G E N E R A L E N F O R C E M E N T P O L I C Y

C O M P E N D I U M

Volume II

CP.1-1

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

OFFICE OF
ENFORCEMENT

MEMORANDUM

SUBJECT: Parallel Proceedings Policy

FROM: Steven A. Herman
Assistant Administrator

TO: All Assistant Administrators
All Regional Administrators
All Regional Counsels
General Counsel

This is the Environmental Protection Agency's revised policy on initiating and maintaining parallel enforcement proceedings.[1]

Most statutes administered by EPA include both criminal and civil enforcement authorities, as well as information gathering and inspection provisions. The United States has multiple duties and goals in carrying out the mandates of federal environmental laws, which often can be achieved most effectively through use of several investigative and enforcement options. Thus, it is in the public interest that EPA retain maximum flexibility in the use of its options, consistent with all legal requirements.

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[1]The following policies are hereby superseded:

Memo, Revised EPA Guidance for Parallel Proceedings, from Edward E. Reich, Acting Assistant Administrator, June 21, 1989;
Guidelines on Investigative Procedures for Parallel Proceedings (attachment to 6/21/89 Memo), prepared by Paul R. Thomson, Jr., Deputy Assistant Administrator for Criminal Enforcement;
Memo, Procedures for Requesting and Obtaining Approval of Parallel Proceedings, from Edward E. Reich, Acting Assistant Administrator for Enforcement, June 15, 1989; and
Memo, Supplement to Parallel Proceedings Guidance and Procedures for Requesting and Obtaining Approval of Parallel Proceedings, from James M. Strock, Assistant Administrator for Enforcement, July 18, 1990.

This policy applies in conjunction with other Agency guidances, where applicable, such as those on case screening, participation in grand jury investigations, and referrals.

As used in this policy, the term "proceedings" includes enforcement actions (both investigation and litigation stages) as well as use of information gathering and entry authorities. "Parallel" means simultaneous or successive civil, administrative and criminal proceedings, against the same or related parties, dealing with the same or related course of conduct.

Principles

1. It sometimes is necessary, appropriate, and a reasonable use of resources to bring a civil (administrative or judicial) enforcement action at the same time as an existing or potential criminal investigation or prosecution concerning the same or a related matter. When, in the course of considering appropriate enforcement options, EPA determines that injunctive relief is necessary to obtain compliance with the law or to impose remedial measures, the pendency of a criminal proceeding is not necessarily a sufficient reason to fail to seek appropriate relief.[2]

2. The government legitimately may seek civil penalties which are punitive (i.e., effect retribution or deterrence). On the other hand, punitive civil penalties may have implications under the Double Jeopardy Clause if they are assessed prior, or subsequent, to a criminal prosecution of the same person for the same violations. Although case law has established that civil penalties which are significant in amount can be assessed without implicating Double Jeopardy concerns, it is preferable to avoid the assessment of federal civil penalties against persons who are likely to be subject to subsequent federal criminal prosecution for the same violations.

3. When an environmental criminal matter is investigated by a grand jury, and EPA personnel obtain access to grand jury information, EPA personnel must take care not to violate the secrecy obligation imposed by law, or to use grand jury information for improper purposes. Although the issue of grand jury secrecy can arise in any criminal case, extra care should be taken in the parallel proceedings context.

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[2]In some cases, it may be appropriate to delay initiation of a civil enforcement action, and/or to seek a remedial order as a condition of probation, or as a condition of the plea agreement, in the criminal action. These decisions must be made on a case by case basis, taking into account the complications which inevitably arise in parallel proceedings (such as defense attempts to use civil discovery to gain information about a criminal investigation), as well as other case-specific considerations (such as the need to prevent persons from learning that they are targets of criminal investigation) and weighing them against the need for the civil action.

4. EPA's regulatory inspections (administrative searches) must be objectively reasonable, and properly limited within the scope of the authorizing statute and warrant. As in every situation, the government has a duty to act in good faith, and must ensure that its use of administrative entry authorities is properly within the mandates of the Fourth Amendment.

5. EPA's information-gathering authorities must be used in accordance with the authorizing statutory provisions. There is no general legal bar to using administrative mechanisms for purposes of investigating suspected criminal matters, unless otherwise specified in the authorizing statute. However, the government must not intentionally mislead a person as to the possibility of use in the criminal enforcement context of information provided in response to such requests, in such a way as to violate the Fifth Amendment Due Process Clause or the Self-Incrimination Privilege.

Procedures

1. The Regional Counsel and the Special Agent in Charge of the Criminal Investigation Division must concur in the initiation (or continuance) of a civil enforcement proceeding (administrative or judicial), when a criminal proceeding is pending or contemplated as to the same or a related matter.[3] During the pendency of any such civil action, the Regional Counsel and the SAC should consult on a continuing basis, in order to avoid undue duplication of effort and interference by one action with the other.[4] As with other aspects of the case screening process, the regions (and HQ offices, where applicable) have flexibility in designing specific procedures to implement these requirements, and issues may be brought to the attention of the Assistant Administrator where agreement cannot be reached.

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[3]If the civil enforcement action contemplated is a judicial (rather than an administrative) one, Agency referral policy continues to require that the request for referral of a parallel proceeding to the Department of Justice be routed through EPA-HQ, for Assistant Administrator approval. In other words, the "direct referral" policy does not apply to parallel proceedings. Note also that DOJ policy affects the Agency's ability to pursue a civil judicial action that is related to a pending criminal investigation.

[4]When an EPA Headquarters office has the lead in an enforcement matter, both the Enforcement Counsel who has the civil case, and the Director of the Office of Criminal Enforcement (or delegate), must concur in the civil action. These persons should consult on a continuing basis.

2. When a parallel civil action is brought, a claim for civil penalties may be filed, as necessary, to avoid claim-splitting or statute-of-limitation problems. Normally, however, a civil penalty claim should be stayed (not assessed or collected) as to a person who is a target of criminal investigation, until the criminal proceeding is concluded as to that person.

3. In the parallel proceedings context, open communication should be maintained between EPA personnel assigned to the civil-enforcement or information-gathering matter and those assigned to the criminal case, in a manner consistent with the legitimate confidentiality and grand jury secrecy needs of the criminal enforcement program.[5] However, information relating to matters occurring before a grand jury should not be revealed without prior consultation with the attorney for the government (usually a Department of Justice attorney).

4. Prior to any use of EPA's statutory information-gathering or entry authorities to gather evidence of suspected criminal activity, the Regional Counsel (or the OCE Assistant Director for Legal Affairs, for HQ cases) should be consulted, to ensure that constitutional requirements are met.

Reservation of Rights

This policy provides internal Environmental Protection Agency guidance. It is not intended to, and does not, create any rights or privileges, substantive or procedural, which are enforceable by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Environmental Protection Agency.

cc: All Office of Enforcement and Compliance Assurance Personnel

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[5]Note that it is good professional practice for enforcement personnel to carefully document the sources of information received and the persons with whom information is shared, whether there is a parallel proceeding or not.

CP.2-1

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

OFFICE OF
ENFORCEMENT

January 12, 1994

MEMORANDUM

SUBJECT: The Exercise of Investigative Discretion

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement Earl E Devaney

TO: All EPA Employees Working in or in Support of the Criminal Enforcement Program

I. Introduction

As EPA's criminal enforcement program enters its second decade and embarks on a period of unprecedented growth, this guidance establishes the principles that will guide the exercise of investigative discretion by EPA Special Agents. This guidance combines articulations of Congressional intent underlying the environmental criminal provisions with the Office of Criminal Enforcement's (OCE) experience operating under EPA's existing criminal case-screening criteria.[1]

In an effort to maximize our limited criminal resources, this guidance sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities.[2]

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[1] This guidance incorporates by reference the policy document entitled Regional Enforcement Management: Enhanced Regional Case Screening (December 3, 1990).

[2] This memorandum is intended only as internal guidance to EPA. It is not intended to, does 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, nor does this guidance in any way limit the lawful enforcement prerogatives, including administrative or civil enforcement actions, of the Department of Justice and the Environmental Protection Agency.

Indeed, the Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

II. Legislative Intent Regarding Case Selection

The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

The Pollution Prosecution Act of 1990 recognized the importance of a strong national environmental criminal enforcement program and mandates additional resources necessary for the criminal program to fulfill its statutory mission. The sponsors of the Act recognized that EPA had long been in the posture of reacting to serious violations only after harm was done, primarily due to limited resources. Senator Joseph I. Lieberman (Conn.), one of the co-sponsors of the Act, explained that as a result of limited resources, "... few cases are the product of reasoned or targeted focus on suspected wrongdoing." He also expressed his hope that with the Act's provision of additional Special Agents, "... EPA would be able to bring cases that would have greater deterrent value than those currently being brought."

Further illustrative of Congressional intent that the most serious of violations should be addressed by criminal enforcement authority is the legislative history concerning the enhanced criminal provisions of RCRA:

> [The criminal provisions were] intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It [RCRA sec. 3008(d)] is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036.

While EPA has doubled its Special Agent corps since passage of the Pollution Prosecution Act, and has achieved a presence in nearly all federal judicial districts, it is unlikely that OCE will ever be large enough in size to fully defeat the ever-expanding universe of environmental crime. Rather, OCE must maximize its presence and impact through discerning case-selection, and then proceed with investigations that advance EPA's overall goal of regulatory compliance and punishing criminal wrongdoing.

III. Case Selection Process[3]

The case selection process is designed to identify misconduct worthy of criminal investigation. The case selection process is not an effort to establish legal sufficiency for prosecution. Rather, the process by which potential cases are analyzed under the case selection criteria will serve as an affirmative indication that OCE has purposefully directed its investigative resources toward deserving cases.

This is not to suggest that all cases meeting the case selection criteria will proceed to prosecution. Indeed, the exercise of investigative discretion must be clearly distinguished from the exercise of prosecutorial discretion. The employment of OCE's investigative discretion to dedicate its investigative authority is, however, a critical precursor to the prosecutorial discretion later exercised by the Department of Justice.[4]

At the conclusion of the case selection process, OCE should be able to articulate the basis of its decision to pursue a criminal investigation, based on the case selection criteria. Conversely, cases that do not ultimately meet the criteria to proceed criminally, should be systematically referred back to the Agency's civil enforcement office for appropriate administrative or civil judicial action, or to a state or local prosecutor.

IV. Case Selection Criteria

The criminal case selection process will be guided by two general measures - significant environmental harm and culpable conduct.

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[3] The case selection process must not be confused with the Regional Case Screening Process. The relationship between the Regional Case Screening Process and case selection are discussed further at "VI.", below.

[4] Exercise of this prosecutorial discretion in all criminal cases is governed by the principles set forth in the Department of Justice's Principles of Federal Prosecution.

A. Significant Environmental Harm

The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as the threat of significant harm, to the environment or human health. The following factors serve as indicators that a potential case will meet the measure of significant environmental harm.

Factor 1. Actual harm will be demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment. This measure will generally be self-evident at the time of case selection.[5]

Factor 2. The threat of significant harm to the environment or human health may be demonstrated by an actual or threatened discharge, release or emission. This factor may not be as readily evident, and must be assessed in light of all the facts available at the time of case selection.

Factor 3. Failure to report an actual discharge, release or emission within the context of Factors 1 or 2 will serve as an additional factor favoring criminal investigation. While the failure to report, alone, may be a criminal violation, our investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harm.

Factor 4. When certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may provide a significant deterrent effect incommensurate with its singular environmental impact. While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

B. Culpable Conduct

The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of case selection. Culpable conduct, however, may be indicated at the time of case selection by several factors.

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[5] When this factor involves a fact situation in which the risk of harm is so great, so immediate and/or irremediable, OCE will always cooperate and coordinate with EPA's civil enforcement authorities to seek appropriate injunctive or remedial action.

Factor 1. **History of repeated violations.**

While a history of repeated violations is not a prerequisite to a criminal investigation, a potential target's compliance record should always be carefully examined. When repeated enforcement activities or actions, whether by EPA, or other federal, state and local enforcement authorities, have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the government's capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.

Factor 2. **Deliberate misconduct resulting in violation.**

Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Factor 3. **Concealment of misconduct or falsification of required records.**

In the arena of self-reporting, EPA must be able to rely on data received from the regulated community. If submitted data are false, EPA is prevented from effectively carrying out its mandate. Accordingly, conduct indicating the falsification of data will always serve as the basis for serious consideration to proceed with a criminal investigation.

Factor 4. **Tampering with monitoring or control equipment.**

The overt act of tampering with monitoring or control equipment leads to the certain production of false data that appears to be otherwise accurate. The consequent submission of false data threatens the basic integrity of EPA's data and, in turn, the scientific validity of EPA's regulatory decisions. Such an assault on the regulatory infrastructure calls for the enforcement leverage of criminal investigation.

Factor 5. **Business operation of pollution-related activities without a permit, license, manifest or other required documentation.**

Many of the laws and regulations within EPA's jurisdiction focus on inherently dangerous and strictly regulated business operations. EPA's criminal enforcement resources should clearly pursue those violators who choose to ignore environmental regulatory requirements altogether and operate completely outside of EPA's regulatory scheme.

V. Additional Considerations when Investigating Corporations

While the factors under measures IV. A and B, above, apply equally to both individual and corporate targets, several additional considerations should be taken into account when the potential target is a corporation.

In a criminal environmental investigation, OCE should always investigate individual employees and their corporate[6] employers who may be culpable. A corporation is, by law, responsible for the criminal act of its officers and employees who act within the scope of their employment and in furtherance of the purposes of the corporation. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so is inconsequential to the issue of corporate culpability.

Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done.[7] On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction.[8] When self-auditing has been conducted (followed up by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.

VI. Other Case Selection Considerations

EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

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[6] The term "corporate" or "corporation", as used in this guidance, describes any business entity, whether legally incorporated or not.

[7] In cases of self-auditing and/or voluntary disclosure, the exercise of prosecutorial discretion is addressed in the Department of Justice policy document entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

[8] See EPA's policy on environmental audits, published at 51 Fed. Reg. 25004 (July 9, 1986)

The case-selection factors described in this guidance should provide the foundation for the communication process that necessarily follows in the Regional Case Screening Process. This guidance envisions application of the case-selection factors first, to be followed by the recurring scrutiny of cases during the Regional Case Screening process.

The fundamental purpose of Regional Case Screening is to consider criminal enforcement in the greater context of all available EPA enforcement and environmental response options, to do so early (at the time of each case opening) before extensive resources have been expended, and to identify, prioritize, and target the most egregious cases. Regional Case Screening is designed to be an ongoing process in which enforcement cases are periodically reviewed to assess not only the evidentiary developments, but should also evaluate the clarity of the legal and regulatory authorities upon which a given case is being developed.[9]

In order to achieve the objectives of case screening, all cases originating within the OCE must be presented fully and fairly to the appropriate Regional program managers. Thorough analysis of a case using the case-selection factors will prepare OCE for a well-reasoned presentation in the Regional Case Screening process. Faithful adherence to the OCE case-selection process and active participation in the Regional Case Screening Process will serve to eliminate potential disparities between Agency program goals and priorities and OCE's undertaking of criminal investigations.

Full and effective implementation of these processes will achieve two important results: it will ensure that OCE's investigative resources are being directed properly and expended efficiently, and it will foreclose assertions that EPA's criminal program is imposing its powerful sanctions indiscriminately.

VII. Conclusion

The manner in which we govern ourselves in the use of EPA's most powerful enforcement tool is critical to the effective and reliable performance of our responsibilities, and will shape the reputation of this program for years to come. We must conduct ourselves in keeping with these principles which ensure the prudent and proper execution of the powerful law enforcement authorities entrusted to us.

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[9] The legal structure upon which a criminal case is built - e.g., statutory, regulatory, case law, preamble language and interpretative letters - must also be analyzed in terms of Agency enforcement practice under these authorities. Thorough discussion of this issue is beyond the scope of this document, but generally, when the clarity of the underlying legal authority is in dispute, the more appropriate vehicle for resolution lies, most often, in a civil or administrative setting.

CP.2-2

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

OFFICE OF ENFORCEMENT

MAR 2 1993

MEMORANDUM

SUBJECT: Referrals of Criminal Cases for Prosecutive Action

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement Earl E Devaney

TO: All OCE Personnel

Regional Counsels

Introduction

This memo establishes and describes new referral policies and procedures for EPA's criminal program.

As you know, for some time the Office of Criminal Enforcement has been discussing with interested offices the advisability of modifying the criminal referral process. Early in my term as Director of OCE, I came to believe that the referral process must be streamlined; accordingly, in April 1992, OCE distributed, for review and comment, draft proposed referral procedures for the criminal enforcement program. In establishing these new procedures, OCE has taken into account the many views and suggestions pertaining to our earlier proposals.

Synopsis of Major Changes to Referral Policy

Among the major changes to the criminal referral process are the following:

a. Redeledgation. As Director of the Office of Criminal Enforcement, I have redelegated my criminal referral authority to the Director of the Criminal Investigation Division. This referral authority is to be exercised in consultation with the Director of the Criminal Enforcement Counsel Division, in response to the recommendations of the CID Special Agent in Charge and the Office of Regional Counsel. Attached for your information is the redelegation memo.

b. Case Report. Under the revised policy, the special agent assigned to the investigation is not required to generate a detailed report of investigation at the time of referral.

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

OFFICE OF ENFORCEMENT

MAR 2 1993

MEMORANDUM

SUBJECT: Redelegation of Criminal Referral Authority

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement

TO: Dale P. Boll, Director
Criminal Investigation Division

By this memorandum, as Director of the Office of Criminal Enforcement, I redelegate to the Director of the Criminal Investigation Division my authorities to cause criminal matters under EPA-administered statutes to be referred to the Department of Justice for assistance in field investigation, for initiation of a grand jury investigation, or for prosecution. The Director of the Criminal Investigation Division shall exercise the referral authority, as to specific cases, only after consulting with the Director of the Criminal Enforcement Counsel Division.[1]

The authorities hereby redelegated may be withdrawn at any time, as to individual cases, or as to all cases.

Background

By delegations under the various statutes administered by EPA which contain criminal enforcement provisions, the Administrator has authorized the Assistant Administrator for Enforcement to cause criminal enforcement matters under those statutes to be referred to the Department of Justice for assistance in field investigation, for initiation of grand jury investigation, and/or for prosecution. The Administrator's delegations permit redelegation, but only to the Division Director level. Subsequently, the Assistant Administrator for Enforcement redelegated referral authority to the Director of the Office of Criminal Enforcement. See, Memo, Redelegations of Authority to the Office of Criminal Enforcement, from Assistant Administrator James M. Strock, dated February 26, 1991.

cc: Kathleen A. Hughes, Acting Director
Criminal Enforcement Counsel Division

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[1]A duly designated "Acting" Director may exercise the criminal referral authority in the absence of the Director.

A. Full name, address, and telephone number of special agent assigned.

B. Full name, address, and telephone number of Agency attorney assigned.

V. Legal Review and Concurrence

A. Include the following language:

"The Regional Criminal Enforcement Counsel has reviewed the investigative materials in this case, has researched statutes, regulations and case law pertinent to the allegations, and has identified legal issues which may require further attention prior to prosecution. Based on this legal review and analysis, the Office of Regional Counsel concurs that this case warrants referral for prosecutive assistance at this time. Attached is a legal memorandum pertaining to this case."

B. Include the signature of the Regional Counsel (or RC's designee).

Signed: _____
Regional Counsel (or designee)

Attachments
Investigative reports not previously submitted to CID-HQ (if any)
Legal memo by RCEC

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

Sample Criminal Referral Memo Outline
As of January 1993

OFFICE OF ENFORCEMENT

MEMORANDUM -- Privileged and Confidential

SUBJECT: Referral for Prosecutive Assistance
(Case Name and Number)

FROM: _____
Special Agent in Charge, CID-_____

TO: _____, Director
Criminal Investigation Division

DATE: _____

I. Introduction

Request that the case be referred to the Department of Justice for prosecutive assistance.

II. Synopsis of Allegations

A. Briefly describe the nature of the case.

B. Cite the statutory provisions violated.

C. Attach investigative or status reports not previously submitted to CID-HQ, if any.

III. Case Status

A. State why referral for prosecutive assistance is warranted at this time.

B. Indicate whether related civil actions have been, are being, or are expected to be brought by the region or the state.

C. (If not previously included in a case opening report and submitted to CID-HQ,) briefly describe the regional case screening process which resulted in an Agency consensus that the case be investigated for criminal violations.

IV. Personnel Assigned

c. Timing. Under the revised policy, the timing of the referral is flexible, and is based on the SAC's judgment, in consultation with the RCEC, that the investigation would best proceed with the active participation of a federal prosecutor and/or a grand jury.

d. United States Attorneys. In the past, EPA's criminal referrals have been sent to both the local U.S. Attorney's office and the Environmental Crimes Section at DOJ-HQ. Hereafter, referrals will be sent only to the U.S. Attorney's office, which in turn will contact DOJ-HQ, as appropriate, pursuant to internal Department of Justice policy.

Background

In order for federal environmental crimes that come to the attention of EPA to be criminally prosecuted, they must be referred to a trial attorney within the Department of Justice.[1] Although this basic fact has not changed, significant changes have occurred in Agency policy and practice since the time EPA's criminal program was founded and its original referral procedures were established, and these changes have affected criminal enforcement. The changes that have most influenced my decision to revise the criminal case referral process include the following.

Case Screening

By memo dated December 3, 1990, the Assistant Administrator for Enforcement issued a policy titled "Regional Enforcement Management: Enhanced Regional Case Screening." Compliance with this case screening policy was intended to address the need for the regions to fully consider, at the time of case opening, whether a "multi-media" approach to enforcement would be advisable, as well as to consider whether the alleged violations would best be addressed by administrative action, civil-judicial action, and/or criminal investigation and prosecution.

Prior to implementation of the case screening policy, the referral process was relied upon as the primary opportunity for the regional media program offices, as well as the Regional Counsels' offices, to be advised of and to indicate support for cases proposed for criminal action. Since that time, CID and the regions have made progress toward the goal of fully consulting, at or near the case opening stage, as to each matter considered for criminal investigation by CID. This permits CID to determine whether the media program office, charged with civilly enforcing

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[1]In this memo, "Department of Justice" (DOJ) refers collectively to the Environmental Crimes Section of the Environment and Natural Resources Division at DOJ headquarters (ECS, or DOJ-HQ), as well as the various United States Attorneys' Offices (USAO).

the statute in question, supports the matter as a criminal investigation; proper implementation of case screening also ensures that the Regional Criminal Enforcement Counsel will have early involvement in the case development process.

Regional Criminal Enforcement Counsel

Over the last several years, the Office of Enforcement has sought to support and enhance the role of the Regional Criminal Enforcement Counsel as a full member of the criminal enforcement team, from the beginning of each case to its conclusion. There is room for improvement still in some areas. However, I believe that progress has been made in ensuring that the RCEC is given an opportunity to, and does, provide useful assistance to CID in case assessment, research to determine legal soundness of cases, performing liaison functions between the CID field offices and interested regional offices, and sometimes assisting DOJ in prosecuting the cases.

The revised referral policy retains the requirement for the RCEC to provide an appropriate level of legal review and analysis of the case at the time of referral. Of course, prior to completion of the full investigation, it will not be possible for the RCEC to do a comprehensive legal analysis of the type required in a "prosecution memo." However, it is expected that, prior to referral, the RCEC will carefully review statutory and regulatory provisions pertinent to the illegal conduct alleged, and will research any significant legal issues which appear at that time, in order to support the recommendation that the matter be referred for prosecutive assistance. An added benefit of a written legal analysis at the referral stage is to assist the prosecutor to understand the case, especially where the prosecutor is not experienced in environmental crimes.

CID Management

During 1991, the Office of the Director of the Criminal Investigation Division was relocated from the National Enforcement Investigations Center in Denver to EPA headquarters in Washington, D.C., where the Director of CID reports directly to the Director of the Office of Criminal Enforcement. This move was part of a process by which the management of the Criminal Investigation Division has become more centralized.

The Director of CID has implemented a policy under which CID special agents assigned to a case are required to write timely, complete reports as the investigation progresses, which are submitted to CID-HQ with case status reports every sixty days, and there reviewed by "desk officers" who monitor CID cases in their regions. Because of these changes in CID procedures, it is no longer necessary for special agents to generate a separate report of investigation to effectuate a referral.

REVISED CRIMINAL REFERRAL POLICY

When, in the course of a CID investigation, the Special Agent in Charge, in consultation with the Regional Criminal Enforcement Counsel, determines that the investigation has advanced to the stage that it is appropriate to refer the case to the United States Attorney's office[2] for assistance in the investigation, for grand jury action, and/or for prosecution, the SAC shall forward to the Director of CID a memorandum in which the SAC recommends that the case be referred for prosecutive assistance.

The memo shall include a statement of the reasons why the matter is appropriate for referral at that time, a brief description of the nature of the allegations and citations of the statutory provisions violated, and information as to whether any related civil actions have been, are being, or are expected to be pursued by the region or the state. In addition, the memo shall indicate the concurrence of the Regional Counsel (or the RC's designee).[3] Attached is a sample outline for the referral memo.[4]

If the Director of the Criminal Investigation Division agrees that the matter warrants referral to the Department of Justice at that time, the Director of CID will so indicate in a letter to the United States Attorney.[5] Only after the Director of CID has referred the matter for prosecutive action shall the

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[2]Note that the U. S. Attorneys, in their discretion and in accordance with internal DOJ policy, may request assistance from prosecutors at DOJ-HQ.

[3]The Regional Counsel may delegate this referral concurrence authority, e.g., to the Regional Criminal Enforcement Counsel. In any event, it is expected that the Office of Regional Counsel will not concur in the referral unless and until the RCEC has been given an opportunity to do, and has done, a legal review appropriate to the stage of the investigation.

[4]This format should be used, consistent with any supplemental or more specific features which may be required by CID, such as in the Special Agents' Manual.

[5]Under appropriate circumstances, and in accordance with CID's Special Agents' Manual, the SAC (with concurrence of the Director of CID) may refer cases to a state or local prosecutor for action.

SAC forward investigative materials to the prosecutor to support the referral.[6]

When warranted by unusual and unavoidable circumstances, and in accordance with applicable guidance in the CID Special Agents' Manual, the SAC may request orally, and the Director of CID may grant orally (e.g., by telephone), authorization to request DOJ's assistance on an expedited basis, or to forward investigative materials to the prosecutor, prior to completion of the written referral process. Such emergency requests and approvals must be followed, in accordance with CID policy, by the written referral request. It is only when the Director of CID refers the case for prosecutive action, by written request, that the CID field office receives credit for the referral.

Conclusion

The simplified criminal referral process, as well as other improvements in CID procedures, are intended to enhance the effectiveness of the criminal program. As the new policy is implemented, there may be opportunities to further improve the process. With your questions, comments and suggestions, please contact either the CID-HQ desk officer for your region (202-260-9377), or Bette Ojala of the Criminal Enforcement Counsel Division (202-260-9660).

Two Attachments
Sample Referral Memo Outline
Memo, Redelegation of Criminal Referral Authority

cc: Regional Criminal Enforcement Counsels

[6]This referral policy is not intended to prohibit a special agent, with permission from the supervisor, from making informal oral contacts with an Assistant U.S. Attorney to discuss a potential, future case referral.

PB.1-1
GM #46

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

NOV 21 1985

MEMORANDUM

SUBJECT: Policy on Publicizing Enforcement Activities

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

Jennifer Joy Manson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

Attached is the EPA Policy on Publicizing Enforcement Activities, a joint project of the Office of Enforcement and Compliance Monitoring and the Office of Public Affairs. The document establishes EPA policy on informing the public about Agency enforcement activities. The goal of the policy is to improve communication with the public and the regulated community regarding the Agency's enforcement program, and to encourage compliance with environmental laws through consistent public outreach among headquarters and regional offices.

To implement this policy, national program managers and public affairs directors should review the policy for the purpose of preparing program-specific procedures where appropriate. Further, program managers should consider reviewing the implementation of this policy in EPA Regional Offices during their regional program reviews. These follow-up measures should ensure that publicity of enforcement activities will constitute a key element of the Agency's program to deter environmental noncompliance.

Attachment

EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES

I. PURPOSE

This memorandum establishes EPA policy on informing the public about Agency enforcement activities. This policy is intended to improve EPA communication with the public and the regulated community regarding the goals and activities of the Agency's enforcement program. Appropriate publication of EPA enforcement efforts will both encourage compliance and serve as a deterrent to noncompliance. The policy provides for consistent public outreach among headquarters and regional offices.

II. STATEMENT OF POLICY

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to deter noncompliance with environmental laws and regulations. Publicizing Agency enforcement activities on an active and timely basis informs both the public and the regulated community about EPA's efforts to promote compliance.

Press releases should be issued for judicial and administrative enforcement actions, including settlements and successful rulings, and other significant enforcement program activities. Further, the Agency should consider employing a range of methods of publicity such as press conferences and informal press briefings, articles, prepared statements, interviews and appearances at seminars by knowledgeable and authorized representatives of the Agency to inform the public of these activities. EPA will work closely with the states in developing publicity on joint enforcement activities and in supporting state enforcement efforts.

III. IMPLEMENTATION OF POLICY

A. When to Use Press Releases [1]/

1. Individual Cases

It is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list); (2) enters into a major judicial or administrative consent decree or files a motion to enforce such a decree; or (3) receives a successful court ruling. In determining whether to issue a press release,

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1/ The term "press release" includes the traditional Agency press release, press advisories, notes to correspondents and press statements. The decision on what method should be used in a given situation must be coordinated with the appropriate public affairs office(s).

EPA personnel will consider: (1) the amount of the proposed or assessed penalty (e.g., greater than $25,000); (2) the significance of the relief sought or required in the case, and its public health or environmental impact; (3) whether the case would create national or program precedence; and (4) whether unique relief is sought. However, even enforcement actions that do not meet these criteria may be appropriate for local publicity in the area where the violative conduct occurred. Where appropriate, a single press release may be issued which covers a group or category of similar violations.

Where possible, press releases should mention the environmental result desired or achieved by EPA's action. For example, where EPA determines that a particular enforcement action resulted (or will result) in an improvement in a stream's water quality, the press release should note such results. In addition, press releases must include the penalty agreed to in settlement or ordered by a court.

Press releases can also be used to build better relationships with the states, the regulated community, and environmental groups. To this end, EPA should acknowledge efforts by outside groups to foster compliance. For example, where a group supports EPA enforcement efforts by helping to expedite the cleanup of a Superfund site, EPA may express its support for such initiatives by issuing a press release, issuing a statement jointly with the group, or conducting a joint press conference.

2. Major Policies

In addition to publicizing individual enforcement cases, EPA should publicize major enforcement policy statements and other enforcement program activities since knowledge of Agency policies by the regulated community can deter future violations. Such publicity may include the use of articles and other prepared statements on enforcement subjects of current interest.

3. Program Performance

Headquarters and regional offices should consider issuing quarterly and annual reports on Agency enforcement efforts. Such summaries present an overview of the Agency's and Regions' enforcement activities; they will allow the public to view EPA's enforcement program over time, and thus give perspective to our overall enforcement efforts. The summaries should cover trends and developments in Agency enforcement activities, and may include lists of enforcement actions filed under each statute. The Office of Enforcement and Compliance Monitoring's (OECM) Office of Compliance Analysis and Program Operations, and the Offices of Regional Counsel will assist the Public Affairs Offices in this data gathering. Public Affairs Offices can also rely on the figures contained in the Strategic Planning Management System.

4. Press Releases and Settlement Agreements

EPA has, on occasion, agreed not to issue a press release as part of a settlement agreement. EPA should no longer agree to a settlement which bars a press release or which restricts the content of a press release. On January 30, 1985, the Deputy Administrator issued an abbreviated press release policy, which stated in pertinent part that: "It is against EPA policy to negotiate the agency's option to issue press releases, or the substance of press releases, with parties outside of EPA, particularly those parties involved in settlements, consent decrees or the regulatory process." This policy will help to ensure consistency in the preparation of press releases and equitable treatment of alleged violators.

B. Approval of Press Releases

EPA must ensure that press releases and other publicity receive high priority in all reviewing offices. By memorandum dated August 23, 1984, the Office of External Affairs directed program offices to review and comment on all press releases within two days after the Office of Public Affairs submits its draft to the program office; otherwise concurrence is assumed. This review policy extends to OECM and the Offices of Regional Counsel for enforcement-related press releases.

C. Coordination

1. Enforcement, Program, and Public Affairs Offices

More active use of publicity requires improved coordination among regional and headquarters enforcement attorneys, program offices and public affairs offices. The lead office in an enforcement case, generally the regional program office in an administrative action and the Office of Regional Counsel or OECM in a judicial action, should notify the appropriate Public Affairs Office at the earliest possible time to discuss overall strategy for communicating the Agency's action (e.g., prior notice to state or local officials) and the the timing of a press release. The lead office should stay in close contact with Public Affairs as the matter approaches fruition.

2. Regional and Headquarters Offices of Public Affairs

Regional and Headquarters Public Affairs Offices should coordinate in developing press releases both for regionally-based actions that have national implications and for nationally managed or coordinated enforcement actions. Whenever possible, both regional and headquarters offices should send copies of draft press releases to their counterparts for review and comment. Both such offices should also send copies of final releases to their counterparts.

3. EPA and DOJ

EPA can further improve the timeliness and effectiveness of its press releases regarding judicial actions by coordinating with DOJ's Office of Public Affairs. When an EPA Office of Public Affairs decides that a press release in a judicial enforcement case is appropriate, it should notify DOJ or the appropriate U.S. Attorney's Office to ensure timeliness and consistency in preparation of press releases. DOJ has been requested to notify OECM when DOJ intends to issue a release on an EPA-related case. EPA's Office of Public Affairs will immediately review such draft releases, and, if necessary to present the Agency's position or additional information, will prepare an Agency release.

4. EPA and the States

Another important goal of this policy is to encourage cooperative enforcement publicity initiatives with the states. The June 26, 1984, "EPA Policy on Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements,'" describes key subjects that EPA should discuss with the states in forming state-EPA Enforcement Agreements. The section on "Press Releases and Public Information," states that the "Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement." Further, as discussed in the subsequent January 4, 1985, Agency guidance on "Implementing Nationally Managed or Coordinated Enforcement Actions," the timing of state and EPA releases "should be coordinated so that they are released simultaneously."

Accordingly, EPA Public Affairs Offices should consult with the relevant state agency on an EPA press release or other media event which affects the State. EPA could offer the State the option of joining in a press release or a press conference where the State has been involved in the underlying enforcement action. Further, EPA-generated press releases and public information reports should acknowledge and give credit to relevant state actions and accomplishments when appropriate.

Finally, it is requested that EPA Public Affairs Offices send the State a copy of the EPA press release on any enforcement activity arising in that state.

D. Distribution of Press Releases

The distribution of EPA press releases is as important as their timeliness. Press releases may be distributed to the local, national, and trade press, and local and network television stations.

1. Local and National Media

EPA must "direct" its press releases to ensure that the appropriate geographical areas learn about EPA enforcement activities. To accomplish this goal, the appropriate Public Affairs Office should send a press release to the media and interest groups in the affected area, i.e., the local newspaper and other local publications, television and radio stations, and citizen groups. The headquarters Public Affairs Office, in conjunction with the appropriate regional office, will issue press releases to the national press and major television networks where an EPA enforcement activity has national implications.

2. Targeted Trade Press and Mailing Lists

The Agency must also disseminate information about enforcement activities to affected industries. Sending a press release to relevant trade publications and newsletters, particularly for a significant case, will put other potential violators on notice that EPA is enforcing against specific conduct in the industry. It is also useful to follow up such press releases with speeches to industry groups and articles in relevant trade publications, reinforcing the Agency's commitment to compliance.

To ensure the appropriate distribution of publicity, we are requesting each of the regional Public Affairs Offices, in cooperation with the Regional Counsels and regional program offices, to establish or review and update their mailing lists of print media, radio and television stations, state and local officials, trade publications, and business and industry groups for each of the enforcement programs conducted in the Regions.

E. Use of Publicity Other Than Press Releases

EPA headquarters and regional offices have generally relied on press releases to disseminate information on enforcement activities. Other types of enforcement publicity are also appropriate in certain instances.

1. Press Conferences and Informal Press Briefings

Press conferences can be a useful device for highlighting an enforcement activity and responding to public concerns in a specific area. Regional Administrators should consider using press conferences to announce major enforcement actions and to elaborate on important simultaneously issued press releases. Press conferences should also be considered where an existing or potential public hazard is involved. The regional Public Affairs Office should always inform the headquarters Public Affairs

Office when it decides to hold a press conference to provide an opportunity for the Administrator's advance knowledge and involvement if necessary.

2. Informal Meetings with Constituent Groups

To further supplement EPA efforts to inform the public and regulated community, regional offices should meet often with constituent groups (states, environmental groups, industry, and the press) to brief these groups on recent enforcement developments. These meetings can be organized by the Public Affairs Offices. By informing the public, EPA increases public interest in its enforcement program and thereby encourages compliance.

3. Responding to Inaccurate Statements

EPA should selectively respond to incorrect statements made about EPA enforcement activities. For example, EPA may want to respond to an editorial or other article which inaccurately characterizes EPA enforcement at a Superfund site with a "letter to the editor." Where an agency response is deemed to be appropriate, it should promptly follow the inaccurate statement.

4. Articles and Prepared Statements

EPA's Public Affairs Offices and the Office of Enforcement and Compliance Monitoring occasionally prepare articles on various aspects of the Agency's enforcement program. For example, Region I issues a biweekly column to several newspapers in the Region covering timely enforcement issues such as asbestos in schools. We encourage all regional and headquarters offices to prepare feature articles on enforcement issues. When the regional office is developing an article on a subject with national implications, it should contact the headquarters Office of Public Affairs to obtain a possible quote from the Administrator and to discuss whether the article should be expanded to a national perspective. Likewise, appropriate regions should be consulted in the preparation of headquarters articles or statements which refer to actions of or facilities in particular regions.

5. Interviews

In some cases, headquarters and regional Public Affairs Offices should consider arranging media interviews with the Regional Administrator, Deputy Administrator, the Administrator, or other EPA officials. Such an interview will reflect the Agency's position on a particular enforcement activity or explain EPA's response to an enforcement problem.

#46-A

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

AUG - 4 1987

MEMORANDUM

SUBJECT: Addendum to GM-46: Policy on Publicizing Enforcement Activities

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

Jennifer Joy Wilson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

I. ISSUE

Significant differences can exist between civil penalties proposed at the initiation of enforcement cases and the final penalties to be paid at the conclusion of such matters. This memorandum provides guidance on addressing the issue of the "penalty gap" where the difference between the proposed and final penalty is appreciable. EPA must avoid any public misperception that EPA is not serious about enforcement when such differences occur.

II. DISCUSSION

Attached is an "Addendum to the EPA Policy on Publicizing Enforcement Activities", GM-46, issued November 21, 1985. The Addendum provides standard text to be included in any press release announcing the settlement of an enforcement case in which the penalty amount finally assessed differs appreciably from the amount proposed.

Press releases issued at the filing of cases normally state the amount of the civil penalty being sought by the Agency. The proposed penalty may be the maximum statutory amount allowable under applicable law, or a penalty amount as calculated by application of an Agency penalty policy which assigns specific penalties to various violations of law.

When a case is settled, however, the penalty to be paid by the violator is oftentimes appreciably less than the penalty sought by the Agency at the initiation of the action. Members of the public may question any difference between these two amounts, especially persons who are not familiar with the laws, regulations, and published policies of the Agency.

The Addendum points out that a number of mitigating factors can result in a penalty adjustment, and that Congress on occasion has dictated that EPA take into account such factors in determining the amount of a civil penalty (e.g., TSCA §16, 15 U.S.C. 2615).

Attachment

ADDENDUM TO EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES, GM-46, ISSUED NOVEMBER 21, 1985

I. PURPOSE

This addendum to the EPA Policy on Publicizing Enforcement Activities, GM-46, issued November 21, 1985, provides standard text which should be included in EPA press releases which announce the settlement of an enforcement case in which the final penalty is appreciably less than the proposed penalty.

The purpose of the text is to preclude any public misperception that EPA is not serious about enforcement when these appreciable differences occur.

II. BACKGROUND

Congress has directed the Agency in certain instances to consider specific mitigation factors in assessing a final penalty. Accordingly, the Agency regularly takes into account such factors as the gravity of the violation(s), the violator's compliance history, and its degree of culpability--in addition to weighing such litigation concerns as the clarity of the regulatory requirements and the strength of the government's evidentiary case--when negotiating a civil penalty amount as part of a settlement agreement. Guidance for applying mitigating adjustment factors is included in the Agency's published penalty policies.

III. POLICY

Since it is the policy of EPA to use publicity of enforcement activities as a key element in the Agency's program to promote compliance and deter violations, public awareness and accurate perceptions of the Agency's enforcement activities are extremely important.

Appreciable differences between civil penalty amounts proposed at the commencement of enforcement cases and the final penalty sums to be paid at the conclusion of such matters may be erroneously perceived as evidence that EPA is not serious about enforcing the Nation's environmental laws. Consequently, such differences should be explained and accounted for in the Agency's communications to the public.

It is the policy of EPA that when press releases are issued to announce the settlement of enforcement cases in which the settlement penalty figure is appreciably less than the initially proposed penalty amount, such releases should include standard text (see Section IV, p.2) to ensure that the general public is

adequately informed of the analysis behind the final penalty amount, and the reasons justifying the penalty reduction. The release should also describe any environmentally beneficial performance required under the terms of the settlement which goes beyond actions being taken simply to come into compliance.

IV. IMPLEMENTATION OF POLICY

When a press release is issued at the settlement of an enforcement action, any such press release that includes the announcement of a final penalty assessment which is appreciably different from the penalty proposed at the outset of the case should include the following standard text:

> "The civil penalty in this action was the product of negotiation after careful consideration by the government of the facts constituting the violation, the gravity of the misconduct, the strength of the government's case, and established EPA penalty policies.
>
> [NOTE: Include the following paragraph only in cases involving environmentally beneficial performance.]
>
> "In agreeing to this $_____ penalty, the government recognizes the contribution to long-term environmental protection of [briefly summarize here the environmentally beneficial performance explained in detail in the body of the release]."

PB.2-2

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

DEC 22 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Public Relations Policies Pertaining to EPA Criminal Investigations and Prosecutions

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Deputy Regional Administrators
Regional Counsels

The Agency's Enforcement Communications Task Force was established by then-Deputy Administrator Jim Barnes on June 9, 1988, for the purpose of enhancing the effectiveness of EPA's enforcement activities by increasing both the regulated community's and the public's level of knowledge regarding the Agency's civil and criminal enforcement successes. As an outgrowth of his participation on the Task Force, Paul R. Thomson, Jr., Deputy Assistant Administrator, Criminal Enforcement, has revised the Agency's public relations policy pertaining to criminal enforcement, reformatting it into two short directives. These policies replace GM-55, "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program" (December 12, 1986). Some issues which were addressed by GM-55, but not in the new policies, will be covered by internal directives to affected offices. Interested Offices and Task Force members are to be complimented for their superlative collegial efforts in developing this clear and concise guidance.

Accordingly, I hereby issue the attached policy statements governing public and media relations in this context.

I ask that you distribute the "Policy on Responding to Public or Media Inquiries Regarding Criminal Investigations" to all personnel in your respective offices or regions, and emphasize the importance of complying with this rule, which is

intended to protect both the rights of persons who may be under criminal investigation and the integrity of the Agency's criminal investigations. This policy directs Agency personnel to refer inquiries about criminal enforcement to appropriate personnel within EPA's criminal program. For your information, also attached is a listing of the referenced criminal program personnel.

The "Policy on Publicizing Criminal Enforcement Activities" is intended to emphasize to all Agency media-relations or public-affairs personnel (and all those who are responsible for providing them with pertinent information, i.e., primarily criminal program personnel) that - unless unusual circumstances warrant an exception - major events in criminal enforcement cases are to be publicized by timely regional press releases. This may be done jointly with the United States Attorney's office, but it should be carried out in a way which ensures that the Agency gets due credit for the case. Furthermore, appropriate Agency personnel must be prepared to respond to public inquires, which may follow the publicity, regarding the Agency's regulatory approach to the environmental problem at issue.

These policies are aimed at getting the message to the public that EPA is committed to using the full array of its legal authorities to compel compliance with the environmental laws, as well as deterring future environmental crimes. Informing the regulated community about the tough enforcement posture we are taking, while at the same time protecting the rights of individuals and the integrity of the criminal process, is the best way to achieve these national goals. I ask your assistance in ensuring that they are met.

Attachments

cc: Directors, Regional Offices of Public Affairs
Lew Crampton, Associate Administrator for Communications and Public Affairs
James L. Prange, NEIC Assistant Director for OCI
OCI Special and Resident Agents-in-Charge
Regional Criminal Enforcement Counsels
Office of Criminal Enforcement Counsel

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Attention: All EPA Personnel

POLICY ON RESPONDING TO PUBLIC OR MEDIA INQUIRIES REGARDING CRIMINAL INVESTIGATIONS

The Environmental Protection Agency's criminal enforcement program is spearheaded by trained law enforcement agents who investigate alleged or suspected criminal violations of Federal environmental laws. If and when the Agency determines that the subject of the investigation warrants criminal prosecution and/or grand jury investigation by the Department of Justice, the Agency refers the matter to the Department for action.

On occasion, a member of the public or of the news media, or a person associated with the subject of an investigation, will contact Agency personnel and seek information regarding the nature or existence of a criminal investigation. In those situations, EPA personnel should respond:

"EPA has a policy to neither confirm nor deny the existence of a criminal investigation."

Agency personnel may explain that the purpose of this policy is to protect the constitutional rights of persons who may be under investigation (and who may be innocent of any violation of Federal law) and the integrity of the Agency's criminal investigations.

All general questions regarding investigative procedures or the criminal enforcement program may be referred to OECM's National Enforcement and Investigations Center, Assistant Director for the Office of Criminal Investigations (OCI), at (303) 236-3215 (FTS 776-3215). EPA personnel may also refer general inquiries to the OCI Agent in Charge of the Region involved, and to OECM's Office of Criminal Enforcement Counsel at headquarters (202/FTS 475-9660).

Once it is known that criminal charges have been filed, all public or media inquiries regarding the case should be referred to the Office of Regional Counsel's Criminal Enforcement Counsel, or to the Office of Public Affairs.

This policy is effective immediately. Issues relating to the Freedom of Information Act, 5 U.S.C. Section 552, in the criminal context are not addressed by this policy.

This policy, and any internal office procedures which implement this policy, are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party to litigation with the United States. The Agency reserves the right to act at variance with this policy as the circumstances may warrant. In particular, nothing in this policy shall be interpreted to preclude the Agency from notifying the public, when necessary, as to any health or environmental hazard.

Prepared by: Paul R. Thomson, Jr.
Deputy Assistant Administrator - Criminal

Date: 12/22/89

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

POLICY ON PUBLICIZING CRIMINAL PROSECUTIONS

With the maturing of EPA's criminal enforcement program, it has become apparent that the public and the news media are becoming increasingly interested in Federal prosecutions of environmental crimes. It is in the Agency's interest to utilize this public interest. By promptly providing appropriate case-specific information as well as relevant programmatic materials to the media, the general deterrence effects of criminal enforcement will be maximized, and public awareness of EPA's activities to address environmental pollution concerns will be enhanced. At the same time, the rights of those suspected or accused of crimes must not be abridged, and the legally-mandated secrecy of the grand jury process must be maintained.

Because of the special considerations which apply in the criminal enforcement context, this guidance supplements the Agency's general media policy (GM-46), entitled "Policy on Publicizing Enforcement Activities," dated November 21, 1985. The policy (GM-55) entitled "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program," dated December 12, 1986, is revoked.

Statement of Policy

1) The filing of criminal charges (by indictment or information), verdicts or guilty pleas, and sentencings are considered major enforcement events which should be publicized in a timely manner by regional press releases, and will frequently warrant national press releases or press advisories. Such releases or advisories may be issued jointly by EPA and the Department of Justice.

2) In publicizing major criminal enforcement events, all Agency personnel must take care to help ensure that the constitutional and other legal rights of the accused are not violated. In addition, EPA personnel who have access to secret grand jury materials must take special care to prevent disclosure of any such information. Finally, EPA personnel must avoid releasing information which could compromise an ongoing

investigation by EPA's Office of Criminal Investigations or the Department of Justice. In order to carry out these objectives, the Office of Regional Counsel's Criminal Enforcement Counsel (or the Associate Enforcement Counsel for Criminal, at headquarters) must be consulted prior to Agency release of any criminal case-specific information.

3) In addition to case-specific information (which is limited in order to protect the rights of the accused and the integrity of the criminal enforcement process), the EPA Public Affairs Offices should make relevant regulatory or programmatic information available to the public and the news media in response to inquiries occasioned by the news-generating criminal case event.

4) Because of the primary role played by the Department of Justice in Federal criminal prosecutions, the content of any Agency press release regarding a criminal case event should be informally reviewed by the prosecuting attorney prior to publication. The ORC Criminal Enforcement Counsel, the OCI Special Agent assigned to the case, (and OECM's Office of Criminal Enforcement Counsel at HQ) are responsible for facilitating this consultation with Justice.

This policy, and any internal office procedures which implement it, are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party to litigation with the United States. The Agency reserves the right to take any action at variance with this policy or implementing procedures as the circumstances warrant. In particular, <u>nothing in this policy shall be interpreted to preclude the Agency from notifying the public, when necessary, as to any health or environmental hazard.</u>

Prepared by: Paul R. Thomson, Jr.
Deputy Assistant Administrator - Criminal

Date: 12/22/89

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

RG. 1-1
GM #58

AUG 15 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Issuance of Enforcement Considerations for Drafting and Reviewing Regulations and Guidelines for Developing New or Revised Compliance and Enforcement Strategies

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

TO: Assistant Administrators
Office of General Counsel

Attached is a guidance package containing: 1) enforcement considerations for drafting and reviewing regulations; and 2) guidelines for developing new or revised compliance and enforcement strategies.

Staff members from both the compliance program offices and the Associate Enforcement Counsel offices assisted with developing the checklists. My staff interviewed legal and technical enforcement personnel and incorporated their comments into the guidance package as well as comments from the review of draft checklists.

The guidance should encourage consistant consideration of minimal enforcement requirements during regulation development. In addition, the guidance may assist with initial enforcement of a new or revised regulation by providing minimal considerations for developing compliance and enforcement strategies appropriate to the regulations.

To implement this guidance, I have requested all Associate Enforcement Counsels to distribute copies of this guidance to all enforcement attorneys responsible for the enforcement aspects of regulation development. I encourage you to distribute copies of this guidance to your national program managers and Associate General Counsels and any staff who are responsible for regulation development.

Attachment

ENFORCEMENT CONSIDERATIONS FOR DRAFTING AND REVIEWING REGULATIONS; IDENTIFYING THE NEED FOR AND DEVELOPING NEW OR REVISED COMPLIANCE AND ENFORCEMENT STRATEGIE_

PART I Enforcement Considerations for Drafting and Reviewing Regulations

PURPOSE

As part of the initiative to establish a compliance and enforcement strategy process, this guidance amplifies the discussion of the options selection process in the Deputy Administrator's January 31, 1984, "Criteria and Guidelines for Review of Agency Actions".

The guidance is in the form of a checklist of minimum considerations for work group members to use during the process of developing a major or significant rule. The checklist is a tool for work groups to use before and during the options selection process as the work group develops the regulation. This guidance does not attempt to list the full range of rulemaking options.

APPLICABILITY

Work groups should use this guidance during the developme of "major rules" and "significant rules" that have enforcement ramifications as well as any other rule with enforcement implications. These classifications of regulations are defined in the Deputy Administrator's February 21, 1984, "Procedures for Regulation Development and Review."

CHECKLIST FOR DEVELOPING ENFORCEABLE REGULATIONS AND REVIEWING REGULATIONS FOR ENFORCEABILITY

I. PREAMBLE

A. For the regulation under development, would it be helpful for the preamble to reference the existence of a compliance and enforcement strategy?

B. If the preamble references the existence of a compliance and enforcement strategy, does the preamble need to include an abstract of the strategy? If the preamble sets forth the strategy in too much detail, EPA may have to use a rulemaking procedure to modify the strategy.

C. If the preamble summarizes policy issues raised during regulation development, does it give the Agency's rationale for all major regulatory policy choices when needed to support future enforcement efforts?

D. Does the preamble impose substantive requirements that should be included in the body of the regulations?

II. DEFINITIONS

A. Are all necessary terms to identify the regulated community, the regulated activities, or the regulated substances defined?

B. Are exceptions to defined terms included and narrow enough to avoid having the exceptions swallow the definition?

C. Are definitions and exceptions precise enough so that enforcement personnel can identify instances of noncompliance?

D. Once a term has been defined, has the term been used consistently, in the defined form, throughout the text of the regulation?

III. SCOPE AND APPLICABILITY OF REGULATION

A. Is the statutory authority underlying the regulation clearly articulated?

B. Are exemptions to the regulation limited in scope and specific enough to avoid confusion about the regulated entities to which they apply?

C. If necessary, is the relationship of the regulation to criminal enforcement in the same program explained?

IV. PERFORMANCE STANDARDS

A. Are performance standards or other end-results quantified or expressed in measurable ways? Are the methodologies for measuring performance linked to the basis for the standard? If applicable, is the averaging time for determining compliance clearly stated?

B. Are more enforceable standards available; i.e, easier to measure, less resource intensive, etc.?

C. Are exceptions or exemptions clearly described? Are these exceptions/exemptions permissible?

V. MONITORING AND INSPECTION

A. What does the regulated community self-monitor, report, or maintain in records?

B. Are the self-monitoring, reporting, or record keeping requirements related to the statutory compliance requirements and desired results? Are EPA/authorized state inspection procedures related to the compliance requirements and results contemplated under the statute? Do the sampling or emission monitoring procedures provide for adequate chain of custody for evidence of violations?

C. Does the regulation provide procedures for entering a regulated facility, inspecting documents, and collecting samples as authorized by statute?

D. What test methodologies are available to determine if a facility is in compliance? Are the methodologies clearly described? Will standardization and quality assurance support a credible compliance monitoring program?

E. Can EPA/authorized state inspectors readily identify conduct in violation of a regulation from the language of the regulation?

F. Are the requirements for reports, records, or inspection/monitoring techniques designed to reduce enforcement costs and increase the effectiveness of inspections?

VI. RECORD KEEPING/REPORTING REQUIREMENTS

A. What kind of records or reports does the regulated community maintain on site or submit periodically to an authorized state or EPA to document compliance or periods of noncompliance.

B. What is the content of required records in terms of evidentiary use to show compliance or failure to comply?

C. Are exceptions to the record keeping requirements spelled out?

D. What kind of records does the regulated community maintain to document self-monitoring and related activities required by the regulation?

E. If the record keeping/reporting requirement may be the basis of an enforcement action, will the information maintained to meet the requirements provide sufficient evidence to document a violation? If not, what else is required?

F. Are the reporting requirements frequent enough for a timely response to a violation? Is the regulated community required to retain information long enough for enforcement purposes?

G. Are exceptions to the reporting requirements spelled out?

VII. DEMONSTRATING COMPLIANCE WITH PERFORMANCE STANDARDS

A. Does the regulation describe what constitutes compliance? Is compliance determined on the basis of field inspections, desk reviews of regularly submitted reports, or is the regulation self-enforcing?

B. Do the regulations set definite time limits within which a member of the regulated community must reach compliance? Do the time periods have specified beginning and end points? If compliance is defined by occurrence of an event, rather than by a date, is the event discrete enough for an inspector to make a compliance determination?

C. Are the regulations clear about who has the burden of proving compliance or noncompliance?

D. Is the proof of violation clearly described? Can EPA carry the burden of proof? Does the regulation describe the latitude of an inspector's exercise of professional judgment in determining whether a facility is in compliance?

E. Is the response to a civil violation consistent with criminal enforcement authority under the statute? Does the regulation provide for coordination with criminal enforcement actions?

F. Are specific penalties described for each instance of noncompliance?

G. If compliance and enforcement is delegated to a state, does the regulation clearly describe the responsibilities of the delegated state?

Part II Guidelines for Identifying the Need for and Developi New or Revised Compliance and Enforcement Strategies

PURPOSE

This guidance provides a checklist for OECM and Program Offices to evaluate the need for new or revised compliance and enforcement strategies, assess the appropriate timing for completing those strategies, and determine the scope of strategies that need to be developed.

Work group members may use this checklist during the options selection process of regulation development to ensure that new or revised compliance and enforcement strategies are developed concurrent with the regulation and that pertinent issues are considered in developing the regulation. Because each Agency program office or enforcement office identified in a compliance and enforcement strategy has had a representative on the work group developing the regulation, a new or revised strategy should include a discussion of which office is responsible for each part of the strategy.

This guidance amplifies the May 1984, "Strategy Framework for EPA Compliance Program" and the October 1984 memorandum from the Deputy Administrator on the strategic planning proces for compliance and enforcement within EPA.

APPLICABILITY

This guidance is limited to developing new or revised compliance and enforcement strategies for:

1. New program initiatives within the Agency;

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.

A compliance and enforcement strategy or revisions in selected components of an existing strategy would not be necessary for every revision of an existing regulatory program. For example, a compliance and enforcement strategy would not be needed for each new or revised effluent guideline.

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

GM #47
RG. 1-2

JAN 27 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: A Summary of OECM's Role in the Agency's Regulatory Review Process

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

TO: Associate Enforcement Counsels
OECM Office Directors

The purpose of this memorandum is to provide OECM staff with a description of OECM's role and responsibilities in the Agency's regulatory review process, and a description of the Agency's regulatory review process itself. This memorandum also sets forth procedures for OECM staff to follow in reviewing and concurring in regulation packages (i.e., Red Border packages, Consent Calendars, responses to General Accounting Office (GAO) reports, reports to Congress, etc.).

Under present procedures, the Associate Enforcement Counsels have the responsibility for developing a timely, coordinated OECM response to a given regulatory package. The correspondence control unit (CCU) keeps track of the status of all regulation packages under OECM review and, where necessary, reminds OECM media divisions of applicable deadlines. The Director of the Legal Enforcement Policy Division acts as OECM's Steering Committee Representative to provide OECM's point of view in general rulemaking procedures and act as a clearinghouse for Start Action Requests.

The first part of this memorandum outlines OECM's role in the regulatory review process. The second part sets forth procedures for OECM staff to follow in reviewing and concurring in regulation packages. Attached are two appendices. The first contains three charts diagramming the regulatory review system. The second is a document which summarizes the Agency's regulatory development and review process as managed by the Office of Policy, Planning, and Evaluation (OPPE).

Please make sure that each member of your staff receives a copy of this memorandum. This will allow all of OECM to operate with a common understanding of the procedures for reviewing regulation packages. If you have any questions or comments on these procedures, please contact Arthene Pugh at 475-8784.

Attachments

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
REGULATORY REVIEW PROCESS

Arthene Pugh
Legal Enforcement Policy
Division
December 11, 1985

I. OECM's Role in The Agency's Regulation Review Process

Over the past several years, OECM has played an active role in the Agency's regulation review process especially during Steering Committee and Red Border reviews. Almost all proposed regulations including Agency directives, manuals, responses to GAO reports and some Agency reports to Congress require the review of OECM staff and the official concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Monitoring (AA/OECM).

A. OECM Participation in Steering Committee Meetings

Occasionally, a formal Steering Committee meeting will be held to discuss an important or controversial regulation package or other related issues (see Appendix II, page 5 for the role of the Steering Committee). As OECM's Steering Committee representative, the Director of OECM's Legal Enforcement Policy Division (LEPD) may attend as OECM's "official" representative at these meetings. As a practical matter, however, the Director/LEPD will inform the appropriate Associate Enforcement Counsel (AEC) of these meetings, and will rely on the AEC and his staff to attend and participate in Steering Commitee meetings.

B. OECM Participation in SAR Review

After a Start Action Request (SAR) has been submitted to the Office of Policy, Planning, and Evaluation (OPPE), OPPE will circulate to Steering Committee representatives a copy of the SAR for review and approval, and a work group membership invitation (see Appendix II, page 3 for a complete explanation of the SAR). Since the Director/LEPD is OECM's Steering Committee representative, he will receive the SAR and work group invitation. The Director/LEPD will forward the SAR review and work group invitation to the appropriate AEC for approval and response. The AEC will submit the name(s) of his staff who will participate in work group meetings, and the AEC will make any comments on the SAR to the Office of Standards and Regulations (OSR) in OPPE.

C. OECM Participation in Work Group

The lead office will convene an Agency-wide work group to develop the regulation. The purposes of the work group are to identify the issues facing different Agency offices in formulating the proposed rule and to begin resolving those issues. OECM's representative in work group activities is responsible for presenting a consensus OECM position on matters and issues discussed before the work group.

D. OECM's Participation in Steering Committee Review

Steering Committee review is the initial procedure to prepare the proposed regulation package for consideration and final concurrence by senior Agency management. The Steering Committee review determines whether the regulation package is ready to enter the final interoffice review (Red Border review) prior to signature by the Administrator. This task is accomplished by means of Consent Calendar clearance review. The Consent Calendar is a review process which gives Steering Committee representatives the opportunity to provide written comments on the regulation package without a scheduled meeting. Consent Calendar packages are reviewed and concurred in by the appropriate AEC.

E. OECM Participation in Red Border Review

Red Border review normally is the final step in Agency-wide review of a proposed regulatory action. In this process, the AA/OECM along with other participating AAs indicate whether they concur in the regulation package. OPPE will send to OECM the regulation package for review and comment and will indicate the established deadline for review. The package will be reviewed by the appropriate OECM media division and concurred in by the AEC, where applicable, or the AA/OECM, as appropriate according to delegations as described below.

II. Procedures for Concurrence on Regulation Packages Under OECM Review

A. Procedures Under The Old System

In the past, LEPD reviewed and maintained a tracking system for all regulation packages (i.e., Red Border, Consent Calendar, reports to Congress, responses to GAO reports, etc.) that required the signature of the AA/OECM. LEPD maintained this tracking system to ensure that OECM responded in a timely manner with established deadlines. Prior to signature by the AA/OECM, LEPD also reviewed the package to make sure that any enforcement issues contained in the package were properly addressed and reviewed by the appropriate OECM media division. After LEPD's review, the package was forwarded to the AA/OECM for concurrence.

The Director/LEPD had final sign-off authority on Consent Calendar packages. These packages were reviewed by the appropriate OECM media division, and then forwarded to the Director/LEPD for signature. However, in rare instances, the AA/OECM would sign off on Consent Calendar packages if they contained controversial enforcement issues. Appendix #1 indicates the review process for regulation packages under this system.

B. Revisions to Procedures for Reviewing Regulation Packages

To streamline the review process, in April 1985, the AA/OECM delegated to the AECs the authority to sign off for the AA/OECM on regulation review packages that only require a recommendation of concur (no outstanding enforcement issues) and concur with comment, if comments were editorial in nature (e.g. correcting typos or grammar). If the recommended response was concur with substantive comment or to non-concur, then the package had to be signed by the AA/OECM. Consent Calendar packages continued to be signed by the Director/LEPD.

Where AEC sign-off is appropriate, the new procedures eliminated four steps - 4, 5, 6, and 7- (see Chart #1 in Appendix I) in OECM's prior review process. Packages that required the signature of the AA/OECM continued to be processed through all of the 8 steps (see Chart #1 in Appendix I). Consent Calendar packages continued to be processed in the same fashion.

Soon thereafter LEPD conducted an evaluation of OECM's review procedures to determine the need for LEPD to continue to review and track regulation packages. The evaluation revealed that the OECM media divisions were performing the review, commenting, and recommendation functions. If any issues had to be resolved or discussed with the AA/OECM, the appropriate OECM media division handled the matter. Consequently, in August 1985, the Director/LEPD issued a memorandum which eliminated LEPD from the tracking and signing off steps in the review process. This action taken by LEPD has greatly streamlined OECM's review process as outlined below.

LEPD maintains its role as OECM overseer of the rulemaking process, primarily in two ways. The Director/LEPD is OECM's Steering Committee Representative and handles all cross-media rulemaking matters. Also, by virtue of his position as OECM Steering Committee Representative, the Director/LEPD receives a great deal of material relating to specific rulemakings, including SARs, which are directed to the proper OECM media division. Twice a year OPPE issues a complete list of all EPA rulemakings which LEPD sends to the media divisions so the AECs can ensure that they are actively involved in all rulemakings in which they have an interest.

C. Current Procedures for Concurrence on Regulation Packages Under OECM Review

OECM's correspondence control unit (CCU) now has the responsibility for making sure that OECM responds in a timely manner to regulation packages under OECM review. The CCU forwards all regulation packages directly to the appropriate

OECM medium division for review and response. The OECM medium division will review the package and make a determination of the appropriate action to be taken. If the regulation package is one in which the response is concur (no comment or outstanding enforcement issues), or concur with comment (if comments are purely editorial in nature), then the AEC should sign the clearance sheet for the AA/OECM, and send it back to the CCU for distribution.

If the package is one in which the response is concur with substantive comments or non-concur, then the OECM medium division should prepare a memorandum from the AA/OECM addressed to the AA of the the lead program office, with a courtesy copy to the AA/OPPE. The review package and memorandum should be sent to the CCU for signature by the AA/OECM. (Charts #2 and #3 in Appendix I outline the stages of review for these packages).

With respect to Consent Calendar packages, the AECs will have the final concurrence on all Consent Calendar clearance sheets. The AEC will indicate, by check mark (✓) the appropriate response, no comments or comments attached, and then sign his name in the signature block. It the response is "comments attached," then a memorandum should be prepared, for the signature of the appropriate AEC, and addressed to C. Ronald Smith, Chairman, Steering Committee, OSR/OPPE. After signature, the package should be returned to CCU for distribution. Although OPPE permits telephone responses on Consent Calendar packages, OECM should respond by completing the Consent Calendar clearance sheet.

APPENDIX I

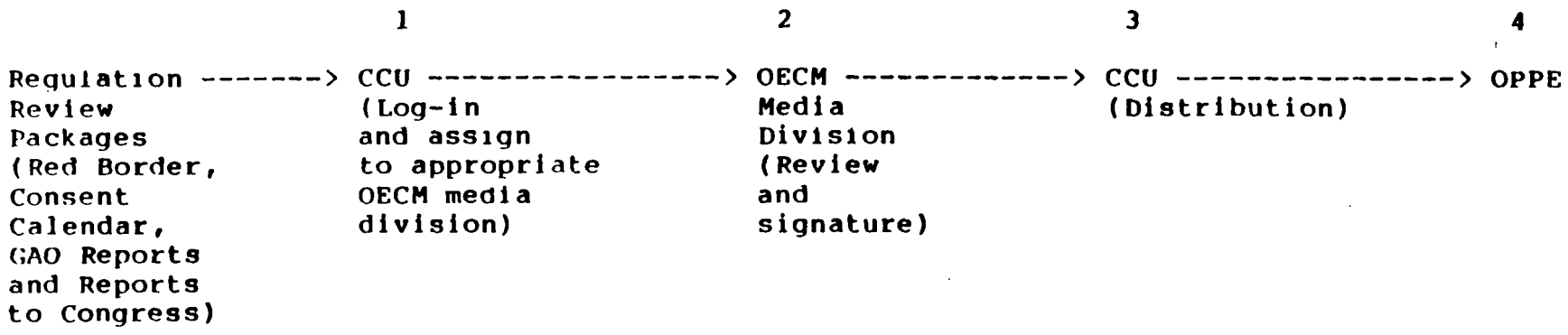
Chart #1

Regulation Review - Old System

	1	2	3	4	5	6	7	8	9
Regulation Review Package (Red Border, GAO Reports and Reports to Congress) -->	CCU (Log-In) ----->	LEPD (Assign to appropriate OECM media division) ---------->	OECM Media Division (Review and action) ------>	LEPD (Review) ---->	CCU (Log-in) ------>	AEC/OECM (Concur-rence) -->	AA/OECM (Signa-ture) -->	CCU (Distri-bution) ----->	OPPE

Chart #2

*Regulation Review - New System



* This system is applicable to those packages for which a recommendation is concur (no comment or outstanding enforcement issues), or concur with comments (comments are purely editorial in nature). If the response is concur with comment (substantive comments) or nonconcur, use the system in Chart #3 of this Appendix.

Chart #3

*Regulation Review - New System

	1	2	3	4	5	6	7
Regulation Review Packages (Red Border, GAO Reports and Reports to Congress) ---->	CCU (Log-in and assign to appropriate OECM division) ---------->	OECM Office (Review and action) ------>	CCU (Log-in) ---->	AEC/OECM (Concurrence) ---->	AA/OECM (Signature) ---->	CCU (Distribution) ------->	OPPE

*This system is applicable to those packages for which a recommendation is concur with substantive comment for which a memorandum is required, or non-concur. If the response is concur (no comment or outstanding enforcement issues), or concur with comment (comments are purely editorial in nature) use the system in Chart #2 of this Appendix.

APPENDIX II

AGENCY REGULATION REVIEW PROCESS

I. Agency Participants and Their Roles in the Regulation Review Process

A. Lead Office

The program offices have lead responsibility for initiating and developing most regulations. The Assistant Administrator (AA) of the lead office and his/her designee (the project officer) manage the development of the regulation. The lead office organizes the Agency-wide work group and notifies designated office representatives of scheduled work group activities. The project officer of the lead office chairs the work group meetings. Milestone schedules for developing the proposed regulation are established by the lead office. In addition, the lead office elicits the participation, support and resources of other Agency offices and the public in developing the proposed regulation.

B. Primary Participating Offices

1. Program Assistant Administrators

The program Assistant Administrators (AAs) review all of the proposed rulemakings, including their own specific program regulations to offer their opinions and expertise on particular issues. This helps ensure the necessary integration of all of the Agency's programs. The AAs are represented in all Steering Committee reviews, and they participate in options selection reviews and meetings, and in Red Border reviews that are of interest to them, as explained below.

2. Assistant Administrator for Policy, Planning and Evaluation

The Assistant Administrator for the Office of Policy, Planning and Evaluation (AA/OPPE) manages the operation of the Agency's regulation review process. Within OPPE, the Office of Standards and Regulations (OSR) performs the task of coordinating the regulatory review process within the Agency. The AA/OPPE is also responsible for overseeing the Agency's compliance with other Federal regulations such as Executive Order 12291, the Paperwork Reduction Act and the Regulatory Flexibility Act.

The AA/OPPE directs the Steering Committee process and participates in each Red Border review. OPPE assigns a lead analyst to work with each of the Agency's program offices on their regulations and work groups. The AA/OPPE focuses the

office's attention on the analytical quality, program integration, cost-effectiveness, and scientific and statistical validity of proposed regulatory actions. The AA/OPPE also provides an independent assessment of the proposed rules for the Administrator's and the Deputy Administrator's review.

3. Office of General Counsel/Office of Enforcement and Compliance Monitoring

The Office of General Counsel (OGC) reviews regulatory action packages to advise the Administrator, Deputy Administrator, and Assistant Administrators on the legal aspects of each proposed rulemaking. The Office of Enforcement and Compliance Monitoring (OECM) reviews regulatory packages to advise the Administrator, Deputy Administrator and Assistant Administrators on the enforcement aspects of each proposed rulemaking. The OGC and OECM lawyers work closely with the lead offices to assist them in drafting regulations. The General Counsel and OECM are represented in all Steering Committee reviews and participate in Red Border reviews.

C. Other Participating Offices

The Assistant Administrators for Enforcement and Compliance Monitoring, Research and Development, External Affairs, and Administration and Resources Management have lead office responsibility for a select number of regulations generated by their offices. These AAs, as well as a representative for the Regional Administrators (RAs), are all represented in Steering Committee reviews and participate in Red Border review for regulatory actions that are of interest to them.

II. Procedures for Developing a Regulation

In terms of work products, the process of developing a regulatory action can be divided into five stages:

- submission of a start action request;
- preparation of a development plan;
- establishment of a work group;
- review and selection of options; and
- submission of a proposed/final regulatory decision package.

The procedures for these five stages consist of certain requirements that the lead program office must satisfy together with an associated review process.

A. Start Action Request (SAR)

All proposed regulations must have an approved SAR before the Agency can begin development of the proposed regulation. The lead office must submit a SAR to OSR/OPPE for approval by the AA/OPPE. The SAR is a brief document which describes the proposed regulatory action, its purpose, and the reason for initiating the regulatory action including any consequences which may result if no regulatory action were initiated or undertaken. The SAR must also justify why Agency time and resources should be expended for developing the proposed regulation during the time period specified for development. OPPE and Steering Committee members must review and approve the SAR within three weeks of its submission.

B. Preparing the Development Plan (DP)

The DP outlines the basic policy and management framework for developing a proposed regulation. All rulemakings that are classified as major or significant require a DP. The DP states the need for the regulatory action, identifies its goals and objectives, identifies any alternative actions that can be taken which may be environmentally or administratively acceptable, and presents a work plan and strategy for developing the regulation.

After OPPE approves the SAR, the lead office has 60 days in which to submit the DP to the Steering Committee. The Steering Committee reviews the DP, usually within a two week period. If the DP is acceptable, the Steering Committee Chairman approves it. In the case of major regulations, the DP must be approved by the AA/OPPE.

C. Establishing the Work Group

The work group meets shortly after the SAR has been approved. The work group consists of representatives from OPPE, OECM, OGC, Office of External Affairs, Office of Research and Development and the RAs who choose to participate in the particular rulemaking. Other AAs or their representatives may participate when there are issues involved that are of interest to their particular program.

The work group meets throughout the regulation development and review process until the decision package is submitted for Agency-wide review. Full support and participation of the work group provides a forum for sharing expertise and knowledge on the regulation under development, and ensures that all Agency resources are efficiently and properly allocated.

D. The Options Selection Process

The options selection process involves the formulation, refinement and selection of feasible options connected with one or a series of decision points. The goal of this process is to narrow the range of acceptable alternatives for the Administrator's final decision. Work group meetings are held to discuss the options, select/reject options and refine the options selected for further development. The options should be clearly stated and defined in the development plan.

1. Level I Process

There are two types of options selection processes. The first, Level I Process, applies to major regulatory actions. The lead office must circulate an options paper to participating AAs and RAs and the Deputy Administrator 10 days before a scheduled options review meeting. The options review meeting is chaired by the Deputy Administrator or the lead program AA. The participants must agree on which options are to be retained for further development and consideration and which are to be rejected. Results of options meetings are documented by OPPE which issues a closure memorandum (summary of options review meeting) that is used by the Deputy Administrator to resolve any options issues.

2. Level II Process

The second, Level II Process, applies to some major and significant regulations. For major regulations, the lead program AA will make the determination as to which process, Level I or Level II, the regulatory action will follow. Work group meetings are convened to discuss the options under consideration for further development. The lead office prepares a summary of the options considered and those rejected, and submits this summary along with the decision package to the Steering Committee and Red Border reviews.

Work group participants and the lead program AA work together to resolve any differences or decisions on options issues that should be considered for further development. If differences or decisions cannot be resolved, the Steering Committee makes a determination which options should be considered or, if it is unable to achieve closure, the Steering Committee identifies all disagreements and brings them to the attention of the Deputy Administrator, or the affected program AA. OPPE documents the results of the meetings and options selected or rejected, and circulates the closure memo to the participants and the AA/OPPE for their review.

3. Options Selection Paper

With respect to both Level I and Level II processes, the options selection paper, prepared by the lead office, should evaluate and analyze the following issues: relevant economic impacts, reporting and recordkeeping burdens required by the proposed rulemaking, assesment of impact on other regulatory programs both within and outside of the Agency, and resources required for implementation and enforcement of the regulatory action.

4. The Decision Package

The lead office prepares the decision package which is submitted for Steering Committee and Red Border reviews. The decison package includes a neutral discussion of the major options including comments from any AAs regarding the options, a summary of the options considered and rejected and reasons therefor, a detailed analysis of reporting and recordkeeping burdens, and a thorough analysis and assessment of the resources necessary for implementing the proposed rulemaking. The decision package must be circulated to the work group for review and comment, and must be approved by the lead program AA before it is submitted for Steering Committee or Red Border review.

III. Reviewing of Regulatory Actions

A. Steering Committee Review

The Steering Committee decides whether a package is ready for Red Border review after resolution of all issues. The Steering Committee includes a representative for each of the AAs and the General Counsel. The representative to the Steering Committee should:

1. Hold a position at or above an Office Director level;

2. Hold a position in the immediate office of the AA or General Counsel, or report directly to the AA or General Counsel;

3. Have general knowledge and responsibilities covering the areas of regulatory issues for the program he/she represents.

The Director of OSR chairs the Steering Committee.

All major and significant rules must follow a certain sequence and a series of reviews. They must all undergo Steering Committee review which usually takes two weeks. For major and

some significant rules, a meeting of Steering Committee representatives must be scheduled. However, some significant rules undergo Consent Calendar review in lieu of a Steering Committee meeting. In such instances, OPPE circulates the package to the Steering Committee for written comments, normally due within two weeks.

B. Red Border Review

Red Border review is the formal senior management review of all decision packages by the AA/OPPE, the General Counsel and all applicable AAs and RAs. The normal period for Red Border review is three weeks. If a reviewing office fails to respond by the established review deadline, it is assumed by OPPE that the reviewing office concurs without comment, and the package proceeds on to the next stage.

C. Office of Management and Budget (OMB) Review

Executive Order 12291 requires that all proposed and final rules (except those that OMB has exempted) be sent to OMB for review. The AA/OPPE must approve Agency documents for transmittal to OMB for review. Minor and significant rules are reviewed within about 10 days. Proposals of major rules and draft regulatory impact analysis are subject to a 60-day review by OMB. Final major rules and final regulatory impact analysis are subject to a 30 day review.

D. Review by the Administrator and Deputy Administrator

Once the Red Border and OMB reviews are completed, the package is forwarded to the Administrator and Deputy Administrator for final approval and signature. A special assistant to the Administrator and the Deputy Administrator will review the regulation package and make a recommendation to the Administrator and Deputy Administrator as to the appropriate action to be taken. Once the Administrator signs the package, it is returned to OSR/OPPE. This office makes the necessary arrangements to publish the rule in the Federal Register.

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

RG. 1-3
GM #59

FEB 6 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: The Regulatory Development Process: Change in Steering Committee Emphasis and OECM Implementation

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

TO: Senior Enforcement Counsel
Associate Enforcement Counsels

I. Background

On October 16, 1986, the Administrator announced significant changes in the role of the Steering Committee in the regulatory development process. (See Attachment 1: Memorandum, Subject: "The Regulatory Development Process: Change in Steering Committee Emphasis", Oct. 16, 1986 with attachments.)

Principal changes in the process include:

- Steering Committee meetings will be held on all Start Action Requests (SARs) at which lead program offices will ask other programs for workgroup representatives, issues, an indication of their level of interest, and agreement on subsequent review of the regulation;
- Workgroup reports will be submitted by each workgroup chair to the Steering Committee; and
- There will be flexibility in determining the levels of review of the final package, depending on resolution of issues through the workgroup process.

A series of ten fact sheets (Attachments 2-11) explain in greater detail various aspects of the newly-constituted Committee.

A primary purpose for the overall change in Steering Committee procedures is to preclude situations where major issues or concerns are raised at the last minute--even as late as the Red Border Review stage--since any such circumstance may significantly disrupt the schedule for completion of a project.

For this reason, the new procedures enhance the individual workgroup's effectiveness by ensuring that issues are raised, resolved, or elevated early in the regulatory development process; and to assure that cross-media issues are identified and addressed as early as possible.

We must therefore ensure that OECM workgroup members are adequately supervised and clearly understand their role in speaking for OECM during the course of workgroup deliberations. Similarly, the OECM Steering Committee Representative must be adequately informed to speak authoritatively for OECM as matters come before the Steering Committee for review.

Accordingly, I am asking each Associate Enforcement Counsel to assume responsibility for ensuring that workgroup members under his supervision clearly understand and articulate OECM's position in all workgroup activities. Enforcement issues which cannot be routinely resolved within the workgroup must be elevated to OECM senior management for further guidance.

I have asked Terrell Hunt to serve as OECM's Steering Committee Representative and Winston Haythe as the Alternate Representative. Mary M. Allen of OPPE is the Steering Committee Chair.

II. Procedures:

In order that OECM's participation on the Steering Committee can be most effective, I am asking that the following procedures be followed.

First, at the conclusion of each Steering Committee meeting, which convenes biweekly on Wednesdays, a draft agenda for the next meeting is distributed. Terrell will furnish copies of that draft agenda (with any other relevant documents) to the AECs at the Senior Enforcement Counsel's regular Friday staff meeting two days thereafter.

Second, each AEC should review that draft agenda (plus any other distributed materials) for matters applicable to his program area and then provide Terrell at the next Friday staff meeting with a one-page summary (e.g., bullets of talking points) for any issues which should be voiced to the Committee with respect to each agenda topic. These summaries should also contain the name and telephone number of the OECM workgroup member for any

given regulatory matter on the agenda. If an AEC desires no involvement on an agenda topic in his area, this fact should likewise be communicated to Terrell.

Finally, if the workgroup member or the AEC desires to attend the Committee's next meeting, please inform Terrell by so indicating on that particular summary.

Attachments: 11

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

OCT 16 1986

THE ADMINISTRATOR

MEMORANDUM FOR: Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators
Staff Office Directors

SUBJECT: The Regulatory Development Process: Change in Steering Committee Emphasis

EPA's regulatory development process is generally viewed as an effective means of accomplishing the Agency's primary business -- producing effective regulations. Improvements are sometimes desirable, however, to keep up with the Agency's changing priorities and needs.

At the September 18th meeting of the Risk Management Council, we discussed one proposal that could improve the process involving the role of the Steering Committee. This proposal has been under consideration for some months and was previously discussed in the Risk Management Council, the Steering Committee, with individual Office Directors and Deputy Assistant Administrators, and finally with Assistant Administrators at a recent staff meeting. Given the positive responses to this proposal and the number of benefits it offers, I want to begin using it for all regulations starting through the regulatory development process, effective immediately.

The principal changes you need to be aware of include:

- Steering Committee meetings will now be held on all SARs, at which lead program offices will ask other programs for workgroup representatives, issues, an indication of their level of interest, and agreement on subsequent review of the regulation;

- A system of workgroup reports submitted by the workgroup chair to the Steering Committee will be initiated; and

- There will be flexibility in determining the levels of review of the final package (e.g., bypassing Steering Committee), depending on resolution of issues through the workgroup process.

Attachment 1

The purpose of these changes is not to alter the basic process itself, but to improve the operations of the workgroup within the system. As the Agency's standing body for regulatory oversight, the Steering Committee is the appropriate vehicle for accomplishing this improvement. There are two important objectives behind these changes:

1. To use the Steering Committee as a vehicle to help program offices plan regulatory activities and set priorities; enhance the workgroup's effectiveness by ensuring that issues are raised, resolved, or elevated early in the regulatory development process; and assure that cross-media issues are identified and addressed as early as possible in the process.

2. To set up a dynamic and flexible approach within the existing regulatory development process to respond to program offices' varying needs for different types of regulatory actions, recognizing the overall goal of the system to produce regulations with adequate involvement of Agency programs.

An outline of how this process will work in practice is attached. The task of implementing this proposal will fall equally on the Steering Committee as well as line managers within the Agency. I would like each of you to support the Steering Committee in moving toward this new role. This process places a premium on good policy management, timely elevation of issues, and collegial working relationships at all levels. Your support and cooperation are essential.

Lee M. Thomas

Attachment

cc: Steering Committee
Members

CHANGES AND ROLES IN THE REGULATORY DEVELOPMENT PROCESS

1. HOW THE PROCESS WILL WORK

(a) Make SAR process work:

- o SARs would be distributed as now to Steering Committee representatives prior to formation of workgroup allowing enough time for program offices, via Steering Committee representatives, to evaluate and decide the level of priority for them.

- o Regular Steering Committee meetings will be scheduled at which several SARs will be presented to:

  --Have the lead program office present what it intends to do, ask other programs for: issues, workgroup representatives, indication of level of interest.

[Note: This will be done for all regulations; from this point on, the level of review for each will depend on the type of regulation under consideration.]

  --Agree on level of subsequent review any particular regulation would receive given cross-office implications, scope, complexity (i.e., how many workgroup reports, whether it needs a development plan [with or without a separate Steering Committee meeting], whether it will need a final Steering Committee meeting).

(b) Work Group Reports (see Exhibit A for prototype of format)

- o Purpose is to:

  --Provide lead program office and workgroup chair with a means to encourage early raising of issues and ensure agreements or disagreements in other offices are identified and resolved early in the process.

  --Include enough information so that workgroup representatives will recognize specific issues and whether or not they have been resolved (this is in the workgroup chair's best interests, since it would be counter-productive to have a workgroup representative raise an issue again later in the process because he/she did not recognize it in the workgroup chair's report). The report does not need to be an exhaustive treatise meant to educate Steering Committee members or other program offices

on the details of workgroup deliberations (that is the responsibility of their workgroup representative).

--Provide Steering Committee members, workgroup representatives from other offices and their managers a useful check on progress of regulations under development.

--Promote a sense of responsiblity in workgroup process since workgroup representatives will need to be sure that positions they take in the workgroup are consistent with their line managers' and Assistant Administrator's positions (because they will be documented in the report and concurred on by Steering Committee members).

o Process:

--Workgroup chair will submit written reports to Steering Committee chair according to the schedule agreed to at SAR (or Development Plan) meeting (could be one during lifetime of workgroup or several, as necessary).

--Report will be distributed to all Steering Committee members requesting comment within a certain timeframe (e.g., two weeks), after which concurrence will be assumed.

--It will be the responsibility of Steering Committee members to determine whether or not the workgroup report is accurate, by checking with the workgroup representative and, as necessary, line managers and the DAA/AA to confirm the AAship's position.

--If another program office does not agree with the workgroup chair's characterization of the status of issue resolution, that should be raised in the comments of the Steering Committee member on the report. Then, the Steering Committee chair will work with the relevant Steering Committee members and program offices to elevate the issue to the appropriate level until it is resolved. Alternatively, the workgroup chair's report may identify an issue that needs to be resolved before the workgroup can proceed. The same process of issue elevation would apply here.

--At the end of the comment period, the Steering Committee chair will issue a closure memo, with the

workgroup report attached, noting any comments received and discussions held, or conclusions reached, as a result of the workgroup report.

(c) Final Review

- The final workgroup report will recommend whether or not the package should be sent directly to Red Border, bypassing final Steering Committee review, or undergo some other form of closure.

- Through the Steering Committee concurrence process on the report, other program offices will agree with the workgroup chair's recommendation, raise unresolved issues, or suggest some other forum for closure.

2. RESPONSIBILITIES OF WORKGROUP CHAIRS

- Provide report(s) to Steering Committee and other workgroup members.

- Manage project according to agreed-upon schedule.

- Assure that all offices have an opportunity to present views and that the best option is selected on an objective and unbiased bases.

- Assure that cross-media considerations are properly addressed.

- Provide early and clear information to workgroup members regarding meetings, issues and other items necessary for full workgroup member participation.

3. ROLES AND RESPONSIBILITIES OF STEERING COMMITTEE MEMBERS

- The role of Steering Committee members will not change substantially. However, they will need to take on the responsibility of explicitly assigning representatives to workgroups, following up on workgroup reports to determine the AAship's position, and, in general, serving as the center of information flow for all regulatory development activities (with special attention to cross-media issues). Specifically, Steering Committee members will require ready access to the entire range of personnel in the office (from workgroup representatives through office directors to the DAA/AA) to be able to carry out their functions. In addition, they will need enough authority to be able to elevate issues for resolution, if necessary, with the AAship.

o Specific functions of Steering Committee members would include:

--Representing the Assistant Administrator in policy discussions arising from the Steering Committee review process, including (a) representing the AA's policy positions on scheduled agenda items and (b) determining how unresolved issues could be addressed and at what level.

--Contributing to identification and decisions on how to resolve cross-media issues in the Agency's regulatory process.

--Directing the flow of the office's regulatory documents into and through the regulatory review systems, including Start Action Requests, Steering Committee, Red Border, Options Selection and Federal Register activities.

--Managing the review of other offices' regulations, reviewing SARs and development plans, assure that line managers understand the nature and consequences of the regulation, participation in the decision on the AAship's level of interest, serving as the primary point of contact regarding representation in workgroups, and managing review of workgroup reports within the AAship, responding, if necessary, to the report via the Steering Committee chair.

--Serving as the liaison for OMB review, including tracking and issue resolution. Managing the relationship regarding Executive Orders 12291 and 12498, including the Regulatory Agenda and Regulatory Program.

--Facilitating the relationships between program staff, OPPE as managers of the regulatory process, and other offices. This includes providing information and guidance to program staff on regulatory development.

--Serving as intra- and inter-office mediator to resolve issues.

PROTOTYPE

WORKGROUP REPORTING FORMAT

1. Issue Resolution:

   a. List significant issues resolved since the last report. For each:

      --What is the issue, and how does it relate to the environmental problem (or regulatory alternative) being considered?

      --What alternative were considered, and why were they eliminated? What options remain?

      --How was the issue resolved?

   b. List significant issues still outstanding. For each:

      --What is the issue that is unresolved? What are the different positions within the workgroup regarding this issue?

      --Has a process been established for resolving the issue within the workgroup, or should it be elevated for resolution?

      --If the lack of resolution relates to the inadequacy of available data, what data are needed and what time and resources are required to obtain them?

2. Status of Technical and Analytic Support Work:

   a. List the status of principal studies and analyses supporting the rulemaking? Are further studies needed to support the project?

   b. Are the current and projected studies sufficient in terms of quality and scope to meet project needs?

3. Operation of the Workgroup:

   a. Is participation in the workgroup sufficient to address important issues and other aspects of the rulemaking?

   b. Do you anticipate any delays and, if so, for what reason?

FACT SHEET #1 -- Regulation Management Series

The Steering Committee

Description and Purpose: The Steering Committee is a standing group with representation from each Assistant Administrator and the General Counsel. It is the primary mechanism for coordinating and integrating the Agency's regulatory development activities. Its key functions are to approve Start Action Requests (SARs) and charter workgroups; monitor the progress of staff-level workgroups, especially regarding cross-media or inter-office problem-solving; and ensure, when appropriate, that significant issues are resolved or elevated to top management. Regions participate in Steering Committee activities through Regional Regulatory Contacts. These Contacts coordinate reviews in the Regions and facilitate rule-related activities and information for the Regional Administrators (RAs).

Operation: The Steering Committee meets biweekly (every other Wednesday morning), with additional meetings scheduled as necessary. Its regular format is (a) discussion and disposition of SARs (b) review of Development Plans (c) consideration of pending Workgroup Reports and (d) other issues. Upon request, the Chair will schedule a separate meeting to consider a proposed or final rulemaking package, or arrange for some other form of Steering Committee review. Any office may submit documents or issues for the agenda through its Steering Committee Representative. Regional Contacts receive all Steering Committee documents. Typically they are not able to attend meetings, but Regions can send written comments. Due to time limitations, they sometimes call the Regulation Management Branch (RMB) in the Office of Standards and Regulations with issues, so that RMB can present these views at a meeting. After each meeting, the Committee Chair issues a closure memo that documents outstanding issues, agreements, and action to be taken. RMB provides staff support for the Committee.

Membership: Chair: Mary M. Allen 382-4001

OW:	George Ames 382-7818	OSWER:	Joan LaRock 382-4617	OEA:	Richard Laska 382-4095
OPTS:	Judy Nelson 382-2890	OECM:	Terrell Hunt 382-4539	OPPE:	Jack Campbell 382-4335
OAR:	Paul Stolpman 382-5580	ORD:	Irwin Baumel 382-7669	OGC:	Gerald Yamada 475-8064
		OARM:	Gail Korb 382-5000		

Role Within Each Office: In addition to their role as members of the Steering Committee, these representatives play an important regulatory management role within their offices. They direct the flow of documents into and through the Agency's regulatory review systems (including Red Border, Options Selection, and Federal Register activities); serve as their Assistant Administrator's liaison with OMB, under Executive Orders 12291 and 12498; and direct their programs' review of other offices' regulatory development activities.

See Also: Administrator's Memorandum "The Regulatory Development Process: Change in Steering Committee Emphasis" (October 16, 1986); and "Information Sheet to Guide New Steering Committee Process" (November 19, 1986). Available through 382-5475 or Room 415W.

FACT SHEET # 2 -- Regulation Management Series

Start Action Requests

Purpose: A Start Action Request (SAR) initiates work on a rule or related action and establishes the Agency workgroup. It provides brief, descriptive information and should be prepared at the very outset of an office's effort. Its principal purposes are to alert other Agency offices to the lead office's intention to develop a rule, and provide the Steering Committee with the opportunity to discuss and plan for the inter-office or inter-media aspects of the action. In addition, submitting the SAR to the Steering Committee is the mechanism for: (a) reaching agreement on the necessary review steps (e.g., a Development Plan, Options Level I review, Workgroup Reports, and an Information Clearance Request), and (b) helping all Agency programs decide at the start of the process whether to designate members to participate on the workgroup and what skills would best contribute to the rulemaking.

Preparing the Document: The SAR is a one-page form with instructions on the reverse side. It asks primarily for descriptive information, which should be available to the lead office when it starts work on the regulation. The most important category of information on the form is Item 4, called "Description of Action." The Steering Committee uses this information to determine the significance of the action for the Agency and for individual offices, the need for a Development Plan, or other planning documents, the composition of the workgroup, and the type of management review that is appropriate. For these reasons, the description should give information on any likely cross-program effects, issues or problems. The description should:

- Clearly define of the problem, including its health and environmental significance;
- Indicate the effect of this problem--and any likely regulatory action to solve it--on other environmental media or programs;
- Identify the EPA Regions and other groups that should be involved; and
- Specify the kind of expertise and level of participation expected from workgroup members.

Operation: The program office prepares a SAR, and submits 25 copies through its Steering Committee Representative to the Steering Committee Chair for distribution. The Steering Committee has at least one week to review it. To be included in a biweekly Wednesday meeting, SARs must be submitted before COB (4:00 p.m.) Tuesday, 8 days before the meeting. The program office briefs the Steering Committee. The Committee approves the SAR, charters a workgroup, designates workgroup members, and determines what further reviews are appropriate. If the SAR does not provide sufficient information for Steering Committee Representatives to select their

workgroup members, they can give the Regulation Management Branch (RMB) the name or names after the meeting. RMB will include these names in the closure memo for the meeting. The program office then convenes the workgroup.

See Also: SAR forms, guidelines, and prototypes are available from your Steering Committee Representative.

FACT SHEET #3--Regulation Management Series

The Workgroup

Purpose: Workgroups are EPA-wide, staff-level groups formed to develop regulatory actions and supporting materials. The workgroup's primary responsibilities are to support the lead office in its design, technical, and analytical work; identify and assess principal policy issues and options, especially those that are cross-media; resolve issues or elevate them for upper management's resolution; and ensure the quality and completeness of regulatory packages. Workgroup members are expected to represent the policy positions and perspectives of their management as well as to contribute their technical and analytic expertise.

Operation: The workgroup's formal operation begins with the approval of the Start Action Request (SAR) and the chartering of the workgroup by the Steering Committee. The lead office chairs and convenes workgroup meetings. Other members of the workgroup are assigned by their offices' Steering Committee Representatives. How the workgroup should operate will vary, depending on the rulemaking. The workgroup chair should discuss and clarify members' roles and expectations early in the process to avoid misunderstandings. The workgroup's first responsibility, for major and significant rules, is to prepare a Development Plan, which the Steering Committee reviews. For most rules, the Steering Committee will ask the workgroup to report on its progress through periodic Workgroup Reports, which the workgroup chair must prepare. To ensure workgroup and Steering Committee consensus on the agenda of issues for discussion, the workgroup chair should prepare a comprehensive list of issues (orginally part of the Development Plan for major or significant rules), and revise it as appropriate throughout the rulemaking.

Participation: Typically the lead office will place several people on the workgroup to support the chair and conduct the bulk of the technical, analytical, and drafting work. OGC, OPPE, and often ORD and OECM participate; other program offices--OAR, OPTS, OSWER, and OW--often participate actively, especially when there are significant inter-media issues. OEA and Regional Offices participate less frequently. If a Steering Committee member assigns more than one representative, they usually designate one person as lead to represent the Assistant Administrator's position and coordinate the efforts of the office's other representatives. If workgroup progress requires that there be a single lead from other offices, the lead program Steering Committee member can request each office to designate a lead. Except for special cases, it is very difficult for Regions to participate actively on work groups. Therefore, the lead office should initiate efforts to solicit Regional office perspectives on regulatory options, especially those that pertain to implementation issues.

See Also: Fact Sheet #, "Workgroup Reports."

FACT SHEET #4 -- Regulation Management Series

Development Plans

Purpose: The Development Plan sets forth the framework for developing proposed major or significant Agency rules. Its purpose is to explain the need for the action; identify regulatory goals and objectives; present the major regulatory issues and alternatives; identify any policies; decision criteria or other factors that will influence regulatory choices; and present the work plan for developing the regulation.

The Development Plan is prepared for Steering Committee review. This review is meant to identify the full range of issues early in the process. Steering Committee will: (a) raise cross-media or other issues or alternatives not identified in the Plan; (b) inform the lead office of related studies underway in the Agency; (c) encourage coordination of Agency resources, experience and policies; and (d) review the work plan and schedule to decide how the various offices will participate, and whether they can meet time and resource needs of the lead office.

Preparing the Document: The lead office prepares the document with participation from the workgroup. The document should include detail commensurate with the complexity and importance of the rule. The extent to which the program can specify the health and environmental problem as well as the issues and alternatives will depend upon their previous experience with this problem and the data available. In any case, the document should include a comprehensive list of issues, which the workgroup should amend as necessary throughout the development process.

Operation: The lead office should submit the Development Plan to Steering Committee review within 60 days of SAR approval (unless the Steering Committee agrees to another date). The lead office submits 25 copies of the Plan to its Steering Committee Representative, who reviews the document before sending it to the Steering Committee Chair for distribution. The Steering Committee review period is two weeks. [To get a Plan on an agenda, the Steering Committee member must submit it to the Office of Standards and Regulations by COB Tuesday, 15 days before that biweekly Wednesday meeting.]

Steering Committee members review the package to ensure that it is complete and to identify questions or issues. The lead program office then briefs the Steering Committee on the Plan at the biweekly meeting. Members will raise any questions or issues at that meeting. After discussion, and resolution of questions and issues, the Steering Committee

approves the Plan, perhaps contingent upon certain revisions or clarifications. The Committee agrees upon an appropriate schedule for workgroup reports and other review steps. A closure memo documents the Steering Committee meeting, including issues raised, decisions made, and next steps. The Steering Committee tracks progress on the rule through workgroup reports.

<u>See Also</u>: Guidelines and prototype Development Plans available Steering Committee Representative.

FACT SHEET # 5 -- Regulation Management Series

Workgroup Reports

Purpose: Workgroup Reports keep the Steering Committee informed about workgroup progress on a regulatory action. They describe: (a) issues and alternatives being addressed and resolved; (b) any issues that need to be elevated for resolution; and (c) the status of ongoing work and any anticipated delays. The Steering Committee's discussion of the Workgroup Report focusses on cross-media or other issues or alternatives not being considered by the workgroup. Steering Committee concurrence with the Report is designed to ensure that issues resolved by the workgroup are not raised again at a later date, and that unresolved issues are dealt with in a timely way.

Preparing the Document: The workgroup chair prepares the Report in consultation with workgroup members. The document should summarize the status of issues; it need not be exhaustive. It should include enough detail to allow workgroup members to determine that all issues are included and their status is presented accurately. Steering Committee Representatives are expected to confer with their workgroup member(s). A cumulative or master list of issues (both resolved and unresolved) should accompany the Report as an attachment. This list should simply copy the issues outlined in the Development Plan, and might not change throughout the workgroup effort. If no Development Plan is prepared, the first Workgroup Report should contain the initial list of issues to be addressed. Any additional issues arising during the rule's development should be added to the master list.

Operation: The Steering Committee Representative submits 25 copies of the Report to the Steering Committee Chair, who distributes it for a two-week Steering Committee review. (Workgroup members should already have received a copy.) To be included in a biweekly Wednesday meeting, Reports must be submitted by COB Tuesday, 15 days before that meeting. At the meeting, the program office briefs the Steering Committee on the Report. Typically the workgroup chair attends the Steering Committee meeting to participate in the discussion. After discussion, the Steering Committee approves the Report or requests revisions and makes recommendations. If issues must be elevated, Steering Committee Representatives determine what these issues are and in what forum to raise them. The Steering Committee Chair issues a closure memo that documents issues raised and decisions made at the Steering Committee meeting.

See Also: Fact Sheet #3, "The Workgroup." A Workgroup Reporting Format and copies of prototype Workgroup Reports are available from your Steering Committee Representative.

FACT SHEET #6 -- Regulation Management Series

Workgroup Closure Meetings

Purpose: The workgroup closure meeting is an alternative to the Steering Committee's review of regulation packages before they enter Red Border (Assistant Administrator's) review. It provides a forum for confirming that (a) the workgroup has successfully completed its job, resolving as many issues as possible and clearly defining others, (b) the rulemaking package is ready for AA, RA, and DA-level review, and (c) Agency and external requirements have been met.

Participants: A representative of the Information and Regulatory Systems Division, from the Office of Standards and Regulations, chairs the closure meeting. The role of the OSR chair is to facilitate closure, not to decide substantive issues. Members of the workgroup participate in the meeting as representatives of their Assistant Administrators. Offices that have not taken part in the workgroup's deliberations do not participate in the closure meeting.

Operation:

1. The lead office's Steering Committee Representative requests a closure meeting through the appropriate Desk Officer in the Regulation Management Branch. The lead office must provide a complete draft rulemaking package to workgroup members at least ten days before the closure meeting. This draft package includes materials that normally are expected as part of the Steering Committee review--the rule, action memo, preamble, supporting analysis, information clearance request (ICR), and other relevant materials.

2. The typical format for the meeting is: with the OSR chair presiding, the workgroup chair gives a brief summary of issues resolved and those still outstanding, and describes any changes since the lead office distributed the draft package to the workgroup. Other workgroup members offer their AA's position (e.g., concurrence, concurrence subject to revisions, concurrence subject to an issue that will be raised for decision in Red Border, or nonconcurrence). The OSR chair encourages closure by clearly establishing:

   a. matters that should be addressed before Red Border,
   b. issues (if any) to be presented in Red Border,
   c. participation in, and date for beginning Red Border review, and
   d. whether or not to have concurrent OMB and Red Border review.

3. Following the closure meeting, OSR will issue a brief summary that certifies a package for Red Border review or documents other conclusions. This closure memo defines the conditions, timing, and other aspects of Red Border review. The lead office and affected parties resolve any problems, either before or during Red Border review, using the Steering Committee as a forum, if appropriate.

See Also: Fact Sheet #3, "The Workgroup."

FACT SHEET #7 -- Regulation Management Series

Information Collection Requests (ICRs)

Purpose: Under the Paperwork Reduction Act (PRA), Agency offices mus prepare an ICR to obtain OMB clearance for any activity that wil involve collecting substantially the same information from ten or more non-Federal respondents. Offices or workgroups involved in developing a rule may need to prepare ICRs for:

- o studies or surveys for rule development; and/or
- o information requirements to be included in the rule itself-- e.g. reporting, monitoring, or recordkeeping requirements.

Timing: For studies or surveys, the ICR should be ready to submit four months before the activity is scheduled to begin. Development Plans should allow enough lead time in scheduling the research activities subject to the PRA.

For information requirements, the ICR should normally be ready to submit by the point at which the rulemaking package first reaches formal Agency-wide closure or review, whether this is Workgroup Closure, Steering Committee, or Red Border review. The ICR may involve rulemaking issues of interest to other participating offices that need to be resolved at the latest in conjunction with Red Border review. The ICR must be submitted to OMB on the date that the proposed rule is published.

Preparing the Document: Offices must submit ICRs to the Information Policy Branch (IPB) in the Office of Standards and Regulations, which has responsibility for EPA compliance with the PRA. IPB has available a detailed set of instructions for writing the ICR; IPB is also prepared to review and offer advice on preliminary drafts. In writing the ICR, special attention should be given to:

- o the statement of the need for--and use of--the information to be collected; this is what justifies the ICR;
- o the calculations of cost to government and burden on respondents especially to make sure that they are consistent with calculations of economic impact in the rulemaking package; and
- o in the case of surveys, a detailed explanation of any statistical components, including the sampling and analysis plans.

Operation: The originating office submits the ICR to IPB. IPB then reviews this document for information policy issues--e.g. the need for the information collection, plans for information management, data quality, statistical validity--and responds with any problems within two or three weeks. Once any problems are resolved, IPB submits the ICR to OMB for their clearance review, which normally takes 60-90 days. In the case of information requirements in proposed rules, if OMB does not approve the ICR then the ICR must be resubmitted in conjunction with publication of the final rule.

See Also: PRA Guidelines

response before making substantive changes. OPPE tracks and reports on the status of rules under OMB review and current issues for senior management.

See Also: Fact Sheet #8, "Red Border Review". Steering Committee Representatives can advise on exemptions from E.O. 12291 review.

FACT SHEET #10 - Regulation Management Series

Federal Register Publication

Purpose: The Federal Register publication system was established by Congress as a means of informing the public of regulations that affect them. The Office of the Federal Register, manages publication of Federal regulations. Publication in the Federal Register has certain legal effects, among them?

- providing official notice of a document's existence and content;
- creating a rebuttable presumption that the text is a true copy of the original document;
- establishing that the document was duly issued, prescribed, or promulgated; and
- providing evidence that is recognizec by a court of law.

Preparing the Document: When preparing a document for Federal Register publication, follow the formal requirements of the Office of the Federal Register (OFR), found in the Federal Register Drafting Handbook. The Federal Register package should include:

- The original plus three copies of the preamble/regulation (please ensure that the copies have a signature;
- Federal Register Checklist, signed by Steering Committee representative or other approving official; and
- Typesetting request (EPA form 2340-15)

For reprints also include EPA form 2340-1

OFR follows strict publication requirements, so even minor problems can delay publication. The most common problems causing delay are: errors in codification; unclear graphs, charts, and tables; providing too few copies; unclear signatures; not including a typesetting request; and not preparing the Federal Register Checklist.

Operation: If your package is reviewed in Red Border you must submit the Federal Register package with your Red Border package. In any case, direct all Federal Register packages to EPA's Federal Register Officer, Regulation Management Branch (RMB), Room 415WT, 382-7205. RMB reviews documents for consistency with OFR requirements, then transmits them to OFR for publication. Documents usually appear in the Federal Register within four days after RMB approves them. However, if a document is particularly long (250 pages or more), and contains many tables, graphs, and pictures, publication will take at least one week.

RMB PROVIDES A LISTING ON E-MAIL THAT DESCRIBES ALL DOCUMENTS SENT TO THE FEDERAL REGISTER OR PUBLISHED WITHIN THE PAST FIVE DAYS. To access this system simply: 1) sign onto E-mail, 2) type PRPOST, 3) type FED.REG when "Subj:" appears, 4) read or scan the listing

See Also: Federal Register Document Drafting Handbook, available the Agency's supply store; Federal Register Checklist available from Steering Committee Representatives.

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

AUG - 1 1977

RG. 1-4
GM #4

THE ADMINISTRATOR

SUBJECT: "Ex Parte" Contacts in EPA Rulemaking

FROM: The Administrator

TO: Addressees

In this memorandum I set forth the 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. The Deputy Administrator and I and our immediate staffs will also observe these guidelines.

The General Counsel has recently informed you that such conversations might result in a rule being held illegal if they took place without notice and opportunity for other interested persons to participate. That advice was based on a recent decision of the United States Court of Appeals for the District of Columbia Circuit. Home Box Office Inc. v. FCC, D. C. Cir. No. 75-1280 (decided March 25, 1977). A subsequent opinion by the same court has moderated that legal danger substantially. Action for Childrens' Television v. FCC, D. C. Cir. No. 74-2005 (decided July 1, 1977).

However, the legal danger has not disappeared. More fundamentally, I do not believe that EPA should base or appear to base its regulatory decisions on information or arguments presented informally that do not appear on the public record. Accordingly, I am establishing the following guidelines.

Behavior during crucial period between Proposal and Promulgation

During the period between proposal and promulgation of a rule all employees may and should be encouraged to respond to inquiries about the rule; explain how it would work, and attend public meetings of interested groups (such as trade association conventions).

During this period agency employees may (and often should) hold meetings 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, however, a written summary of the significant points made at the meetings must be placed in the comment file.

This requirement applies to every form of discussion with outside interested persons whether at a trade association meeting, at EPA, or over the telephone as long as the discussion is significant. The memorandum should be prepared and forwarded within two or three days of the meeting at the latest. All new data or significant arguments presented at the meeting should be reflected in the memorandum. Discussions of generalities or simple explanations of how the rule would work need not be included.

I will continue to explore with the General Counsel's office and others whether further actions to ensure that we provide full notice and opportunity for comment in all our procedures are necessary.

ADDRESSEES

Deputy Administrator
Assistant Administrators
Deputy Assistant Administrators
Office Directors
Regional Administrators
Associate General Counsels
Regional Counsels

SF.1

SF. 1-1
GM #41

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

AUG 2 5 1986

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy Framework for State/EPA Enforcement Agreements

FROM: A. James Barnes
Deputy Administrator

TO: Assistant Administrators
Associate Administrator for Regional Operations
Regional Administrators
Regional Counsels
Regional Division Directors
Directors, Program Compliance Offices
Regional Enforcement Contacts

I am pleased to transmit to you a copy of the Agency's revised Policy Framework for State/EPA Enforcement Agreements. The Policy Framework, originally developed in 1984, along with program-specific implementing guidance, will continue to serve as the blueprint for our State/EPA enforcement relationship. The revised Policy Framework integrates new guidance developed since its original issuance. It reinforces the Guidance for the FY 1987 Enforcement Agreements Process which I transmitted to you on April 15, 1986 and should serve as your guide for negotiations and implementation of the Enforcement Agreements.

Although the intent of the revisions was to incorporate new policy, the process gave the Agency, with the assistance of the Steering Committee on the State/Federal Enforcement Relationship, an opportunity to reassess with the States our original approach. This process has clearly reaffirmed that the basic approaches we put in place in 1984 for an effective working partnership are sound and that all parties continue to be committed to its effective implementation.

The revisions incorporate into the Policy Framework addenda developed over the past two years in the areas of oversight of State civil penalties, involvement of the State Attorneys General

in the Enforcement Agreements process, and implementation of nationally managed or coordinated cases. The revisions also reflect, among other things, some of the points that have been emphasized in my annual guidances on the Enforcement Agreements process, the Evaluation Report on Implementation of the Agreements, and the Agency's Criminal Enforcement and Federal Facilities Compliance draft strategies.

I am firmly committed to full and effective implementation of the Policy Framework and am relying on your continued personal attention to this important effort. I plan to review the Region's performance in implementing the revised Policy Framework and the program-specific guidance, particularly the "timely and appropriate" enforcement response criteria, as part of my semi-annual regional visits.

I encourage you to share the revised Policy Framework with your State counterparts.

Attachments

cc: Steering Committee on the State/Federal Enforcement Relationship

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS

August 1986
(originally issued June 1984)

OFFICE OF ENFORCEMENT
AND COMPLIANCE MONITORING

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS[1/]

Achieving and maintaining a high level of compliance with environmental laws and regulations is one of the most important goals of Federal and State environmental agencies, and is an essential prerequisite to realizing the benefits of our regulatory programs. While States and local governments have primary responsibility for compliance and enforcement actions within delegated or approved States, EPA retains responsibility for ensuring fair and effective enforcement of Federal requirements, and a credible national deterrence to noncompliance. An effective State/Federal partnership is critical to accomplishing these goals, particularly given limited State and Federal resources. The task is difficult and one of the most sensitive in the EPA/State relationship, often compounded by differences in perspectives on what is needed to achieve compliance.

To establish an effective partnership in this area, and implement the State/Federal enforcement relationship envisioned in the Agency Oversight and Delegation policies, EPA called for State-specific enforcement agreements to be in place beginning FY 1985 which will ensure there are: (1) clear oversight criteria, specified in advance, for EPA to assess good State --or Regional-- compliance and enforcement program performance; (2) clear criteria for direct Federal enforcement in delegated States with procedures for advance consultation and notification; and (3) adequate State reporting to ensure effective oversight.

This document is the Agency's policy framework for implementing an effective State/Federal enforcement relationship through national program guidance and Regional/State agreements. It is the product of a Steering Committee effort involving all major national EPA compliance and enforcement program directors, State Associations, State officials from each of the media programs, and the National Governors' Association. EPA anticipates that the relationship, and the use of the agreements first established in FY 1985, will evolve and improve over time. They will be reviewed, and updated where necessary, on an annual basis. The Policy Framework will be subject to periodic review and refinement. Originally issued on June 26, 1984, the Policy Framework has been updated to reflect additional guidance developed since that time.

1/ The term Enforcement Agreement is used throughout to describe the document(s), be it an existing grant, SEA, MOU, or separate Enforcement Agreement, which contains the provisions outlined in the Policy Framework and related media-specific guidance. (See p.4 for description of form of agreement.)

Policy Framework Overview

The Policy Framework applies both to Headquarters program offices in their development of national guidance and to Regions in tailoring program guidance to State-specific needs and agreements. Although enforcement agreements are not required for States which do not have delegated or approved programs, Regions are encouraged to apply to these States certain policies and provisions where relevant, particularly advance notification and consultation protocols. The Policy Framework is divided into six sections, to address the following key areas:

A. State/Federal Enforcement "Agreements": Form, Scope and Substance (pages 4-7)

This section sets forth for Regions and States developing enforcement agreements, the areas that should be discussed, priorities, and the degree of flexibility that Regions have in tailoring national guidance to State-specific circumstances, including the form and scope of agreements.

B. Oversight Criteria and Measures: Defining Good Performance (pages 8-17)

This section is primarily addressed to EPA's national programs, setting forth criteria and measures for defining good performance generally applicable to any compliance and enforcement program whether administered by EPA or a State. It forms the basis for EPA oversight of State programs. A key new area that should receive careful review is the definition of what constitutes timely and appropriate enforcement response, Section B, Criterion #5, pages 11-13.

C. Oversight Procedures and Protocols (pages 18-20)

This section sets forth principles for carrying out EPA's oversight responsibilities, including approach, process and follow-up.

D. Criteria for Direct Federal Enforcement in Delegated States (pages 21-25)

This section sets forth the factors EPA will consider before taking direct enforcement action in a delegated State and what States may reasonably expect of EPA in this regard including the types of cases and consideration of whether a State is taking timely and appropriate enforcement action. It also establishes principles for how EPA should take enforcement action so that we can be most supportive of strengthening State programs.

E. Advance Notification and Consultation (pages 26-30)

This section sets forth EPA's policy of "no surprises" and what arrangements must be made with each State to ensure the

policy is effectively carried out by addressing planned inspections, enforcement actions, press releases, dispute resolution and assurances that publicly reported performance data is accurate.

F. State Reporting (pages 31-35)

This section sets forth seven key measures EPA will use, at a minimum, to manage and oversee performance by Regions and States. It summarizes State and regional reporting requirements for: (1) compliance rates; (2) progress in reducing significant non-compliance; (3) inspection activities; (4) formal administrative enforcement actions; and (5) judicial actions, at least on a quarterly basis. It also discusses required commitments for inspections and for addressing significant non-compliance.

In addition, it sets forth State and regional requirements for recordkeeping and evaluation of key milestones to assess the timeliness of their enforcement response and penalties imposed through those actions.

Appendices

Appendix A: Annual priorities and implementing guidance provides a list of the annual priorities for implementing the enforcement agreements and a summary index of what national program guidance has been or will be issued by programs to address the areas covered by the Policy Framework for State/EPA Enforcement Agreements.

Appendix B: Addendum to the Policy Framework on "Implementing Nationally Managed or Coordinated Enforcement Actions," issued January 4, 1985.

Appendix C: Guidance on "Division of Penalties with State and Local Governments," issued October 30, 1985.

A. STATE/FEDERAL ENFORCEMENT AGREEMENTS: FORM, SCOPE, AND SUBSTANCE

This section sets forth the form, scope and substance of the State/Federal Enforcement Agreements as well as the degree of flexibility Regions have in tailoring national policy to individual States.

1. What Form Should the Agreements Take?

We do not anticipate the need for a new vehicle or document for the State/Federal enforcement agreements. Wherever possible, State/Federal agreements should be set forth in one or more of a number of existing formats: grant agreements, State/EPA Agreements, Memoranda of Agreement or Understanding or a statement of Regional Office operating policy. Where there are new documents the appropriate linkage should be made to grants and SEA's as applicable. To the extent the areas covered by this Policy Framework translate into specific output commitments and formal reporting requirements, they may belong in the grant agreements as specified in national program grant guidance. Regions should discuss with the States at an early stage in the planning process their views on both the form and substance of the agreements. Once the basic agreements are in place, Regions should consider most aspects of the written agreements as multi-year, minimizing the need to renegotiate the agreements each year. Regions should conduct an annual review with the States to identify needed revisions and additions to the agreements to address identified problems or reflect further national guidance.

2. What is the Scope of the Agreements?

This guidance and the State/EPA agreements cover all aspects of EPA's civil compliance and enforcement programs, including those activities involving Federal facilities. The criminal enforcement program is not included and will be addressed elsewhere.

Discussions between EPA Regions and States should cover the minimum areas listed below:

- Oversight Criteria and Measures: Good Performance Defined --See Section B.
- Oversight Procedures and Protocols -- See Section C.
- Criteria for Direct EPA Enforcement -- See Section D.
- Procedures for Advance Notification and Consultation -- See Section E.
- Reporting Requirements -- See Section F.

However, Regions and States are not expected to duplicate national Program guidance in their agreements -- we are not looking for lengthy documents. Written agreements resulting from these discussions could cover topics which are not clearly specified elsewhere. If not otherwise specified, national policy will apply and should be so stated in the state agreements. Although not required for non-delegated or unapproved programs, Regions are encouraged to apply certain policies and provisions where relevant, particularly advance notification and consultation protocols.

This Policy Framework and the resulting State/EPA Enforcement Agreements are intended to enhance enforcement of State and Federal environmental laws. Each agreement should be careful to note that nothing in them or this Policy Framework constitutes or creates a valid defense to regulated parties in violation of environmental statutes, regulations or permits.

3. Parties to the Agreements and Participants in the Process.

It is important to involve the appropriate State and regional personnel early in the agreements process. In the Regions, this means involving the operating level program staff and the Regional Counsel staff along with top management; and in the States it means the participation of all the organizational units responsible for making enforcement work, e.g., State program staff, those responsible for oversight of field operations, staff attorneys, and the State Attorneys General (AG). The State agency should have the lead in establishing effective relationships with the State AG or State legal staff, as appropriate. The Regions should ensure that there is adequate communication and coordination with these other participants in the enforcement process. States are strongly encouraged to commit advance notification and consultation procedures/protocols between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Region should seek to incorporate these written protocols into the State/EPA Enforcement Agreements (See discussion on pages 17 and 26-27).

4. What Flexibility do Regions Have?

Regions must be allowed substantial flexibility to tailor agreements to each State, as the agreements process is intended to be based upon mutual understandings and expectations. This flexibility should be exercised within the framework of national program policy and the Agency's broad objectives. Specifically,

a. Oversight Criteria:

Oversight criteria would generally be provided in national program guidance but Regions should tailor their general oversight to address environmental and other priorities in the Region or State, and other specific areas of concern that are unique to an individual State, including any issues raised by the scope of State enforcement authorities, unique technical problems and available expertise, and areas targeted for improvement.

In addition, Regions and States should adapt national timely and appropriate enforcement response criteria to State-specific circumstances to fit State authorities and procedures as follows:

(i) Timeliness: The national program guidance on key milestones and timeframes should be applied to all States with adjustments to accommodate each State's laws and legal procedures. Such adjustment can be important particularly where the proposed enforcement action cannot possibly take place within the proposed timeframes or where a State chooses to address problems more expeditiously than the Federal guidelines. The trigger points should be realistic expectations, but within modest variance from the national goals. Other adjustments should not be made solely because a State program consistently takes longer to process these actions due to constraints other than procedural requirements, e.g., resources. However, if this is the case the timeframes should serve as a basis for reviewing impediments with the State to identify how problems can be overcome and to explore ways over time for the State program to perform more efficiently. (See discussion in Section B, p.13)

The timeframes are not intended to be rigid deadlines for action, but rather are: (1) general targets to strive for in good program performance; (2) trigger points that EPA and States should use to review progress in individual cases; and (3) presumptions that, if exceeded, EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State. It is not the Agency's intention to assume the major enforcement role in a delegated State as a result of these timeframes. The trigger points should be realistic expectations, but within modest variance from the national goals. It must also be realized that in some programs we need experience with the timeframes to assess how reasonable and workable they really are and further, that judgments on what is a reasonable timetable for action must ultimately be case specific. For example, complex compliance problems may require longer-term studies to define or achieve an appropriate remedy.

(ii) Appropriate Enforcement Response:

(a) Choice of response: National medium-specific program guidance applicable to State programs on appropriate enforcement response should be followed (See Appendix A). There is usually sufficient flexibility within such guidance to allow the exercise of discretion on how best to apply the policies to individual cases. The Agency is making every effort to set forth a consistent national policy on enforcement response for each program. It is therefore essential that in setting forth clear expectations with States this guidance not be altered.

(b) Definitions of formal enforcement actions: Regions should reach agreement with States as to how certain State enforcement actions will be reported to and interpreted by EPA. This should be based upon the essential characteristics and impact of State enforcement actions, and not merely upon what the actions are called. National program guidance setting forth consistent criteria for this purpose should be followed, pursuant to the principles listed in Section B, pages 11-12.

(c) Civil Penalties and Other Sanctions: Program guidance must also be followed on where a penalty is appropriate. Regions have the flexibility to consider other types of State sanctions that can be used as effectively as cash penalties to create deterrence, and determine how and when it might be appropriate to use these sanctions consistent with national guidance. Regions and States should reach understanding on documentation to evaluate the State's penalty rationale. Maximum flexibility in types of documentation will be allowed to the State.

5. Procedures and Protocols on Notification and Consultation:

Regions and States should have maximum flexibility to fashion arrangements that are most conducive to a constructive relationship, following the broad principles outlined in this document.

6. State-Specific Priorities:

In addition, while of necessity EPA must emphasize commitments by States to address significant noncompliance and major sources of concern, Regions should be sensitive to the broad concerns of State Programs including minor sources and the need to be responsive to citizen complaints. Regions should discuss the State's perspective on both its own and national priorities, and take into account State priorities to the extent possible.

7. What Does it Mean to Reach Agreement?

To the extent possible, these agreements should reflect mutual understandings and expectations for the conduct of Federal and State enforcement programs. At a minimum, EPA Regions must: (1) be clear and ensure there are "no surprises"; (2) make arrangements with the States so that actions taken are constructive and supportive; and (3) tailor the application of the national program guidance to the States' programs and authorities. Where mutual agreement cannot be achieved, clear unilateral statements of policy will have to suffice, with commitments to try to seek further agreements over time. Areas where agreements have not been reached should be clearly identified for senior Agency management attention.

B. OVERSIGHT CRITERIA AND MEASURES: DEFINING GOOD PERFORMANCE

The first step to achieving strong and effective national compliance and enforcement programs is a clear definition of what constitutes good performance. Because each of EPA's programs embodies unique requirements and approaches, good performance must be defined on a program-specific basis. Adjustments also must be made in applying criteria and measures to the States and Regions, based upon their environmental problems and authorities. Nevertheless, there are several basic elements which will generally be applicable to a good compliance and enforcement program in any of our medium-specific programs. The following outlines the criteria and measures that form the common framework for defining a quality program. The framework is to serve as a guide to the national programs as they develop, in cooperation with Regions and States, the criteria they will use to assess their performance in implementing national compliance and enforcement programs.

The framework is not intended to be adopted word-for-word by the programs, nor is there any format implied by this list. What is important are the concepts. This section addresses only the elements of a quality program. Issues such as how oversight should be conducted are addressed in Section C. Each national program may choose to focus on certain elements of performance in a given year.

These criteria and measures are intended to apply to the implementing agency, that is, to an approved or delegated State or to an EPA Region in the event a program is not "delegated." Our philosophy is that EPA should be held to the same standards as we would apply to the States if they were implementing the program. Portions may also apply to those non-approved or non-delegated States which are administering portions of the programs under cooperative agreements.

CRITERION #1 Clear Identification of and Priorities for the Regulated Community

A quality compliance and enforcement program is based upon an inventory of regulated sources which is complete, accurate and current. The data should in turn be accessible, preferrably in automated data systems which are accurate, and up-to-date. The scope of coverage for the inventory should be appropriately defined by each program as it is probably not feasible to identify every person or facility subject to environmental laws and regulations, especially when they are numerous small sources. Those priorities should be clearly established in national program guidance and tailored to State-specific circumstances as appropriate.

The inventory of sources or other relevant information on sources should be utilized as a basis for a priority-setting system established by the administering agency. These priorities should reflect and balance both national priorities and state-specific priorities. A quality program uses those priorities as a basis for program management. National priorities are generally set forth in EPA's Operating Year Guidance and program-specific compliance and enforcement strategies. State-specific priorities should address not only efforts to achieve broad based compliance but also should assess the expected environmental impact of targeting enforcement and compliance monitoring to specific geographic areas or against certain source types. Ambient monitoring systems can provide an important point of departure for priority-setting.

CRITERION #2 Clear and Enforceable Requirements

Requirements established through permits, administrative orders and consent decrees should clearly define what a specific source must do by a date certain, in enforceable terms. It is not EPA's intention in this policy framework to suggest that EPA conduct a top down review of a State or Regional program's entire regulatory program. However, areas where provisions cannot be enforced due to lack of clarity or enforceable conditions should be identified and corrected.

CRITERION #3 Accurate and Reliable Compliance Monitoring

There are four objectives of compliance monitoring:

- reviewing source compliance status to identify potential violations;
- helping to establish an enforcement presence;
- collecting evidence necessary to support enforcement actions regarding identified violations; and
- developing an understanding of compliance patterns of the regulated community to aid in targeting activity, establishing compliance/enforcement priorities, evaluating strategies, and communicating information to the public.

The two factors in assessing the success of a compliance monitoring program are coverage and quality.

Coverage: Each program's strategy should reflect a balance between coverage: (1) for breadth, to substantiate the reliability of compliance statistics and establish an enforcement presence; and (2) for targeting those sources most likely to be out of compliance or those violations presenting the most serious environmental or public health risk.

Inspections: Each administering agency should have a written and reviewable inspection strategy, reviewed and updated annually, as appropriate: in some programs a multi-year strategy may be preferable. The strategy should demonstrate the minimum coverage for reliable data gathering and compliance assessment set forth in national program guidance and meet legal requirements for a "neutral inspection scheme." The strategy should also address how the inspections will most effectively reach priority concerns and potential noncompliers including the use of self-reported data, citizen complaints and historic compliance patterns. The strategy will be assessed on whether it embodies the appropriate mix of categories of inspections, frequency and level of detail. Inspections should then be carried out in a manner consistent with the inspection strategy.

Source Self-Monitoring and Reporting: The administering agency should ensure that minimum national requirements for source self-monitoring and reporting are imposed and complied with, either through regulation or permit condition, pursuant to national guidance as appropriate.

Quality: Each program should define minimum standards for quality assurance of data and data systems, and timely and complete documentation of results. At a minimum, each program should have a quality assurance program to insure the integrity of the compliance monitoring program. This quality assurance program should address essential lab analysis and chain of custody issues as appropriate.

Inspections: Inspectors should be able to accurately document evidence needed to determine the nature and extent of violations, particularly the presence of significant violations. Documentation of inspection findings should be timely, complete and able to support subsequent enforcement responses, as appropriate to the purpose of the inspection. Federal oversight inspections should corroborate findings. Oversight inspections are a principal means of evaluating both the quality of an inspection program and inspector training.

Source Self-Monitoring: The administering agency should have a strategy for and implement quality assurance procedures, with sufficient audits and follow-up action to ensure the integrity of self-reported data.

CRITERION #4 High or Improving Rates of Continuing Compliance

The long-term goal of all of our compliance and enforcement programs is to achieve high rates of continuing compliance across the broad spectrum of the regulated community. Until that goal is achieved, compliance rates can fluctuate for several reasons. In assessing how well an administering agency is meeting the goal of high or improving rates of

compliance, other factors must be assessed in addition to the overall compliance rate. Improved inspections or inspection targeting often can result in a temporary decrease in rates of compliance until newly found violations are corrected and the regulated community responds to the more vigorous attention to specific compliance problems. In these instances, a decrease in the rate of compliance would be a sign of a healthy compliance and enforcement program. At a minimum, programs should design mechanisms to track the progress of all sources out of compliance through major milestones up to achieving final physical (full) compliance with applicable regulations and standards.

Program quality must also be assessed in terms of how well the program is returning significant noncompliers to compliance. The use of lists of significant violators and specific commitments to track and resolve significant noncompliance should be part of the planning process of the administering agency, and, between States and Regions. The lists should be developed in consultation with the States and continually updated each fiscal year and sources on it tracked through to final physical compliance.

CRITERION #5 Timely and Appropriate Enforcement Response

Quality enforcement programs ensure that there is timely and appropriate enforcement response to violations. Expectations for what constitutes timely and appropriate action should be based upon national program guidance, tailored to the procedures and authorities in a given State and assessed in regard to particular circumstances surrounding each instance of violation. National programs must establish benchmarks or milestones for what constitutes timely and appropriate enforcement action, forcing progress in enforcement cases toward ultimate resolution and full physical compliance. This concept is a key new feature to our compliance and enforcement program implementation.

In designing oversight criteria for timely enforcement response, each program will attempt to capture the following concepts:

1. A set number of days from "detection" of a violation to an initial response. Each program should clearly define when the clock starts, that is, how and when a violation is "detected."

2. Over a specified period of time, a full range of enforcement tools may be used to try to achieve compliance, including notices of violation, warning letters, phone calls, site visits, etc. The adequacy of these responses will be assessed based upon whether they result in expeditious compliance.

3. A prescribed number of days from initial action within which a determination should generally be made, that

either compliance has been achieved or an administrative enforcement action has been taken (or a judicial referral has been initiated, as appropriate) that, at a minimum:

- Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
- Explicitly is based on the issuing Agency's determination that a violation has occurred;
- Requires specific corrective action, or specifies a desired result that may be accomplished however the recipient chooses, and specifies a timetable for completion;
- May impose requirements in addition to ones relating directly to correction (e.g., specific monitoring, planning or reporting requirements); and
- Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

4. A specific point at which a determination is made either that final physical compliance has been achieved, that the source is in compliance with a milestone in a prior order, or that escalation to a judicial enforcement action has been taken if such actions have not already been initiated.

   In developing program-specific guidance, this milestone may be treated more as a concept than as a fixed timetable, taking into account the fact that the administrative hearing process and the State Attorney General's actions are not within the direct control of the administering agency.[2/] What is important, is the embodiment of the concept of timely follow-up and escalation, in requirements for tracking and management.

5. Final physical compliance date is firmly established and required of the facility. Although it is not possible for programs to establish any national timeframes, the concept of final physical compliance by a date certain should be embodied in EPA and State enforcement actions.

6. Expeditious physical compliance is required. It may not be possible for programs to define "expeditious" in terms of set time periods, but some concept of "expeditious" (i.e., that the schedule will result in a return to full physical compliance as quickly as can reasonably be expected) should be embodied in each program's guidance.

2/ See p. 17, 26-27, regarding the State Agency's responsibilities for coordinating with the State Attorney General or other legal staffs.

Timeframes established by the national programs for each of these minimum milestones are principally intended to serve as trigger points and not as absolute deadlines, unless specifically defined as such. Whatever timeframes are established are intended to apply only to Federal requirements as adopted by the States, and do not apply to State statutes and requirements that go beyond those required by Federal law. The timeframes are key milestones to be used to manage the program, to trigger review of progress in specific cases, and a presumption of where EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State.

Timeframes and their use in management will evolve over time as they will have to reflect different types of problems that may warrant different treatment. For example, programs will have to take into account such factors as new types of violations, the difference between operating and maintenance violations versus those that require installation of control equipment, emergency situations which may fall outside the scope of the normal timeframes for action, etc.

Administering agencies are expected to address the full range of violations in their enforcement responses considering the specific factors of the case and the need to maintain a credible enforcement presence. However, the new management approach setting forth desired timeframes for timely action could have resource implications beyond what is currently available to or appropriate for the full range of sources and violations. Therefore, as we begin to employ the concept of timely and appropriate enforcement response, at a minimum, the focus should be on the greatest problems, i.e., the significant noncompliers. Over time, and with more experience, this concept should be phased-in to cover a broader range of violations. This in no way should constrain the programs* from applying the concepts broadly.

The choices of appropriate response are to be defined within the constraints of national program guidance and applied by the administering agency based upon consideration of what is needed: (1) in general, to achieve expeditious correction of the violation, deterrence to future noncompliance and fairness; and (2) in individual circumstances, based upon the gravity of the violation, the circumstances surrounding the violation, the source's prior record of compliance and the economic benefits accrued from noncompliance. With three exceptions, the form of the enforcement response is not important by itself, as long as it achieves the desired compliance result. The exceptions generally fall into the following three categories:

1. If compliance has not been achieved within a certain timeframe, the enforcement response should meet minimum requirements, usually associated with at least the issuance of an administrative order (see criteria listed above) or judicial referral.

2. Because of the need to create a strong deterrence to noncompliance, it is important to assess penalties in certain cases, and only certain types of enforcement actions can provide penalties. Each program must clearly define, as appropriate, the circumstances under which nothing less than a penalty or equivalent sanction will be acceptable. (See Criterion #6 below.)

3. In some circumstances, a judicial action or sanction is usually the only acceptable enforcement tool. Each program must define these circumstances as appropriate. For example, a judicial action might be required where a compliance schedule for Federal requirements goes beyond Federal statutory deadlines.

A good program should have adequate legal authority to achieve the above objectives. Where deficiencies have been identified, steps should be taken to fill identified gaps.

CRITERION # 6 Appropriate Use of Civil Judicial and Administrative Penalty and Other Sanction Authorities to Create Deterrence[3/]

1. Effective Use of Civil Penalty Authorities and Other Sanctions:

Civil penalties and other sanctions play an important role in an effective enforcement program. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detecting a violation, 2) the speed of the enforcement response, and 3) the likelihood and severity of the sanction. While penalties or other sanctions are the critical third element in creating deterrence, they can also contribute to greater equity among the regulated community by recovering the economic benefit a violator gains from noncompliance over those who do comply.

Effective State and regional programs should have a clear plan or strategy for how their civil penalty or other sanction authorities will be used in the enforcement program. At a minimum, penalties and/or sanctions should be obtained where programs have identified that a penalty is appropriate (see Criterion #5 above).

The anticipated use of sanctions should be part of the State/EPA Enforcement Agreements process, with Regions and States discussing and establishing how and when the State generally plans to use penalties or other approaches where some sanction is required.

3/ Excerpts from the Policy on "Oversight of State Civil Penalties" 2/28/86. The focus of the policy is on both civil judicial and civil administrative penalties, and does not cover criminal penalties.

EPA generally prefers the use of cash penalties to other types of sanctions.[4] However, there may be other sanctions which are preferable to cash penalties in some circumstances. In particular, States may have a broader range of remedies than those available at the Federal level. Examples of other sanctions may be: pipeline severance (UIC), license revocation (FIFRA) or criminal sanctions including fines and/or incarceration. National program guidance should clarify in general terms how the use of other types of sanctions fits into the program's penalty scheme at the Federal and State levels, e.g., whether they are substitutes for or mitigate a cash penalty.[5] In any case, States are urged to use cash penalty authorities in those cases for which a penalty is "appropriate" and/or to use other sanctions pursuant to these agreements with the Regions.

EPA encourages States to develop civil administrative penalty authority in addition to civil judicial penalty authority, and to provide sufficient resources and support for successful implementation where they do not already have this authority. In general, a well designed administrative penalty authority can provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities. Both civil judicial and administrative penalty authorities are important, complementary, and each should be used to greatest advantage. EPA is similarly seeking to gain administrative penalty authority for those Federal programs which do not already have it. To support State efforts to gain additional penalty authorities, EPA will share information collected on existing State penalty authorities and on the Federal experience with the development and use of administrative authorities.

2. Oversight of Penalty Practices:

EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on individual penalty calculations and regional penalty practices and patterns.

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[4] In limited circumstances where they meet specified criteria, EPA and DOJ policies and procedures allow for alternative payments -- such as beneficial projects which have economic value beyond the costs of returning to compliance -- in mitigation of their penalty liability.

[5] Until program-specific guidance is developed to define the appropriate use of civil sanctions, the Region and State should consider whether the sanction is comparable to a cash penalty in achieving compliance and deterring noncompliance. Costs of returning to compliance will not be considered a penalty. Criminal authorities, while not clearly comparable to cash penalties, can be used as effectively as cash penalties to create deterrence in certain circumstances.

EPA will review state penalties in the context of the State's overall enforcement program not merely on its use of cash penalties. While individual cases will be discussed, the program review will more broadly evaluate how penalties and other sanctions can be used most effectively. The evaluation will consider whether the penalties or other sanctions are sought in appropriate cases, whether the relative amounts of penalties or use of sanctions reflect increasing severity of the violation, recalcitrance, recidivism etc., and bear a reasonable relationship to the economic benefit of noncompliance (as applicable) and whether they are successful in contributing to a high rate of compliance and deterring noncompliance. EPA may also review the extent to which State penalties have been upheld and collected.

3. Development and Use of Civil Penalty Policies:

EPA Regions are required to follow written Agency-wide and program specific penalty policies and procedures.

EPA encourages States to develop and use their own State penalty policies or criteria for assessing civil penalties. The advantages of using a penalty policy include:

- leads to improved consistency;
- is more defensible in court;
- generally places the Agency in a stronger position to negotiate with the violator;
- improves communication and support within the administering agency and among the agency officials, attorneys and judges especially where other organizations are responsible for imposing the penalty;
- when based on recoupment of economic benefit and a component for seriousness, deters violations based upon economic considerations while providing some equity among violators and nonviolators; and
- can be used by judges as a basis for penalty decisions.

EPA encourages States to consider EPA's penalty policies as they develop their own penalty policies.

4. Consideration of Economic Benefit of Noncompliance:

To remove incentives for noncompliance and establish deterrence EPA endeavors, through its civil penalties, to recoup the economic benefit the violator gained through noncompliance. EPA encourages States to consider and to quantify where possible, the economic benefit of noncompliance where this is applicable. EPA expects States to make a reasonable effort to calculate economic benefit and encourages States to attempt to recover this amount in negotiations and litigation. States may use the Agency's computerized model (known as BEN) for calculating that benefit or different approaches to calculating economic benefit. EPA will provide technical assistance to States on calculating the economic benefit of noncompliance, and has made the BEN computer model available to States.

CRITERION #7 Accurate Recordkeeping and Reporting

A quality program maintains accurate and up-to-date files and records on source performance and enforcement responses that are reviewable and accessible. All recordkeeping and reporting should meet the requirements of the quality assurance management policy and procedures established by each national program consistent with the Agency's Monitoring Policy and Quality Assurance Management System. Reports from States to Regions, Regions to Headquarters must be timely, complete and accurate to support effective program evaluation and priority-setting.

State recordkeeping should include some documented rationale for the penalties sought to support defensibility in court, enhance Agency's negotiating posture, and lead to greater consistency. These records should be in the most convenient format for administration of the State's penalty program to avoid new or different recordkeeping requirements.

CRITERION #8 Sound Overall Program Management

A quality program should have an adequate level, mix and utilization of resources, qualified and trained staff, and adequate equipment. The intention here is not to focus on resource and training issues unless there is poor performance identified elsewhere in the program. In those instances, these measures can provide a basis for corrective action by the administering agency. There may be, however, some circumstances in which base level of trained staff and equipment can be defined by a national program where it will be utilized as an indicator of whether the program is adequate.

Similarly, a good compliance and enforcement program should have a clear scheme for how the operations of other related organizations, agencies and levels of government fit into the program, especially the State Attorneys General or other appropriate State legal organizations. The State Agency should, at a minimum, ensure that the State AG, internal legal counsel, or other appropriate government legal staff are consulted on the enforcement commitments the State is making to EPA to assure that the level of legal enforcement support and associated resources needed to accomplish the agreed-upon goals are secured. This coordination should result in timely review of initial referral packages, satisfactory settlement of cases, as appropriate, timely filing and prosecution of cases, and prompt action where dischargers violate consent decrees. (See Section E, p. 26-27).

C. OVERSIGHT PROCEDURES AND PROTOCOLS

This section addresses how EPA should conduct its oversight function, its approach, process and follow-up, to build and improve individual programs and overall national performance. On May 31, 1985, the Agency issued the Policy on Performance-Based Assistance, which contains guidance on how Regions should oversee assistance agreements. Both of these policies call for oversight with a problem-solving orientation with clear identification of actions needed to correct problems or recognize good performance.

1. Approach

The goal of oversight should be to improve the State (or Regional) compliance and enforcement program. To accomplish this, oversight should be tailored to fit State performance and capability. The context must be the whole State compliance and enforcement program, although EPA's focus for audit purposes will be on national priority areas.

No new oversight process is intended here. Existing procedures such as mid-year reviews, periodic audits and oversight inspections as established by each program and Region should be used. Administering agencies should identify strengths and weaknesses of the State and Federal programs and develop mutual commitments to correct problems.

EPA oversight of State performance should be consistent with the following principles:

a. Positive oversight findings should be stressed as well as the negative ones.

b. Positive steps that can be taken to build the capability of State programs in problem areas should be emphasized. This should include providing technical assistance and training -- by EPA staff to the extent possible.

c. EPA action to correct problems should vary, depending on the environmental or public health effect of the problem and whether it reflects a single incident or a general problem with the State program.

d. The States should be given an opportunity to formally comment on EPA's performance. Regions should provide information to the States that is available on its performance against the national standards, including their performance on meeting the "timely and appropriate" criteria, as well as their performance on commitments to that State.

e. EPA should give States sufficient opportunity to correct identified problems, and take corrective action pursuant to the criteria for direct enforcement established in Section D.

f. EPA should use the oversight process as a means of transferring successful regional and State approaches from one Region or State to the other.

2. Process

Several actions can result in the most constructive review of the State's programs:

a. To the extent possible, files to be audited will be identified in advance, with some provision for random review of a percentage of other files if necessary.

b. Experienced personnel should be used to conduct the audit/review -- EPA staff should be used to the extent possible to build relationships and expertise.

c. There should be an exit interview and every opportunity should be made to discuss findings, comment on and identify corrective steps based upon a review draft of the written report.

d. Opportunity should be made for staffs interacting on enforcement cases and overseeing State performance to meet personally rather than rely solely upon formal communications -- this applies to both technical and legal staffs.

3. Follow-Up and Consequences of Oversight

When State performance meets or exceeds the criteria and measures for defining good program performance, EPA should reward this performance in some of the following ways:

a. reduce the number, level or scope, and/or frequency of reviews or of some reporting requirements consistent with statutory or regulatory requirements;

b. reduce the frequency and number of oversight inspections; and/or

c. allow the program more flexibility in applying resources from an almost exclusive focus on national priorities e.g., major sources, to addressing more priorities of concern to the State e.g., minor sources.

When State performance fails to meet the criteria for good State performance, EPA may take some of the following actions, as appropriate:

a. suggest changes in State procedures;

b. suggest changes in the State's use of resources or training of staff;

c. provide technical assistance;

d. increase the number of oversight inspections and/or require submittal of information on remedial activities;

e. provide other workable State models and practices to States with problems in specific areas and match State staff with expertise in needed area;

f. if State enforcement action has not been timely and appropriate, EPA may take direct enforcement action;

g. track problem categories of cases more closely;

h. grant awards could be conditioned by targeting additional resources to correct identified problems or reduced based on poor performance where such performance is not due to inadequate resources; and/or

i. consider de-delegation if there is continued poor performance.

D. CRITERIA FOR DIRECT FEDERAL ENFORCEMENT IN DELEGATED STATES

This section addresses criteria defining circumstances under which approved State programs might expect direct Federal enforcement action and how EPA will carry out such actions so as to be most supportive of strengthening State programs.

1. When Might EPA Take Direct Enforcement Action in Approved States?

A clear definition of roles and responsibilities is essential to an effective partnership, since EPA has parallel enforcement authority under its statutes whether or not a State has an approved or delegated program. As a matter of policy in delegated or approved programs, primary responsibility for action will reside with State or local governments with EPA taking action principally where a State is "unwilling or unable" to take "timely and appropriate" enforcement action. Many States view it as a failure of their program if EPA takes an enforcement action. This is not the approach or view adopted here. There are circumstances in which EPA may want to support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case or to support its own program.

Because States have primary responsibility and EPA clearly does not have the resources to take action on or to review in detail any and all violations, EPA will circumscribe its actions to the areas listed below and address other issues concerning State enforcement action in the context of its broader oversight responsibilities. The following are four types of cases EPA may consider taking direct enforcement action where we have parallel legal authority to take enforcement action:

a. State requests EPA action
b. State enforcement response is not timely and appropriate
c. National precedents (legal or program)
d. Violation of EPA order or consent decree

In deciding whether to take direct enforcement in the above types of cases, EPA will consider the following factors:

- Cases specifically designated as nationally significant (e.g., significant noncompliers, explicit national or regional priorities)
- Significant environmental or public health damage or risk involved
- Significant economic benefit gained by violator
- Interstate issues (multiple States or Regions)
- Repeat patterns of violations and violators

How these factors are applied for the various types of cases is discussed below.

a. State requests EPA action:

The State may request EPA to take the enforcement action for several reasons including but not limited to: where State authority is inadequate, interstate issues involving multiple States which they cannot resolve by themselves, or where State resources or expertise are inadequate, particularly to address the significant violation/violators in the State in a timely and appropriate manner. EPA should honor requests by States for support in enforcement. ERA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements Process.

b. State Enforcement is not "Timely and Appropriate"

The most critical determinant of whether EPA will take direct enforcement action in an approved State is whether the State has or will take timely and appropriate enforcement action as defined by national program guidance and State/Regional agreements. EPA will defer to State action if it is "timely and appropriate" except in very limited circumstances: where a State has requested EPA action (a, above), there is a national legal or program precedent which cannot be addressed through coordinated State/Federal action (c, below), EPA is enforcing its own enforcement action (d, below) or the case of a repeat violator, where the State response is likely to prove ineffective given the pattern of repeat violations and prior history of the State's success in addressing past violations.

(i) Untimely State Enforcement Response:

If a State action is untimely, EPA Regions must determine after advance notification and consultation with the State whether the State is moving expeditously to resolve the violation in an "appropriate" manner.

(ii) Inappropriate State Action:

EPA may take direct action if the State enforcement action falls short of that agreed to in advance in the State/EPA Enforcement Agreements as meeting the requirements of a formal enforcement response (See Section B, page 13) where a formal enforcement response is required. EPA may also take action if the content of the enforcement action is inappropriate, i.e., if remedies are

clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.

(iii) Inappropriate Penalty or other Sanction:

For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA will take action to recover a penalty if a State has not assessed a penalty or other appropriate sanction. EPA generally will not consider taking direct enforcement action solely for recovery of additional penalties unless a State penalty is determined to be grossly deficient after considering all of the circumstances of the case and the national interest. In making this determination, EPA will give every consideration to the State's own penalty authority and any applicable State penalty policy. EPA will consider whether that State's penalty bears any reasonable relationship to the seriousness of the violation, the economic benefit gained by the violator (where applicable) and any other unique factors in the case. While this policy provides the basis for deciding whether to take direct Federal action on the basis of an inadequate penalty, this issue should be discussed in more detail during the agreements process to address any state-specific circumstances and procedures established to address generic problems in specific cases. Where identified in national guidance and agreed to between the Region and State, other sanctions will be acceptable as substitutes or mitigation of penalty amounts in these considerations.

Program-specific national guidance on expectations for State penalty assessments may be developed in consultation with the States and applied for determining adequacy of penalty amounts after being applied in practice in EPA Regions. It is the current expectation of Agency managers that EPA will continue to gain experience in implementing its own penalty policies before national programs consider such guidance. Thus, in the near term a determination that a penalty is "grossly deficient" will remain a judgment call made on a case-by-case basis.

c. National Precedents

This is the smallest category of cases in which EPA may take direct enforcement action in an approved State, and will occur rarely in practice. These cases are limited to those of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis. Some of these cases may most appropriately be managed or coordinated at the national level. Additional guidance on how potential cases will be identified, decisions made to proceed and involvement of States and Regions in that process, has been developed as Appendix B to this document.

d. Violation of EPA order or consent decree:

EPA places a high priority on following through on enforcement actions until final compliance is achieved. If EPA has taken administrative, civil or criminal judicial enforcement in a delegated or approved State, EPA will take any follow up enforcement action on violations of those agreements or orders to preserve the integrity of Federal enforcement actions.

2. How Should EPA Take Action So As To Better Support Strong State Programs?

Section E describes in some detail the principles and procedures for advance notification and consultation with States. These are imperatives for a sound working relationship. In all of these circumstances, where EPA may overfile a State action on the basis that it is not timely and appropriate EPA should work with the State as early as possible in the case, well before completion of a State action which, if resulting in expeditious compliance by the facility, would render any subsequent EPA involvement unconstructive, ineffective or moot. This is particularly important since it is EPA policy that once a case has been commenced, EPA generally will not withdraw that case in light of subsequent or simultaneous State enforcement action.

In particular, Regions also should identify, with their States, particular areas in which arrangements can or should be made, in advance, for direct EPA enforcement support where State authorities are inadequate or compliance has been a continuing problem.

There are several other approaches identified here for how EPA can take enforcement action, where it is appropriate, in a manner which can better support States.

To the maximum extent possible, EPA should make arrangements with States to:

a. Take joint State/Federal action -- particularly where a State is responsibly moving to correct a violation but lacks the necessary authorities, resources, or national or interstate perspective appropriate to the case.

b. Use State inspection or other data and witnesses, as appropriate.

c. Involve States in creative settlements and to participate in case development -- so that the credibility of States as the primary actor is perceived and realized.

d. Arrange for division of penalties with State and local governments[6/] (to the extent they participate in Federal enforcement actions, and where permitted by law) -- to enhance Federal/State cooperation in enforcement.

e. Issue joint press releases and share credit with the State -- to ensure EPA is not in competition with the State and that EPA action is not erroneously perceived as a weakness or failure in the State's program.

f. Keep States continually apprised of events and reasons for Federal actions -- to avoid conflicting actions and to build a common understanding of goals and the State and Federal perspectives.

3. How Do the Expectations for "Timely and Appropriate Action" Apply to EPA in Delegated States?

In delegated States, EPA performs an oversight function, standing ready to take direct Federal enforcement action based upon the factors stated above. In its oversight capacity, in most cases, EPA will not obtain real-time data. As indicated in Section F on State Reporting, EPA will receive quarterly reports and will supplement these with more frequent informal communications on the status of key cases. Therefore, we do not expect EPA Regions, through their oversight, to be able to take direct enforcement action following the exact same timeframes as those that apply to the administering agency. However, when EPA does determine it is appropriate to take direct Federal action, EPA staff are expected to adhere to the same timeframes as applicable to the States starting with the assumption of responsibility for enforcement action.

6/ See Appendix C for Agency Policy on "Division of Penalties with State and Local Governments," issued October 30, 1985.

E. ADVANCE NOTIFICATION AND CONSULTATION

A policy of "no surprises" must be the centerpiece of any effort to ensure the productive use of limited Federal and State resources and an effective "partnership" in achieving compliance. This principle should be applied to all aspects of the compliance and enforcement program covering inspections, enforcement activities, press releases and public information, and management data summaries upon which State and national performance are assessed.

In order to guarantee that there is ample advance notification and consultation between the proper State and Federal officials, EPA Regions should confer annually with each State, discuss the following areas and devise agreements as appropriate. The agreements should be unique to each State and need not cover all areas -- so long as there is a clear understanding and discussion of how each area will be addressed.

1. Advance Notification to Affected States of Intended EPA Inspections and Enforcement Actions

   Agreements should identify:

   - who should be notified, e.g.
     -- the head of the program if it involves potential Federal enforcement; and
     -- who is notified of proposed/planned Federal inspections.

   - how the State will be notified, e.g.
     -- the agencies share inspection lists; and
     -- the agency contact receives a telephone call on a proposed Federal enforcement case.

   - when they will be notified -- at what point(s) in the process, e.g.
     -- when a case is being considered; and/or
     -- when a case is ready to be referred, or notice order issued.

   Some specific provisions need to be made to address the following:

   a. Advance Notification of State Attorneys General or other legal staff of potential EPA enforcement actions[1]

      While EPA's primary relationship with the State is and should continue to be with the State agency that has been delegated or been approved to administer the programs, EPA needs to ensure that all parties in the

[1] In some States there are legal organizations that have direct enforcement authority which by-passes the State AG, e.g., District Attorneys, internal legal counsel, Governor's General Counsel. In these instances, this guidance would apply to these other organizations.

State affected by a pending EPA enforcement action receive appropriate advance notification. In addition, when EPA negotiates commitments each year with the State to address specific significant violators, it is important that all the parties affected by these commitments are aware of the legal enforcement support and associated resources needed to accomplish these goals.

As part of the State/EPA Enforcement Agreements process, the Region should discuss with the State agency their internal procedures and/or protocols for advance notification and consultation with the State AG or other legal staff. The State agency is responsible for assuring that the State AG or other legal staff are properly notified and consulted about planned Federal enforcement actions and/or enforcement initiatives on an ongoing basis. States are strongly encouraged to commit advance notification and consultation procedures/protocols reached between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Regions should seek to incorporate these written protocols into the State/EPA Enforcement Agreements.

The Region should do everything possible to work through the State agency on the issue of communicating with the State AG or other legal staff on potential EPA enforcement actions as well as other matters. However, if the State agency does not have a workable internal procedure and if problems persist, the Region, after advance notification and consultation with the State agency, may make arrangements for directly communicating with the State AG or other legal staff.

The Region and State agency should discuss how the outside legal organizations will be consulted on the commitments the State is making to EPA on addressing significant violators each year. These consultations are intended to clarify the legal enforcement support needed to accomplish these goals. This is particularly important for those State agencies dependent upon the State AG or other outside legal organizations to implement their enforcement program.

State agencies are also encouraged to notify these organizations of the anticipated timing of the negotiations each year with EPA on the Enforcement Agreements, grants, and related documents.

Regions are encouraged to work with their State agencies to set up a joint meeting at least annually to which all parties are invited--the program and legal staffs of both the EPA Region and the State agency(s), plus U.S. Attorney staff and State AG staff--to review EPA's enforcement priorities and recent program guidance.

b. Federal Facilities

Federal facilities may involve a greater or different need for coordination, particularly where the Federal facilities request EPA technical assistance or where EPA is statutorily required to conduct inspections (e.g., under RCRA). The advance notification and consultation protocols in the State/EPA Enforcement Agreements should incorporate any of the types of special arrangements necessary for Federal facilities. The protocols should also address how the State will be involved in the review of Federal agency A-106 budget submissions, and include plans for a joint annual review of patterns of compliance problems at Federal facilities in the State.

c. Criminal Enforcement

Although the Policy Framework does not apply to the criminal enforcement program, to improve the coordination with States on criminal investigations and assist the States in their criminal enforcement efforts the Regions should discuss with States any affirmative plans for cross-referrals and cooperative criminal investigations. Such discussions should include the Special Agent in Charge and appropriate program staff familiar with criminal enforcement.

In cases where other States or jurisdictions may be directly and materially affected by the violation, i.e., environmental or public health impacts, EPA's Regional Offices should attempt to notify all of the States that are interested parties or are affected by the enforcement action through the communication channels established by the State agreements, working through the appropriate Regional Office. This notification process is particularly important for hazardous waste cases in which regulatees often operate across State boundaries.

Protocols for advance notification must be established with the understanding that each party will respect the other's need for confidentiality and discretion in regard to the information being shared, where it is appropriate. Continuing problems in this regard will be cause for exceptions to the basic principle of advance notification.

Many of our statutes or regulations already specify procedures for advance notification of the State. The State/Federal agreements are intended to supplement these minimum requirements.

2. Establishment of a Consultative Process

Advance notification is only an essential first step and should not be construed as the desired end result of these

State/Federal agreements. The processes established should be consultative and should be designed to achieve the following:

a. Inspections

Advance notice to States through sharing of lists of planned Federal inspections should be designed so that State and Federal agencies can properly coordinate the scheduling of site inspections and facilitate joint or multi-media inspections as appropriate. This should generally be done for all programs whether or not they are delegated, except for investigative inspections which would be jeopardized by this process.

b. Enforcement Actions

Federal and State officials must be able to keep one another current on the status of enforcement actions against noncomplying facilities. Regularly scheduled meetings or conference calls at which active and proposed cases and inspections are discussed may achieve these purposes.

3. Sharing Compliance and Enforcement Information

The Region and State should discuss the need for a process to share, as much as practicable, inspection results, monitoring reports, evidence, including testimony, where applicable for Federal and/or State enforcement proceedings. The Regions should also establish mechanisms for sharing with the States copies of reports generated with data submitted by the Regions and States, including comparative data -- other States in the Region and across Regions.

4. Dispute Resolution

The Region and State should agree in advance on a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instances of noncompliance. As stated in the policy on Performance-Based Assistance, the purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both the Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving these problems expeditiously.

5. Publicizing Enforcement Activities

EPA has made commitments to account publicly for its compliance and enforcement programs. It is EPA's policy to publicize all judicial enforcement actions and significant administrative actions to both encourage compliance and serve as a deterrent to noncompliance.

While State philosophies on these matters may vary, the Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement.

Discussions should address how and when this coordination would take place. Regions should consult with the State on any enforcement related EPA press release or other media event which affects the State. To the extent possible, the State should be given an opportunity to join in the press release or press conference if it has been involved in the underlying enforcement action. Further, EPA generated press releases and public information reports should acknowledge and give credit to relevant State actions and accomplishments when appropriate.

6. Publicly Reported Performance Data

Regions should discuss with States mechanisms for ensuring the accuracy of data used to generate monthly, quarterly and/or annual reports on the status of State and Federal compliance and enforcement activities. Opportunities should be provided to verify the accuracy of the data with the States prior to transmittal to headquarters. Time constraints may be a real limitation on what can be accomplished, but it is important to establish appropriate checks and control points if we are to provide an accurate reflection of our mutual accomplishments. If there are no data accuracy concerns, these mechanisms may not be needed.

F. STATE REPORTING

This section reviews key reporting and recordkeeping requirements for management data and public reporting on compliance and enforcement program accomplishments. It also addresses related reporting considerations such as reporting frequency and quality assurance.

1. Overview

A strong and well managed national compliance and enforcement program needs reliable performance information on which to judge success and identify areas needing management attention. The following outlines the reporting and recordkeeping framework for monitoring enforcement and compliance program performance. The information will be used by the Agency's chief executives to manage EPA operations, and to convey our combined Federal and State performance record to others outside the Agency. This framework is limited in its application to information gathered for management purposes. It is not intended to apply to the environmental data and reporting on a source-by-source basis which is gathered routinely by the Agency from Regions and States under its source reporting programs and ongoing operations. The framework should serve as a stable guide to the national programs as they develop, in cooperation with the Regions and States, the measures and reporting requirements they will use to assess performance in implementing national compliance and enforcement programs.

Five measures of compliance and enforcement performance will be used for reporting purposes, identified in sequence below. The first two measure compliance results: (1) overall compliance rate for the regulated community; and (2) correction of the most significant violations. The Agency is working diligently to establish clear and reliable indicators for these two measures, recognizing the desirability of managing based as much as possible on results. While it is most desirable to find ways to ultimately examine the environmental benefits of compliance and enforcement actions, i.e., pollution levels reduced, this will not be accomplished in the near term.

The two compliance results measures are supplemented with three measures of enforcement activity: (3) inspection levels as an indicator of the reliability of compliance data and as an indicator of field presence for deterrence purposes; (4) formal administrative enforcement actions undertaken; and (5) judicial referrals and filed court cases, the latter two measures of enforcement activities both serving as indicators of enforcement strength and the will to enforce.

In addition to these five reporting requirements, the Agency is introducing two new areas of recordkeeping requirements to support general management oversight of the national enforcement effort: (1) success in meeting new management milestones for defining timely and appropriate enforcement action; and (2) the level of penalties assessed and collected. Records should be maintained by States and Regions for review during the course of the year and to support an assessment at the end of the year on how well the agencies have done and how appropriate performance expectations might best be defined.

2. Reported Measures of Performance

Programs and Regions should ensure the first five measures of performance are required to be reported on a quarterly basis:

a. Compliance levels can be measured according to several different approaches. National program guidance should describe the approach each has selected as most appropriate given the characteristics of its program and regulated community. Each program should, at a minimum, report full physical compliance rates and also distinguish where relevant in reporting compliance levels between final "physical" compliance (compliance with emissions limits) and "paper" compliance (violation of emissions limits but following a compliances schedule).

b. Progress in Returning Significant Violations to Compliance: Each program in putting together its guidance should specifically define what it measures as significant violations. Lists of significant violators should be compiled jointly by the Region and State. The Agency has two indicators of performance in this area: one is a static measure of progress against a beginning-of-year backlog of significant violators not yet brought into compliance. The second is a dynamic balance sheet which adds to the beginning-of-year inventory any new significant violators as they are found and keeps a running tally of those for which a formal enforcement action was taken, those which were brought into compliance, or those which remain, pending enforcement action.

Each program should also anticipate being required to set quarterly targets for reduction of its beginning-of-year backlog of significant violators. Targets will be set for States and Regions on the basis of either returning the violator to compliance or taking a formal enforcement action which will lead to expeditious physical (full) compliance. Reporting of progress against significant violations will be set on the basis of these same two categories of response. In developing its guidance, each program should specify the types of enforcement actions which qualify as having taken "a formal enforcement action."

c. Inspections are conducted for many purposes, including confirmation of compliance levels. Reporting on inspections has been a long standing practice. Regions and States should be asked to provide specific quarterly commitments and reporting on the number of inspections to be conducted. Where programs have broken down inspection reporting into different classes to reflect the different purposes, for example, sampling inspections, "walk-through," or records check inspections, this reporting is expected to continue. Each program, as it draws up its guidance, should be as clear and specific as possible in defining the different categories of inspection activity to be reported.

d. Formal administrative enforcement actions will be reported as the critical indicator of the level of administrative enforcement activity being carried on by environmental enforcement agencies. It is not our intention to provide a comprehensive reporting of all actions, both informal and formal, being taken to secure compliance. At the same time, it is recognized that there are many different informal techniques used which succeed in getting sources to return to compliance. What is sought here is a telling indicator which will keep reporting as clear cut and unburdensome as possible.

In preparing its guidance each program should list the specific actions to be included under this reporting area. Each program should be guided by the characteristics of a formal administrative action set forth in Section B on "Timely and Appropriate Enforcement Action." For programs without formal administrative authority, such as Drinking Water, other surrogate measures should be defined.

e. Judicial Actions is an area where there has been a long standing practice of Federal reporting with no corresponding State data. Commensurate with current reporting practices within EPA, the number of State civil referrals and filed cases will now be reported. We will also now include criminal judicial actions. These should be reported as a separate class and be counted only after they are filed in court in recognition of their sensitive nature.

3. Recordkeeping for Performance Measurement

There are two performance areas for which States and Regions will be asked to retain accessible records and summary data: (1) timeliness and appropriateness of response to violations; and (2) penalties. These categories of information will be considered for future development as measures for possible inclusion in the Agency's management and reporting systems.

a. Timeliness and appropriateness of State and Federal response to violations is the principal subject of new guidance being developed by each program. Administering agencies need to ensure that adequate tracking systems are in place to assess the timeliness and appropriateness of actions on an ongoing basis. Implementation of timely and appropriate criteria should also be closely monitored to ensure that sources subject to the guidance are properly identified and made part of the covered universe. The Program Offices, in conjuction with the Regions, are expected to report periodically on both EPA's and the States' performance in meeting the timely and appropriate criteria and to periodically reassess the criteria. As programs gain experience, they should consider whether "timeliness" should be measured quantitatively as a performance accountability measure or qualitatively through program audits.

b. Penalty programs are essential to the effective working of an environmental enforcement program. Sufficient documentation needs to be kept to enable the Region to evaluate whether the State obtained a penalty where appropriate, the State's rationale for the penalty, and, where appropriate, a calculation of any economic benefit of noncompliance gained by the violator. Records need to be kept of the number and amount of penalties issued by State and Federal program offices regularly assessing penalties, both those assessed and collected. These records and summary data should be available for review at the time of annual program audits and, in the event of information requests by external groups, on the extent of penalties assessed at any point in time. Each program office in preparing its guidance should specifically address the need for recordkeeping on penalties.

4. Future Improvements in Enforcement Management Information Systems

EPA is working to fill the gaps in its current enforcement management information and is developing a guide to State and national program managers in setting priorities for future design and development work on these systems.

In the near term, EPA is exploring ways to use the current management systems to better reinforce timely and appropriate enforcement response and follow-through on enforcement actions. EPA Program Offices, in consultation with Regions and States, should develop ways to better measure and report on timeliness of enforcement actions. The focus for follow-through will be on tracking compliance with EPA consent decrees and administrative orders. State follow-through will be part of general regional oversight.

Other potential enforcement management indicators, such as the deterrence effects of enforcement, the quality of enforcement actions, an extended compliance picture, and overall environmental results of enforcement actions, are longer term issues to be considered after the near-term issues are addressed.

5. Reporting Considerations

There are three areas for special consideration by the programs as they put together their guidance on reporting requirements:

a. Quality assurance and quality control of reported data is essential as these are the critical indicators of program performance which will be used in making program management decisions of priority, resource levels, and direction. This information must be as reliable as possible. Quality assurance and quality control of data encompasses three types of activities including: (1) setting up initial reporting procedures; (2) building in information review and confirmation loops; and (3) conducting routine audits and reviews of reports and reporting systems. Each program in preparing its guidance should describe the safeguards it uses in its reporting, review and confirmation procedures, and describe the audit protocols it will use to ensure the reliability of enforcement and compliance data.

b. The frequency of formal reporting should be done on a quarterly basis unless there is a specific performance problem in a State or compelling program need for more frequent (e.g., monthly) reporting, which may be necessary on an interim basis due either to their newness or their importance. A quarterly reporting frequency is designed for oversight purposes. It is not designed to provide for "real time" information, that is, instant access to information on the status of a case. However, it is anticipated that formal reporting will be supplemented with more frequent informal communications, such as monthly conference calls, between the Regions and States on the progress of key cases of concern.

c. Federal facility compliance data should be reported as part of each program's reporting measures and commitments. The Regions may also request States to provide additional information on Federal facilities compliance status, if needed, and if mutual agreement can be reached, as part of the Enforcement Agreements process.

APPENDIX A

EXISTING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS Revised: 8/14/86

Cross-cutting National Guidance:
- Revised Policy Framework for State/Federal Enforcement Agreements--reissued 8/86
- Agency-wide Policy on Performance-Based Assistance—issued by Admin. 5/31/85

NOTE: Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
•"National Guidance for Oversight of NPDES Programs FY 1987." (issued 4/13/86) •Final Regulation-Definition of instances of non-compliance reported in QNCR. (8/26/85) •QNCR Guidance (issued 3/86) •Inspection Strategy and Guidance (issued 4/85) •Revised EMS (Enforcement Management System) (issued 3/86) •NPDES Federal Penalty Policy (issued 2/11/86) •Strategy for issuance of NPDES minor permits (issued 2/86)	•"FY 85 Initiatives on Compliance Monitoring & Enforcement Oversight." 6/29/84 •"Final Guidance on PWS Grant Program Implementation" (3/20/84) •Regs - NIPDWR, 40CFR Part 141 and 142. •DW annual Reporting Requirements - "Guidance for PWSS Program Reporting Requirements" 7/9/84 •"FY's 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems." Memo from Paul Baltay 3/18/85. •Guidance for the Development of FY 86 PWSS State Program Plans and Enforcement Agreements" (issued 7/3/85)	•"Guidance on Timely & Appropriate"... for Significant Air Violators." 6/28/84 •"Timely and Approp. Enforcement Response Guidance" 4/11/86 •National Air Audit System Guidelines for FY 1986. (issued 2/86) •"Guidance on Federally-Reportable Violations." 4/11/86 •Inspection Frequency Guidance (issued 3/19/85 and reissued 6/11/86) •"Final Technical Guidance on Review and Use of Excess Emission Reports" Memo from Ed Reich to Air Branch Chiefs --Guidance for Regional Offices (issued 10/5/84)	•"Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA." (reissued 6/86) •"RCRA Penalty Policy" 5/8/84 •FY 1987 "RCRA Implementation Plan" (reissued 5/19/86) •"RCRA Enforcement Response Policy" (issued 12/21/84) (to be revised by 12/86) •"Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies," memo from Lee Thomas to RAs. (issued 6/12/84)	•Final FY 87 Enforcement & Certification Grant Guidance (issued 4/13/86) •Interpretative Rule - FIFRA State Primacy Enforcement Responsibilities. 40 FR Part 173 1/5/83.	•FF Compliance Strategy (to be issued 10/86) •FF Prog. Manual for Implementing CERCLA Responsibilities of Federal Agencies (draft/85: to be issued in final after CERCLA reauthorization)

NPDES	DRINKING WATER	AIR	RCRA	FIFRA	FED FAC
	•Guidance on FY 86 UIC Enforcement Agreements" ICPG #40 (issued 6/28/85) •"FY 87 SPMS & OWAS Targets for the PWSS Program" (SNC definition) (issued 7/10/86) •Guidance on FY 87 UIC Enforcement Agreements (Draft issued 7/1/86) •Guidance on FY 87 PWSS Enforcement Agreements (issued 8/8/86) •Guidance on Use of AO Authority under SDWA Amendments (to be issued pending legislation)	•"Technical Guidance on the Review and use of Coal Sampling and Analysis Data:" EPA-340/1-85-010. 10/30/85 Guidance for Regional Offices	•Compliance Monitoring & Enforcement Log - form for recording monthly compliance data from States & Regions. •Technical Enforcement Guidance on Ground Water Monitoring (Interim Final Aug. 1985) •Compliance order Guidance for Ground Water Monitoring (issued Aug. 85) •Loss of Interim Status Guidance (issued Aug. 85)		

APPENDIX A: ANNUAL PRIORITIES AND PROGRAM GUIDANCES

Annual Priorities for Implementing Agreements

FY 1985: Given the enormity of the task in the first year, 3 priorities were established:

- defining expectations for timely and appropriate enforcement action;
- establishing protocols for advance notification and consultation; and
- reporting State data.

FY 1986: Building on the FY 1985 process, three areas were emphasized:

- expanding the scope of the agreements process to cover all delegable programs;
- adapting national guidance to State-specific circumstances; and
- ensuring a constructive process for reaching agreement.

FY 1987: Continuing to refine the approaches and working relationships with the States, three areas are to be emphasized:

- improving the implementation and monitoring of timely and appropriate enforcement response with particular emphasis on improving the use of penalty authorities;
- improving the involvement of State Attorneys General (or other appropriate legal staff) in the agreements process; and
- implementing the revised Federal Facilities Compliance Strategy.

SF. 1-2

GM - 57, was revised on June 20, 1988. The 1987 version has been replaced with the 1988 version.

SF. 1-2
GM #57

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

JUN 20 1988

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Guidance for the FY 1989 State/EPA Enforcement Agreements Process

FROM: A. James Barnes
Deputy Administrator Jim Barnes

TO: Assistant Administrators
Associate Administrator for Regional Operations
Regional Administrators
Regional Counsels
Regional Division Directors
Directors, Program Compliance Offices

The attached enforcement agreements guidance for FY 1989 looks to continuing the successes of the State/EPA enforcement relationship. It re-emphasizes the need for annual updates of the enforcement agreements. It also 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. There is a new emphasis for FY 1989 on tracking of both state and federal referred/filed cases, inspector training and development, and on upfront agreements on penalty sharing.

The "Revised Policy Framework for State/EPA Enforcement Agreements" remains our blueprint for the State/EPA enforcement relationship. States and Regions should reacquaint themselves with its provisions and focus on fully implementing them, consistent with program-specific guidance.

The recently issued report on the FY 87 Implementation of the Timely and Appropriate Enforcement Response Criteria highlights response areas needing increased attention by Headquarters Program Offices, Regions, and States. I encourage you to read this report and work closely within the Regions and Headquarters Program Offices

to improve regional and state performance, tracking of violations and enforcement follow-up. The Steering Committee on the State/ Federal Enforcement Relationship is considering ways to improve implementation of the response criteria during its meetings in 1988. Each Region's performance in implementing the timely and appropriate guidance will continue to be a focus of semi-annual regional visits.

In a continuing effort to improve enforcement planning, OECM will be developing, with the program offices, summaries of FY 1989 enforcement priorities. These summaries will be available in June and will be based on results of the strategic planning sessions with the program offices and the FY 1989 Operating Year Guidance. They can assist in developing operating plans among regional program divisions, Regional Counsels, and Environmental Service Divisions, by identifying shifting emphases in case selection, inspection targeting, etc. The Regions may wish to share these enforcement priority summaries with States as part of the enforcement agreements process.

I remain firmly committed to full and effective implementation of the Enforcement Agreements process and am relying on your continued personal attention to this important effort.

Attachments

cc: Steering Committee on the State/Federal
Enforcement Relationship
Regional Enforcement Contacts

GUIDANCE FOR IMPLEMENTING THE FY 1989 ENFORCEMENT AGREEMENTS PROCESS

1. Maintaining the Enforcement Agreements Process

The process for State/EPA enforcement agreements has been in place for over four years and has led to greater clarity of the roles and responsibilities between Regions and States and to more effective enforcement -- as our enforcement data for the last two years indicate. The revised "Policy Framework for State/EPA Enforcement Agreements," issued in August 1986, continues to serve as the blueprint for our State/EPA enforcement relationship. Each year, Regions and States should jointly review the agreements to assure:

- That the agreements reflect any changes in State and Federal enforcement priorities. Guidance documents which highlight enforcement priorities are identified in Attachment 2. The new Regional enforcement strategies process that resulted from the EPA Enforcement Management Council discussions, may be used as one means of better responding to differences among national, regional, and state enforcement priorities.

- That the "no surprises" policy applies to all aspects of the compliance and enforcement program. States and Regions should evaluate their success in involving Attorneys General, determine if Attorney General involvement should be increased, especially for Superfund and Federal facilities enforcement actions, and determine if other parties[1] need to be routinely notified or consulted in the enforcement process. Regions and States should discuss the need to further share enforcement and compliance information including inspection results, monitoring reports, and evidence, and how this could best be accomplished.

- That effective dispute resolution processes are in place to surface issues quickly to managers in both Regions and States and provide for prompt resolution.

2. Improved Management and Tracking of Enforcement Responses

a. For Enforcement Responses that are Timely and Appropriate:

The FY 1987 report on the implementation of the timely and appropriate enforcement response criteria indicated that some improvements have been made by some programs but that still more needed to be done to fully implement the guidance. In FY 1988, the Steering Committee on the State/Federal Enforcement Relationship

1/ The Steering Committee on the State/Federal Enforcement Relationship is exploring the need to improve communications and relations with State environmental boards or commissions.

will be discussing how to improve the use of the timely and appropriate response criteria as an enforcement tool.

- Regions and States should, consistent with program guidances, improve their management and tracking of significant non-compliers/violators.

- The FY 1988 enforcement agreements stressed improving use of state penalty authorities or other sanctions. For FY 1989, States should commit to developing and implementing a strategy for obtaining a penalty or other sanction designed to determine future violations consistent with program guidance defining "appropriate" enforcement response. Regions should continue to encourage States to develop civil administrative penalty authorities or to use other appropriate sanctions available under state law or regulation.

The Deputy Administrator and each program office will review Regional data for timely and appropriate response as part of scheduled Regional visits and reviews. The FY 1987 timely and appropriate report includes a section on EPA and state performance, by Region, specifically for this purpose.

b. For Tracking and Follow-through on Cases:

The current tracking and reporting systems call for periodic reporting by EPA and States on cases filed or referred. We are, however, facing problems by not knowing the status of state cases once they have been filed or referred, not knowing whether or when they have been settled, or not knowing whether or when final compliance has been achieved.

- Regions and States should agree on how existing reporting relationships can provide the status of filed or referred cases up to the time of settlement or closure and when compliance has been achieved.

3. Inspector Training and Development

In FY 1988, EPA will issue a policy statement and EPA Order on inspector training and development. Although EPA's Order for inspector training and development does not establish training requirements for state and local inspectors, States are encouraged to adopt their own formal inspector training programs.

- Regions and States should annually assess a State's inspector training needs and inspection priorities as part of the enforcement agreements process.

- Regions should encourage state inspector training programs through information sharing and through state participation

in the design of EPA's training curricula, routine communication on course offerings, and training state instructors in the use of EPA's training materials.

4. Up Front Agreement on Penalty Sharing

In general, EPA's policy provides for state and local participation in certain aspects of federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent permitted by law and the circumstances of the individual case. Appendix C of the Policy Framework is an October 30, 1985 memorandum containing EPA's policy on the division of penalties with state and local governments. Unnecessary disputes regarding penalty sharing have arisen when discussions on the appropriate division of penalties occur late in the enforcement process.

- Regions and States should consider developing a process for establishing penalty sharing ground rules in advance of enforcement settlement negotiations.

5. Working With States To Improve Federal Facilities Compliance

Once the Federal Facilities Compliance Strategy is complete, Regions should reassess the following areas and incorporate into the agreements, as appropriate, understandings reached with States on:

- The enforcement approach a State generally plans to use for responding to Federal facility violations and plans for escalating the response, if necessary;

- Types of situations where a State would request EPA support or direct action;

- Advance notification to States when EPA conducts inspections at Federal facilities, and protocols for State enforcement response following EPA inspections in delegated States;

- Plans for joint EPA/State annual review of compliance problems at Federal facilities in a State.

EXISTING OR PLANNED* NATIONAL GUIDANCE AFFECTING STATE EPA ENFORCEMENT AGREEMENTS PROCESS (rev. 4/6/88)

Inter-Program National Guidance:

- Revised Policy Framework for State/Federal Enforcement Agreements, August 26, 1986
- Annual Guidance for the FY 1989 Enforcement Agreements Process.
- Agency-Wide Program to Train, Develop and Recognize Compliance Inspectors and Field Investigators, to be issued June 1988.
- Federal Facility Compliance Strategy, to be issued June 1988.

Media Program Guidance:

Water-NPDES	Drinking Water	Air	RCRA	FIFRA/TSCA
• National Guidance for Oversight of NPDES Programs FY 1987, 4/1/87	• FY 85 Initiatives on Compliance Monitoring and Enforcement Oversight, 6/29/84.	• Timely and Appropriate Enforcement Response Guidance, 6/28/84. rev. 4/11/86	• Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA, 6/86.	• Final FY 88 Enforcement and Certification Grant Guidance, 3/10/87.
• Final Regulation: Definition of Instances of Non-Compliance Reported in QNCR, 8/26/85	• Final Guidance on PWS Grant Program Implementation, 3/29/84.	• Compliance Data System Guidelines for FY 1986, 2/86.	• RCRA Penalty Policy, 5/8/84.	• Interpretative Rule: FIFRA State Primacy Enforcement Responsibilities, 40 CFR Part 173, 1/15/83
• QNCR Guidance, 3/86	• Regulations: NIPDWR, 40 CFR Parts 141, 142.	• Guidance on Federally-Reportable Violations, 4/11/86.	• FY 1988 RCRA Implementation Plan, 3/31/87, to be reissued for FY 89 by 4/1/88.	• Final TSCA Grant Guidance for the Cooperative Agreement States, 3/10/87.
• Inspection Strategy and Guidance, 4/85	• Guidance for PWSS Program Reporting Requirements, 7/9/84.	• Compliance Monitoring Strategy, 3/31/88.	• RCRA Enforcement Response Policy, issued 12/21/84, revised 12/21/87.	

* Planned guidance is underlined.

Water-NPDES	Drinking Water	Air	RCRA	FIFRA/TSCA
• Revised Enforcement Management System, 3/86. • NPDES Federal Penalty Policy, 2/11/86. • Strategy for Issuance of NPDES Minor Permits, 2/86. • Guidance for Reporting and Evaluating POTW Non-Compliance with Pretreatment Implementation Requirements, 9/30/87. • Implementation of the Pretreatment Permits and Enforcement Tracking System, 3/24/87 (letter) • National Municipal Policy, published 3/28/84, and guidance, 3/84. • NMP Enforcement Strategy, 9/22/87.	• FY 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems, 3/1/85. • Guidance on FY 88 UIC Enforcement Agreements, 4/87. • FY 87 SPMS & OWAS Targets for the PWSS Program, (SNC definitions), 7/10/86. • Guidance on FY 88 PWSS Enforcement Agreements, 4/87. • Guidance on Use of AO Authority Under SDWA Amendments, 1/20/87. • FY 88 UIC Reporting Guidance, 4/87. • UIC Program Guidance #53, 12/86. • PWSS Compliance Strategy, 4/1/87.	• Asbestos Strategy, 3/31/88. • Class B VOC Source Compliance Strategy, 3/87.	• Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies, 6/12/84. • Compliance Monitoring and Enforcement Log - form for recording monthly compliance date from States and Regions. • Technical Enforcement Guidance on Ground-Water Monitoring, Interim Final, 8/85. • Compliance Order Guidance for Ground Water Monitoring, 8/85. • Loss of Interim Status Guidance, 8/85. • RCRA State Oversight Inspections, 12/87.	

[illegible]	Drinking Water	Air	RCRA	FIFRA/TSCA
• Pretreatment Compliance Monitoring and Enforcement Guidance, July 25, 1986. • Administrative Penalty Order Regulations, Policies, and Guidances, August 28, 1987 • PCS Policy Statement, Oct. 31, 1985. • Compliance Monitoring and Enforcement Strategy for Toxics, to be issued April 1988.	• UIC Compliance Strategy, 3/31/87.			

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OR.1-1
GM#17

OCT 19 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Guidance for Drafting Judicial Consent Decrees

FROM: Courtney Price
Special Counsel for Enforcement

TO: Assistant Administrators
Associate Administrator for Policy
and Resource Management
Associate Administrator for Regional Operations
General Counsel
Associate Enforcement Counsels
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

I am forwarding to you enforcement guidance entitled "Guidance for Drafting Judicial Consent Decrees" for use by you and your staff.

This guidance was circulated in draft form to the program AAs for review and concurrence. I believe the guidance will be useful to those at EPA responsible for negotiating enforcement actions and drafting consent decrees.

Obviously, the general guidance provided by this document cannot deal with any one program specifically. Therefore, the program offices may wish to work with their respective Associate Enforcement Counsel to develop media-specific guidance to deal with unique issues or to provide more specific examples of certain consent decree provisions.

This document should be added to your copy of the General Enforcement Policy Compendium which was distributed in March of 1983. A revised table of contents and index for the Compendium are also attached.

If you have questions concerning this guidance, please contact Janet Clark of my staff at 426-7503.

Attachments

GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES

EPA GENERAL ENFORCEMENT POLICY # GM - 17

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: OCT 19 '83

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

TABLE OF CONTENTS

I. Introduction

The purpose of this document is to provide guidance on provisions which 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 document explains the appropriate use of various standard provisions and provides sample language for these provisions.

Each judicial consent decree negotiated by EPA differs, because each deals with a different noncompliance problem and embodies the results of a separate negotiating process. Provisions contained in decrees must differ to reflect the agreement resulting from these negotiations. Most consent decrees, however, also must contain certain relatively standard provisions to address matters which are relevant in virtually all enforcement actions. Use of this standard language will lessen the review necessary of the resulting draft consent decree. Of course, local court rules may also mandate specific forms which must be followed or provisions which must be included in settlement agreements.

The settlement of a potential civil judicial action should almost always result in a negotiated consent decree. Occasionally, in the past, EPA has entered into voluntary agreements to settle some enforcement actions. Those EPA officials negotiating settlements in EPA enforcement actions are not encouraged to use such voluntary agreements and they should be limited to unique situations, for example,

in cases in which no prospective action is required from the defendant.

A consent decree may operate as a release from liability for the defendant for the violations addressed by the decree. For this reason, the decree must be narrowly drawn and address only the allegations made in the complaint. The consent decree should release the defendant from liability only after the defendant has complied with all the terms of the decree. In all cases, settlements must be carefully drafted. Many parties may be involved as defendants or potential defendants, particularly in hazardous waste cases; therefore, you should be certain that non-settling defendants or potential defendants are not released from liability because EPA has settled with one or some of the defendants. (See, Nonwaiver Provision, page 20).

This guidance is meant to apply generally to all EPA media areas and does not attempt to discuss unique issues limited to a specific media. Therefore, EPA attorneys drafting consent decrees should consult any applicable media-specific policies for guidance in dealing with these issues. You should follow separately issued guidance for procedures to use in conducting negotiations and for the review and approval of proposed consent decrees.

II. "Front End" Standard Provisions - Providing the Factual and Legal Background for the Consent Decree.

A. Parties and Cause of Action

It is obvious that each consent decree must identify the parties and the cause of action. The plaintiff in every action is the United States of America, on behalf of the United States Environmental Protection Agency. Identify the cause of action by specifying the legal authorities allegedly violated by the defendant and by briefly describing those actions by the defendant which led to the filing of the complaint. The decree should make some reference to the complaint which has been or will be filed to demonstrate the decree's relationship to pending litigation.

EXAMPLES

1. Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency (EPA), has filed the complaint herein on (date) . This complaint alleges that the defendant violated the Clean Air Act, 42 U.S.C. § 7401 et seq. and the _____ State Implementation Plan (the SIP) adopted under the Clean Air Act by the following actions:

2. Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency (EPA), filed the complaint herein on (date) . This complaint alleges that the defendant violated the Clean Water Act, 33 U.S.C. §1251 et seq. and National Pollutant Discharge Elimination System (NPDES) Permit No._____ by the following actions:

Every consent decree should identify the defendant in terms of the defendant's status as an individual, corporate entity, partnership, etc. This section should give enough factual information to establish the court's personal jurisdiction

over the defendant and to establish venue. In some situations, the defendant will own or operate several facilities. Facilities covered by this decree should be specified with particularity. If the decree fails to identify precisely those facilities or sources which are in violation of the relevant statute(s) and for which relief is provided in the decree, there may be some question as to the scope of the decree.

EXAMPLE

> Defendant, XYZ Steel Corporation (Defendant), is a Delaware corporation, registered to do business in the Commonwealth of Virginia with its prinicipal place of business at 6004 Main Street, Alexandria, Virginia.
>
> Defendant owns and operates an integrated steel-making facility known as the "Karefull Works", in Karefull Hills, Smith County, in the Southern District of Virginia. Defendant owns and operates various facilities at the Karefull Works, including among others, a sinter plant, comprised of two sintering lines; an open hearth furnace; three blast furnaces; an electric arc fan shop, comprised of two electric arc furnaces; and two coke oven batteries. All of the above facilities are alleged by the Plaintiff to be sources of air pollution operating in violation of the State Implementation Plan and are covered by this decree.

In addition to the plaintiff and defendant(s), any intervenors in the suit (often affected States) should be identified as parties to the decree. Making the intervenors parties to the decree is necessary for full settlement and can give them the ability to enforce the decree's provisions. Binding intervenors to the decree's provisions also provides the defendant with complete information as to the extent of its liability. If

motions to intervene are pending, those, as well as any other outstanding motions, should be resolved by the decree.

EXAMPLE

> The State of Ohio has moved to intervene as Plaintiff. The Commonwealth of Pennsylvania has also moved to intervene as Plaintiff to protect its interest insofar as resolution of the allegations of the complaint affect water quality in the Mahoning River at the Ohio-Pennsylvania State line. The motions to intervene are hereby granted.

B. Procedural History

The decree should include provisions regarding procedural history if the defendant in the case at bar has been involved in prior relevant enforcement proceedings. It is helpful, in these cases, to specify the relationship between this decree and previous decrees and orders in effect with regard to this defendant. The decree you are drafting may abrogate or add to the provisions of a previous decree or order. If so, you should detail these facts in the decree. In some instances, the previous decree or order may have resolved violations at the same facility which are so similar to those presently being addressed that the existence of two decrees would be confusing. A new decree which incorporates those provisions of the prior decree still in effect may clarify the obligations of the defendant. Finally, if the violation of an administrative order preceded this judicial action, you should note that fact in this section of the decree.

EXAMPLES

1. Plaintiff and Defendant entered into a

Consent Decree to resolve a prior case, Civil Action No. _____, and the Defendant has fully and satisfactorily complied with that prior Decree.

2. Plaintiff and Defendant entered into a Consent Decree, to resolve violations of the Clean Air Act at defendant's _____ facility. That Decree retains full force and effect.

3. Plaintiff issued an administrative order pursuant to §309 of the Clean Water Act to the Defendant on (date). The Defendant has failed to comply with the terms of this administrative order.

III. "Transitional" Clause - Providing a Lead into the Court's Order

Traditionally, every consent decree contains a transitional clause which signals the end of the introductory portions of the decree and the beginning of the Court's order.

You will most likely draft and execute a consent decree which is the result of a settlement before the introduction of any evidence or the finding of any facts. In these instances, it is inappropriate to recite that these events took place.

In some instances, settlement may be reached without the defendant admitting any facts or points of law and refusing to admit any liability. It is appropriate to use this clause to indicate this fact.

EXAMPLE

> There has not been a trial on any issue of fact or law in this case. However, the parties wish to settle the dispute described above. Accordingly, they have agreed to the following order through their attorneys and authorized officials.
>
> THEREFORE, it is ORDERED as follows:

However, if the defendant has admitted certain facts, these should be explicitly noted in the decree.

IV. Provisions of the Court's Order

A. Jurisdiction and Statement of the Claim

Every decree must contain a provision reciting that the court has subject matter and personal jurisdiction. The decree should recite the statutory authority for the court's jurisdiction. This is particularly important if the defendant disputed the court's jurisdiction. The following example states the fact of the court's jurisdiction and provides a waiver by the defendant of any objections to the court's jurisdiction.

EXAMPLE

> This Court has jurisdiction over the subject matter and over the parties pursuant to 28 U.S.C. §1345; 42 U.S.C. §7603 and 42 U.S.C. 6973. The Defendant waives any objections it may have to the jurisdiction of the Court.

Additionally, Federal Rule of Civil Procedure 8(a) requires that a complaint state a claim for which relief can be granted. Obviously, courts cannot grant relief where no cause of action will lie. It is essential to state in the decree that the complaint met this requirement, e.g., "The Complaint filed herein

states a claim for which relief can be granted". Such a statement does not constitute an admission of liability by the defendant, but only that the allegations of the complaint, if proved, would support the judgment.

B. Applicability Clause

The applicability clause defines those to whom the decree applies. It binds the successors in interest to both the plaintiff and the defendant, thus providing for those instances when ownership of facilities or sources may change after entry of the decree. The language used parallels the language of Federal Rule of Civil Procedure 65(d) since that rule sets out the scope of injunctions.

EXAMPLE

> The provisions of this consent decree shall apply to and be binding upon the parties to this action, their officers, agents, servants, employees and successors. Defendant shall give notice of this consent decree to any successors in interest prior to transfer of ownership and shall simultaneously verify to plaintiff that defendant has given such notice.

In some cases, particularly hazardous waste site cases, the decree may include a further provision which will ensure that subsequent purchasers of the property have notice that the site was or is a hazardous waste site and that a consent decree exists which affects the property. For example, the decree could provide that it be recorded with the local office having responsibility for the recording of deeds and other such instruments. Alternatively, the defendant could

agree to note the decree on the deed to the property.

C. Public Interest Provision

All consent decrees should contain a provision that the parties agree and the Court has found that the decree is in the public interest. Such a statement by the parties and a finding by the Court makes it more difficult for others to later attack the decree's terms. (This is especially true for those decrees which are subject to public comment. See the discussion at page 27.)

EXAMPLE

> The parties agree and the Court finds that settlement of these matters without further litigation is in the public interest and that the entry of this decree is the most appropriate means of resolving these matters.

D. Definitions Section

Consent decrees which contain many technical or potentially ambiguous terms, or define terms according to agreement reached between the parties should contain a separate section listing those definitions. This section can also give definitions for potentially misleading terms.

Of course, definitions given must conform with definitions given in statutes and regulations. Do not attempt to redefine terms that have specific legal definitions; however, examples or illustrations of these terms may be appropriate.

For consent decrees that are very short and limited in scope a separate section devoted to definitions may be unnecessary. Terms defined in specific decrees will, of course,

vary. The following example demonstrates one form of such a section.

EXAMPLE

> The following terms used in this consent decree shall be defined as follows:
>
> a. The term "days" as used herein shall mean calendar days.
>
> b. The term "permanently cease operation", when used in such phrases as "permanently cease operation of the six (6) open hearth furnaces", shall mean the complete cessation of production at the relevant source and the termination of all power or fuel to the source.

E. Compliance Provisions

1. Generally

Consent decrees must require compliance with applicable statutes or regulations and commit the defendant to a particular remedial course of action by a date certain. Consent decrees negotiated by EPA contain compliance provisions whenever it is necessary for defendant to take remedial action to cure or prevent violations unless no injunctive relief is necessary to obtain compliance with applicable law (i.e., penalties only case).

Compliance provisions set out what steps the defendant must take to remedy violations of various environmental statutes and usually define methods EPA can use to determine the defendant's success in meeting these provisions. The specific compliance provisions of each decree will vary depending on the facts of the specific case and the media

involved. Drafters should consult media-specific policies for guidance.

Compliance provisions should specify the standard or level of performance which a source ultimately must demonstrate it has met. Other than interim standards to be attained until final compliance is achieved, a decree should not set a standard less stringent than that required by applicable law because a decree is not a substitute for regulatory or statutory change.

You should avoid including compliance provisions which require the defendant to comply solely by installing certain equipment, unless specific technical standards are required by applicable regulations. Such provisions should require compliance with the appropriate standard as well. Such a provision may allow the defendant to argue that installation of the equipment fulfills the requirements of the consent decree even if the equipment fails to achieve compliance with statutes and regulations. You may include provisions which require the installation of necessary control technology. However, the provisions must be clear that installation of specific equipment does not relieve the defendant from the responsibility for achieving and maintaining compliance with the applicable laws and regulations.1/

1/ Under some statutes, CERCLA, for example, standards for clean-up are rarely available. When the decree involves future clean-up activities rather than cash settlements, the decree may usefully specify continuing State/EPA responsibilities for determining future clean-up activity.

An important part of the compliance section of a decree is the inclusion of provisions which provide a means of monitoring the defendant's performance. Depending upon the performance standard required by the decree, monitoring provisions might, for example, require periodic tests or reports by the defendant. Test protocols may be set out in technical appendices to the decree. Generally, in choosing monitoring provisions you should consider such factors as the impact on Agency resources of different monitoring requirements and the ease with which the Agency can proceed with monitoring, as well as the need for some type of Federal oversight to ensure that the defendant is addressing noncompliance problems adequately. For example, you will want to provide for site entry and access and document review by the Agency in the decree. You should not waive the Agency's right to assert or utilize its statutory authorities, such as right of entry or document production.

EXAMPLE

> Any authorized representative or contractor of U.S. EPA or Intervenors, upon presentation of his credentials, may enter upon the premises of the Karefull Works at any time for the purpose of monitoring compliance with the provisions of the Consent Decree.

The decree should specify timetables or schedules for achieving compliance requiring the greatest degree of remedial action as quickly as possible. Such timetables are particularly relevant in decrees which mandate construction the defendant must undertake or cleanup the defendant must accomplish.

These schedules should include interim dates so that the Agency can monitor the defendant's progress toward compliance.

EXAMPLE

III. Sinter Plant

A. Applicable Emissions Limitations

1. Emissions from the sinter plant at Defendant's Karefull Works shall comply with the emission limitations in 25 Pa. Code §§123.41, 123.3 and 123.1 as follows:

a. Visible emissions from any sinter plant stack shall not equal or exceed 20% opacity for a period or periods aggregating more than three (3) minutes in any sixty (60) minute period and shall not equal or exceed 60% at any time, as set forth in 25 Pa. Code §123.41.

b. Visible emissions from any part of sinter plant operations shall not equal or exceed 20% opacity for a period of periods aggregating more than three (3) minutes in any sixty (60) minute period and shall not equal or exceed 60%, as set forth in 25 Pa. Code §123.41.

c. Mass emissions from the sinter plant windboxes and from all gas cleaning devices installed to control emissions at the sinter plant shall not exceed ____ grains (filterable) per dry standard cubic foot (the applicable emission limitation).

d. Fugitive emissions from any source of such emissions at the sinter plant shall not exceed the emissions limitation set forth in 25 Pa. Code §123.1

2. The air pollution control equipment described below shall be installed in accordance with the following schedule:

Submit permit application to DER and to EPA for approval	November 1, 1980
Issue purchase orders	May 1, 1981

Commence installation	November 1, 1981
Complete installation and start up	September 1, 1982
Achieve and demonstrate compliance	November 1, 1982

B. Sinter Plant Compliance Program

1. In order to bring Defendant's sinter plant into compliance with the requirements specified in paragraph III.A.1.c. above, Defendant shall install the following air pollution control equipment on sintering line #1.:

   a. Defendant shall install an air pollution control device which complies with the emission limitation of paragraph III.A.1.c. on #1 sinter plant windbox to control sinter plant windbox stack emissions.

   b. Defendant shall install a scrubber or a baghouse (or separate baghouse, as appropriate) on #1 sinter line and appropriate ductwork to replace the existing cyclone for control of emissions from the discharge end of #1 sinter line.

   c. Installation of this equipment in no way relieves the defendant of the requirement of achieving and maintaining compliance with the emission limitations set out in paragraph III.A.1.

2. Compliance Provisions for Repeat Violators

When negotiating with a source with a long history of repeated violations negotiators should consider including more stringent compliance monitoring provisions in resulting consent decrees. The decree could include provisions for more frequent monitoring and testing by the source to ensure continued future compliance or opportunities for more EPA monitoring and testing in addition to self-monitoring by the source.

2. Performance Bonds

EPA may require performance bonds from a defendant to ensure that actions required by the decree (i.e., clean-up of a site, installation of pollution control equipment) are actually completed. The amount of any such bond will vary from case to case. The provision should state those circumstances under which the bond becomes payable. The bond itself is a separate instrument which sets out more fully those circumstances under which the bond is forfeited and those conditions under which the bond is released, as well as any sureties guaranteeing the bond. Therefore, the bond instrument itself should be closely reviewed for adequacy.

EXAMPLE

> The defendant shall comply with the follwing provisions at Blast Furnaces 1, 2, 3 and 4.
>
> a. Defendant shall install an emission suppression system on furnaces 1 and 4.
>
> . . .
>
> c. Defendant has posted a bond payable to United States Treasury in the amount of $1,000,000 for each of blast furnaces 1 and 4 payable immediately and in full if defendant fails to certify installation of an emission suppression system by December 31, 1982, and demonstration of compliance with the above emission limitation by December 31, 1982.

F. Provisions Defining Other Responsiblities of the Parties to the Decree.

1. Notification Provision

Various provisions in consent decrees may require notification of different events to the plaintiff, defendant

and/or the court. When this is the case, it is appropriate to include a provision setting out to whom such notices should be given.

EXAMPLE

> Whenever, under the terms of this decree, notice is required to be given by one party to another party and/or the court, such notice shall be directed to the individuals specified below at the addresses given, unless those individuals or their successors give notice in writing to the other parties that another individual has been designated to receive such communications.
>
> (appropriate names and addresses)

2. Penalties

a. Generally

Often, the defendant will be liable for a civil penalty for its violation of the statute. Some decrees may contain only penalty provisions in situations in which some sanctions are appropriate to respond to past violations and to deter future misconduct, yet compliance provisions are unnecessary because the defendant has achieved compliance before the execution of the decree. The decree should state that the payment is a penalty so the defendant does not obtain a tax advantage from its payment.

EXAMPLE

> Defendant shall pay a civil penalty in the amount of _____ as a result of the defendant's violation of _____ with regard to facilities which are the subject of this decree.

The decree should also state terms for payment of any penalty. Normally, payment should be in a lump sum within a short time from the entry of the decree. Installment payments may be allowed in the following circumstances:

- if the defendant can demonstrate an inability both to pay the lump sum penalty and to finance remedial action or continue in operations; and,
- if there is no reason to believe that further payments will not be forthcoming.

If the defendant agrees to pay by installments, the decree can provide for interest at the appropriate judgment interest rate.

Payment provisions should recite the amount of the payment, to whom paid, how payment is made and when payment is due. Normally, the provisions should require defendants to submit a cashier's check payable to "Treasurer, United States of America" to the appropriate Regional Counsel.

EXAMPLE

> Defendants agree to pay a civil penalty in the total sum of ONE MILLION, THREE HUNDRED AND FIFTY THOUSAND DOLLARS ($1,350,000). The terms of this paragraph do not limit remedies available for violation of this decree. Payment of ONE MILLION DOLLARS ($1,000,000) of such penalty shall be made within five days of the entry of this decree, by cashiers check payable to "Treasurer, United States of America", delivered to the Regional Counsel, USEPA, Region V, 230 South Dearborn Street, Chicago, Illinois 60640.
>
> The remaining THREE HUNDRED AND FIFTY THOUSAND DOLLARS ($350,000) of such penalty shall be paid in the same manner, either by December 31, 1982,

in which event there will be no interest charge, or by June 30, 1984, in which event interest shall be charged at the rate provided in 28 U.S.C.A. §1961, for the time period between the date of entry of this decree and the date of payment.

b. Other Obligations Assumed by Defendants

During negotiations, defendants may offer to take certain action in order to offset or in lieu of a cash penalty. For example, the defendant may offer to install extra pollution control equipment which is not necessary to meet legal requirements.

If EPA has agreed to accept lesser amounts in settlement because of extra pollution control activity by the defendant, drafters of consent decrees must be sure that this agreement is explicitly noted in the decree, and that the decree requires the defendant to operate and maintain any "extra" equipment. Consent decrees have precedential value, and any such trade-off between the Federal government and defendants must be readily apparent to readers of the decree. This provision will also ensure that the defendant is bound by its agreement to undertake these actions. You should refer to applicable civil penalty policies for guidance in evaluating credit-worthy activities and their appropriate use.

An effective means of ensuring the defendant's performance of these actions is to include a provision which defers collection of some or all of a penalty amount until performance is completed, so long as the amount ultimately paid is acceptable under any applicable penalty policy. The provision could then excuse payment of the deferred portion of the penalty entirely when performance has been satisfactorily completed.

EXAMPLE

The payment of the penalty amount due on (date) shall be excused by the plaintiff if the plaintiff finds that the following conditions have been met.

a) By (date) , defendant shall install and operate a coke-side shed (as described in paragraph I.B.1.b.) on each battery to control pushing emissions. Each shed shall be evacuated continuously to capture and clean emissions from both the pushing operation and all door leaks.

b) Defendant shall achieve, maintain and demonstrate compliance with the emission limitation set forth in paragraph I.A.1.d. with respect to mass emissions attributable to coke oven pushing operations by (date) . Defendant shall achieve and demonstrate compliance with the emissions limitation set forth in 25 Pa. Code §123.44(a)(3) with respect to door emissions under the shed by (date).

c) Defendant shall certify completion of the conditions listed in subparagraphs (a) and (b) above to the plaintiff by certified letter. This notification should be sent by U.S. Mail, return receipt requested to (name, title and address) by (date)

3. Dispute Resolution Provision

Disputes may arise between EPA and the defendant after execution of the decree as to the defendant's compliance with the terms of the decree. The decree can provide its own mechanism for resolving some or all of these potential disputes by the parties before resorting to the court for resolution of the dispute. Dispute resolution by the parties should be limited to a specific amount of time. Such a dispute resolution provision will allow EPA to avoid resolution of each dispute by the court. Advantages of such a provision include:

a) speedier resolution of disputes because resort to

the court may not be necessary; and

b) technical disputes can be resolved by those with the requisite expertise, thus avoiding the need to educate the court before evidence can be evaluated.

A number of dispute resolution devices can be used in decrees. For example:

a) EPA and the defendant could agree to negotiate for a a limited period of time any such dispute or specified disputes which arise.

b) The parties could agree to submit the matter to arbitration. Again, a limited time period should be specified during which the parties could submit the matter to arbitration. A specific time limit would be appropriate for the arbitration process as well.

c) Failing resolution by the parties, the decree should provide for application to the court to resolve disputes. If the matter is submitted to the court for resolution, the decree should provide that the defendant bears the burden of proof.

4. Nonwaiver Provision

At times a set of actions by a defendant may violate separate statutory requirements. One violation may be settled while other claims are litigated. In all decrees, it is proper to state that the decree does not affect the defendant's liability with regard to other statutes or regulations. The following sample is acceptable.

EXAMPLE

> This consent decree in no way affects or relieves defendant of responsibility to comply with any other State, Federal or local law or regulation.

If a consent decree settles a portion of a dispute under a statute, the consent decree should clearly indicate that other aspects of the case have not been settled. For example, in some hazardous waste cases an agreement may be reached dealing with surface clean-up of a site but issues on ground water contamination may be reserved for later resolution. These partial consent decrees should clearly state that the defendant is not fully released from liability.

Various statutes grant EPA specific powers to deal with emergency situations. The decree may specify that the Agency retains the power to act in these situations.

EXAMPLE

> This decree in no way affects the ability of EPA to bring an action pursuant to Section 303 of the Act, 42 U.S.C. §7603.

Additionally, you may want to include a provision to preserve the government's cause of action against third parties who are not parties to the suit and who may be responsible along with the named defendant(s).

EXAMPLE

> This decree does not limit or affect the rights of the defendants or of the United States as against any third parties.

5. Stipulated Penalties

Most decrees should contain provisions for stipulated penalties. These provisions encourage compliance and simplify enforcement by providing a significant, clearly defined sanction in the event the defendant violates a provision of the decree. Stipulated penalties are appropriate for violation of the following types of provisions:

a) final and interim compliance requirements,

b) reporting, testing or monitoring requirements,

c) any other performance requirements (including requirements to pay civil penalties).

Provisions for stipulated penalties should include the amount of the penalty, how the penalty should be paid, and to whom the penalty should be paid. To set the amount of a proposed stipulated penalty, you should be guided by applicable statutes, regulations and EPA policies. Normally, defendants should pay stipulated penalties by delivering a cashiers check made payable to "Treasurer United States of America" to the appropriate Regional Counsel.

The decree may also provide that the court issuing the decree will resolve disputes between the parties as to liability for and the amount of an assessed stipulated penalty. The provision should also make clear that stipulated penalties are not the plaintiff's exclusive remedy for the defendant's violation of the decree and that the plaintiff reserves its right to seek injunctive relief.

EXAMPLE

Failure by the defendant to achieve full compliance as required by Paragraphs IV.A.1 through 9, except as excused pursuant to Paragraph V herein (force majeure), shall require defendant to pay a stipulated penalty of $7,500 per day for each day that such failure continues.

Stipulated penalties are payable upon demand as follows:

Cashiers check payable to: Treasurer, United States of America

Address for payment: USEPA, Region III
Curtis Building, Second Floor
6th and Walnut Streets
Philadelphia, PA. 19106
Attn: Regional Counsel

Any dispute with respect to defendant's liability for a stipulated penalty shall be resolved by this court. The provisions of this paragraph shall not be construed to limit any other remedies, including but not limited to institution of proceedings for civil or criminal contempt, available to plaintiff or intervenors for violations of this consent decree or any other provision of law.

You may want to provide for stipulated penalties which escalate based on the number of days the source is not in compliance or on the amount of excess emissions or effluents discharged by the source in violation of the decree. For example, for days 1 through 30 of violation the stipulated penalty could be $1000 per day. This could increase to $2000 per day for days 30 through 60 and so on. Similarly, excess discharges or emissions could be expressed as a percentage over the daily limitation and a scale could be devised for these as well. For example, discharges which are less than 10% over the daily discharge limitation would be subject to a stipulated penalty of $500, from 10% to 25%, $1000 and so forth.

Another approach which may aid the negotiation process is to use a stipulated penalties provision which allows the payment of penalties for interim violations into some kind of escrow account. The clause could provide for the return of these payments to the defendant if timely final compliance is achieved and the terms of the consent decree are satisfied. If such an escrow account arrangement is used, EPA staff should review the escrow agreement itself. The agreement should clearly give the escrow agent the authority to turn the fund over to EPA in the event of noncompliance.

6. Force Majeure

The purpose of a force majeure clause is to excuse the defendant's performance pursuant to the decree because of circumstances beyond the defendant's control (e.g., acts of God). Therefore, such a clause should not be included in a decree unless the defendant insists on its inclusion.

Although a force majeure clause is something the defendant may want in the decree, it normally will be to EPA's negotiating advantage if Agency representatives draft the clause. Generally, the following elements should be included in drafting such a clause.

a) The clause must clearly limit excused delays in performance to those events which are beyond the control of the defendant. The decree may define specifically which circumstances would trigger the force majeure clause. Arriving at a list of such circumstances, however, may consume a good deal

of negotiating time. For this reason, the term "circumstances beyond the control of the defendant" is acceptable. The language in the example (circumstances entirely beyond the control of the defendant) is better.

The clause should not allow the defendant to claim economic hardship or increased costs as circumstances beyond defendant's control which trigger the force majeure clause.

b) The clause should clearly place the burden on the defendant to prove that the events causing the delay are based on circumstances beyond its control. The burden should be one satisfied by clear and convincing evidence, if possible.

c) The clause should include a provision requiring notification within a time certain by the defendant to the plaintiff and the court of any delay or anticipated delay the defendant claims triggers the force majeure clause. This notification should include the cause of the delay and the expected duration of the delay. Failure to give notice of a particular problem should preclude the defendant from invoking the force majeure provision based on that problem.

d) The clause should provide that the defendant take measures to prevent or minimize the delay to the maximum extent reasonable and to propose a time when the preventive measures will be fully implemented.

e) The clause should state that events triggering the force majeure clause do not automatically excuse the defendant from complying with the terms of the decree. Ultimate compliance should occur as quickly as possible, consistent with the decree's

terms and any extensions granted because of the force majeure clause.

f) Finally, the clause should provide some mechanism for dispute resolution, since there may be instances in which EPA and the defendant cannot agree that a specific delay is caused by circumstances beyond the defendant's control. (See the discussion of dispute resolution provisions on page 19.) It is acceptable to allow the defendant to submit such disputes to the court for resolution if agreement cannot be reached between the parties.

EXAMPLE

a) If any event occurs which causes or may cause delays in the achievement of compliance at Defendant's facilities as provided in this decree, Defendant shall notify the Court, the Plaintiff and Intervenors, in writing within 20 days of the delay or anticipated delay, as applicable. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Defendant to prevent or minimize the delay, and the timetable by which those measures will be implemented. The Defendant shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Defendant to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of the defendant's right to request an extension of its obligation under this Decree based on this incident.

b) If the parties agree that the delay or anticipated delay in compliance with this decree has been or will be caused by circumstances entirely beyond the control of Defendant, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time and so inform the Court. In the event the parties cannot agree, any party may submit the matter to this Court for resolution.

c) The burden of proving that any delay is caused by circumstances entirely beyond the control of the Defendant shall rest with the Defendant. Increased

costs or expenses associated with the implementation of actions called for by this Decree shall not, in any event, be a basis for changes in this decree or extensions of time under paragraph b. Delay in achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

7. Public Comment on the Decree

A Department of Justice regulation calls for a thirty day public comment period on consent decrees which enjoin the discharge of pollutants. (See, 28 CFR §50.7) A provision should be included in these decrees which acknowledges this requirement.

EXAMPLE

> The parties agree and acknowledge that final approval and entry of this proposed decree is subject to the requirements of 28 CFR §50.7. That regulation provides that notice of the proposed consent decree be given to the public and that the public shall have at least thirty days to make any comments.

In the usual case, the proposed consent decree is executed by the parties and forwarded to the court with a cover letter advising the court that the decree should not be signed by the Judge or entered until the thirty day comment period has passed. When the comment period has passed, the court is advised either that no adverse comments were received or is advised of comments received and the EPA/DOJ responses to the comments. The court is then requested to sign and enter the decree.

8. Retention of Jurisdiction

The decree should include a provision which recites that the court will retain jurisdiction of the case in order to enforce

the decree and resolve disputes under the decree not specifically provided for elsewhere.

EXAMPLE

> The Court shall retain jurisdiction to modify and enforce the terms and conditions of this decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this decree.

9. Confidentiality of Documents

In some actions, defendant will claim that documents provided by it are confidential in nature. In these cases, the decree should provide that EPA regulations will control with regard to such documents.

EXAMPLE

> All information and documents submitted by defendants to EPA/State pursuant to this decree shall be subject to public inspection unless identified and deemed confidential by defendants in conformance with 40 CFR Part 2. The information and documents so identified as confidential will be disclosed only in accordance with EPA and State regulations.

10. Modification of the Consent Decree

Consent decrees entered by the court are court orders and as such may not be modified without the court's approval. Currently, consent decrees are executed on EPA's behalf by the Special Counsel for Enforcement or her delegatee. Therefore, modifications of decrees should be similarly executed. A provision in the decree reciting these principles will help to make clear to defendants what they must do in order to modify the decree.

EXAMPLE

> Any modification of this consent decree must be in writing and approved by the Court. Any such written modification must be executed on EPA's behalf by the Special Counsel for Enforcement or her delegatee or successor.

11. Termination of the Decree and Satisfaction

Since the defendant has agreed to settle the case and avoid trial, it is appropriate that EPA agree to a termination of the consent decree after the defendant has complied with all consent decree provisions. This provision is most appropriately placed at the conclusion of the decree or in the introductory 'front end' provisions of the decree.

This termination may be automatic upon completion of the terms of the decree. However, a provision calling for a motion for termination by the plaintiff is preferred. This required action by EPA would aid in eliminating disputes as to whether compliance was achieved or not and as to when the consent decree terminated. The decree may provide for a time lag between the time the defendant comes into compliance with the decree and the termination of the decree. This time lag ensures that the defendant continues to comply for a specified period of time. When termination is delayed in this manner, the time period specified is at least 180 days in most instances.

EXAMPLE

> The defendant must demonstrate to the plaintiff's satisfaction that the defendant has complied with all of the terms of the decree. One hundred and eighty days (180) after such a showing by the defendant, the plaintiff agrees to move the court to terminate the decree.

Additionally, during negotiations the defendant may insist on a provision which recites that the decree constitutes a full settlement of the action contained in the complaint and that this settlement bars the plaintiff from any other action against the defendant based on those violations. Such a clause should not be included in a decree unless the defendant specifically insists on its inclusion. These clauses should be narrowly drawn so that it is clear that only the specific action in the complaint is covered. Also, cases with multiple defendants or potential defendants require extra care so that these other parties are not released from liability when that is not intended.

EXAMPLE

> Plaintiff and Intervening Plaintiff will refrain from initiating any other civil enforcement action pursuar to Section 113(b) of the Act, 42 U.S.C. §7413, Secti 304 of the Act, 42 U.S.C. §7604, or applicable state law, with respect to the limitations contained in this Decree for the emission of particulate matter and visible emissions from the bark boiler while Defendant is in compliance with this Decree.

12. Costs of the Action

A consent decree should contain a provision which allocates responsibility for payment of court costs incurred in the action up to the date of settlement. In most negotiated settlements, each party bears its own costs.

EXAMPLE

> Each party in this action shall bear its own costs.

13. Execution of the Decree

The decree should include signature lines for those who will execute the decree on behalf of the parties and for the court.

The authority to settle judicial actions is currently delegated to the Associate Administrator for Legal and Enforcement Counsel. Therefore, consent decrees must be signed by the AA for OLEC or his delegatee. Additionally, in keeping with EPA's Memorandum of Understanding with the Department of Justice, settlements of cases in which DOJ represents the Agency require the consultation and concurrence of the Attorney General. Therefore, the decree should be signed by the Attorney General or his delegatee.

APPENDIX A
CONSENT DECREE CHECKLIST

(This checklist can be used as a guide for inclusion of consent decree provisions.)

NAME OF CASE: U.S. v. _____
Civil Action No. _____

PROVISION	INCLUDED YES	NO	COMMENTS
Identification of Parties and cause of action -			
Plaintiff & initiation of the action			
Defendant - where defendant does business or is incorporated, facilities covered by decree			
Intervenors			
Procedural history - prior consent decrees and status prior administrative action			
Transitional Clause			
Jurisdiction			
Statement of claim - complaint states claim for relief			
Applicability clause - to whom decree applies			
Public Interest - decree is in the public interest			
Definitions			

PROVISION	INCLUDED YES	INCLUDED NO	COMMENTS
Compliance Provisions -			
Test method for demonstration of compliance			
Monitoring provisions			
Entry and access			
Standards defendant must meet			
Schedules - final deadline and interim schedules construction schedules			
Operation & maintenance procedures			
Performance bonds			
Notification provision			
Civil penalties -			
Amount and form of payment (lump sum or installment)			
Penalty payment to State			
Credits			
Dispute Resolution			
Nonwaiver provision			
Stipulated penalties -			
Items covered			
How payed			
Dispute resolution			
Escrow arrangements			

PROVISION	INCLUDED YES	INCLUDED NO	COMMENTS
Force Majeure			
Events covered			
Burden of proof on defendant			
Defendant's duties (notification requirement)			
Dispute resolution			
Public comment on decree (28 CFR §50.7)			
Retention of jurisdiction (by the Court)			
Confidentiality of documents			
Modification of decree			
Termination & satisfaction			
Costs of the action			
Execution of decree			

APPENDIX B

SAMPLE CONSENT DECREES

(Attached are consent decrees from the Air and Water Programs. Although these decrees do not contain all of the provisions discussed in the guidance, they can be used as examples of completed decrees.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, and STATE OF MICHIGAN, et al., Intervening Plaintiff, v. PACKAGING CORPORATION OF AMERICA Defendant	)	CIVIL ACTION NO. G 81-289 CA 7 JUDGE BENJAMIN F. GIBSON

CONSENT DECREE

Plaintiff, United States of America, representing the United States Environmental Protection Agency (hereinafter, the "EPA"), having filed the Complaint herein on June 3, 1981;

And the State of Michigan, representing the Michigan Department of Natural Resources (hereinafter, the "DNR") and the Michigan Air Pollution Control Commission (hereinafter, the "Commission" or "MAPCC"), having moved to intervene as a party plaintiff on June 4, 1981, and this Court having granted said Motion;

And Plaintiff and Intervening Plaintiff having acted in concert in this action against Defendant, Packaging Corporation of America;

And Plaintiff, Intervening Plaintiff and Defendant having agreed that settlement of this matter is in the public

interest and that entry of this Decree without further litigation is the most appropriate means of resolving this matter;

And Plaintiff, Intervening Plaintiff and Defendant having moved the Court to enter this Consent Decree;

NOW, THEREFORE, before the taking of any testimony, upon the pleadings, without adjudication of any issue of fact or law, without any admission or denial of the violations alleged in the Complaint and upon consent and agreement of the parties of this Decree, it is hereby Ordered, Adjudged and Decreed as follows:

STIPULATIONS

1. This Court has jurisdiction of the subject matter herein and of the parties consenting for the purpose of entering this Consent Decree. The Complaint states a claim upon which relief can be granted against Defendant, under Section 113 of the Clean Air Act, as amended, (hereinafter, the "Act"), 42 U.S.C. 7413.

2. The provisions of this Consent Decree shall apply to and be binding upon all the parties to this action, their officers, directors, agents, servants, employees, successors and assigns, and all persons, firms and corporations having notice of the Consent Decree and who are, or will be, acting in concert and privity with the Defendant to this action or its officers, directors, agents, servants, employees and successors and assigns. In the event Defendant proposes to sell or transfer its real property or operations subject to this Consent Decree, it shall

advise such purchaser or transferee of the existence of this Decree, and shall notify all parties to this Decree of such proposed sale or transfer.

3. The parties agree and acknowledge that final approval and entry of this Decree is subject to the requirements of 28 C.F.R. §50.7, which provides that notice of proposed Consent Decrees be given to the public and that the public shall have at least 30 days in which to make any comments.

4. Defendant owns and operates a facility in Filer City, Michigan (hereinafter, the "Filer City facility") which includes a Riley bark-fired boiler (hereinafter, the "bark boiler"). The bark boiler is a source of air pollution emissions subject to the provisions of Michigan Air Pollution Control Commission Rules and the federally approved Michigan State Implementation Plan (hereinafter, the "Michigan SIP").

5. Former MAPCC Rule R 336.44 established an emission limitation for particulate matter of 0.65 pound of particulate matter per 1000 pounds of exhaust gases, corrected to 50 percent excess air, for the bark boiler.

6. Former MAPCC Rule R 336.41 established a smoke plume opacity limitation of 40 percent, generally, with certain exemptions not material to this Decree.

7. On May 31, 1972, the Administrator of the EPA approved, as part of the Michigan SIP, MAPCC Rules R 336.44 and R 336.41.

8. On or about November 19, 1979, Defendant received from the EPA a Notice of Violation citing, inter alia, the bark boiler for violations of R 336.44 and R 336.41 of the approved Michigan SIP. On December 19, 1979, a conference was held at EPA offices in Chicago, Illinois, with representatives of Defendant and the DNR, to discuss the cited violations.

9. MAPCC Rule R 336.1331 currently establishes an emission limitation for particulate matter of 0.50 pound of particulate matter per 1000 pounds of exhaust gases, corrected to 50 percent excess air, for the bark boiler.

10. MAPCC Rule R 336.1301 currently establishes a smoke plume opacity limitation of 20 percent, generally, with certain exemptions not material to this Decree.

11. On May 6, 1980, the Administrator of the EPA conditionally approved MAPCC Rules R 336.1331 and R 336.1301, as part of the Michigan SIP (45 Fed. Reg. 29791).

12. On or about August 17, 1982, Defendant received from the EPA a Notice of Violation citing the bark boiler for violations of R 336.1301 of the Michigan SIP.

13. Defendant owns and operates a boiler (hereinafter, the "No. 5 boiler") at its Filer City facility, which boiler was formerly a recovery boiler but is currently fired with natural gas. Defendant has applied to the Michigan DNR for an installation permit to convert the No. 5 boiler to multi-fuel operation (including the combustion of coal, wood, bark, wood waste, sludge, and natural gas). The Commission has recently approved

the issuance of such installation permit. The converted No. 5 boiler will have a baghouse collector as its air pollution control equipment (hereinafter the "No. 5 baghouse").

ORDER

In consideration of the foregoing and the representations made in open Court by the parties hereto, IT IS HEREBY ORDERED:

Defendant shall achieve, demonstrate, and maintain final compliance with MAPCC Rules R 336.44, R 336.41, R 336.1331 and R 336.1301, and other emission limitations specified in this Consent Decree, in accordance with the following paragraphs:

COMPLIANCE PROGRAM

1. Defendant shall install an add-on collector (side-stream separator) to the existing pollution control equipment of the bark boiler according to the following schedule:

a.	commence engineering and preparation of plans and specifications	Completed
b.	submit copies of plans and specifications to EPA and DNR; submit application to DNR for installation permit	Completed
c.	issue purchase order for collector	1/31/83
d.	begin on-site construction	8/31/83

e.	complete construction and installation	10/31/83
f.	complete "shakedown" and achieve compliance with a particulate emission limitation of .40 pound of particulate matter per 1000 lbs of exhaust gases, corrected to 50 percent excess air, and MAPCC Rule R 336.1301	11/30/83
g.	demonstrate compliance with the emissions limitations set forth in Subparagraph 1(f) in accordance with Appendix A	12/31/83

2. If Defendant elects to proceed with the No. 5 boiler conversion and construction of the No. 5 baghouse in lieu of the compliance program set forth in Paragraph 1 it shall, on or before March 15, 1983, so notify the EPA and the DNR, in writing, and certify that it has sent out requests for bids for the completion of the No. 5 boiler conversion and No. 5 baghouse and that the necessary funds have been appropriated. Upon such notification and certification, Defendant shall proceed with the compliance program set forth in Paragraph 3 and shall be thereafter excused from complying with subsequent requirements of Paragraph 1; provided, that if any stipulated penalties have accrued, prior to the date of such notification and certification, for failure to comply with the requirements of Paragraph 1 such penalties shall then become due and payable upon demand. If the notification and certification described herein is not given to the EPA and the DNR on or before March 15, 1983, Defendant shall not be relieved from the obligation under Paragraph 1 to

install the sidestream collector in accordance with the terms thereof.

3. If Defendant elects to proceed with the No. 5 boiler conversion and complies with the notice and certification requirements of Paragraph 2 on or before March 15, 1983, it shall install the No. 5 baghouse and either (a) route the bark boiler exhaust through the No. 5 baghouse, or (b) complete the No. 5 boiler conversion such that no bark or wood wastes are burned in the bark boiler, but will be burned instead in the No. 5 boiler, the emissions of which will be controlled by the No. 5 baghouse, in accordance with the following schedule:

a.	prepare specifications and submit copies to EPA and DNR	Completed
b.	obtain installation permit	Completed
c.	award contract	6/30/83
d.	begin on-site construction	2/28/84
e.	complete construction and installation and achieve compliance at the bark boiler with a particulate emission limitation of .05 pound of particulate matter per 1000 lbs of exhaust gases, corrected to 50 percent excess air, and MAPCC Rule R 336.1301	6/30/84
f.	demonstrate compliance with the emissions limitations set forth in Subparagraph 3(e) in accordance with Appendix A	7/31/84

If Defendant elects to proceed with the compliance program set forth in this paragraph it shall not operate the bark boiler

after June 30, 1984, unless the emissions thereof are controlled by the No. 5 baghouse.

4. If the No. 5 boiler and bark boiler are both controlled by the No. 5 baghouse, at no time shall they be operated simultaneously.

5. If Defendant proceeds with construction and installation of the sidestream collector in accordance with the terms of this Decree, nothing herein shall preclude it from proceeding with conversion of the No. 5 boiler at a later date (after March 15, 1983); provided, that such later election to proceed with the conversion shall not relieve Defendant from any obligation arising under this Decree to complete the requirements of Paragraph 1, hereof.

INTERIM REQUIREMENTS

6. Until final compliance is achieved pursuant to Paragraph 1 or 3, whichever is applicable, Defendant shall achieve and maintain compliance by the bark boiler with MAPCC Rule R 336.1331 and limit the density of visible air contaminants to a maximum of 44 percent opacity, determined as a six-minute average, except that a maximum of one six-minute average of up to 51 percent opacity shall be permitted in any one hour. Compliance shall be determined in accordance with EPA Method 9, Appendix A, 40 CFR, Part 60.

7. The operation and maintenance procedures set forth in Appendix B shall be implemented and followed until such time as bark boiler emissions are controlled by the No. 5 baghouse.

8. Upon request of the EPA or the DNR, and within thirty (30) days of any such request, Defendant shall perform stack testing at the bark boiler in accordance with Appendix A. Defendant shall notify the EPA and the DNR of the date of the stack test in sufficient time to allow said agencies to observe the testing. Such tests shall not be requested more often than every three months unless evidence is shown of noncompliance with the interim limits specified above.

CONTINUOUS MONITORING REQUIREMENTS

9. Defendant has installed and calibrated, and shall maintain and operate, a continuous opacity monitoring system in the stack which serves the bark boiler, in accordance with the procedures set forth in 40 CFR Part 60, Appendix B, or any other applicable procedures approved by the EPA.

10. Beginning with the calendar quarter commencing on January 1, 1983, Defendant shall prepare quarterly reports of "excess" emissions as measured by the opacity monitor identified in Paragraph 9 above. The reports shall be submitted to the EPA and the DNR within 30 days from the end of each calendar quarter and shall include the following information:

a. The magnitude of "excess" emissions in percent opacity, the date and time of commencement and completion of each time period of excess emissions, and the cause of each such exceedance.

b. If a malfunction is indicated in the report, the corrective actions taken, if any.

c. The date and times the opacity monitor was inoperative, or of system repairs and adjustment.

d. When the opacity monitor is inoperative, all equipment malfunctions and corrective actions taken.

e. Where no "excess" emissions have occurred, such shall be stated.

For the purposes of continuous emissions reporting pursuant to this Decree, "excess" emissions are those opacity monitor readings which exceed the applicable opacity standard. Average values may be obtained by integration over 6 minutes or by arithmetically averaging a minimum of 24 equally spaced, instantaneous opacity measurements in each 6 minute period.

11. During the period from January 1, 1983, through March 31, 1983, and for the first 90 days following a demonstration of compliance pursuant to paragraph 1(g), Defendant shall report all six-minute averages of excess emissions during boiler operation, including startup and shutdown. During all other times, Defendant shall maintain records of opacity during startup and shutdown and shall report all six-minute averages of excess emissions during boiler operation. During startup and shutdown, unless requested otherwise by the EPA or the DNR, Defendant need only report the times of excess emissions and the highest and lowest opacity readings.

12. After termination of this Consent Decree, Defendant shall continue to maintain the information required for "excess" emissions reports at its Filer City facility and make such information available to the EPA and the DNR upon request.

13. Beginning with the calendar quarter commencing on January 1, 1983, and continuing until all necessary work is completed, Defendant shall send to the EPA and the DNR, within 30 days from the end of each calendar quarter, quarterly reports on progress toward the achievement of final compliance with the terms of this Decree. If Defendant fails to meet a compliance schedule increment, it shall notify the EPA and the DNR within 10 days of such failure and set forth the cause therefor.

14. EPA and DNR repesentatives may at any time during normal business hours enter upon the premises of the Filer City facility to monitor compliance with this Decree including, but not limited to, performing stack tests on the bark boiler. Authorized contractors of the EPA or the DNR may, upon five days notice to Defendant, enter upon said premises for purposes of inspecting the facility or records pertaining to the bark boiler or stack testing of the bark boiler.

15. All information, reports, and notifications required by this Decree to be submitted by Defendant shall be sent to the following addresses:

Chief, Air Compliance Branch
United States Environmental
Protection Agency, Region V
230 South Dearborn
Chicago, Illinois 60604

Chief, Air Quality Division
Michigan Department of
Natural Resources
P.O. Box 30028
Lansing, Michigan 48909

GENERAL PROVISIONS

16. As consideration for Defendant's entry into this Consent Decree and the assumption of the obligations provided for herein, Plaintiff and Intervening Plaintiff will refrain from initiating any other civil enforcement action pursuant to Section 113(b) of the Act, 42 U.S.C. §7413, Section 304 of the Act, 42 U.S.C. §7604, or applicable state law, with respect to the limitations contained in this Decree for the emission of particulate matter and visible emissions from the bark boiler while Defendant is in compliance with this Decree.

17. This Consent Decree in no way affects Defendant's responsibility to comply with any other state, federal or local regulations or any Order of the Court including, but not limited to, Section 303 of the Act; 42 U.S.C. §7604.

18. Defendant acknowledges that it has been advised that it may be subject to the applicable requirements of Section 120 of the Clean Air Act, 42 U.S.C. §7420, but reserves the right to contest the assessment of any penalties under such Section.

19. Nothing in this Decree shall be construed as an admission by Defendant of violations of any provisions of the Act or of the Michigan SIP.

20. Notwithstanding any other provision of this Decree, Defendant may achieve compliance with any emission limitation or compliance requirement herein applicable to the bark boiler by permanently ceasing operation of the bark boiler. Stipulated

penalties associated with failure to perform any such requirement or achieve such limitation shall cease to accrue on the date of actual shutdown and written certification thereof to the EPA and the DNR. All stipulated penalties which have accrued prior to such actual shutdown and certification shall become due and payable upon demand.

21. The EPA and the DNR reserve the right to seek a modification of this Decree to impose more stringent emission limitations on the bark boiler, and to enforce such more stringent emission limitations, by reason of any revised (federally enforceable) state or federal law or regulation, including any revised implementation plan. Defendant reserves the right to seek a modification of this Decree if the EPA promulgates or approves a revised SIP that contains requirements that are less stringent than the emission limitations set forth in the Michigan SIP for the bark boiler as of the date of lodging of this Decree. It is the intent of the parties that any such modification of this Decree be accomplished through mutual agreement on a revised control strategy or compliance schedule (if necessary), followed by a joint application to the Court.

22. The parties anticipate that the installation of the add-on collector (sidestream separator) referred to in Paragraph 1 of this Consent Decree will result in compliance with the particulate and visible emission limitations further specified in Subparagraph 1(f). Should such compliance not be achieved with proper operation and maintenance of such equipment, PCA may apply

to the MAPCC for the establishment of an alternate visible emission limitation, pursuant to MAPCC Rule R 336.1301(1)(c), the establishment of a particulate mass emission limitation (not to exceed 0.5 lb per 1,000 pounds of exhaust gases, corrected to 50 percent excess air), or both. In either case, the DNR agrees not to oppose such application on the basis that compliance can be achieved by the installation of pollution control equipment additional to that required by this Consent Decree, unless such additional pollution control equipment is required because of a change in the applicable law. Such application shall in no way relieve PCA of its obligation to fully and timely comply with all interim and final requirements as set forth in this decree or from any liability for payment of stipulated penalties pursuant to Subparagraph 27(e)(1).

23. No provision of any installation permit necessary to implement the compliance program set forth in Paragraph 1 shall be construed to conflict with any express provision of this Consent Decree.

24. Nothing in this Consent Decree shall be construed to limit the right of the MAPCC and the DNR to impose and enforce more stringent emission limitations or pollution control equipment requirements for the bark boiler as the result of any revision to the Commission's rules.

CIVIL PENALTY AND COSTS

25. In consideration of Intervening Plaintiff's agreement to settle this action, Defendant agrees to reimburse the State of Michigan the sum of $40,000 for its costs and expenses associated with this case. Payment shall be made by certified check payable to "Treasurer, State of Michigan" and sent to the Assistant in Charge, Environmental Protection Division, Department of the Attorney General, Law Building, Lansing, Michigan 48913, within 15 days after final entry of this Decree.

26. The United States has determined that, pursuant to Section 113 of the Act, 42 U.S.C. §7413 and the Civil Penalty Policy of July 8, 1980, Defendant should pay a civil penalty of $40,000. Payment shall be made by certified check payable to "Treasurer, United States of America" and sent to the Regional Hearing Clerk, United States Environmental Protection Agency, Region V, 230 South Dearborn, Chicago, Illinois 60604, within 15 days after final entry of this Decree.

STIPULATED PENALTIES

27. It is hereby stipulated and agreed among the parties that unless excused by the provisions of Paragraph 28 of this Decree the following stipulated penalty provisions shall apply and may be enforced by the United States:

a. If Defendant fails to complete the installation of all pollution control equipment required by this Decree by the date specified (in Paragraph 1 or 3, whichever is

applicable) it shall be liable for a stipulated penalty of $7,500 for each day it operates the bark boiler without the required pollution control equipment.

b. If Defendant fails to issue a purchase order for the sidestream collector by the date specified in Paragraph 1(c), it shall be liable for a stipulated penalty of $2,000 for each day such failure continues.

c. If Defendant fails to meet any other interim date of a construction schedule (in Paragraph 1 or 3, whichever is applicable), it shall be liable for a stipulated penalty of $1500 for each day such failure continues. Any penalty liability under this subparagraph will be forgiven if Defendant meets the final compliance date in the applicable schedule for completion of the installation of the required pollution control equipment.

d. If Defendant fails to meet any interim testing requirement or emission limitation for the bark boiler it shall be liable for the following stipulated penalties:

1) The sum of $1000 for each day that the failure to meet a testing requirement continues;

2) The sum of $1,500 for each day that a violation of an interim opacity limit continues;

3) The sum of $7,000 for each day that a violation of an interim particulate mass emission limitation continues.

e. If Defendant fails to demonstrate final compliance with the applicable emission limits under Paragraph 1 (if applicable) by December 31, 1983, or fails to maintain compliance thereafter, it shall be liable for stipulated penalties as follows:

1) The sum of $2,500 per day for each day failure to demonstrate and/or maintain compliance with the specified particulate mass emission limit in Subparagraph 1(f) continues. Defendant's total liability under this subparagraph shall not exceed $20,000.

2) The sum of $7,000 for each day failure to demonstrate and/or maintain compliance with MAPCC Rule R 336.1331 continues.

3) If Defendant fails to demonstrate and/or maintain compliance with MAPCC Rule R 336.1331 and also fails to comply with R 336.1301, the additional sum of $2,500 for each day failure to demonstrate and/or maintain compliance with MAPCC Rule R 336.1301 continues.

f. If Defendant fails to demonstrate final compliance with the applicable emission limits under Paragraph 3 (if applicable) by July 31, 1984, or fails to maintain compliance thereafter, it shall be liable for stipulated penalties as follows:

1) The sum of $2,500 for each day failure to demonstrate and/or maintain compliance with the specified particulate mass emission limit in Subparagraph 3(e) continues. Defendant's total liability under this subparagraph shall not exceed $20,000.

2) The sum of $7,000 for each day failure to demonstrate and/or maintain compliance with MAPCC Rule R 336.1331 continues.

3) The sum of $2,500 for each day failure to demonstrate and/or maintain compliance with MAPCC Rule R 336.1301 continues.

g. If Defendant fails to comply with any of the operation and maintenance requirements set forth in Appendix B of this Decree, it shall be liable for a

stipulated penalty of $2,500 for each day such failure continues.

h. If Defendant fails to submit any quarterly "excess" emissions reports pursuant to Paragraph 10 or progress reports pursuant to Paragraph 13, it shall be liable for a stipulated penalty of $500 for each day such failure continues.

One-half of any payment made under this paragraph shall be by certified check payable to "Treasurer, United States of America" and sent as specified in Paragraph 26, within 15 days after a demand for payment has been made. The remaining one-half of any payment made under this paragraph shall be by certified check payable to "Treasurer, State of Michigan" and sent as specified in Paragraph 25, within 15 days after a demand for payment has been made. Such payments shall not be considered the exclusive remedy for violation of this Decree.

FORCE MAJEURE

28. Defendant's obligation to meet any requirement set out in this Decree, including achievement of compliance with any specific emission standard or regulation, may only be excused to the extent that such delay is beyond the control of, and without the fault of Defendant. Defendant shall notify the EPA and the DNR in writing within twenty (20) days of the event which causes or may cause the delay, describing in detail the anticipated length of the delay, the precise cause or causes of delay, the

measures taken and to be taken by Defendant to prevent or minimize the delay, and the timetable by which those measures will be implemented. Defendant will adopt all reasonable measures to avoid or minimize any such delay.

29. If the parties agree that the delay or anticipated delay was beyond the control of, and without fault of, Defendant this may be so stipulated and the parties may petition the Court for appropriate modification of this Decree. If the parties are unable to reach such agreement, any party may petition the Court for appropriate relief. The burden of proving that any delay was beyond the control of, and without fault of, Defendant is on Defendant. Failure by Defendant to comply with the notice requirements of this paragraph shall render Paragraphs 28 through 30 void and of no force and effect as to the particular incident involved and constitute a waiver of Defendant's right to request an extension of its obligations under this Decree based on such incident. Increased cost, by itself, shall not constitute an appropriate justification, for the purposes of this paragraph, to excuse noncompliance with any of the terms of this Decree.

30. An extension of one compliance date based upon a particular incident does not necessarily mean that Defendant qualifies for an extension of a subsequent compliance date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought.

TERMINATION

31. This Decree shall terminate one year after the date scheduled for demonstration of compliance in Paragraph 1(g) or 3(f), whichever is applicable, or at such earlier date as Defendant has demonstrated and maintained compliance with the requirements of Paragraph 1(f) or 3(e), whichever is applicable, as may be modified by the MAPCC pursuant to Paragraph 22, for a continuous period of six months, unless either party petitions the Court for an extension of this Decree and the Court grants such extension. Until termination of this Decree, jurisdiction is retained by this Court for the purpose of enabling any party to this Decree to apply to this Court at any time for the enforcement of any terms of this Decree.

For Plaintiff - United States of America:

By _____ Dated July 19, 1983

F. HENRY HABICHT II
Acting Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice

By _____ Dated _____

Assistant United States Attorney
Western District of Michigan

By _____ Dated May 2nd, 1983

VALDAS V. ADAMKUS
Regional Administrator
U.S. Environmental
Protection Agency, Region V

By _____ Dated April 11 1983
DEBORAH GARBER
Assistant Regional Counsel
U.S. Environmental
Protection Agency, Region V

By _____ Dated June 20, 1983
Courtney M. Price
Special Counsel for Enforcement
United States Environmental
Protection Agency

For Intervening Plaintiff - State of Michigan, et al.:

By _____ Dated April 7, 1983
E.E. VALENTINE
Assistant Attorney General,
Environmental Protection Division

By _____ Dated April 7, 1983
STEWART FREEMAN
Assistant-In-Charge
Environmental Protection Division

For Defendant - Packaging Corporation of America

By _____ Dated March 16, 1983
M.R. HAYMON
President
Packaging Corporation of America

Attest: _____
A.A. Haller
Assistant Secretary
Packaging Corporation of America

Consent Decree entered in accordance with the foregoing this ____ day of _____, 1983.

_____
Judge Benjamin F. Gibson
United States District Court
For The Western District of
Michigan

By_____
Deputy Clerk

JUL 15 1983

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 77-1163-BL

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF WELCH, McDOWELL COUNTY, WEST VIRGINIA, a municipal corporation, WELCH SANITARY BOARD, and the STATE OF WEST VIRGINIA, Defendants.	)	CONSENT ORDER

THIS MATTER having come before the Court upon the application of the United States of America for entry of this order; and

WHEREAS, the United States of America, the City of Welch (hereinafter, "Welch"), Welch Sanitary Board (hereinafter, "Board"), and the State of West Virginia have consented to entry of this order;

WHEREAS, this Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319(b);

WHEREAS, venue is proper in this Court pursuant to 28 U.S.C. 1391(b) and (c); and

WHEREAS, the Court finds that: Welch owns a sewage collection system in McDowell County, West Virginia, which discharges pollutants into Tug Fork; Welch controls the

financing and initiation of construction of sewage treatment works for that city; Welch created the Board to supervise, control, administer, operate and maintain any and all works for the collection and treatment of sewage which are owned by Welch; Tug Fork is a navigable waterway as defined in the Clean Water Act, section 502(7), 33 U.S.C. 1362(7); on August 23, 1974, pursuant to 33 U.S.C. 1342, and based upon an application submitted on behalf of the Board, the United States (through the U.S. Environmental Protection Agency) issued a national pollutant discharge elimination system (hereinafter, "NPDES") permit for the discharge of pollutants from the Board's sewage treatment system; the terms or conditions of the permit were not contested by the Board, Welch, or the State; the permit became effective on September 22, 1974; the permit required the Board to submit to the United States not later than March 22, 1975, a compliance schedule for termination of its discharge in accordance with 33 U.S.C. 1311(b)(1)(B); the Board has failed to submit the compliance schedule in violation of the permit; on May 17, 1976, the United States pursuant to 33 U.S.C. 1319(a)(3) and (4) issued findings of violation and an order for compliance to the Board, citing the Board for violations of its permit conditions and directing the Board to submit to the United States not later than June 18, 1976, a schedule for compliance; the Board has failed to submit the schedule for compliance in violation of the May 17, 1976, order; neither Welch nor the Board have constructed a sewage treatment works capable of achieving effluent limitations

based upon secondary treatment as defined by the Adminstrator of the Environmental Protection Agency pursuant to 33 U.S.C. 1314(d)(1); Welch and the Board have continued to discharge pollutants within the meaning of 33 U.S.C. 1311; the discharge of pollutants by Welch and the Board is not in compliance with an NPDES permit and is in continued violation of 33 U.S.C. 1311; and

WHEREAS, the parties have agreed that this order shall be lodged and made available for public comment prior to entry by the Court, pursuant to the procedures identified at 28 C.F.R. 50.7; and

WHEREAS, entry of this order is in the public interest; NOW THEREFORE,

Pursuant to F.R.C.P. 65, IT IS on this _____ day of _____, 1983, ORDERED that:

1. Municipal compliance plan.

Within 120 days of the entry of this order, or by November 30, 1983, whichever is earlier, the Board shall pursuant to F.R.C.P. 5 file with the Court and serve upon an individual designated by the United States Environmental Protection Agency (hereinafter, "EPA designate") and serve upon an individual designated by the West Virginia Department of Natural Resources (hereinafter, "WVDNR designate") a plan (hereinafter, "municipal compliance plan") for achieving compliance with the Clean Water Act. The Board shall file a municipal compliance plan which:

(a) has been certified by a registered professional engineer;

(b) identifies a treatment technology which the Board proposes to use and which will achieve the level of effluent quality attainable through the application of secondary treatment;

(c) proposes that construction of the treatment facility which will achieve the level of effluent quality attainable through the application of secondary treatment will be started by no later than May 1, 1984;

(d) proposes that construction of the treatment facility will be completed no later than May 1, 1986;

(e) proposes that the level of effluent quality attainable through the application of secondary treatment will be achieved no later than August 1, 1986;

(f) estimates the capital requirements of the treatment technology proposed;

(g) estimates the operation and maintenance costs of the treatment technology proposed;

(h) identifies the financial mechanisms proposed to be used by the Board for facility construction;

(i) identifies the financial mechanisms proposed to be used by the Board for generating adequate revenues for operation and maintenance;

2. Modifications to municipal compliance plan. The United States may inform the Board of any modifications which the United States proposes to the municipal compliance plan.

In the event the Board agrees to modify the municipal compliance plan as proposed by the United States, the Board shall pursuant to F.R.C.P. 5 file with the Court, and serve upon the EPA designate and the WVDNR designate, the modifications to which the Board and the United States have agreed. In the event the Board does not agree to modify the municipal compliance plan as proposed by the United States (or in the event the Board fails to file with the Court modifications to which the United States and the Board have agreed), the United States may pursuant to F.R.C.P. 5 file with the Court and serve upon the Board proposed modifications to the municipal compliance plan. The municipal compliance plan shall be deemed to be modified as proposed by the United States unless, within fourteen days of the filing of the proposed modification, American Cyanamid applies to the Court pursuant to F.R.C.P. 7 for further order.

3. Implementation of municipal compliance plan. The Board shall implement the municipal compliance plan filed by the Board, as modified by (a) modifications filed with the Court to which the Board and the United States have agreed, (b) modifications filed by the United States and for which timely motion for further order has not been made by the Board, and (c) further order of the Court.

4. Minimum effluent limitations. After August 1, 1986, the Board and Welch are enjoined from discharging any effluent from the collection system or treatment works that does not achieve the following effluent limitations:

(i) the arithmetic mean of the values for biological

oxygen demand for effluent samples collected in any period of thirty consecutive days shall not exceed 30 milligrams per liter;

(ii) the arithmetic mean of the values for biological oxygen demand for effluent samples collected in any period of seven consecutive days shall not exceed 45 milligrams per liter;

(iii) the arithmetic mean of the values for biological oxygen demand for effluent samples collected in any period of thirty days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period;

(iv) the arithmetic mean of the values of suspended solids for effluent samples collected in any period of thirty consecutive days shall not exceed 30 milligrams per liter;

(v) the arithmetic mean of the values of suspended solids for effluent samples collected in any period of seven consecutive days shall not exceed 45 milligrams per liter;

(vi) the arithmetic mean of the values of suspended solids for effluent samples collected in a period of thirty consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period;

(vii) the effluent values for pH shall be maintained within the limits of 6.0 to 9.0; and

(viii) the fecal coliform content of the effluent shall not exceed 200 per 100 milliliter as a 30-day geometric mean

based on not less than five samples during any 30-day period nor exceed 400 per 100 milliliter in more than ten percent of all samples during any 30-day period.

5. Compliance with NPDES permit. After August 1, 1986, the Board and Welch are enjoined from discharging any pollutant from the collection system or treatment works except in compliance with an NPDES permit issued pursuant to the Clean Water Act.

6. Penalty. The Board shall pay a civil penalty of [amount], by tendering a check in that amount payable to the order of the Treasurer of the United States within thirty days of the entry of this order.

7. Stipulated penalties. If the Board violates any provision of this order, the Board shall pay a civil penalty of

(i) $100 per day for each of the first 30 days of violation,

(ii) $200 per day for each of the next 60 days of violation,

(iii) $500 per day for each of the next 60 days of violation, and

(iv) $1000 per day for each of the next 60 days of violation. Thereafter, the United States may apply to the Court for appropriate penalties. The United States may apply to the Court at any time for other non-penalty relief in the event of any violation of the Act, of any permit issued pursuant to the Act, or of this order.

8. Nonwaiver provision. This order in no way relieves any defendant of responsibility to comply with any other State, Federal or local law or regulation. The order dated May 17, 1976, of the United States EPA retains full force and effect.

U.S.D.J.

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

OR. 1-2
GM #68

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

January 11, 1988

MEMORANDUM

SUBJECT: Procedures for Modifying Judicial Decrees

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 modifying consent decrees and other judicial orders entered in EPA enforcement cases.

Consent decree "modifications" are changes to a consent decree proposed jointly to the court by the Federal government and a defendant, largely to address circumstances which have arisen since the entry of the consent decree (such as force majeure events or other unanticipated circumstances). Thus, these "modifications" are distinct from Federal government unilateral enforcement actions requiring the violator to comply with the terms of the decree and imposing sanctions. Consent decree modifications should be addressed as follows:

- As soon as the need to modify a consent decree is discovered, the Region should send a letter to the appropriate OECM-AEC and DOJ-Environmental Enforcement Section Chief notifying them of the intent to open negotiations with the defendant. The letter should contain summary information sufficient to apprise OECM and DOJ of relevant facts, issues, and proposed solutions.

- Consistent with appropriate consultation procedures with OECM or DOJ, the Region (along with OECM or DOJ, as appropriate) may proceed to negotiate a modification of the consent decree in the manner described in the letter.

- o OECM retains authority for approving any modifications on behalf of EPA. DOJ retains authority for approving any modifications on behalf of the United States.

- o After OECM and DOJ officials have approved the modifications, the DOJ attorney will present the proposed consent decree modification to the appropriate court for approval.

SPMS CONSENT DECREE TRACKING MEASURE

A consent decree violation handled through modification will be considered addressed under the SPMS consent decree tracking measure when a modified consent decree is signed by the AA-OECM and DOJ representative. Until these officials approve the modification, the Region will report the consent decree in the "in violation with action planned" category.

If you have any questions regarding these procedures, please contact Lisa Oyler, Compliance Evaluation Branch, OECM, at 475-6118.

cc: Roger J. Marzulla, DOJ
David Buente, DOJ
Gerald A. Bryan, OCAPO
Thomas Gallagher, NEIC
Deputy Assistant Administrators, OECM
Associate Enforcement Counsels, OECM

GM-86
OR.2-1

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

FEB 6 1990

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Manual on Monitoring and Enforcing Administrative and Judicial Orders

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
Regional Administrators, I-X

This memorandum transmits the EPA Manual on Monitoring and Enforcing Administrative and Judicial Orders. The Manual provides general guidance to EPA enforcement staff on their roles and responsibilities in monitoring and enforcing final order requirements. The Manual applies to all regulatory enforcement programs with the exception of the CERCLA (Superfund) Program. The term "order" includes judicial consent decrees and administrative consent orders. The Manual also outlines a process for working with the EPA Financial Management Offices (FMOs) and the Department of Justice for monitoring and collecting penalties.

The Manual was prepared in response to recommendations in several Office of Inspector General (OIG) audit reports that OE, the Program Offices and the OARM Financial Management Division (FMD) develop clearer guidance and management systems for ensuring that administrative and judicial order requirements are aggressively monitored until compliance is achieved. A major concern of the OIG was the failure of enforcement staff to notify the Regional Financial Management Offices (FMOs) when administrative or judicial penalties have been assessed so that these "accounts receivables" can be entered into and tracked in the Agency's Integrated Financial Management System (IFMS).

The Manual has received two Agency-wide reviews, in May 1987 and October 1988. Both reviews surfaced gaps and deficiencies in the Manual's attempt to designate areas of responsibility and information sharing. The final Manual contains procedures designed to address the deficiencies.

The OARM FMD has drafted revisions to Chapter Nine of its Resource Management Directives to conform with the guidance agreed to in this Manual. These Directives will soon undergo green border review and may require some adjustments to the FMD-related sections of the Manual. Accordingly, the Manual will be updated as necessary. A summary of the major provisions of the Manual, including the latest revisions, is contained in Attachment A.

OE is available to assist you in implementing the revised procedures. Questions should be directed to Renelle Rae, Chief of the Program Development Branch, at 475-8777.

Attachments

cc: Deputy Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Regional Financial Management Offices

Associate Enforcement Counsels

Associate General Counsels

Headquarters Enforcement Office Directors

Financial Management Division Director

Deputy Assistant Administrator for Criminal Enforcement

Acting Director, National Enforcement Investigations Center

Chief, Environmental Enforcement Section, DOJ

Attachment #1

MANUAL ON MONITORING AND ENFORCING ADMINISTRATIVE AND JUDICIAL ORDERS

SUMMARY OF PROVISION AND RESPONSE TO COMMENTS

Chapter 1 - Monitoring and Reporting the Status of Orders.

Roles and Responsibilities

The Regional Program Office (RPO) is responsible for monitoring (i.e. routinely checking) compliance with the technical requirements in administrative and judicial orders. The Regional Financial Management Office (FMO) is responsible for monitoring and collecting administrative penalties as "accounts receivables". The Department of Justice (DOJ) is responsible for monitoring and collecting judicial penalties and for reporting the status of penalty collection to the EPA Headquarters Financial Management Division (HQ-FMD).

Reporting on Penalty Payments

While the RPO is not responsible for monitoring collection of administrative or judicial penalties, RPO is responsible for verifying that penalties have been paid before terminating an order or reporting a violator in full compliance. Therefore, RPO data systems should include the amount of penalties assessed in a final order and be able to report on a "yes/no" basis whether the total amount of the administrative or judicial penalty has been collected. The OE Docket also will report the amount of the judicial penalty assessed and contain a yes/no statement on whether the total amount assessed has been collected. The Integrated Financial Management System (IFMS) maintained by the Headquarters and Regional FMOs will be the official EPA system for reporting the numerical (dollar) amounts of enforcement penalties collected.

EPA Enforcement Payment Accounts Receivable Control Number

In order to cross-walk between program office systems and the IFMS, the Manual recommends that all programs enter into their program data system the assigned IFMS accounts receivable control number for the penalty assessed in each final order. When the Regional FMO receives a copy of a final order and establishes the accounts receivable in IFMS, the FMO will provide the RPO, the ORC and the Regional Hearing Clerk with the accounts receivable control number. The goal is to have the IMFS accounts receivable control number be the common identifier number in all data systems that report penalty information.

Several of the comments received on the Manual expressed concern that some program office data systems do not have the ability to report penalty payments on a "yes/no" basis or to include the IFMS accounts receivable control number. These additions would require modifications to their systems. Program Offices should follow the Manual's guidance, wherever possible including these penalty tracking modifications as they make other improvements to their system. OE will work with the Program Offices to ensure that these changes are made. As of the date of the issuance of the Manual, the IMFS will be recognized as the official EPA record of the total amount of dollars collected on every penalty assessed in a final order.

Chapter 2 - Collecting Administrative Penalties.

Roles and Responsibilities

The RPO (or the ORC in some Regions) is responsible for sending a copy of the final order assessing a penalty to the FMO. The FMO is responsible for monitoring and collecting the penalty as an accounts receivable for the first 120 days. The ORC is responsible for collecting the penalty after 120 days in default. The Regional Hearing Clerk is responsible for keeping the official administrative record for the case and including any penalty payment information received from the RPO, ORC or FMO in the record.

Notifying the FMO of Assessed Administrative Penalties

The 1989 OIG audits of the Regional Financial Management Offices found that the FMOs still are not receiving from enforcement offices all copies of final orders that assess penalties. The Manual adds a documentation procedure for ensuring that the responsible enforcement office sends to the FMO a copy of the order and the transmittal letter to the violator.

A new form entitled: "EPA Enforcement Payment Accounts Receivable Control Number Form", hereafter referred to as the Form (See last page of Attachment #1), will provide a record that the responsible EPA office has sent a copy of the final order to the FMO. The Form also will document that the FMO provided the offices designated on the Form with the IFMS accounts receivable control number for each assessed penalty. Under most enforcement programs, the RPO has been delegated the responsibility for administrative enforcement, so the Manual presumes the RPO is the responsible party ("originating office") for filling out the Form, and sending the Form with a copy of the final order and transmittal letter to violator to the FMO. In some Regions, the ORC may have assumed the "originating office" responsibility. A copy of the completed Form that includes the IFMS accounts

receivable control number should be included in the case file and available for review in the context of an audit.

Collecting, Enforcing and Terminating Administrative Penalty Payments

The procedures for coordinating among the FMO, RPO and ORC in collecting, enforcing and terminating administrative penalty payments also have been refined. At the request of FMD, the time frames have been added for ORC review of enforcement options regarding penalties that have not been paid within 120 days. The process for collecting, enforcing or terminating orders is as follows:

Once the FMO receives a copy of the final order and establishes the accounts receivable, the FMO will monitor and collect the receivable using standard debt collection practices. The FMO will send the RPO, ORC and Regional Hearing Clerk a copy of payments received. These payments will be identified by the IFMS Accounts Receivable Control Number.

Uncollected penalties, at the end of 120 days and after three demand letters have been issued, will be referred by the FMO to the ORC for review and option selection. The ORC, after consulting with the RPO, must notify the FMO, in writing within 30 days from receipt of debt from the FMO, of the collection option the ORC will pursue. Options include referring the penalty debt to DOJ for judicial collection, pursuing additional FMO collection activities such as outside collection agencies, or requesting termination of the debt. However, to uphold EPA's enforcement authority, administrative penalty debts should be terminated only under exceptional circumstances. The ORC's written response to the FMO should be included in the official case file.

Several reviewers of the draft Manual suggested that EPA and DOJ institute a direct referral process from the ORC to the U.S. Attorneys' Office (USAO) for administrative penalty debt collection. The current delegation of authority by the Attorney General to the Land and Natural Resources Division precludes a direct referral to the USAO of EPA enforcement cases including administrative penalty collection cases.

Chapter 3 - Collecting Judicial Penalties.

Roles and Responsibilities

The Manual recognizes that the DOJ Land and Natural Resources Division, Environmental Enforcement Section, hereinafter referred to as LNRD-EES, is responsible for

monitoring judicial penalty payments and the U.S. Attorneys' Office is responsible for collecting payments through the DOJ lockbox system and pursuing uncollected debts. While EPA is not responsible for collecting judicial penalty payments, it is the policy of EPA Financial Management Division that all judicial penalty payments that are the result of an EPA enforcement action be recorded in the IFMS as "accounts receivables". As EPA receivables, these debts must be monitored by the Regional FMO until collected or terminated. This requires all DOJ offices and all EPA offices involved with the penalty to have a common identifier number--the IFMS accounts receivable control number.

Superfund cost recovery payments (debts) obtained through judicial actions (court orders or consent decrees) are collected differently than judicial penalties. All cost recovery payments (administrative or judicial) are collected by the EPA Regional FMOs through the EPA Regional Superfund lockbox depositories. Even though a judicial cost recovery case has been handled by the USAO, Agency resource management directives (RMDS 2550) governing financial management of the Superfund Program require that EPA FMOs monitor and collect Superfund debts.

Obtaining Copies of Final Orders and Notifying the FMO of Penalties Assessments and Superfund Cost Recovery Payments

A major concern raised in the review on the draft Manual is that the ORC and the Regional FMOs do not consistently get copies of the final (entered) judicial orders (enforcement penalty or Superfund cost recovery) from the USAO. Under the guidance specified in Chapter Three, the LNRD-EES will be responsible for ensuring that the USAO sends a copy of the entered final order including all consent decrees to the appropriate ORC. The ORC is responsible for following up with the LNRD-EES or USAO if an order is not received. Unless another office is designated in a Region, the ORC is responsible for sending to the FMO a copy of the final order with the attached EPA Enforcement Payment Accounts Receivable Control Number Form.

The FMO will fill in the IFMS accounts receivable control number on the Form and send a copy of the Form to the parties designated on the Form, including the DOJ LNRD-EES. The Form containing the IFMS accounts receivable control number will be retained in the case file as documentation.

Reporting the Status of Penalty Payments

DOJ LNRD-EES will enter the IFMS accounts receivable control number in its Lands Docket Tracking System (LDTS) and will provide quarterly reports to the Headquarters FMD on the status

of EPA penalty payments using the IFMS number. The Headquarters FMD will distribute copies of these reports to the Regional FMOs. The FMOs will update the IFMS with the data received from LNRD-EES. The IFMS will be the official EPA system for reporting the dollar amounts of judicial enforcement penalties collected. Other EPA data systems will, as with administrative penalty payments, provide information on judicial penalty collection in a "yes/no penalty paid" format only. To interface with the IFMS, other EPA program offices can include the IFMS accounts receivable control number in their data systems.

Chapter 4 - Enforcing Orders.

This chapter remains unchanged and contains existing guidance on available enforcement tools such as motions for specific enforcement, contempt actions, contractor listing, etc. The Appendix contains procedures for working with DOJ Land and Natural Resources Division on modifying judicial orders or collecting stipulated penalties under judicial consent decrees.

EPA ENFORCEMENT ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE FILLED OUT BY ORIGINATING OFFICE:
(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: _____ _____
[Name of contact person] [Date]

in the _____ at _____
[office] [phone number]

☐ Non-SF Jud. Order/Consent Decree. **USAO COLLECTS.**

☐ Administrative Order/ Consent Agreement **FMO COLLECTS PAYMENT.**

☐ SF Jud. Order/Consent Decree. **FMO COLLECTS.**

☐ This is an original debt

☐ This is a modification

Name of Person and/or Company/Municipality making the payment

---

The Total Dollar Amount of Receivable _____
(If in installments, attach sch. of amounts and respective due dates)

The Case Docket Number _____

The Site-Specific Superfund (SF) Acct. Number _____

The Designated Regional/HQ Program Office _____

TO BE FILLED OUT BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number _____

If you have any questions call: _____ _____
[Name of Contact] [Date]
in the Financial Management Office, phone number: _____

JUDICIAL ORDERS: Copies of this form with an attached copy of the front page of the **final judicial** order should be mailed to:

1. Debt Tracking Officer
   Environmental Enforcement Section
   Department of Justice/Rm. 1647D
   P.O.Box 7611, Benjamin Franklin Station
   Washington, DC 20044
2. Originating office (ORC)
3. Designated Program Office

ADMINISTRATIVE ORDERS: Copies of this form with an attached copy of the front page of the **administrative** order should be sent to:

1. Originating office
2. Designated Program Office
3. Regional Hearing Clerk
4. Regional Counsel

GLOSSARY

Below are key terms for filling out the EPA Enforcement Payment Account Receivable Control Number Form.

EPA Originating Office - In the case of administrative orders, the EPA office that originates and sends a copy of the signed final order and the transmittal letter to the defendant/respondent is responsible for filling out the top half of the Form. In the case of judicial orders, the U.S. Attorneys' Office (USAO) will in most cases be the entity that sends a copy of the final (entered) order or consent decree to the defendant with a transmittal letter. By Directive, the USAO will send to the appropriate Office of Regional Counsel (ORC), a copy of the entered order and transmittal letter. Unless otherwise designated in a Region, the ORC will be the EPA originating office responsible for filling out the Form and sending a copy of the entered order to the FMO.

Designated Regional Headquarters Program Office - This is the Office responsible for enforcing the statutory program (e.g., CAA, CWA, TSCA, RCRA, FIFRA, Superfund, etc.) that governs the violation. The designated program office is responsible for tracking the technical (non-penalty) requirements of the order. This program will use the IFMS accounts receivable number to check with the FMO on the status of payment of the administrative or judicial penalty.

Case Docket Number - This is the number in the upper right hand corner of the final order that is provided by the Regional Hearing Clerk (administrative) or the Clerk of the Court (judicial).

Site-Specific Superfund Account Number - The ten digit number used in the Superfund Program to identify a particular site so that monies can be tied to specific sites and activities.

IFMS Accounts Receivable Control Number - When the FMO is provided documentation (final order) on the creation of a debt, the FMO enters the debt into the Integrated Financial Management System (IFMS) and creates a new accounts receivable. If there are several violators under the same case that will be making a payment, then each "payee" receives a different control number. The FMO will fill out a separate copy of the Form for each payee and accounts receivable control number.

The completed version of the Form with the EPA Originating Office and the FMO portions of the form filled in should be included in the enforcement case official file as a record for audit purposes that the final order was sent to the FMO and that an accounts receivable control number was provided.

MANUAL ON MONITORING AND ENFORCING ADMINISTRATIVE AND JUDICIAL ORDERS

January 1990

Office of Enforcement
U.S. Environmental Protection Agency

ACKNOWLEDGEMENTS

This manual is the end result of several management studies conducted by the Office of Enforcement (OE) and the Office of Administration and Resources Management (OARM) in FY 1987 and 1988. Acknowledgement for their contribution to this Manual goes to Renelle Rae, Project Leader; Lisa Nelson and Linda R. Thompson, OE Program Development and Training Branch; Robert Banks, Eloise Furbush and Bill Watt, OE Compliance Evaluation Branch; Lisa Fiely, Jo Cohen, Melvin Visnick, and Ivy Jacobs, OARM Financial Management Division; Ray Spears, Office of General Counsel (OGC); Ross Coneally, Ellen Stough, Dodie Steemland and Rosemarie Pacheco, Department of Justice; and the Headquarters and Regional staff who commented on the draft Manual.

Questions concerning this Manual or requests for additional copies should be directed to:

Chief, Program Development and Training Branch
Office of Compliance Analysis and
Program Operation
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

U.S. EPA Mail Code LE-133

INTRODUCTION

This Manual provides guidance to EPA enforcement staff on monitoring and enforcing administrative and judicial orders. The procedures described in this Manual apply to all EPA statutes that provide authority to issue administrative and judicial orders requiring compliance with Agency requirements with the exception of the CERCLA (Superfund) program. The procedures set forth herein will supersede general guidance in program case development manuals that address the topics in this Manual. Each program, however, may have more specific guidance on monitoring and tracking orders that supplements this manual.

The Manual focuses on the activities of Regional Offices in monitoring and enforcing penalties since the majority of the cases are initiated by the Regional programs. Some Headquarters offices, such as the Office of Toxic Substances, have national programs where enforcement cases are initiated, concluded and settlements monitored by Headquarters staff. These Headquarters offices have program, legal, administrative hearing clerk and financial management functions comparable to the Regional structure described in this Manual. Headquarters offices involved in monitoring and enforcing orders should substitute their office functions for the comparable Regional functions described and follow the guidance set forth in this Manual.

Table of Contents

CHAPTER ONE

MONITORING AND REPORTING THE STATUS OF FINAL ORDERS

Final Administrative and Judicial Orders (Decrees)

This chapter provides general guidance on the roles and responsibilities in monitoring (i.e. routinely checking) of compliance with EPA administrative and judicial order requirements and reporting the status of the orders in Agency reporting systems. EPA National Program Managers may have additional guidance for their program on monitoring and reporting that supplements this general guidance.

Because EPA statutes vary on the type of administrative and judicial authority available to address violations, program specific guidance should be referred to for information on the type and process for reaching a final administrative or judicial order. Once a final order has been issued, it must be monitored until compliance with the terms of the order has been achieved.

In this chapter and for the remainder of the Manual, the term "final order" refers to all types of orders including consent orders and consent decrees issued or entered [1] as final under the appropriate EPA administrative or judicial statutory authority. In addition, this manual will use the term "violator" [2] to refer to the party which must comply with an administrative or judicial order.

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1 Judicial consent decrees are first "lodged" with the court and published by the DOJ in the Federal Register for public review and comment. Unless challenged by the public, at the end of the 30-day review period the consent decree normally is entered as a final order (judgment) by the court (See 28 C.F.R. 50.7).2 Judicial enforcement actions refer to the violator as the "Defendant" and administrative actions refer to the violator as "Respondent".

Drafting Enforceable Orders

Clarifying Acceptable Verifications of Compliance

Development of an effective post-litigation/settlement monitoring program should begin at the time a settlement agreement and/or when the order is drafted. The final order must state the required activity clearly and precisely. Any work plans and schedules referenced and appended to the orders must also be clearly and precisely drafted with notice to the violator of what constitutes acceptable verification of compliance with terms and milestones.

Certification of Compliance

Where appropriate, a well-drafted agreement should include provisions for self-monitoring and self-reporting by the violator and instructions for penalty payments. The "responsible corporate or municipal officer" should be required to sign these self-monitoring reports to ensure that high-level management attention of the company or municipality is focused on complying with the order. Although such self-monitoring provisions do not obviate the need for periodic post-settlement monitoring by the Agency, they enable EPA to utilize its limited resources in a more efficient manner. See Appendix 1 of this chapter for guidance on self-monitoring and verification requirements.

Stipulated Penalty Provisions

Stipulated penalty provisions can be included in final orders to provide additional incentive for compliance. These are penalties agreed upon by the parties, at the time of entering into settlement, as being payable in the event that the violator does not comply with specified terms of the agreement. Appendix 2 of this chapter provides guidance on the use of stipulated penalties in EPA settlement agreements (administrative or judicial). Chapters Two (administrative) and Four (judicial) discuss the procedures for collecting stipulated penalties.

Ensuring Penalties Are Not Tax Deductible

To ensure that violators do not treat penalties as a business expense (i.e., pay to pollute), up-front and stipulated penalties clauses in settlement orders should inform the violator that penalties are not tax deductible. Under a Memorandum of Understanding with the IRS, EPA program offices and OE send to the IRS quarterly data on the names of violators and the amounts of penalties assessed.

Monitoring Systems

To be effective, a post-litigation/settlement enforcement program must be able to routinely track and identify violations of final order requirements and quickly take action to address the violations. Tracking compliance with technical (non-penalty) requirements of administrative and judicial orders is the responsibility of the Regional Program Offices (RPOs). Each National Program Manager is responsible for establishing oversight mechanisms (reporting, annual program audits or special management reviews) for ensuring that the RPOs have systems in place for following through on administrative and judicial orders. Each RPO is responsible for implementing, under its national program guidance, a specific system for monitoring compliance with the technical (non-penalty) requirements of judicial and administrative orders. Each RPO system should at a minimum include three elements: (1) an automated tracking system, (2) regular supervisory review of the status of active orders, and (3) maintenance of the case file. These elements are described in detail below.

Automated Tracking

An easily accessed automated data base is the first element of a sound monitoring system. To do this, three specific activities must occur. First, all judicial and administrative order requirements are entered into the system. Second, a "tickler system" is established that alerts the user to the order milestones due in each reporting period so that compliance can be verified. Third, the system must be routinely updated with compliance information.

All technical (non-penalty) compliance schedules and reporting requirements set forth in judicial decrees and administrative orders must be entered into the system in order for it to be used as a "tickler". When all requirements and due dates are entered into the system, the system should allow easy retrieval of requirements and due dates.

Some programs have national automated data systems designed for reporting national compliance information. These systems provide data fields for reporting compliance with technical and penalty milestones. These systems may or may not provide "tickler" monitoring system capability. Where national data bases are not available, RPOs can develop their own personal computer (PC)

"tickler" system. However, to minimize resources, PC "tickler" programs for monitoring compliance also should be designed for reporting purposes to provide the minimal national administrative enforcement data requirements established by each program.

The National Enforcement Investigations Center (NEIC) has an automated system that can be used as a tickler monitoring system for judicial orders (primarily consent decrees). The NEIC system can be used as a supplement to program office systems. As of October 1989, administrative orders can now be added and tracked in the NEIC data base. The Regional data clerks in the Office of Regional Counsel can access this system from Regional terminals. (See the ORC for more information on the services the NEIC system can provide.)

Routine updating must be made a high priority for the automated tracking system to be useful. Most programs with national automated data systems have requirements on the frequency of data updates for reporting compliance status under the Strategic Targeted Activities for Results System (STARS) and other management accountability systems. To obtain maximum effectiveness in using these data bases as "tickler" monitoring systems, RPOs should strive to update order milestones no less than quarterly, so that current information is available to engineers, project managers and supervisors concerning order requirements.

Regular Supervisory Review of the Status of Active Orders

Regular supervisory review is the second element for maintaining an effective monitoring system. Supervisors should routinely review the status of all cases with the engineer or project manager. This will help to ensure that all milestones set forth in the judicial and administrative orders are being met in a timely fashion and that office policy is being carried out effectively on discretionary issues. Given the low visibility of settled cases versus ongoing cases, it is essential that the supervisor conduct this type of review on a regular basis.

Maintenance of the Case File

The third element of an effective system for monitoring and enforcing orders is the maintenance of the files. Successful enforcement of order violations often hinges on the establishment of a "good paper trail", i.e., factual information that describes the type of violation(s), the frequency of violations and the

actions EPA has taken to address the violations. The file, therefore, should contain all documentation of efforts to verify compliance, such as routine company self-reporting and efforts to address noncompliance, EPA contacts with the company, telephone calls, meetings and letters.

Two important elements are necessary for ensuring the integrity of the documentation in the case file. First, each Region should strive to maintain a complete and up-to-date official file. (The official file can be a separate RPO file, ORC file or a common RPO-ORC file depending on the Region.) All documentation regarding compliance with order requirements should be in the designated official file.

Second, one person should be responsible for ensuring that all pertinent documents are in the official case file. This will ensure that all incoming documents are added to the file and that when a case file has been borrowed that all documents are still in the file when it is returned. Standard borrowing procedures allow only office personnel to remove the file. Monitoring "checked out" files is usually initiated by requiring borrowers to turn in a "check out slip" for all materials leaving the file room or file storage area. Supervisory oversight and routine file reviews should be utilized to ensure all pertinent documents are in the official file and that the integrity of the case file is subsequently maintained. Also, case files should not be archived until full compliance with any order has been verified.

Reporting Requirements

For reporting (not monitoring) purposes, RPO automated data systems should maintain a data field for recording penalty payments. While RPOs are not responsible for monitoring and collecting penalties, RPOs are responsible for verifying that all penalties, including assessed stipulated penalties [3], have been

[3] Stipulated penalties are considered "assessed" and should be entered into the RPO data base when the responsible EPA (administrative) or DOJ (judicial) official sends the violator a "bill for stipulated penalties". See Chapter Two (administrative penalties) and Chapter three (judicial penalties) for additional guidance.

paid before terminating or closing out a judicial and administrative order, or reporting the violator as "in compliance" in its data systems. RPO data systems should provide the amount of penalty assessed and a "yes or no" field on whether penalties have been paid.

Chapter Two of this manual describes the procedure for collecting administrative penalties through the financial management offices of EPA. The Integrated Financial Management System (IFMS) (automated data base) will provide the numerical data on the status of each penalty debt and the total amount of penalties collected. Chapter Three describes the monitoring and collection of judicial penalties by DOJ and the reporting of penalty collection information to the IFMS.

Additional Oversight Requirements for Administrative Orders

[Note: Based on a recommendation of the Enforcement Management Council, an OE work group is currently developing a set of minimum data requirements that each national program manager should maintain on administrative enforcement actions from initiation to compliance with all final order requirements. This manual will be revised to include those requirements when they become final.]

Some program offices such as the OPTS-Office of Compliance Monitoring require the Regional Offices to submit final civil administrative orders to Headquarters for inclusion on a central listing, so that a history of nationwide non-compliance can be documented.

Additional Oversight Requirements For Judicial Orders (Consent Decrees)

Judicial Consent Decree Tracking and Follow-up Directive

This Directive contained in Appendix 3 of this chapter outlines the basic requirements for effective management of Agency consent decree tracking and follow-up responsibilities and supplements this manual's guidance.

STARS Consent Decree Tracking Measure

Under the STARS consent decree tracking measure, each Region is responsible for quarterly reporting of compliance status of its active judicial orders to OE. See the Directives in Appendix 3 of this chapter.

NEIC Central Repository

Under EPA guidance issued on December 20, 1983, each Region must send to the National Enforcement Investigations Center (NEIC) - Lakewood, CO, a copy of all judicial orders to which EPA is a party. This includes State court orders where EPA is a party. All subsequent modifications of judicial orders approved by a court also must be forwarded. The ORC is responsible for sending judicial orders to NEIC unless the Region has officially designated the Regional Program Office as the responsible office.

The NEIC maintains a central (hard copy) repository for all EPA judicial orders and an automated management information system that stores summaries of each decree. It is essential that the EPA have a complete file on all orders. EPA's enforcement program is decentralized and defendants can use that to their advantage in negotiating settlements with EPA Regions. The NEIC Central Repository enables the Agency to exchange information across Regions on the scope and type of language provided in orders. For example, a defendant may assert that EPA has provided a certain type of relief for a similarly-situated company in another Region. The NEIC repository provides a tool for enforcement staff to verify that assertion and to determine the context for that provision. (Obviously, use of a provision in one case does not necessarily make it appropriate in a different case.)

The NEIC data analyst who maintains the OE Docket in each Office of Regional Counsel (ORC) can access the NEIC data base for judicial order information. Regions also can use the NEIC automated system as a "tickler" system and as a means of reporting the compliance status of judicial orders under the STARS consent decree tracking measure mentioned above.

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

JUL 25 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Certification of Compliance with Enforcement Agreements

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels

I. BACKGROUND

Over the past several years, EPA has initiated record numbers of civil judicial and administrative enforcement actions. The vast majority of such actions have been resolved by judicial consent decree or administrative consent order.

The terms of many of these settlements require the violator to perform specific tasks necessary to return to or demonstrate compliance, to accomplish specific environmental cleanup or other remedial steps, and to take prescribed environmentally beneficial action.

Settlement agreements typically specify that the violator perform certain required activities and thereafter report their accomplishment to EPA. Verification that the required activities have actually been accomplished is an essential element in the overall success of the Agency's enforcement program.

II. PURPOSE

The focus of this advisory guidance is on verification of compliance with settlement agreements which require specific performance to achieve or maintain compliance with a regulatory standard. EPA has ongoing responsibility for ensuring that settling parties are in compliance with the terms of their negotiated agreements. To this end, the Agency may require that a responsible official (as that term is defined herein) personally attest to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement.

The inspection programs of EPA and other federal regulatory agencies are based of necessity on the concept that a limited number of regulated facilities will be inspected each year. Conversely, this means that a large number of regulated parties can operate for extended periods of time without being the subject of an on-site inspection by EPA staff. Hence, it is crucial to ensure that all required compliance reports are received from the regulated facility in a timely manner. In addition--and equally as important--timely review of such reports must be undertaken by EPA to ensure that the reports are adequate under the terms of the settlement agreement.

EPA experience shows that the majority of regulated parties make good faith efforts to comply with their responsibilities under the environmental laws and regulations. Nevertheless, the Agency must have effective monitoring procedures to detect instances of noncompliance with a settlement agreement. A vital component of these procedures will be to ensure that the environmental results obtained in the enforcement action are indeed achieved and that criminal sanctions, where appropriate, are available to respond to instances of intentional misrepresentation or fraud committed by such violators.

EPA will ensure that all responsible officials entering into settlement agreements with the Agency are held accountable for their subsequent actions and the actions of any subordinates responsible for the information contained in compliance reports submitted to the Agency.

III. GUIDANCE

A. Certification by Responsible Corporate Official

The terms of settlement agreements, as well as any certification language in subsequent reports to the Agency, should be drafted in a manner to trigger the sanctions of 18 U.S.C. §1001, [1/] in the event that false information is knowingly and willfully submitted to EPA. Submission of such false information

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1/ United States Code, Title 18, Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

may also expose the defendant(s) in judicial consent decree falsification incidents to both civil and criminal contempt proceedings.

This provision of law is a key sanction within the federal criminal code for discouraging any person from intentionally deceiving or misleading the United States government.

1. Signatories to Reports

Settlement agreements should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of any agreement, shall be signed by a responsible official. The term "responsible official" means as follows:[2/]

a. For a corporation: a responsible corporate officer. A responsible corporate officer means: (a) A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $35 million (in 1987 dollars when the Consumer Price Index was 345.3), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

2. When to Require a Certification Statement

The requirement for an attestation by a responsible official is always useful as a matter of sound regulatory management practice. Such a requirement is more urgent,

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(Note 1, cont'd)

fined not more than $10,000 or imprisoned not more than five years, or both."

There are four basic elements to a Section 1001 offense: (1) a statement; (2) falsity; (3) the false statement be made "knowingly and willfully"; and (4) the false statement be made in a "matter within the jurisdiction of any department or agency of the United States". United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965).

2/ For NPDES matters, the definitions of "responsible official" and "certification", as set forth in 40 CFR §122.22, may be used as alternative language to this guidance.

however, where a regulated party has a history of noncompliance or where prior violations place one's veracity into question. 3/

3. Terms of a Certification Statement

An example of an appropriate certification statement for inclusion in reports submitted to the Agency by regulated parties who are signatory to a settlement agreement is as follows:

> "I certify that the information contained in or accompanying this (submission) (document) is true, accurate, and complete.
>
> "As to (the) (those) identified portion(s) of this (submission) (document) for which I cannot personally verify (its) (their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete." 4/

B. Documentation to Verify Compliance

Typical settlement agreements require specific steps to be undertaken by the violator. As EPA staff members engage in settlement negotiations and the drafting of settlement documents, they should identify that documentation which constitutes the

3/ While personal liability is desirable to promote compliance, it should be noted that corporations may be convicted under 18 U.S.C. §1001 as well. A corporation may be held criminally responsible for the criminal acts of its employees, even if the actions of the employees were against corporate policy or express instructions. See U.S. v. Automated Medical Laboratories, 770 F.2d 339 (4th Cir. 1985); U.S. v. Richmond, 700 F.2d 1183 (8th Cir. 1983). Moreover, both a corporation and its agents may be convicted for the same offense. See U.S. v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983).

4/ It is inevitable that in negotiating consent agreements, counsel for respondents will seek to insert language in the certification statement as to the truth of the submissions to be to the "best information" or to the "fullest understanding" or "belief" of the certifier. Such qualifiers should not be incorporated, since the provisions of 18 U.S.C. §1001 provide for prosecution for making false statements knowingly and willfully--not for forming erroneous beliefs, etc.

most useful evidence that the action required has actually been undertaken. The most useful evidence would be that information or documentation that best and most easily allows the Agency to verify compliance with the terms (including milestones) of a settlement agreement. Examples of documentation to substantiate compliance include, but are not limited to, invoices, work orders, disposal records, and receipts or manifests.

Attachment A is a suggested type of checklist that can be developed for use within each program area. 5/ The checklist includes examples of specific documentary evidence which can be required to substantiate that prescribed actions have, in fact, been undertaken.

IV. SUMMARY

This guidance is to provide assistance to EPA employees who negotiate and draft settlement documents. It is appropriate when circumstances so dictate that such documents contain sufficient certification language for ensuring, to the maximum extent possible, that all reports made to EPA, pursuant to the terms of any settlement agreement, are true, accurate, and complete, and that such reports are attested to by a responsible official.

The Agency must incorporate within its overall regulatory framework all reasonable means for assuring compliance by the regulated community. The inclusion of compliance certification language, supported by precise documentation requirements, in negotiated settlement agreements may, in appropriate instances, mean the difference between full compliance with both the letter and the spirit of the law, and something less than full compliance. In the case of the latter, the violating party is then subject to the sanctions of the federal criminal code.

Attachment A

5/ EPA or a State may be unable to confirm the accuracy of certifications for an extended period of time. Therefore, it is suggested that, whenever certification by a respondent/defendant is required, the order/decree provide that "back-up" documentation--such as laboratory notes and materials of the types listed in the examples in the text above--be retained for an appropriate period of time, such as three years. See, for example, the 3 year retention time in 40 CFR §122.41(j)(2).

MEANS OF CERTIFYING COMPLIANCE
WITH CONSENT AGREEMENTS
(Examples)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Purchase pollution control equipment.	*Equipment purchased	*Invoice
*Installation	*Equipment installed and tested	*Invoice for work with photograph
*Ongoing operation and maintenance	*Operating as required	*Continuous monitoring tape *Periodic sample results *Maintenance of records
*Meet discharge levels	*Discharge levels have been met	*Continuous monitoring tapes *Periodic sample results
*Labeled transformers	*Transformers have been labeled	*Photographs
*Do risk study	*Study has been completed	*Study report and recommendations
*Hire employees	*Employees have been hired	*Personnel records *Position descriptions *Entry on duty dates *Salary data
*Use complying coatings	*Verifying complying coatings are used	*Documents to verify VOC content
*Train employees (e.g., work practices)	*Employee training has been completed	*Educational materials and record of employee attendance at training session
*Set up environmental auditing unit	*Unit has been established *Orientation and instruction completed	*Same as above re: personnel *Charter of audit group

(continued on next page)

MEANS OF CERTIFYING COMPLIANCE
WITH CONSENT AGREEMENTS
(Examples)

(continued from previous page)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Dispose of PCBs	*PCBs disposed of in lawful manner	*Copies of manifests
*Replace PCB transformers	*New transformers installed	*Copies of purchase and installation receipts
*Register pesticide certification of applicator	*Applicator certification has been accomplished	*Copies of certificates
*Remove cancelled product from the market	*Removal has been accomplished	*Copies of correspondance with customers and documentation of removal *Copies of customer lists for independent verification by EPA and states
*Comply with asbestos removal and disposal regulations	*Compliance with asbestos removal and disposal regulations on a job-by-job basis	*List of locations of all jobs
*Monitor waste stream	*Waste stream has been properly monitored	*Discharge Monitoring Report
*Sludge removal	*Sludge removed by milestone deadline	*Copies of invoices on sludge removal
*Conduct groundwater monitoring	*Groundwater monitoring accomplished in appropriate manner	*2/A (quality analysis) tests; certification by laboratory
*Collect and analyze soil samples	*Soil samples collected and analyzed in specified manner	*Same as above
*Remove contaminated soils and dispose of in compliance with RCRA	*Contaminated soils removed and disposed of compliance with RCRA	*Copies of contract documents and manifests

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
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 per day basis than the initial civil penalties imposed. See Guidelines for Enforcing Federal District Court Orders in Environmental Cases (GM-27).

The economic benefit accruing to a source due to a violation should be recovered in order for the stipulated penalty to be an effective deterrent. For some types of violations, such as notice provisions, the economic benefit of noncompliance may be minimal, though significant stipulated penalties may be appropriate based on other criteria as discussed below. For these types of violations, no formal BEN analysis is necessary. For violation of provisions which involve quantifiable delayed or avoided costs, such as installation of control equipment as part of a compliance schedule, the minimum stipulated penalty should be the economic benefit of noncompliance. However, the recidivism factor will nearly always justify a penalty well above this minimum, which often serves as the point of departure for a minimum initial penalty.

The source's ability to pay can be another important criterion to consider. How much of a deterrent a stipulated penalty is will depend on how financially significant it is to the source. The same stipulated penalty may be

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[1] In considering whether to attach penalties to violations uncovered by an environmental audit, the November 14, 1986 Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (GM-52) should be consulted.

financially crippling to one source, while merely a routine business expense for another. However, the burden is always on the defendant to raise such issues during negotiations and to justify lower stipulated penalties than the government has proposed. Financial ability to pay a penalty can be determined using the ABEL computer program for corporate violators and the MABEL computer program for municipal violators.

It should be emphasized that this factor should not be considered a reason for lowering the level of stipulated penalties below the level equal to the economic benefit. It would mainly affect the degree to which this base minimum amount is increased to account for the recidivist nature of the violation. The key concern is that stipulated penalties should be set at levels which are significant enough to deter violations rather than resulting in a "pay-to-pollute" scheme.

Another criterion which should be considered in setting stipulated penalty amounts is the gravity of the violation, i.e., how critical is the requirement to the overall regulatory scheme and how environmentally significant is the violation. The environmental significance factor should include consideration of potential and actual harm to human health and the environment. In general, consent agreement provisions which are central to a particular regulatory scheme should have higher stipulated penalties than provisions that are considered less significant. It is up to each enforcement program to make judgments about the relative importance of respective requirements. As previously noted, some consent agreement requirements such as notice provisions may have little or no associated economic benefit, but may nevertheless be critical to the regulatory program in question and would warrant high stipulated penalties.

Another consideration related to the gravity component is the source's history of compliance. If the source has a record of previous violations, a higher stipulated penalty may be necessary because earlier enforcement responses were ineffective in deterring subsequent violations.

Another option to consider whenever setting stipulated penalty levels is an escalating schedule, in which the stipulated penalty increases with the length of the violation. For example, violations of up to two weeks might have stipulated penalties of $1000 per day while violations of two to four weeks might have stipulated penalties of $2000 per day, and so on.

III. Method of Collection

Settlement agreements should state the method by which stipulated penalties will be collected. Two options are for the settlement agreement to provide that the penalty is automatically due upon the occurrence or non-occurrence of a specified event, or it may make the penalty payable only on demand by the government.

Automatic payment is the preferred approach. It saves resources which would otherwise be devoted to making demands for payment and may put the government in a more advantageous position should the source declare bankruptcy. If payment is made on demand, the consent agreement should make it clear that the legal liability of the source for the stipulated penalty attaches immediately upon violation, and it is only payment of the penalty to the Agency which is not due until demand is made.

Settlement agreements should always state where and how the penalty should be paid and how the check should be drafted. See EPA Manual on Monitoring and Enforcing Administrative and Judicial Orders for additional guidance. In addition, settlement agreements should not agree to pre-enforcement review of accrued stipulated penalties.

IV. Timing of Enforcement Responses

Prompt action to collect stipulated penalties due under any consent agreement is crucial. If stipulated penalties are due on demand, it is very important such demands be timely. The government encounters significant difficulty collecting stipulated penalties if it sits on its rights. Delay allows penalties to increase to levels parties may argue are inequitable. Sources may also raise equitable defenses such as laches or estoppel, arguing that the government cannot fail to exercise its rights for extended periods of time allowing stipulated penalties to continue to accrue and then move to collect unreasonably high penalties. The government, of course, can and should always rebut such claims by arguing it is simply enforcing the decree or agreement as agreed to by defendant, and is not subject to such equitable defenses. However, this unnecessary complication should be avoided.

A cap on the amount of stipulated penalties which can accrue is generally not a preferred solution to this problem. The stipulated penalty would lose its deterrent value once the cap is reached. Also, the main goal of any enforcement action must be compliance with the law so that public health and welfare is protected. If consent agreement provisions

are allowed to be violated long enough for a cap to be reached, serious environmental consequences may have occurred.

Providing that stipulated penalties only apply for a specific, reasonably short period of time in conjunction with reserving to the government all available enforcement responses for violation of the consent agreement, however, solves many of the problems mentioned above. By its own terms, stipulated penalties will not accrue to levels defendants can argue are inequitable. The government will be in a strong position when it pursues other enforcement options, such as contempt actions or a new enforcement action to get additional penalties, because it can argue that the penalties in the original consent agreement were not enough to deter the defendant from further violations and the possibility of additional penalties was clearly contemplated.

V. Reservation of Rights

All consent agreements must contain a provision which reserves to the government the right to pursue any legally available enforcement response for violation of any consent agreement provision. These enforcement responses would include civil contempt proceedings and injunctive relief, and criminal contempt proceedings for particularly egregious violations. However, for provisions mandated by statute or regulation and which have stipulated penalties attached, a reservation to pursue statutory penalties is suggested but not required. For model language, see the October 19, 1983 Guidance for Drafting Judicial Consent Decrees (GM-17).

VI. Collection of Stipulated Penalties

The government should be prepared to collect the full amount of stipulated penalties due under a consent agreement. No agreement should ever anticipate compromise by specifying instances where it will be allowed, aside from a standard force majeure clause. In rare, unforeseeable circumstances, however, the equities of a case may indicate that the government may compromise the amount it agrees to collect. For penalties payable on demand, the government may also exercise prosecutorial discretion by declining to proffer a demand for stipulated penalties for minor violations of a consent agreement.

It may also be appropriate to provide that stipulated penalties for violation of interim milestones in a compliance schedule will be forgiven if the final deadline for achieving compliance is met. This is clearly inappropriate where there is significant environmental harm caused by the defendant missing the interim deadlines. If such a provision is used,

the defendant should generally be required to place accrued penalties in an escrow account until compliance by the final deadline is achieved.

In judicial cases, the Attorney General and his delegatees in the Department of Justice (DOJ) have plenary prosecutorial discretion to compromise stipulated penalties. This authority stems from 25 U.S.C. § 516, which reserves to DOJ authority to conduct the litigation of the United States, including cases in which an agency of the United States is a party, and the cases and regulations broadly interpreting this authority.

In administrative cases handled solely by EPA, stipulated penalties should be collected pursuant to the enforcement authority granted to EPA under the statute governing the case. This authority to collect and compromise stipulated penalties varies from statute to statute.

Separate from the process for collecting stipulated penalties, EPA must keep track of money owed the federal government (accounts receivable) resulting out of the activities of the Agency, including administrative penalty assessments. A stipulated penalty becomes an account receivable when the appropriate Agency official determines that a violation of a consent agreement provision with an attached penalty has occurred. Under Agency financial regulations and policies for monitoring accounts receivable, stipulated penalties due and owing must be reported within three days to the Regional Financial Management Office (FMO). The FMO is responsible for entering the stipulated penalty as an accounts receivable into the Agency's Integrated Financial Management System (IFMS). The "appropriate agency official" who determines the existence of a stipulated penalty account receivable is responsible for keeping the FMO updated on the status of enforcement penalty collection efforts. A more detailed account of these procedures is included in the Manual on Monitoring and Enforcing Administrative and Judicial Orders.

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

JAN 11 1990

MEMORANDUM

SUBJECT: Agency Judicial Consent Decree Tracking and Follow-up Directive

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
Regional Administrators, I-X

This memorandum transmits the Agency Judicial Consent Decree Tracking and Follow-up Directive. The Directive specifies Agency requirements for how EPA Regional Offices track compliance with judicial consent decree requirements and for how Regions select and document decisions on appropriate Agency follow-up responses to consent decree violations (for the purposes of this Directive, the use of the term "consent decree" also includes judicially imposed court orders). Each Region should develop and execute a plan to implement this Directive so that all elements will be in place by April 30, 1990. By no later than May 30, each Region should submit to me a memorandum detailing the steps they have taken to implement the Directive. In addition, we intend to review its implementation during this year's audits of the Offices of Regional Counsel.

The Directive was developed after an extensive review of current Agency requirements and practices conducted, over the last nine months, in consultation with the Enforcement Management Council and the Enforcement Office Directors. We appreciate the efforts of the Regional and Headquarters offices, which made significant contributions to the study and to the development of the requirements outlined in this Directive. The resultant Directive outlines the basic requirements that are necessary to effectively manage our consent decree tracking and follow-up responsibilities and should be used as a supplement to the Agency "Manual on Monitoring and Enforcing Administrative and Judicial Orders", which OECM will soon be publishing.

There are a few requirements from the Directive that I would like to highlight. The Directive emphasizes the need for adequate documentation of each violation and the selection of the Agency's enforcement response in response to a violation. The documentation requirement is handled through the use of a form which has been kept basic so as to not cause a resource drain on Regional resources. The Directive also lays out a requirement for database management but provides each Region with maximum flexibility on selecting the appropriate method of maintaining its database based on its caseload and computer capabilities. Finally, the Directive requires that the Regional Program Division and the Office of Regional Counsel jointly select the Agency response to a consent decree violation, with the decision made at the Branch Chief or higher level in keeping with the seriousness associated with consent decree violations.

Fulfilling the requirements of the Directive should allow us to successfully address the increasing workload associated with the growing number of judicial consent decrees. We will soon be discussing with the Headquarters Enforcement Office Directors the appropriateness of applying elements of these judicial Directive requirements to at least some classes of administrative enforcement orders.

Each Region currently reports quarterly on the status of each active consent decree as part of the Agency's STARS system. OECM would like to move to oversight of Regional consent decree tracking and follow-up implementation through our existing Regional audits, rather than through the STARS system. We will assess the Regions' success in implementing this Directive with the goal of dropping this activity as a STARS reporting measure in FY 1992. We will also be working with the Headquarters Enforcement Office Directors to include consent decree tracking and follow-up activity in their Regional audit programs. As we move to drop the STARS reporting requirements, Regions must assure that their consent decree tracking systems have the capacity to provide timely information or reports on the compliance status of their consent decrees to respond to information requests that might occasionally be made by Agency management or in response to outside inquiries.

OECM is available to provide assistance to you in implementing this Directive. Rick Duffy, Chief of the Compliance Evaluation Branch, or Bill Watt of his staff are available to assist the Regions on the technical and management requirements and can be reached at 382-3130. Regions interested in exploring the option of using the consent decree tracking database management system developed by the National Enforcement Investigation Center (the NEIC-CDETS) should contact Rob Laidlaw at 776-3210.

Attachment

cc: Headquarters Enforcement Office Directors
Deputy Regional Administrators, I-X
Regional Counsels, I-X
Associate Enforcement Counsels
Acting Director, NEIC
Regional Program Division Directors, I-X

Judicial Consent Decree Tracking and Follow-up Directive

January 1990

Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

Questions concerning this Directive or requests for additional copies can be directed to:

Chief, Compliance Evaluation Branch
Office of Compliance Analysis and Program Operations
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

401 M Street S.W.
Washington, D.C. 20460
(202 - 382-3130)

U.S. EPA Mail Code LE-133

JUDICIAL CONSENT DECREE TRACKING AND FOLLOW-UP DIRECTIVE

PURPOSE

This directive is provided to clarify and supplement existing Agency requirements and guidance for judicial consent decree tracking and follow-up. Agency managers responsible for consent decree tracking and follow-up activities must implement the requirements of this directive. Managers are also responsible for fulfilling any additional requirements for consent decree tracking and follow-up that are issued by National Program Managers. This Directive is effective April 30, 1990. For purposes of this Directive, the term "consent decree" includes judicially imposed court orders.

This directive prescribes judicial consent decree tracking and follow-up requirements for the following areas:

1. Implementing the Agency Guidance on Certification of Compliance with Enforcement Agreements
2. Regional consent decree tracking and follow-up database management
3. File documentation of consent decree violations
4. Decisions on Agency follow-up to violations
   A. Responsibility for decision
   B. General criteria for making follow-up decisions
   C. File documentation of follow-up decisions
5. Maintaining data on the current status of EPA consent decrees
6. Termination of consent decrees and closing cases

BACKGROUND

Consent Decree Tracking Responsibilities:

Consent decree tracking and follow-up is conducted by each Regional Office under the direction of the Regional Administrator. Within each Region, most responsibilities are shared between the Office of Regional Counsel (ORC) and the Regional Divisions responsible for program compliance activity. Generally, the responsibilities are divided within each Region as follows:

Regional Program Divisions

Regional Program Divisions are responsible for the overall management and direction of the Regional compliance program in accordance with the policies and procedures of the Agency and each National Program Office. In that role, they are responsible for the following regional consent decree tracking and follow-up activities:

1. Assuring, along with ORC, that proposed consent decree agreements contain provisions/milestones that maximize the Region's ability to determine compliance status.

2. Determining compliance with the consent decree requirements through the use of announced and unannounced inspections and the receipt and review of deliverables.

3. Determining whether there are violations of the consent decree and notifying the ORC of each violation.

4. Maintaining a database of consent decree status which tracks completion of consent milestones and denotes violations. (*Can be a component of a Region-wide consent decree database system.*)

5. Determining (jointly with the ORC) the appropriate Agency response to each violation.

6. In concert with the ORC, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate Program file, ORC file or a common Program-ORC file.)

7. Notifying the ORC when all the requirements of the consent decree have been met so that the ORC can track and assist in the termination of the decree according to the terms of the decree.

Offices of Regional Counsel:

The Office of the Regional Counsel in each Region is responsible for the following Regional Office consent decree tracking and follow-up activities:

1. Assuring that each settlement agreement complies with the "Guidance on Certification of Compliance with Enforcement Agreements" (July 25, 1988 memorandum from Thomas L. Adams to AAs, RAs, and RCs).

2. Obtaining a copy of the entered decree and providing it to the appropriate regional program compliance office and to the NEIC Central Depository in a timely manner. A copy must also be provided to the Financial Management Office (FMO) in the Region when the decree requires a penalty payment.

[The regional FMO, after receiving a copy of the entered decree, will enter the penalty amount into the Integrated Financial Management System (IFMS). EPA policy requires that all judicial penalty amounts be recorded in the IFMS as "accounts receivable" and that they be tracked as receivables until collected or terminated. The Land and Natural Resources Division at DOJ is the responsible entity for monitoring judicial penalty debts and notifying EPA's Financial Management Division of the status of penalty payments. This information is placed in the IFMS so that Regions can determine if penalties requirements of the decree have been met. The program database as well as the Enforcement DOCKET database should contain a milestone/requirement for tracking penalty payment.]

3. Determining (jointly with the Regional Program Divisions) the appropriate follow-up action the Region will take in response to a violation of the decree.

4. Providing legal support and services to the programs, as necessary, to enforce the consent decree.

5. In concert with the Program Division, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate ORC file, Program file, or a common Program-ORC file.)

6. Maintaining and reporting data on the status of active consent decrees as might be required by the Agency management and accountability systems.

7. Assisting in obtaining the termination of consent decrees which have been successfully fulfilled, including updating the Agency DOCKET database to reflect current status.

CONSENT DECREE TRACKING REQUIREMENTS

1. IMPLEMENTING THE AGENCY GUIDANCE ON CERTIFICATION OF COMPLIANCE WITH ENFORCEMENT AGREEMENTS

Background:

Certification requirements were prescribed in the July 25, 1988 memorandum from Thomas L. Adams Jr. to Assistant Administrators, Regional Administrators and Regional Counsels, "Guidance on Certification of Compliance with Enforcement Agreements." This Guidance addresses the inclusion of compliance certification language (in which a responsible official personally attests to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement) and the need for including precise documentation requirements for self-certifying provisions of the decree.

Requirements:

Each Region must take steps to insure that all staff involved in drafting and negotiating consent decrees are fully aware of the requirements of the July 25, 1988 guidance memorandum and this Policy. (While that guidance applies more broadly than to consent decrees, the discussion in this Policy will refer only to consent decrees, consistent with the scope of the rest of the document.)

Staff involved in drafting consent decrees must incorporate the guidance for documentation of compliance and for certification by a responsible official unless

they affirmatively determine and document that the policy is not applicable to a specific case. Therefore, each consent decree should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of the decree, shall be signed by a responsible official. The need for certification and documentation requirements should be raised early in the negotiation and drafting process.

Regional managers who review and approve drafted consent decrees must assure that the Guidance has been adequately incorporated or determine that the Guidance is not applicable for the specific case.

Staff and managers within the OECM Associate Enforcement Counsel Offices must also review drafted consent decrees for inclusion and/or applicability of the Guidance. Implementation of the certification and documentation requirements will be a component of the ongoing oversight and periodic reviews conducted by OECM.

2. REGIONAL CONSENT DECREE TRACKING DATABASE MANAGEMENT

Background:

Regional Program Divisions are responsible for tracking compliance with active consent decrees once the decree has been entered by the Court. The ORC is responsible for obtaining a copy of the entered decree and providing it to the Program Division and the Financial Management Office (for penalty tracking). If the decree has been entered but a copy has not yet been made available, the program can use the lodged decree during the interim, if it is known that the final decree was not changed.

Compliance tracking is accomplished through the receipt of reports and other deliverables from the consent decree parties and through the use of announced and unannounced inspections. In order to determine whether a party is currently in compliance with the consent agreement, the program compliance staff must compare the requirements of each decree with the information gathered through inspections and deliverables. In the case of deliverable items, the compliance staff should determine if the submission adequately meets the decree requirements.

Good database management is an important element for effective and timely tracking and reporting of case status. This policy outlines requirements for the consent decree databases that are used to track consent decrees for each Regional program. Additional elements may be required by each of the National Program Offices.

Requirements:

Each program responsible for tracking consent decree compliance status must maintain a consent decree database (file/record). Each program database must

include the following information for each active decree: case name and enforcement civil judicial docket number, statute/program, all required milestones and their due dates, and a block for inserting the date each milestone was completed.

The consent decree database can be manual, on a personal computer or included as a part of a national compliance database such as the CDS of the Air Program. The database could also be maintained centrally, as in Region II, where the ORC maintains a database of all regional consent decrees using the NEIC - CDETS capability. Each Region can choose what database type system(s) to use. For programs with only a few consent decrees to track, a manual system may be sufficient. Regional programs may opt to use the national compliance database depending on its specific capabilities.

The consent decree database must be maintained in three ways for it to be used effectively. Milestones for all decrees must be entered (and revisions, if applicable, in the case of amended decrees). On a regular schedule (not less than quarterly), all currently due (and overdue) milestones must be extracted from the system and made available to staff and supervisors. This use as a tickler system will alert staff as to what actions are required to be checked on. Finally, the dates for completed milestones must be put into the database on a regular basis (suggested monthly updates).

Maintaining this database in a central location will allow a program easy access to the status of all its decrees, the ability to retrieve all due milestones and a complete historical record of each decree as staff turnover and assignment changes occur. It will also provide documentation of case history for audits or other oversight activity.

3. FILE DOCUMENTATION OF VIOLATIONS

Background:

Program Divisions are responsible for determining if a consent decree violation has occurred. Any milestone not complied with by the due date of the consent decree constitutes a violation, regardless of the substantive impact of the deviation from the consent decree requirement. In certain cases, Program Divisions may need to consult with the ORC in determining whether a violation has occurred (e.g., where a claim of force majeure has been made).

Requirements:

Regional Program Divisions must notify the ORC of each violation of an active consent decree. A violation occurs when any milestone is missed (i.e. a report that is one day late is a violation), although there may be instances where, as a matter of priority, no formal enforcement action is taken. In addition, a record of the violation must be placed in the official Regional case file (see copy of form attached).

4. DECISIONS ON AGENCY FOLLOW-UP TO VIOLATIONS

Background:

When a violation occurs, the Region must determine the appropriate Agency response. In some cases, the violation may not pose a threat to public health or the environment or jeopardize the party's ability to meet subsequent milestones or the final compliance date. In such instances, after a review including the criteria discussed in subsection C below, the program office and ORC may jointly decide that no follow-up action is required or that a non-formal response may be appropriate. Other violations will be more serious and the program and ORC may decide to take a formal enforcement action such as seeking stipulated penalties or initiating a contempt action. For all violations it is important for the Agency to document the decision process within the case record. For all violations, the responsibility for determining the appropriate response action is shared by the Regional Program Division and the Office of Regional Counsel.

Requirements:

A. Responsibility for decision:

Once a violation occurs, the Program and the ORC must jointly determine the Agency response. Given the seriousness of consent decree violations, concurrence must occur at no lower than the Branch Chief level in both Offices. Disagreements should be elevated to senior management. On the rare occasion when the two offices cannot agree, the issue will be resolved at the RA or DRA level.

B. File documentation of follow-up decisions:

The decision concerning how the Agency will respond to a violation must be documented in the official Regional case file. The documentation (copy of form attached) must include the decision made and the reason for the decision. The documentation must also include the signatures of the responsible Program Office and ORC Branch Chiefs (or higher level).

C. General Criteria for follow-up decisions:

When the Agency enters into a consent decree we expect the defendant to comply. We take compliance with the decree very seriously and expect all parties to take all steps necessary for timely compliance. As a result, if they are in violation, we will normally respond for the purpose of remedying the violation, obtaining a penalty, or both. However, given the need to set priorities, we may not choose to take a formal action in every instance. The Region is delegated authority to decide what follow-up action, if any, to take. The decision not to take a formal action is a serious judgment required to be made jointly by the Regional Program Division and the Office of Regional Counsel at the Branch Chief or higher level.

In selecting the appropriate response, the following factors/criteria might be considered.

Environmental Harm Caused by Violation: What is the level of risk to human health and to the ambient surroundings for continuing noncompliance?

Duration of the Violation: How long has the violation continued? Has the violation been continuous or interrupted? Has the violation been corrected?

Good Faith/Bad Faith (Compliance history): Was the violation deliberate? Has the party been notified that it was in violation and continued to violate? Has the party demonstrated good or bad faith in its past efforts to comply or respond to Agency efforts? Is there a pattern of violations which suggests inattention to its compliance obligations, even though the individual violations are not, in themselves, of major concern?

Deterrence Value: Will an action deter future violations?

Ability to Respond: Will the enforcement action result in compliance? Will the facility meet its final compliance date, even though it missed an interim date?

Economic Gain: Has the violator gained an economic advantage over its competitors as a result of the violation?

Violations for which a decision not to take a formal action based on competing priorities might be appropriate would generally find the party on the positive side of the factors above (i.e. no or limited environmental harm from the violation, good compliance record, etc.). Situations where the Agency might exercise its discretion not to take an action might include:

- Late reporting with no environmental consequence and without a past pattern of delay or noncompliance.

- Missed milestone, not a major requirement, with expectation they will be in compliance with/by the next milestone.

- Violation of an interim limit, magnitude of the exceedence is minor, with compliance now achieved or anticipated shortly.

5. MAINTAINING REGIONAL CONSENT DECREE TRACKING STATUS

Background:

Currently, each ORC is responsible for providing consent decree status reports each quarter to OECM as part of the Agency SPMS system. In most Regions, the information for this report is collected from each program and combined into a Regional report.

Requirements:

The ORCs will continue to be responsible for maintaining information on regionwide status of consent decrees and providing Regional reports to OECM, as required. The specific nature of these reports may change from the current STAR measure. Regional Program Divisions are responsible for supplying program-specific information or reports to ORC that might be needed to fulfill national reporting requirements in addition to meeting the requirements of their National Program Office.

6. TERMINATION OF CONSENT DECREES AND CLOSING OF CASES

Background:

A judicial enforcement case with a consent decree is successfully completed when all the requirements of the consent decree, including penalty payments, have been met and the termination clause satisfied. At that point, the consent decree should be terminated in accordance with the terms of the decree. Agency databases and status reports need to accurately reflect the current status of cases (including cases where the requirements of the decree have been fully met, cases for which termination of the decree is due, and cases which have been closed after consent decree termination). Accurate data are needed to report the status of active decrees and for planning, budgeting and other management purposes.

Requirements:

Program Divisions, as part of their responsibility for tracking consent decree compliance status, must notify the ORC when all the requirements of the consent decree have been satisfied.

The ORC is responsible for working with DOJ to effect the termination of the consent decrees, in accordance with the termination clause of the decree (timeframe, automatic, plaintiff or defendant motion). The ORC is responsible for tracking the termination status of inactive decrees and assisting the completion of plaintiff responsibilities, as appropriate. The ORC is responsible for maintaining the current status of these decrees in the Agency DOCKET system and closing cases after termination.

CONSENT DECREE VIOLATION AND FOLLOW-UP FORM

PART A: REPORT OF VIOLATION

Program/Statute: _____

Case Name: _____ EPA Docket # _____

Requirement(s) in violation: _____

_____

_____

Requirement due date: _____

Requirement was completed late: _____ (when) Requirement not completed: _____ (check)

Comments: _____

_____

_____

_____

Violation documented by: Signature/date: _____

Print name: _____

Title/organization: _____

PART B: DECISION ON RESPONSE TO VIOLATION (check appropriate box)

☐ Type of enforcement action planned: _____

_____

☐ Enforcement action determined not to be appropriate for the following reason(s): _____

_____

_____

Concurrences by:	Program Division	Office of Regional Counsel
Name /signature:	_____	_____
Organization title:	_____	_____
Date:	_____	_____

EPA-OECM Form

CHAPTER TWO

COLLECTING ADMINISTRATIVE PENALTIES

This chapter describes the roles and responsibilities of EPA offices (Regions and Headquarters) in collecting penalties (initial and stipulated) assessed under administrative penalty programs with the exception of the CERCLA (Superfund) Program and Section 311 of the Clean Water Act (CWA). The Superfund Program has issued specific program guidance for the collection of Superfund debts. CWA Section 311 administrative penalties are assessed and collected by the U.S Coast Guard.

Penalties assessed in final administrative orders are considered debts under Chapter 31 of the United States Code governing Federal Money and Finance. Thus, Federal and EPA debt collection regulations and procedures must be followed in collecting penalties.

Failure to adhere to official Agency financial management procedures could subject an individual to disciplinary action for misuse and mismanagement of Federal funds. If you have any questions about the receipt or collection of penalty funds, check with your local Financial Management Office (FMO) or the EPA Claims Collection Officer in the Office of General Counsel.

Authority for Administrative Penalty Collection

Statute and Regulations

Fiscal Accounting

Chapter 31 U.S.C. 3512 et seq. requires the heads of each executive agency to establish and maintain a system for accounting and internal controls. The EPA Delegations Manual authorizes the Director of FMD to develop Agency-wide financial policies and procedures and to maintain the official books of record. Authority also is delegated to Headquarters and local Financial Management Offices (servicing FMOs) to provide general accounting services and to receive and deposit funds. Procedures pertaining to fiscal management of penalty debts are set forth in Office of the Comptroller's Resource's Management Directives System (RMDS) 2540 Chapter 9. [This Directive is currently being revised and when final shall be made an Appendix in this chapter]. Agency-wide financial policies include the establishment of an EPA FMO lockbox system for the payment of administrative enforcement penalties and Superfund payments. See Appendix 1 of this chapter. However, the Superfund Program has a separate Directive (RMDS 2550D) for financial management of the Superfund Program.

CHAPTER TWO COLLECTING ADMINISTRATIVE PENALTIES

Administrative Debt Collection

Chapter 31 U.S.C. 3701 et seq. requires the heads of agencies to attempt collection of all claims (including fines and penalties) of the United States arising out of activities of the agency. Section 3701 also provides that executive agencies may compromise claims of not more than $20,000 (excluding interest). The Federal Claims Collection Standards (FCCS) at 4 C.F.R. 101-105 and the EPA Claims Collection Standards (CCS) at 40 CFR Part 13 prescribe minimum debtor notification requirements and collection procedures.

EPA's Office of the Comptroller is responsible for establishing minimum notification requirements and for taking the necessary collection actions. These duties have been delegated to the Financial Management Division (FMD) in the Office of the Comptroller as described below.

Consolidated Rules of Practice for Administrative Proceedings

Prior to April 1985, the EPA Hearing Clerks who maintained the administrative case docket for Administrative Law Judges were responsible for collecting penalties under the 1980 Consolidated Rules of Practice (C.R.O.P.). 40 C.F.R. 22.31 of C.R.O.P. requires the respondent (debtor) to send payments to the Regional Hearing Clerk. In April 1985, this procedure was superseded by an Agency-wide decision to have all debts including penalties paid through the EPA Regional lockbox system. See Appendix 1 of this chapter for the list of Regional lockbox depositories. The Consolidated Rules of Practice are in the process of being revised to make the rules consistent with these procedures.

Roles and Responsibilities

The collection of administrative penalties requires the coordination of the Regional Program Office (RPO), the Regional Financial Management Office (FMO), the Office of Regional Counsel (ORC) and the Regional Hearing Clerk. Their respective roles and responsibilities are described below. Each Office should designate a specific individual or position as a contact point for dealing with financial matters.

A model "streamlined" system for carrying out these procedures and coordinating the interlocking responsibilities of the above EPA offices is described in Appendix 2 of this chapter. This model system will be adopted in the final RMDS, 2540.

Regional Program Office

The RPO has overall responsibility for implementing an administrative penalty program pursuant to national program guidance. This includes tracking final orders until all requirements, including penalty payments, have been met. Since collection of administrative penalties must be done in accordance with Chapter 31 of the U.S.C., the RPO must inform the Regional FMO when a penalty has been assessed (final order) and must inform the violator to pay penalties through the EPA Regional lockbox system. For each final order, an individual will be designated to coordinated with the FMO on all activities pertaining to payment of the penalty.

The RPO, as the originating office of the final order, must provide to the FMO, within three working days of a signed final order, the following:

- A copy of the signed final order containing the penalty assessment and the transmittal letter to the violator. A copy of the "Bill for Stipulated Penalties" where this requirement applies based on discussions at pages 2-5 through 2-7. For installment payments, attach also a schedule of payment amounts and respective due dates.

- The form entitled: EPA Enforcement Payment Accounts Receivable Control Number Form (see Appendix 2 of this chapter), hereinafter referred to as the Enforcement Control Number Form, with the originating office data included. The Enforcement Control Number Form should be attached to the final order. This form should be used when sending documents to the FMO that create a new accounts receivable, including a "Bill for Stipulated Penalties", or to modify an existing accounts receivable. The FMO will return the Form to the RPO with the accounts receivable control number. The Form with the control number filled in should be included in the RPO case file for review in the context of audits.

The RPO also is responsible for notifying the FMO of any errors or changes in the status of the penalty assessed in the final order or the assessment of stipulated penalties for violations of requirements of the order. The RPO must ensure that the EPA

Regional lockbox number is on all documents drafted and negotiated and transmitted to the Defendant regarding the payment of penalties.

Where the ORC, by agreement with the RPO, is the originating office in drafting, negotiating, litigating or settling the administrative case or assessing stipulated penalties, the ORC must perform all of the above requirements in lieu of the RPO. This includes designating a specific individual as a point of contact for each final order.

Regional Financial Management Office

The Headquarters Financial Management Division, along with the Regional FMO, is responsible for maintaining and updating the Integrated Financial Management System (IFMS), the Agency's official system for reporting the status of penalty payments. Upon receipt of the copy of a final penalty order and the Enforcement Control Number Form (see Appendix 2 of this chapter), the local FMO is responsible for establishing the "accounts receivable" file. The FMO must then fill out the remaining portion of the Enforcement Control Number Form including the accounts receivable number and send copies of the Form to the RPO, ORC and the Regional Hearing Clerk.

Once entered into the IFMS as an accounts receivable, the local FMO is responsible for tracking the accounts receivable, accepting penalty payments through the EPA Regional lockbox system, sending out demand letters when penalty payments are not received, assessing interest and handling charges, maintaining the general ledger, and making every effort to collect debts.

The FMO also is responsible, using the IFMS control number, for keeping the RPO, ORC and Regional Hearing Clerk informed on the status of penalty collection including sending these offices copies of payments. The FMO must also notify the RPO and the ORC when the penalty debt is 120 days in arrears and/or when it anticipates that the debt collection remedies available under its authorities will not be successful in collecting the debt. FMO collection remedies available include demand letters, private collection agencies and credit bureaus or agencies.

Office of Regional Counsel

The ORC is responsible for taking appropriate action (with the concurrence of the RPO) when notified by the local FMO that a penalty debt is 120 days in arrears. The ORC must decide and notify the local FMO in writing within 30 days on whether to (1) recommend to the Regional Administrator that the uncollected debt

be referred to the Department of Justice, Land and Natural Resources Division for the initiation of a judicial action, (2) authorize additional FMO collection procedures such as private collection agencies or (3) terminate the debt. The ORC is responsible for keeping the RPO and the FMO informed in writing, using the IFMS control number, on the status of any penalty debt referred to the ORC for enforcement action.

If the ORC is the originating office of the final order instead of the RPO, then the ORC is responsible for the duties described in the RPO section with regard to notifying the local FMO of the creation of a penalty debt.

Regional Hearing Clerk

The Regional Hearing Clerk is responsible for maintaining the Administrative Law Judge Hearing Docket. Since April 1985 when the EPA lockbox payment procedure was established, the Regional Hearing Clerk has not had the responsibility for receiving penalty payments. See Appendix 1 of this chapter. However, the Hearing Clerk is responsible for maintaining the official administrative record on each case including updating the official record when he/she receives notice from the FMO that a penalty payment has been received. The Hearing Clerk should enter the IFMS control number into the case file so that penalty payment update information can be requested from the IFMS when needed.

Financial Management Collection Procedures

This section describes the procedures for tracking "accounts receivable" and collecting penalties pursuant to Chapter 31 of the U.S.C., the Federal and EPA Claim Collection Standards, and Treasury Department and OMB requirements as set forth in the EPA Office of Comptroller, Resource Management Directives System (RMDS).

Accrual Accounting

Chapter 31 U.S.C. 3512 entitled, "Executive Agency Accounting Systems", prescribes the use of accrual accounting. Under the accrual basis of accounting, an accounts receivable represents the amount due from others, and is accounted for as an asset from the time of the event giving rise to such a claim (the time the event occurs), until such time as the amount is collected, or

determined to be uncollectible in whole or in part. The responsible FMO is to enter promptly every billing transaction into the IFMS to establish and allow for the tracking of the receivable. Chapter 31 U.S.C. 3701 et seq. requires agencies to charge interest on outstanding debts from the date on which notification of the amount is first mailed to the debtor (the original billing), and assess other processing and handling charges, unless the debt is paid by the due date.

Action Document That Establishes the Penalty Debt

FMOs must account for all funds due the Federal government as a result of EPA activities. EPA enforcement offices must inform the FMOs when a penalty debt has been created. The "action document" that establishes the creation of an up-front or stipulated penalty debt is described below.

Up-Front Penalty (Past Violations)

Under the FMD system, an EPA up-front administrative or judicial penalty becomes an EPA accounts receivable when a final order is issued. This is considered the "action document that establishes a debt". The transmittal letter and copy of the final order (action document) that the RPO sends to the violator constitutes the "original billing" in financial management language. If the penalty is not paid in accordance with the terms in the original bill, follow-up letters sent by the local FMO are called "demand letters".

Stipulated Penalties (Future Violations)

Stipulated penalties are penalties, agreed to by the violator at the time of entering into settlement, as being payable in the event that the violator does not comply with specified terms of the agreement.

In the case of stipulated penalties, the FMD "action document" is a written notice to the violator entitled: "Bill for Stipulated Penalties". Once a stipulated penalty provision has been triggered, the responsible Agency enforcement official sends the violator a transmittal letter and a "Bill for Stipulated Penalties" that informs the violator of the amount of money due the Agency under the stipulated provision, the date it is due and the method for payment (EPA lockbox).

The wording of the stipulated penalties provision determines when the penalty has become an accounts receivable. The two common options are: (1) the settlement agreement may provide that the penalty is automatically due upon the occurrence or non-occurrence of a specified event, or (2) the settlement agreement may make the penalty payable only on demand by the government. The guidance on the use of stipulated penalties, located in Appendix 2 of Chapter One, provides additional information on these options. This manual does not dictate an option but identifies when the accounts receivable is triggered under each of these options and the process for collecting stipulated penalties.

If the wording of a stipulated penalty provision is "on demand", then the accounts receivable is created only after the designated Agency enforcement official determines that a penalty is due the Federal government. Once the determination is made, a "Bill for Stipulated Penalties" (action document) is sent to the violator. With the "on-demand" provision, the responsible Agency enforcement official makes a determination to demand a penalty pursuant to any terms negotiated in the original consent order. Prior to the issuance of the official "Bill for Stipulated Penalties" (action document), any letters, discussions and negotiations regarding the activation of a stipulated penalty provision pursuant to our statutory enforcement authority and any dispute resolution clause provided under the consent order do not constitute the creation of an accounts receivable.

Only after any disputes over an "on-demand" stipulated penalty provision have been resolved in accordance with the guidance on the Use of Stipulated Penalties in EPA Settlement Agreements (See Appendix 2 of Chapter 1), will the designated Agency enforcement official send the violator the "Bill for Stipulated Penalties" (action document). The FMO should receive a copy of the "Bill" and a completed Enforcement Control Number Form as notice that a new accounts receivable has been created.

If the wording of a stipulated penalty provision is "automatic", then the accounts receivable is created at the time the specified event occurs. As soon as the responsible Agency enforcement official monitoring the Final Order (RPO or ORC) learns of the occurrence or non-occurrence of the specified event, a transmittal letter and "Bill for Stipulated Penalties" (action document) should be sent to remind the violator of the amount due, the date it was due and the method for payment (EPA lockbox). The FMO should receive a copy of the "Bill" and a completed Enforcement Control Number Form.

Under the "automatic" provision, penalty amounts can only be altered by formally amending the original final order. Such amendments may be required because of unforeseen changes to the significant event which triggers the stipulated penalty provision. Where an amendment is required, the "Bill for Stipulated Penalties" and an amended final order signed by the Regional Administrator (or his/her delegatee) should be sent to the violator, with copies to FMD, as the "action document" that establishes the stipulated penalty debt.

Notifying the Debtor

Once the designated EPA enforcement personnel has determined that an up-front or stipulated penalty "debt" has been established and has prepared the appropriate "action document" that creates the accounts receivable, the next step in debt collection is notifying the debtor that penalties are due (the original billing). Both the transmittal letter and the final order drafted by the RPO (or the ORC if lead) should include clear instructions to the debtor on terms and conditions for payment, including how much is due, when it is due, where the payment is to be made under the EPA Regional lockbox system and the consequences of default. The specific language on payment instructions is in the model system in Appendix 2 of this chapter.

Notifying the FMO of Penalties Assessed

Within three working days of a signed agreement, the RPO (or the ORC if lead) should send copies of the transmittal letter and final order (original billing) to the FMO, thus notifying the FMO that penalties have been assessed. Attached to the final order and transmittal letter should be the completed Enforcement Control Number Form (see Appendix 2). The Regional Hearing Clerk and the ORC attorney also should be sent copies of the transmittal letter and final order for their records.

Establishing Accounts Receivable

The servicing FMO will establish an accounts receivable for each final order in accordance with Agency financial management procedures. The FMO will notify the RPO, ORC and Regional Hearing Clerk of the IFMS accounts receivable control number by filling

out the FMO section of the Enforcement Control Number Form and sending each designated office a copy of the form with the attached front page of the final order.

Follow-Up Billings

Until payment is received, or the debt is referred to the ORC for judicial collection, the servicing FMO will be responsible for follow-up billings (demand letters).

- 30 days after the due date--First demand letter is sent to the debtor, providing notice that payment has not been received, interest has begun to accrue and a handling charge is being assessed.

- 60 days after the due date--Second demand payment letter is sent providing notice that interest and handling charges are accruing and advising of the consequences of failure to pay.

- 90 days after the due date--Final demand letter is sent, repeating the information on interest, handling charges and the assessment of a late payment penalty.

- 120 days after the due date--The FMO notifies the ORC in writing that collection activities have been unsuccessful and that payment is 120 days outstanding. The debt then becomes the responsibility of the ORC, but the FMO can provide advice to the ORC on the availability of other FMO collection activities such as referral to a credit agency.

Uncollected Administrative Penalties Debts

As noted above, at 120 days, after receiving no response to the third demand letter, the responsible FMO must review the case to determine whether there are any additional means available that could be successful in collecting the administrative penalty (debt). This includes the use of a private collection agency. At this point, 120 days after the penalty due date, the FMO should refer the uncollected debt (accounts receivable) to the ORC with a recommendation on whether to pursue additional FMO collection activities.

ORC Option Selection

ORC option selection must occur within 30 days of a referral from the FMO to the ORC. The ORC should consult with the FMO and RPO and select one of the following options: (1) refer to the DOJ for judicial enforcement action, (2) pursue additional FMO collection activities such as referral to a private collection agency, or (3) recommend suspension or termination of the debt. Options 2 and 3 are carried out pursuant to Chapter 31 U.S.C. 3701 (Federal Claims Collection Act) and the Federal and EPA Claims Collection Standards. Once either Option 2 or 3 is chosen, Option 1, referral to DOJ for judicial enforcement, cannot be pursued absent stringent unanticipated circumstances where our enforcement authority must be upheld.

Option selection is required to avoid confusion over who in EPA is responsible and accountable for collecting funds owed to the Federal government. Under Option 1, once the administrative debt is referred to DOJ-LNRD, DOJ is responsible for pursuing collection of the debt and keeping the ORC informed. Under Options 2 and 3, the debt is pursued within EPA under the FMO collection procedures set forth in RMDS directives and the FMO is responsible for collection efforts.

The reason for interrupting FMO collection activities at 120 days and referring the debt to the ORC for option selection is to ensure that EPA's enforcement authority is not compromised by pursuing open-ended administrative debt collection activities. Federal agencies including EPA only recently have received statutory authority to use private collection agencies. Until the EPA has sufficient experience with private collection agencies and that experience shows that the debts can be collected quickly (within 30 days), the recommendation of this Manual is that the penalty debt be referred to DOJ-LNRD for judicial enforcement. This approach reinforces EPA's enforcement policy to escalate the enforcement response from the administrative to the judicial forum in response to continuing noncompliance.

The ORC must notify the FMO in writing, within 30 days from receiving notice from the FMO of a penalty payment default, of its choice of options. A copy of the written notification should be included in the case file. If Option 1 is chosen, the written notice to the FMO should include a statement that EPA is pursuing its enforcement options under the appropriate statute and referring the debt to DOJ-LNRD. With Option 1, the ORC should be

prepared to update the FMO quarterly on the status of DOJ debt collection. Quarterly notice is important because while the FMO is no longer responsible for pursuing collection under Option 1, the FMO is still responsible to the Comptroller and OMB for quarterly reports on the status of all debts owed to the Federal government (including those referred to DOJ for collection) as a result of EPA activities.

On rare occasions, the ORC, after consulting with the FMO and the RPO, may determine that the debt is uncollectible and should be suspended or terminated to save any further loss of agency resources in attempting to collect the debt.

Procedures for referring the debt to DOJ for judicial enforcement or for suspending or terminating the debt are explained below.

Escalation of Enforcement Action on Uncollected Administrative Penalties.

As noted above, EPA's enforcement policy is to escalate the enforcement response from an administrative to judicial action when a violator does not comply with the administrative order requirements. Thus, there is a presumption that all administrative debts are collectable irrespective of the amount. However, debts under $600 should not be referred to DOJ for judicial action unless specific requirements [1]/ are met.

Once DOJ-LNRD has obtained a judicial judgment on an outstanding administrative debt, the judgment is referred to the USAO. The USAO conducts Federal (DOJ) collection activities in accordance with the law of the State in which the debtor resides.

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[1] Debt collection procedures set forth at 4 C.F.R. 105.4 state: "Agencies will not refer claims of less than $600, exclusive of interest, penalties, and administrative costs, for litigation unless: (a) Referral is important to a significant enforcement policy, or (b) the debtor not only has the clear ability to pay the claim but the Government can effectively enforce payment, having due regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government."

The USAO also may be able to use the IRS tax offset referral program for collecting delinquent penalties once a judicial judgment has been obtained.

Evaluating Whether to Recommend Termination of the Debt

Administrative penalty debts should be terminated only in extreme circumstances. In evaluating whether to terminate the debt, the following items should be considered:

- o Inability to collect any substantial amount;
- o Inability to locate the debtor;
- o The IRS tax offset program is not a viable option;
- o Cost will exceed recovery;

Even where no assets are currently available, the deterrent impact on other similarly situated violators if the government pursues its judicial debt collection remedies to the fullest must be considered before the debt is terminated.

Procedures for Compromising, Suspending or Terminating a Debt

EPA Delegation 1-28 authorizes the EPA General Counsel to collect, compromise, suspend or end collection action on EPA claims for money or property (including penalties) arising out of EPA activities that are less than $20,000. The General Counsel has re-delegated this authority to the EPA Claims Officer in the Office of General Counsel. The EPA Claims Officer has re-delegated to the Director of FMD limited authority to compromise, terminate or suspend debts (See Appendix 3). Authority and monetary limits are as follows:

$ Amount	Office
less than 4,000	Regional FMO
less than 6,000	HQ FMD
less than 20,000	EPA Claims Officer, OGC
greater than 20,000	DOJ

Administrative penalty debts of less than $6,000 can be terminated by the FMD with the concurrence of the ORC and RPO. Debts greater than $6,000 but less than $20,000 must be referred to the OGC EPA Claims Officer and require the concurrence of the ORC and the RPO.

Debts greater than $20,000 should be referred to the DOJ Land and Natural Resources Division for judicial collection action through the direct referral process described in Chapter Four, Appendix 1.

Closure

The servicing FMO will continue to carry a debt referred to ORC or the DOJ as a receivable, including interest, penalties and handling charges, until the debt is paid in full, compromised and paid, or written off. Therefore, the EPA office to which the debt has been referred for further collection activity or termination should update the FMO, quarterly, on the status of the "receivable" using the IFMS control number. The EPA office also should send to the FMO copies of any change in the "receivable" as a result of these activities.

Appendix 2540-9-3

LOCKBOX ADDRESSES

FMO	LOCKBOX BANK	ADDRESS FOR REMITTING PAYMENT
Region 1 - Boston	Mellon Bank	EPA - Region 1 P.O. Box 360197M Pittsburgh, PA 15251
Region 2 - New York	Mellon Bank	EPA - Region 2 P.O. Box 360188M Pittsburgh, PA 15251
Region 3 - Philadelphia	Mellon Bank	EPA - Region 3 P.O. Box 360515M Pittsburgh, PA 15251
Region 4 - Atlanta	The Citizens and Southern National Bank	EPA - Region 4 P.O. Box 100142 Atlanta, GA 30384
Region 5 - Chicago	The First National Bank of Chicago	EPA - Region 5 P.O. Box 70753 Chicago, IL 60673
Region 6 - Dallas	Mellon Bank	EPA - Region 6 P.O. Box 360582M Pittsburgh, PA 15251
Region 7 - Kansas City	Mellon Bank	EPA - Region 7 P.O. Box 360748M Pittsburgh, PA 15251
Region 8 - Kansas City	Mellon Bank	EPA - Region 8 P.O. Box 360859M Pittsburgh, PA 15251
Region 9 - San Francisco	Mellon Bank	EPA - Region 9 P.O. Box 360863M Pittsburgh, PA 15251
Region 10 - Seattle	Mellon Bank	EPA - Region 10 P.O. Box 360903M Pittsburgh, PA 15251

REGIONAL SUPERFUND LOCKBOX DEPOSITORIES

EMO	LOCKBOX BANK	ADDRESS FOR REMITTING PAYMENT
Region 1 Boston	Mellon Bank	EPA - Region 1 Attn: Superfund Accounting P.O. Box 360197M Pittsburgh, PA 15251
Region 2 New York	Mellon Bank	EPA - Region 2 Attn: Superfund Accounting P.O. Box 360188M Pittsburgh, PA 15251
Region 3 Philadelphia	Mellon Bank	EPA - Region 3 Attn: Superfund Accounting P.O. Box 360515M Pittsburgh, PA 15251
Region 4 Atlanta	The Citizens and Southern National Bank	EPA - Region 4 Attn: Superfund Accounting P.O. Box 100142 Atlanta, GA 30384
Region 5 Chicago	The First National Bank of Chicago	EPA - Region 5 Attn: Superfund Accounting P.O. Box 70753 Chicago, IL 60673
Region 6 Dallas	Mellon Bank	EPA - Region 6 Attn: Superfund Accounting P.O. Box 360582M Pittsburgh, PA 15251
Region 7 Kansas City	Mellon Bank	EPA - Region 7 Attn: Superfund Accounting P.O. Box 360748M Pittsburgh, PA 15251
Region 8 Denver	Mellon Bank	EPA - Region 8 Attn: Superfund Accounting P.O. Box 360859M Pittsburgh, PA 15251
Region 9 San Francisco	Mellon Bank	EPA - Region 9 Attn: Superfund Accounting P.O. Box 360863M Pittsburgh, PA 15251
Region 10 Seattle	Mellon Bank	EPA - Region 10 Attn: Superfund Accounting P.O. Box 360903M Pittsburgh, PA 15251

MODEL SYSTEM FOR ADMINISTRATIVE PENALTY COLLECTION

Introduction

The Regions require a systematic method for tracking the payment of the fines and penalties under agreements which conclude with enforcement actions. Although the servicing Financial Management Office (FMO) has the lead responsibility for tracking the accounts receivable and collecting the fines and penalties, the RPO and ORC (if lead) must notify the FMO of the assessment of an administrative penalty so that the FMO can establish an "accounts receivable".

In order to have a sound tracking system: (1) EPA must make it clear to the person owing the money how much is due, when it is due, the interest accrual if not paid when due, and where payment is to be made; (2) the final order must be sent to the FMO for tracking; and (3) there must be a way to verify and record receipt of the payment.

Region V has recognized the need for a systematic approach and in June 1987 instituted procedures for the payment of fines, penalties and reimbursements under administrative orders. These procedures were originally developed as a joint effort among the Region V Regional Counsel, Program, and Financial Management staffs. The procedures have proven to work well because they define each party's responsibility in the process and they represent a joint effort in their development.

Region V's procedures for administrative penalty collection have been adopted in this Manual but modified to include the EPA Enforcement Payment Accounts Receivable Control Number Form (hereinafter referred to as the Enforcement Control Number Form) located at the end of this Appendix. The Enforcement Control Number Form was a necessary addition to allow consistent tracking of the same accounts receivable (penalty) by different EPA offices.

The Final Order

Once the final administrative order (AO) has been signed by the Regional Administrator, the appropriate RPO (or ORC if originating office) will send the signed AO with a transmittal letter to the respondent (debtor) in the case by certified mail (return receipt requested) and send a copy to the attorney representing the party.

The program office also will fill out the "originating office" section of the IFMS Form (see p. 2-A2-50), attach to the IFMS Form the final copy of the AO and the transmittal letter to the respondent, and send them to:

- o the Regional Financial Management Office;
- o the Regional Counsel;
- o the Regional Hearing Clerk; and
- o the Headquarter's program office (where required by the Headquarter's program.)

Both the AO and the transmittal letter must include the following provisions:

- o payment of the fine or penalty must be made by the date specified in the executed order;
- o a statement to the effect that if payment is not received within 30 days of the date of the notification (billing), interest charges will be assessed from the date of notification through the date of payment at a rate established by the U.S. Treasury (rate changes, no more frequently than quarterly). Additionally, a handling charge will be imposed in 30-day increments consisting of $15.00 after the first 30 days and $15.00 for each additional 30-day increment. A six percent per annum penalty will be applied on any principal amount not paid within 90 days of the due date applied 120 days from the date of the bill;
- o payment of the fine or penalty is to be made to the designated lockbox for the Region; and,
- o transmittal of copies of the check to any designated person in the program and/or the ORC.

When the FMO receives the AO, the transmittal letter, and the IFMS Form, the assessed penalty amount will be entered into the Integrated Financial Management System (IFMS) as an accounts receivable and will be given an IFMS control number. This number will be entered on the Enforcement Control Number Form and copies of the Form and the front page of the AO will be sent to the designated offices on the Form.

Once the FMO gets confirmation of the payment from the bank, the FMO will update the accounts receivable. A copy of the payment with the IFMS control number will be forwarded by the FMO to the designated persons in the ORC and RPO for their tracking purposes. A copy also will be sent to the Regional Hearing Clerk who maintains the official administrative record on the case.

Modifications and Stipulated Penalties

Once an accounts receivable has been established for a penalty order, two events could change the accounts receivable:

- Modifications - An order could be amended to increase or reduce the total up-front penalties assessed in the order. This requires an amended order signed by the Regional Administrator.

- Stipulated Penalties - The order may provide that if milestone(s) are missed, stipulated penalties will be assessed. This requires a "Bill for Stipulated Penalties" to be sent to the violator for the original amount agreed to in the order. Depending on the wording of the stipulated penalties clause, a change in the stipulated penalty amount to be paid may require an amended order signed by the Regional Administrator (or his/her delegatee).

The RPO or the (ORC if lead) has the responsibility for notifying the FMO of modifications or stipulated penalties using the Enforcement Control Number Form that contains the IFMS accounts receivable control number. The same procedures described in "The Final Order" section above, apply for implementing modifications and stipulated penalties.

Failure to Pay Penalties

All EPA administrative penalty debt collection activities must be done pursuant to Resources Management Directives (RMDS) 2540, Chapter 9). All Superfund debt collection activities must be done pursuant to RMDS 2550D.

Correction of Errors on Accounts Receivable

If an account receivable is no longer valid (e.g., EPA was in error in the amount of penalty assessed in the Final Order), the appropriate RPO or ORC lead official must notify the servicing FMO

in writing. The memorandum should reference the specific IFMS control order number, date, name and amount. An explanation for the change in the status of the account receivable also should be provided in the memorandum. Copies should be sent to the appropriate parties as described previously in the "Final Order" section of this Appendix.

EPA ENFORCEMENT ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE FILLED OUT BY ORIGINATING OFFICE:
(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: _____ _____
[Name of contact person] [Date]
in the _____ at _____
[office] [phone number]

☐ Non-SF Jud. Order/Consent Decree. **USAO COLLECTS.**

☐ Administrative Order/ Consent Agreement **FMO COLLECTS PAYMENT.**

☐ SF Jud. Order/Consent Decree. **FMO COLLECTS.**

☐ This is an original debt

☐ This is a modification

Name of Person and/or Company/Municipality making the payment

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The Total Dollar Amount of Receivable _____
(If in installments, attach sch. of amounts and respective due dates)

The Case Docket Number _____

The Site-Specific Superfund (SF) Acct. Number _____

The Designated Regional/HQ Program Office _____

TO BE FILLED OUT BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number _____

If you have any questions call: _____ _____
[Name of Contact] [Date]
in the Financial Management Office, phone number:_____

JUDICIAL ORDERS: Copies of this form with an attached copy of the front page of the final **judicial** order should be mailed to:

1. Debt Tracking Officer
   Environmental Enforcement Section
   Department of Justice/Rm. 1647D
   P.O.Box 7611, Benjamin Franklin Station
   Washington, DC 20044
2. Originating office (ORC)
3. Designated Program Office

ADMINISTRATIVE ORDERS: Copies of this form with an attached copy of the front page of the **administrative** order should be sent to:

1. Originating office
2. Designated Program Office
3. Regional Hearing Clerk
4. Regional Counsel

GLOSSARY

Below are key terms for filling out the EPA Enforcement Payment Account Receivable Control Number Form.

EPA Originating Office - In the case of administrative orders, the EPA office that originates and sends a copy of the signed final order and the transmittal letter to the defendant/respondent is responsible for filling out the top half of the Form. In the case of judicial orders, the U.S. Attorneys' Office (USAO) will in most cases be the entity that sends a copy of the final (entered) order or consent decree to the defendant with a transmittal letter. By Directive, the USAO will send to the appropriate Office of Regional Counsel (ORC), a copy of the entered order and transmittal letter. Unless otherwise designated in a Region, the ORC will be the EPA originating office responsible for filling out the Form and sending a copy of the entered order to the FMO.

Designated Regional Headquarters Program Office - This is the Office responsible for enforcing the statutory program (e.g., CAA, CWA, TSCA, RCRA, FIFRA, Superfund, etc.) that governs the violation. The designated program office is responsible for tracking the technical (non-penalty) requirements of the order. This program will use the IFMS accounts receivable number to check with the FMO on the status of payment of the administrative or judicial penalty.

Case Docket Number - This is the number in the upper right hand corner of the final order that is provided by the Regional Hearing Clerk (administrative) or the Clerk of the Court (judicial).

Site-Specific Superfund Account Number - The ten digit number used in the Superfund Program to identify a particular site so that monies can be tied to specific sites and activities.

IFMS Accounts Receivable Control Number - When the FMO is provided documentation (final order) on the creation of a debt, the FMO enters the debt into the Integrated Financial Management System (IFMS) and creates a new accounts receivable. If there are several violators under the same case that will be making a payment, then each "payee" receives a different control number. The FMO will fill out a separate copy of the Form for each payee and accounts receivable control number.

The completed version of the Form with the EPA Originating Office and the FMO portions of the form filled in should be included in the enforcement case official file as a record for audit purposes that the final order was sent to the FMO and that an accounts receivable control number was provided.

CHAPTER THREE

COLLECTING JUDICIAL PENALTIES

This chapter describes the roles and responsibilities of EPA offices and the Department of Justice (DOJ) in monitoring and collecting judicial civil penalty judgments. This chapter does not apply to criminal fines and penalties.

Payment Depositories

EPA Judicial Enforcement Penalty Payment

EPA judicial enforcement penalties assessed under EPA statutes with the exception of CERCLA (Superfund) must be paid to the local U.S. Attorney Office (USAO) and are deposited in the DOJ lockbox system.

CERCLA (Superfund) Payments

Reimbursements to the CERCLA Trust Fund are not enforcement penalties and must be paid to the EPA FMO Regional lockbox system. Appendix 1 of this chapter contains the names and addresses of Regional Superfund lockbox depositories. Appendix 2 of this chapter contains the addresses of Headquarters and Regional FMOs. For information on the financial management of the Superfund Program see EPA Resource Management Directives (RMDS) 2550D and the September 20, 1988, Interim Desk Operating Procedures prepared by the FMD Fiscal Policies and Procedures Branch.

Responsibilities

Department of Justice

The Land and Natural Resources Division (LNRD) Environmental Enforcement Section (EES) is responsible for prosecution and supporting and coordinating the prosecution of all civil and criminal cases, matters and proceedings arising under EPA statutes. This includes monitoring and reporting on penalty judicial payments collected by the U.S. Attorneys' Office.

The U.S. Attorneys' Office is responsible for collecting judicial penalty judgments (including consent decree settlements).

Environmental Protection Agency

EPA Regional Financial Management Offices (FMOs) are responsible for establishing an "accounts receivable" for judicial penalty judgments (including consent decree settlements) and for reporting on the status of the accounts receivable (penalty/debt) until it is paid in full. FMOs do not collect, i.e., send out billings or demand letters for judicial penalties. This is the responsibility of the USAO.

Distributing Copies of Final Orders

Department of Justice

LNRD-EES is responsible for devising an arrangement with the USAO whereby a copy of the entered (final) judicial order (consent decree) is sent to the EPA Office of Regional Counsel (ORC). (Appendix 4 of this chapter contains the addresses of the Regional Counsel Offices).

Environmental Protection Agency

The ORC is responsible for distributing to the appropriate offices, copies of entered orders received from DOJ. This includes sending a copy of the entered order to the EPA Regional FMO. The completed EPA Enforcement Payment Accounts Receivable Control Number Form, (see Appendix 3 of this chapter), hereinafter referred to as the Enforcement Control Number Form, should be attached to the FMO's copy of the entered order. The FMO will return the Enforcement Control Number Form with an IFMS accounts receivable control number included. The Form with the control number should be included in the case file for review in the context of audits.

Monitoring Penalty Payments

LNRD-Environmental Enforcement Section

LNRD-EES maintains an automated data base entitled: Land Docket Tracking System (LDTS). This system monitors a case from the time a judgment is entered until verification has been received from the USAO that all penalties assessed have been paid. Using LDTS, the LNRD-EES will provide the EPA HQ-FMD, Financial Reports and Analysis Branch, with quarterly updates on the status of penalty collection.

EPA Regional Financial Management Office

EPA maintains an automated data base that tracks accounts receivable entitled: Integrated Financial Management Systems. Upon receipt of the final judicial order from the ORC, the Regional FMO is responsible for entering the penalty debt into the IFMS and tracking the debt as an account receivable until it is paid.

To crosswalk between the DOJ and EPA data systems, the Regional FMO must also, within 3 days of receipt of a copy of an entered (final) order, send copies of the Enforcement Control Number Form with a copy of the front page of the entered (final) order attached to the designated parties on the Form. LNRD-EES will enter the IFMS number into the Land Docket Tracking System (LDTS) so that penalty payments can be tracked under the EPA IFMS control number as well as the court docket number.

EPA Enforcement Reporting of the Status of Penalty Payments

Once LNRD-EES receives and records the IFMS accounts receivable control number in its docket, LNRD-EES will provide to EPA HQ-FMD, Financial Reports and Analysis Branch, quarterly updates on the status of the accounts receivable using the LDTS format. The Financial Reports and Analysis Branch will distribute the quarterly updates to the Regional FMOs.

The Regional FMO will input the information it receives on the LDTS report into the IFMS. The IFMS will be the official EPA record of the numerical status of the judicial penalty debt. Other EPA data bases will provide yes/no information on whether the total penalty assessed has been paid. Only the IFMS will be used to officially report dollar amounts. The appropriate office, RPO or ORC, should request information from the Regional FMO using the IFMS accounts receivable control number in order to verify the status of the judicial penalty debt for updating RPO data bases and STARS Consent Decree Tracking System (CDTS). (See Chapter One, Appendix 3 for STARS CDTS requirements.)

Coordination of DOJ and EPA Accounts Receivable Reporting Systems

The DOJ LNRD-EES and EPA-FMD must routinely compare and verify the accuracy of the data in their systems in order for both offices to meet their reporting responsibilities under 31 U.S.C. 3512, "Executive Agency Accounting Systems".

CHAPTER THREE COLLECTING JUDICIAL PENALTIES

Pursuing Outstanding Penalty Debts

When a penalty payment is not paid, the USAO will pursue collection in accordance with the law of the State in which the debtor resides. The USAO also may use the IRS tax offset referral programs to collect the debt.

Compromising, Suspending, or Terminating Judicial Penalty Debts

The Attorney General and his delegatee in the Department of Justice have plenary prosecutorial authority to collect and compromise judicial penalties. This authority stems from 25 U.S.C. 516, which reserves to DOJ the authority to conduct the litigation of the United States, including cases in which an agency of the U.S. is a party, and the cases and regulations broadly interpreting this authority.

The USAO will notify the LNRD-EES of any plans to suspend or terminate an EPA penalty debt. LNRD-EES will notify the EPA attorney of record on the case (with a copy to the Assistant Administrator of the Office of Enforcement) and offer an opportunity to comment on any DOJ decision to suspend or terminate the debt. Any decision affecting an EPA penalty (receivable) will be reflected in the LNRD-EES quarterly updates to EPA as described in the EPA Enforcement Reporting of the Status of Penalty Payments section of this Chapter.

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

OCT 6 1988

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

MEMORANDUM

SUBJECT: Transfer of Responsibility for Superfund Accounts Receivable to the Regions

FROM: Charles L. Grizzle
Assistant Administrator

TO: Regional Administrators

On April 27, 1988, I sent a memorandum to you about various initiatives being taken within the Agency to respond to the Fiscal Year 1986 Superfund audit report. One initiative was to improve controls over Superfund accounts receivable by placing responsibility for those receivables in the regions. I noted in my memorandum that we were developing revised guidance, Financial Management of the Superfund Program -- 2550D, which would transfer this responsibility.

I am pleased to report to you that the Agency's striped border review of the guidance has been completed, and the final version of "2550D" is being delivered through the standard Agency distribution channels.

As required by 2550D, any new or amended Superfund state contract, settlement or any other agreement or order creating amounts due EPA must now direct payment to the regional lockbox address. Further, the regional counsel, regional program office, and regional financial management office should implement the policies and procedures described in 2550D.

Please ensure that your staff members fulfill their responsibilities in this area. As you know, our success in Superfund cost recovery is being closely monitored. Our achievements in this area are measured by the amounts actually returned to the Trust Fund, and timely and accurate billings are an essential link in the recovery process.

REGIONAL SUPERFUND LOCKBOX DEPOSITORIES

FMO	LOCKBOX BANK	ADDRESS FOR REMITTING PAYMENT
Region 1 Boston	Mellon Bank	EPA - Region 1 Attn: Superfund Accounting P.O. Box 360197M Pittsburgh, PA 15251
Region 2 New York	Mellon Bank	EPA - Region 2 Attn: Superfund Accounting P.O. Box 360188M Pittsburgh, PA 15251
Region 3 Philadelphia	Mellon Bank	EPA - Region 3 Attn: Superfund Accounting P.O. Box 360515M Pittsburgh, PA 15251
Region 4 Atlanta	The Citizens and Southern National Bank	EPA - Region 4 Attn: Superfund Accounting P.O. Box 100142 Atlanta, GA 30384
Region 5 Chicago	The First National Bank of Chicago	EPA - Region 5 Attn: Superfund Accounting P.O. Box 70753 Chicago, IL 60673
Region 6 Dallas	Mellon Bank	EPA - Region 6 Attn: Superfund Accounting P.O. Box 360582M Pittsburgh, PA 15251
Region 7 Kansas City	Mellon Bank	EPA - Region 7 Attn: Superfund Accounting P.O. Box 360748M Pittsburgh, PA 15251
Region 8 Denver	Mellon Bank	EPA - Region 8 Attn: Superfund Accounting P.O. Box 360859M Pittsburgh, PA 15251
Region 9 San Francisco	Mellon Bank	EPA - Region 9 Attn: Superfund Accounting P.O. Box 360863M Pittsburgh, PA 15251
Region 10 Seattle	Mellon Bank	EPA - Region 10 Attn: Superfund Accounting P.O. Box 360903M Pittsburgh, PA 15251

EPA Financial Management Offices

EPA - Region I
JFK Fed Bldg Rm. 2203
Boston, MA 02203
FTS - 835-3339

EPA- Region II
JKJ Fed Bldg/26 Fed Plaza
New York, NY 10278
FTS - 264-8989

EPA - Region III
841 Chestnut Bldg
Philadelphia, PA 19107
FTS - 597-7805

EPA - Region IV
345 Courtland St., NE
Atlanta, GA 30365
FTS - 257-3278

EPA- Region V
230 South Dearborn Street
Chicago, IL 60604
FTS - 353-8923

EPA - Region VI
1445 Ross Ave,
12th Floor Suite 1200
Dallas, TX 75202
FTS - 255-6550

EPA - Region VII
726 Minnesota Avenue
Kansas City, KS 66101
FTS - 757-2830

EPA- Region VIII
999 18th St., Suite 50
Denver, CO 80202-2405
FTS - 564-1617

EPA - Region IX
1235 Mission Street
San Francisco, CA 94103

EPA - Region X
1200 Sixth Avenue
Seattle, WA 98101
FTS - 399-2961

Headquarters Accounting
Operations Branch
EPA (PM-226)
401 M St, SW
Washington, DC 20460
FTS - 382-5100

Headquarters Financial
Reports and Analysis
Branch
EPA (PM-226F)
401 M St, SW
Washington, DC 20460
FTS - 382 -5131

EPA ENFORCEMENT ACCOUNTS RECEIVABLE CONTROL NUMBER FORM

TO BE FILLED OUT BY ORIGINATING OFFICE:
(Attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: _____ _____
[Name of contact person] [Date]
in the _____ at _____
[office] [phone number]

☐ Non-SF Jud. Order/Consent Decree. **USAO COLLECTS.**

☐ Administrative Order/ Consent Agreement **FMO COLLECTS PAYMENT.**

☐ SF Jud. Order/Consent Decree. **FMO COLLECTS.**

☐ This is an original debt

☐ This is a modification

Name of Person and/or Company/Municipality making the payment

---

The Total Dollar Amount of Receivable _____
(If in installments, attach sch. of amounts and respective due dates)

The Case Docket Number _____

The Site-Specific Superfund (SF) Acct. Number _____

The Designated Regional/HQ Program Office _____

TO BE FILLED OUT BY LOCAL FINANCIAL MANAGEMENT OFFICE:

The IFMS Accounts Receivable Control Number _____

If you have any questions call: _____ _____
[Name of Contact] [Date]
in the Financial Management Office, phone number: _____

JUDICIAL ORDERS: Copies of this form with an attached copy of the front page of the **final judicial** order should be mailed to:

1. Debt Tracking Officer
   Environmental Enforcement Section
   Department of Justice/Rm. 1647D
   P.O.Box 7611, Benjamin Franklin Station
   Washington, DC 20044
2. Originating office (ORC)
3. Designated Program Office

ADMINISTRATIVE ORDERS: Copies of this form with an attached copy of the front page of the **administrative** order should be sent to:

1. Originating office
2. Designated Program Office
3. Regional Hearing Clerk
4. Regional Counsel

GLOSSARY

Below are key terms for filling out the EPA Enforcement Payment Account Receivable Control Number Form.

EPA Originating Office - In the case of administrative orders, the EPA office that originates and sends a copy of the signed final order and the transmittal letter to the defendant/respondent is responsible for filling out the top half of the Form. In the case of judicial orders, the U.S. Attorneys' Office (USAO) will in most cases be the entity that sends a copy of the final (entered) order or consent decree to the defendant with a transmittal letter. By Directive, the USAO will send to the appropriate Office of Regional Counsel (ORC), a copy of the entered order and transmittal letter. Unless otherwise designated in a Region, the ORC will be the EPA originating office responsible for filling out the Form and sending a copy of the entered order to the FMO.

Designated Regional Headquarters Program Office - This is the Office responsible for enforcing the statutory program (e.g., CAA, CWA, TSCA, RCRA, FIFRA, Superfund, etc.) that governs the violation. The designated program office is responsible for tracking the technical (non-penalty) requirements of the order. This program will use the IFMS accounts receivable number to check with the FMO on the status of payment of the administrative or judicial penalty.

Case Docket Number - This is the number in the upper right hand corner of the final order that is provided by the Regional Hearing Clerk (administrative) or the Clerk of the Court (judicial).

Site-Specific Superfund Account Number - The ten digit number used in the Superfund Program to identify a particular site so that monies can be tied to specific sites and activities.

IFMS Accounts Receivable Control Number - When the FMO is provided documentation (final order) on the creation of a debt, the FMO enters the debt into the Integrated Financial Management System (IFMS) and creates a new accounts receivable. If there are several violators under the same case that will be making a payment, then each "payee" receives a different control number. The FMO will fill out a separate copy of the Form for each payee and accounts receivable control number.

The completed version of the Form with the EPA Originating Office and the FMO portions of the form filled in should be included in the enforcement case official file as a record for audit purposes that the final order was sent to the FMO and that an accounts receivable control number was provided.

U.S. Department of Justice

Land and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 8, 1990

MEMORANDUM

TO: All United States Attorneys

FROM: Richard B. Stewart
Assistant Attorney General
Land and Natural Resources Division

Laurence S. McWhorter
Director, Executive Office For
United States Attorneys

SUBJECT: Distribution of Court-Approved Consent Decrees Under Environmental Statutes

The Inspector General of the Environmental Protection Agency has recently conducted an audit of the Agency's financial practices and procedures including its monitoring of consent decrees and court judgments relating to the payment of civil penalties and the collection of Superfund money. As you know, while civil penalties are collected by each of your collection units, Superfund monies are payable to EPA's regional financial management divisions and are deposited in separate Superfund lockboxes.

The Inspector General's report severely criticized certain of the Agency's procedures noting that its ten regional financial management divisions were not receiving file-stamped, court-approved consent decrees which is the mechanism for creating "accounts receivable" at the Agency. One difficulty for the Agency is that consent decrees under environmental statutes must undergo a 30-day public comment period prior to final approval by the district court. In those cases where the proposed settlements result in substantial public comment, the decrees may not be finally approved for months after lodging. In its report, the Inspector General directed the Agency to arrange for the receipt of court-approved consent decrees. While EPA does not itself collect civil penalties, the Inspector General is requiring the Agency to acquire all entered consent decrees, not just Superfund decrees.

Accordingly, on behalf of our client Agency, we are requesting that each United States Attorney Office provide copies of file-stamped and court-signed consent decrees not only to this Division's Environmental Enforcement Section but to the appropriate regional EPA office as set forth in the attached mailing list. Your cooperation in this endeavor is greatly appreciated.

Attachment

ATTACHMENT

MAILING LIST FOR SENDING COURT-APPROVED, FILE-STAMPED CONSENT DECREEE UNDER ENVIRONMENTAL STATUTES

Copies of all court-approved consent decrees on behalf of the Environmental Protection Agency should be sent to the Land and Natural Resources Divison as follows:

Debt Tracking Unit
Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

In addition, copies should be sent to EPA's regional office as follows:

U.S. ATTORNEY OFFICES LOCATED IN THE FOLLOWING STATES	SHOULD SEND DECREES TO THE FOLLOWING EPA REGIONAL OFFICE
Maine, New Hampshire, Vermont, Mass., R.I., Conn.	Regional Counsel EPA - Region I JFK Bldg. Rm. 2203 Boston, MA. 02203
N.Y., N.J., P.R./Virgin Islands	Regional Counsel EPA - Region II 26 Fed. Plaza New York, NY 10278
Pa., Del., Md., Va., W.Va., D.C.	Regional Counsel EPA - Region III 841 Chestnut Street Philadelphia, PA. 19107
N.C., S.C., Ga., Tenn., Ky., Fla., Miss., Ala.	Regional Counsel EPA - Region IV 345 Courtland Street, N.E. Atlanta, Georgia 30365
Ill., Ind., Ohio, Minn., Wis., Mich.	Regional Counsel EPA - Region V 230 South Dearborn Street Chicago, Ill. 60604

Tex., La., Okla., N.M., Ark.	Regional Counsel EPA - Region VI 1445 Ross Ave. 12th Floor - Suite 1200 Dallas, TX. 75202
Kan., Mo., Iowa, Neb., N.D., S.D.	Regional Counsel EPA - Region VII 726 Minn. Avenue Kansas City, KS. 66101
Col., Utah, Wyo., Mont.	Regional Counsel EPA - Region VIII 999 18th St. - Suite 50 Denver, CO. 80202-2405
Cal., Ariz., Nev., Hawaii	Regional Counsel EPA - Region IX 1235 Mission Street San Francisco, CA. 94103
Wash., Ore., Idaho, Alaska	Regional Counsel EPA - Region X 1200 Sixth Avenue Seattle, WA. 98101

CHAPTER FOUR

ENFORCING FINAL ORDERS

Enforcing Administrative Orders

Each program has guidance for taking timely and appropriate responses on violations of administrative orders. Some programs provide for the use of stipulated penalties to address certain types of violations of administrative orders such as self-reporting. Chapter Two, Collection of Administrative Penalties, provides guidance on assessing and collecting stipulated penalties.

For violations of statutory or regulatory requirements such as permit discharge limits, Agency policy is to escalate enforcement response by issuing a second order with higher penalty assessments or by filing a judicial case to enforce the order. Judicial referrals to enforce violations of administration orders require the development of a litigation referral package and are referred to OE or directly to DOJ depending on the statute and issues involved in the case. Appendix 1 of this chapter describes the direct referral requirements.

"Contractor Listing" which is described at the end of this chapter is available as an enforcement remedy for administrative order violations under the CWA and CAA. (Appendix 5 of this chapter describes procedures for listing a violator.)

Enforcing Judicial Orders

EPA may use a variety of actions to enforce violations of judicial orders. Any such response, however, must be prompt and firm to reflect the importance the Agency attaches to such agreements. Informal actions include warning letters and compliance conferences with the violator. Formal enforcement of judicial orders includes modifications of the terms of an order, invoking stipulated penalties, motions to enforce the decree, civil and criminal contempt of Court motions, and contractor listing under the CAA and CWA. The Judicial Consent Decree Tracking and Follow-up Directive issued in January 1990 supplements this Manual's guidance and can be found in Appendix 3 of Chapter One. The April 18, 1984 Guidelines for Enforcing Federal District Court Orders (GM 27), contained in Appendix 2 of this chapter provides additional information on judicial order enforcement. This Manual supersedes any inconsistencies between the April 1984 Guidelines and practices set forth in this Manual.

Modifications

Either the Federal government or the defendant can request that the Court grant a modification to an existing order, or both parties can jointly propose a modification to the court. Modification of the existing terms of a judicial order must be consistent with each program's guidance on what warrants granting the defendant relief from the original terms of the order.

Modifications usually address circumstances which have arisen since the entry of the consent decree (such as force majeure events or other unanticipated circumstances).

Modifications require the signature of the Assistant Administrator for OE and the Assistant Attorney General for the Land and Natural Resources Division (LNRD) of DOJ, consistent with the requirements for the original decree. Appendix 3 of this chapter describes procedures for modifying judicial orders and obtaining OE and DOJ concurrence. Modifications approved by the court must be sent to the NEIC Central Repository, (see Chapter One).

Stipulated Penalties (Judicial Decrees)

Most judicial consent decrees contain provisions for stipulated penalties (i.e., penalties that are agreed upon by the parties, at the time of entering into settlement, as being payable in the event that the defendant violates a provision of the decree). Any stipulated penalties in judicial orders or consent decrees, whether automatic or upon notice, should be paid to the DOJ Lockbox. Appendix 2 in Chapter One provides guidance concerning the use of "automatic" versus "on demand" stipulated penalties in EPA settlement agreements.

While LNRD has the overall responsibility for enforcing judicial judgments and collecting outstanding penalties, DOJ rarely will know, independently of EPA, when the underlying technical conditions of an EPA consent decree have not been met. DOJ relies on EPA to monitor the technical requirements of an order and notify DOJ staff when stipulated penalty provisions (automatic or on demand) have been triggered.

Once DOJ has been informed that a stipulated penalty is due the Federal government, DOJ has the responsibility and the prosecutorial authority for collecting and resolving any controversies over the payment of the penalty debt. As with the initial litigation governing the consent decree, LNRD works with EPA on developing

the documents to collect stipulated penalties and keeps EPA informed on the status of the action. Appendix 4 of this chapter describes the procedures for informing DOJ that a stipulated penalty provision has been triggered.

Motions to Enforce the Consent Decree and Contempt of Court

For serious violations of a settlement agreement, the Agency may seek to enforce the terms of the agreement by requesting that LNRD file a "Motion to Enforce the Judgment". Such a motion is filed with the same court that had originally issued the consent decree and requests the court to exercise its authority to ensure compliance.

A Motion to Enforce the Judgment may assert that the defendant has failed to comply with the consent decree provisions that relate to the agreed-upon compliance schedule or operation and maintenance requirements and that no provision of the decree for excusing noncompliance (e.g., a force majeure clause) is applicable. The motion may also request that the court compel payment of any uncollected stipulated penalties.

A Motion to Enforce a Judgment may be accompanied by a "Motion to Show Cause Why Defendant Should Not Be Held In Contempt". Such a contempt motion is usually reserved for the most serious violations of a consent decree (e.g. willing and knowing violations). The ORC should request DOJ assistance on filing the above motions through the direct referral process outlined in Appendix 1 of this chapter.

Contractor Listing (Air and Water Violations Only)

EPA has the authority to prohibit a facility from participating in Federal contracts, grants or loans, where that facility has a record of continuing or recurring noncompliance with clean air or clean water standards, and where that facility is subject to a prior or ongoing enforcement action. Established guidance on the use of this authority notes that violations of judicial consent decrees, administrative orders and notices of noncompliance are prime examples of cases where the "contractor listing" prohibition should be strongly considered. (See "Guidance on Implementing the Discretionary Contractor Listing Program", November 26, 1986). This is an administrative procedure and does not require the assistance or concurrence of DOJ. However, if the case has been filed or referred to DOJ for filing, EPA should notify DOJ before initiating or disposing of a contractor listing action.

CHAPTER FOUR ENFORCING FINAL ORDERS

Procedures for listing a violator are set forth at 40 C.F.R. Part 15. OE has designated a "Listing Official" to implement the process required by 40 C.F.R. Part 15. Listing actions are formally commenced by submitting to the Listing Official a "Recommendation to List" which has been signed by either the Regional Administrator, the OE Associate Enforcement Counsel for Air or Water, or the Assistant Administrator for Air and Radiation or Water. Appendix 5 of this chapter describes the process for submitting a "Recommendation to List".

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.

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 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

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

APR 18 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidelines for Enforcing Federal District Court Orders

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

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Regional Counsels

Attached please find the most recent addition to the General Enforcement Policy Compendium entitled "Guidelines for Enforcing Federal District Court Orders in Environmental Cases." The document emphasizes the very high priority we attach to preserving the integrity of court orders to enable the Agency to maintain its credibility with the courts, the public, and the regulated community so as to achieve environmental objectives. If you have any questions concerning this guidance, please contact Glenn Unterberger, Director of the Office of Legal and Enforcement Policy. He may be reached at (FTS) 382-4541.

Attachment

cc: Assistant Attorney General for Land and Natural Resources
Chief, Environmental Enforcement Section, DOJ

GUIDELINES FOR ENFORCING FEDERAL DISTRICT COURT ORDERS IN ENVIRONMENTAL CASES

Purposes

This guidance emphasizes the importance of enforcement of Federal district court orders that embody either consensual or nonconsensual resolutions of environmental enforcement litigation. It establishes uniform Agency objectives in preparing for and in responding to violations of court orders. The goal of this initiative is to minimize the number of violations of court orders and to facilitate enforcement efforts when such violations are detected. Recently, the Agency developed the Consent Decree Tracking System which will provide a centralized data base and reporting system to upgrade consent decree enforcement. Ultimately, the lists of "significant violators" maintained in each program area should include all significant violations of court orders.

Policy

EPA places a very high priority on enforcement of court orders. This policy ensures that defendants meet the requirements of each court order in order to achieve the objectives of the underlying civil action. Moreover, vigorous enforcement of court orders is essential to enable the Agency to maintain its credibility with the courts, the public, and the regulated community, and to achieve the desired environmental objective.

Scope

This guidance specifically applies 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. It also covers the following areas:

- -- Drafting court orders to ensure enforceability.[1]
- -- Selecting responses to violations of consent decrees and other court orders.
- -- Considering other procedures in implementing an enforcement response.

1/ Additional guidance on drafting enforceable consent decrees can be found in Agency policy entitled, "Guidance for Drafting Judicial Consent Decrees" (General Enforcement Policy Compendium, GM-17, dated 10/19/83).

Drafting Orders to Ensure Enforceability

EPA should obtain terms that are legally enforceable in negotiating a consent decree or writing an order at the request of the court. The order should provide for reasonable methods for monitoring compliance with the order's requirements and should establish adequate incentives for compliance.

Careful elimination of areas for future dispute can facilitate enforceability. Requirements in the order should be clear, understandable, and should avoid any possible ambiguities. The order should both clearly require compliance with the applicable regulations and establish the method or procedure that will be used to determine compliance. In some cases, it may be appropriate to specify the pollution control technology to be used. In no event, however, should the order deem compliance to mean anything but compliance with the applicable legal requirement.

In every case, the obligation to comply must rest solely with the defendant. Provisions that operate to "excuse" noncompliance, e.g., a force majeure clause, should be narrowly and explicitly drawn.[2] The order should avoid any ambiguities regarding the defendant's compliance obligations associated with revisions to the underlying requirements. If the litigants expect future legislative or regulatory changes to the underlying requirements, the court order must clearly establish the procedures that would change the order's compliance obligations. The order should provide that revision to the underlying requirement does not excuse noncompliance with the terms of the order unless and until the court amends the order.

The order should establish explicit compliance verification procedures. Because inspections are likely to be more objective than self-monitoring, the order should provide authority for EPA to conduct inspections at reasonable times. If resources will not permit detailed inspections by EPA or State or local authorities, some alternative form of compliance verification (e.g., self-monitoring, self-reporting, third-party verification) should be required. In such cases, the order should require the defendant to conduct compliance tests at its own expense on the basis of the test methods established in the order. In addition,

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2/ Economic hardship should not be established as a force majeure event. Instead, the defendant suffering the hardship should petition the court for a modification of the order. See, Federal Rules of Civil Procedure Rule 60. EPA should oppose such petitions unless the defendant convincingly demonstrates extreme circumstances that justify modifications to the order.

the order should provide for prior notice to EPA to enable the Agency to observe the test or other critical event. However, the order should always preserve EPA's authority to inspect or otherwise obtain information on its own, and should also provide for inspections by EPA contractors.

Compliance verification requirements should not be more burdensome to the defendant than is necessary to determine compliance. EPA should carefully review each report that the defendant submits to verify that it includes all of the information that the order requires. The order should provide that the information used by defendants to generate self-reports must be retained for a reasonable period of time, and that EPA must have access to such information during that period of time. A provision which establishes that self-monitoring and third party verification information is admissible in proceedings to enforce the order is highly desirable.

To facilitate verification of compliance with penalty payment provisions, the Regional Office must ensure that, at a minimum, it receives notice when penalties that are due have been paid. The Regional Office should maintain organized records indicating penalty collection dates.

It is essential to include in court orders the mechanisms necessary to assure compliance with the terms of those orders. Such mechanisms may include stipulated penalties, posting and forfeiture of performance bonds or letters of credit, suspension of operation, increased reporting requirements, and advance approval from EPA for certain activities. Regional Offices should determine appropriate mechanisms on a case-by-case basis taking into account the factors described below.

The compliance mechanisms should be strong enough to deter noncompliance by, for example, removing the economic incentives for noncompliance, yet flexible enough to deal equitably with the possible range of future violations. The force majeure clause and prudent exercise of prosecutorial discretion are the proper mechanisms for providing flexibility. In addition, the compliance incentive provisions should not be excessive although stipulated penalties should permit assessments which are large enough to take into account that the violator of a court order is, by definition, a recividist or a recalcitrant and, therefore, in need of more serious incentive to comply.

The order should expressly provide that the compliance mechanisms therein are not the exclusive remedies available to the government. This type of provision preserves the government's ability to seek civil or criminal contempt penalties, specific performance of compliance provisions, and such other relief as the government may deem appropriate to obtain final compliance or to provide adequate deterrence against future violations.

Court orders should generally require the defendant to maintain and be able to demonstrate compliance for a specified period of time after the initial demonstration of compliance. This requirement ensures that the defendant is likely to remain in compliance. This provision should be consistent with the order's termination clause.

Finally, the order should explicitly state that it is binding on subsequent owners, operators, assignees, and other successors in interest in the facility. The order should require that these successors, etc., receive notification of the existence of the court order. The order should also require notification to EPA of any transfer of interest.

Selecting Responses to Violations of Court Orders

The primary objectives of enforcement of court orders are to correct the violation expeditiously, deter future violations by the defendant and by the regulated community, and preserve the integrity of court ordered remedies so as to achieve the desired environmental protection objective. Responses to violations must be prompt and firm to reflect the importance which EPA attaches to the court ordered requirements.

The government may pursue a range of remedies to address violations of court orders. These remedies include specific performance of the order's requirements (e.g., through a motion to enforce the order), additional specific performance requirements, stipulated monetary penalties, civil and criminal contempts, contractor suspension and debarment proceedings in appropriate cases involving the Clean Air Act or the Clean Water Act, and revised or extended compliance schedules (in the limited circumstances described below). These remedies may be used individually or in combination.

The government must weigh several factors in deciding upon the type and extent of relief to pursue. The chief factors are the environmental harm or risk caused by the violation, the degree of willfulness or negligence displayed by the defendant, the degree of economic benefit accruing to the defendant from the noncomplying behavior, any attempts to mitigate the violation, the deterrence value of the response, and the likelihood that the response will remedy the violation. It is also appropriate to consider the defendant's history of noncompliance and any extraordinary costs borne by the public. In addition, and as a secondary consideration, the government must assess the resource implications of the enforcement response.

All responses must require compliance with the order's terms as quickly as possible. This requirement includes initiation of postjudgment proceedings to collect civil penalties originally imposed in the decree for the underlying violation if the defendant has failed to pay such penalties. Collection should be for the full penalty amount.

Responses to violations of court orders typically should be more severe than those which the government normally would seek for a comparable initial violation of a statute, regulation, or administrative order. Absent a convincing demonstration by the defendant of mitigating circumstances, the government typically should pursue significant monetary penalties unless the violations are clearly de minimis. Penalties must remove any appreciable economic benefit accruing to the violator. In addition to recouping economic benefit, the penalties should reflect the recidivistic or recalcitrant behavior of the defendant. The case file must include an explanation of why the case managers have decided to pursue a particular penalty figure or no penalty.

The government should seek imposition of specific relief beyond that already required in the court order when necessary to provide adequate assurances of future compliance. Factors to consider in determining the need for such assurances are the likelihood of future violations, the environmental harm or risk which a future violation would be likely to pose, and the government resources involved in monitoring compliance with the additional requirements. Examples of further specific relief include more stringent reporting requirements, advance EPA approval of relevant activities by the defendant, temporary or permanent shutdown of violating facilities, more stringent operation and maintenance obligations, and posting of revocable or irrevocable letters of credit or performance bonds.

Normally, the government should avoid agreeing to extensions of compliance schedules without pursuing significant monetary penalties. Extensions without penalties typically should be limited to cases in which the defendant can prove that the violation was caused by circumstances falling squarely within the force majeure clause of the order. Moreover, an extension without penalties is permissible only if the extension poses limited environmental harm or risk, and a substantial public interest basis exists for extending the deadline. Extensions of compliance schedules must set realistic timetables for compliance aimed at securing compliance as quickly as possible. In any event, the defendant must continue to otherwise comply with the order.

The government should also consider the possibility of criminal contempt under the provisions of 18 U.S.C. § 401(3) in situations of aggravated noncompliance with consent decrees for which punishment is a legitmate objective of an enforcement

response. Factors to be considered in determing the appropriateness of criminal sanctions include: (1) the scope and duration of the noncompliance involved in the violation of the consent decree; (2) the environmental contamination or human health hazard resulting from that noncompliance; (3) the willfulness of the violation (in a criminal contempt action the government must show that the violation was willful and deliberate); (4) any falsification activity involved in the noncompliance (i.e., misrepresentation by the party subject to the consent decree concerning compliance with that consent decree); (5) the ability of the party that is subject to the consent decree to achieve compliance; and (6) the evidence of motivation for the noncompliance.

When dealing with deliberate noncompliance with a civil consent decree, one is by definition dealing with a corporation or individual that has already gone through less severe enforcement actions which have proven ineffective. The potential for using criminal contempt should, therefore, be considered in all significant cases of noncompliance with judicial consent decrees.

Other Matters To Consider In Implementing An Enforcement Response

The government should make every effort to coordinate enforcement responses with any governmental co-plaintiff. If no satisfactory agreement is possible, EPA must still fulfill its mandate to enforce environmental laws. Similarly, the government should give careful consideration to the enforcement concerns of private co-plaintiffs, particularly regarding final settlements. Even if the private party's role is limited to commenting on the settlement, the government should carefully consider such comments.

The government should establish a timetable for responding to a violation which reflects the high priority EPA places on enforcement of court orders. The timetable should take into consideration the nature of the violation, the need, if any, to take immediate action, the sufficiency of the available proof, and the complexity of the potential enforcement litigation. In uncomplicated cases that do not present an emergency to the public health or environment and, absent time requirements specifically imposed by the court order, the Regional Office should attempt to develop and refer the case to Headquarters within 45 days from the date the violation was detected. Headquarters and the Justice Department should process cases according to the timetable established in the September 29, 1983, agreement between the EPA Deputy Administrator and the Assistant Attorney General for Land and Natural Resources.

Any consent decrees and modifications to consent decrees must be in writing and signed by the Assistant Administrator for the Office of Enforcement and Compliance Monitoring and the Assistant Attorney General for Land and Natural Resources. Attorneys must

make clear to the defendant that the government requires such signatures to legally bind the United States notwithstanding recommendations of acceptance of the terms of the document by the government negotiators.

The policies and procedures set forth in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

PROCEDURES FOR MODIFYING JUDICIAL DECREES

Definition

Consent decree "modifications" are changes to a consent decree proposed jointly to the court by the Federal government and a defendant, largely to address circumstances which have arisen since the entry of the consent decree (such as force majeure events or other unanticipated circumstances). Thus, these "modifications" are distinct from Federal government unilateral enforcement actions requiring the violator to comply with the terms of the decree and imposing sanctions. Consent decree modifications should be addressed as follows:

Concurrence Process

- As soon as the need to modify a consent decree is discovered, the Region should send a letter to the appropriate OE-AEC and DOJ-Environmental Enforcement Section Chief notifying them of the intent to open negotiations with the defendant. The letter should contain summary information sufficient to apprise OE and DOJ of relevant facts, issues, and proposed solutions.

- Consistent with appropriate consultation procedures with OE or DOJ, the Region (along with OE or DOJ, as appropriate) may proceed to negotiate a modification of the consent decree in the manner described in the letter.

- OE retains authority for approving any modifications on behalf of EPA unless the underlying settlement authority of the original order has been delegated to the Regions. If delegated, then the modification does not bring the settlement within the scope of OE authority. DOJ retains authority for approving any modifications on behalf of the United States.

- After [redacted] and DOJ officials have approved the modifications, the [redacted] attorney will present the proposed consent decree modification to the appropriate court for approval.

STARS Consent Decree Tracking Measure

A consent decree violation handled through modification will be considered addressed under the STARS consent decree tracking measure when a modified consent decree is signed by the AA-OE (or, in the case of delegated settlements, the Regional Administrator) and the appropriate DOJ manager. Until these officials approve the modification, the Region will report the consent decree in the "in violation with action planned" category.

PROCEDURES FOR NOTIFYING DOJ OF STIPULATED PENALTIES

The procedure described below will be used for notifying the Department of Justice (DOJ) Land and Natural Resources Division (LNRD) of the need to initiate the collection of stipulated penalties. DOJ has the authority and responsibility to enforce judicial judgments and can also initiate collection of stipulated penalties without EPA's notification or request. However, DOJ rarely will know, without EPA notification, of the occurrence or non-occurrence of a specified event that triggers a stipulated penalty provision.

Definition

Stipulated penalties are penalties agreed to by the parties to a consent decree for violation of the agreement's provisions. These penalties are made a part of the consent decree and are enforceable if violated.

Notification Process

Unless the consent decree specifies otherwise, notification to defendants on the collection of stipulated penalties should be sent by DOJ-LNRD. Unless the consent decree specifies otherwise, all judicial stipulated penalties should be paid to the DOJ lockbox. The following procedures apply for enlisting DOJ's assistance:

- The Region sends a letter to DOJ (copy to AA-OE) requesting DOJ to pursue collection activities. The letter to DOJ should contain summary information sufficient to apprise DOJ of relevant facts, issues and proposed solutions.

- DOJ copies the Region and AA-OE with a copy of the notice letter sent to the defendant and any response to the notice letter.

- If the response is unsatisfactory, the Region will send a direct referral package to DOJ (copy to AA-OE). The referral package should request that DOJ enforce against the unresolved consent decree violations, include any relevant new

information arising since the notice letter request, and specify the extent of the relief which EPA wishes to pursue.

- DOJ takes appropriate action to enforce the original consent decree with full participation by the Region.

- When the defendant automatically pays stipulated penalties to the Federal government through any means, including the DOJ or EPA lockbox systems, the RPO, or the ORC, the office receiving the payment should immediately send a copy to the ORC, AA-OE, DOJ-LNRD and the EPA Local Financial Management Office (FMO). This includes the U.S. Attorneys' Offices.

STARS CONSENT DECREE TRACKING MEASURE

Under the STARS consent decree tracking measure, a demand letter or a notice to the defendant to pay a stipulated penalty is not considered a "formal enforcement response". A penalty payment must be received or a direct referral package sent to DOJ (copy to OE) before the violation is considered addressed. Where a demand or notice 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.

CONTRACTOR LISTING IN CASES OF NONCOMPLIANCE WITH ADMINISTRATIVE OR JUDICIAL ORDERS

Guidance

EPA has authority to prohibit facilities which have a record of continuing or recurring noncompliance with Clean Air Act or Clean Water Act standards, and which are the subject of a prior or ongoing enforcement action, from participating in federal contracts, grants, or loans. (Clean Air Act §306, Clean Water Act §508, Executive Order 11738, 40 CFR Part 15). Established guidance on the use of this authority notes that violations of consent decrees, administrative orders, and notices of noncompliance are prime examples of cases where this prohibition, referred to as "Contractor Listing", should be strongly considered (See "Guidance on Implementing the Discretionary Contractor Listing Program", November 26, 1986).

Procedures

The process for listing a violator, set forth at 40 CFR Part 15 and in the November 26, 1986 Guidance, should begin with a determination that the "continuing or recurring noncompliance" involves clearly applicable Clean Air Act or Clean Water Act standards. If there is a pending judicial action against a party, such as an outstanding consent decree, there should be coordination with the appropriate DOJ attorney to ensure that the listing proceeding will not compromise the litigation posture and will complement a motion to enforce the decree. The listing action can then be formally commenced by a "Recommendation to List" signed by a Regional Administrator, the AEC for Air or Water, or the Assistant Administrator for Air and Radiation or Water and sent to the Listing Official in OE. The recommendation must include:

(1) The name, address, and telephone number of the Recommending Person.

(2) A description of the facility in question and its owner or operator.

(3) A description of the alleged continuing or recurring Clean Air Act or Clean Water Act noncompliance and the evidence thereof.

(4) A description of the prior or ongoing enforcement action against the facility (such as an outstanding consent decree or administrative order).

If these requirements are met, the Listing Official notifies the facility of the recommendation and transmits it to the Assistant Administrator for Enforcement. The owner or operator of the facility then has 30 calendar days to request a listing proceeding. If such a request is made, EPA and the requesting person may present oral or written evidence relevant to the proposed listing to an appointed Case Examiner at an informal proceeding, "without formal rules of evidence or procedure", and the Case Examiner decides whether or not to list the facility. If the Case Examiner decides to list the facility, the owner or operator may ask the General Counsel to review the Case Examiner's decision. The General Counsel's decision would then constitute final Agency action. If there is no request to present evidence, the Assistant Administrator for Enforcement the matter. These procedures and the provisions for review of a listing decision are set forth at 40 CFR Part 15.

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

OR.22
GM#27

APR 18 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidelines for Enforcing Federal District Court Orders

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

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Regional Counsels

Attached please find the most recent addition to the General Enforcement Policy Compendium entitled "Guidelines for Enforcing Federal District Court Orders in Environmental Cases." The document emphasizes the very high priority we attach to preserving the integrity of court orders to enable the Agency to maintain its credibility with the courts, the public, and the regulated community so as to achieve environmental objectives. If you have any questions concerning this guidance, please contact Glenn Unterberger, Director of the Office of Legal and Enforcement Policy. He may be reached at (FTS) 382-4541.

Attachment

cc: Assistant Attorney General for Land and Natural Resources
Chief, Environmental Enforcement Section, DOJ

GUIDELINES FOR ENFORCING FEDERAL DISTRICT COURT ORDERS IN ENVIRONMENTAL CASES

Purposes

This guidance emphasizes the importance of enforcement of Federal district court orders that embody either consensual or nonconsensual resolutions of environmental enforcement litigation. It establishes uniform Agency objectives in preparing for and in responding to violations of court orders. The goal of this initiative is to minimize the number of violations of court orders and to facilitate enforcement efforts when such violations are detected. Recently, the Agency developed the Consent Decree Tracking System which will provide a centralized data base and reporting system to upgrade consent decree enforcement. Ultimately, the lists of "significant violators" maintained in each program area should include all significant violations of court orders.

Policy

EPA places a very high priority on enforcement of court orders. This policy ensures that defendants meet the requirements of each court order in order to achieve the objectives of the underlying civil action. Moreover, vigorous enforcement of court orders is essential to enable the Agency to maintain its credibility with the courts, the public, and the regulated community, and to achieve the desired environmental objective.

Scope

This guidance specifically applies 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. It also covers the following areas:

- -- Drafting court orders to ensure enforceability.[1]
- -- Selecting responses to violations of consent decrees and other court orders.
- -- Considering other procedures in implementing an enforcement response.

1/ Additional guidance on drafting enforceable consent decrees can be found in Agency policy entitled, "Guidance for Drafting Judicial Consent Decrees" (General Enforcement Policy Compendium, GM-17, dated 10/19/83).

Drafting Orders to Ensure Enforceability

EPA should obtain terms that are legally enforceable in negotiating a consent decree or writing an order at the request of the court. The order should provide for reasonable methods for monitoring compliance with the order's requirements and should establish adequate incentives for compliance.

Careful elimination of areas for future dispute can facilitate enforceability. Requirements in the order should be clear, understandable, and should avoid any possible ambiguities. The order should both clearly require compliance with the applicable regulations and establish the method or procedure that will be used to determine compliance. In some cases, it may be appropriate to specify the pollution control technology to be used. In no event, however, should the order deem compliance to mean anything but compliance with the applicable legal requirement.

In every case, the obligation to comply must rest solely with the defendant. Provisions that operate to "excuse" non-compliance, e.g., a force majeure clause, should be narrowly and explicitly drawn.[2] The order should avoid any ambiguities regarding the defendant's compliance obligations associated with revisions to the underlying requirements. If the litigants expect future legislative or regulatory changes to the underlying requirements, the court order must clearly establish the procedures that would change the order's compliance obligations. The order should provide that revision to the underlying requirement does not excuse noncompliance with the terms of the order unless and until the court amends the order.

The order should establish explicit compliance verification procedures. Because inspections are likely to be more objective than self-monitoring, the order should provide authority for EPA to conduct inspections at reasonable times. If resources will not permit detailed inspections by EPA or State or local authorities, some alternative form of compliance verification (e.g., self-monitoring, self-reporting, third-party verification) should be required. In such cases, the order should require the defendant to conduct compliance tests at its own expense on the basis of the test methods established in the order. In addition,

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2/ Economic hardship should not be established as a force majeure event. Instead, the defendant suffering the hardship should petition the court for a modification of the order. See, Federal Rules of Civil Procedure Rule 60. EPA should oppose such petitions unless the defendant convincingly demonstrates extreme circumstances that justify modifications to the order.

the order should provide for prior notice to EPA to enable the Agency to observe the test or other critical event. However, the order should always preserve EPA's authority to inspect or otherwise obtain information on its own, and should also provide for inspections by EPA contractors.

Compliance verification requirements should not be more burdensome to the defendant than is necessary to determine compliance. EPA should carefully review each report that the defendant submits to verify that it includes all of the information that the order requires. The order should provide that the information used by defendants to generate self-reports must be retained for a reasonable period of time, and that EPA must have access to such information during that period of time. A provision which establishes that self-monitoring and third party verification information is admissible in proceedings to enforce the order is highly desirable.

To facilitate verification of compliance with penalty payment provisions, the Regional Office must ensure that, at a minimum, it receives notice when penalties that are due have been paid. The Regional Office should maintain organized records indicating penalty collection dates.

It is essential to include in court orders the mechanisms necessary to assure compliance with the terms of those orders. Such mechanisms may include stipulated penalties, posting and forfeiture of performance bonds or letters of credit, suspension of operation, increased reporting requirements, and advance approval from EPA for certain activities. Regional Offices should determine appropriate mechanisms on a case-by-case basis taking into account the factors described below.

The compliance mechanisms should be strong enough to deter noncompliance by, for example, removing the economic incentives for noncompliance, yet flexible enough to deal equitably with the possible range of future violations. The force majeure clause and prudent exercise of prosecutorial discretion are the proper mechanisms for providing flexibility. In addition, the compliance incentive provisions should not be excessive although stipulated penalties should permit assessments which are large enough to take into account that the violator of a court order is, by definition, a recividist or a recalcitrant and, therefore, in need of more serious incentive to comply.

The order should expressly provide that the compliance mechanisms therein are not the exclusive remedies available to the government. This type of provision preserves the government's ability to seek civil or criminal contempt penalties, specific performance of compliance provisions, and such other relief as the government may deem appropriate to obtain final compliance or to provide adequate deterrence against future violations.

Court orders should generally require the defendant to maintain and be able to demonstrate compliance for a specified period of time after the initial demonstration of compliance. This requirement ensures that the defendant is likely to remain in compliance. This provision should be consistent with the order's termination clause.

Finally, the order should explicitly state that it is binding on subsequent owners, operators, assignees, and other successors in interest in the facility. The order should require that these successors, etc., receive notification of the existence of the court order. The order should also require notification to EPA of any transfer of interest.

Selecting Responses to Violations of Court Orders

The primary objectives of enforcement of court orders are to correct the violation expeditiously, deter future violations by the defendant and by the regulated community, and preserve the integrity of court ordered remedies so as to achieve the desired environmental protection objective. Responses to violations must be prompt and firm to reflect the importance which EPA attaches to the court ordered requirements.

The government may pursue a range of remedies to address violations of court orders. These remedies include specific performance of the order's requirements (e.g., through a motion to enforce the order), additional specific performance requirements, stipulated monetary penalties, civil and criminal contempts, contractor suspension and debarment proceedings in appropriate cases involving the Clean Air Act or the Clean Water Act, and revised or extended compliance schedules (in the limited circumstances described below). These remedies may be used individually or in combination.

The government must weigh several factors in deciding upon the type and extent of relief to pursue. The chief factors are the environmental harm or risk caused by the violation, the degree of willfulness or negligence displayed by the defendant, the degree of economic benefit accruing to the defendant from the noncomplying behavior, any attempts to mitigate the violation, the deterrence value of the response, and the likelihood that the response will remedy the violation. It is also appropriate to consider the defendant's history of noncompliance and any extraordinary costs borne by the public. In addition, and as a secondary consideration, the government must assess the resource implications of the enforcement response.

All responses must require compliance with the order's terms as quickly as possible. This requirement includes initiation of postjudgment proceedings to collect civil penalties originally imposed in the decree for the underlying violation if the defendant has failed to pay such penalties. Collection should be for the full penalty amount.

Responses to violations of court orders typically should be more severe than those which the government normally would seek for a comparable initial violation of a statute, regulation, or administrative order. Absent a convincing demonstration by the defendant of mitigating circumstances, the government typically should pursue significant monetary penalties unless the violations are clearly de minimis. Penalties must remove any appreciable economic benefit accruing to the violator. In addition to recouping economic benefit, the penalties should reflect the recidivistic or recalcitrant behavior of the defendant. The case file must include an explanation of why the case managers have decided to pursue a particular penalty figure or no penalty.

The government should seek imposition of specific relief beyond that already required in the court order when necessary to provide adequate assurances of future compliance. Factors to consider in determining the need for such assurances are the likelihood of future violations, the environmental harm or risk which a future violation would be likely to pose, and the government resources involved in monitoring compliance with the additional requirements. Examples of further specific relief include more stringent reporting requirements, advance EPA approval of relevant activities by the defendant, temporary or permanent shutdown of violating facilities, more stringent operation and maintenance obligations, and posting of revocable or irrevocable letters of credit or performance bonds.

Normally, the government should avoid agreeing to extensions of compliance schedules without pursuing significant monetary penalties. Extensions without penalties typically should be limited to cases in which the defendant can prove that the violation was caused by circumstances falling squarely within the force majeure clause of the order. Moreover, an extension without penalties is permissible only if the extension poses limited environmental harm or risk, and a substantial public interest basis exists for extending the deadline. Extensions of compliance schedules must set realistic timetables for compliance aimed at securing compliance as quickly as possible. In any event, the defendant must continue to otherwise comply with the order.

The government should also consider the possibility of criminal contempt under the provisions of 18 U.S.C. § 401(3) in situations of aggravated noncompliance with consent decrees for which punishment is a legitmate objective of an enforcement

response. Factors to be considered in determing the appropriateness of criminal sanctions include: (1) the scope and duration of the noncompliance involved in the violation of the consent decree; (2) the environmental contamination or human health hazard resulting from that noncompliance; (3) the willfulness of the violation (in a criminal contempt action the government must show that the violation was willful and deliberate); (4) any falsification activity involved in the noncompliance (i.e., misrepresentation by the party subject to the consent decree concerning compliance with that consent decree); (5) the ability of the party that is subject to the consent decree to achieve compliance; and (6) the evidence of motivation for the noncompliance.

When dealing with deliberate noncompliance with a civil consent decree, one is by definition dealing with a corporation or individual that has already gone through less severe enforcement actions which have proven ineffective. The potential for using criminal contempt should, therefore, be considered in all significant cases of noncompliance with judicial consent decrees.

Other Matters To Consider In Implementing An Enforcement Response

The government should make every effort to coordinate enforcement responses with any governmental co-plaintiff. If no satisfactory agreement is possible, EPA must still fulfill its mandate to enforce environmental laws. Similarly, the government should give careful consideration to the enforcement concerns of private co-plaintiffs, particularly regarding final settlements. Even if the private party's role is limited to commenting on the settlement, the government should carefully consider such comments.

The government should establish a timetable for responding to a violation which reflects the high priority EPA places on enforcement of court orders. The timetable should take into consideration the nature of the violation, the need, if any, to take immediate action, the sufficiency of the available proof, and the complexity of the potential enforcement litigation. In uncomplicated cases that do not present an emergency to the public health or environment and, absent time requirements specifically imposed by the court order, the Regional Office should attempt to develop and refer the case to Headquarters within 45 days from the date the violation was detected. Headquarters and the Justice Department should process cases according to the timetable established in the September 29, 1983, agreement between the EPA Deputy Administrator and the Assistant Attorney General for Land and Natural Resources.

Any consent decrees and modifications to consent decrees must be in writing and signed by the Assistant Administrator for the Office of Enforcement and Compliance Monitoring and the Assistant Attorney General for Land and Natural Resources. Attorneys must

make clear to the defendant that the government requires such signatures to legally bind the United States notwithstanding recommendations of acceptance of the terms of the document by the government negotiators.

The policies and procedures set forth in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

GM - 25, was revised in November 1988. The old version has been deleted and relevant excepts of the new document have been put in its place in the manual. A complete copy of the strategy can be obtained from the Office of Federal Activities.

EPA

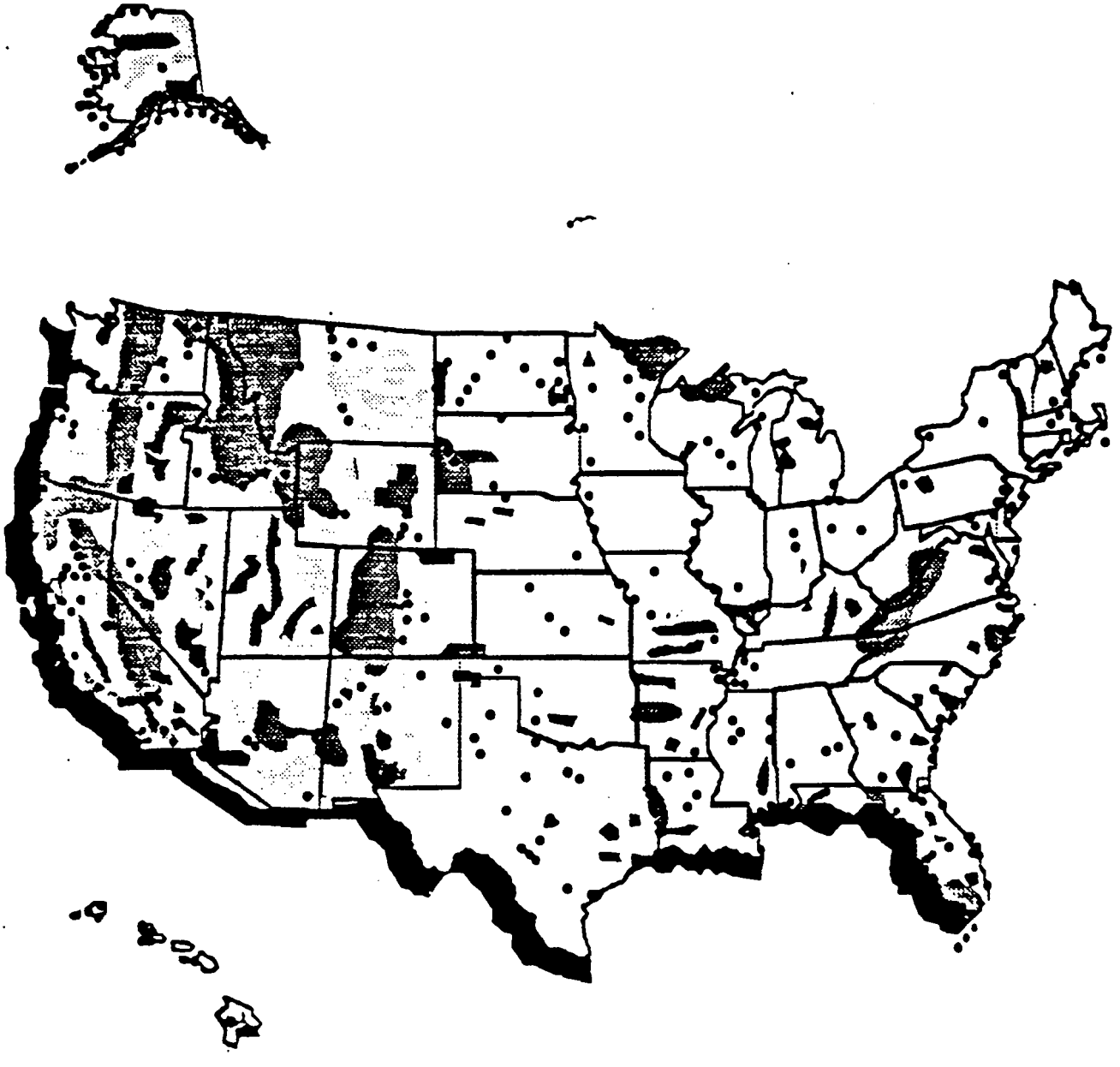
United States
Environmental Protection
Agency

Office of
Federal Activities
Washington, D.C.

EPA/00 FA 88-001
November 1988

FF. 1-1
GM #25

Federal Facilities Compliance Strategy



Federal Facilities Compliance Strategy

Office of Federal Activities
U.S. Environmental Protection Agency

November 1988

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

NOV 8 1988

THE ADMINISTRATOR

The U.S. Environmental Protection Agency (EPA) believes that Federal agencies have an inherent obligation to comply with all Federal environmental statutes in the same manner and degree as all other regulated entities. It is imperative that every effort be made to ensure that Federal facilities achieve and maintain high rates of compliance with all environmental requirements. And it is important to EPA's compliance and enforcement efforts at non-Federal entities that facilities of the Federal government demonstrate that they have their "own house in order." In order to demonstrate EPA's commitment in this important area, we have established a new goal for our Federal Facilities Compliance Program which states that EPA shall help "ensure that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities."

To help achieve this goal, EPA has developed a new Federal Facilities Compliance Strategy which establishes a comprehensive and proactive approach to achieving compliance at Federal facilities. This document, also known as the "Yellow Book", provides the basic framework and consistent guidelines for all EPA media programs (e.g., air, water, hazardous waste, etc.) to follow in their compliance and enforcement activities at Federal facilities. It also attempts to reconcile EPA's dual responsibilities to provide technical assistance and advice to Federal facilities pursuant to Executive Order No. 12088, and our statutory authorities to take enforcement actions for violations at Federal facilities in appropriate circumstances.

Recently-authorized environmental statutes have included special requirements and additional provisions which are specific to Federal facilities. These provisions clarify that Federal agencies must comply with environmental laws in the same manner and degree as all other facilities subject to such requirements. EPA intends to utilize the full range of its available enforcement authorities to ensure compliance by Federal facilities. However, EPA also recognizes that there are some limitations and differences in the types of enforcement actions which EPA can take at Federal facilities. These special circumstances have made it clear that if EPA is to be truly effective in ensuring high compliance rates at Federal facilities, a separate strategy such as this is needed to address this unique subset of facilities which we regulate.

Thorough and consistent implementation of this Strategy should significantly strengthen EPA's compliance and enforcement program for Federal facilities. We will apply the same timeframes for taking enforcement action at Federal facilities as EPA does for other facilities. We also have established a formal dispute resolution process with strict time periods for escalation when Compliance Agreements or Consent Orders cannot be expeditiously negotiated between EPA Regional offices and Federal facilities.

This Strategy also emphasizes the use of innovative compliance management techniques (e.g., environmental auditing), selected initiatives for improved compliance tracking of Federal facilities and more effective use of the Federal Agency A-106 Pollution Abatement

Planning Process. In addition, since many of EPA's programs are delegated to the States, we have devoted a separate chapter in this document to the critical role of States in responding to compliance problems at Federal facilities.

In closing, I would like to reiterate that EPA is very serious in its efforts to ensure compliance by Federal facilities, and we will take all necessary actions, including enforcement in appropriate circumstances, to improve the environmental status of facilities of the Federal government. Federal facilities have done much to increase the effectiveness of their environmental management programs, but further progress is needed if Federal facilities are to meet their obligations to comply to the fullest extent possible with all of the environmental laws. We at EPA believe that this is an attainable goal and look forward to working together with affected parties in implementing this strategy and demonstrating that Federal facilities can truly be the model for compliance which we feel they are capable of becoming.

Nov. 8, 1988
Date

Lee M. Thomas
Administrator

FEDERAL FACILITIES COMPLIANCE STRATEGY

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INDEX OF EXHIBITS

LIST OF ACRONYMS AND ABBREVIATIONS

AA	Assistant Administrator
AO	Administrative Order
ATS	Administrator's Tracking System
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
COCO	Contractor Owned/Contractor Operated
COCO (E)	Contractor Owned/Contractor Operated (Equipment)
CWA	Clean Water Act
DOD	Department of Defense
DOJ	Department of Justice
DRA	Deputy Regional Administrator
E.O.	Executive Order
ESD	Environmental Services Division
FARES	Federal Activities Regional Evaluation System
FEMA	Federal Emergency Management Agency
FFIS	Federal Facilities Information System
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FINDS	Facility Index System
GAO	General Accounting Office
GOCO	Government Owned/Contractor Operated
GOGO	Government Owned/Government Operated
GOPO	Government Owned/Privately Operated
IRIS	Integrated Risk Information System
JOCO	Jointly Owned/Contractor Operated
NEIC	National Enforcement Investigations Center
NRC	Nuclear Regulatory Commission

LIST OF ACRONYMS AND ABBREVIATIONS (Continued)

NOV	Notice of Violation
OARM	Office of Administration and Resources Management
OEA	Office of External Affairs
OECM	Office of Enforcement and Compliance Monitoring
OFA	Office of Federal Activities
OGC	Office of General Council
OIRM	Office of Information and Resource Management
OMB	Office of Management and Budget
OMSE	Office of Management Systems Evaluation
OPPE	Office of Policy and Program Evaluation
ORD	Office of Research and Development
POGO	Privately Owned/Government Operated
PWSS	Public Water Supply System
RA	Regional Administrator
RAP	Remedial Action Plan
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
SDWA	Safe Drinking Water Act
SNC	Significant Noncomplier
SPMS	Strategic Planning and Management System
TSCA	Toxic Substances Control Act
UIC	Underground Injection Control

LIST OF APPENDICES

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

The Federal Facilities Compliance Strategy establishes a comprehensive and proactive approach to achieving and maintaining high rates of compliance at Federal facilities. It provides 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. It also attempts to reconcile the Agency's dual responsibilities of providing technical assistance and advice to Federal facilities to help ensure their compliance, as required under Presidential Executive Order No. 12088, and of taking enforcement actions against Federal facilities, where appropriate, as provided for in the various environmental statutes.

This Strategy clarifies that Federal agencies must comply with environmental laws in the same manner and degree as non-Federal entities and EPA will utilize the full range of its available enforcement mechanisms to ensure compliance by Federal facilities. However, EPA also recognizes that there are certain limitations and differences in the types of enforcement actions which EPA will take at Federal facilities. In addition, EPA's mandate to provide technical assistance as well as the restrictions inherent in the Federal budget and appropriations process influenced EPA's decision that a separate strategy was needed to address compliance problems at Federal facilities.

This document was written to serve several audiences: to serve as guidance for EPA Headquarters and Regional staff; to clarify State and Federal compliance monitoring and enforcement roles; to inform Federal agencies of EPA's strategy and identify procedures to be followed when violations have been discovered; and finally, to communicate EPA's approach for addressing compliance problems at Federal facilities to Congress, the public, and concerned interest groups.

Chapter II -- Summary of Environmental Statutes and Executive Orders

Federal agencies generally must comply with all provisions of Federal environmental statutes and regulations as well as all applicable State and local requirements, with the exception of very limited Presidential exemptions which may be issued on a site-specific basis. Presidential Executive Orders also stress the mandate for Federal facilities to comply fully with environmental requirements and to establish procedures for ensuring that this is accomplished, including special procedures for resolving compliance disputes within the Executive Branch involving EPA and other Federal agencies.

Chapter III -- Identification of the Regulated Community

A more definitive inventory of Federal facilities will enable EPA to establish more effective priorities and select targets for assistance, compliance monitoring, and enforcement activities. The Strategy clarifies that EPA is focusing on that subset of Federal facilities which have potential for environmental impact.

The Strategy defines the various types of Federal facilities and Federal lands, and describes how available sources of information and program data systems will be used by EPA to identify and track compliance at Federal facilities. It outlines new actions that EPA will undertake to improve the quantity and quality of information on the Federal facilities universe, including reviews of Federal facility classifications and major/minor facility

definitions and the identification of important Federal facility minors and environmentally significant facilities on a multi-media basis.

Chapter IV – Compliance Promotion, Technical Assistance and Training

To meet its unique responsibilities under E.O. 12088 to provide technical assistance and advice to Federal agencies, EPA is establishing a more systematic communications system for exchange of information on new or revised regulatory or statutory environmental requirements. The Strategy describes the functions of EPA's various "Hotlines" and encourages Federal agency personnel to utilize these services to assist them in maintaining compliance at their facilities. In addition to information transfer, the Strategy introduces improved approaches for informing Federal facilities of available training courses. EPA will attempt to target particular agencies for courses in areas where an Agency has had a pattern of compliance problems.

EPA has a unique opportunity to work with other Federal agencies and the States to identify broad patterns of current and potential compliance problems among facilities in a given Agency. Based upon information from Regions and States about patterns of noncompliance by Federal facilities, EPA will develop a comprehensive strategy to correct these noncompliance patterns and will work with the parent Agency to ensure the strategy is implemented. In an effort to prevent future compliance problems, the annual A-106 planning process will be used more effectively to inform Federal agencies of EPA priority areas and request them to direct their A-106 projects to these areas where appropriate.

Federal facilities are also encouraged to adopt environmental auditing programs to help achieve and maintain higher levels of overall compliance. EPA will provide technical assistance to other Federal agencies in the initiation and implementation of auditing programs.

Chapter V – Compliance Monitoring

The Strategy strengthens compliance monitoring activities at Federal facilities by ensuring that EPA or the States' presence is being demonstrated at all Federal agencies which have the potential for environmental impact. Federal facilities are to be inspected at least as frequently as all other sources, consistent with the priorities, frequencies and types of inspections established in each media program guidance. In addition, Regions are to identify the most environmentally significant Federal facilities across several media programs as candidates for multi-media inspections.

EPA plans to improve the efficiency and effectiveness of the Federal agency A-106 pollution abatement planning process by addressing compliance problems at Federal facilities before they become violations, linking the process more closely to identified EPA environmental priorities and other systematic program improvements.

Chapter VI – EPA Enforcement Response at Federal Facilities

The most significant provisions of this Strategy deal with the basic approach and procedures EPA will use when responding to violations at Federal facilities. The strategy clarifies that Federal agencies are required to comply with environmental laws the same as non-Federal regulated entities and that EPA will utilize all of its available enforcement mechanisms at Federal facilities. The strategy also recognizes that there are certain

limitations and differences in terms of the types of enforcement action which EPA will take against Federal facilities.

EPA and States are to pursue "timely and appropriate" enforcement responses to address violations at Federal facilities in a manner similar to actions taken to address violations at non-Federal facilities. EPA's enforcement responses emphasize that if a violation is not or will not be corrected within the timeframe for violations of that class, an enforcement action should be taken consistent with media program guidance.

EPA's formal enforcement responses for Federal facilities emphasize the use of mutually negotiated remedial actions and schedules in the first instance, formalized through Compliance Agreements or Consent Orders, depending upon program authorities and guidance. EPA will issue proposed administrative enforcement actions where mutual agreement cannot be reached in a timely manner, and will promptly utilize all available dispute resolution mechanisms to effectively resolve areas of disagreement. The Strategy also clarifies that Federal agency officials are required to take all available steps to obtain sufficient funds to achieve compliance on the most expeditious schedule possible.

EPA's enforcement process for Executive Branch Agencies is purely administrative, and neither provides for civil judicial action nor assessment of civil penalties.[1] This limitation does not apply to enforcement actions taken by States as authorized under various statutes nor to EPA actions directed to non-Federal operators of Federal facilities who are not officials of Executive Branch Agencies. EPA will pursue the full range of its enforcement authorities against private operators of Federal facilities (e.g., GOCOs) where appropriate and also take action against Federal agencies at GOCO facilities in certain circumstances. EPA will develop a GOCO Enforcement Strategy as a follow-up to this document to further clarify this issue.

Chapter VII -- Role of the States in Federal Facilities Compliance

States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. Under many statutes, delegated or authorized States can use the full range of these enforcement authorities to address Federal facility violations to the same extent they are used for non-Federal facilities. States are also encouraged, wherever possible, to pursue bilateral, negotiated agreements or Consent Orders with Federal facilities. In any delegated State enforcement action involving Federal facilities EPA will be careful not to interfere with the State's enforcement proceedings. However, EPA will be available upon request to either party to help facilitate expeditious compliance.

State and Federal roles in compliance and enforcement are defined through State/EPA Enforcement Agreements negotiated by the Region and each of its States for each media program, consistent with the Policy Framework for State/EPA Enforcement Agreements and program-specific implementing guidance. While most aspects of these Agreements pertain equally to Federal and non-Federal facilities, the Strategy outlines several areas in which Federal facilities should be explicitly addressed in the Enforcement Agreements process.

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[1] This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA).

As part of the State/EPA Enforcement Agreements process, Regions should review the Strategy with their States and address five areas: (1) the enforcement approach the State plans to use for responding to Federal facility violations; (2) the types of situations where the State would request EPA support or direct action; (3) any additional information the State has agreed to report to EPA on Federal facilities compliance and enforcement activities; (4) how the State will be involved in the A-106 process; and (5) plans for a joint EPA/State annual review of compliance problems at Federal facilities in the State.

Chapter VIII – EPA Roles and Responsibilities for Strategy Implementation

The Strategy clarifies EPA roles and responsibilities for implementing this Strategy and the overall Federal facilities compliance program. It outlines the roles of the Regional staff and the various Headquarters offices.

The Strategy emphasizes the need for Federal facilities to be integrated into the ongoing compliance and enforcement activities of each EPA media program. The Federal facilities Coordinator's role is to coordinate Regional program office implementation of these activities. Implicit in this Strategy is the need for teamwork among the various offices and staff involved in addressing Federal facilities compliance.

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This Strategy replaces the previous program document, entitled "Resolution of Compliance Problems at Federal Facilities" (known as the "Yellow Book"), dated January 1984, and will still be referred to as the "Yellow Book." Full implementation is being phased in over the next few years, beginning in mid-FY 1988. The enforcement response provisions are to be fully implemented immediately. EPA's Annual Operating Year Guidance will set subsequent priorities for the implementation of the remainder of this Strategy. Enforcement and remedial response procedures under CERCLA/SARA generally are not addressed by this document. However, references to CERCLA/SARA have been included in several places for informational purposes only.

In addition, the Strategy document has a number of Appendices which contain various reference documents, model response forms, compliance agreements, definitions of key EPA terms, etc., all of which should prove to be helpful to environmental staff in other Federal agencies. Additional copies of the Strategy may be obtained by written request to EPA at the following address:

U.S. Environmental Protection Agency
Office of Federal Activities (A-104)
Federal Facilities Compliance Program
401 M Street, S.W.
Washington, D.C. 20460

VI. ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES

This Chapter outlines the basic approach and procedures which EPA uses when responding to violations of environmental law at Federal facilities.[1] It explains the concept of timely and appropriate enforcement response and why it is important to gaining high levels of compliance. It discusses unique features of Federal enforcement procedures, State enforcement responses to Federal facility violations as well as the enforcement roles and responsibilities of each level of government. EPA media program offices also may develop specific enforcement guidance for Federal facilities through either their annual Operating Guidance or in other program policy documents. However, any media-specific enforcement guidance which is issued for Federal facilities will be consistent with the basic framework and concepts set forth in this strategy.

In summary, EPA and States are to pursue "timely and appropriate" enforcement responses to address violations at Federal facilities in a manner similar to actions taken to address violations at non-Federal facilities. EPA's enforcement response guidance emphasizes that if a violation is not or will not be corrected within the timeframe for violations of that class, a formal enforcement action must be taken consistent with media program guidance, including required degrees of formality and timeliness.

EPA's enforcement approach for Federal facilities emphasizes the importance of negotiated responses for the correction of violations and schedules formalized through Compliance Agreements or Consent Orders, depending upon program authorities and guidance. Where agreement cannot be reached on all issues in a timely manner, EPA will promptly utilize all available enforcement and dispute resolution mechanisms to effectively resolve areas of disagreement.

This chapter also clarifies that Federal officials are expected to take all available steps to obtain sufficient funds to achieve compliance on the most expeditious schedule possible. While EPA recognizes that the Anti-Deficiency Act places certain limitations on Federal officials' abilities to commit funds which they have not been authorized to spend, they may seek additional funds where needed to correct identified compliance problems.

EPA's enforcement response for Executive Branch agencies differs somewhat from its enforcement against non-Federal parties in that it is purely administrative, and neither provides for civil judicial action nor assessment of civil penalties.[2] This does not apply to enforcement actions taken by States as authorized under various statutes nor to EPA actions directed to non-Federal operators of Federal facilities (e.g., GOCO's). EPA will pursue the full range of its enforcement responses against private operators of Federal facilities in appropriate circumstances. In addition, sanctions may be sought against individual employees of Federal agencies for criminal violations of environmental statutes.

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1 The provisions of this Chapter are not applicable to enforcement actions under CERCLA/SARA. Any references to CERCLA/SARA are included for information purposes only.

2 This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA) pursuant to Sections 109(a)(1)(E) and 122(g) of SARA.

A. OVERALL COMPLIANCE POLICY AND PHILOSOPHY

Enforcement is an essential supplement to the strong public mandate for Federal facilities to comply with Federal, State and local pollution control requirements to the same extent as non-Federal entities. Enforcement reinforces the special sense of public duty to comply that this mandate instills in our Federal officials. It is generally recognized by EPA and the public that compliance promotion activities such as technical assistance and training are not in themselves sufficient to create full compliance nor to provide the necessary incentives for public or private officials to affirmatively prevent and anticipate problems in complying with environmental laws.

Federal agencies must comply with Federal environmental laws in the same manner and degree as non-Federal entities and EPA will utilize the full range of its available enforcement mechanisms to ensure Federal facilities compliance. Federal environmental statutes require that, in most circumstances, facilities of the United States Government comply with Federal, State, and local pollution control requirements to the same extent as non-Federal entities. There are, however, certain limitations and differences in terms of the types of enforcement actions which EPA will take against Federal facilities. Unique considerations and procedures that are applicable when enforcement is undertaken against Federal facilities by EPA are explained in the next section of this Chapter.

Federal and State enforcement officials must adhere to the concept of timely and appropriate enforcement response, which EPA and the States have defined for each program to establish a strong, stable, and predictable national enforcement presence. What this means is that if violators are not returned to compliance within a certain timeframe, through a variety of informal contacts and enforcement responses, timely formal enforcement action is required. Timely and appropriate enforcement response guidance, with its timelines, required degree of formality, sanction and escalation, is deemed essential to achieving high levels of Federal facility compliance.

National guidance issued for each environmental program establishes timelines for key milestones in the enforcement Framework for Implementing State/Federal Enforcement Agreements," which sets forth the Agency's general principles on timely and appropriate enforcement response, and program implementing guidance are summarized in Exhibit VI-1 and Appendix C. This exhibit also includes the criteria for defining what constitutes a formal enforcement response. The principles of timely and appropriate enforcement response apply to the full range of sources regulated under Federal statutes; however, the application of specific timelines and definitions in Exhibit VI-1 is generally directed to the most significant violations in each environmental program. Appendix C contains each of the EPA media programs' definitions for significant noncompliance. Regions and States should also apply these timeframes to other types of violations at Federal facilities to the extent possible with available resources and consistent with media program guidance.

The national timely and appropriate milestones are adapted to specific legal enforcement mechanisms and procedures unique to each State. Agreements which embody these "timely and appropriate" requirements and definitions are reached between EPA Regions and States and committed to writing in State/EPA Enforcement Agreements, discussed more fully in Chapter VII. These agreements may also specifically address other compliance activities and response actions of Federal facilities.

EPA emphasizes negotiation with responsible Federal officials on corrective actions and schedules needed to expeditiously resolve noncompliance situations. EPA will generally use either Compliance Agreements or Consent Orders (depending upon available

statutory authorities and media program guidance) as the primary mechanism for formalizing agreements with Federal facilities.

B. EPA RESPONSE TO FEDERAL FACILITIES VIOLATIONS

The Federal enforcement process outlined in this Section is designed to provide a uniform approach to responding to violations at Federal facilities, recognizing that each environmental statute establishes somewhat different enforcement response mechanisms. There are several factors which distinguish EPA's enforcement response to Federal facilities from enforcement at non-Federal facilities and by the States:

(a) EPA has a broad mandate to provide technical assistance and advice to Federal agencies to ensure their compliance, as required under Executive Order 12088 (See detail in Chapter II). However, implementing this mandate will not interfere with the application by EPA (or States) of timely and appropriate enforcement procedures to achieve the most expeditious schedule of compliance.

(b) EPA places emphasis on negotiations with responsible Federal officials in resolving Federal facility noncompliance with enforcement documents issued on consent and signed by both parties. This Strategy also explains how failure to reach agreement in a timely manner will be resolved.

(c) Federal EPA enforcement actions and procedures for resolution of compliance problems differ in certain respects for Federal versus non-Federal facilities:

i. *EPA will not bring civil judicial suit against Executive Branch Agencies* and will rely upon administrative enforcement mechanisms for Federal facilities as outlined in Appendix I. This respects the position of the Department of Justice that civil suits within the Federal establishment lack the constitutionally required "justiciable controversy." (See Appendix H which contains the Justice Department's testimony on this issue at a Congresional oversight hearing in April, 1987).

ii. *EPA generally will not assess civil penalties against Federal facilities* under most environmental statutes.[3] This also is in response to the Justice Department position discussed above as well as Federal District court rulings which have issued conflicting decisions as to whether or not the United States government has clearly and unambiquously waived its soverign immunity for penalties under various environmental statutes.

iii. *EPA will negotiate Compliance Agreements or Consent Orders with Federal agencies* to address violations at Federal facilities. The timeframes for negotiation of Compliance Agreements and Consent Orders are defined by EPA's media specific "timely and appropriate" criteria. Prior to issuing a final Compliance Agreement or Consent Order to a Federal facility, the Federal Agency will be provided an opportunity to meet with EPA to discuss key issues and to sign it on

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3 This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA) pursuant to Sections 109(a)(1)(E) and 122(g) of SARA.

consent prior to the order or agreement becoming final and effective.[4] This approach is also based in part on DOJ's written position which states that "Executive Branch agencies may not sue one another nor may one agency be ordered by another to comply without the prior opportunity to contest the order within the Executive Branch."

iv. *Additional dispute resolution procedures are provided* in media program guidance to resolve compliance issues through EPA, and if necessary, involve OMB under E.O. 12088 for funding disputes, the Attorney General under E.O. 12146 for legal interpretation and the EPA Administrator under E.O. 12580 for CERCLA/SARA.

v. *Federal facilities, like all public entities, face problems in ensuring that funds are adequate to* meet environmental requirements and remedy noncompliance. The obligation to comply is not altered by such funding considerations; the most expeditious means of achieving compliance and obtaining funds is expected. However, the process for acquiring funds does pose unique considerations which should be taken into account in negotiating compliance schedules as described in Section B.1.f.

B.1 Federal Facilities Compliance Process: Civil Administrative Enforcement Procedures

The Federal facilities compliance process outlines the administrative procedures EPA will follow when responding to civil violations identified at Federal facilities. This process is illustrated in Exhibit VI-2 and discussed below. These procedures apply when civil enforcement responses are directed at facilities of Executive Branch Agencies.

B.1.a Notification of Violation

EPA monitors compliance status and identifies violations at Federal facilities through reviews of source self-monitoring and reporting documents, onsite inspections, and the A-106 process. Once a violation is discovered, EPA makes a determination of noncompliance and takes its initial enforcement response.

EPA's initial enforcement response to an identified violation may vary depending on the type of violation and nature of the violator. Media-specific guidance governs the type of initial response and timeframe for such response. See Appendix I for types of enforcement mechanisms used under each Federal environmental program. When EPA has made its determination that a violation has occurred at a Federal facility, Federal Facilities Coordinators or media program staff may informally notify the facility (e.g., via telephone) prior to issuance of formal written notification. If Federal Facilities Coordinators provide this informal notification, they should first consult with appropriate media program staff. This will provide the Federal facility with some additional time to remedy the identified violation before receiving formal written notification from EPA.

Generally, EPA issues a Notice of Violation (NOV), or other program equivalent as the initial written notice for requiring response to address significant violations. NOVs or program equivalents issued for violations at Federal facilities are similar to those issued for

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[4] EPA may issue unilateral administrative orders to Federal facilities under Section 106 of SARA following concurrence by the Department of Justice pursuant to Section 4(b)(1) of Executive Order 12580.

non-Federal violations except that they should not mention civil judicial actions by EPA. At a minimum, NOVs or their program equivalent issued for Federal facilities should:

- Be issued to base commander or facility director level officials.
- Describe the violation and how it was identified.
- State that the consequences of not meeting the requirements stated in the NOV in a timely manner or responding to EPA by the dates specified will result in the issuance of an order or formal escalation of the enforcement action. Relevant citizen suit provisions of involved statutes may also be cited here.
- Explain that the Federal agency can either submit a written certification that it has corrected the violation if only a short-term "fix" is required or an action plan and schedule for a violation requiring more extensive remedial action. Selection of a date for requiring submission of a certification of compliance or remedial action plan and schedule is dependent on the timely and appropriate timeframes shown for each program in Exhibit VI-1. In certain cases, EPA may also include a schedule, proposed order, or proposed compliance agreement as part of or attached to the NOV. The NOV should also state the number of days EPA will take to respond to the reply.
- Refer to any available alternatives to compliance (e.g., Presidential exemptions or specific legislative relief).
- Offer to schedule a meeting or conference with Federal agency officials who are authorized to sign a Compliance Agreement or Consent Order. These officials must also have the authority to make the necessary budget requests to correct the violation according to the schedule outlined in the Agreement.

The NOV, or program equivalents, should be tailored to address the specific noncompliance situation identified at the facility. Appendix J provides a model for developing an NOV. Copies of all NOVs and other enforcement actions issued by EPA to Federal facilities shall be sent to the involved Headquarters media program enforcement office with a copy to the Office of Federal Activities.

B.1.b Response by Federal Facilities: Certification of Compliance or Remedial Action Plans

Once a facility has received the official notice of violation or program equivalent, it is required to submit either a certification of violation correction, or a remedial action plan (RAP) to EPA. A facility can also dispute EPA's noncompliance finding through appeals as provided for through the dispute resolution process outlined in Section B.1.e.

The certification of violation correction will consist of a letter from the facility which identifies the violation and describes remedial action taken. It is accompanied by support documentation that demonstrates achievement of compliance. When remedial actions needed to correct the violation will exceed the timeframes for timely and appropriate enforcement response for either achieving compliance or being subject to formal enforcement response, the facility must submit a remedial action plan. The plan should:

- Describe the noncompliance situation;

- Identify the corrective actions to be taken;
- Outline the schedule for implementing the remedial actions; and
- Describe the content and frequency of progress reports.

EPA will acknowledge the receipt of the proposed certifications and remedial action plans with a written response. An example of such a Response Form is provided in Appendix J. A response should be worded so the facility is not insulated from further EPA or State enforcement action. The response should also specify a date by which EPA will respond which should normally be within 30 days. In complex situations, detailed comments may follow thereafter.

Remedial actions and schedules proposed by the Federal facility may serve as a basis for a Compliance Agreement or Consent Order. Although a remedial action plan does not constitute an EPA enforcement response, it may be used as a basis for monitoring future compliance for violations that are not sufficiently significant, as defined in program guidance, to mandate formal enforcement response.

In the event of disputes in instances where formal enforcement response is not necessary, the Region may use the dispute resolution processes described in Section B.1.e to further escalate and resolve compliance.

B.1.c Initial Negotiation of Compliance Agreements or Consent Orders

Where formal enforcement response is required, following the notification of violation, EPA generally will use Compliance Agreements or Consent Orders as the primary formal enforcement response to formalize bilateral agreements between EPA and a Federal agency to ensure expeditious return to compliance. Compliance Agreements will be used as EPA's principal formal enforcement response unless media program guidance indicates that statutory authorities are available for use of Consent Orders for Federal facilities violations. Appendix I indicates the specific enforcement responses in each media program and highlights those which are available for use at Federal facilities. Consent Orders should be used when agreements are negotiated jointly with a State and the State has administrative order authority.

It is EPA policy that Compliance Agreements or Consent Orders should be negotiated within required media-specific, "timely and appropriate" timeframes or EPA may take further formal administrative enforcement action to achieve compliance. EPA will prepare Compliance Agreements or Consent Orders for joint signature by the affected facility and EPA. At a minimum, all Compliance Agreements and Consent Orders should state that the violating facility is accountable for meeting timeframes and taking required actions as outlined in the Agreement or Order or be subject to further enforcement action. In certain cases, it may be necessary to negotiate a two phased agreement or order for the same violation: the first detailing a schedule for studies necessary to correct the problem and the second establishing a plan and schedule for remedying the problems based on the results of the studies. The time schedules included in both may overlap or be concurrent.

Environmental audit provisions will be emphasized in negotiations in instances in which the Federal agency can constructively be directed to correct similar violations which are likely to occur at other related facilities or there appear to be systematic compliance

management problems. This is consistent with the July 9, 1986 Policy Statement on Environmental Auditing, 51 FR 25004 (See Appendix D).

Federal Facility Coordinators will assist the media program offices and the Regional Counsel's office in preparing and negotiating Compliance Agreements or Consent Orders with Federal agencies. Appendix J outlines a format to use when developing a Compliance Agreement or Consent Order for a Federal facility. This sample Compliance Agreement incorporates model language developed by the Department of Justice.

EPA media programs may consider including enforceability clauses in Compliance Agreements with Federal facilities which reference the applicable citizen suit provisions of the involved statute. The RCRA program has developed a model "Enforceability Clause" to be included in all RCRA Federal Facility Compliance Agreements. These clauses reference the use of applicable citizen suit provisions by States or citizens for failure to comply with terms or schedules in Compliance Agreements. See Appendix J for a copy of the RCRA Program Enforceability Clause. Certain EPA Media program offices also have developed specific guidance concerning Compliance Agreements. For example, the RCRA program model language for Federal facility Compliance Agreements is contained in the January 25, 1988 memorandum "Enforcement Actions under RCRA and CERCLA at Federal Facilities," which is contained in Appendix K.

- *Timely and Appropriate Response Criteria*

EPA's timely and appropriate enforcement guidance sets forth the criteria for the commencement of an enforcement action at a facility in violation. The negotiation of Compliance agreements and Consent Orders at Federal facilities are subject to EPA's timely and appropriate enforcement response criteria. Based on the type of violation at the facility, this guidance establishes the time it should take to issue the initial enforcement action, the type of enforcement action that should be taken, and the amount of time it should take the facility either to achieve full physical compliance or to enter into a Consent Order or Compliance Agreement which incorporates a schedule for achieving compliance.

If compliance is not achieved or a Compliance Agreement or Consent Order can not be negotiated within required media-specific timeframes, EPA generally will issue a proposed order or proposed compliance agreement prior to escalating its enforcement action using the dispute resolution procedures outlined in Section B.1.e.

Timeframes for issuance of proposed Administrative Orders or Compliance Agreements and their program equivalents will follow media-specific timely and appropriate guidance as shown in Exhibit VI-1.

Informal assistance from OFA and Headquarters media program offices can be used at any point in the process. Regional program offices are encouraged to request OFA assistance through the Federal Facilities Coordinators who will assist them in contacting Federal agency regional operations and commands to resolve compliance problems. OFA and the media program office will work directly with the parent agency's Headquarters office and appropriate EPA Headquarters and Regional legal and compliance program offices to try to resolve the problem.

EPA Regional staff also should successively escalate unresolved issues up to the Deputy Regional Administrator (DRA), to the extent appropriate before taking formal administrative action due to unresolved issues in remedying compliance problems. The DRA may then contact an equivalent level official of the other Federal Agency in an effort to achieve resolution.

B.1.d Issuance of Proposed Consent Orders or Proposed Compliance Agreements

EPA may issue proposed administrative orders or proposed Compliance Agreements at a number of different points in the compliance process in order to expedite the timely resolution of violations by Federal facilities. Proposed orders or compliance agreements generally are issued to Federal facilities when:

- A Federal facility fails to respond by the date(s) specified in a notification of violation or program equivalent.
- A Consent Order or Compliance Agreement cannot be or is not successfully negotiated within the timeframes established in media-specific guidance because of disagreement on proposed remedial actions, the schedule for correcting the violation, or other outstanding issues.
- A Federal facility has violated the terms of a signed Compliance Agreement or Consent Order.
- There is an imminent and substantial endangerment to human health or the environment which necessitates immediate action.

When initial negotiations for a Compliance Agreement or Consent Order to address the violations at a Federal facility exceed the timely and appropriate enforcement response timeframes for resolving violations, EPA shall escalate the enforcement response action by issuing either a proposed administrative order or a proposed Federal Facility Compliance Agreement to the violating Federal facility. EPA's use of either a proposed order or a compliance agreement as the formal enforcement mechanism for Federal facility violations is dependent upon both the scope of EPA's administrative order authority under each of the environmental statutes and media program-specific enforcement guidance on the appropriate use of Consent Orders vs. Compliance Agreements at Federal facilities. Appendix I contains a statute-by-statute summary of EPA's administrative enforcement response authorities for Federal facility violations. Since there are certain procedural differences when using orders vs. compliance agreements at Federal facilities, these two mechanisms are discussed separately as follows:

- *Compliance Agreements*

Where agreement has not been reached within the media program's timeframes for formal enforcement action, EPA generally will issue a proposed compliance agreement to a Federal facility and allow a specified period of time, usually 30 days, for the Federal agency to respond in writing as to whether it agrees with the terms of the agreement or whether it will seek resolution of disputed issues through EPA dispute resolution process procedures. Upon issuance of the proposed compliance agreement, EPA will notify the Federal facility that failure to either agree to the conditions of the agreement or resolve the remaining issues within 30 days of issuance will trigger the formal dispute resolution process. If at the end of the 30-day period, the Federal agency chooses to accept the proposed compliance agreement, the agreement will become final and effective upon signature by both parties. If the Federal Agency appeals the conditions of the compliance agreement in writing or fails to respond within 30 days, the formal EPA dispute resolution procedures will be initiated. See Section

B.1.e. below which outlines the formal procedures for escalating and resolving disputes between Executive Branch agencies.

- *Consent Orders*

Where EPA has statutory administrative order authority for Federal facilities, and where it is specified in media-program guidance, EPA will issue a proposed administrative order to a Federal facility and allow a specified period of time, generally 30 days, for the Federal agency to respond in writing stating whether it will (a) accept the terms of the proposed order on consent or (b) seek resolution through formal administrative appeals procedures EPA has established for the type of order which was issued (e.g., "Final Administrative Hearing Procedures for RCRA Section 3008 (h) Orders," issued by EPA on February 19, 1987). If the Federal facility chooses to accept the proposed order within the 30-day time period, it will be signed by both parties and become a final consent order.

If the Federal facility fails to take advantage of this opportunity and does not respond to EPA within the 30-day time period specified in the proposed order, the order will become a final administrative order, effective at the time established in the proposed order. It is important to point out that it is incumbent upon the Federal agency to respond to EPA in writing within the timeframe specified in the proposed order (i.e., generally 30 days) or it will become a final administrative order which will foreclose any further opportunity to negotiate and sign an order on consent. This approach is consistent with the Justice Department's position that EPA may not issue Administrative Orders to other Federal agencies "without the prior opportunity to contest the order within the Executive Branch."

When a Federal facility has chosen to appeal a proposed order through EPA's established administrative appeals procedures, it shall be subjected to such proceedings in the same manner and degree as any private party. If a settlement is reached through the use of these appeals procedures, EPA and the involved Federal facility will both sign a final administrative order on consent. If, however, these administrative proceedings have been fully exhausted and agreement cannot be reached on consent, the formal dispute resolution process will be initiated and the dispute will be escalated to EPA Headquarters following the steps outlined in Section B.1.e. The proposed order will be stayed pending escalation and resolution of the dispute.

B.1.e Internal EPA Dispute Resolution Procedures

This strategy sets forth EPA's basic Federal Facilities Dispute Resolution Process as described in detail in Section B.1.f below. There are however, certain existing formal administrative procedures which are applicable to all regulated entities and these will be utilized for Federal facilities in appropriate circumstances. Certain media programs also have issued specific written guidance for resolving disputes at Federal facilities which may be followed consistent with the process outlined in Section B.1.f.below. The types of internal EPA dispute resolution procedures that may be utilized to resolve compliance problems at Federal facilities are:

1) Administrative procedures established for certain specific statutory authorities (e.g., "Final Administrative Hearing Procedures for RCRA Section 3008(h)");

2) Media-program specific written guidance for dispute resolution at Federal facilities (e.g., "Elevation Process for Achieving Federal Facility Compliance Under RCRA," March 24, 1988 (See Appendix K)); or

3) EPA's Federal Facilities Dispute Resolution Process as described below.

If available, established administrative procedures should first be invoked to resolve disputes between Executive Agencies. If there are no existing administrative procedures in place to resolve a conflict at a Federal facility, the Regions should utilize media specific guidance, when available, or the general Federal facilities EPA Dispute Resolution Process outlined below. Media-specific dispute resolution procedures for Federal facilities still follow the general concepts set forth in the EPA Federal Facilities Dispute Resolution Process. However, media-specific guidance may contain certain variations to accommodate media program procedural difference or preferences.

B.1.f Federal Facilities Dispute Resolution Process

The focus of EPA's Federal Facilities Dispute Resolution Process is on cases where EPA and the Federal agency are unable to agree on the conditions, terms or schedules to be contained in a Compliance Agreement or Consent Order. This process is also sometimes utilized for resolving disputes resulting from violations of signed agreements or orders. In addition, certain EPA media programs (e.g., RCRA) have established other dispute resolution procedures for use when a facility has violated the terms of a signed order or agreement as described further in section B.1.f.

EPA will make every effort to resolve noncompliance disputes at the Regional level. However, when EPA and a Federal agency are unable to reach formal agreement in a signed Consent Order or a signed Compliance Agreement, the dispute will be formally referred by the Regional Administrator (RA) to the Assistant Administrator (AA) for the affected media program, the AA for the Office of Enforcement and Compliance Monitoring and the AA for External Affairs as shown in Exhibit VI-2. This joint referral should take place only after the Regional Office has tried to resolve the issue within established timeframes for guiding what constitutes "timely and appropriate" enforcement response (See Exhibit VI-1). In the Federal facility compliance process, the use of internal EPA dispute resolution procedures is the functional equivalent of a referral of civil judicial enforcement actions for prosecution in the sense that it provides a final forum in which disputes may be resolved for Executive Branch Agencies.

A formal referral shall be sent to EPA Headquarters within 60 days after the established media timeframe for formal enforcement action has been exceeded and the Federal facility has failed to sign a proposed order or proposed compliance agreement. If a proposed order has been appealed, EPA's formal administrative appeals procedures should first be exhausted prior to making a formal referral to EPA Headquarters. The referral package should describe the identified violation, provide a historical summary of the communications and negotiations with the facility, identify enforcement actions taken (including any State or citizen actions), identify the unresolved issues and include appropriate support data, with documentation similar to a litigation report. The referral package must be signed by the EPA Regional Administrator.

The Office of Federal Activities, or the lead media program office, will notify the RA in writing when Headquarters receives the referral package and also will report to the Region informally on a monthly basis and quarterly on a formal basis the status of those facilities formally referred to Headquarters. The involved EPA Headquarters media

program office, with assistance from OFA and OECM, will attempt to negotiate an acceptable solution with the parent Federal agency Headquarters office within a maximum of 90 days of the referral to EPA Headquarters. At the conclusion of this ninety-day period, if these negotiations are unsuccessful, the Assistant EPA Administrator for the affected media program will refer the dispute to the Administrator for resolution.

The EPA Administrator has primary responsibility for resolving environmental disputes between Executive Branch agencies. The EPA Administrator will consult with the head official of the parent Federal agency and make every effort to reach agreement on an acceptable solution to the problem. If the EPA Administrator determines that there are remaining issues that cannot be resolved, the Administrator may exercise his authority to invoke the procedures afforded by Executive Order 12088 or Executive Order 12146 and involve either OMB or DOJ, respectively, in resolution of the dispute.

B.1.g Use of Executive Order 12088 - Federal Compliance with Pollution Control Standards

Section 1-602 of Executive Order 12088 states that "the Administrator shall make every effort to resolve conflicts regarding such violations between Executive agenices." The EPA Administrator may request OMB's involvement particularly in cases where funding or schedules are the primary issues in resolving the dispute. Section 1-603 further clarifies that OMB "shall consider unresolved conflicts at the request of the Administrator." This means that the EPA Administrator is the only Executive Branch official who can formally request OMB resolution of a conflict between Federal agencies under Executive Order 12088. The section further states that in resolving such conflicts OMB "shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations."

It also is important to point out that Section 1-604 of Executive Order 12088 states that "these conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards." This provision recognizes that applicable EPA internal dispute resolution procedures shall be utilized prior to Executive Order 12088 being invoked by the EPA Administrator.

B.1.h Use of Executive Order 12146 - Resolution of Interagency Legal Disputes

Executive Order 12146 (Appendix B) provides for the submittal of legal disputes between Federal agencies to the U.S. Attorney General whenever Executive Branch agency heads are unable to resolve such legal disputes. The Executive Order clarifies that an interagency "legal dispute" would include "the question of which [agency] has jurisdiction to administer a particular program or to regulate a particular activity." In addition, Section 1-402 of Executive Order 12146 specifically states that:

> "Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere."

This means that while the EPA Administrator may invoke E.O. 12088 for Federal facility disputes related primarily to funding and scheduling issues, he may invoke Executive Order 12146 in cases involving legal disputes. Therefore, for Federal agency

legal disputes the EPA will utilize its internal dispute resolution procedures prior to invoking E.O. 12146 as outlined above. When a legal dispute cannot be resolved between the EPA Administrator and the involved Agency head, the EPA Adminstrator may request the involvement of the Justice Department in resolving the dispute as outlined in E.O. 12146. Another significant difference between the E.O. 12088 and the E.O. 12146 dispute resolution procedures is that, unlike E.O. 12088, referral of disputes to the Attorney General is not limited to EPA, i.e., either Federal agency or both that are involved in a legal dispute may submit the case to the Justice Department.

B.1.i Use of Other Dispute Resolution Procedures for Violations of Signed Agreements or Consent Orders

The internal dispute resolution procedures outlined above are used primarily to resolve disputes which arise prior to the finalization of a signed Compliance Agreement or Consent Order (e.g., the involved parties cannot agree on the terms, conditions or schedules in the order or agreement). However, there are also situations where disputes occur when a Federal facility violates the terms of a Compliance Agreement or Consent Order which has already been signed by both EPA and the involved agency. In such cases, other dispute resolution procedures may be utilized if EPA and the Federal facility had previously agreed to use other means of resolving disputes that arise in the context of signed agreements or consent orders. For example, the RCRA program has developed this type of dispute resolution process as outlined in their January 25, 1988 guidance memorandum "Enforcement Actions Under RCRA and CERCLA at Federal Facilities" (See Appendix K). The primary differences between these procedures and what is provided for in the Federal Facilities Dispute Resolution Process (Section B.1.f.) are different timeframes and establishment of the EPA Administrator as the final arbiter for disputes resulting from violations of signed agreements.

In addition, the use of alternative dispute resolution (ADR) procedures, i.e., employing neutrals such as mediators, fact-finders, or arbitrators, may be very helpful in resolving compliance problems and disputes at a Federal facility (See the Administrator's Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, dated August 14, 1987).

B.1.j Impact of Funds Availability on Achieving Compliance and Negotiating Compliance Schedules

The Federal environmental statutes generally require that Federal facilities must comply with pollution control requirements to the same extent as non-Federal entities. The obligation of a Federal facility to comply is not solely contingent upon the availability of existing funds. In fact, Executive Order 12088 states that, "the head of each Executive Branch agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget." Specific exemptions under the statutes discussed in Section B.1.k. do provide a highly limited exception where the President has specifically requested an appropriation as part of the budgetary process and the Congress failed to make available such requested appropriation (See RCRA §6001, CAA §118, CWA §313).

Federal facilities are expected to seek all possible means of funding to achieve environmental compliance. While the A-106 pollution abatement process is the primary vehicle which Federal agencies use to plan for environmental projects, it is not the only funding related mechanism available. Many compliance problems may not require large capital expenditures, e.g., operation and maintenance (O&M) activities, and Federal

agencies are expected to use all available existing funds to return to compliance in such circumstances. Some Federal agencies have O&M accounts or capital accounts for building and construction funding, which can serve as a source of funds. If a compliance problem does require significant capital expenditures, the agency can consider reprogramming funds, transfer authority, or requesting a supplemental appropriation, which will enable an agency to receive funds in the year in which they are needed.

During negotiations on Compliance Agreements and Consent Orders, Federal officials will be expected to offer the most expeditious means of funding required remedial action(s). However, EPA recognizes that the Anti-Deficiency Act (31 U.S.C. §1341) prohibits Federal officials from commiting funds beyond those they are authorized to spend. Therefore, the language in the model Compliance Agreement in Appendix J simply commits the Federal official to seek any additional necessary funding where existing funds are unavailable to correct identified compliance problems. Additional appropriations should be sought only where it has been determined that existing agency funds are either unavailable or inadequate to address the violations. The Federal official signing a Compliance Agreement or Consent Order should have the authority to obligate the funds or make the necessary budget requests to expeditiously correct the violation according to the schedule outlined in the Agreement or Order.

Section 1-602 of E.O. 12088 provides the opportunity for OMB to consider such alternate sources of compliance funding as reprogramming or environmental accounts and should be used by Federal agencies to ensure that all possible avenues of securing necessary funds are exhausted.

B.1.k Exemptions

As directed by Section 1-703 of E.O. 12088, EPA can advise the President on recommendations made by Federal agencies concerning exemptions of facilities from compliance with applicable environmental regulations. Exemptions may be granted only where such exemptions are necessary in the interest of national security or in the paramount interest of the United States. Additional requirements are imposed in particular environmental statutes, e.g., in some, such an exemption is authorized for one year and may be renewed, if necessary. In addition, as noted in Section B.1.e, exemptions may only be granted for lack of funds if the President specifically requests such funds from Congress and they are denied. Section B of Chapter II summarizes the provisions of each of the statutes which provide for such exemptions. It should be noted that while such exemptions are provided for in the statutes, they have been rarely, if ever, invoked to date, and it is not anticipated that there will be any increase in the request or granting of exemptions in the future.

The Regional office will assist any Federal facility which believes it cannot comply with pollution control requirements in finding ways to achieve compliance. Every effort will be made to negotiate an alternative to an exemption which is acceptable to the parent Federal agency, EPA, and State and local pollution control agencies.

If a Federal agency recommends that a facility receive an exemption, the EPA Regional office will provide OFA, the Headquarters media enforcement office and OECM with documentation of the problem so that EPA can establish a position on the exemption. The Regional office should also submit its analysis of the pros and cons of granting such an exemption. The analysis should include the positions of any affected States. OFA will then submit a recommended position for the Administrator to submit to OMB with the views of all affected offices within EPA.

If an exemption is granted to a Federal facility, EPA will provide assistance to the facility in order to correct the pollution problem as expeditiously as possible. The objective is to bring the facility into compliance prior to the expiration of the exemption to preclude the need for a renewal. A copy of the exemption will be sent to any affected States.

B.2 Enforcement Actions For Violations at Federal Facilities Directed at Non-Federal Parties

This section outlines EPA's enforcement approach for addressing violations at Federal facilities which are operated by private contractors or other non-Federal parties, which generally are subject to the full range of EPA's civil judicial and administrative enforcement authorities.

B.2.a Limitation on Civil Judicial Enforcement Actions Applies Only to Executive Branch Agencies

Although EPA will not bring civil judicial enforcement action or assess civil penalties under most statutes against other Executive Branch Departments and Agencies, EPA intends to exercise its full authority to bring civil suits and assess civil penalties, as appropriate, against parties that are not subject to this constraint.

B.2.b Contractor and Other Private Party Arrangements Involving Federal Facilities

Most environmental statutes authorize enforcement response to be pursued against either facility owners, operators or both to correct violations of environmental law. There are numerous Federal facilities and public lands which have some level of private party or non-Federal government involvement in their operation or use. In its April 28, 1987 Congressional testimony the Department of Justice stated that EPA has the authority to take enforcement action against private contractors at Federal facilities (See Appendix H). There may be cases where it will be more appropriate to direct enforcement responses to these other parties, or to both the non-Federal party and the Federal agency depending on the nature of the non-Federal involvement, the language of the involved environmental statute or other factors. This issue arises frequently at government-owned, contractor-operated Federal facilities, commonly known as GOCO facilities.

- *EPA Enforcement Response Policy at GOCO Facilities*

EPA's initial enforcement response at GOCO facilities is influenced by a number of factors including: the statutory language as to who can be held responsible, (i.e., providing that enforcement can be directed at the owner, operator or both); decisions made by State and EPA officials in deciding who the permit holder should be in the case of permit violations; established contractual arrangements; the nature and type of violation(s); and other factors which may determine where enforcement response will yield the most expeditious return to compliance and deterrence for future violations. In this regard, it is EPA policy to pursue the full range of its enforcement authorities against contractor operators of government-owned facilities in appropriate circumstances. EPA also may take enforcement actions against Federal agencies at GOCO facilities following the procedures outlined earlier in this chapter. In certain situations, it may be appropriate to pursue enforcement actions against both the private contractor and the involved Federal agency.

As a follow-up to this strategy, EPA will be developing an Agencywide GOCO Enforcement Strategy which will provide more detailed criteria and factors to be considered in determining which party or parties to pursue enforcement action against. This strategy shall also address the extent to which there are certain Federal agency-specific circumstances which could affect to whom EPA's initial enforcement response should be directed.

Exhibit VI-3 provides definitions of the various types of facilities and lands with Federal involvement. This exhibit designates which party EPA generally will direct its initial enforcement response against when violations are identified (i.e., either the Federal agency or the involved private party). Given the complex mix of public and private ownership, operation, and use of the term "Federal facilities," the guidelines in Exhibit VI-3 should help EPA to eliminate delays in taking initial action to return violators to compliance.

It is important to note that this approach focuses only on the party at which EPA's "initial enforcement response" will be directed. Following this initial response, EPA's review of additional information and possible discussions with each party may affect against which party any further enforcement action should be taken, if such further action is necessary. In addition, EPA's enforcement response against either or both parties does not limit or otherwise restrict any future determination of their possible joint or several liability in cases involving CERCLA or RCRA cleanup actions. Simultaneous enforcement actions against both the Federal agency and the contractor should be considered if this would facilitate resolution of the compliance problem.

- *Notification Procedures for GOCO Enforcement Actions*

When EPA has determined which party it will pursue enforcement action against, EPA will make every effort to notify (through, at a minimum, a formal copy (cc) of the enforcement action) other involved parties of the action being taken against either the Federal facility or the contractor. This is important not only to enhance effective communication but also to assist in bringing about expeditious compliance and remedying the violation as soon as possible.

When EPA determines that its initial enforcement response will be directed at the contractor, EPA will take enforcement action appropriate for private parties. This will usually be an NOV, administrative complaint or the program equivalent (depending on the nature of the violation and the media program guidance) to the contractor explicitly stating that they are primarily or individually responsible for correcting the violation in a timely manner and for responding directly to EPA by the date specified. The limitations on civil judicial enforcement and on the imposition of penalties that is applicable to enforcement actions against Federal Executive Branch Agencies, are not applicable to enforcement actions taken against non-Federal parties. Where the notice or complaint is sent to the contractor, it also will state that the involved Federal agency has been simultaneously notified of the action being taken against the contractor. A copy (cc) of the action taken against the contractor should not only inform the Agency of the enforcement action being taken against the contractor but also include a notice which emphasizes the importance of their responsibility to effectively oversee their contractor to ensure compliance (See Appendix J). It should also request the Agency's complete cooperation in working with the contractor to correct the violation and return the facility to compliance as quickly as possible. In circumstances where Federal funding is required to correct the violation, the approach and considerations described in Section B.1.j. are applicable and will be considered in any agreements reached on expeditious compliance schedules.

When EPA determines that its initial response should be directed at the involved Federal facility, EPA will send, where appropriate, an NOV or the program equivalent to the Federal facility stating that they are responsible for correcting the violation in a timely manner and for responding to EPA by the date specified. A copy of the notice will be sent simultaneously to the involved contractor.

B.2.c Contractor Listing

The regulations at 40 CFR Part 15 establish the contractor listing program in which facilities that violate Clean Air or Clean Water Act standards may be put on a List of Violating Facilities. Any facility on the List is ineligible to receive any non-exempt Federal government contract, grant, or loan, or other assistance. Contractors operating Federal facilities are not exempt from being placed on the List.

Such listing is mandatory where a violation at a facility gives rise to a criminal conviction under § 113(c) of the CAA or § 309(c) of the CWA. It is EPA policy to initiate discretionary listing actions against recalcitrant contractors who are operating Federal facilities in a manner which causes continuing or recurring violations of the CAA or the CWA. Under the regulations, EPA may initiate a discretionary listing action against a facility only if the facility is already the subject of requisite EPA or State enforcement action against the contractor. The policies and procedures for the contractor listing program are described in guidance issued by OECM "Implementation of Mandatory Contractor Listing," August 8, 1984; "Implementation of Discretionary Listing Authority," July 18, 1984; and "Contractor Listing Protocols," October 1987.

B.3 Criminal Enforcement Actions at Federal Facilities

In situations where employees of Federal agencies have committed criminal violations of environmental statutes applicable criminal sanctions may be sought against such individuals, in the same manner as is done with respect to employees of other types of regulated entities. Such criminal violations will be addressed in accordance with the investigative policies and procedures of the EPA/NEIC Office of Criminal Investigations and the Agency's criminal enforcement priorities set by the Office of Enforcement and Compliance Monitoring.

B.4 Press Releases for EPA Enforcement Actions at Federal Facilities

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to promote compliance and to deter noncompliance with environmental laws and regulations. Publicizing EPA enforcement actions on an active and timely basis informs both the public and the regulated community of EPA's efforts to ensure compliance and take enforcement actions at Federal facilities. The issuance of press releases in appropriate circumstances can be a particularly effective tool for expediting timely compliance at violating Federal facilities.

Consistent with EPA November 21, 1985, "Policy on Publicizing Enforcement Actions," (Appendix L) the strategy for EPA press releases on enforcement actions at Federal facilities is as follows:

- Press releases generally will be issued for major enforcement actions such as:

- Significant Compliance Agreements or Consent Orders signed by both parties (and approvals of major RAPs where Compliance Agreements are unnecessary).

- Referral of disputes to EPA Headquarters when agreement cannot be reached at the Regional level.

- Proposed contractor listings and the administrative decision to list.

All press releases should be done as a part of communications strategy which will be developed for all EPA enforcement actions involving Federal facilities consistent with EPA Order No. 1510.1 "Communication Strategy Document Development" issued April 7, 1987 and transmitted by memorandum from the Administrator to all EPA Senior Managers on June 24, 1987. This order states that "Communication Strategy Documents will be developed for all major actions by the appropriate AA or RA." "Enforcement Actions" are included in the definition of Agency actions covered by the Order (See section 5 of EPA Order 1510.1). At a minimum, these communication strategies should include provisions for notifications to OEA and affected Headquarters program offices as well as a senior ranking official at the affected Federal facility or agency.

EPA's decision to issue a press release and the contents of press releases are not negotiable with Federal agencies or other regulated entities. The publicity of enforcement actions against Federal facilities must be consistent with EPA's "Policy On Publicizing Enforcement Actions" (GM-46) jointly issued on November 21, 1985 by the Office of Enforcement and Compliance Monitoring and the Office of External Affairs; in addition, in the case of criminal enforcement actions such publicity must be in accordance with the EPA guidance memorandum (GM-55) "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program" jointly issued by the Office of Enforcement and Compliance Monitoring and the Office of External Affairs on December 12, 1986.

B.5 Monitoring Compliance

The EPA Regional office is responsible for monitoring a Federal facility's compliance with any remedial actions and associated schedules which have been agreed to in formal EPA enforcement actions. Such Compliance Agreements or Consent Orders between EPA and Federal facilities are tracked in the EPA Consent Decree Tracking System maintained by the Office of Enforcement and Compliance Monitoring. Regional Federal Facilities Coordinators in cooperation with the regional program offices, must closely review A-106 submissions against all Compliance Agreements, Consent Orders, approved remedial action plans or consent decrees to ensure that projects and corrective actions agreed to are being requested as scheduled. Compliance monitoring and the A-106 process are further addressed in Chapter V.

EXHIBIT VI-1

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

olicy Framework [1]	NPDES[2]	Drinking Water[3]	UIC[4]	AIR[5]	RCRA[6]	FIFRA[6]
tional programs must tablish benchmark or lestones for what nstitutes timely and propriate enforcement ses toward ultimate solution and full ysical compliance.	Yes	Yes	Yes	Yes	Yes	Yes--1/5/A Interpretative Rule re State Primacy for use violations which deal only with instances where EPA refers violations to State, not with violations discovered by States.
designing oversight criteria for mely enforcement sponse, each program will attempt to pture the following ncepts:						
A set number of ys from detection violation to	Date of violation is when agency learns about violation Required to screen all DMRs within 30 days of receipt. By the time a permittee appears on the QNCR, informal or formal enforcement actions should have been initiated.	Clock starts after State is considered to have "discovered" an SNC (within 2 months after the end of each reporting period).	Clock starts 30 days after date of insp. or receipt of self-monitoring report. The SNC should be resolved by the end of the quarter in which the SNC first appears.	Clock starts 30 days after date of inspection or receipt of a source self-monitoring report which first identifies the violation. By day 45 source should be notified by State of the violation.	Clock starts when case development staff determines a violation has occurred through review of inspection report and/or other data (for tracking purposes, fixed at 45 days after inspection. Initial enforcement response for Class I violators is an NOV within 30 days of discovery. For High Priority Violators there is no initial informal action--the initial action is formal.	Clock starts when EPA refers significant violators to State. State has 30 days to initiate an investigation (can obtain extensions based on circumstances

. "Policy Framework for State/EPA Enforcement Agreements" August 25, 1986.
. "FY 1987 National Guidance for Oversight of NPDES Program" April 18, 1986.
. "Guidance for FY 1987 PWSS Enforcement Agreements," August 1986, "PWSS Compliance Strategy," April 1, 1987, and "Definitions of Timely and Appropriate Action and Significant Non-Compliance," August 27, 1987.
. "UIC-Program Guidance #53," December 1986 and "UIC Compliance Strategy," March 31, 1987.
. "Timely and Appropriate Enforcement Response Guidance" April 11, 1986.
. "Enforcement Response Policy" December 21, 1984.
. Interprative Rule - FIFRA State Primacy Enforcement Responsibilities, 40 CFR Part 173, Jan. 15, 1983.

EXHIBIT VI-1 (continued)

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

licy Framework	NPDES	Drinking Water	UIC	AIR	RCRA	FIFRA
ver a specific l of time, a ange of en- ent tools y be used to try achieve com- iance.	Discussed full range of informal, formal, administrative, and judicial enforcement tools.[9]	Discusses full range of informal, formal, administrative and judicial enforcement tools.[10]	Discusses full range of informal, formal, administrative, and judicial enforcement tools.	Focuses on formal enforcement but implies use of informal tools. EPA may develop case at day 90 and will normally issue NOV at day 120 if violation is still unresolved.	Allows for full range of enforcement responses for Class I & II violations.	Interpretive rule focuses on formal enforcement action.
A prescribed num- of days from ini- l action within ch a determination uld generally be, e that either com- ance has been ieved or an admini- ative enforcement ion has been taken :h meets minimum al requirements, judicial referral initiated as opriate.[8]	Prior to appearing on a 2d QNCR for the same violation (generally w/i 60 days of the 1st QNCR identifying the SNC) permittee must be in compliance or formal enforcement action must be taken. (p. 30) Permittees that are still in violation on the 2d QNCR, go on Exceptions List which is part of SPMS system.	Prior to appearing on a 2d quarterly report for the same violation, source must be in compliance, on an enforceable compliance schedule, or formal enforcement action must be taken.	Prior to appearing on a 2d quarterly report for the same violation, source must be in compliance, on an enforceable schedule or formal enforcement action must be taken.	By day 120, source must be either in compliance or on an administrative or judicial order, subject to referral, or subject to proposed SIP revision that is likely to be approved and is scheduled for State hearing.	High Priority Violators must commence with formal enforcement within 90 days of discovery. For medium priority violator, if compliance is not achieved w/i 90 days after the violation discovery, a decision to escalate is made.	After the investigation is completed. States have 30 days to commence the enforcement action.

Formal enforcement action defined in Policy Framework as having, at a minimum, the following elements:
- Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
- Explicitly is based on the issuing agency's determination that a violation has occurred;
- Requires specific corrective action, or specifies a desired result that may be accomplished as the recipient chooses, and specifies a timetable for completion;
- May impose requirements in addition to ones relating directly to correction, e.g., specific monitoring, planning, or reporting requirements; and
- Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

See "Enforcement Management System Guide" issued 2/27/86 by AA for Water for Enforcement Response Guide.

See "Safe Drinking Water Act Public Water System Settlements" - Interim Guidance" issued 11/17/83 by AA for OECM.

EXHIBIT VI-1 (continued)

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

licy Framework	NPDES	Drinking Water	UIC	AIR	RCRA	FI
Follow-Up and calation: A specific point at which a termination is made ther that final ysical compliance s been achieved or at escalation to judicial enforcent action should be cen if such actions ve not already en initiated.	Guidance establishes goal that cases should proceed from referral to filing in 60-90 days. SNC lists track until compliance is achieved. PCS tracks compliance w/ AOs. Consent Decree tracking follows milestones until compliance is achieved.	SNC lists track until appropriate action is taken or system returns to compliance without an enforcement action. Consent decree tracking follows milestones until compliance is achieved. PWSS AO tracking system will track milestones in federal AOs.	SNC lists track until compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved.	CDS tracks status of compliance with schedule until physical compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved.	SNC lists track until compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved. See 3/24/88 OSWER memo on Elevation Process for Achieving Compliance at Fed. Facilities.	Interpretive rule has criteria for referring significant cases. Consent Decree tracking follows milestones until compliance is achieved for all cases.
Final physical pliance date is ly established i required of : facility.	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific
Expeditious sical compli- e is required.	Violator is returned to compliance as expeditiously as possible	No specific language.	No specific language	Expeditious compliance implicit in guidance.	Expeditious compliance required.	Interpr rule c signif. violations that EPA refers to State
Scope of Coverage: a minimum, signiant noncompliers to be addressed. ansions to larger verse to be conered at later e.	SNC who are major permittees	SNCs as defined for MCL, M/R and chem/rad violations.	SNCs as defined and applied to all well classes.	The following classes of SNC: Class A SIP violators in nonattainment areas in violation for pollutant for which area is in nonattainment, NSPS violators and sources operating in violation of Part C& D permit requirements; and NESHAP violators.	Applies to High Priority Violators and medium priority violators	Not appropriate

EXHIBIT VI-2
FEDERAL FACILITIES ENFORCEMENT RESPONSE PROCESS

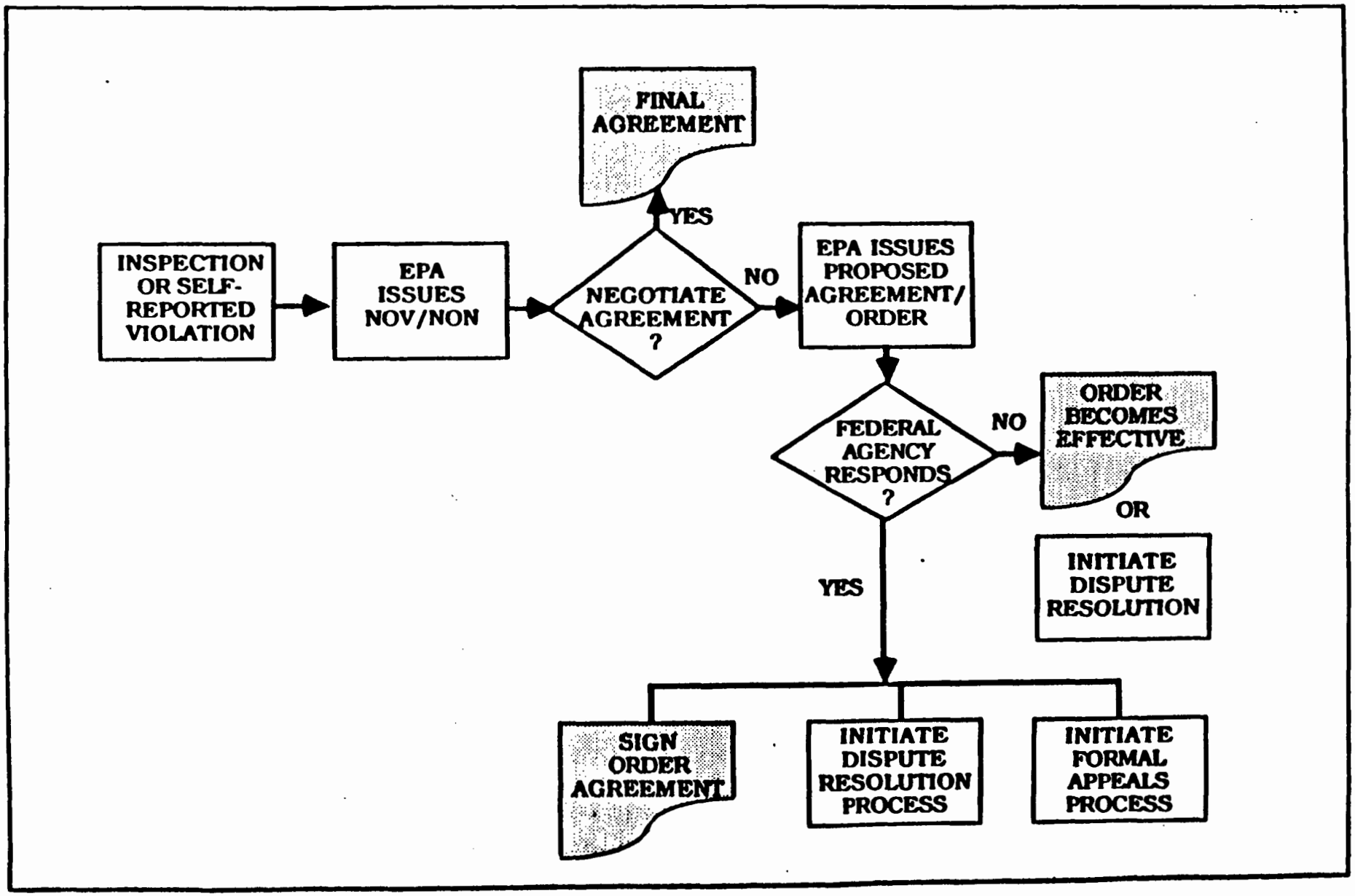
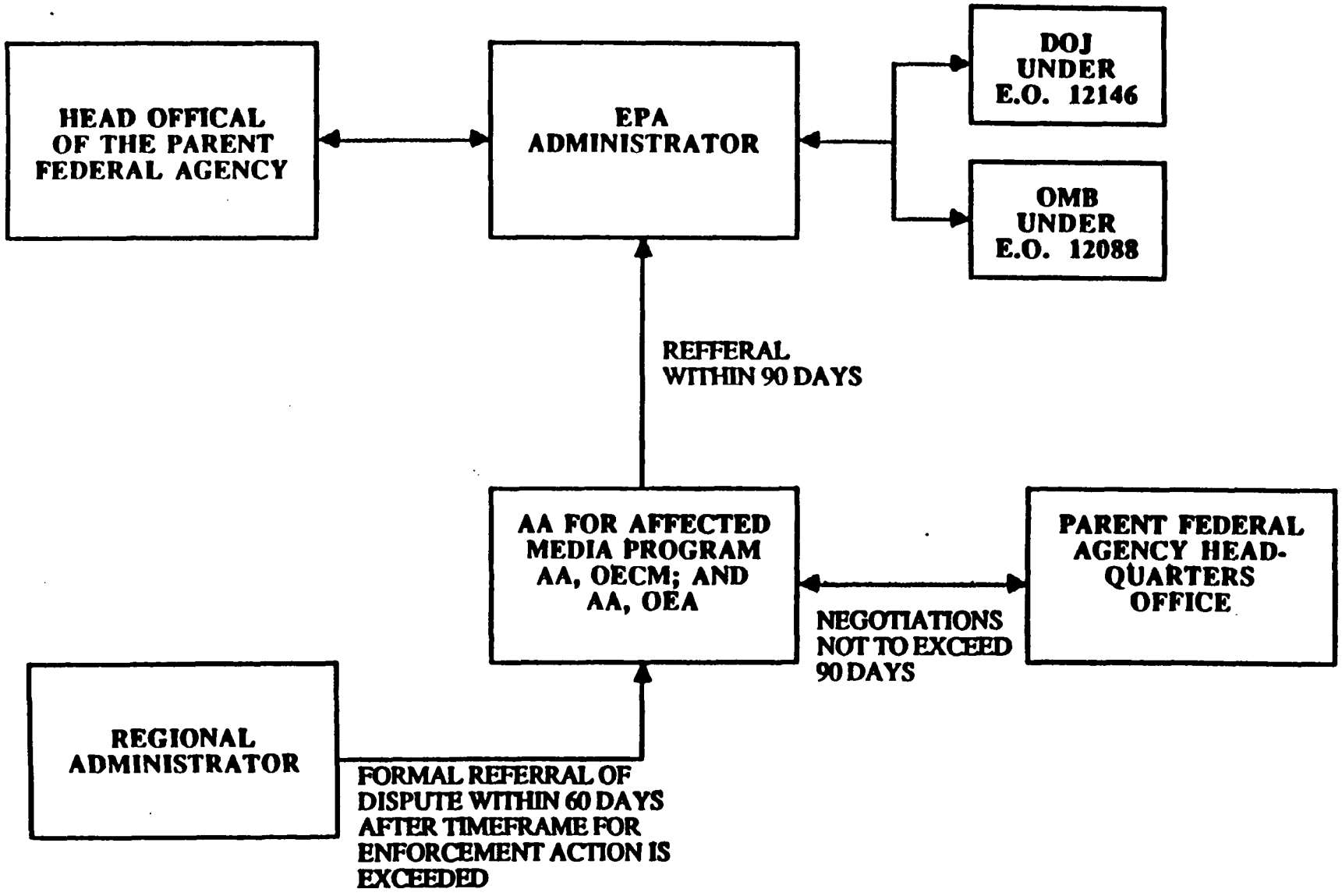


EXHIBIT VI-2
(Continued)

FEDERAL FACILITIES DISPUTE RESOLUTION PROCESS



EXHIBIT

EPA INITIAL ENFORCEMENT RESPONSE TO VIOLATIONS AT FACILITIES WITH FEDERAL INVOLVEMENT

Acronym/ Term	Definition	Exception or Other Comment	Initial Enforcement Response Directed at:
GOGO:	Government owned/government operated facility is the traditional Federal facility where the government owns and operates all regulated activity.		FEDERAL FACILITY
PERMITTEE:	Parties granted a permit for short-term use of government land (special use permit holders).		
WITHDRAWAL FROM PUBLIC USE:	Permit granted to a Federal agency or instrument of the Federal government to use the land of another Federal agency for up to twenty years, under the Federal Land Policy and Management Act, as long as the intended use does not involve destruction of the land (e.g. military uses and dams).	If administering the lands when the violation occurred.	
GOCO:	Government owned/contractor operated facility is owned by a Federal agency but all or portions of it are operated by private contractor(s).	Except if dictated by statute or other factors. Action may also be against both parties.	FEDERAL FACILITY OR PRIVATE PARTY
JOCO:	Jointly owned/contractor operated is a facility where a portion is owned by the Federal agency and a portion is owned by a private operator which operates the entire facility and produces some goods and services for the Federal agency and some for its own use or profit.		
GOPO:	Government owned/privately operated is a facility where the government has leased all or part of its facility to a private operator for their operation and profit.		
COCO:	Contractor owned/contractor operated facility is a non-government owned, privately operated facility that provides goods and/or services to a Federal agency under contract.		PRIVATE PARTY
COCO(E):	Same as COCO, however, contractor may be furnished government equipment to manufacture a product or provide a service.	Except if pollution abatement is to be paid by the Federal facility for the furnished equipment.	
POGO:	Privately owned/government operated is a facility where the government leases buildings or space for its operations.	Except if violation resulted because of Federal agency operation. Or non-Federal parties.	
LEASEE:	Parties granted use of government land by a rental agreement or a title transfer with a revisionary clause (municipal landfills, oil and gas, mining, grazing, agricultural and industrial operations).	Or non-Federal parties.	
GRANTEE:	Parties having received a grant for permanent authorization to use government land or given right of way. Grants usually involve a single payment for the land or transfer of land use rights.		
CLAIMANT:	Parties that have properly located, recorded, and maintained mining claims on the public domain under the 1872 mining law (and who) have a possessory right against the U.S. and third parties.		
PATENT HOLDER:	A mining claimant who has met the statutory requirements of the 1872 mining law and has been issued a patent.		
HOLDER:	Any applicant who has received a special use authorization (for the use of National Forest land) from 36 CFR 251.51.		

CHAPTER VII

ROLE OF THE STATES IN RESPONDING TO FEDERAL FACILITIES VIOLATIONS

VII. ROLE OF THE STATES IN RESPONDING TO FEDERAL FACILITIES VIOLATIONS

The purpose of this Chapter is to clarify the role of the States in responding to Federal facilities violations and to highlight several aspects of the State/EPA relationship that will be spelled out in the State/EPA Enforcement Agreements. This Chapter should be read in conjunction with Chapter VI, which sets forth the basic approach and procedures EPA and delegated or approved States will use when responding to violations of Federal law at Federal facilities.

A. STATE RESPONSE TO FEDERAL FACILITIES VIOLATIONS

States with delegated or authorized Federal programs have primary responsibility for responding to violations at Federal facilities under most of the environmental statutes with a few exceptions such as toxic chemical controls under TSCA, and enforcement of certain motor vehicle requirements under the Clean Air Act. In addition, as discussed in Chapter II.A of this Strategy most Federal environmental statutes require that Federal facilities must comply with Federal laws and regulations, but also with all applicable State and local environmental requirements to the same extent as non-Federal entities.

EPA retains parallel legal authority and responsibility to enforce Federal law even in delegated or approved States. As a matter of policy, in order to avoid duplication of effort where both EPA and States have parallel enforcement authority, EPA enforcement action in States where programs are delegated or approved only take place when a State: (1) fails to take timely and appropriate action, (2) requests EPA to take the lead or decide that joint enforcement action is appropriate, or (3) in other limited circumstances as outlined in the "Policy Framework for Implementing State/EPA Enforcement Agreements." The remainder of this section highlights the following areas concerning State responses to Federal facility violations:

- The use of State enforcement authorities;
- State enforcement response following EPA inspections in delegated States; and
- The relationship between EPA and State enforcement actions against Federal facilities.

A.1 Use of State Enforcement Authorities

As noted above, most EPA statutes envision that States with adequate authority and capability will assume operating responsibility for environmental programs, including Federal facilities. While the extent of delegation varies from program to program and State to State, the majority of EPA's responsibility for direct program administration on a day-to-day basis including initial obligation for enforcement, has been assigned to the States through delegation or authorization.

States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. States should use the full range of their enforcement authorities to address Federal facility violations to the same extent they are used for non-Federal facilities while meeting the requirements of timely and appropriate enforcement response. States are also encouraged,

wherever possible, to pursue bilateral, negotiated agreements, or consent orders or decrees as appropriate with Federal facilities or three party (EPA/State/Federal agency) agreements as outlined in Section B.1.c where this would facilitate compliance. EPA will, however, deem acceptable any State enforcement approaches which are at least comparable to EPA's in meeting goals for timely and appropriate enforcement response.

A.2 State Enforcement Response Lead Following EPA Inspection in Delegated States

Even where program authorities are authorized or delegated to States, EPA may conduct inspections of regulated entities, including Federal facilities, for a variety of purposes including State oversight, response to citizen complaints, as part of special enforcement initiatives, or where required by statute (e.g., RCRA Section 3007(c) and (d)). EPA generally provides States with advance notification prior to such inspections and generally invites them to participate.

When violations are identified through such EPA inspections of Federal facilities in delegated States, EPA will immediately contact the State and offer them the first opportunity to pursue timely and appropriate response with the involved Federal facility, consistent with the State's delegated authority. EPA will send the inspection report identifying any violations to the Federal facility simultaneously with EPA's sharing of this information with the State. An up-front mutual decision will then be made between EPA and the responsible State agency as to which of them will take any follow-up action. If a State is unwilling or unable to take action, or fails to take action in a timely manner after initially agreeing to pursue the case, EPA will take direct Federal action after advance consultation and notification of the State pursuant to the State/EPA enforcement agreement.

To the extent possible, arrangements should be made in advance in individual State/EPA Enforcement Agreements on the types of situations involving Federal facilities in which the State would request EPA support or direct action, paying particular attention to these situations in which follow-up is required to EPA inspections. In particular, in the case of a State's use of an EPA inspection as the basis for its own action, EPA and the State should agree on how EPA evidence and expertise will be utilized in taking State enforcement action. How the State uses EPA's inspection report will be up to the State so long as the state's response to any violations identified by EPA's inspection report are addressed in a timely and appropriate manner.

A.3 EPA Involvement in State Enforcement Actions

Because of EPA's ongoing responsibility to provide technical assistance and support to Federal Agencies in achieving compliance, as required under E.O. 12088, EPA may need to be involved in assisting to resolve noncompliance problems even when a State takes the lead in an enforcement action. If either the State or the Federal facility in violation requests EPA's involvement, EPA will participate to the extent determined appropriate by affected Regional program division directors in consultation with the Federal Facility Coordinator. EPA's involvement should focus more on resolving disputes rather than on providing project-level technical assistance to the Federal facility which could conflict with the State's ongoing enforcement proceedings.

As directed in E.O. 12088, EPA has a duty to "make every effort to resolve conflicts regarding such violations between Executive agencies and, *on request of any party*, such conflicts between an Executive agency and a State, interstate or a local agency." However, in each such case, EPA's involvement will respect the perogatives of the State to

pursue independent enforcement action and EPA will be careful not to interfere with State enforcement proceedings. EPA will offer both parties its assistance to promote a speedy resolution of identified problems, and communicate fully with both the State agency and affected Federal agency officials of its responses and suggested role consistent with EPA's conflict of interest rules and judicial ethics.

A.4 Relationship of State Administrative and Judicial Citizen Suits to EPA Compliance Agreements

Usually, when EPA pursues a judicial enforcement action against a violator, it serves as a bar to further enforcement action by States or citizen (under citizen suit provisions provided in most of the statutes) for similar action for the same violation. The Federal EPA enforcement process described for Executive Branch Agencies relies heavily on Compliance Agreements, which do not bar State administrative or judicial actions or citizen suits to compel compliance by Federal Agencies. Therefore, when EPA has negotiated a Compliance Agreement, as opposed to issuing an Order on consent, it would not legally affect the rights of non-parties to the Agreement. Despite EPA's belief that in the vast majority of cases Compliance Agreements should be a very effective means of ensuring a prompt return to compliance, there may be circumstances in which States or private citizens choose to exercise their rights to take further enforcement action. EPA encourages such non-parties to the EPA/Federal agency Compliance Agreement to fully consider and use it as a basis for relief sought in their own actions to seek expeditious compliance. It is also for the above reasons that it is desirable for States to sign Compliance Agreements and Consent Orders along with EPA and involved Federal facilities. In addition, EPA compliance agreements may contain enforceability clauses which recognize the rights of states and citizens to enforce these agreements through the citizen suit provisions of the relevant statutes.

B. FEDERAL FACILITIES IN THE STATE/EPA ENFORCEMENT AGREEMENTS PROCESS

State and Federal roles are defined through negotiated multi-year State/EPA Enforcement Agreements, which are reviewed annually on a State-by-State basis for each environmental program. Implementation of these agreements is guided by the EPA "Policy Framework for State/EPA Enforcement Agreements" (issued June 26, 1984, revised and reissued June, 1986), associated national program implementing guidance, and an annual guidance memo on the enforcement agreements process from the Deputy Administrator to the Regions. The purposes of these Agreements are: to establish clear expectations for what constitutes a good State or EPA enforcement program through oversight criteria specified in advance, to establish clear roles and responsibilities for State and Federal enforcement to avoid duplication of effort and use limited resources effectively and efficiently, and to ensure effective national reporting of accomplishments.

The Regions have a great deal of flexibility in determining the form of the agreements and the internal process for handling the agreements. Some Regions have umbrella agreements that include all programs in one comprehensive agreement negotiated between the RA and the State Environmental Commissioner. Other Regions have program-specific agreements with the respective State Agency. To the extent possible, Regions are encouraged to incorporate the enforcement agreement provisions into existing documents, e.g., grants, Memorandum of Understanding's, State/EPA Agreements.

The timing of negotiations/reviews of the agreements depends on the vehicle chosen and the Region or State planning cycle. Regional program staff should consult with the

Federal Facilities Coordinator in the development and negotiation of the Enforcement Agreements.

While most aspects of the Agreements pertain equally to Federal and non-Federal facilities, this Chapter focuses on how Federal facilities should be explicitly addressed in the State/EPA Enforcement Agreements in three of the areas covered in the Policy Framework: clear oversight criteria, criteria for direct Federal action, and advance notification and consultation.

B.1 CLEAR OVERSIGHT CRITERIA AND OVERSIGHT APPROACH

There are seven general criteria mentioned in the Policy Framework and covered in various forms in program guidance:

B.1.a Identification of and Priorities for the Regulated Community

States will be expected to have included Federal facilities in their inventories and program information systems, appropriately identified as such through the use of assigned Federal facility ID numbers. The Federal Facility Coordinator will make the information available to the State on the different types of Federal facilities using the FINDS information system. As part of the enforcement agreements process, EPA Regions and the State will review any special needs for identifying and tracking Federal facilities.

B.1.b Clear and Enforceable Requirements

Requirements established through permits, compliance agreements, administrative orders, and consent decrees should define in enforceable terms a timetable for Federal facility remedial actions. In particular, EPA and the States need to assure that Federal facilities have permits that are current. If there are permitting problems at Federal facilities, Regions and States should develop a strategy for addressing them as part of the annual work plan negotiations process, consistent with national program permitting strategies, where applicable.

B.1.c Accurate and Reliable Compliance Monitoring

EPA and the State will review the planned inspection schedules for the coming year for each program to ensure that Federal facilities are inspected at required frequencies.

EPA will assist in resolving any particular problems of access to facilities that the States may be encountering, including instructions on how to obtain security clearances, where necessary.

B.1.d High or Improving Rates of Continuing Compliance

As part of each media program tracking system, administering agencies should track the progress of returning Federal facility significant violators to compliance. To ensure broad Federal facility compliance, the States may be asked to participate in targeted initiatives in compliance monitoring and enforcement for Federal facilities of specific agencies or by facility type.

B.1.e Timely and Appropriate Enforcement Response

States are responsible for taking timely and appropriate enforcement action, as described in Chapter VI. EPA Regions and States are to reach agreement on adapting national definitions of appropriate enforcement response and timeframes to state-specific authorities and procedures. Regions and States should discuss the enforcement approach the State generally plans to use for responding to Federal facility violations. They should also reach agreement on any differences in procedure that the State plans to use, if any, that are different from those used for non-Federal facilities. For example, the Region and State should discuss any upfront agreements the State wants to make about taking enforcement action based on an EPA inspection (e.g., for statutorily-required EPA inspections of Federal TSD's in RCRA), and agree on how Federal or State evidence and expertise will be used in taking such action.

B.1.f Accurate Recordkeeping and Reporting

In order to support an effective program, administering agencies must have timely, complete, and accurate information on Federal facility compliance status and enforcement actions. States should report Federal facility compliance data as part of each program's reporting measures and commitments (e.g., SPMS and program-specific system). The Regions should also request States to provide different information on Federal facilities compliance status if mutual agreement can be reached as part of the State/EPA enforcement agreements process. EPA is especially interested in receiving copies of State enforcement actions at Federal facilities.

B.2 DIRECT EPA ENFORCEMENT

EPA will take direct Federal action principally where a State is unwilling or unable to take "timely and appropriate" enforcement action, or where the State asks EPA to join in or take enforcement action. To the extent possible, arrangements should be made in advance, as part of the enforcement agreement, concerning the types of situations in which the State would request EPA to take direct enforcement action to address Federal facility violations.

B.3 ADVANCE NOTIFICATION AND CONSULTATION

As part of the agreements process, Regions and States are to agree in writing as to who, how, and when EPA will notify and consult with the State agency in advance of Federal inspections and enforcement actions. Federal facilities may involve a greater or different need for coordination between States and Regions than non-Federal facilities, particularly where the Federal facilities request EPA technical assistance or where EPA is required to conduct an inspection (e.g., under RCRA). Because Federal facilities compliance problems are often of a multi-media nature, it may be appropriate to arrange a single point of contact in a State, statewide or in a particular program, for Federal facility issues.

The advance notification and consultation protocols in the State/EPA Enforcement Agreements should incorporate any of the above-mentioned types of special arrangements necessary for Federal facilities.

The protocols should also address how the State will be involved in the review of Federal agency A-106 submissions, and include plans for an annual review of patterns of compliance problems at Federal facilities in the State.

CHAPTER VIII

EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

VIII. EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

The Federal Facilities Compliance Program is a multi-media program requiring close coordination and cooperation among all involved parties. The purpose of this Chapter is to clarify the roles and responsibilities of EPA Headquarters staff and the Regional offices for implementing the Federal facilities program and this Strategy. This Chapter is necessary in order to ensure implementation and integration of all elements of this strategy into the various media programs and EPA's overall internal management systems.

The EPA tasks for ensuring Federal facilities compliance are divided between the Regional offices and Headquarters staff. Coordination among both staffs is necessary to ensure that this Strategy is executed consistent with national and program policies, procedures, and guidance. Therefore, this Chapter has been divided into the following sections:

(1) Regional office staff - This section addresses the roles and responsibilities of the Regional Administrator, Deputy Regional Administrator, Regional Counsel Regional Program Staff/Division Directors, and Regional Federal Facilities Coordinators for implementing various aspects of the Strategy.

(2) Headquarters offices - This section describes the roles and responsibilities of those Headquarters offices that have certain responsibilities for coordinating and working with the Regions on Federal facility activities.

Responsibilities for implementing key strategy features such as identification of the regulated community, technical assistance/ training, compliance monitoring, involvement in the A-106 review process, and participation in the dispute resolution process are described for Headquarters and Regional program offices and staff.

A. REGIONAL OFFICE STAFF

The following section describes the roles and responsibilities of the Regional office staff with regard to the Federal facilities program. See Exhibit VIII-1 at the end of this Chapter for a diagram which depicts these Regional relationships.

A.1 Regional Administrator

The Regional Administrator (RA) ensures that Agency policies and guidance on implementing Executive Orders 12088 and 12146 and the environmental statutes are effectively carried out. The RA is responsible for the level of Federal facility compliance in the Region through encouragement of and support for the Regional staff in their efforts to resolve compliance problems at Federal facilities. The RA will formally refer disputes with other Federal agencies that cannot be resolved at the Regional office level within established media timeframes to the Assistant Administrator (AA) for the affected media program, the AA for External Affairs and the AA for OECM. These referrals will be signed by the Regional Administrator.

A.2 Regional Administrator/Deputy Regional Administrator

The RA or Deputy Regional Administrator (DRA) defines the following based on internal Regional operating procedures consistent with the guidelines in this strategy:

(a) Involvement of Regional Counsels and the role of Program Divisions in the issuance of enforcement actions and negotiations of compliance agreements for Federal facilities;

(b) The process for evaluating inspection schedules for Federal facilities and opportunities for multi-media inspections and the respective roles of the Program Divisions, Environmental Services Divisions (ESD's) and Federal Facilities Coordinators in this process;

(c) Designation of Regional staff responsible for signing Compliance Agreements, NOV's, Consent Orders, etc., for Federal facilities violations;

(d) Assurance that Regional program reviews/audits of delegated State programs include a review of the State's progress in addressing Federal facilities compliance problems and ensuring that Federal Facilities Coordinators are informed and involved in these reviews;

(e) Responsibilities for Regional review of Federal agency A-106 submissions and coordination with States on the A-106 process; and

(f) Assurance that Federal facilities compliance is specifically addressed in State/EPA enforcement agreements.

In appropriate cases where agreement cannot be reached in the negotiation of Compliance Agreements or Consent Orders with Federal facilities, Regional staff should escalate unresolved issues to the RA/DRA for resolution within media specific timely and appropriate timeframes prior to issuance of a proposed Order. The RA/DRA may then choose to contact an equivalent level official at the involved Federal agency to attempt to resolve remaining issues.

A.3 Regional Counsel

Upon request, the Regional Counsel provides legal advice to the RA, the Federal Facilities Coordinator, and the Regional media program staff on:

- Determining the compliance status of Federal facilities;
- Evaluating the sufficiency of data supporting compliance determinations;
- Negotiating agreements on solutions to compliance problems;
- Resolving compliance disputes with Federal facilities; and
- Reviewing draft Compliance Agreements and Consent Orders for their legal sufficiency and consistency with Agency policy.

Each Region should clearly identify the role of the Regional Counsel in the Federal facilities compliance process. It is imperative, however, that the Regional Counsel consult with OECM and Headquarters Office of General Counsel on questions of national significance concerning Federal facilities.

A.4 Regional Program Staff/Division Directors

Each Region is responsible for designating a staff person to serve as the primary point of contact for the Federal Facilities Coordinators to deal with on media-specific Federal facilities compliance issues. This designee also is responsible for the following activities.

Identifying the Regulated Community - Ensure that Federal facilities data in program information systems is maintained through the use of a support identification code for Federal facilities.

Technical Assistance/Training - Assist Federal Facilities Coordinators with their Regional multi-media technical program workshops for Federal facilities in their Region. In addition, provide the Federal Facilities Coordinator and OFA, at the beginning of the fiscal year, with the program's annual training plan and notify the Federal Facilities Coordinator of all program training courses and workshops which will be open to Federal facilities in the Region. On a quarterly basis, notify the Federal Facilities Coordinator of availability of spaces for Federal facilities participants.

On-the-job training opportunities should be considered for officials of other Federal agencies where feasible, in cooperation with Regional Federal Facilities Coordinator.

Compliance Monitoring - Ensure that Federal facilities are receiving the required number of inspections for programs where EPA has the lead. This includes conducting at least the same percentage of program oversight inspections for Federal facilities as is done for other facilities in delegated or approved states. The Regional media-program contact should provide the Regional Federal Facilities Coordinator with copies of all EPA inspection reports of Federal facilities.

State Oversight - Develop and negotiate the State/EPA Enforcement Agreements in consultation with the Federal Facilities Coordinator and ensure that at least the required number of inspections of Federal facilities are being conducted in delegated or authorized States.

The Regional media-contact should ensure that a separate component in the Regional reviews/audits of delegated programs is included on State handling of Federal facilities compliance problems. This insert should be developed in consultation with the Federal Facilities Coordinator.

Responding to Violations - At the beginning of the fiscal year and periodically as required by the program, the Regional media-contact in coordination with the Regional Federal Facilities Coordinator, identifies those Federal facilities in significant noncompliance and following media-program Strategic Planning and Management System (SPMS) requirements, reports program actions against the identified Federal facilities Significant Noncompliers (SNCs) to Headquarters. Also, works with the Federal Facilities Coordinator to establish quarterly targets for Federal facilities inspections.

Following consultation with the Regional Federal Facilities Coordinator, the program offices are responsible for issuing NOV's, Compliance Agreements, and/or Consent Orders, where appropriate, for Federal facilities violations within the time frames established in program-specific timely and appropriate guidance. Program Division Directors have the responsibility for sign-off on Federal facilities NOV's, Compliance Agreements and Consent Orders in most Regions consistent with the delegations of

authorities for their respective media. Federal Facilities Coordinators should be notified by Division Directors prior to issuance of any enforcement action to a Federal facility. For any disputes formally referred to Headquarters under the RA's signature, the program offices are responsible for formulating referral packages, in consultation with the Federal Facilities Coordinator.

Where there is contractor or other private party involvement at a Federal facility (e.g., GOCO's), the program office must ensure that other parties receive a copy of any enforcement action sent to any of the involved parties.

Involvement in A-106 Review Process - Another responsibility of the Regional media-program contact is to review all Federal agency A-106 submissions and provide comments to the Federal Facilities Coordinator on media-related pollution abatement projects in the areas of engineering, timeliness, and cost to ensure that proposed projects have been appropriately designed and adequately funded to meet compliance requirements. In addition, Regional media-program contacts must work with the Federal Facilities Coordinator on identified media program priority areas that should be targeted for A-106 projects by Federal agencies.

As requested, media-program contacts should participate in on-site preliminary planning and design review conferences for significant projects with the Federal Facilities Coordinator.

Consent Decree Tracking System - In consultation with the Regional Federal Facilities Coordinator, media-program contacts will report to HQ/OECM on the status of compliance with the schedule and actions agreed to in an EPA Compliance Agreement or Consent Order with Federal facilities, following guidance on the Agency's Consent Decree Tracking System. Items reported should be consistent with SPMS requirements for consent decrees. (This is consistent with the guidance on "Consent Decree Tracking," Memorandum from Alvin L. Alm, Deputy Administrator, dated August 15, 1984.)

A.5 Regional Federal Facilities Coordinator

The Federal Facilities Coordinator is responsible for coordination with Regional program offices on implementation of Federal facilities compliance activities in the Regional office. The Coordinator also is the Regional liaison with the Office of External Affairs (OEA) and serves as the primary point-of-contact for EPA with all Federal agencies in the Region on environmental compliance matters. Duties of the Coordinator typically include:

- Ensuring that the Regional staff are knowledgeable on guidance issued by OEA;
- Coordinating and quality assurance of Regional A-106 reviews;
- Monitoring actions being taken by the Regional staff to resolve compliance problems at Federal facilities;
- Coordinating negotiations of Compliance Agreements; and
- Providing data to OEA on the compliance status of Federal facilities located in the Region.

Besides those duties mentioned above, the Federal Facilities Coordinator has specific responsibilities for implementing various aspects of this Strategy and the Federal facilities program as highlighted below.

Identifying the Regulated Community - Regional Federal Facilities Coordinators regularly identify Federal facilities information, by type of facility, (i.e., GOGO, GOCO, POGO, etc.) in the Facility Index System (FINDS) information system. Data for this system is provided by Regional program offices and States in order to track the compliance status of Federal facilities. In addition to identifying the regulated community via FINDS data, all Coordinators should develop a name list for applicable media programs of those Federal facilities minor sources considered to be environmentally significant (limited to no more than to 10% of all minor sources per program) and monitor the compliance status of these sources. Besides maintaining the list of minor sources, they also track those facilities which are the most environmentally significant in each Region. This list is updated annually in consultation with media program staff.

Technical Assistance/Training - The Federal Facilities Coordinators are tasked to conduct at least one Regional multi-media technical program workshop annually for Federal facilities in their Region with assistance from program offices. In addition, they invite Federal agency environmental personnel in each Region to bimonthly meetings to discuss new and upcoming program, generic compliance problems, etc.

The Coordinator serves as the Regional clearinghouse for information exchange with Federal agencies on new regulations, policies, etc. They also identify appropriate EPA training courses and workshops for the Federal agencies and in coordination with media program offices and conduct compliance program assistance visits to facilities to help them with overall environmental program practices and management.

As part of their technical assistance role, Federal Facilities Coordinators provide Federal agencies assistance with designing environmental auditing programs through training, workshops, guidance manuals, etc.

Compliance Monitoring - Federal Facilities Coordinators work with Regional program offices and Environmental Services Division (ESD) to establish quarterly targets for Federal facilities inspections and schedule multi-media inspections, as appropriate. As part of this effort, the Coordinators provide ESD annually with a name list of Federal facilities that are appropriate candidates to receive multi-media inspections based upon their environmental significance in a number of media program areas.

Part of their compliance monitoring tasks involve coordination with program offices prior to negotiations with States on the State/ EPA enforcement agreements to decide on a mutually acceptable approach to receive compliance and inspection data on Federal facilities from delegated or approved States.

Involvement in A-106 Review Process - Coordination of the Regional office review of Federal agency A-106 submissions is overseen by the Federal Facilities Coordinators in accordance with national guidance provided by OFA and OMB. The Coordinators work with the program offices in evaluating the adequacy of proposed projects in the areas of engineering, timeliness and cost to ensure that the projects have been appropriately designed and adequately funded to meet all compliance requirements. The Coordinators are responsible for final quality assurance of Regional reviews and for the timely submission of materials to OFA.

Copies of the A-106 submissions are provided by the Coordinators to the States in January of each year for their review. Once the States receive their copies, the Coordinators conduct an annual meeting with appropriate State representatives to discuss their comments on A-106 projects as well as any identified Federal agency patterns of noncompliance.

Federal agencies are informed of selected annual program priority areas toward which A-106 projects should be targeted. Federal Facilities Coordinators work with the agencies to ensure that A-106 projects are proposed for facilities with compliance problems.

Federal Facilities Coordinators are available to participate in preliminary planning and design review conferences on significant projects at Federal facilities, as appropriate. They may also request media program technical assistance when necessary.

Responding to Violations - At the beginning of the fiscal year, in coordination with the Regional program offices, the Regional Federal Facilities Coordinators identify the names of those Federal facilities in significant noncompliance. They assist with negotiations of Compliance Agreements between EPA media programs and involved Federal agencies to resolve identified compliance problems and violations. As part of this process, the Coordinator may informally notify the Federal facility of identified violations following an EPA inspection and prior to issuance of written notification of violation. The FFC should initiate informal notification process after first consulting with the affected media program offices.

Dispute Resolution Process - As described in Chapter VI, Federal Facilities Coordinators may informally request Headquarter's OFA assistance in resolving disputes at any point in the Federal facilities compliance resolution process. They also will assist the program office in developing referral packages for disputes formally referred to Headquarters under the Regional Administrator's signature.

Consent Decree Tracking - Each Coordinator provides the program offices assistance with tracking the status of EPA Compliance Agreements and Consent Orders with Federal facilities for reporting to Headquarters and input into the Agency's Consent Decree Tracking System.

B. HEADQUARTERS OFFICES

The following Headquarters staff have certain responsibilities for working with the Regions on Federal facilities activities, resolving compliance problems, and developing policy and guidance:

- Program Offices;
- OEA/OFA;
- OECM;
- OGC; and
- Office of the Administrator.

See Exhibit VIII-2 at the end of this chapter for a diagram depicting these Headquarters relationships.

B.1 Headquarters Program Offices

In order to fully implement this Strategy it is critical that the program offices work with OFA to ensure that media-specific regulations, policies and guidance, and Federal facilities compliance guidance are mutually consistent and address Federal facilities compliance issues where appropriate. Also, it is important that the program offices:

- Meet with OFA periodically to identify and discuss generic compliance problems at Federal facilities.
- Continue to provide OFA with speakers, documents and other assistance for the monthly meetings of the EPA/Federal Agency Environmental Roundtable.
- Ensure that Headquarters evaluations of Regional programs address Federal facilities compliance and that program offices report the results of these evaluations to OFA.

In addition to these general responsibilities, Headquarters program offices are tasked to ensure that specific initiatives of this Strategy are integrated program-wide as discussed below.

Identifying the Regulated Community - Program office staff will maintain current Federal facilities data on program information systems and data bases for tracking purposes based upon input from Regions and States and ensure that proper Federal facilities identification numbers are included for all appropriate sources.

Compliance Monitoring - Headquarters program office staff will ensure that the required number of Federal facilities inspections (of majors, etc.) are being conducted annually by Regions and the States, as appropriate. Headquarters will verify that the Regions are conducting at least the same number of oversight inspections for Federal facilities as for other facilities in delegated States.

Dispute Resolution Process - The involved media program office shall have the lead in resolving disputes referred to Headquarters, in cooperation with OFA and OECM. Each of the Headquarters program offices shall provide technical advice and assistance in the resolution of disputes upon referral from the Region. Headquarters media program offices shall notify OFA and provide copies of any Federal facility disputes which have been referred to their office, either formally or informally.

Compliance Statistics - Headquarters program offices will work with OMSE, OECM and OFA to improve the quality of Federal facilities data currently in EPA's various Headquarter and Regional media tracking and information systems. Program offices will periodically review their definitions of "majors" to ensure that Federal facilities are adequately addressed. In addition, appropriate offices will issue guidance requiring Regions and States to code input data into existing tracking and information systems with Federal facilities indicators and identification numbers as appropriate. Periodic management reports for the Federal facility subset of regulated sources for submittal to OFA will be prepared by program office staff, as requested.

Involvement in A-106 Review Process - Review of Regional program staff A-106 submissions by the program offices is necessary to ensure that media program priority areas are reflected in proposed projects and to identify compliance problems. All program

offices should meet annually with OFA to update media program priority areas that are to be addressed by Federal agencies through the A-106 process.

Development of Policy and Guidance - Media-specific policies and guidance will be developed by appropriate program offices. These policies and guidances should, where appropriate, address implementation of program requirements by Federal agencies. Upon request by the media program office, OFA can coordinate Federal agency review and comment on media program documents.

B.2 Office of External Affairs/Office of Federal Activities

OEA/OFA is responsible for ensuring effective implementation of Section 1-6 of Executive Order 12088 which specifies the administrative procedures to be used in resolving compliance problems at Federal facilities. OEA/OFA also chairs the EPA Standing Committee on E.O. 12088.

OEA establishes applicable Agency policy and guidelines on Federal facilities compliance in consultation with OECM, OGC and the Headquarters program offices. Implementing operating guidance for the Regional Federal Facilities Coordinators is developed and issued by OEA/OFA.

OFA conducts annual audits (i.e., the FARES review) of Regional Federal facilities programs to ensure proper adherence to national guidance, thorough coordination with Regional program offices, adequate and ongoing assistance to Federal agencies, and overall consistency of the program with this Strategy.

OEA is the principal point-of-contact with the national offices of other Federal agencies through the EPA/Federal Agency Environmental Roundtable.

OEA assists affected Headquarters program offices in resolving Federal facilities compliance problems which the Regional offices escalate for dispute resolution. In addition, OEA actively participates in Agency strategic planning and management systems to ensure Federal facilities compliance concerns are being integrated into program priorities and plans and provides analysis of patterns of Federal facilities noncompliance to program offices on an annual basis.

Periodic reports on the compliance status of Federal facilities are prepared by OEA/OFA for administrative purposes. A quarterly report identifying major Federal facilities which are not meeting substantive pollution control requirements is produced for the Administrator. The Federal agencies are provided, semi-annually, with a listing of all non-complying facilities under their jurisdiction. A similar report is submitted annually to the OMB. This OMB report will be expanded to include information on the compliance status of all Federal facilities. In addition, OEA/OFA conducts annual meetings with Headquarters offices of other Federal agencies to discuss identified patterns of noncompliance. Other OEA/OFA Federal facilities responsibilities are addressed below.

Identifying the Regulated Community - Coordination with Headquarter program offices and the FINDS office is done by OEA/OFA staff to ensure that program information systems have adequate and current information for tracking Federal facilities compliance status.

Technical Assistance/Training - OEA/OFA conduct monthly meetings of the EPA Federal Agency Environmental Roundtable for top Federal agency officials to exchange information

regulations, policies, etc. Participation of program office staff is solicited regularly meetings.

Currently, OEA/OFA is implementing a comprehensive system for technical ance, training and information transfer in cooperation with program offices and ional Federal Facilities Coordinators.

OEA/OFA serves as a national clearinghouse for opportunities for other Federal cy participation in EPA training courses and workshops, and technical assistance ices available from the National Enforcement Investigations Center (NEIC) and the ce of Research and Development (ORD) labs. Also, ensures that all of the EPA ines are accessible to Federal agency personnel.

OEA/OFA coordinates extensively with the Office of Administration and Resources agement (OARM) in the planning and development of the EPA Training Institute to re opportunities are available for Federal facilities participants. Also, coordination OECM on the development of the basic inspector training course occurs for the same ose.

Federal agencies are encouraged to implement environmental auditing programs and /OFA provides assistance in designing and establishing such programs through shops, manuals, guidance, etc.

ute Resolution Process - When requested by Regional program staff, in consultation the Federal Facilities Coordinator, OFA will provide informal assistance by working involved agencies' parent offices to attempt to resolve disputes. Such assistance s working with the parent agency of the noncomplying facility, where appropriate, re that funds are made available to correct identified violations as expeditiously as or to secure the cooperation of a recalcitrant facility manager.

After the RA has tried but been unable to resolve disputes within established media frames, the cases are formally referred jointly to Headquarters media program office, M and OFA for resolution. Upon receipt of the referral package, OFA or the media ram office will notify the RA in writing of their receipt of the package.

OEA/OFA may assist in negotiations of a mutually acceptable solution between media programs and the official responsible for environmental compliance matters at leadquarters of the parent agency. If this effort fails, within a maximum of 90 days AA for the affected media program office escalates the problem to the EPA inistrator for resolution.

OFA will develop and maintain a system for notifying the Regional Administrator mally on a monthly basis and formally on a quarterly basis on the status of those ral facilities actions formally referred to Headquarters.

vement in A-106 Review Process - OEA/OFA is tasked to coordinate the Agency- review of Federal agency A-106 submissions via the Pollution Status Report and ace the annual report to OMB evaluating proposed projects for use by OMB in budget w process.

B.3 Office of Enforcement and Compliance Monitoring

OECM advises the Administrator, and OEA, and provides guidance to the Regional Offices on general enforcement and compliance policy issues relating to Federal facilities including:

- Determining the compliance status of Federal facilities;
- Assessing the sufficiency data supporting compliance determinations;
- Conducting negotiations of agreements on solutions to compliance problems;
- Resolving compliance disputes with Federal facilities;
- Assuring that Federal facilities compliance efforts support national compliance and enforcement objectives;
- Developing (with OFA and media programs) compliance and enforcement strategy guidance for Federal facilities;
- Coordinating and overseeing the State/EPA enforcement agreements process;
- Maintaining the Agency consent decree tracking system, including tracking of Federal facilities compliance agreements; and
- Conducting follow up on possible criminal violations.

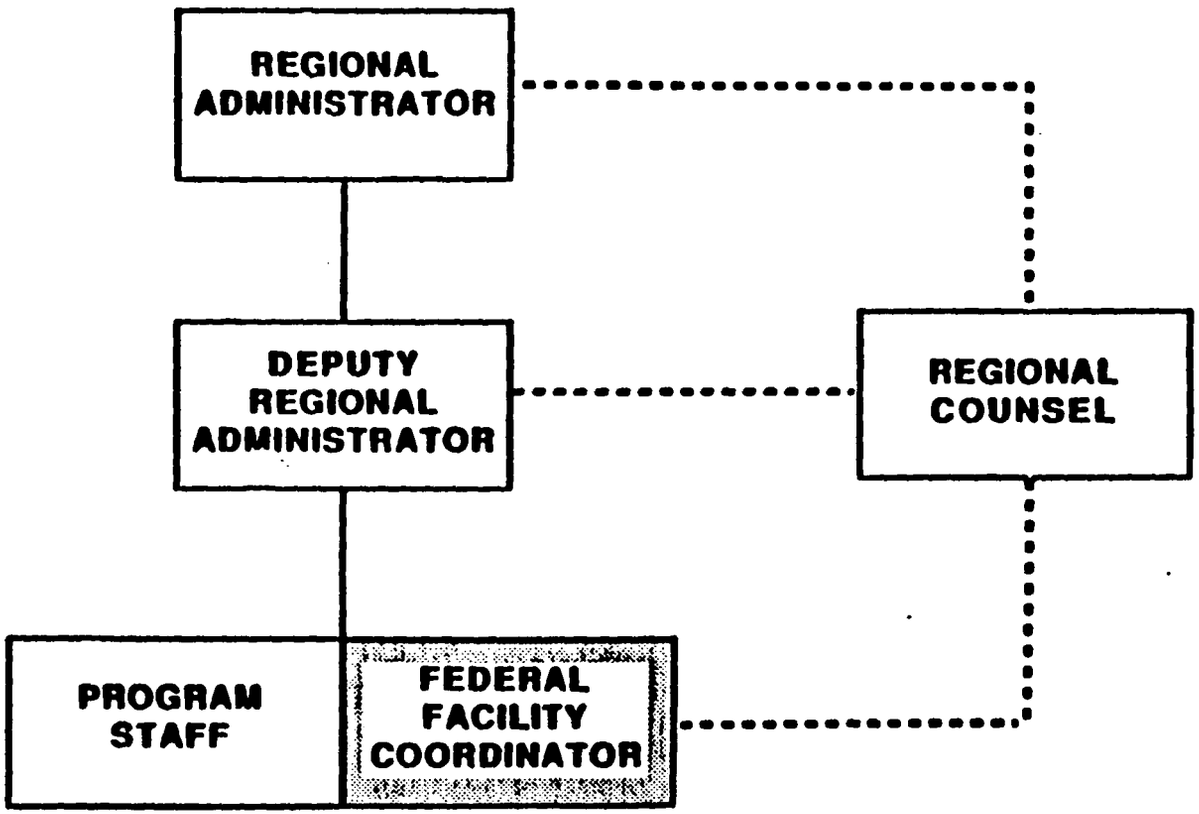
OECM also provides assistance and expertise in the use of alternative dispute resolution procedures for resolving compliance problems at Federal facilities.

B.4 Office of General Counsel

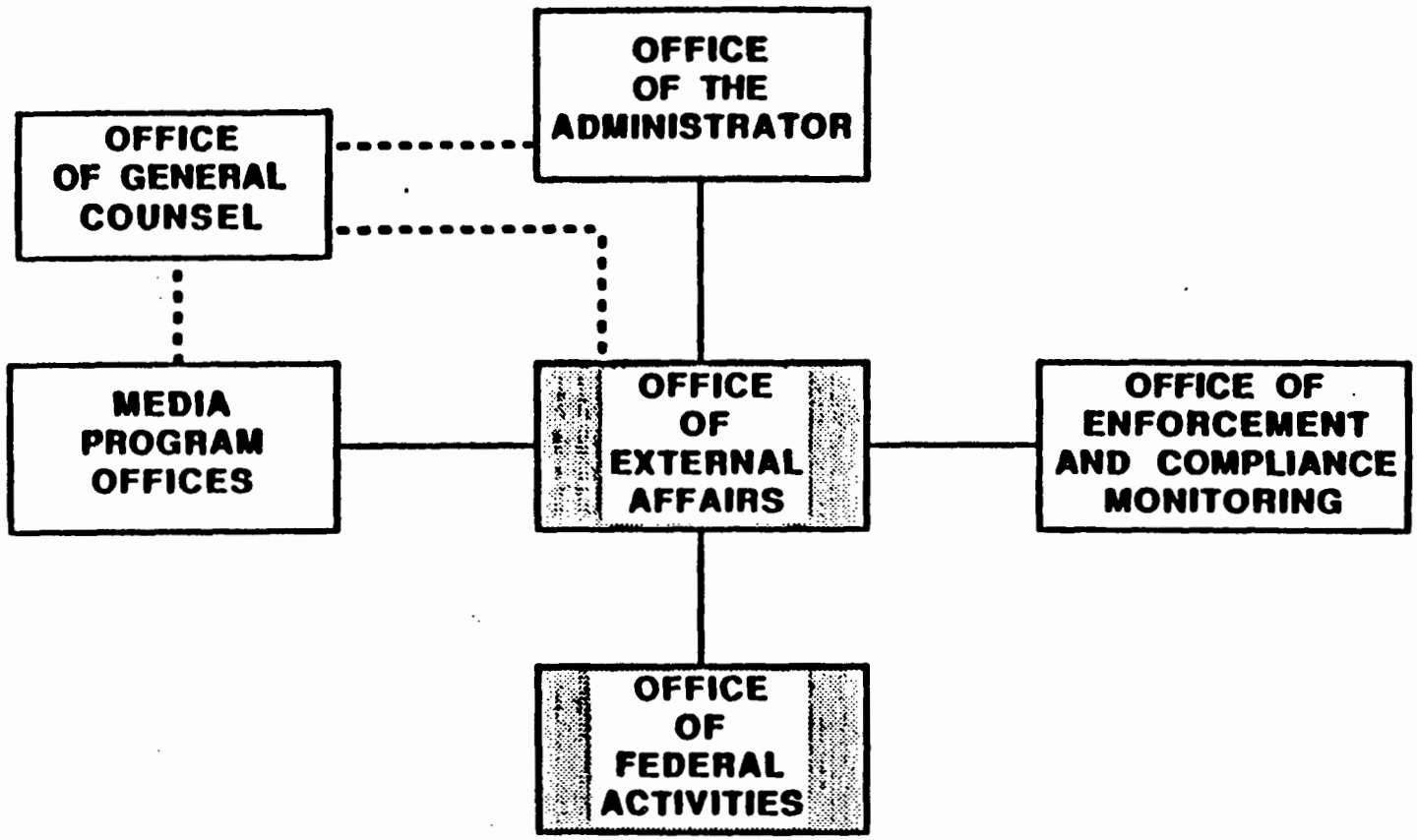
OGC provides legal advice and assistance to the Administrator, OEA, media program offices and the Regional counsels on legal matters and interpretations related to Federal facility compliance with the environmental statutes. OGC also plays a major role in resolving interagency legal disputes and in making referrals to the Department of Justice under Executive Order 12146 when necessary.

EXHIBIT VIII-1

EPA REGIONAL OFFICE STAFF



EPA HEADQUARTERS OFFICE STAFF



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GM-76

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

JAN 11 1990

MEMORANDUM

SUBJECT: Agency Judicial Consent Decree Tracking and Follow-up Directive

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
Regional Administrators, I-X

This memorandum transmits the Agency Judicial Consent Decree Tracking and Follow-up Directive. The Directive specifies Agency requirements for how EPA Regional Offices track compliance with judicial consent decree requirements and for how Regions select and document decisions on appropriate Agency follow-up responses to consent decree violations (for the purposes of this Directive, the use of the term "consent decree" also includes judicially imposed court orders). Each Region should develop and execute a plan to implement this Directive so that all elements will be in place by April 30, 1990. By no later than May 30, each Region should submit to me a memorandum detailing the steps they have taken to implement the Directive. In addition, we intend to review its implementation during this year's audits of the Offices of Regional Counsel.

The Directive was developed after an extensive review of current Agency requirements and practices conducted, over the last nine months, in consultation with the Enforcement Management Council and the Enforcement Office Directors. We appreciate the efforts of the Regional and Headquarters offices, which made significant contributions to the study and to the development of the requirements outlined in this Directive. The resultant Directive outlines the basic requirements that are necessary to effectively manage our consent decree tracking and follow-up responsibilities and should be used as a supplement to the Agency "Manual on Monitoring and Enforcing Administrative and Judicial Orders", which OECM will soon be publishing.

There are a few requirements from the Directive that I would like to highlight. The Directive emphasizes the need for adequate documentation of each violation and the selection of the Agency's enforcement response in response to a violation. The documentation requirement is handled through the use of a form which has been kept basic so as to not cause a resource drain on Regional resources. The Directive also lays out a requirement for database management but provides each Region with maximum flexibility on selecting the appropriate method of maintaining its database based on its caseload and computer capabilities. Finally, the Directive requires that the Regional Program Division and the Office of Regional Counsel jointly select the Agency response to a consent decree violation, with the decision made at the Branch Chief or higher level in keeping with the seriousness associated with consent decree violations.

Fulfilling the requirements of the Directive should allow us to successfully address the increasing workload associated with the growing number of judicial consent decrees. We will soon be discussing with the Headquarters Enforcement Office Directors the appropriateness of applying elements of these judicial Directive requirements to at least some classes of administrative enforcement orders.

Each Region currently reports quarterly on the status of each active consent decree as part of the Agency's STARS system. OECM would like to move to oversight of Regional consent decree tracking and follow-up implementation through our existing Regional audits, rather than through the STARS system. We will assess the Regions' success in implementing this Directive with the goal of dropping this activity as a STARS reporting measure in FY 1992. We will also be working with the Headquarters Enforcement Office Directors to include consent decree tracking and follow-up activity in their Regional audit programs. As we move to drop the STARS reporting requirements, Regions must assure that their consent decree tracking systems have the capacity to provide timely information or reports on the compliance status of their consent decrees to respond to information requests that might occasionally be made by Agency management or in response to outside inquiries.

OECM is available to provide assistance to you in implementing this Directive. Rick Duffy, Chief of the Compliance Evaluation Branch, or Bill Watt of his staff are available to assist the Regions on the technical and management requirements and can be reached at 382-3130. Regions interested in exploring the option of using the consent decree tracking database management system developed by the National Enforcement Investigation Center (the NEIC-CDETS) should contact Rob Laidlaw at 776-3210.

Attachment

cc: Headquarters Enforcement Office Directors
Deputy Regional Administrators, I-X
Regional Counsels, I-X
Associate Enforcement Counsels
Acting Director, NEIC
Regional Program Division Directors, I-X

Judicial Consent Decree Tracking and Follow-up Directive

January 1990

Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

CONSENT DECREE VIOLATION AND FOLLOW-UP FORM

PART A: REPORT OF VIOLATION

Program/Statute: _____

Case Name: _____ EPA Docket # _____

Requirement(s) in violation: _____

_____

_____

Requirement due date: _____

Requirement was completed late: _____ (when) Requirement not completed: _____ (check)

Comments: _____

_____

_____

_____

Violation documented by: Signature/date: _____

Print name: _____

Title/organization: _____

PART B: DECISION ON RESPONSE TO VIOLATION (check appropriate box)

☐ Type of enforcement action planned: _____

_____

☐ Enforcement action determined not to be appropriate for the following reason(s): _____

_____

_____

Concurrences by:	Program Division	Office of Regional Counsel
Name /signature:	_____	_____
Organization title:	_____	_____
Date:	_____	_____

EPA-OECM Form

Questions concerning this Directive or requests for additional copies can be directed to:

Chief, Compliance Evaluation Branch
Office of Compliance Analysis and Program Operations
Office of Enforcement and Compliance Monitoring
U.S. Environmental Protection Agency

401 M Street S.W.
Washington, D.C. 20460
(202 - 382-3130)

U.S. EPA Mail Code LE-133

JUDICIAL CONSENT DECREE TRACKING AND FOLLOW-UP DIRECTIVE

PURPOSE

This directive is provided to clarify and supplement existing Agency requirements and guidance for judicial consent decree tracking and follow-up. Agency managers responsible for consent decree tracking and follow-up activities must implement the requirements of this directive. Managers are also responsible for fulfilling any additional requirements for consent decree tracking and follow-up that are issued by National Program Managers. This Directive is effective April 30, 1990. For purposes of this Directive, the term "consent decree" includes judicially imposed court orders.

This directive prescribes judicial consent decree tracking and follow-up requirements for the following areas:

1. Implementing the Agency Guidance on Certification of Compliance with Enforcement Agreements
2. Regional consent decree tracking and follow-up database management
3. File documentation of consent decree violations
4. Decisions on Agency follow-up to violations
   A. Responsibility for decision
   B. General criteria for making follow-up decisions
   C. File documentation of follow-up decisions
5. Maintaining data on the current status of EPA consent decrees
6. Termination of consent decrees and closing cases

BACKGROUND

Consent Decree Tracking Responsibilities:

Consent decree tracking and follow-up is conducted by each Regional Office under the direction of the Regional Administrator. Within each Region, most responsibilities are shared between the Office of Regional Counsel (ORC) and the Regional Divisions responsible for program compliance activity. Generally, the responsibilities are divided within each Region as follows:

Regional Program Divisions

Regional Program Divisions are responsible for the overall management and direction of the Regional compliance program in accordance with the policies and procedures of the Agency and each National Program Office. In that role, they are responsible for the following regional consent decree tracking and follow-up activities:

1. Assuring, along with ORC, that proposed consent decree agreements contain provisions/milestones that maximize the Region's ability to determine compliance status.

2. Determining compliance with the consent decree requirements through the use of announced and unannounced inspections and the receipt and review of deliverables.

3. Determining whether there are violations of the consent decree and notifying the ORC of each violation.

4. Maintaining a database of consent decree status which tracks completion of consent milestones and denotes violations. (*Can be a component of a Region-wide consent decree database system.*)

5. Determining (jointly with the ORC) the appropriate Agency response to each violation.

6. In concert with the ORC, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate Program file, ORC file or a common Program-ORC file.)

7. Notifying the ORC when all the requirements of the consent decree have been met so that the ORC can track and assist in the termination of the decree according to the terms of the decree.

Offices of Regional Counsel:

The Office of the Regional Counsel in each Region is responsible for the following Regional Office consent decree tracking and follow-up activities:

1. Assuring that each settlement agreement complies with the "Guidance on Certification of Compliance with Enforcement Agreements" (July 25, 1988 memorandum from Thomas L. Adams to AAs, RAs, and RCs).

2. Obtaining a copy of the entered decree and providing it to the appropriate regional program compliance office and to the NEIC Central Depository in a timely manner. A copy must also be provided to the Financial Management Office (FMO) in the Region when the decree requires a penalty payment.

[The regional FMO, after receiving a copy of the entered decree, will enter the penalty amount into the Integrated Financial Management System (IFMS). EPA policy requires that all judicial penalty amounts be recorded in the IFMS as "accounts receivable" and that they be tracked as receivables until collected or terminated. The Land and Natural Resources Division at DOJ is the responsible entity for monitoring judicial penalty debts and notifying EPA's Financial Management Division of the status of penalty payments. This information is placed in the IFMS so that Regions can determine if penalties requirements of the decree have been met. The program database as well as the Enforcement DOCKET database should contain a milestone/requirement for tracking penalty payment.]

3. Determining (jointly with the Regional Program Divisions) the appropriate follow-up action the Region will take in response to a violation of the decree.

4. Providing legal support and services to the programs, as necessary, to enforce the consent decree.

5. In concert with the Program Division, maintaining complete file documentation of consent decree violations and the subsequent follow-up activity, including documentation of all consent decree violations and follow-up decisions. (File documentation must be maintained in whatever file or files the Region uses as the official case file, whether in a separate ORC file, Program file, or a common Program-ORC file.)

6. Maintaining and reporting data on the status of active consent decrees as might be required by the Agency management and accountability systems.

7. Assisting in obtaining the termination of consent decrees which have been successfully fulfilled, including updating the Agency DOCKET database to reflect current status.

CONSENT DECREE TRACKING REQUIREMENTS

1. IMPLEMENTING THE AGENCY GUIDANCE ON CERTIFICATION OF COMPLIANCE WITH ENFORCEMENT AGREEMENTS

Background:

Certification requirements were prescribed in the July 25, 1988 memorandum from Thomas L. Adams Jr. to Assistant Administrators, Regional Administrators and Regional Counsels, "Guidance on Certification of Compliance with Enforcement Agreements." This Guidance addresses the inclusion of compliance certification language (in which a responsible official personally attests to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement) and the need for including precise documentation requirements for self-certifying provisions of the decree.

Requirements:

Each Region must take steps to insure that all staff involved in drafting and negotiating consent decrees are fully aware of the requirements of the July 25, 1988 guidance memorandum and this Policy. (While that guidance applies more broadly than to consent decrees, the discussion in this Policy will refer only to consent decrees, consistent with the scope of the rest of the document.)

Staff involved in drafting consent decrees must incorporate the guidance for documentation of compliance and for certification by a responsible official unless

they affirmatively determine and document that the policy is not applicable to a specific case. Therefore, each consent decree should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of the decree, shall be signed by a responsible official. The need for certification and documentation requirements should be raised early in the negotiation and drafting process.

Regional managers who review and approve drafted consent decrees must assure that the Guidance has been adequately incorporated or determine that the Guidance is not applicable for the specific case.

Staff and managers within the OECM Associate Enforcement Counsel Offices must also review drafted consent decrees for inclusion and/or applicability of the Guidance. Implementation of the certification and documentation requirements will be a component of the ongoing oversight and periodic reviews conducted by OECM.

2. REGIONAL CONSENT DECREE TRACKING DATABASE MANAGEMENT

Background:

Regional Program Divisions are responsible for tracking compliance with active consent decrees once the decree has been entered by the Court. The ORC is responsible for obtaining a copy of the entered decree and providing it to the Program Division and the Financial Management Office (for penalty tracking). If the decree has been entered but a copy has not yet been made available, the program can use the lodged decree during the interim, if it is known that the final decree was not changed.

Compliance tracking is accomplished through the receipt of reports and other deliverables from the consent decree parties and through the use of announced and unannounced inspections. In order to determine whether a party is currently in compliance with the consent agreement, the program compliance staff must compare the requirements of each decree with the information gathered through inspections and deliverables. In the case of deliverable items, the compliance staff should determine if the submission adequately meets the decree requirements.

Good database management is an important element for effective and timely tracking and reporting of case status. This policy outlines requirements for the consent decree databases that are used to track consent decrees for each Regional program. Additional elements may be required by each of the National Program Offices.

Requirements:

Each program responsible for tracking consent decree compliance status must maintain a consent decree database (file/record). Each program database must

include the following information for each active decree: case name and enforcement civil judicial docket number, statute/program, all required milestones and their due dates, and a block for inserting the date each milestone was completed.

The consent decree database can be manual, on a personal computer or included as a part of a national compliance database such as the CDS of the Air Program. The database could also be maintained centrally, as in Region II, where the ORC maintains a database of all regional consent decrees using the NEIC - CDETS capability. Each Region can choose what database type system(s) to use. For programs with only a few consent decrees to track, a manual system may be sufficient. Regional programs may opt to use the national compliance database depending on its specific capabilities.

The consent decree database must be maintained in three ways for it to be used effectively. Milestones for all decrees must be entered (and revisions, if applicable, in the case of amended decrees). On a regular schedule (not less than quarterly), all currently due (and overdue) milestones must be extracted from the system and made available to staff and supervisors. This use as a tickler system will alert staff as to what actions are required to be checked on. Finally, the dates for completed milestones must be put into the database on a regular basis (suggested monthly updates).

Maintaining this database in a central location will allow a program easy access to the status of all its decrees, the ability to retrieve all due milestones and a complete historical record of each decree as staff turnover and assignment changes occur. It will also provide documentation of case history for audits or other oversight activity.

3. FILE DOCUMENTATION OF VIOLATIONS

Background:

Program Divisions are responsible for determining if a consent decree violation has occurred. Any milestone not complied with by the due date of the consent decree constitutes a violation, regardless of the substantive impact of the deviation from the consent decree requirement. In certain cases, Program Divisions may need to consult with the ORC in determining whether a violation has occurred (e.g., where a claim of force majeure has been made).

Requirements:

Regional Program Divisions must notify the ORC of each violation of an active consent decree. A violation occurs when any milestone is missed (i.e. a report that is one day late is a violation), although there may be instances where, as a matter of priority, no formal enforcement action is taken. In addition, a record of the violation must be placed in the official Regional case file (see copy of form attached).

4. DECISIONS ON AGENCY FOLLOW-UP TO VIOLATIONS

Background:

When a violation occurs, the Region must determine the appropriate Agency response. In some cases, the violation may not pose a threat to public health or the environment or jeopardize the party's ability to meet subsequent milestones or the final compliance date. In such instances, after a review including the criteria discussed in subsection C below, the program office and ORC may jointly decide that no follow-up action is required or that a non-formal response may be appropriate. Other violations will be more serious and the program and ORC may decide to take a formal enforcement action such as seeking stipulated penalties or initiating a contempt action. For all violations it is important for the Agency to document the decision process within the case record. For all violations, the responsibility for determining the appropriate response action is shared by the Regional Program Division and the Office of Regional Counsel.

Requirements:

A. Responsibility for decision:

Once a violation occurs, the Program and the ORC must jointly determine the Agency response. Given the seriousness of consent decree violations, concurrence must occur at no lower than the Branch Chief level in both Offices. Disagreements should be elevated to senior management. On the rare occasion when the two offices cannot agree, the issue will be resolved at the RA or DRA level.

B. File documentation of follow-up decisions:

The decision concerning how the Agency will respond to a violation must be documented in the official Regional case file. The documentation (copy of form attached) must include the decision made and the reason for the decision. The documentation must also include the signatures of the responsible Program Office and ORC Branch Chiefs (or higher level).

C. General Criteria for follow-up decisions:

When the Agency enters into a consent decree we expect the defendant to comply. We take compliance with the decree very seriously and expect all parties to take all steps necessary for timely compliance. As a result, if they are in violation, we will normally respond for the purpose of remedying the violation, obtaining a penalty, or both. However, given the need to set priorities, we may not choose to take a formal action in every instance. The Region is delegated authority to decide what follow-up action, if any, to take. The decision not to take a formal action is a serious judgment required to be made jointly by the Regional Program Division and the Office of Regional Counsel at the Branch Chief or higher level.

In selecting the appropriate response , the following factors/criteria might be considered.

Environmental Harm Caused by Violation: What is the level of risk to human health and to the ambient surroundings for continuing noncompliance?

Duration of the Violation: How long has the violation continued? Has the violation been continuous or interrupted? Has the violation been corrected?

Good Faith/Bad Faith (Compliance history): Was the violation deliberate? Has the party been notified that it was in violation and continued to violate? Has the party demonstrated good or bad faith in its past efforts to comply or respond to Agency efforts? Is there a pattern of violations which suggests inattention to its compliance obligations, even though the individual violations are not, in themselves, of major concern?

Deterrence Value: Will an action deter future violations?

Ability to Respond: Will the enforcement action result in compliance? Will the facility meet its final compliance date, even though it missed an interim date?

Economic Gain: Has the violator gained an economic advantage over its competitors as a result of the violation?

Violations for which a decision not to take a formal action based on competing priorities might be appropriate would generally find the party on the positive side of the factors above (i.e. no or limited environmental harm from the violation, good compliance record, etc.). Situations where the Agency might exercise its discretion not to take an action might include:

- Late reporting with no environmental consequence and without a past pattern of delay or noncompliance.

- Missed milestone, not a major requirement, with expectation they will be in compliance with/by the next milestone.

- Violation of an interim limit, magnitude of the exceedence is minor, with compliance now achieved or anticipated shortly.

5. MAINTAINING REGIONAL CONSENT DECREE TRACKING STATUS

Background:

Currently, each ORC is responsible for providing consent decree status reports each quarter to OECM as part of the Agency SPMS system. In most Regions, the information for this report is collected from each program and combined into a Regional report.

Requirements:

The ORCs will continue to be responsible for maintaining information on regionwide status of consent decrees and providing Regional reports to OECM, as required. The specific nature of these reports may change from the current STAR measure. Regional Program Divisions are responsible for supplying program-specific information or reports to ORC that might be needed to fulfill national reporting requirements in addition to meeting the requirements of their National Program Office.

6. TERMINATION OF CONSENT DECREES AND CLOSING OF CASES

Background:

A judicial enforcement case with a consent decree is successfully completed when all the requirements of the consent decree, including penalty payments, have been met and the termination clause satisfied. At that point, the consent decree should be terminated in accordance with the terms of the decree. Agency databases and status reports need to accurately reflect the current status of cases (including cases where the requirements of the decree have been fully met, cases for which termination of the decree is due, and cases which have been closed after consent decree termination). Accurate data are needed to report the status of active decrees and for planning, budgeting and other management purposes.

Requirements:

Program Divisions, as part of their responsibility for tracking consent decree compliance status, must notify the ORC when all the requirements of the consent decree have been satisfied.

The ORC is responsible for working with DOJ to effect the termination of the consent decrees, in accordance with the termination clause of the decree (timeframe, automatic, plaintiff or defendant motion). The ORC is responsible for tracking the termination status of inactive decrees and assisting the completion of plaintiff responsibilities, as appropriate. The ORC is responsible for maintaining the current status of these decrees in the Agency DOCKET system and closing cases after termina[redacted]

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

TK.1-2
GM #74

JUL 25 [illegible]

MEMORANDUM

SUBJECT: Guidance on Certification of Compliance with Enforcement Agreements

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels

I. BACKGROUND

Over the past several years, EPA has initiated record numbers of civil judicial and administrative enforcement actions. The vast majority of such actions have been resolved by judicial consent decree or administrative consent order.

The terms of many of these settlements require the violator to perform specific tasks necessary to return to or demonstrate compliance, to accomplish specific environmental cleanup or other remedial steps, and to take prescribed environmentally beneficial action.

Settlement agreements typically specify that the violator perform certain required activities and thereafter report their accomplishment to EPA. Verification that the required activities have actually been accomplished is an essential element in the overall success of the Agency's enforcement program.

II. PURPOSE

The focus of this advisory guidance is on verification of compliance with settlement agreements which require specific performance to achieve or maintain compliance with a regulatory standard. EPA has ongoing responsibility for ensuring that settling parties are in compliance with the terms of their negotiated agreements. To this end, the Agency may require that a responsible official (as that term is defined herein) personally attest to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement.

The inspection programs of EPA and other federal regulatory agencies are based of necessity on the concept that a limited number of regulated facilities will be inspected each year. Conversely, this means that a large number of regulated parties can operate for extended periods of time without being the subject of an on-site inspection by EPA staff. Hence, it is crucial to ensure that all required compliance reports are received from the regulated facility in a timely manner. In addition--and equally as important--timely review of such reports must be undertaken by EPA to ensure that the reports are adequate under the terms of the settlement agreement.

EPA experience shows that the majority of regulated parties make good faith efforts to comply with their responsibilities under the environmental laws and regulations. Nevertheless, the Agency must have effective monitoring procedures to detect instances of noncompliance with a settlement agreement. A vital component of these procedures will be to ensure that the environmental results obtained in the enforcement action are indeed achieved and that criminal sanctions, where appropriate, are available to respond to instances of intentional misrepresentation or fraud committed by such violators.

EPA will ensure that all responsible officials entering into settlement agreements with the Agency are held accountable for their subsequent actions and the actions of any subordinates responsible for the information contained in compliance reports submitted to the Agency.

III. GUIDANCE

A. Certification by Responsible Corporate Official

The terms of settlement agreements, as well as any certification language in subsequent reports to the Agency, should be drafted in a manner to trigger the sanctions of 18 U.S.C. §1001, [1/] in the event that false information is knowingly and willfully submitted to EPA. Submission of such false information

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1/ United States Code, Title 18, Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

may also expose the defendant(s) in judicial consent decree falsification incidents to both civil and criminal contempt proceedings.

This provision of law is a key sanction within the federal criminal code for discouraging any person from intentionally deceiving or misleading the United States government.

1. Signatories to Reports

Settlement agreements should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of any agreement, shall be signed by a responsible official. The term "responsible official" means as follows:2/

a. For a corporation: a responsible corporate officer. A responsible corporate officer means: (a) A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $35 million (in 1987 dollars when the Consumer Price Index was 345.3), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

2. When to Require a Certification Statement

The requirement for an attestation by a responsible official is always useful as a matter of sound regulatory management practice. Such a requirement is more urgent,

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(Note 1, cont'd)

fined not more than $10,000 or imprisoned not more than five years, or both."

There are four basic elements to a Section 1001 offense: (1) a statement; (2) falsity; (3) the false statement be made "knowingly and willfully"; and (4) the false statement be made in a "matter within the jurisdiction of any department or agency of the United States". United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965).

2/ For NPDES matters, the definitions of "responsible official" and "certification", as set forth in 40 CFR §122.22, may be used as alternative language to this guidance.

however, where a regulated party has a history of noncompliance or where prior violations place one's veracity into question. 3/

3. Terms of a Certification Statement

An example of an appropriate certification statement for inclusion in reports submitted to the Agency by regulated parties who are signatory to a settlement agreement is as follows:

> "I certify that the information contained in or accompanying this (submission) (document) is true, accurate, and complete.
>
> "As to (the) (those) identified portion(s) of this (submission) (document) for which I cannot personally verify (its) (their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete." 4/

B. Documentation to Verify Compliance

Typical settlement agreements require specific steps to be undertaken by the violator. As EPA staff members engage in settlement negotiations and the drafting of settlement documents, they should identify that documentation which constitutes the

3/ While personal liability is desirable to promote compliance, it should be noted that corporations may be convicted under 18 U.S.C. §1001 as well. A corporation may be held criminally responsible for the criminal acts of its employees, even if the actions of the employees were against corporate policy or express instructions. See U.S. v. Automated Medical Laboratories, 770 F.2d 339 (4th Cir. 1985); U.S. v. Richmond, 700 F.2d 1183 (8th Cir. 1983). Moreover, both a corporation and its agents may be convicted for the same offense. See U.S. v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983).

4/ It is inevitable that in negotiating consent agreements, counsel for respondents will seek to insert language in the certification statement as to the truth of the submissions to be to the "best information" or to the "fullest understanding" or "belief" of the certifier. Such qualifiers should not be incorporated, since the provisions of 18 U.S.C. §1001 provide for prosecution for making false statements knowingly and willfully--not for forming erroneous beliefs, etc.

most useful evidence that the action required has actually been undertaken. The most useful evidence would be that information or documentation that best and most easily allows the Agency to verify compliance with the terms (including milestones) of a settlement agreement. Examples of documentation to substantiate compliance include, but are not limited to, invoices, work orders, disposal records, and receipts or manifests.

Attachment A is a suggested type of checklist that can be developed for use within each program area. 5/ The checklist includes examples of specific documentary evidence which can be required to substantiate that prescribed actions have, in fact, been undertaken.

IV. SUMMARY

This guidance is to provide assistance to EPA employees who negotiate and draft settlement documents. It is appropriate when circumstances so dictate that such documents contain sufficient certification language for ensuring, to the maximum extent possible, that all reports made to EPA, pursuant to the terms of any settlement agreement, are true, accurate, and complete, and that such reports are attested to by a responsible official.

The Agency must incorporate within its overall regulatory framework all reasonable means for assuring compliance by the regulated community. The inclusion of compliance certification language, supported by precise documentation requirements, in negotiated settlement agreements may, in appropriate instances, mean the difference between full compliance with both the letter and the spirit of the law, and something less than full compliance. In the case of the latter, the violating party is then subject to the sanctions of the federal criminal code.

Attachment A

5/ EPA or a State may be unable to confirm the accuracy of certifications for an extended period of time. Therefore, it is suggested that, whenever certification by a respondent/defendant is required, the order/decree provide that "back-up" documentation--such as laboratory notes and materials of the types listed in the examples in the text above--be retained for an appropriate period of time, such as three years. See, for example, the 3 year retention time in 40 CFR §122.41(j)(2).

MEANS OF CERTIFYING COMPLIANCE
WITH CONSENT AGREEMENTS
(Examples)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Purchase pollution control equipment.	*Equipment purchased	*Invoice
*Installation	*Equipment installed and tested	*Invoice for work with photograph
*Ongoing operation and maintenance	*Operating as required	*Continuous monitoring tape *Periodic sample results *Maintenance of records
*Meet discharge levels	*Discharge levels have been met	*Continuous monitoring tapes *Periodic sample results
*Labeled transformers	*Transformers have been labeled	*Photographs
*Do risk study	*Study has been completed	*Study report and recommendations
*Hire employees	*Employees have been hired	*Personnel records *Position descriptions *Entry on duty dates *Salary data
*Use complying coatings	*Verifying complying coatings are used	*Documents to verify VOC content
*Train employees (e.g., work practices)	*Employee training has been completed	*Educational materials and record of employee attendance at training session
*Set up environmental auditing unit	*Unit has been established *Orientation and instruction completed	*Same as above re: personnel *Charter of audit group

(on next page)

MEANS OF CERTIFYING COMPLIANCE
WITH CONSENT AGREEMENTS
(Examples)

(continued from previous page)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Dispose of PCBs	*PCBs disposed of in lawful manner	*Copies of manifests
*Replace PCB transformers	*New transformers installed	*Copies of purchase and installation receipts
*Register pesticide certification of applicator	*Applicator certification has been accomplished	*Copies of certificates
*Remove cancelled product from the market	*Removal has been accomplished	*Copies of correspondance with customers and documentation of removal *Copies of customer lists for independent verification by EPA and states
*Comply with asbestos removal and disposal regulations	*Compliance with asbestos removal and disposal regulations on a job-by-job basis	*List of locations of all jobs
*Monitor waste stream	*Waste stream has been properly monitored	*Discharge Monitoring Report
*Sludge removal	*Sludge removed by milestone deadline	*Copies of invoices on sludge removal
*Conduct groundwater monitoring	*Groundwater monitoring accomplished in appropriate manner	*2/A (quality analysis) tests; certification by laboratory
*Collect and analyze soil samples	*Soil samples collected and analyzed in specified manner	*Same as above
*Remove contaminated soils and dispose of in compliance with RCRA	*Contaminated soils removed and disposed of in compliance with RCRA	*Copies of contract documents and manifests

TK.1-3
GM#40

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

MAY 30 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Revised Regional Referral Package Cover Letter and Data Sheet

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

TO: Regional Administrators
Regional Counsels
Associate Enforcement Counsels

As part of our on-going efforts to improve the civil judicial case referral process, I have requested my staff to formulate a standard referral package cover letter and data sheet (see attached outline). The new cover letter has been substantially streamlined. Most of the case information will now be contained in the data sheet. This approach is the result of discussions held at the Regional Counsels' meeting last January in Denver and is designed to aid my staff in tracking referrals. This memorandum supersedes all previously issued guidance concerning referral package cover letters.

The letter and data sheet with its 11 critical elements have been designed to facilitate ease of preparation and to give a very brief capsule description of the case to the reviewer. In short, once the system is in place, anyone who reads the letter and data sheet will get an excellent summary of the case's major elements.

Please put this standard referral cover letter and data sheet into effect by June 14, 1985. I suggest you implement this approach by drawing up forms listing these 11 elements. We have attached a suggested model data sheet. If you have any questions please contact Bill Quinby of the Legal Enforcement Policy Division at FTS 475-8781.

cc: Program Office Directors
Chief, Environmental Enforcement Section,
Land and Natural Resources Division, DOJ

CONTENTS OF REGIONAL COVER LETTER AND DATA SHEET
FOR REFERRAL PACKAGES

The cover letter itself should be signed by the Regional Administrator and consist of one short paragraph requesting EPA Headquarters to review the attached litigation report and refer it to the Department of Justice, or in the case of direct referrals requesting DOJ to file a civil action.

Attach to this cover letter a very brief description of the following in a data sheet. Certain items may not be appropriate in every case.

1. The statute(s) and regulation(s) which are the basis for the proposed action, including state regulations, if applicable.

2. The name and location of the defendant(s).

3. The violation(s) upon which the action is based.

4. The proposed relief to be sought, including injunction, and proposed amount of penalty to be sought at settlement, if applicable.

5. The recent contacts with the defendant(s), including any previous administrative enforcement actions taken, and negotiations, if any.

6. The significant national or precedential legal or factual issues.

7. Date of inspection, information response, or receipt of evidence of violation which led to decision to initiate enforcement proceedings.

8. Date, if applicable, that the technical support documents from the program, or support documents necessary for preparation of a referral reach the Regional Counsel's office.

9. Date referral is signed by Regional Administrator.

10. Any other aspect of the case which is significant or should be highlighted including any extraordinary resource demands which the case may require.

11. The identity of lead regional legal and technical personnel.

[PLEASE SEE ATTACHED MODEL DATA SHEET]

MODEL DATA SHEET

1. The statute(s) and regulation(s) which are the basis for the proposed action, including state regulations, if applicable.

2. The name and location of the defendant(s).

3. The violation(s) upon which the action is based.

4. The proposed relief to be sought, including injunction, and proposed amount of penalty to be sought at settlement, if applicable.

Model Data Sheet - Cont.

5. The recent contacts with the defendant(s), including any previous administrative enforcement actions taken, and negotiations, if any.

6. The significant national or precedential legal or factual issues.

7. Date of inspection, information response, or receipt of evidence of violation which led to decision to initiate enforcement proceedings.

8. Date, if applicable, that the technical support documents from the program, or support documents necessary for preparation of a referral reach the Regional Counsel's office.

9. Date referral is signed by Regional Adminstrator.

10. Any other aspect of the case which is significant or should be highlighted including any extraordinary resource demands which the case may require.

11. The identity of lead regional legal and technical personnel.

GM - 41, was revised on August 25, 1986. The 1984 version has been replaced with the 1986 version. Appendix A from the 1986 version is attached to the policy as part of GM-41. Appendix B, EPA Policy on Implementing Nationally Managed or Coordinated Enforcement Actions is already contained in this Compendium as GM-35. Appendix C, Division of Penalties with State and Local Governments is already contained in this Compendium as GM-45.

Tk.1-4
GM#19

CONSENT DECREE TRACKING SYSTEM GUIDANCE

EPA GENERAL ENFORCEMENT POLICY # GM - 19

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: DEC 20 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

DEC 20 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Consent Decree Tracking System Guidance

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

TO: Assistant Administrators
Associate Administrator for Policy
and Resource Management
Associate Administrator for Regional Operations
General Counsel
Associate Enforcement Counsels
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

I am forwarding to you for use by you and your staff enforcement guidance on the use of the consent decree tracking system developed by NEIC and OLEP. This tracking system is designed to enable the Agency to track the compliance of consent decrees for all media on a national basis.

This guidance was circulated in draft form to the Regional Administrators and to the program Assistant Administrators for review and comment. I believe the guidance will help ensure proper use of the consent decree tracking system, better enabling EPA to meet its legal responsibility to the courts of ensuring that the terms of each consent decree are being met.

This consent decree tracking system will be only as good as the data that is put into it. In order to ensure that the consent decree data in the system is kept up to date, I have asked Lew Crampton to incorporate a requirement to maintain the tracking system into the Administrator's Management Accountability System (AMAS). Staff from Lew's office and mine will jointly contact each Assistant Administrator's office in the near future to formally negotiate the measure, so that it can be included in future AMAS reports.

I also have attached another guidance document developed by my office entitled, "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983". This document provides guidance to EPA Headquarters and Regional personnel on making direct referrals to DOJ from EPA Regional offices for certain categories of cases. Both of these documents should be added to your copy of the General Enforcement Policy Compendium which was distributed in March of 1983. A revised table of contents and index for the Compendium are also attached.

If you have questions concerning this guidance, please contact Mike Randall at FTS 382-2931 or Gerald Bryan at FTS 382-4134.

Attachments

TABLE OF CONTENTS

INTRODUCTION

The Environmental Protection Agency (EPA) places a high priority on consent decree compliance. This is consistent with the Agency's Congressional mandate to enforce the nation's environmental laws. It is also consistent with EPA's legal responsibility to the Courts of ensuring that the terms of each consent decree are met properly.

A uniform national approach to consent decree compliance tracking can enhance the Agency's consent decree enforcement efforts. This uniform approach should incorporate an automated management information system intended primarily for consent decree compliance tracking. This will enable Agency managers to:

- Address consent decree compliance problems quickly and effectively.
- Assess overall national trends in EPA's consent decree enforcement efforts.
- Respond quickly and accurately to Congressional and public inquiries concerning the compliance status of the Agency's consent decrees.

Until recently, EPA had no uniform automated information system intended primarily for consent decree compliance tracking. Some Agency offices do use automated information systems to track source compliance generally. However, the use of these systems varies throughout the Agency, making it difficult to integrate compliance data. Moreover, some offices track consent decree compliance by hand, resulting in lengthy information retrieval times.

On August 4, 1982, EPA managers met to discuss establishing a uniform national approach to consent decree compliance tracking which incorporates the use of an automated information system intended primarily for tracking consent decree compliance. They agreed that this tracking system should build upon, rather than replace, existing information systems maintained by various Agency enforcement offices.

Subsequent to that meeting, the National Enforcement Investigations Center (NEIC), working closely with the Office of Legal and Enforcement Policy (OLEP), developed ideas for such a tracking system. This document describes the proposed tracking system and Agency office roles in implementing and maintaining it.

Scope and Exclusions

This tracking system will include information on all court entered judicial consent decrees in enforcement cases to

which EPA is a party, as well as the status of compliance efforts required by these decrees. It will not include:

- State consent decrees to which EPA is not a party. This includes cases in which EPA may have a continuing interest in the compliance status of the decree even though, for example, EPA originally deferred the underlying enforcement action to appropriate State authorities. This topic will be discussed generally in guidance entitled, "Coordinating Federal and State Enforcement Actions".
- Federal Facilities Compliance Agreements. These agreements are negotiated with Federal facilities to bring them into compliance with applicable environmental statutes. Executive Order 12088 provides a non-judicial mechanism for negotiating these agreements. Within EPA, the Office of Federal Activities (OFA) has the lead responsibility for tracking compliance with these compliance agreements. OFA is developing guidance on this area entitled, "Federal Facilities Compliance Program - Resolution of Compliance Problems".

Also, considerations in selecting an appropriate enforcement response to a consent decree violation are discussed generally in forthcoming guidance entitled, "Enforcing Consent Decree Requirements".

TRACKING SYSTEM

Tracking System Objectives

This uniform national approach to consent decree compliance tracking seeks to achieve the following objectives:

- Facilitate consent decree enforcement by uniformly tracking the compliance status of all EPA consent decrees.
- Keep senior Agency managemement informed of the compliance status of all EPA consent decrees.
- Provide timely, accurate information upon request to Congress and the public concerning the compliance status of EPA consent decrees.

Key Tracking System Components

To achieve these objectives, the tracking system relies on four key components:

1. The Repository
2. The Consent Decree Library
3. Compliance Monitoring
4. Compliance Tracking

These components are described below.

1. The Repository

The Repository is a collection of physical copies of over 425 EPA consent decrees NEIC has on file. NEIC assembled this collection with the assistance of the Regional Offices, the Department of Justice (DOJ), and the Federal Courts. NEIC is continuing its efforts to complete the collection of consent decrees to be filed in the Repository. To facilitate this effort, the Regional Counsels should forward copies of all new consent decrees to NEIC for inclusion in the Repository.

NEIC maintains the Repository and, upon request, can provide a copy of any EPA consent decree on file to requesting Agency offices.

2. The Consent Decree Library

NEIC developed, and will maintain, the consent decree library as an automated management information system to store summaries of each EPA consent decree on file in the Repository. Each consent decree summary will include the following information:

- Case name.
- Date the consent decree was entered and, if applicable, the date the decree was modified.
- Consent decree requirements, including due dates.
- Information indicating when these requirements were met.

NEIC will develop these summaries and send them to the Regional Counsels' Offices to review and confirm their accuracy. The information in the library can be updated by NEIC, based upon information sent to NEIC by the Office of Enforcement and Compliance Monitoring (OECM), to reflect the current compliance status of EPA consent decrees.

The library contains summaries of most EPA consent decrees on file. Computer terminals will link EPA Headquarters and the Regional Offices electronically with the library. NEIC will provide OECM and Regional Office personnel training on how to use the library.

Direct access to the library will provide the Agency's attorneys and enforcement staff with information on active or terminated consent decrees which may be useful in drafting and negotiating new consent decrees. Direct access to the library will also provide Regional managers with information on upcoming requirements which may be useful in targeting source inspections and in projecting resource needs.

3. Compliance Monitoring

Consent decree compliance monitoring is presently conducted to determine whether individual consent decree requirements are properly met. Compliance monitoring activities often include source reporting and on-site inspections.

Under the national consent decree tracking system, the Regional Program Offices are primarily responsible for conducting monitoring activities in accordance with national guidance issued by EPA Headquarters. The Regional Program Offices will continue to conduct compliance monitoring using whatever automated information system (e.g., PCS for Water Enforcement) they choose to use to assist them in their monitoring efforts.

4. Compliance Tracking

Compliance tracking is the gathering and compiling of compliance information which Agency management can use to determine and assess general trends in the Agency's consent decree enforcement efforts. Compliance tracking will be based upon the information gathered by the Regional Program Offices in the course of conducting their compliance monitoring activities.

OECM is responsible for tracking EPA's enforcement efforts on a national level, including whether the Agency is meeting its legal responsibility to the Courts for ensuring that consent decree requirements are met. Consequently, OECM will be principally responsible for compliance tracking, through use of the automated Consent Decree Library operated by NEIC, to ensure that Agency consent decree enforcement efforts are adequate.

To facilitate OECM compliance tracking activities, The Office of Management Operations (OMO) will send each Regional Administrator periodic information requests concerning the compliance status of each consent decree in the Region. These information requests will serve as a tool to ensure that Regional Offices focus on source compliance with individual milestones in each consent decree.

Tracking System Operation

The operation of the tracking system will draw from the information stored in the consent decree library. At the beginning of each quarter, OMO will send to each Regional Administrator two computer print-outs (see attachments) containing consent decree information from the consent decree library. The computer print-outs will list:

a. All consent decree milestones in each Region which are scheduled to come due during the present quarter (prospective).
b. All consent decree milestones in each Region for which the Region was responsible for ensuring compliance during the preceding quarter (retrospective).

The prospective print-out is intended as a tool for use by the Regional and OECM management generally. It may be used, for example, as an alert device to assist each Regional Administrator in advance preparations for ensuring that consent decree milestones coming due during the quarter are met properly.

The retrospective print-out will contain instructions asking each Regional Administrator to respond to OMO, within ten working days of the transmission date of the print-out, with the following summary information:

- Whether each consent decree milestone which came due during the preceding quarter was achieved.
- The consent decree milestones which were not in compliance.
- Whether any consent decree milestones were renegotiated.
- If any milestone is not achieved or renegotiated, the enforcement response the Region intends to take to ensure that the milestone is achieved.

The Associate Enforcement Counsels in OECM will review the information provided by the Regional Administrator for use in tracking the Agency's overall consent decree enforcement efforts. OMO will send the raw data to NEIC to be used to update the information in the consent decree library.

It will be important for the Regional Administrator to make sure that the response is properly coordinated between the various offices in the Region (e.g., the Regional Program Offices and the Regional Counsels' Offices). This will better ensure that the information in the tracking system is accurate and complete.

OFFICE RESPONSIBILITIES

Three Agency components will share responsibilities in implementing and maintaining the consent decree tracking system. These three offices are:

1. NEIC
2. Regional Administrators
3. OECM Headquarters

The respective responsibilities of these offices are specified below.

1. NEIC

NEIC's responsibilities generally will involve the start-up operations and the maintenance of the Repository and the Consent Decree Library. This will include the following:

- Completing the collection of physical copies of EPA consent decrees to be filed in the Repository.
- Maintaining the Repository and making available to Agency personnel upon request copies of consent decrees filed in the Repository.
- Ensuring that summaries of all EPA consent decrees filed in the Repository are fed into the Consent Decree Library. NEIC will send copies of the summaries to the Regional Counsels' Offices for review to ensure the accuracy of the summaries.
- Maintaining the Consent Decree Library and ensuring the smooth technical operation of the library.
- Providing OECM and Regional Office personnel with training on how to use the library and establishing a contact point in NEIC to respond to Agency inquiries on proper library use.
- Updating the Consent Decree Library with compliance information sent to NEIC quarterly by OMO.

2. Regional Administrators

The Regional Administrators are ultimately responsible for keeping informed of the compliance status of the consent decrees in their Regions, so that they can act promptly to remedy any identified instances of noncompliance. It will be important for the Regional Administrator to make sure that the Region's consent decree compliance efforts are properly coordinated between the Regional Program Offices, the Regional Counsel's Office, and other appropriate offices in the Region. With regard to the consent decree tracking system, these compliance efforts will include:

- Reviewing the consent decree summaries prepared by NEIC for accuracy prior to final entry into the Consent Decree Library.
- Forwarding to NEIC copies of all future EPA consent decrees that have been entered in Court, including any renegotiated consent decrees.
- Conducting compliance monitoring in accordance with policy issued by the national program offices to determine if the terms of each consent decree are met. Regional Offices may use whatever automated information system they choose to assist them in monitoring.

- Responding to OMO requests for information concerning consent decree compliance status.
- Using the Consent Decree Library as may be necessary to ensure the compliance of existing consent decrees and in drafting and negotiating new consent decrees.

3. OECM

Under the tracking system, OECM's general responsibilities of tracking consent decree compliance will be shared by OMO and the Associate Enforcement Counsels. These responsibilities will include:

- Sending quarterly information requests inquiring about the compliance status of the consent decrees in each Region to each Regional Administrator.
- Forwarding summary information from the Regional Administrator to NEIC to use in updating the Consent Decree Library.
- Forwarding to NEIC copies of all future EPA consent decrees in nationally managed cases, including any renegotiated consent decree in which the Associate Enforcement Counsel took the lead in the renegotiation.

- Tracking the overall EPA consent decree enforcement effort using information contained in the Regional Adminstrator's responses to OECM's quarterly consent decree compliance information requests.
- Evaluating each Region's accomplishments in monitoring consent decree compliance and responding to noncompliance problems.

The success of this uniform national system for tracking consent decrees depends upon how well Agency offices work together in implementing and maintaining the system. If properly implemented and maintained, the tracking system can enhance EPA's consent decree enforcement efforts.

If you have any questions concerning the system, please contact Michael Randall of OLEP at FTS 382-2931 or Gerald Bryan of OMO at FTS 382-4134.

Attachments

Attachment A

SAMPLE PROSPECTIVE REPORT FOR THE QUARTER BEGINNING 7/1/83

Listed below are the consent decree milestones which will come due during the present quarter.

---

1. Republic Steel — Chicago, Ill

   Milestone: Place purchase order
   Due date: 9/15/83

2. Great Lakes Steel — Zug Island, MI

   Milestone: Commence construction
   Due date: 8/1/83

3. Ford Motor Co. — Dearborn, MI

   Milestone: Demonstrate compliance
   Due date: 9/30/83

Attachment B

SAMPLE RETROSPECTIVE REPORT FOR THE QUARTER ENDED 6/30/83

Please provide the requested information for the consent decrees milestones listed below.

A. Milestones due in quarter dated 4/1/83 to 6/30/83:

1. Republic Steel Chicago, Ill

Milestone: Submit engineering plan
Due date: 6/30/83

a. Was Milestone Achieved?
(yes or no)

b. If not achieved, was milestone renegotiated?
(yes or no)

c. If renegotiated, please indicate new milestone.
(e.g., new milestone date due is 9/30/83)

d. If not achieved or renegotiated, what action is contemplated to bring source back into compliance?
(e.g., referral to OLEC HQ)

B. Milestones due in previous quarters which were not met in those quarters and had not been renegotiated or achieved as of 3/31/83?

1. Great Lakes Steel Zug Island, MI

Milestone: Place purchase order
Due date: 1/1/83

a. Has milestone been achieved since the previous update?
(yes or no)

b. If not achieved, has milestone been renegotiated since the previous update?
(yes or no)

c. (Repeat above)

d. (Repeat above)

C. Total number of consent decrees with milestones not met or renegotiated by 6/30/83. (number)

D. Total number of consent decrees this quarter brought back into compliance with milestone requirements due to action (including renegotiation) taken by the Region? (number)

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

Tk. 1-5
GM #60

MAR 16 1987

SUBJECT: Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket

FROM: Richard H. Mays, Senior Enforcement Counsel,
Office of Enforcement and Compliance Monitoring (LE-133)

TO: Associate Enforcement Counsel
Regional Counsel

We have just completed compiling and reporting our 1st Quarter, FY 1987 accountability measures for civil judicial referrals. This process always requires considerable effort in reconciling and interpreting data and suggests that there may be some confusion and misunderstanding about the data required and about the procedures and responsibilities for updating and maintaining the Docket.

The responsibility for providing, maintaining, and verifying data in the Docket is shared among Headquarters and Regional staff, Headquarters and Regional data analysts. I have identified in the attached procedures some of the data problems that we observed and ask that every one participate in correcting erroneous and missing data and continue during each monthly update cycle to provide accurate and complete data. The procedures discuss the various areas of concern and the primary responsibilities. Each staff attorney should receive a copy of these procedures so that they are reminded of how the Docket is maintained and understand their responsibilities in the overall process.

Every attorney is asked to review their cases, provide correct or missing data, and to remain diligent in the monthly review and entry of Docket data. I have also asked the Headquarters and Regional data analysts to routinely run reports that will help locate incorrect or missing data. The analysts will review these reports for inconsistent or missing data and contact the Responsible attorneys for clarification.

Your persistence and continued efforts are essential to the successful operation of the Docket. If you have any questions about the procedures or wish to make suggestions to improve the procedures and usefulness of the system please get in touch with me, Sally Mansbach, or Bruce Rothrock.

cc: J. Bryan
S. Mansbach
B. Rothrock
G. Young
Computer Sciences Corporation

Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket

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 and Regional attorneys assigned to the case. It is particularly critical that the update and data entry schedule be adhered to at the end of each fiscal quarter. The steps in the process are:

(1) Prepare Case Data and Facility Data Forms for the initial entry of cases, either during the period when the case is under development or at the time the case is referred (Regional attorney)
(2) Enter all new cases (Regional analyst)
(3) Prepare monthly case updates (Regional & HQ attorneys)
(4) Enter monthly case updates (Regional & HQ analysts)
(5) Run reports to verify the overall accuracy of the Docket (number of new referrals, overall status of cases, major milestone dates, referral indicator, law/section) and distribute to Regional Counsel and Associate Enforcement Counsel for verification (Regional & HQ analysts)
(6) Verify accuracy of Docket and make corrections (Regional Counsel, Associate Enforcement Counsel)
(7) Enter corrections (Regional & HQ analysts)
(8) Run accountability reports and complete SPMS reporting instruction forms (HQ analysts, MOB)

Monthly updates (item 3) should be completed by the first of the month, verification (item 6) about the 9th, completion of SPMS reporting instructions (item 8) and to the Compliance Evaluation Branch on the 13th, to the Assistant Administrator on the 14th, and final SPMS reporting and to OMSE no later than the 15th of the month. This means that all corrections and data entry and updating (item 7) must be completed by the 10th to be included in the accountability report for the just concluded fiscal quarter.

The verification reports are a tool for use in determining if all cases have been accounted for and the events surrounding active or recently concluded cases have been entered in the DOCKET. Information relevant to quarterly accountability measures which is obtained after the monthly updates have been submitted to the Regional analyst can be entered on the verification reports and included in the final quarterly update (on the 10th).

1. Initial Entry of a Case: The Regional attorney assigned to develop the case is responsible for completing the Case Data Form and the Facility Data Form(s), and for providing this information to the Regional analyst for initial entry of the case. Attorneys should not expect that the analyst will complete these forms unless a procedure has been arranged with their analyst and the data is readily available in the litigation package. Such a procedure does not relieve the attorney of the responsibility for the accuracy and completeness of the data.

The attorney may enter a case in the Docket any time after the case is "opened," but no later than when the case is initiated. The "Date Opened" is an arbitrary date but is sometime in the period between when a decision is made to take judicial action (an attorney is assigned to begin case development) and when the case is "initiated." The "Date Initiated" is the date that the Regional Administrator signs and dates the referral letter. This means that the referral package is ready to be placed in the mail. To be counted as initiated in a fiscal quarter, a case must be in the mail and entered in the Docket by the Regional data analyst by the last day of the quarter.

2. Major Milestone Event Dates: Major milestone event dates are critical in tracking cases, accountability measures, and in most analyses that are performed. The timely and accurate entry of these dates is crucial for the overall integrity of the system. Significant problems have arisen due to very late or inaccurate entry of dates.

We regularly make calculations of the number of cases pending(e.g., at EPA HQ, at court) on a particular day(e.g., 10/01/86). Each time that a major milesone date is entered, the Overall Status (present/pending location) of the case changes. Inaccurate and late entries can seriously distort data used for accountability and budgeting.

Headquarters and Regional attorneys are responsible for the entry of dates as part of the monthly case update. More specifically the lead for entry of each event date is identified below:

Event/Milestone Date	Primary/Lead Responsibility
Violation Determined	Regional Attorney
Technical Documents Received by ORC	Regional Attorney
Opened	Regional Attorney
Initiated	Regional Attorney
Received at EPA HQ	HQ Attorney
Check List Completed	HQ Attorney

Referred to DOJ	HQ Attorney or Regional Attorney for Direct Referral to DOJ
Referred to US Atty	HQ Attorney & Regional Attorney
Filed	HQ Attorney & Regional Attorney
Concluded	HQ Attorney & Regional Attorney
Returned to Region	HQ Attorney
Rereferred	Regional Attorney

3. Overall Status: The Overall Status of the case coincides with the most recent major milestone and indicates the present location of the case. The HQ and Regional analysts are responsible for verifying that the overall status and latest milestone agree.

Overall Status	Milestone/Event	Meaning
O	Opened	Case opened, under development in Region
1	Initiated	Initiated, Under Review/pending at EPA HQ
2	To DOJ	Referred to DOJ; under review/pendi— at DOJ
3	To US Atty	Referred to US Atty for filing
4	Filed in Court	Filed; pending in court
5	Concluded	Concluded; judicial aspects completed
S	Returned to Region	Returned to Region for further development and subsequent rereferral
1	Rereferred	Rereferred by Region, pending at EPA HQ (a case that is rereferred is not counted as a new referral; the case is counted once at the time of the original referral)

4. Headquarters Review Time: The determination of the headquarters review time is applied to all cases initiated, regardless of whether the case is referred to DOJ, declined and concluded, or returned to the Region for further development. The starting point is the "Date Received at EPA HQ" which is defined as the date that the Associate Enforcement Counsel receives the litigation package. The Headquarters attorney assigned to the case is responsible for providing these dates as part of his or her monthly update. If the "Date Received at EPA HQ" is not provided, the default is "Date Initiated."

Cases can be divided into four categories and the dates used in computing the review time is defined for each.

a. Referral by Region to EPA Headquarters:

- Date Received at EPA HQ(or Date Initiated)
- Date Referred to DOJ

b. Direct Referral by Region to DOJ:

- Date Received at EPA HQ(or Date Initiated)
- Date Check List Completed

Note: Date Check List Completed will be entered in the DOCKET as a miscellaneous event and will appear on the Case Status/Update Report once entered. The event code is: CHKLST

c. Referral by Region to EPA HQ, Returned to Region for Further development:

- Date Received at EPA HQ(or Date Initiated)
- Date Returned to Region

d. Referral by Region to EPA HQ, Declined by EPA HQ or Withdrawn by Region:

- Date Received at EPA HQ(or Date Initiated)
- Date Concluded (Declined/Withdrawn)

5. Referral Indicator: The "Referral Indicator" designates the office(Region or EPA HQ) developing and originating the case and where the case is referred(EPA HQ or direct referral to DOJ).

RH - Region to EPA HQ

RD - Region direct to DOJ

A case that is referred by the Region directly to DOJ has the same date for "Initiated" and "To DOJ". Many cases that have a Referral Indicator of "RH" have the same date for "Initiated" and "To DOJ," suggesting that the case was really referred directly to DOJ and should have a "Referral Indicator" of RD.

The Regional Attorney and the Regional Data Analyst are are responsible for entering the correct Referral Indicator at the time the case is initiated. Check that all direct referrals are properly designated.

6. Concluded Cases: At the time a case is concluded the Regional and Headquarters attorneys are responsible for entering three data items as part of their monthly update:

   a. Date Concluded
   b. Result - how the case was concluded
   c. Assessed/Adjusted Penalty - for cases settled by consent decree or litigated

   This information should be provided as soon as possible after the case is concluded. In the past, delays in entering these items, for instance "Date Concluded," have altered the number of active cases on a particular date as previously reported in OECM's SPMS quarterly accountablility measures.

7. Headquarters Division: Some values for Headquarters Division do not match the Law/Section values, e.g., HQDV = PES, and LAW/SECTION = RCRA 7003, CERCLA 106. The Regional Attorney initiating the case is responsible for designating on the Case Data Form the appropriate Headquarters Division that will be reviewing the case.

8. Law/Section: The Law(s) and Section(s) are the ones violated and cited in the litigation report and complaint, the most significant entered first. Do not use the section authorizing enforcement, e.g., CAA, §113. A Section must be entered for each Law. If more than one section of a particular law is violate and cited in the litigation report, then each are entered as separate combinations.

   EXAMPLES:

CERCLA	106
CERCLA	107
RCRA	3008
RCRA	7003

   In the DOCKET we use the section designation from the published statute; do not use the one from the U.S. CODE.

FIG. 1-8

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

TK.1-6
GM#61

APR 8 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Docket Maintenance

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

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

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

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

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

(3) Headquarters will not amend regional data entry;

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

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

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

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

My thanks for your cooperation.

Attachments

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

I. INTRODUCTION

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

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

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

II. DEFINITION OF A CASE

A. DOCKET Design and Assigning a Case Number.

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

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

B. Amendments to Ongoing Cases.

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

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

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

III. INITIAL CASE ENTRY

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

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

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

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

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

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

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

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

- Significant national or precedential legal or factual issues.

- Previous enforcement actions (date, type).

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

- Other significant aspects.

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

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

IV. CASE STATUS REVIEW PROCEDURES

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

The Lead EPA Attorney should pay particular attention to the

following areas:

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

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

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

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

V. QUALITY ASSURANCE

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

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

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

Headquarters staff.

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

ENFORCEMENT CASE DATA FORM

APPENDIX A

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

* CASE NAME: _____

* TYPE CASE: _____ (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

Appendix B

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: _____ _____ _____

APPENDIX C

CASE SUMMARY CONTENT AND FORMAT

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

- EXAMPLE -

CASE SUMMARY:

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

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

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

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

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

APPENDIX D

CASE STATUS COMMENTS

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

- EXAMPLE -

HEADQUARTERS CASE STATUS:

REGIONAL CASE STATUS:

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

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

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

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

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

CIVIL JUDICIAL ENFORCEMENT DOCKET
DATA ENTRY MAINTENANCE VERIFICATION
RESPONSIBILITIES AND PROCEDURES

APPENDIX E
03/11/88

ACTIVITY	WHO	WHAT	When	HOW
Open a Case	Regional Attorney assigned to Case development or Lead EPA Atty	Completes: Case Data Form, Facility Data Form for each violating Fac., Case Summary. Case is a matter which is filed, settled or litigated separately from any other Case.	Optional; When case is opened or any time up to but no later than when case is referred to HQ or directly to DOJ	Attorney completes forms and Case Summary. All items marked with '*' must be completed. Gives to Regional data analyst.
Initial Case Entry	Regional Data Analyst	Assign Case Number: Enter data from Case Data and Facility Data Forms, Case Summary	At time Regional Attorney Completes Forms.	On-line from Case Data and Facility Data Forms, Case Summary
Case Review and Case Update of all Active Cases	a. Lead EPA Atty	Maj. Milestones/Misc. Events, Dates, Staff, Status Comments and Signficant Case events	Monthly, Completed and given to Regional Analyst by 1st work day of each month	Review & edit as appropriate Case Update Report (using clear notations in bright colored ink)
	b HQ Attorney	HQ data fields (e.g. checklist complete, HQ Comments if appropriate)	Monthly	Case Update Report, as above, delivered by HQ data analyst
Data Entry, Data Base Update	a. Reg. Analyst	Case Update Report as reviewed and annotated by Lead Attorney	Monthly, Beginning the 1st of the month, completed by the 5th work day. Run new Update Reports and distribute by 8th work day.	On-line, directly from Case Update provided by Regional Attorney. Update all active cases even if no change made or no update received.
	b. HQ Analyst	As appropriate		
Case/Data Verification	HQ Attorney	Major milestone Dates, Overall Status (see 3b), other Case Level Data; Regular Status Comment Update Lead Attorney	Monthly for FY'88 quarterly thereafter	Scan Case Update Report provided by HQ Analyst. Any obvious errors or omissions are brought to t' nrion attention of Ass. and then Regional Counsel for Lead EPA Atty to correct.

CIVIL JUDICIAL [redacted]...MENT DOCKET
DATA ENTRY MAINTENANCE VERIFICATION
RESPONSIBILITIES AND PROCEDURES

ACTIVITY	WHO	WHAT	WHEN	HOW
Tracking Settlements and Litigation Events	Lead EPA Atty	Significant events related to settlement negotiation or Litigation as required by RC	Monthly	Part of monthly review of Case Update Report.
	HQ Attorney	HQ Events, as appropriate	Monthly	monthly case review.
Concluding a Case (CD/Judgement Entered	Lead EPA Atty	Enter data about settlement/Judgement Results, Date, Penalty	Monthly	Part of monthly review of Case Update Report, or as events occur.
Closing a Case Final Compliance, Case Withdrawn, Declined, Dismissed or Combined	Lead EPA Atty	Enter Data for Closed Case - when final compliance achieved or case is withdrawn, declined or dismissed	Monthly	Part of monthly review of Case Update Report, or as events occur.
Case Returned to Region	Lead EPA Atty	Enter "Date Returned"	Monthly	Part of Monthly Update, or as returns occur by proper notification of data analyst.
Case Rereferred	Lead EPA Atty	Enter "Date Re-referral"	Monthly	Part of Monthly Update
Monitor Case Returned to Region	Lead EPA Atty	Determine cases returned and pending > 60 days. Determine action to be taken: Refer or close. Update Docket	Monthly	Analyst produces report of all cases returned to Region and pending >60 days for Lead EPA Attorney review
	HQ Attorney	Assess need to discuss cases with Region	Quarterly	HQ analyst prepares quarterly report on cases rtd to Region >60 days
Amending a Case	Lead EPA Atty	Add amendments to existing case when matter is part of on-going case and will not be filed as a separate matter for litigation	When matter is referred	Monthly Case Update, or on amendment data form, to Regional Analyst, when amendment occurs

Tracking (1)

VIOLATION TABLE

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

POLLUTANT TABLE

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

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

RESULT TABLE

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

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

REFERRAL INDICATOR TABLE

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

TK.1-7

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

OCT 3 1994

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Support of the Enforcement DOCKET for Information Management in OECA

FROM: Elaine G. Stanley, Director
Office of Compliance

TO: Deputy Regional Administrators, Regions 1 - 10
Regional Counsels, Regions 1 - 10
Office Directors, OECA

OECA and the Regions are now accountable for the accurate tracking and reporting of important information regarding all enforcement activities of this Agency under its multiple statutory authorities. It is imperative that we maintain and improve a reliable, centralized system for gathering such information that can be relied on by OECA, other offices within U.S. EPA, the Department of Justice, Congress and the public. The National Civil Enforcement DOCKET is currently maintained by OECA for case tracking and reporting purposes. It is our intent that all formal enforcement cases, civil judicial and administrative penalty orders, be included and managed through the Enforcement DOCKET.

Accordingly, to move us collectively in the direction of better case tracking and information, we are establishing the following set of expectations, which are effective immediately.

The Regional Counsels have the primary responsibility for entering and maintaining data on all civil judicial and administrative enforcement actions. The Regional Counsels, with Division Directors of the Office of Regulatory Enforcement, will ensure that every civil judicial and formal administrative penalty enforcement case will be included and managed through the National DOCKET. Starting in FY 1995, all new formal administrative penalty actions will be entered into the Enforcement DOCKET. By the end of the second quarter FY 1995, all administrative penalty orders that have been issued or filed but not yet concluded are to be entered into DOCKET. As time and resources allow, any other administrative matter is to be entered into DOCKET as well. Beginning in FY 1995, we intend to use the Enforcement DOCKET as the sole source of Agency reporting on Administrative Penalty Orders. We intend to examine the feasibility of including all formal administrative orders (AOs

and APOs) in the DOCKET beginning in FY 1996.

I expect that every civil case referred will continue to be entered promptly into the DOCKET, including an appropriate case summary before it is referred. Compliance with DOCKET management and quality control principles should be a factor in the performance appraisal of each affected manager. Effective use of the DOCKET should help improve efficiency and minimize disruption and transaction costs.

All OECA offices will use the DOCKET as the primary data source for enforcement activity. Before an OECA office requests information regarding enforcement activities from Regional offices or other offices in Headquarters, the Office Director or other requesting manager or staff will attempt to get that information from the DOCKET. Only with the DOCKET data in hand will HQ offices call the Regions and verify the data. To the greatest extent possible, OECA will notify the Regions when the DOCKET will be used for special analysis so that the Regions are given an opportunity to clean up data. If the manager determines that the information is not available on DOCKET, that fact should be reported to the Region and to the Director of the Enforcement Planning, Targeting and Data Division (ETPDD) of the Office of Compliance so that changes can be made to DOCKET.

We recognize that certain improvements and additional support are needed for the Enforcement DOCKET system. To that end, we are forming an Executive Steering Committee to provide guidance and direction to the DOCKET managers for short and long term planning for the DOCKET. For the past year, a DOCKET workgroup headed by Larry Kyte, ORC, Region V, has been working with OECA to recommend and implement DOCKET improvements. Many of these recommendations will be implemented in FY 1995. The Executive Steering Committee will build on the Docket Workgroup's efforts and will have representatives from the Regional Counsels, Regional Enforcement Programs, and OECA Offices.

OECA is committed to implementing DOCKET improvements. Some improvements already identified have been made such as the addition of a field to easily identify Multi-Media cases. Immediate improvements are also being made to the Regional Matters Tracking System to make it operate faster and be more compatible with the DOCKET.

The Regional Counsels must continue to ensure that the quality and timeliness of information in the DOCKET is maintained. A failure to maintain that quality will result in the data not being relied upon and undermines the integrity of the entire information management program. It is hoped that the

above procedure will avoid unnecessary "fire drill" requests of the Regions and particularly Regional Counsels' offices. It should also help assure that the DOCKET is tracking needed information in an efficient and accurate manner. Your support of the system is needed and expected. If you have any questions regarding this guidance, please call me or Fred Stiehl at (202) 260-8180.

cc: Scott Fulton
Steve Herman

CM.1-1

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

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MAR 11 1988

GM #71
CM.1-1

MEMORANDUM

SUBJECT: Case Management Plans

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring (OECM)
U.S. Environmental Protection Agency (EPA)

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice (DOJ)

TO: EPA Regional and OECM Attorneys

EPA Regional Program Office Personnel

Environmental Enforcement Section Attorneys
DOJ Division of Land and Natural Resources

The environmental enforcement cases initiated by the United States Environmental Protection Agency (EPA) and the United States Department of Justice (DOJ) are characterized by their complexity, their significant demand on resources, and the participation of numerous legal and technical people from many offices. Nearly all cases present major challenges to EPA and DOJ, and in some instances can take several years to bring to conclusion. In order to achieve the best possible results in the shortest time, with the most efficient use of resources, both EPA and DOJ will be implementing a number of measures to promote the effective handling of cases.

Case management plans represent a mechanism to enhance the effectiveness of the environmental enforcement program. Case management plans are plans for the conduct of environmental enforcement cases which provide a road map for bringing a case

from its initiation to a successful conclusion. The primary elements of the plans include the tasks to be performed, the people assigned to perform the tasks, and the dates by which the tasks are to be completed. Case management plans include both the litigation and negotiation elements of the case, and the legal and technical tasks to be performed.

With the number of people involved in cases, it is essential to establish as early as possible which litigation team members will be responsible for what tasks and when these tasks will be completed. Because DOJ is primarily responsible for management and control of the case, it will have the lead role in establishing the case management plan. Attorneys in the regional offices, the Office of Enforcement and Compliance Monitoring, and in some cases U.S. Attorney's Offices, also play significant roles in the cases, as do EPA technical staff; therefore, they will participate in the development of the plan. The case management plan will, to the maximum extent practicable, reflect the agreement among members of the litigation team as to how they will bring the case from its initiation to a successful conclusion.

DOJ has developed the attached form covering the legal assignments for the litigation elements of case management plans This form is comprehensive and will be used for all cases beginning April 1, 1988. The form will be used as follows.

Regional attorneys and regional program staff who are preparing litigation reports should indicate their availability for case work assignments in a draft case management plan when the case is referred. The attorney should use the standard DOJ form, and should propose assignments for the regional attorney and regional technical staff which include only those tasks which regional supervisors and managers consider appropriate for the individuals assigned to perform them. The form, as submitted by the region, will not address assignments for DOJ attorneys or Assistant U.S. Attorneys. The draft case management plan should also reflect the regional attorney's initial thinking concerning the strategy and timetable for litigating and negotiating the case, although at this point in the development of the case, the draft plan may not contain much detail.

During the period assigned for its review of the referral, OECM will propose to DOJ, after discussion with the region, any assignments which management considers appropriate for the OECM attorney assigned to the case. The DOJ attorney should then, in consultation with EPA, complete the case plan for litigation and negotiation. It is important for the DOJ attorney to initiate

development of a strategy and timetable for the case, in concert with the other members of the litigation team. The team's members should assure support for the plan by their respective supervisors. The plan should reflect a realistic assessment of the resources (including technical and contract dollar resources) available to support the case, and team members should be assigned responsibility for actually obtaining the resources contemplated by the plan. The DOJ attorney should have a case plan in place by the date of filing of the complaint, addressing the roles of DOJ, the Assistant U.S. Attorney, and regional and headquarters legal and technical staff.

Because litigation and negotiation of environmental cases is a dynamic process, initial projections of tasks in a case plan will need to be revised on a periodic basis. In order to keep the case plan up to date, but, at the same time, avoid undue consumption of the litigation team's time, the case plans will be updated on a quarterly basis. The case plans will serve as the primary discussion documents for the legal and technical staff and their first-line supervisors in periodic case reviews. The plans also will be used as a guide to managers interested in the general progress of a case. In order to facilitate the best use of the case management plans, DOJ will work towards developing a means of incorporating the plans in its case docket system.

If prepared and used properly, case management plans can help assure effective and efficient management of complex cases and available resources.

Date

PRELIMINARY CASE PLAN

Case Name: U.S. v. _____ DJ #90-_____

Statutes: _____ EPA Region: _____

Nature of Violation/Claims: _____ District: _____

Litigation Team:

DOJ/LNRD: _____ EPA/Reg. Program _____

DOJ/AUSA: _____ EPA/HQ Program _____

EPA/RC: _____ State Rep. _____

EPA/OECM: _____

A. General Breakdown of Case Responsibilities Assignment — Name

1. General Oversight and Case Management -- Review of all briefs and other filings; consultation on litigation and negotiations strategy _____ DOJ Attorney (or AUSA)

2. Principal Contact with Defendant(s) on Litigation Matters _____

3. Principal Contact with Defendant(s) Regarding Settlement _____

4. Development of Technical Proof [List needs for liability and remedy case; assign by need] _____

5. Selection and Development of Expert(s) [List needs] _____

6. Development of Liability Case */ [List elements; assign by element] _____

7. Development of Remedy Case [Break down; assign by element where possible] _____

B. Preliminary Discovery Plan Task	Name	Date
1. Offensive Discovery		
a. First Set of Interrogatories	_____	_____
b. First Set of Production Requests	_____	_____
c. First Set of Requests for Admissions	_____	_____
d. Forseeable Offensive Depositions [List each deponent and assign by deponent]	_____	_____
2. Defensive Discovery		
a. Responses to Written Discovery	_____	_____
b. Depositions	To be assigned as they are noticed	
C. Preliminary Motions Plan		
1. U.S. Motion to Strike Jury Trial Demand	_____	_____
2. U.S. Motion to Strike Defenses */	_____	_____
3. U.S Motion for Partial Summary Judgment */	_____	_____
4. U.S. Motion for Case Management Order (if appropriate)	_____	_____
5. Analyze Answer/Motion to Dismiss */	_____	_____
6. Response to Motion to Dismiss */	_____	_____
D. Preliminary Settlement Plan [List near-term events and tasks relating to settlement; assign as appropriate]	_____	_____
	_____	_____
E. Deadline for First Revision and Expansion		

*/ In multiple defendant cases, list each defendant and assign by defendar in single defendant cases, assign by liability element.

GM-85
CM.1-2

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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Regional Enforcement Management: Enhanced Regional Case Screening

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators
Assistant Administrators

The attached guidance on regional enforcement case screening is now final. Your careful review of prior drafts is greatly appreciated. The review period has been well spent in clarifying issues and ensuring the approach set forth in the guidance provides sufficient flexibility for practical implementation.

The final version makes several minor changes to the October 10, 1990 draft. It:

1. alters the case screening worksheet to:

   -- provide further protection as a privileged document;
   -- include dates for any revisions;
   -- clarify criteria for contractor listing; and
   -- clarify the relationship between civil and criminal judicial case potential criteria;

2. clarifies that:

   -- case screening has benefits for resource allocation and prioritization of cases where there are competing resource demands;

   -- case screening is not intended to preclude or substitute for early and ongoing consultation within Regions, with Headquarters or with DOJ where appropriate;

-- multi-media enforcement initiatives are included within the objective of a multi-media perspective;

-- single-media enforcement initiatives can be handled flexibly within the guidance;

-- case screening is not intended to preclude criminal investigation necessary to further characterize the situation; and

3. excludes field citations from the case screening process where issued in the field.

Enhanced case screening is an important undertaking which I am gratified is receiving considerable support and attention within the Regions. I look forward to receiving your reports on how you are implementing the guidance.

Attachment

cc: Deputy Assistant Administrators
Headquarters Compliance Directors
F. Henry Habicht II
Nancy Firestone
Daniel C. Esty

bcc: OE Managers

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

DEC 3 1990

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Regional Enforcement Management: Enhanced Regional Case Screening

FROM: James M. Strock
Assistant Administrator

TO: Regional Administrators
Assistant Administrators

The Enforcement Four Year Strategic Plan and the Enforcement in the 1990's project identify several shifts in direction and emphasis that are essential to meeting demands on enforcement over the next several years. This memorandum implements regional case screening for innovative and balanced use of the full range of enforcement authorities called for in the Strategic Plan to be fully operational by Fiscal Year 1991.

Regional case screening and the use of screening committees or other processes to accomplish its objectives are not unfamiliar subjects within EPA. Most Regions already have in place systems for communication and coordination among program enforcement staff, Regional Counsel, Environmental Service Divisions and the criminal investigators on enforcement case selection, development, and follow through. Regions will nonetheless need to be prepared to adjust existing management systems to include those aspects of case screening which are not presently being adequately addressed. At the same time as this office strongly recommends the use of formal enforcement screening committees, we also encourage the Regions to continue to review and revise their overall management systems and organizations to meet Administrator Reilly's high expectations for enforcement. We will share successful management approaches across Regions and use the occasion of program reviews and our OE Regional Counsel audits to assess how various approaches are working.

This memorandum describes: 1) the objectives of case screening; 2) requirements for a regional case screening capability, including the use of case development worksheets to aid the screening process for selected cases; 3) the recommended use of regional case screening committees; 4) the relationship between enforcement case screening and regional strategic planning; and 5) oversight of the screening process.

I. The Objectives of the Regional Enforcement Case Screening Process

Enforcement case screening is a process to link the characteristics of the violator or violations in a particular case with the right response from among alternative courses of action. The concept is not a one-time "screening in" or "screening out" but a continuing process with elements of both. It identifies where decisions must be made, where there may be good candidates for a particular enforcement approach, and where the course of action is or is not clear. It is not intended to preclude or substitute for early and ongoing consultation within Regions, with Headquarters, or with the Department of Justice where appropriate.

Enhanced case screening may operate within existing program guidance on appropriate enforcement response. It need not alter accountability for enforcement, nor who should develop enforcement actions. It should, however, bring to bear, on individual case decisions, a broader perspective on the goals and objectives of enforcement. The premise is that enforcement decisions must not be made unilaterally; the decision-making process must take into account the full panoply of alternatives. This guidance introduces a systematic means of introducing these other factors into the normal case decision process. Civil enforcement issues would be raised to the appropriate program Division Director and Regional Counsel in their traditional line management roles, with conflicts to be resolved at the DRA/RA level. Criminal enforcement issues would be resolved in accordance with the March 28, 1989 memorandum from Edward E. Reich entitled "Planning and Priority-Setting in the Criminal Enforcement Program".

Regional enforcement case screening objectives include, and cases should be systematically screened for, the following:

1. the strategic value of undertaking federal enforcement;

whether the case furthers specific national, Regional or state environmental goals articulated in strategic plans and operating guidance; whether the case reflects appropriate state/federal roles; and the extent to which the case reduces public health risk, protects the environment, prevents pollution or enhances deterrence.

2. the appropriate enforcement response;

whether administrative, civil judicial or criminal enforcement is most appropriate (See attachment 1 for criteria when judicial enforcement may be favored; bullet below for essential discussion of criminal enforcement screening).

3. the appropriate, considered use of innovative settlement conditions or tools;

whether to seek environmental auditing, pollution prevention, contractor listing, suspension and debarment, and whether to leverage broader compliance with outreach, publicity, training, and/or other requirements in enforcement settlements. (See attachment 2 for criteria where innovative settlement terms and tools may be favored);

4. potential multi-media and cross-statutory action; (which may alter the course any single program might otherwise pursue); and

examining multi-media violation status, multi-media compliance history, alternative statutory authorities which might better address a problem, multi-media impacts of proposed settlements and the need for triggering a multi-media team inspection in support of a possible and desirable multi-media enforcement case. (See attachment 3 for further discussion of these factors); and

5. effective integration of criminal and civil enforcement;

reviewing violations for criminal enforcement potential, criminal enforcement leads for priority, the criminal case/investigatory docket for the need for parallel or solely civil proceedings, and criminal cases for innovative use of sentencing and/or probation requirements. (See attachment 4 for further discussion of these factors).

The case screening management structure established to implement enhanced case screening also may have benefits in facilitating the commitment and allocation of resources in support of enforcement cases and in prioritizing cases in circumstances of competing resource demands.

Violations subject to case screening are those potentially suitable for federal enforcement, including those state-lead cases for which the targets for timely and appropriate enforcement response have been exceeded, violations of AOs and/or Consent Decrees, referrals by the State, or other federal-lead violations arising from self-reporting and inspections. (Violations handled

by field citations issued in the field are not subject to this process). These violations should be screened as early as possible following identification so that undue delays are not encountered or opportunities foreclosed. Further, screening can be a sequential or tiered process. For example, screening for appropriate enforcement response, innovative approaches, or multi-media perspective would, in the vast majority of cases, follow a decision that a federal enforcement response is warranted.

II. Structure for Enforcement Case Screening

OE has a strong preference for the use of face-to-face case screening committees. We believe, following consultation with the Regions and review of their experiences to date, that it is the most effective means to meet the screening goals outlined above. However, Regions may choose variant processes that will work best in their own particular circumstances, provided they meet the criteria noted below.

A. Criteria for an Acceptable Case Screening Process

In implementing the enforcement case screening capability, several criteria must be achieved:

1. Decisions on case screening should not be unilateral[1].

2. There should be an effective cross-media capability for coordinating multi-media enforcement initiatives, information on compliance status and histories, making timely decisions on case consolidation, and/or devising settlement conditions involving more than one media.

3. There should be an effective civil/criminal coordination capability to address not only potential criminal enforcement actions and priorities but also the need for parallel or alternative civil enforcement proceedings to address environmental harm. The capability should ensure timely and ongoing access to information which allows independent judgment and direct involvement of appropriate staff with expertise in the review of those cases:

   (a) all violations should be reviewed by media program enforcement personnel for criminal enforcement potential;

   (b) violations which cross the threshold (see Attachment 4) for criminal enforcement potential are screened both:

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[1] For a discussion of the meaning of this criterion with regard to criminal enforcement, see Attachment 4, paragraph 2.

(1) by those with criminal enforcement responsibility; and

(2) by media program enforcement personnel.

The method chosen is a matter of Regional discretion, but must reflect the sensitivity of access to criminal enforcement information.

4. Internal policies and procedures should be in place to reinforce screening factors noted here. The use of case screening worksheets described below is an indispensable part of this process.

B. Case Screening Worksheet

The attached worksheet, or revised worksheet(s) tailored to a particular Regions's use, is part of the internal policies and procedures required for an effective regional screening capability. These worksheets are a complement to -- not a substitute for -- the very important face-to- face interactions among key players at appropriate points in the screening process. We envision that they would be used early in the case screening process to help assess what further screening and consultations might be necessary and to help identify early how an enforcement case will be developed. Who completes the worksheet is up to each Region to decide.

Elements may be added or the format of presentation adjusted to facilitate use, but the questions on the attached worksheet and substance must be retained. However, the assessment of criminal enforcement potential may not be altered without consultation with the Office of Criminal Enforcement Counsel, since it is carefully presented to avoid compromising a criminal case during discovery. We caution the Regions to exercise discretion in possibly generating discoverable material during the course of screening committee sessions. The case screening worksheet has been designed with this in mind.

The worksheets provide a systematic means of ensuring that staff explicitly consider the potential for innovative enforcement settlement conditions and tools, a multi-media perspective, and criminal enforcement potential in conjunction with other factors traditionally considered in determining the appropriate enforcement response. It introduces background information on compliance history within the same program and in other programs as well as information on the toxics release inventory for the facility. The worksheets build on the pilot system implemented in Region I.

While the issues raised by the worksheets may have to be revisited at various stages in a case, most factors should be

initially considered as early as possible in the process. The worksheets are to be retained as a formal part of case files to facilitate periodic assessments of how the process is working and to help improve our process over the coming years.

C. Focusing and Phasing Case screening

While all cases are "screened" to the extent that strategic value is considered at some point in the process and the appropriate enforcement response defined and reassessed, as necessary, over the course of case development, there are ways in which the Regions can phase in and focus, the enhanced case screening envisioned here:

1. Although we are encouraging Regions to examine multi-media compliance history, it will not be required until the OE data integration project is completed because of the amount of work involved in obtaining violation histories from all media. The OE data integration project should be completed by January 1, 1991.

2. The Toxics Release Inventory (TRI) is an important means of identifying high risk circumstances and the potential for pollution prevention to reduce significant risk at a facility which may be agreed upon through an enforcement settlement negotiation. Since use of the TRI is new to most regional office staff, Regions may establish their own criteria for cases for which TRI data will be sought. However, we would expect movement toward increasing integration of this data.

3. Cases can be packaged and reviewed in summary fashion where the cases present similar violations and violator characteristics. This may be particularly helpful for handling a group of cases involved in an enforcement initiative. Single and multi-media compliance status should still be assessed at individual facilities covered by such an initiative since such information may affect settlement terms with the facility. However, this information may be assessed after such cases are initiated where the Region decides that a packaged and timely single-media initiative is the preferred enforcement response for those violations.

4. Regions may further focus their case screening efforts by defining categories of violations and violators and specific objectives which they do not believe would benefit from the review and accompanying worksheets proposed here. These exclusions from analysis should not be unilateral, in keeping with the spirit of the screening process itself. The screening committee itself is best suited to identify such exclusions. Only those violator/violation categories for which there is no significant, identifiable benefit from the objectives listed should be considered for exclusion. Thus,

no enforcement case should be excluded from screening for current cross-media violations and multi-media impacts of any resulting remedy. Further, cut-offs based solely upon penalty amounts or type of enforcement action (i.e. administrative or judicial enforcement) are not appropriate.

5. Regions with particularly large caseloads in which case screening would represent a substantial initial investment by regional staff, may phase-in screening through the first half of the fiscal year. In any event, by the end of the second quarter of FY 1991 all violations subject to case screening defined in Section I above, must be part of the process.

OE recognizes that one outcome of case screening may be a regional decision not to pursue federal enforcement or to defer action based upon strategic value considerations. OE requests Headquarters programs to review current reporting and tracking systems to assess whether new or revised procedures may be desirable or needed to explicitly address such violations.

D. Initiation of Criminal Investigations in Cases of Ongoing Releases or Discharges

Prior to the initiation of a criminal investigation [2] where there is an apparent violation involving the release, discharge, or emission of a contaminant or pollutant which may continue during the course of the investigation [3] an extra degree of coordination and inter-program review is needed. Furthermore, where there is an apparent or potential violation involving the release, discharge, or emission of a contaminant or pollutant which may continue during the course of the criminal investigation, the SAC after consultation with the RCEC, before opening criminal investigation, must inform the Regional program personnel of his intention to open a criminal investigation, providing sufficient information to enable them to assess the facts. The SAC should simultaneously provide, on a continuing

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[2] This policy is also intended to include cases where there may be no ongoing exposure but the risk or threat of harm is plain. Examples of such cases include improper storage of ignitable or reactive waste, an eroding lagoon, and falsification of drinking water data.

[3] Consistent with Attachment 4, paragraph 2, some initial investigatory actions may commence without such prior coordination if necessary to further characterize the situation.

basis, non-Grand Jury [4] evidence of an ongoing release or discharge which violates EPA requirements.

Regional program technical staff must be consulted regarding whether an ongoing release or discharge in fact does or may present an unacceptable level or risk of harm before the conclusion of the criminal case. Their evaluation of the probable risk is crucial.[5]

The RCEC's role is as a catalyst and counsellor to encourage coordinated Regional decision making regarding criminal enforcement, and, where a consensus is reached to advise on the best legal procedures to obtain the desired results. The RCEC will also help by assuring that the Regional case screening process works well and that any dispute is elevated and resolved.

III. Recommended Case Screening Approach

OE has developed a recommended approach to enforcement case screening. We recommend that Regions establish formal screening committees to coordinate enforcement activities and screen enforcement cases. See Charts 1 (a-c) for the proposed regional screening structure and Chart 2 for existing regional mechanisms.

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[4] Furthermore, should the criminal investigation result in Grand Jury evidence which demonstrates that an ongoing release or discharge of a pollutant or contaminant in fact does or may present an unacceptable level or risk or harm before the conclusion of the criminal case, OCI shall forthwith discuss with the Government attorneys assigned to prosecute the case whether to seek judicial approval to disclose this evidence to the civil authority. Note that some such information derived from non-Grand Jury proceedings may also require special handling and similar restrictions to those posed by Grand Jury proceedings, for example, if from a confidential source or from an undercover operation.

[5] Sworn law enforcement officers have a duty to report to DOJ apparent criminal violations by an identifiable person. While Headquarters or Regional managers cannot veto a criminal investigation, they can participate in the setting of appropriate priorities among various leads, and their opinion can differ regarding the advisability of a criminal investigation. Should there be a difference of opinion within EPA regarding the relative priority of a criminal investigation or its advisability, before seeking from DOJ a prosecutive determination the parties shall follow the dispute resolution procedure referenced above.

It should be noted that most of the Regions are considering revisions to their current systems in keeping with the Strategic Plan requirement for case screening.

1. **Continued reliance on initial screening on a single media basis, supported by case worksheets to promote awareness and consideration of broader strategic concerns:**

In all Regions, there are regular meetings between Regional Counsel and program enforcement staff. Screening takes place on a single media program basis in meetings comprised principally of the Enforcement Branch or Section Chiefs of the Program Divisions and Regional Counsel. We believe that for reasons of efficiency and respect for the level of knowledge of the case at issue, this level of screening must remain the fundamental point at which most of the screening takes place. If not already adopted, we propose that these meetings be formalized as enforcement case screening committees which meet at least monthly. They would continue to review violations in detail for appropriate enforcement response, including identification of any judicial, criminal or multi-media concerns, and the strategic value of any proposed action.

Particular attention must be paid by these groups to determining whether judicial enforcement is appropriate, whether there are criminal and multi-media enforcement issues, and whether the facility's compliance history (viewed from a multi-media perspective) and the nature of the violation merit the use of innovative techniques. To do this, case screening worksheets will help to turn policy to daily practice by translating criteria for case screening into something that will be considered on an ongoing basis within the Region. The worksheets will ensure that those cases most deserving of multimedia considerations will be adequately reviewed for referral to a multi-media process.

2. **Multi-media Screening Committee:**

It is also proposed that the Deputy Regional Administrator, as the primary enforcement contact within the Region, convene monthly a multi-media screening committee comprised of all key Regional managers on enforcement matters. This group would likely include the Regional Counsel, possibly with Regional Counsel Branch Chiefs, Enforcement Branch Chiefs and/or Program Division Directors, the Associate Regional Administrator, as appropriate, and Environmental Service Division Director. This group would review, in detail, cases identified as having a multi-media concern. Regional Counsels' offices can provide a useful bridge between the single and multi-media screening committees by helping to prepare agendas based upon those cases identified during single media screening as having multi-media enforcement potential. Review of cases by the multi-media screening group should not unduly delay processing of single-media cases. As a group, the multi-media committee also could review proposed judicial

enforcement actions for a pattern of strategic value, or areas missing a judicial presence.

Several Regions currently have this type of multi-media screening committee structure in place devoted to case screening. Other Regions have multi-media meetings with a broader agenda but at which these multi-media coordination issues may be discussed if they arise; still other regions are actively considering multi-media screening meetings. It is possible that the Regional Counsel could fulfill this function if there is sufficient capability to identify multi-media concerns, assisted with the proposed case worksheets. Nevertheless, the multi-media committee is recommended here to provide region-wide leadership that will facilitate a cross-media approach to facility non-compliance -- we believe it will best serve to meet the Administrator's goal of 25% multi-media cases. It also provides an opportunity for groups such as the ESDs and programs with broad authorities to offer new perspectives on how the agency might better address certain types of violations.

3. Criminal/Civil Integration Screening:

To assure proper integration of civil and criminal enforcement, we offer several approaches. Each includes timely and ongoing access to information for staff with criminal enforcement expertise in the review of cases with any criminal enforcement potential.

Ideally, the Special Agent-in-Charge (SAC)[6] their designees and/or the Regional Criminal Enforcement Counsel (RCEC) would be a part of the deliberations in the single media screening committees (see Chart 1b). However, in most Regions this would prove impractical given the number of programs meeting each month and the sizable number of violations being screened with no criminal enforcement potential. The Regions also could use the current routine meetings with the SAC or RAC and RCEC as a third level of case screening committee (see Chart 1a). The scope of review in most of these meetings has not been as broad as that proposed here. Specifically, this guidance envisions review of the full range of violations which have been identified through the civil enforcement process for criminal enforcement potential (in detail for those above a threshold with periodic reviews of the basis for threshold determinations) (see Attachment 4), review of criminal leads and investigations for priority, and review of the need for parallel or alternative civil enforcement. Another approach could provide a documented process of case-by-case consultation on any

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[6] As used in this guidance, "SAC" also includes Resident Agents-in-Charge, "RAC".

cases with criminal enforcement potential with either the SAC or RCEC (see Chart 1c). This would be supplemented with the use of the current routine reviews of the criminal enforcement docket. All three versions are presented in the Charts.

If a Region attempts to institute screening without face-to-face meetings, it will become even more important for the SAC and RCEC to be kept apprised of the status of regional enforcement cases to provide the necessary judgments on the agency's course of action in particular cases.

The challenge presented by criminal case screening is that it cannot be a one-time event. At any time during the development of a "civil" case, information gathering, discovery, etc., may disclose evidence of criminal conduct requiring the SAC or RCEC to coordinate with and seek a prosecutorial judgment by DOJ. Similarly, during the development of a "criminal" case OCI may develop evidence of sufficient environmental harm that would necessitate commencement of a civil action seeking injunctive relief, requiring consultation and coordination with regional technical program staff and ORC civil attorneys. The regional process should reflect this need for ongoing criminal/civil enforcement integration and appropriately caveat any determinations as to the preferred agency response based upon the stage of review and availability of evidence.

IV. Relationship Between Strategic Planning and Case screening

The more effectively we carry out the strategic planning function, the easier case screening will become. Through strategic planning, the Region can target, in advance, repeat violators for innovative settlement conditions or use of contractor listing, facilities deserving of multi-media inspections and follow up enforcement, geographic areas, pollutants, industries or facilities of concern. Further, a significant violation in one program may lead to a decision to investigate further for its multi-media case potential given the nature of the source and the violation. The least disruptive approach would stress early identification of such opportunities.

Regions also should make use of Headquarters targeting information and early identification of where judicial legal or program precedents are needed in a program area.

V. Oversight of the Screening Process

The Regions are asked to report on their approach to case screening in the FY 1991 Regional Enforcement Strategic Plan submission to OE at the end of the first quarter FY 1991. As the regional systems evolve over the year, we request that OE be kept

apprised of any changes. The regional systems should be fully operational by the end of the second quarter FY 1991.

In addition, our Regional Counsel audits, along with those we conduct in cooperation with the Headquarters program offices of regional program operations, will review implementation of this guidance, including use of case screening worksheets, and how effective different approaches are in meeting our screening objectives.

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In closing, enhanced enforcement case screening by the Regions, in conjunction with strategic planning, is central to meeting the challenges and achieving the new directions we have set for our enforcement program. The Administrator's goals for criminal enforcement and multi-media cases, outlined in his September 25, 1990 Address to the Senior Executive Service, make institution of effective screening all the more urgent. I look forward to continuing to work with the Regions in finding the most effective and efficient ways to see these activities implemented.

Attachments

cc: Deputy Assistant Administrators
Headquarters Compliance Directors
F. Henry Habicht II
Nancy Firestone
Daniel C. Esty

bcc: OE Managers

Chart 1a
RECOMMENDED REGIONAL ENFORCEMENT CASE SCREENING COMMITTEES

11/90	single media civil case screening	multi-media case screening	civil/criminal integration
who	Program Enforcement Branch / Section Chief Regional Counsel Branch Chief	Deputy Regional Administrator Regional Counsel Environmental Service Division Regional Division Directors or program enf. Branch or Section Chiefs: RC and Program	RC Criminal Enforcement SAIC/RAIC Regional Division Directors or Enforcement Branch/Section Chiefs
what	Violations potentially suitable for Federal Enforcement: e.g. AO and CD violations; State referrals; state-lead violations exceeding timely and appropriate response targets; repeat violators Application of Regional Thresholds and HQ Guidance	Cases w/multi-media violations Cases w/ multi-media impacts Cases w/ multi-media violation history Cases targeted for multi-media inspections	Criminal Leads Criminal Docket Potential criminal cases (civil docket in summary)
how often	monthly	monthly	monthly/as cases with criminal potential are identified
why	No Action/Admin/Judicial Enf. Potential criminal enforcement Application of innovative tools or settlement conditions Multi-media implications	Potential Consolidation of Multi-media cases Coordination of cases with multi-media impacts/settlements Review judicial case profile in general for strategic value Coordination of multi-media enforcement initiatives	Criminal leads for priority Criminal docket for civil enforcement requirement Selected individual cases for criminal case potential

Chart 1b

RECOMMENDED REGIONAL ENFORCEMENT CASE SCREENING COMMITTEES

11/90

	single media civil case screening	multi-media case screening
who	Program Enforcement Branch / Section Chief Regional Counsel Branch Chief RC Criminal Enforcement or SAIC/RAIC	Deputy Regional Administrator Regional Counsel Environmental Service Division Regional Division Directors or Program Enf. Branch or Section Chiefs: RC and Program RC Criminal Enforcement or SAIC/RAIC
what	Violations potentially suitable for Federal Enforcement: e.g. AO and CD violations; State referrals; state-lead violations exceeding timely and appropriate response targets; repeat violators Application of Regional Thresholds and HQ screening guidance	Cases w/multi-media violations Cases w/ multi-media impacts Cases w/ multi-media violation history Cases targeted for multi-media inspections
how often	monthly	monthly
why	No Action/Admin/Judicial Enf. Application of innovative tools or settlement conditions Multi-media implications Potential criminal enforcement Criminal leads for priority Criminal Docket for civil enforcement requirement	Potential Consolidation of Multi-media cases Coordination of cases with multi-media impacts/settlements Review judicial case profile in general for strategic value Coordination of multi-media enforcement initiatives

civil/criminal integration

Chart 1c

RECOMMENDED REGIONAL ENFORCEMENT CASE SCREENING COMMITTEES

11/90

	single media civil case screening	multi-media case screening
who	Program Enforcement Branch / Section Chief Regional Counsel Branch Chief	Deputy Regional Administrator Regional Counsel Environmental Service Division Regional Division Directors or Program Enf. Branch or Section Chiefs: RC and Program
what	Violations potentially suitable for Federal Enforcement: e.g. AO and CD violations; State referrals; state-lead violations exceeding timely and appropriate response targets; repeat violators Application of Regional Thresholds and HQ screening guidance	Cases w/multi-media violations Cases w/ multi-media impacts Cases w/ multi-media violation history Cases targeted for multi-media inspections
how often	monthly	monthly
why	No Action/Admin/Judicial Enf. Application of innovative tools or settlement conditions Multi-media implications Potential criminal enforcement	Potential Consolidation of Multi-media cases Coordination of cases with multi-media impacts/settlements Review judicial case profile in general for strategic value Coordination of multi-media enforcement initiatives

civil/criminal integration

- o Document consultation with criminal enforcement personnel on threshold cases with criminal enforcement potential
- o Use of routine meetings for review of criminal docket and leads

CHART 2: CURRENT REGIONAL SCREENING STRUCTURES

Regions	I	II	III	IV	V	VI	VII	VIII	IX	X
I. Single media meetings/ committees										
A. Who meets:										
Program Division Director								4	x	x
Program Branch/Section Chief for Enforcement	x	x	x	x	x	x	x	x	x	x
Regional Counsel Branch Chief	x	x	x	x	x	x	x	x	x	x
ESD	4			4			x	x		x
Criminal SAIC/RAIC/OCI				x						
DRA/RA			x				x	4		x
RC/DRC			x			x	x	4	x	x
B. How often:	mo	mo	mo	mo	mo	mo	mo	mo	mo	mo
C. Issues Addressed:	1									
Admin/Judicial Civil	x	x	x	x	x	x	x	x	x	x
Innovative tools/settlements	x						x	x		x
Criminal Enforcement potential	x		x		x		x	x	x	x
Multi-media potential/issues	x		x		x		x	x	x	x
II. Multi-media\ meetings/Committee (Civil)										
A. Who meets:										
DRA			x			3	3	x	3	x
RC	x	x	x			3	3	x	3	x
Division Directors						3	3	x	3	x
Program Branch/Section Chief for Enforcement		x	x		x			x		x
Regional Counsel Branch Chiefs	x	x	x		x			x		
ESD		4				3	3	x		x
Criminal SAIC/RAIC		x						x	3	
B. How often:	2mo	2mo	mo		2mo	mo	wk	Q	Q	mo
C. Issues Addressed:										
Admin/Jud Civil	x	x	2		x			x	3	
Innovative tools/settlements	x							x	3	x
Criminal Enforcement potential							3	x	3	x
Multi-media potential/issues	x	x			x		3	x	3	x
Data integration/information		x	x		x		x		3	x
III. Criminal/Civil Enforcement Relationship Meetings/ Committee										
A. Multi-media?	N	Y	N	N	N	Y	Y	Y	N	
B. Who meets:										
DRA		x	x		x	x	x	x		
RC/criminal attorney	x	x	x		x	x	x	x	x	
Division Director/Deputy Division Director	x	x			5	x	x			
Program Branch/Section Chief for Enforcement	x		x	x	5	x			x	
Regional Counsel Branch Chief				x			x		x	
ESD						x	x			
Criminal SAIC/RAIC	x	x	x	x	x	x	x	x	x	
C. How often:	mo	2mo	mo	mo	mo	mo	Q	mo	mo	
D. Issues Addressed:										
Civil Docket for Criminal				x	x	x	x	x	x	
Criminal Docket for Civil		x		x	x	x	x	x		
Priority of Leads		x	x	x	x			x		

Footnotes:

1) Worksheets foster consideration of these factors in all cases.
2) Only proposed judicial referrals are discussed.
3) Meeting is opportunity for screening but it is not sole purpose.
4) May attend as observer.
5) Meeting is expanded every other month to include specific program participation.

Attachment 1

Choosing between administrative or judicial enforcement

For reasons of efficiency, administrative enforcement will continue to be the norm in programs with adequate administrative enforcement penalty authority. Screening must provide the necessary impetus to evaluate whether cases which would otherwise be handled administratively, are deserving of judicial action. Factors to be included in a determination of whether judicial enforcement is appropriate include:

- the degree to which the case merits a strong signal of the agency's resolve in dealing with violations posing significant environmental harm or risk given the nature, magnitude, duration of the violation;

- the size of the proposed penalty, particularly in relation to any statutory caps;

- compliance history both within the program and in other programs with particular view toward the need for increased penalty assessment or judicial response to violations of Administrative Order and Consent Decree conditions;

- the need for the greater deterrent value of. judicial as compared to administrative enforcement in sending a message to the source or to the regulated community, particularly from the publicity surrounding judicial action, and including consideration of the expectation that the facility will or will not comply with an administrative order.

- whether the firm or source category is targeted by Headquarters or the Regions for coordinated enforcement initiatives.

- whether legal or program precedents are needed;

- whether the judiciary may be needed to oversee a particular remedy or to impose injunctive relief;

- where there is a repeat violator within or among media programs.

- whether consolidating multi-media violations require a judicial forum to join enforcement procedures.

- whether there is criminal enforcement potential (see attachment 4).

- need for extensive discovery which may be more available in judicial cases.

Attachment 2

Identifying candidates for innovative settlement terms or enforcement tools.

Each of the following innovative settlement conditions or enforcement tools should be explicitly considered and used in either administrative or judicial cases where the benefits could justify potential delays in case resolution or additional regional resources.

- **potential for waste minimisation or pollution prevention:** pollution prevention conditions in enforcement settlements are particularly encouraged where 1) elimination or substitution of chemicals offers the best chance to end recurring violations; 2) there would be no negative crossmedia impacts; there are known technological and economically feasible options for pollution prevention.

- **potential for leveraging the single enforcement action to reach the broader regulated community** through source outreach, communications and/or training opportunities. This is particularly encouraged where the category of source or type of violation is one which has a particular compliance or environmental problem or one which is difficult for the agency to detect;

- **need for correction of underlying management problems through the use of an environmental audit provision or use of contractor listing,** or of suspension and debarment warranted by the type of violation and compliance history;

- **potential value of contractor listing to correct a recurring or ongoing violation in air or water or suspension and debarment to address repeat violators in any program.**

Attachment 3

Ensuring a multi-media case screening perspective

1. Multiple violations at a single facility: The Regions should have a system in place for identifying violations in more than one program and for making explicit decisions as to the merits of consolidating cases or adjusting proposed settlement terms (e.g. penalty calculations and audit provisions) before commitments are made to pursue administrative or judicial enforcement in any one program.

2. Multi-media impacts of proposed settlement conditions: Violations may involve only one media program, but the remedies or the impacts may involve other programs, requiring permits or other approvals for implementation. The Region should have a system in place to identify such cases and to initiate the necessary coordination and support across divisional lines.

3. Multi-media compliance history: Regions should screen selected cases for facility compliance history in other programs as well as the program attempting to address a particular violation. Violators with a history of multi-media violations are candidates for increased penalty assessments and special settlement conditions such as environmental auditing to address underlying problems leading to a poor performance record. Also, because compliance monitoring is not always conducted at a frequency to allow detection of violations, multi-media violation history may be an indication of more significant media specific problems than those identified. Screening for multi-media facility violation history will be facilitated by the completion of OE's data integration project. Specific firms with a poor compliance record nationally may be identified by OE Headquarters targeting information and should be taken into account as well.

4. Selection of best statutory approach: Some environmental problems are best addressed by using other statutory provisions than those available within the program in which the violation was identified. The Region should establish procedures for identifying when these other statutory authorities should be considered and how such decisions are to be made. Problems posed by groundwater contamination, and toxic chemicals are prime examples.

5. Coordinated inspection planning/enforcement initiatives: Regional systems should provide a mechanism for deciding whether to initiate multi-media team inspections when investigating a violation in a single program. Such inspections would be initiated for prime candidates for possible multi-media case development. Systems should also provide for coordination of case screening considerations for multi-media enforcement initiatives.

Attachment 4

Integrating civil and criminal enforcement activities:

All violations ripe for possible federal enforcement with criminal enforcement potential should be reviewed for possible criminal violations; proposed criminal cases should likewise be reviewed for needed injunctive relief. Criminal enforcement cases with multi-media aspects should be identified with systems in place to coordinate case development, sentencing and probation terms.

1. Reviewing proposed violations for criminal enforcement potential.

There should be some opportunity for the SAC and/or RCEC to review all violations beyond a certain threshold for possible criminal enforcement. The threshold for review by personnel with criminal enforcement responsibility is as follows:

The presence of both (a) misconduct which threatens accomplishment of a specific nationwide or regional EPA program goal or priority (determined by reading EPA's Operating Year Guidance, as supplemented by the stated priorities of the EPA Regions), and (b) any one or more factors indicating aggravated environmental misconduct, specifically, one or more of the following:

(1) history of repeated violations;

(2) potentially deliberate, knowing or willful misconduct;

(3) concealment of misconduct or falsification of required records, including failure to report where another aggravating factor is present;

(4) tampering with monitoring or control equipment;

(5) business operations of pollution-related activities without a required permit, license, manifest, or other authorizing documentation; or

(6) actual illegal discharge, release, or emission, or other facts demonstrating the presence or potential for harm to the environment or human health.

The larger the number of EPA priorities threatened, or number of aggravating factors present, the less serious any single priority or factor must be.

Regional program staff and attorneys should be encouraged to discuss any potential criminal enforcement cases with the RCEC and/or SAC. In general, the planning process for identifying

program priorities for criminal enforcement is described in a memorandum from Edward E. Reich, March 28, 1989, entitled, "Planning and Priority-Setting in the Criminal Enforcement Program."

2. Reviewing criminal enforcement leads/investigations for program priority.

With the growth of the criminal enforcement program, it is essential that communications between the criminal and civil enforcement program provide an understanding of how criminal enforcement can most effectively further a program' s environmental and compliance goals. However, Special Agents must bring to the attention of DOJ any substantial evidence of a crime by an identifiable suspect, and DOJ exercises independent prosecutorial judgment with regard to all evidence of criminality which comes to their attention. Despite the caveat that only DOJ may terminate a formal criminal investigation matter, the regional program and Regional Criminal Enforcement Counsel must be asked by the SAC to screen and comment on the potential benefits of all cases deriving from leads and leads received by the Special Agents. Such consultation is not intended to preclude initiation of investigatory activities needed to characterize the situation, for screening purposes.

If the Regional program or legal personnel involved in screening believe that a different case is a greater investigative priority or that a particular case is not appropriate for prosecution, while at the same time DOJ is requesting OCI's investigative assistance on that particular case that it views as appropriate for prosecution (or the SAC disagrees with the EPA screening committee or already has evidence of criminality), the SAC is not free to act unilaterally. Instead, the SAC shall activate the internal EPA dispute resolution procedure before referring the case to DOJ or seeking from DOJ a prosecutive determination. The outcome of the EPA dispute resolution procedure determines whether EPA will not invest further resources in a criminal investigation, which DOJ then may decide to pursue independently.

3. Reviewing the criminal case docket for the need for parallel civil proceedings.

If there is the possibility of: 1) an imminent and substantial endangerment, and/or 2) apparent violation involving an ongoing discharge or release that may cause harm during the processing of a criminal enforcement action, it is essential that the Regional program office and ORC civil personnel be informed by criminal enforcement personnel in a timely manner. The program should have an opportunity to request either that a parallel civil enforcement action be pursued, that criminal action not be pursued in favor of civil action, or that the program be closely involved in the

progress of the criminal enforcement action, including the design of terms of probation and recommended sentencing and contractor listing or suspension and debarment considerations.

4. Reviewing criminal enforcement cases for sentencing provisions and potential probation requirements

The screening process for integrating criminal and civil enforcement needs to include a review of the criminal docket by the program and regional counsel staff of affected offices to assist in developing and recommending terms for sentencing and probation that properly reflect the source's compliance history and environmental concerns.

Based on information as of (date) revised. revised

Name of Violator

Address

Violation.

Type of Business/Manufacturing Process: (SIC?)
(including indication of whether violator is a federal contractor/owner/operator or American Indian tribal gov't

Repeat Violator in same program? Identify violations:

Recurring Violation ?
Continuing Violation ?

Violations under other statutes or programs?
statute: Violation: current enforcement?
(known or suspected)

Multi-media impacts of violation or remedy?

Toxics Release Inventory:
media: total: chemical substances:

Pollution Prevention Potential:
a. Toxics Release Inventory reduction potential? ____
b. Recurring violation amenable to pp? ____
c. Known feasible pp option? ____
d. Program guidance/other? ____

Environmental Auditing Conditions Potential:
a. Underlying management problems likely? ____
b. Likely pattern of violation at other facilities? ____

Contractor Listing Potential:
a. Recurring/continuing viol. of CAA/CWA ____
b. Prior or existing enforcement Action ____
c. Multiple viol. facilities by same owner ____

Suspension and Debarment:
a. Poor Performance ____
b. Misconduct/Lack of Integrity ____
c. Repeat Violators ____

Civil Judicial Enforcement Potential:
a. legal or program pre[illegible] ____
b. need to show resolve[illegible] harm/risk ____
c. repeat or multi-medi[illegible] ____
d. need deterrence mess[illegible] judicial action ____
e. judiciary needed:oversee remedy/impose relief ____
f. desire to consolidate multi-media case ____
g. substantial penalty ____

Multi-media Potential:
a. Current Violations ____
b. Multi-media impacts ____
c. Multi-media History of non compliance ____
d. Use of other authorities ____

Innovative Settlement Approaches:
a. ADR potential ____
b. Field Citation potential (notice with settlement) ____

Leveraging Broad Deterrence:
a. Industrial sector w/ compliance problems? ____
b. Likelihood that training, publicity, technical assistance would enhance compliance? ____
c. Critical Habitat/geographic area? ____

Criminal Enforcement Potential: 2
a. potential document falsification
b. unauthorized discharge/emission/shipment or release
c. monitoring or control equipment tampering
d. potentially deliberate/intentional/knowing
e. repeated violations
f. priority violation for criminal enforcement

1 This is a pre-decisional document protected by the deliberative process and attorney work product privileges (and may also be a privileged attorney-client communication). Conclusions or recommendations are intended solely as preliminary information for government personnel. This worksheet contains tentative conclusions and staff-level recommendations and does not create any rights, substantive or procedural, or defenses, as they are not binding on the Agency or DOJ.

2 See also civil judicial enforcement potential criteria which may favor either a civil or a criminal enforcement response, choice between those options being a matter of degree. Evidence of any of these factors,whenever identified, will be screened by the appropriate representatives of the Office of Criminal Investigations and regional criminal enforcement attorney.

CM-3
GM #20

GUIDANCE ON EVIDENCE AUDITS OF CASE FILES

EPA GENERAL ENFORCEMENT POLICY #GM - 20

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: DEC 30 1983

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

DEC 30 1983

MEMORANDUM

SUBJECT: Guidance for Evidence Audit of Case Files for Civil Referrals

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

TO: Assistant Administrators
Regional Administrators, Regions I-X
Regional Division Directors, Regions I-X
Regional Counsels, Regions I-X

I recently forwarded to you a draft policy relating to the performance of an evidence audit in all cases which were to be referred to Headquarters for possible judicial enforcement, and invited comments upon that draft policy.

I have received comments from many of you, and have considered them carefully. Most of the comments were directed to the requirement that evidence audits be mandatory in all cases which were about to be referred to Headquarters. While I firmly believe that evidence audit would be useful in all cases, I agree that it should not be mandatory. I have, therefore, revised the policy so that those cases which, in the opinion of the Regional Administrator, are sufficiently complex or involve substantial quantities of documents, may be subjected to an evidence audit before referral at the option of the Regional Administrator. After referral, I may order an evidence audit should I believe one to be warranted.

Attached is the final policy on evidence audits which incorporates the approach described above. Your comments on the draft were appreciated, and I would welcome additional suggestions as experience with evidence auditing is gained under this policy.

Attachment

cc: Director, NEIC
Deputy Administrator

GUIDANCE FOR EVIDENCE AUDIT OF CASE FILES FOR CIVIL REFERRALS

INTRODUCTION

Cases developed by EPA, pursuant to the environmental statutes, and referred to the Department of Justice for potential civil litigation, must be based upon rigorously documented evidence and supporting data in order to minimize delay in filing, facilitate discovery proceedings, present a convincing case for the EPA and DOJ attorneys engaged in pre-trial negotiations, and finally, to prevail in the courtroom. EPA Headquarters and Regional staffs have demonstrated widely varying approaches to the provision of well-ordered referral packages and the supporting documentation.

The types and volume of documents relating to a case are often overwhelming. For instance, a single hazardous waste case may involve 100,000 or more documents. The attorneys are confronted with difficult tasks of assembling and organizing all documents, preparing witness lists, and extracting information necessary to conduct interrogatories and depositions. Documents supporting EPA civil referrals may originate in Regional and Headquarters program offices, State files and/or contractors performing support services for the Agency. Records obtained from the prospective defendants are often so voluminous and/or disorganized that

it is difficult for the EPA/DOJ case management team to effectively review them. Lack of sufficient assembly and organization of this material becomes obvious at the time of discovery (production of documents) or during settlement and negotiation discussions. The consequences may include unknowingly exposing case strategy, inadvertently releasing privileged or confidential material, or being unaware of documents that could strengthen or weaken the case. The Agency position is vulnerable to attack if the EPA/DOJ case management team is not assured of the integrity of the supporting documentation, as well as a case file that is organized for rapid and efficient access. Indeed, attack of the government's documentation and procedural weaknesses is now being advocated in journals and papers of the legal profession as a tactic for defending attorneys.

Evidence Auditing

An evidence audit includes the review, inventory and organization of the documents that make up a case file. The audit of a simple case may involve only the assembly and handwritten compilation of the documents present and a review of the case files to ensure that all pertinent documents are present. The audit of a highly complex case involving large numbers of documents may involve, in addition to assembly and inventory, computerized

listing and sophisticated categorization, construction of evidence profiles, and elaborate formatting as an aid to understanding the material content of the documents. These audits assist case attorneys in their preparations for pre-trial and trial phases of Agency litigation efforts. The evidence audit system is designed to: (1) establish an overall case document control system, (2) provide quick and complete access to records, and (3) provide a means for assuring admissibility of the evidence. The system is flexible to accommodate the increase of material as the case progresses and is adaptable to changes in case strategy.

With the advent of the hazardous waste enforcement programs and the conduct of a major portion of the Agency's hazardous waste site investigations by contractors, the National Enforcement Investigations Center was assigned responsibility for making evidence audits available to Regional and Headquarters staffs for enforcement case referrals developed as a result of these activities. Accordingly, an evidence audit capability has now been available for approximately three years and is extensively used and endorsed by Regional and Headquarters case management teams who have availed themselves of this service.

Evidence audits lend a major advantage to the case development process; enhancing the supportive rationale and development of legal strategy of cases; detecting flaws in evidence

with timeliness that permits repair; the avoidance of presenting questionable evidence in the court room; and perhaps most importantly, conserving the time and case-handling capacities of the case attorneys and Regional and Headquarters Technical staff.

PROPOSED PROCEDURE

It is recognized that EPA cases vary greatly in terms of complexity involving volume and types of records generated. The scope of the audit should be tailored to the complexity of the case and to the number of documents involved.

Because each case is unique, and not all cases may require an evidence audit, the decision on whether an evidence audit will be performed, either for cases referred directly to the Department of Justice by the Region or before referral to Headquarters Office of Enforcement and Compliance Monitoring prior to transmittal to the Department, will be made by the Regional Administrator or his/her designee. For those cases referred to the Assistant Administrator for Enforcement and Compliance Monitoring, the Assistant Administrator may require an evidence audit after referral by the Region and prior to transmittal to the Department of Justice, should it become apparent during the review process that such an audit is necessary. In general, the audits should include:

- o document assembly
- o document organization and review

- o evidence profiles
- o document storage and retrieval

Each of these elements is discussed briefly in the following sections.

Document Assembly

The case management team is responsible for identifying all EPA and contractor groups generating records for the case. Each of these organizational components should be instructed to gather and transmit complete files to the Regional case attorney or Headquarters case attorney (for nationally managed cases). Continuing investigation and data collection, if any, should be described in the transmittal memo from the document generating group to the case management team and a date specified when the remaining documents will be transmitted. The attorney should also gather all of the documents obtained from the prospective defendant(s) and place them in one location for review.

The NEIC Contract Evidence Audit Team (CEAT) can provide assistance to Regional and/or Headquarters case management teams for identification of organizational elements generating documents participating in the case and to track receipt of records. The team can also assist in the assembly of documents.

Document Organization and Review

This process establishes a complete case file of readily retrievable records. The case management team decides on an organizational format. A variety of formats is available (chronological, by subject matter, author, recipient, type of document, etc.). Once this decision is made, the documents are examined by the Evidence Audit Team and placed in the proper order. Each document is stamped with a serial number and pertinent identifying information is recorded on an inventory sheet. Computer services enhance this effort and can provide keyword search capability. Computerized document databases are accessible to all members of the case management team and printouts can be provided to facilitate document retrieval. Databases are secured and access is limited to those persons authorized by the case management team. In addition to describing each document, the review process is designed to identify originals, duplicates, confidential business information, enforcement sensitive records, privileged material and evidentiary records.

Files obtained from the prospective defendant(s) are also organized and reviewed in a similar manner. As new documents are generated or received, they are added to the system.

Evidence Profiles

Evidence profiles are graphic or narrative presentations of the history and chain-of-custody of evidence from the time of collection through final disposition. They are particularly useful for demonstrating integrity of samples and analyses where multiple laboratories, field teams, or other entities are involved. Field and laboratory records must be located and audited. Information documenting the transfer, handling, and storage of samples is extracted and summarized. The profile identifies the following:

- when evidence was collected
- who collected it
- all transfers of custody
- when received by a laboratory
- who received it
- how it was secured
- who performed analytical tasks
- when tasks occurred
- where samples are stored after analysis

The source and serial number of documents containing this information is also recorded. This procedure enables the case attorney to assess the adequacy of sampling and analysis records and to rehabilitate deficient areas in the paper trail. The goal is to demonstrate integrity of the evidence in order to arrive at a stipulation for uncontested entry of the data.

Document Storage and Retrieval

Completed files must be controlled to provide quick and complete access to the documents and to prevent deterioration of the filing system. Document control procedures must be followed to keep track of the location and distribution of all records. A document control officer (DCO) or the case attorney must assume this responsibility. Files should be securely stored and made available only on a check-out basis. Computerized inventories enable multiple users of the files to identify documents they need to access.

The NEIC, through its evidence audit capability has developed an additional litigation support service to assist Regional case management teams with large and complex cases. The procedures provide for assembly of records, categorizing, stamping, and inventorying the documents, and making microfiche copies. A computerized listing of the documents is prepared which includes the following information:

- document control number
- document date
- document type
- source of document
- author
- recipient
- title or subject

Information retrieval can be selected on any of these categories. Complete microfiche sets can be provided to all members of the litigation team and hard copies can be made available as needed.

This procedure enables the team to work with the information while keeping the original files intact.

The evidence audit procedures described above are intended to lead to admissibility of evidence and to assure that supporting documents for allegations listed in the complaint are controlled and available.

OPERATIONAL OUTLOOK

Based on historical data, completion of evidence audits in response to requests for assistance from the NEIC Evidence Audit Team can be expected to be from two weeks for cases involving small numbers of documents to four to six weeks for complex cases with large numbers of documents.

During fiscal year 1984, the NEIC Evidence Audit Unit can assist Regions and Headquarters elements in establishment and implementation of internal document control and evidence audit procedures as requested.

To secure evidence audit services, the Regional Administrator or his/her designee should contact either of the two Deputy Project

Officers (Mr. Robert Laidlaw or Ms. Geraldine Hilden) at FTS 234-4656 to describe the nature of the case and documents and work out schedules and logistics. The requestor should then confirm the request, in writing, to the DPO.

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

IN. 1-1
GM #5

11 APR 1979

MEMORANDUM

OFFICE OF ENFORCEMENT

TO: Regional Administrators
Surveillance and Analysis Division Directors
Enforcement Division Directors

FROM: Assistant Administrator
for Enforcement

SUBJECT: Conduct of Inspections After the Barlow's Decision

I. Summary

This document is intended to provide guidance to the Regions in the conduct of inspections in light of the recent Supreme Court decision in Marshall v. Barlow's, Inc., ___U.S.___, 98 S. Ct. 1816 (1978). The decision bears upon the need to obtain warrants or other process for inspections pursuant to EPA-administered Acts.

In Barlow's, the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant.

In summary, Barlow's should only have a limited effect on EPA enforcement inspections:

- o Inspections will generally continue as usual;
- o Where an inspector is refused entry, EPA will seek a warrant through the U.S. Attorney;
- o Sanctions will not be imposed upon owners of establishments who insist on a warrant before allowing inspections of the non-public portions of an establishment.

The scope of the Barlow's decision is broad. It affects all current inspection programs of EPA, including inspections conducted by State personnel and by contractors. The Agency's procedures for inspections, particularly where entry is denied, were largely in accord with the provisions of Barlow's before the Supreme Court issued its ruling. Nevertheless, a number of changes in Agency procedure are warranted. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this document.

This document 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.

II. Conduct of Inspections

The following material examines the procedural aspects of conducting inspections under EPA-administered Acts. Inspections are considered in three stages: (1) preparation for inspection of premises, (2) entry onto premises, and (3) procedures to be followed where entry is refused.

A. Preparation

Adequate preparation should include consideration of the following factors concerning the general nature of warrants and the role of personnel conducting inspections.

(1) Seeking a Warrant Before Inspection

The Barlow's decision recognized that, on occasion, the Agency may wish to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. Such a warrant may be necessary when surprise is particularly crucial to the inspection, or when a company's prior bad conduct and prior refusals make it likely that warrantless entry will be refused. Pre-inspection warrants may also be obtained where the distance to a U.S. Attorney or a magistrate is considerable so that excessive travel time would not be wasted if entry were denied. At present, the seeking of such a warrant prior to an initial inspection should be an exceptional circumstance, and should be cleared through Headquarters. If refusals to allow entry without a warrant increase, such warrants may be sought more frequently. (For specific instructions on how to obtain a warrant, see Part D.)

(2) Administrative Inspections v. Criminal Investigations

It is particularly important for both inspectors and attorneys to be aware of the extent to which evidence sought in a civil inspection can be used in a criminal matter, and to know when it is necessary to secure a criminal rather than a civil search warrant. There are three basic rules to remember in this regard: (1) If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, an administrative inspection (civil) warrant may be used; (2) if the inspection is in fact intended, in whole or in part, to gather evidence for a possible criminal prosecution, a criminal search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; and (3) evidence obtained during a valid civil inspection is generally admissible in criminal proceedings. These principles arise from the recent Supreme Court cases of Marshall v. Barlow's, Inc., supra; Michigan v. Tyler, ___U.S.___, 98 S.Ct. 1942 (1978); and U.S. v. LaSalle National Bank, ___U.S.___, 57 L. Ed. 2d 221 (1978). It is not completely clear whether a combined investigation for civil and criminal violations may be properly conducted under a civil or "administrative" warrant, but we believe that

a civil warrant can properly be used unless the intention is clearly to conduct a criminal investigation.

(3) The Use of Contractors to Conduct Inspections

Several programs utilize private contractors to aid in the conduct of inspections. Since, for the purpose of inspections, these contractors are agents of the Federal government, the restrictions of the Barlow's decision also apply to them. If contractors are to be conducting inspections without the presence of actual EPA inspectors, these contractors should be given training in how to conduct themselves when entry is refused. With respect to obtaining or executing a warrant, an EPA inspector should always participate in the process, even if he was not at the inspection where entry was refused.

(4) Inspections Conducted by State Personnel

The Barlow's holding applies to inspections conducted by State personnel and to joint Federal/State inspections. Because some EPA programs are largely implemented through the States, it is essential that the Regions assure that State-conducted inspections are conducted in compliance with the Barlow's decision, and encourage the State inspectors to consult with their legal advisors when there is a refusal to allow entry for inspection purposes. State personnel should be encouraged to contact the EPA Regional Enforcement Office when any questions concerning compliance with Barlow's arise.

With regard to specific procedures for States to follow, the important points to remember are: (1) The State should not seek forcible entry without a warrant or penalize an owner for insisting upon a warrant, and (2) the State legal system should provide a mechanism for issuance of civil administrative inspection warrants. If a State is enforcing an EPA program through a State statute, the warrant process should be conducted through the State judicial system. Where a State inspector is acting as a contractor to the Agency, any refusal to allow entry should be handled as would a refusal to an Agency inspector as described in section II.B.3. Where a State inspector is acting as a State employee with both Federal and State credentials, he should utilize State procredures unless the Federal warrant procedures are more advantageous, in which case, the warrant should be sought under the general procedures described below. The Regions should also assure that all States which enforce EPA programs report any denials of entry to the appropriate Headquarters Enforcement Attorney for the reasons discussed in section II.B.4.

B. Entry

(1) Consensual Entry

One of the assumptions underlying the Court's decision is that most inspections will be consensual and that the administrative inspection framework will thus not be severely disrupted. Consequently, inspec-

tions will normally continue as before the Barlow's decision was issued. This means that the inspector will not normally secure a warrant before undertaking an inspection but, in an attempt to gain admittance, will present his credentials and issue a notice of inspection where required. The establishment owner may complain about allowing an inspector to enter or otherwise express his displeasure with EPA or the Federal government. However, as long as he allows the inspector to enter, the entry is voluntary and consensual unless the inspector is expressly told to leave the premises. On the other hand, if the inspector has gained entry in a coercive manner (either in a verbal or physical sense), the entry would not be consensual.

Consent must be given by the owner of the premises or the person in charge of the premises at the time of the inspection. In the absence of the owner, the inspector should make a good faith effort to determine who is in charge of the establishment and present his credentials to that person. Consent is generally needed only to inspect the non-public portions of an establishment - i.e., any evidence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

(2) Withdrawal of Consent

The owner may withdraw his consent to the inspection at any time. The inspection is valid to the extent to which it has progressed before consent was withdrawn. Thus, observations by the inspector, including samples and photographs obtained before consent was withdrawn, would be admissible in any subsequent enforcement action. Withdrawal of consent is tantamount to a refusal to allow entry and should be treated as discussed in section II.B.3. below, unless the inspection had progressed far enough to accomplish its purposes.

(3) When Entry is Refused

Barlow's clearly establishes that the owner does have the right to ask for a warrant under normal circumstances.[1] Therefore, refusal to allow entry for inspectional purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of a warrant and one of the exemptions discussed in Part C does not apply. If the owner were to allow the inspector to enter his establishment only in response to a threat of enforcement liability, it is quite possible that any evidence obtained in such an inspection would be inadmissible. An inspector may, however, inform the owner who refuses entry that he intends to seek a warrant to compel the inspection. In any event, when entry is

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1 FIFRA inspections are arguably not subject to this aspect of Barlow's See discussion, p. 5 and 6.

refused, the inspector should leave the premises immediately and telephone the designated Regional Enforcement Attorney as soon as possible for further instructions. The Regional Enforcement Attorney should contact the U.S. Attorney's Office for the district in which the establishment desired to be inspected is located and explain to the appropriate Assistant United States Attorney the need for a warrant to conduct the particular inspection. The Regional Attorney should arrange for the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided in the appendix to this document.

(4) Headquarters Notification

It is essential that the Regions keep Headquarters informed of all refusals to allow entry. The Regional Attorney should inform the appropriate Headquarters Enforcement Attorney of any refusals to enter and should send a copy of all papers filed to Headquarters. It is necessary for Headquarters to monitor refusals and Regional success in obtaining warrants to evaluate the need for improved procedures and to assess the impact of Barlow's on our compliance monitoring programs.

C. Areas Where a Right of Warrantless Entry Still Exists

1. Emergency Situations.

In an emergency, where there is no time to get a warrant, a warrantless inspection is permissible. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Supreme Court states that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations". Nothing stated in Barlow's indicates any intention by the court to retreat from this position. The Regions will always have to exercise considerable judgment concerning whether to secure a warrant when dealing with an emergency situation. However, if entry is refused during an emergency, the Agency would need the assistance of the U.S. Marshal to gain entry, and a warrant could probably be obtained during the time necessary to secure that Marshal's assistance.

An emergency situation would include potential imminent hazard situations, as well as, situations where there is potential for destruction of evidence or where evidence of a suspected violation may disappear during the time that a warrant is being obtained.

(2) FIFRA Inspections.

There are some grounds for interpreting Barlow's as not being applicable to FIFRA inspections. The Barlow's restrictions do not apply to areas that have been subject to a long standing and pervasive history

of government regulation. An Agency administrative law judge held recently that even after the Barlow's decision, refusal to allow a warrantless inspection of a FIFRA regulated establishment properly subjected the owner to civil penalty. N. Jonas & Co., Inc., I.F. & R Docket No. III-121C (July 27, 1978). For the present, however, FIFRA inspections should be conducted under the same requirements applicable to other enforcement programs.

(3) "Open Fields" and "In Plain View" situations.

Observation by inspectors of things that are in plain view, (i.e., of things that a member of the public could be in a position to observe) does not require a warrant. Thus, an inspector's observations from the public area of a plant or even from certain private property not closed to the public are admissible. Observations made even before presentation of credentials while on private property which is not normally closed to the public are admissible.

D. Securing a Warrant

There are several general rules for securing warrants. Three documents have to be drafted: (a) an application for a warrant, (b) an accompanying affidavit, and (c) the warrant itself. Each document should be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document.

The application for a warrant should generally identify the statutes and regulations under which the Agency is seeking the warrant, and should clearly identify the site or establishment desired to be inspected (including, if possible, the owner and/or operator of the site). The application can be a one or two page document if all of the factual background for seeking the warrant is stated in the affidavit, and the application so states. The application should be signed by the U.S. Attorney or by his Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial documents. Each affidavit should consist of consecutively numbered paragraphs, which describe all of the facts that support warrant issuance. If the warrant is sought in the absence of probable cause, it should recite or incorporate the neutral administrative scheme which is the basis for inspecting the particular establishment. Each affidavit should be signed by someone with personal knowlege of all the facts stated. In cases where entry has been denied, this person would most likely be the inspector who was denied entry. Note that an affidavit is a sworn statement that must either by notarized or personally sworn to before the magistrate.

The warrant is a direction to an appropriate official (an EPA inspector, U.S. Marshal or other Federal officer) to enter a specifically described location and perform specifically described inspection functions. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, any articles to be seized, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge The draft warrant should be ready for the magistrate's signature at the time of submission via a motion to quash and suppress evidence in Federal District court. Once the magistrate signs the draft warrant, it is an enforceable document. Either following the magistrate's signature or on a separate page, the draft warrant should contain a "return of service" or "certificate of service". This portion of the warrant should indicate upon whom the warrant was personally served and should be signed and dated by the inspector. As they are developed, more specific warrant-issuance documents will be drafted and submitted to the Regions.

E. Standards or Bases for the Issuance of Administrative Warrants.

The Barlow's decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of traditional criminal probable cause, 2) of civil probable cause, or 3) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme.

1. Civil specific probable cause warrant.

Where there is some specific probable cause for issuance of a warrant, such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the U.S. Attorney in detail the basis for this probable cause.

The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.

2. Civil probable cause based on a neutral administrative inspection scheme.

Where there is no specific reason to think that a violation has been committed, a warrant may still be issued if the Agency can show that the establishment is being inspected pursuant to a neutral administrative scheme. As the Supreme Court stated in Barlow's:

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]". A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various type of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employers Fourth Amendment rights."

Every program enforced by the Agency has such a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. Also, a scheme in which one out of every three known PCB transformer repair shops is inspected on an annual basis is satisfactory, as long as, neutral criteria such as random selection are used to select the individual establishment to be inspected. Headquarters will prepare and transmit to the Regions the particular neutral administrative scheme under which each program's inspections are to be conducted. Inspections not based on specific probable cause must be based on neutral administrative schemes fr a warrant to be issued. Examples of two neutral administrative schemes are provided in the appendix. (Attachments II and III)

The Assistant U.S. Attorney will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The Assistant U.S. Attorney will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or Federal district court judge.[2]

3. Criminal Warrants.

Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector and the Regional Attorney should request that the U.S. Attorney seek a criminal warrant under Rule 41 of the Federal Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered. Agency policy on the seeking of criminal warrants has not been affected by Barlow's. The

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[2] The Barlow's decision states that imposing the warrant requirement on OSHA would not invalidate warrantless search provisions in other regulatory statutes since many such statutes already "envision resort

distinction between administrative inspections and criminal warrant situations is discussed in Section II.A.2.

F. Inspecting with a Warrant

Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal when he goes to serve the warrant on the recalcitrant owner. The inspector should never himself attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the Assistant U.S. Attorney and the designated Regional Attorney. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. Thus, if a refusal or threat to refuse occurs, the inspector should abide by the U.S. Marshal's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

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2 continued from page 8.

to Federal court enforcement when entry is refused". There is thus some question as to whether the existence of a non-warrant Federal court enforcement mechanism in a statute requires the use of that mechanism rather than warrant issuance. We believe that the Barlow's decision gives the agency the choice of whether to proceed through warrant issuance or through an application for an injunction, since the decision is largely based on the fact that a warrant procedure imposes virtually no burden on the inspecting agency. In addition, an agency could attempt to secure a warrant prior to inspection on an ex parte basis, something not available under normal injunction proceedings. Several of the acts enforced by EPA have provisions allowing the Administrator to seek injunctive relief to assure compliance with the various parts of a particular statute. There may be instances where it would be more appropriate to seek injunctive relief to gain entry to a facility than to attempt to secure a warrant for inspection, although at this point we cannot think of any. However, since the warrant process will be far more expeditious than the seeking of an injunction, any decision to seek such an injunction for inspection purposes should be cleared through appropriate Headquarters staff.

G. Returning the Warrant.

After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant, (i.e., whoever performs the inspection), must sign the return of service form indicating to whom the warrant was served and the date of service. He should then return the executed warrant to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

III. Conclusion

Except for requiring the Agency to formalize its neutral inspection schemes, and for generally ending the Agency's authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections, Barlow's should not interfere with EPA enforcement inspections.

Where there is doubt as to how to proceed in any entry case, do not hesitate to call the respective Headquarters program contact for assistance.

Marvin B. Durning

Marvin B. Durning

APPENDIX

The Appendix contains three attachments.

Attachment I 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 occured. In particular, care should be taken in spelling out the specific facts that give rise to probable cause. Note also, that the scope of the warrant is carefully articulated.

Attachment II is a warrant application, affidavit and warrant to conduct an inspection in which the establishment to be inspected has been selected under a neutral administrative inspection scheme. Note the extraordinary detail of the administrative scheme describe in paragraphs 8-20 of the affidavit. Such detail should not be necessary for most EPA neutral administrative inspection schemes. Note also the executed inventory and return of service forms attached to Attachment II.

Attachment III contains a neutral administrative scheme for CFC inspections. In implementing such a scheme, the Regions must still utilize neutral criteria in selecting the individual establishment to be inspected.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

IN THE MATTER OF	:	
CLEAN LAND AIR AND WATER,	:	NO. 78-43 m
CORPORATION, D/B/A CLAW;	:	
ROLLINS ENVIRONMENTAL SERVICES	:	APPLICATION FOR WARRANT TO
OF LOUISIANA INCORPORATED;	:	ENTER, INSPECT, PHOTOGRAPH,
ENVIRONMENTAL PURIFICATION	:	SAMPLE, COLLECT INFORMATION,
ADVANCEMENT INCORPORATED;	:	INSPECT AND COPY RECORDS
EPA, INC.; IN IBERVILLE	:	
PARISH, LOUISIANA	:	

TO THE UNITED STATES MAGISTRATE, by the United States of America, Environmental Protection Agency, through James Stanley Lemelle, Assistant United States Attorney, for the Middle District of Louisiana, hereby applies for a warrant pursuant to section 308 of the Federal Water Pollution Control Act, 33 U.S.C. 1318, and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6927, for the purpose of conducting an inspection as follows:

To enter to, upon, or through the premises of a waste disposal operation known by various names including the CLAW facility, which consists of three sites, to wit: an injection well site, a field office and storage tanks, and waste pits and landfill site located in Iberville Parish, Louisiana in or near the Bayou Sorrells community. The facility can be reached for disposal purposes by truck or barge. The ownership and operation of the CLAW facility waste disposal operation has been known by several different names, to wit: Clean Land Air Water Corporation (CLAW); EPA, Incorporated; Environmental Purification Advancement; Environmental Purification Abatement (EPA, Inc.) and Rollins Environmental Services of Louisiana. A company letterhead using the names of CLAW and EPA, Inc. lists an address of Route 2, Box 380B, Plaquemine, Louisiana 70764. It is reported in the newspapers and elsewhere, that on July 28, 1978 - three days after the death of the truck driver on the CLAW facility - that the injection well on the CLAW facility was sold to the Rollins Environmental Services of Louisiana. Unsubstantiated reports say that CLAW no longer has any

[illegible] ownership of EPA, Inc. and the injection well under the ownership of Rollins. CLAW and EPA, Inc. are reported to be different company and/or corporate names for the same people. Despite these possible ownership changes, the CLAW facility apparently continues to be operated as a single unit. Further, it is reported that CLAW or Rollins is under a federal court order to honor its contract with a client to accept waste. For purposes of this application, affidavit and warrant, the three sites and all operations will be referred to as CLAW.

The field office and storage tanks are in or on the edge of Bayou Sorrells; the injection well site is about 1.6 miles northwest of Bayou Sorrells on the road; the waste open pits-landfills are located approximately 7.7 miles northwest of Bayou Sorrals on the levee road. The address of the CLAW facility is Clean Land Air Water Corporation EPA Incorporated, Route 2, Box 380 B, Plaquemine, Louisiana. These CLAW facilities are known to EPA inspectors and well known to local people.

The CLAW facility is an establishment subject to the requirements and prohibitions of the Federal Water Pollution Control Act, including but not limited to sections 301, 308 and 311, and sections 3007 and 7003 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 et seq.)

On Friday, August 4, 1978, Edward McHam, an employee of the U.S. Environment Protection Agency, requested permission to enter and inspect the said premises. Despite such request, employees of said facility refused to grant access to said premises to Mr. McHam, a duly authorized inspector of the Environmental Protection Agency.

The determination to inspect said premises was based on the following:

The sheriff's office of Iberville Parish requested EPA's assistance and reported a death at said premises.

Local unrest and fear of the facility was reported to the Enforcement Division of Region VI, Dallas, Texas on Tuesday, August 1, 1978 and EPA was requested to inspect the facility which is a disposal site for chemical wastes and numerous oil wastes of a hazardous and toxic nature.

Much local unrest, and agitation and complaints have been reported on television and in newspapers concerning the operation of the CLAW facility as well as the untimely death of a 19 year old truck driver at said facility while he was discharging waste into an open pit at the facility. The death was possibly caused by his inhalation of toxic fumes caused by a reaction of mixing incompatible toxic wastes in the open pit. Allegedly two eye witnesses to the death of the driver reported the presence of choking fumes in the area when they opened the doors to their truck to assist the driver who died. They also reported that his truck was parked at the edge of the open pit truck ramp, with doors open at the time of his death. Subsequent laboratory tests of waste taken from the pits have shown waste materials present in the pit, which, when mixed with the spent caustic being discharged from the driver's truck could have caused the death. Final autopsy reports are still pending. It is reported and alleged that CLAW facility officials directed the driver to take and discharge his wastes at the truck ramp in the open pit, rather than in the injection well. Discharging toxic waste into an open pit, at the edge of a pit, is not a safe, desirable, or acceptable practice since toxic chemical reactions are very probable and can result in the death of anyone nearby.

Edward.McHam made a preliminary inspection in which he obtained two pit samples and observed evidence of oil, hazardous wastes, waste spillage and a "sloppy" operation which appears to be dangerous to the environment

as well as hazardous to the health and welfare of citizens. He further observed high water markings on the adjacent trees at the pit site and a lack of levees between the sites and the Grand River and other waterways. In addition, there may be hazardous wastes and conditions which may pose a substantial present, or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

The inspection will be commenced in daytime within regular business hours and will begin as soon as practicable after issuance of this warrant and will be completed with reasonable promptness.

The inspection will be conducted by the United States Environmental Protection Agency (EPA) inspectors, who will be accompanied by the United States Marshal to ensure entry so that the EPA inspectors may perform an inspection of the premises, inspect and copy records, take photographs, gather information and evidence and collect samples in accord with 33 USC 1318 and 42 USC 6927.

A return will be made to the Court upon completion of the inspection.

WHEREFORE, it is respectfully requested that a warrant to enter and inspect the CLAW facility be issued.

Respectfully submitted,

DONALD L. BECKNER
UNITED STATES ATTORNEY

JAMES STANLEY LEMELLE
Assistant U.S. Attorney

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

I, Edward McHam, being duly sworn, hereby depose and say:

1. I am a duly authorized employee of the United States Environmental Protection Agency, and my title is Chemical Engineer, Surveillance and Analysis Division, Region VI, which includes the State of Louisiana. In my capacity, I am responsible for inspecting facilities subject to various federal environmental statutes as directed by my supervisors.

2. On Tuesday, August 1, 1978 from about 7:45 p.m. to 8:45 p.m., I made a preliminary inspection of the CLAW facility and took two samples at the open pits. On Wednesday, August 2, 1978, I took a few photographs of the facilities from around 3:30 p.m. until 5:30 p.m. On Thursday, August 3, 1978 accompanied by another EPA employee, I visited the facility and area from about 11:30 a.m. to 2:00 p.m. and also took a few additional photographs. These brief visits to the site have only involved facility employees a few minutes each time in order to obtain passes from the field office and to open gates at various guard houses.

3. On Friday, August 4, 1978, a local deputy sheriff, state and local officials and I were refused admittance to the CLAW facility. Also, CLAW officials were no longer at the field house or available elsewhere to issue passes to enter. My previous sampling and inspection was not sufficient for laboratory purposes and needs to be resumed.

4. Information I have gathered in the local community, in newspapers, on television, from laboratory

tests of the samples, from the Iberville Sheriff's Office, and at the CLAW facility strongly suggest and support the need to enter and inspect the facilities for possible Section 301, 311 and other violations of the Federal Water Pollution Control Act. Further, it is possible that there are hazardous wastes and conditions on the premises as defined in Section 1004(5) of the Resource Conservation and Recovery Act of 1976, (42 USC 6903)(5) which constitute an imminent hazard under section 7003 of the Resource Conservation and Recovery Act of 1976 (42 USC 6973). These observations are:

a. Obvious spillage of waste material on the grounds of the CLAW facility subject to entering waterways.

b. Contaminated landfills with obviously exposed and damaged barrels with their contents emptied or nearly empty.

c. Drainage from landfills into a "fishing" lake and other adjacent areas leading to various waterways.

d. Open pits containing oil wastes and hazardous, toxic chemical wastes with the appearance of overflow wastes on the adjacent grounds as well as high water marks on trees next to the open pits equal to or higher than the pits.

e. The lack of levees between the facility grounds and drainage areas to the Grand River, "fishing lake", bayous and barrow ditches.

f. Copies of a few facility log records and other documents which were previously copied by the local Sheriff's office. These records indicate the receipt and content of oil and hazardous chemical wastes accepted at the facility.

g. Poor maintenance and sloppy "housekeeping" practices at the facility which leads a reasonable person to recognize the likelihood of these prohibited pollutants

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

IN THE MATTER OF
CLEAN LAND AIR AND WATER,
CORPORATION, d/b/a CLAW;
ETC., ET AL.

NO. 78-154

WARRANT OF ENTRY, INSPECTION
AND MONITORING PURSUANT TO
33 U.S.C.§1318 and 42 U.S.C.§6927

TO: THE UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THROUGH ITS DULY DESIGNATED REPRESENTATIVE OR REPRESENTATIVES, THE UNITED STATES MARSHAL OR ANY OTHER FEDERAL OFFICER

An application having been made by the United States of America, United States Environmental Protection Agency, for a warrant of entry, inspection and monitoring pursuant to 33 U.S.C.§1318 and 42 U.S.C.§6927, as part of an inspection program designed to assure compliance with the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.), and an affidavit having been made before me by Edward McHam, a duly authorized employee of the United States Environmental Protection Agency, that he has reason to believe that on the premises hereinafter described there exist a danger to the public's health, welfare and safety and to the property, rivers and environment of the United States, and that in order to determine whether the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.), and the rules, regulations and orders issued pursuant to the Acts have been or are being violated, an entry on, and inspection and monitoring of the said described property is required and necessary;

And, the Court being satisfied that there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied with respect to the said described property and that probable cause exist to issue a warrant for the entry, inspection, investigation and monitoring of the said described premises:

IT IS HEREBY ORDERED AND COMMANDED that the United States of America, United States Environmental Protection Agency, through its duly designated representative or representatives, the United States Marshal, or any other federal officer are hereby entitled to and shall be authorized and permitted to have entry upon the following described property which is located in the Middle District of Louisiana:

> "Those premises known as the Claw Corporation waste disposal facility in Iberville Parish, Louisiana, also known as EPA, Inc., Clear Land Air Water Corporation, Environmental Purification Advancement, Environmental Purification Abatement and possibly as the Rollins Environmental Services of Louisiana, or which are owned or operated by any other person or company, corporation or partnership, which premises and property are more particularly and further described as follows:
>
> "From the intersection of La. Highway 75 and La. Highway 3066, proceed South for approximately 7 miles; turn right and travel across the Bayor-Sorrel-Pontoon Bridge, a distance of approximately 0.2 miles; turn right, proceed northwest on Route 2, the Lower Levee Road, for approximately 1.6 miles at which point the pavement ends; at this point turn right, travel approximately 0.1 miles to the entrance of the injection well, which is believed to be owned by Rollins Environmental Services of Louisiana, Incorporated, all as is shown on the attached photos identified as Government Exhibits 1 and 2."
>
> "From the Rollins Environmental Services of Louisiana, Incorporated office, proceed South on the shell/gravel road for approximately 1.4 miles until the road deadends. This is the location of the field office of Clean Land Air and Water (CLAW), and storage tanks which are believed to be owned by Rollins Environmental Services of Louisiana Incorporated, all as is shown on the attached photos identified as Government Exhibits 3, 4, and 5.

"From the field office of CLAW, return to the site of the intersection at the paved lower levee road and the road leading to the deep well injection site (Rollins Environmental). Proceed northwest on the unpaved shell/gravel lower levee road approximately 6.1 miles to the entrance road and bridge leading to the gate guard house and gate of the EPA, Inc. waste disposal pits. This same entrance road is 7.7 miles northwest along the lower levee road from the intersection of the lower levee road and Bayou Sorrel Pontoon Bridge Road.

IT IS FURTHER ORDERED that the entry, inspection, investigation and monitoring authorized herein shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner from 6:00 a.m. to 10:00 p.m.

IT IS FURTHER ORDERED that the warrant issued herein shall be for the purpose of conducting an entry, inspection, investigation and monitoring pursuant to 33 U.S.C.§1318 and 42 U.S.C.§6927 consisting of the following:

(1) entry to, upon or through the above described premises, including all buildings, structures, equipment, machines, devices, materials and sites to inspect, sample, photograph, monitor or investigate the said premises;

(2) access to, seizure of and copying of all records pertaining to or related to the operation of the facility, equipment, waste materials which are accepted and stored on the premises and records which are required to be maintained under 33 U.S.C.§1318(a)(A), and 42 U.S.C.§6901, et seq., including any rules and regulations and orders promulgated thereto;

(3) inspection, including photographing, of any monitoring equipment or methods required by 33 U.S.C.§1318(a)(A), and 42 U.S.C.§6927;

(4) inspection, including photographing of any equipment, processes or methods used in sampling, monitoring or in waste characterization;

(5) inspection, including photographing, of any equipment or methods used to dispose of or store waste substances;

(6) sample and seize any pollutants, effluents, runoff, soil, or other materials or substances which may reasonably be expected to pollute the waters of the United States under various conditions or threaten the public health, safety or welfare of the people of the United States;

(7) seize, inspect, sample, and photograph any evidence which constitutes or relates to or is part of a violation of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act, 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.);

(8) take such photographs of the above authorized procedures as may be required or necessary.

IT IS FURTHER ORDERED that a copy of this warrant shall be left at the premises at the time of the inspection.

IT IS FURTHER ORDERED that if any property is seized, the officer conducting the search and seizure shall leave a receipt for the property taken and prepare a written inventory of the property seized and return this warrant with the written inventory before me within 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the warrant authorized herein shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist the representatives of the United States Environmental Protection Agency in such manner as may be reasonably necessary and required to execute this warrant and the provisions contained herein, including but not limited to gaining entry upon the premises, the inspection and monitoring thereof, the seizure and sampling of materials, documents or equipment, and the photographing of the premises, and the materials or equipment thereon.

DATED this 10 day of August, 1978.

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:	)	
	)	
GENERAL MOTORS CORPORATION	)	
GENERAL MOTORS ASSEMBLY DIVISION	)	
WILLOW RUN AIRPORT	)	APPLICATION FOR
YPSILANTI, MICHIGAN 48197	)	ADMINISTRATIVE WARRANTS
AND	)	
VEHICLE EMISSION LABORATORY	)	
GENERAL MOTORS PROVING GROUND	)	
MILFORD, MICHIGAN 48042	)	

NOW COMES the Administrator for the Environmental Protection Agency (EPA), by and through the United States Attorney, and applies for administrative warrants to enter, to observe a Selective Enforcement Audit (SEA) test on a configuration of motor vehicles manufactured by the General Motors Corporation (GM) as specified in a SEA test order issued on July 28, 1978, by the Assistant Administrator for Enforcement of EPA, and to inspect GM's records, files, papers, processes, controls, and facilities which are involved in and associated with the manufacture and testing of said configuration pursuant to said test order at the premises of the GM Willow Run vehicle assembly plant, Ypsilanti, Michigan, and the GM vehicle emission laboratory at Milford, Michigan, in accordance with Sections 206(b) and (c), 208(a) and 301(a) of the Clean Air Act, 42 U.S.C. §7525(b) and (c), 7542(a) and 7601(a), and regulations promulgated thereunder. In support of this application, the Administrator respectfully submits an affidavit and proposed warrants.

James K. Robinson
United States Attorney

By: _____

Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:		
GENERAL MOTORS CORPORATION GENERAL MOTORS ASSEMBLY DIVISION WILLOW RUN AIRPORT YPSILANTI, MICHIGAN 48197	)	ADMINISTRATIVE WARRANT FOR ENTRY AND INSPECTION UNDER THE CLEAN AIR ACT

TO: MATTHEW A. LOW, Acting Chief, Manufacturers Programs Branch, Mobile Source Enforcement Division, Office of Enforcement, United States Environmental Protection Agency (EPA), and any other duly designated enforcement officers or employees of the EPA:

Application having been made, and Matthew Low having shown probable cause for the issuance of an administrative warrant for entry; observation of a Selective Enforcement Audit (SEA) test on the configuration of motor vehicles manufactured by General Motors Corporation (GM) of engine family 840B2 and engine code 2, with 4000-pound inertia weight, A-3 transmission and 2.56 rear axle ratio, as specified in a SEA test order issued on July 28, 1978, by the Assistant Administrator for Enforcement of EPA; and inspection of GM's records, files, papers, processes, controls and facilities which are involved in and associated with the manufacture and testing of said configuration pursuant to said test order at the premises of the GM Willow Run vehicle assembly plant, Ypsilanti, Michigan;

WHEREFORE, pursuant to the Clean Air Act as amended, 42 U.S.C. §7401 et seq., and the regulations thereunder, you and any duly designated enforcement officers and employees of the Environmental Protection Agency are hereby authorized to enter the above-described premises at reasonable times during normal operating hours for the

purpose of conducting an administrative inspection pursuant to Sections 206(b) and (c), 208(a) and 301(a) of the Clean Air Act, 42 U.S.C. §§7525(b) and (c), 7542(a) and 7601, and 40 C.F.R. §86.601 et seq. You and any duly designated enforcement officers and employees of EPA are authorized to observe activities conducted by GM pursuant to the SEA test order issued on July 28, 1978, concerning the vehicle configuration specified in said test order to determine whether GM is complying with 40 C.F.R Part 86 and with the test order. The activities that you and the designated persons are authorized to observe include the following: vehicle and engine manufacture, assembly, and storage procedures; sample test vehicle selection procedures; and related activities. You and any designated enforcement officers and employees are authorized to inspect at reasonable times during normal operating hours the records, files, papers, processes, controls and facilities which are involved in and associated with the above activities and are maintained, used and generated by GM at that location. You and any duly designated enforcement officers and employees are authorized to copy documents and photograph components, test vehicles and facilities.

The duration of this inspection shall be of such reasonable length as to enable you and the authorized enforcement officers and employees of EPA satisfactorily to complete such inspection according to 40 C.F.R. §86.601 et seq.

A prompt return of this warrant shall be made to this court showing that the warrant has been executed and that inspection has been completed within such reasonable time.

DATED: Dec 31 5:00 PM., 1978

UNITED STATES MAGISTRATE

This warrant to be executed within 48 hours.

RETURN OF SERVICE

I hereby certify that a copy of the within warrant was served by presenting a copy of same to Robert Prevost and Jr. an agent of General Motors Corporation (GM) on August 1, 1978, at the GM Willow Run vehicle assembly plant, Ypsilanti, Michi

(Name of person making service)

Acting Chief, Mobile Source Branch
(Official Title within the United States Environmental Protection Agency)

RETURN

Inspection of the establishment described in this warrant was completed on August 4, 1978.

Name of EPA employee

Inventory of Property Received Pursuant to Administrative Warranty

GM Assembly Division, Willow Run Airport, Ypsilanti, Michigan 48197

1. Vehicle Inspection Record Form (Chassis No. 2 (yellow) #NRN-71-54)
2. Xeroxed copies of lists of VIN Numbers of Cars making up Batches 4, 5, 6, 7, 8, 9 (7 sheets)

These are the items that EPA has received under the authority granted it pursuant to the Administrative Warrant for Entry and Inspection

Bruce Lundy
Enforcement Officer
11:30 am 8/4/78

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF :	)	AFFIDAVIT IN SUPPORT OF
	)	APPLICATION FOR WARRANTS
GENERAL MOTOR CORPORATION	)	TO ENTER AND INSPECT
GENERAL MOTORS ASSEMBLY DIVISION	)	PURSUANT TO THE CLEAN AIR
WILLOW RUN, AIRPORT	)	ACT (42 U.S.C. §7401 et seq.)
YPSILANTI, MICHIGAN 48197	)	
AND	)	
VEHICLE EMISSION LABORATORY	)	
GENERAL MOTORS PROVING GROUND	)	
MILFORD, MICHIGAN 48042	)	

Matthew Low being duly sworn upon his oath, according to law, deposes and says:

1. I am Acting Chief, Manufacturers Programs Branch, Mobile Source Enforcement Division, Office of Enforcement, United States Environmental Protection Agency (EPA), Washington, D.C. I am in charge of a program known as the Selective Enforcement Audit (SEA) program, which will be described below. I report to the Director of the Mobile Source Enforcement Division, who is under the Deputy Assistant Administrator for Mobile Source and Noise Enforcement; in turn, he is under the Assistant Administrator for Enforcement, who reports to the Administrator of the Environmental Protection Agency.

2. This affidavit is made in support of an application for administrative warrants to enter; observe a Selective Enforcement Audit (SEA) test on the configuration of motor vehicles manufactured by the General Motors Corporation (GM) of engine family 840B2 and engine code 2, with 4000-pound inertia weight, A-3 transmission and 2.56 rear axle ratio as specified in a SEA test order issued on July 28, 1978, by the Assistant Administrator for Enforcement of EPA; and inspect GM's records, files, papers, processes, controls, and facilities which are involved in and associated with

the manufacture and testing of said configuration pursuant to said test order at the premises of the GM Willow Run vehicle assembly plant at Ypsilanti, Michigan, and the GM vehicle emission laboratory at Milford, Michigan, pursuant to Sections 206(b) and (c), 208(a) and 301(a) of the Clean Air Act, 42 U.S.C. §7525(b) and (c), 7542(a), and 7601(a), and 40 C.F.R. §86.601 et seq., 41 Fed. Reg. 31472 (July 28, 1976).

3. Title II of the Clean Air Act, 42 U.S.C. §§7401, 7520-7551, establishes the Federal program for control of motor vehicle emissions. Emission standards for motor vehicles are prescribed pursuant to Section 202 of the Act, 42 U.S.C. §7521. Section 206(a), 42 U.S.C. §7525(a), authorizes the EPA Administrator to require new motor vehicles to be tested to determine whether such vehicles conform with the emission standards and other regulations prescribed pursuant to Section 202. Such standards are applicable for the vehicles' useful life (5 years or 50,000 miles). The vehicles that are tested during this certification process are usually pre-production prototypes. In the certification process the manufacturer submits applications for certification, each covering one or more engine families and setting forth the corresponding technical descriptions, specifications, and operating parameters for each family covered. An engine family is made up of a group of vehicle models, known as "configurations", with the same basic engine and emission control system specifications. One or more prototypes, known as durability vehicles, from each engine family are subjected to testing over 50,000 miles to determine deterioration in emissions performance for that engine family. Thereafter, prototypes, known as emission-data vehicles, of individual configurations within a given family

are subjected to a 4000-mile test. The emission levels of the emission-data vehicles during their useful life are determined by applying the "deterioration factor" calculated from the 50,000-mile test results for that engine family to the emission data obtained after 4000 miles of operation. If it is demonstrated that the prototype vehicles of the various configurations within an engine family comply with the emission standards over their useful life and with other regulations, the Administrator issues to the manufacturer a certificate of conformity for the particular engine family described in the application.

4. To determine whether new motor vehicles actually being manufactured, as distinguished from pre-production prototypes, meet the regulations, including emission levels, with respect to which the certificate of conformity was issued, Section 206(b), 42 U.S.C. §7525(b), authorizes the Administrator to test and to require the testing of new production vehicles. In addition, to enforce Section 206, Section 206(c) provides that officers or employees designated by the Administrator may enter a manufacturer's plant to conduct tests of vehicles and to inspect records, files, papers, processes, controls, and facilities. Section 208(a), 42 U.S.C. §7542(a), further requires manufactuers to establish and maintain such records, make such reports, and provide such information as the Administrator may reasonably require to enable him to determine whether the manufacturer has acted or is acting in compliance with Title II of the Act and the regulations promulgated thereunder and to permit duly-designated EPA officers or employees to have access to and copy such records. Section 301(a), 42 U.S.C. §7601(a), authorizes the Administrator to prescribe such regulations as are necessary to carry out his functions under the Act and to delegate to any EPA officer or

employee such of his powers and duties under the Act, except t making of regulations, as he may deem necessary, ~~or expedient~~ o.k.y Based upon the authority of Section 206, 208 and 301, 42 U.S.C. §§7525, 7542 and 7601, EPA has established a program for spot assembly-line testing known as the Selective Enforcement Audit (SEA) program. Regulations concerning the SEA program are set forth at 40 C.F.R. §86.601 et seq., 41 Fed. Reg. 31472 (July 28, 1976).

5. Under the SEA program, the manufacturer can be required to test a representative sample of production vehicles from a designated motor vehicle configuration to determine whether the configuration is being manufactured to conform to the applicable emission requirements. The SEA regulations prescribe specific procedures by which SEA testing is to be conducted, including procedures for vehicle selection, preparation and pre-conditioning, for dynamometer operation to simulate driving conditions and fo collection of vehicle exhaust gas samples for analysis. A SEA is initiated by the issuance of a test order to a manufacturer requiring that manufacturer to conduct emissions testing and specifying, among other items, the motor vehicle configuration to be tested, the plant or storage facility from which vehicles must be selected and the procedures to be employed in selecting sample vehicles for SEA testing. Section 206(b) of the Act, 42 U.S.C. §7525(b), authorizes the Administrator to issue a test order. Pursuant to Section 301(a) of the Clean Air Act, 42 U.S.C. §7601(a), the Administrator has delegated the authority to conduct testing through the issuance of test orders to EPA's Assistant Administrator for Enforcement along with the further authority to redelegate this power to the Deputy Assistant Administrator for Mobile Source and Noise Enforcement, and in

turn to redelegate to the Director, Mobile Source Enforcement Division. EPA Delegation 7-30, November 10, 1977. Such redelegation to the Deputy Assistant Administrator was made on November 14, 1977.

6. Under Sections 206(b) and (c), 208(a) and 301(a) of the Clean Air Act, 42 U.S.C. §§7525(b) and (c), 7542(a) and 7601(a), and 40 C.F.R. §86.601 et seq., duly designated EPA enforcement officers and employees are authorized under the SEA program to enter the manufacturers' facilities at reasonable times during normal working hours for the purpose of observing activity relating to the SEA testing and inspecting records, files, papers, processes, controls and facilities to determine if the manufacturer is acting in compliance with regulations and the test order. Ordinarily, the EPA monitoring includes observation of vehicle and engine manufacture, assembly and storage procedures sample test vehicle selection procedures; sample test vehicle preparation, pre-conditioning, mileage accumulation, emission test maintenance and soaking procedures, as well as the calibration of equipment; and related activities. Commonly, EPA inspects records, files, papers, processes, controls, and facilities which are involved in and associated with the above activities and are maintained, used or generated by the manufacturer at the locations where test vehicle assembly, SEA test vehicle selection and testing take place. Also, EPA is authorized to copy documents, photograph components, test vehicles and facilities and obtain reasonable assistance from facility personnel in executing its functions under the SEA program. EPA attempts to enter and conduct these inspection-related activities in conjunction with each SEA test order for the purpose of monitoring the activity of the manufacturer undertaken pursuant to the test order to ensure

that such activity conforms to the requirements of the test order and the SEA regulations.

7. The manufacturer is notified by the test order of the configuration (or alternate) to be tested, the location from which test vehicles will be selected, when the testing is to begin and when EPA officers and employees will be present. The date of completion of the test, and therefore the duration of the EPA inspection, is not specified at the outset because it is not possible to do so. SEA selection and testing normally take up to two weeks. If the manufacturer elects to retest vehicles in an attempt to avoid failing an audit, or if upon failing an audit a re-audit is necessary, audit activity under the test order may continue for a month. The Clean Air Act Selective Enforcement Audit regulations, 40 C.F.R. §86.601 et seq., 41 Fed. Reg. 31472 (July 28, 1976), and the test order define the scope and purpose of the audit. The test order identifies the EPA enforcement officers and employees who have been designated to enter, observe activities, and inspect records, files, papers, processes, controls and facilities used in or associated with the audit.

8. Under the regulations and the Clean Air Act, a SEA test order may be issued to any manufacturer at any time for any motor vehicle configuration being manufactured. When a SEA test order provides less than 24 hours notice to the manufacturer, the SEA test order must be authorized in writing by the EPA Assistant Administrator for Enforcement.

9. The frequency with which SEA test orders are issued to any given manufacturer is generally based on that manufacturer's proportionate share of total vehicle production. A manufacturer's

projected sales volume is used as the basis for establishing the preliminary number of SEA test orders to which that manufacturer may be subject annually. A higher production volume requires more audits for sufficient review of the manufacturer's production. The maximum number of SEA test orders that may issue to a given manufacturer during a given model year is preliminarily set at the number obtained by dividing that manufacturer's total projected sales for that model year by 300,000 and rounding to the nearest whole number. 40 C.F.R. §86.603(f). Any manufacturer with projected sales of less than 150,000 may be subject to an initial annual limit of one SEA test order. One additional SEA test order may issue to a manufacturer for each configuration failing an audit and, when the annual limit figure, inceased by these additional test orders, has been met, for each configuration for which evidence exists indicating noncompliance. Because the agency's resources are limited, EPA may undertake fewer SEA's than are authorized by its regulations.

10. Within these annual limits on the number of test orders EPA may issue to each manufacturer, EPA employs a systematic process, as discussed below, for choosing which configuration of which manufacturer to subject to an audit. Initially, EPA seeks to issue test orders propertionately among manufacturers according to their respective annual projected sales and to distribute those test orders evenly over the course of a model year. This process then employs three primary sources of information, assembly-line test data, projected sales volume, and certification data, as bases for assigning points to rank configurations for the purpose of determining which configuratin would be most appropriate for an audit at a given time. Once

configurations are ranked, the process also considers other, non-quantifiable factors in reaching an ultimate decision about which configuration to audit.

11. Where data being evaluated by EPA from any of these three sources pertains to individual configurations, points are assigned to the respective individual configurations according to the guidelines of the ranking system. If the data evaluated pertains to engine families, points based on a engine family's data will be assigned for ranking purposes to an individual configuration within the engine family. The configuration receiving the engine family's points will be identified according to two factors. To begin with, its production rate must be high enough to enable sample test vehicles to be selected for testing in an expeditious manner. Once that determination has been made, its actual physical characteristics (such as engine code, inertia weight, type of transmission, or rear-axle ratio) which distinguish it from other configurations within the engine family must make it the configuration most likely to produce the highest level of emissions of the configurations in that family.

12. Before ranking configurations, SEA's systematic configuration selection process applies the general objective that each manufacturer should receive at least one half of its annual limit of audits as computed from its projected sales during the model year, with those audits distributed over the model year, to ensure proper review of the total production of each manufacturer. Thus under the plan described below, a configuration of a particular manufacturer may replace another configuration of any manufacturer which otherwise would have been chosen for an audit. This result occurs whenever issuing the test order to the manufacturer

of the replaced configuration would have subjected that manufacturer to a disproportionate number of audits as of that time in the model year.

13. The most important factor considered quantitatively by EPA is a configuration's emissions data which have been generated by a manufacturer's own quarterly assembly-line testing and submitted to EPA. The data allows EPA to evaluate both the rate at which production vehicles coming off the assembly line fail to meet an emission standard for a given pollutant and the mean emission value measured from assembly-line vehicles as compared to a pollutant's emission standard. Points due to failure rates are assigned to a vehicle configuration as follows:

Failure Rate Range	Points
0-10%	0
11-20%	5
21-30%	15
31-40%	20
40% and above	50

Points according to the configuration's mean emission value compared to the emission standard (std) are assigned as follows:

Range	Points
Mean value is between 0.9 of the std and the std	5
Mean value is greater than the std but less than or equal to 1.1 of the std	15
Mean value is greater than 1.1 of the std	30

Application of the point total derived from these calculations will take into account the reliability that can be attributed to the data submitted by a manufacturer. For example, EPA will assess the number of vehicles tested in order to determine the failure rate or mean emission value. Data

reliability also depends upon the extent to which a discrepancy is found in a comparison between past SEA data pertaining to the configuration in question and the manufacturer's most recently submitted internal assembly-line data. Furthermore, evaluation of this point total also will consider both whether a manufacturer has failed to provide test data for one or more configurations in production at the time the assembly-line data was generated and whether any "running changes" incorporated into the manufacturer of a configuration since that time may be expected to cause the emissions level of the configuration to exceed standards for a pollutant.

14. The next most important factor in this point ranking system is the configuration's (or engine family's) projected annual sales figure as provided by the manufacturer in its application for certification. Points based upon projected sales are assigned as follows:

Annual Projected Sales	Points
0-20,000	0
20,000-50,000	10
50,000-100,000	20
100,000 and above	30

This factor focuses on higher-production models and tends to assure through SEA review that a high percentage of vehicles produced complies with the emission standards.

15. Finally, certification data generated from prototype testing and regarding configurations currently in production are examined; that is, EPA reviews the pertinent certification data on configurations being manufactured either according to the manufacturer's original application for certification or according to its latest running change application for an amended certificate of conformity. If the configuration's emission performance level based on that data is within 10% of the emission

standard for a given pollutant, 15 points are assigned to that configuration. Application of this factor may be adjusted where analysis by EPA's certification group indicates that certification test data may not be indicative of whether production vehicles of that configuration are likely to meet emission requirements. The focus of this factor is on vehicles that have demonstrated only marginal compliance during the certification or running change approval process.

16. Aside from these quantitative factors and the objective of distributing audits among manufacturers throughout the model year, in choosing which configuration of which manufacturer to audit EPA takes into account the location of the manufacturer's assembly plant and test facilities. This factor generally is given significant consideration if these establishments are located overseas or are otherwise geographically removed from the Midwestern United States. Most manufacturing and testing establishments are located in the area, and therefore most audit activity can be expected to take place there. EPA also considers whether a configuration is being manufactured at a sufficiently high rate to allow sample vehicles to be selected expeditiously for testing. Information on current production rates of configurations might not be requested from a manufacturer so as to avoid suggesting to manufacturers which configurations may be subject to an imminent test order. Thus, a test order can designate an alternate configuration of that manufacturer for testing, chosen according to the normal systematic process described above subject to the constraints regarding location and production rate, in the event that the primary configuration is unavailable for testing.

17. Automobile manufacturers for the most part have centralized their testing facilities in eastern Michigan. Consequently, they generally have expressed a preference that vehicle selection for any audit of any configuration produced in that area and others take place at a plant in that area. Pursuant to 40 C.F.R. §86.603(d), EPA complies with these indicated preferences when specifying locations for vehicle selection pursuant to a test order unless the Administrator determines that information exists indicating noncompliance at other plants. If a manufacturer does not indicate a preferred plant for a configuration being audited, the test order will specify that test vehicle selection be conducted at the location closest to the manufacturer's testing facility at which a sufficient number of vehicles are available from which a sample representative of the configuration can be chosen expeditiously, unless it is determined that evidence exists indicating non-compliance at another plant. Since the goals of the EPA program can be accomplished with a relatively high percentage of audits testing vehicles selected from locations in eastern Michigan, a relatively high percentage of vehicle selection for SEA's takes place in that area. Once a test order has been issued covering a specific manufacturer, configuration and facility for sample test vehicle selection, EPA sends a team of enforcement officers to the manufacturer's facilities where selection and testing take place for the purpose of monitoring the manufacturer's activity performed in response to the test order.

18. Experience with the administration of the SEA program has produced indications that providing a manfacturer with advance

notice of an intent to require SEA testing before EPA enforcement officers can gain access to the manufacturer's facilities pursuant to that test order can give the manufacturer an opportunity to alter its production processes. The manufacturer thereby can bias production of a vehicle configuration so that sample vehicles selected for SEA testing will not provide representative data which would enable EPA to review accurately the manufacturer's production of that configuration on the whole. Such notice would occur if EPA enforcement officers requested permission to enter a facility to monitor activity related to the SEA, and permission to enter were refused, before a warrant authorizing that entry were obtained.

19. On the basis of 1978 model year projected sales alone General Motors may be subject to 20 test orders during the model year and has been subject to 10 orders thus far. Ford may receive 11 test orders on the basis of projected sales and has been issued 8. Chrysler may receive 5 test orders based on projected sales and has received 6, since one of its configurations failed an audit. See 40 C.F.R. §86.603(f). American Motors may be issued 1 test order based on projected sales and has not yet received any. Four European and three Japanese auto manufacturers have been audited during the current model year.

20. GM is a manufacturer of automobiles and operates facilities devoted to that purpose at its Willow Run vehicle assem plant in Ypsilanti, Michigan. GM also operates emission testing facilities at its vehicle emissions testing laboratory in Milford, Michigan, where GM usually ships cars for SEA testing after such cars have been selected at a vehicle assembly plant as SEA sample test vehicles. GM produces hundreds of different configurations during the model year.

21. GM is still eligible to receive 10 SEA test orders for model year 1978 configurations. The configuration specified in the SEA test order issued on July 28, 1978, has been chosen as the subject for SEA testing because of the configurations currently under production and available for selection it has accumulated the greatest number of points under EPA's systematic process for choosing configurations to audit and because no non-quantitative factors indicate that another configuration is more appropriate for auditing. Assembly-line test data submitted by GM which, according to our analysis, pertains to its engine code 2 configuration of its 84082 engine family with 4000-pound inertia weight, A-3 transmission and 2.56 rear axle ratio shows a 56% failure rate of vehicles tested with respect to the emission standard for nitrous oxides (NOx), giving that configuration 50 points for ranking purposes. The mean emission value for NOx derived from this assembly-line testing (1.99 grams/mile) falls within 0.9 of the NOx emission standard (2.00 grams/mile), contributing another 5 points. The projected annual sales for this configuration is 63,741, giving the configuration an additional 20 points. Certification testing conducted for this configuration produced data which showed the prototype CO emissions level (15 gram/mile) to be within 10% of the CO emission standard (also 15.0 grams/mile), thereby assigning the configuration 15 more points. The configuration's point total of 90 is the highest for any configuration remaining in production long enough and at a rate high enough to allow for expeditious sample test vehicle selection pursuant to the SEA regulations.

22. The document, which is attached and incorporated by reference, and sets forth the SEA test order for this configuration will be delivered to GM by an EPA enforcement officer at the same time the designated officers and employees appear at GM's vehicle assembly facilities in Ypsilanti, Michigan, to begin monitoring GM's activities performed pursuant to the SEA test order. The entry, observation and inspection there and at GM's vehicle emission testing laboratory in Milford, Michigan will be consistant in purpose, scope, location and timing with the Clean Air Act, this Court's administrative warrants, EPA regulations, the test order and the program described in this affidavit.

MATTHEW LOW

Sworn and subscribed before me
this _____ day of _____ , 1978

ATTACHMENT III

NEUTRAL INSPECTION SCHEME FOR AEROSOL FILLERS

1. The rule published by EPA on March 17, 1978 (43 FR 11318) bans processing of fully halogenated chlorofluoralkanes, or CFC's, for aerosol propellant uses after December 15, 1978, except for certain essential uses. Such processing would be done by businesses known as aerosol fillers.

2. Only aerosol fillers who have bought CFC's since October 15, 1978 or who are otherwise known to be in the position to fill aerosols with CFC's after December 15, 1978 will be candidates for inspection. Such fillers may be identified by inspections of the records of CFC manufacturers, by information from the Consumer Product Safety Commission (CPSC), or by other means.

3. Such candidates for inspection will be ranked according to the relative quantity of CFC's estimated to have been received after December 15, 1978. Fillers estimated to have received more CFC's will be assigned higher priorities for inspection. Such estimates shall be based on the records of quantities distributed by CFC manufacturers. If the amount of CFC's received by a candidate for inspection is unknown, then that filler will be assigned a ranking in the middle of the ranked list.

4. A ranked list of candidates for inspection will be sent to each Regional Office. Such lists may be amended later by information from the CPSC or other sources.

5. The total number of aerosol fillers to be inspected in FY 79 by each Regional Office will be determined first. Then the ranked list will be used to identify the particular fillers to be inspected. The total number to be inspected in each Region will be inspected, and so that an approximately equal proportion of the fillers in each Region will be inspected.

6. The sequence of inspection shall be determined by the rank order of the list, except that this sequence may be adjusted to conserve Agency resources (such as by combining several inspections in one trip.)

7. This neutral inspection scheme will be modified after the annual reports required by the CFC rule to be submitted by March 31, 1980 have been analyzed.

entering into nearby waterways including waters of the United States and its tributaries, as well as posing a threat to the environment and the public health and welfare of the United States.

h. The reported death of a 19 year old truck driver at the CLAW (EPA, Inc.) open pits on July 25, 1978 while he was discharging waste into an open pit at the facility. The death was possibly caused by his inhalation of toxic fumes caused by a reaction of mixing incompatible toxic wastes in the open pit. Two eye witnesses to the death of the driver reported the presence of choking fumes in the area when they opened the doors to their truck to assist the driver who died. They also reported that his truck was parked at the edge of the open pit with the doors open at the time of death. Subsequent laboratory tests of waste taken from the pits have shown waste materials were present in the pit which, when mixed with the spent caustic being discharged from the driver's truck could have caused the death. Final autopsy reports are still pending. It is allegedly reported that CLAW facility officials directed the driver to take and discharge his wastes to the truck ramp on the edge of an open pit. Discharging toxic waste into an open pit at the edge of a pit is not a safe, desirable, or acceptable practice since toxic chamical reactions are very probable and can result in the death of anyone nearby.

5. Section 308 of the Federal Water Pollution Control Act, 33 USC 1318, and section 3007 of the Resource Conservation and Recovery Act of 1976, (42 USC 6927), providing for entry, inspection, record inspection and copying and sampling are reasonable, in the public interest and necessary in order to carry out the provisions of these Acts, which Acts are designed to protect the environment, as

well as the public health and welfare. In the instant matter it is reasonable to assume the need for inspection based on the information and observations set out in paragraph 4 above and in the public interest.

Edward C. McKam

EDWARD C. MC KAM
CHEMICAL ENGINEER
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Subscribed and sworn to before me
at Baton Rouge, State of Louisiana,
this 10 of August, 1978.

U.S. Magistrate

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
OFFICE OF THE GENERAL COUNSEL
WATERSIDE MALL

IN. 1-2
GM #1

NOV 8 1972

Memorandum

To: All Regional Counsels

From: Assistant Administrator for Enforcement and General Counsel

Subject: Visitors' Releases and Hold Harmless Agreements as a Condition to Entry of EPA Employees on Industrial Facilities

FACTS

As a condition to entry on industrial facilities, certain firms have required EPA employees to sign agreements which purport to release the company from tort liability. The following "Visitors Release" required by the Owens-Corning Fiberglas Corporation is an example:

VISITORS RELEASE

> In consideration of permission to enter the premises of Owens-Corning Fiberglas Corporation and being aware of the risk of injury from equipment, negligence of employees or of other visitors, and from other causes, the undersigned assumes all risk, releases said corporation, and agrees to hold it harmless from liability for any injury to him or his property while upon its premises. . .

READ CAREFULLY BEFORE SIGNING

In addition to such "Visitors Releases" employees or their supervisors have been asked to sign entry permits which include an agreement that EPA will pay for any injury or damage resulting from our activities at the facility.

Enclosure 5

QUESTIONS

1. Does signing such a "Visitors Release" effectively waive the employee's right to obtain damages for tortious injury?

2. May EPA employees contractually obligate the Agency to pay for any injury or damage caused by our activities?

3. May firms condition EPA's entry upon signing such agreements?

ANSWERS

1. Generally, yes; employees waive their right to damages and the government is prevented from exercising its right of subrogation under the Federal Employees' Compensation Act.

2. No; federal tort liability is established and limited by the Federal Tort Claims Act, and such agreements are also invalid as violative of the Anti-Deficiency Act.

3. No; EPA employees possess a right of entry under both the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972.

DISCUSSION

Although the precise effect of an advance release of liability for negligence cannot be determined without reference to the law of the state in which the tort occurs, we must assume that such agreements are generally valid. By signing such agreements EPA employees may effectively waive their right to sue for damages and the government's right of subrogation under the Federal Employees' Compensation Act, 5 USC 8101 et seq.

The Restatement of Contracts, Ch. 18, § 575 states:

> (1) A bargain for exemption from liability for the consequences of a willful breach of duty is illegal, and a bargain for exemption from liability for the consequences of negligence is illegal if
>
> (a) the parties are employer and employee and the bargain relates to negligent injury of the employee in the course of the employment, or,
>
> (b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation . . .

With the exceptions mentioned in the Restatement of Contracts, supra, no general public policy seems to exist against express agreements for assumption of risk, and they need not be supported by consideration. 10 Prosser on Torts § 55 and Restatement of Torts 2d, Ch. 17A, §496B. Despite this general rule, cases arising under the Federal Tort Claims Act involving releases signed by civilian passengers prior to boarding ill-fated government aircraft indicate that the courts do not favor such agreements. (Friedman v. Lockheed Aircraft Corp., 138 F. Supp. 530 (1956)--a release is no defense against gross, willful, or wanton negligence in New York; Rowe v. U.S., 173 F. Supp. 547 (1959)--a release is ineffective unless the flight is gratuitous; Moncellier v. U. S., 315 F2d 180 (1963)--a release does not destroy a cause of action for wrongful death in Massachusetts.) Such apparent judicial disfavor of advance releases is, of course, insufficient justification for assuming the risk of signing them, and ordinary prudence requires us to assume their validity. Although signing a release does not affect the employee's right to benefits under FECA, such compensation will ordinarily be much less than might be recovered in a tort action against the negligent corporation.

Since the Federal Employees' Compensation Act, 5 USC 8131 and 8132, provides that an employee may be required to assign his right to sue third parties to the United States and that the employee must, within limitations, pay over any recovery from third parties as reimbursement of FECA benefits, the employee's release prejudices the government's rights as well as his own. Employees should therefore be instructed not to sign such releases under any circumstances.

Although an EPA employee's express assumption of the risk of injury to himself may be valid, an agreement which purports to obligate EPA to pay all damages caused by our activities is not. The Federal Tort Claims Act, 28 USC 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages

Congress has granted only a limited waiver of the government's sovereign immunity, and 28 USC 2680 lists exceptions to the

general waiver stated in 28 USC 2674, supra. Exceptions which might be relevant in cases arising out of the actions of EPA employees include 28 USC 2680(a):

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused;

and 28 USC 2680(b):

> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .

Since the government's tort liability is limited by statute, an administrative undertaking to expand such liability by contract is probably invalid. In any event, EPA should not create the occasion for judicial resolution of the question.

An additional basis for considering such indemnification agreements invalid is the Anti-Deficiency Act, which provides at 31 USC 665(a):

> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein.

Since the extent of the government's obligation is uncertain, the Comptroller General has stated that a contractual assumption of tort liability is not a lawful obligation of the United States, and payment may not be made pursuant to such agreements. (7 CG 507, 35 CG 803, and 35 CG 86.) In fairness to companies which may rely upon the validity of such indemnity provisions, employees should be instructed not to sign them.

Inasmuch as the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972 grant EPA employees a right of entry to corporate facilities, a company may not

lawfully condition the exercise of this right upon the signing of a release or indemnity agreement. The Clean Air Act provides, at 42 USC 1857c--9(a)(2):

> . . .the Administrator or his authorized representative, upon presentation of his credentials---(A) shall have a right of entry to, upon, or through any premises in which an emission source is located or in which any records required to be maintained under paragraph (1) of this section are located . . .

The procedure for enforcement of this right is provided in 42 USC 1857c--8:

> (a)(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of. . . any requirement of section 1857c--9 of this title, he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.
> (b) The Administrator may commence a civil action for appropriate relief, including a permanent or temporary injunction, whenever any person--(4) fails or refuses to comply with any requirement of section 1857c--9 of this title.

When a firm refuses entry to an EPA employee performing his functions under the Clean Air Act, the employee may appropriately cite the statute and remind the company of EPA's right to seek judicial enforcement. If the company persists in its refusal, EPA should go to court in preference to signing a "Visitors Release."

In addition to procedure for judicial enforcement similar to that of the Clean Air Act, the Federal Water Pollution Control Act Amendments of 1972 reinforce EPA's right of entry with criminal and civil penalties. Section 309 states:

> (c)(1) Any person who willfully or negligently violates section . . .308 of this Act (Note--Section 308 establishes the right of entry). . . shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

> If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.
> (3) For the purposes of this subsection, the term 'person' shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.
> (d) Any person who violates section . . .308 of this Act. and any person who violates any order issued by the Administrator under subsection (a) of this section (Note--subsection (a) provides for administrative orders to enforce the right of entry), shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

In See v. Seattle, 387 U.S. 541(1967) the Supreme Court reversed the conviction of a corporation for refusal to admit building inspectors of the City of Seattle. Justice White held that the Fourth and Fourteenth Amendments required a warrant for such inspections, even where the search was reasonably related to protecting the public health and safety and even where a corporation, rather than an individual, was the subject. Under See evidence obtained by inspectors of the Food and Drug Administration has been held inadmissible where the inspectors obtained consent to enter by threatening prosecution under 21 USC 331, which provides criminal penalties for refusal to permit entry, U.S. v. Kramer Grocery Co., 418 F2d 987 (8th Cir., 1969). Although two more recent Supreme Court decisions, Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) and U.S. v. Biswell, 92 S. Ct. 1593 (1972), may create doubt as to whether See retains its original vigor (see Memorandum of the Assistant to the Deputy General Counsel, September 29, 1972), the possibility that evidence obtained under the FWPCA Amendments of 1972 will be ruled inadmissible is a risk EPA need not assume.

Since the Amendments provide for judicial enforcement of the right of entry, EPA employees should be instructed not to mention the civil or criminal penalties of Section 309 when faced with a refusal to permit entry. When such refusals occur, this office should be informed immediately so that a decision can be made as to whether to issue an order of the Administrator under 309(a) or seek an appropriate judicial remedy under 309(b).

John R. Quarles, Jr.

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GM #6

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

OCT 7 1981

OFFICE OF
LEGAL COUNSEL AND ENFORCEMENT

MEMORANDUM

SUBJECT: Contacts with Defendants and Potential Defendants in Enforcement Litigation

TO: Addressees

FROM: William A. Sullivan, Jr.
Enforcement Counsel

Most of the Agency's staff is aware of the need to consult with the Department of Justice (DOJ) before contacting defendants in enforcement litigation or potential defendants in cases referred to Justice for filing. I want to stress the importance of giving DOJ an opportunity to participate in any meetings with such persons or firms to review their compliance status. Failure to observe proper practice in this regard can seriously undermine the Department's ability to effectively represent EPA and ultimately diminish the prospects for satisfactory enforcement of environmental laws.

Headquarters and regional enforcement personnel should already be aware of the importance of including Justice in such discussions when they are initiated by EPA, and of giving the Department notice of and opportunity to attend meetings requested by potential defendants or their counsel. Justice's caseload may not always permit them to send a representative, in which case EPA staff should thoroughly coordinate the ground rules of the contact with DOJ in advance. Follow-up information should be provided to the Department's attorneys promptly after the conclusion of any meetings. This is the procedure I shall expect to be followed at all times.

I also want to urge enforcement staff to caution their "client" program offices and others within the Agency about the sensitivity of contacts with persons or firms that have been named in cases referred to Justice for filing. There are many matters unrelated to an enforcement action — processing of grants, development of rules, etc.— 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, the discussion should be interrupted and continued only after consulation with in-house enforcement counsel and DOJ.

Your cooperation will assure that litigation strategy is not compromised by inappropriate discussions, and can avoid embarrassment from last minute cancellation or rescheduling of meetings. If you have questions about whether a particular person, firm, or state or local government is a defendant in enforcement litigation or is a potential defendant in a case which has been referred to the Department of Justice, please contact Jonathan Libber of my staff at 426-7503.

Addressees: John Daniel, Chief of Staff
Assistant Administrators
Enforcement Office Directors
Regional Administrators
Regional Enforcement Division Directors

CO.1-2

CO.1-2
GM #7

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

DEC 10 1981

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Ex Parte Rules Covering Communications on Issues Which are the Subject of Formal Adjudicatory Hearings

FROM: Robert M. Perry
General Counsel (A-130)

TO: John E. Daniel
Chief of Staff
Office of the Administrator (A-100)

The Office of General Counsel has been asked to advise your office on the handling of ex parte communications on issues arising in formal Agency adjudications. This question is important because ex parte communications may occur when, for example, a party to pending or ongoing litigation seeks a speedier, more direct resolution of the litigation than is offered by the formal adjudication. In some cases, telephone calls, letters or even casual remarks relating to a substantive issue in litigation can constitute an improper ex parte communication. In general, such communications concerning the merits of a proceeding create the risk that an adjudicatory decision may be set aside by a reviewing court. However, the ex parte rules do not preclude the Administrator from engaging in discussions with persons regulated by EPA merely because those persons happen to be involved in a formal adjudication.

Accordingly, we have prepared this memorandum to guide your staff (1) in recognizing and avoiding improper ex parte communications and (2) in taking remedial steps if an improper ex parte communication occurs. Sections I-III of this memorandum 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.

I. Why do we have rules about ex parte contacts, and to what do they apply?

The Agency conducts formal adjudicatory hearings in a number of areas, including:

- Hearings to decide whether pesticide registrations should be denied, cancelled, suspended, or modified, under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. §136d).
- Hearings to decide whether to assess any civil penalty under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. §1361(a)).
- Hearings to decide whether to assess any civil penalty under Section 211 of the Clean Air Act, as amended (42 U.S.C. §7545).
- Hearings to decide whether to assess any civil penalty or to revoke or suspend any permit issued under Section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act, as amended (33 U.S.C. §1418(c))
- Hearings on the issuance of a compliance order or the assessment of any civil penalty conducted under Section 3008 of the Solid Waste Disposal Act, as amended (42 U.S.C. §6928).
- Hearings to decide whether to assess any civil penalty under Section 16(a) of the Toxic Substances Control Act (15 U.S.C. §2615(a)).
- Hearings conducted in connection with the termination of a hazardous waste permit under the Resource Conservation Recovery Act. (42 U.S.C. §6928(b)).
- Hearings to challenge the issuance of any individual National Pollutant Discharge Elimination System permit for a point source discharge under Section 402 of the Clean Water Act. (33 U.S.C. §1342).
- Hearings to determine data compensation amounts under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended. (7 U.S.C. §136(d)).

Under the Administrative Procedure Act (APA), (5 U.S.C. §551 et seq.), the decisions which result from these adjudicatory hearings

must be based solely on the formal record compiled during the proceeding, i.e., the pleadings, transcripts, exhibits, and briefs. In order to safeguard the integrity of the adjudicatory process, the Administrative Procedure Act prohibits all extra-record communications relevant to the merits of an adjudicatory proceeding between Agency decision-makers and interested persons inside or outside the Agency. 5 U.S.C. 554(d), 557(d)(1). A decision made in a formal adjudication may also be subject to legal challenge if there is reason to think that it was based on any material fact which is not a part of the formal record. 5 U.S.C. 554(d)(1), 556(e). In recognition of these statutory provisions, the various Agency regulations concerning hearing procedures (see 40 CFR §§22.01, 124.78 and 164.7) and pertinent judicial precedent establish rules dealing with "ex parte" communications made to or by persons responsible for making decisions in adjudicatory hearings. The remainder of this memorandum will discuss what "ex parte" communications are, and the rules that apply to them.

II. What is an ex parte communication?

One definition appears in the APA, 5 U.S.C. §551(14):

> "Ex parte communications means an oral or written communication not on the public record with respect to which reasonably prior notice to all parties is not given, but it shall not include requests for status reports. . . ."

This definition is somewhat cryptic and incomplete, however. A more useful working definition is:

> "Ex parte communication" means any communication (written or oral) concerning the merits of an ongoing formal adjudicatory proceeding, between any decision-maker and either (A) any interested person outside the Agency, or (B) any member of the Agency trial staff, if any of the parties to the hearing did not receive prior written notice that the communication would be made or were not invited to be present and participate in the communication.1/

An ex parte communication could take the form of a letter, telephone conversation, meeting, or other informal discussion. (Of course,

1/ This definition is in large part a paraphrase of the definition in 40 CFR §124.78.

pleadings, testimony, and the like presented or filed according to the hearing rules are not covered.)

III. What are the rules governing ex parte communications?

In brief, the APA and related EPA regulations state that ex parte communications concerning the merits of a proceeding are improper but also recognize that they may nonetheless occur and provide mechanisms designed to counteract their possible influence on decision-making.

A. What kinds of communications concern "the merits" of a hearing?

As indicated above, the prohibition against ex parte contacts covers communications regarding the merits of an ongoing adjudicatory proceeding. This restriction is to be construed broadly and covers not just communications regarding facts in issue, but any statement which could affect the Agency's decision on the merits. Inquiries about scheduling and other procedural matters (such as requests for status reports) may properly be made ex parte. (The Administrator has traditionally referred such inquiries to the appropriate trial staff for a response.) In doubtful cases, the prudent course is for the Agency decision-maker to treat the communication as one which may concern the case's merits.

B. What communications within the Agency are prohibited?

In almost every formal adjudication conducted by EPA,2/ one of the parties is the Agency trial staff. Typically, the order by which the Administrator (or his delegate) initiates the hearing contains a designation of the Agency personnel who will make up the Agency trial staff. That order often also designates those persons who will serve as adjudicators in the proceeding (typically the Administrator or the Regional Administrator, the Judicial Officer, an Administrative Law Judge, and sometimes others.)

Members of the Agency trial staff are forbidden from communicating with the Administrator (or other designated adjudicators) on an ex parte basis concerning the merits of the proceeding. Although the Administrator theoretically can consult with other

2/ There is one exception: hearings under FIFRA §3(c)(1)(D) to determine data compensation payment amounts are disputes between private parties which are decided by EPA. The Agency is not a party in these cases.

Agency personnel who are not (and have not been) involved in trial staff functions (and who do not represent other interested persons), no substantive consultation which may concern facts at issue should occur unless all parties are notified and given an opportunity to participate. Otherwise, there exists a substantial risk that the Administrator's decision might be based on evidence that has not properly been made a part of the record of the proceeding.

C. What communications with persons outside the Agency are prohibited?

The APA also prohibits ex parte communications between the Agency adjudicators and "interested persons" outside the Agency. The legislative history says that the term

> "is intended to be a wide, inclusive term. . . . The interest need not be monetary, nor need a person be a party to, or intervenor in, the agency proceeding to come under this section. The term includes, but is not limited to, parties, competitors, public officials, and non-profit or public interest organizations and associations with a special interest in the matter regulated."

Government in the Sunshine Act, Committee on Goverment Operations, H.R. REP No. 94-880, 94th Cong., 2d Sess. (1976), at 19-20, Source Book: Legislative History, Texts, and other Documents, Committees on Government Operations, U.S. Senate and House of Representatives, 530-531. With certain exceptions,3/ it seems logical to treat the very fact of a communication concerning the merits of an adjudicatory proceeding as evidence that the person making it is "interested." Certainly anyone whose communication seems designed to influence the outcome of the case (or the timing of rulings) should be treated as an interested person. Again, where there is doubt about a communication's status, it should be treated as one by an interested person.

As noted earlier, the ex parte rules prohibit not only communications by interested persons to Agency adjudicators, but also communications by Agency adjudicators to interested persons. This could present problems in situations where the adjudicator does not know whether the persons to whom he or she is speaking

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3/ Routine inquiries from the news media, or from persons whose interest in the case is purely academic, normally would fall outside the rule's coverage.

are "interested." Moreover, as in the case of communications with non-interested Agency personnel, the adjudicator should avoid substantive communications with any person outside the Agency (whether interested or not) concerning facts at issue in the proceeding, unless all parties are notified and given an opportunity to participate. Finally, discussion by the adjudicator of the merits of an ongoing proceeding may lead people to assume the matter has been pre-judged even if technically there is no violation of the ex parte rules.

IV. How can ex parte communications be minimized, and what should be done if they occur?

It is probably impossible to prevent entirely the occurrence of improper ex parte communications. In a discussion of general matters between industry representatives and the Administrator, for instance, the conversation may inadvertently move to a matter which is involved in an adjudication. The Administrator must deal with a wide variety of topics, most of which are not covered by the ex parte rules, and should not feel constrained to avoid discussions with persons who are regulated by EPA merely because those persons also may be involved in some formal adjudication. But the ex parte doctrines must be kept in mind if such discussions are to be held.

There are two kinds of measures -- preventive and curative -- that should be taken by your office to lessen the likelihood of problems. Preventive measures should include:

(1) An awareness on the part of the Administrator and her immediate staff of the importance of the principles discussed in this memorandum;

(2) A system designed to keep the staff aware of the adjudicatory proceedings that are in process, and the parties to and issues in those proceedings;

(3) Attention to potential ex parte problems when scheduling meetings, drafting speeches, and screening telephone calls, and reminders by the staff of topics that should be avoided; and

(4) Similar attention to the problem by those who handle incoming and outgoing written correspondence; and

(5) For "ex parte" purposes, members of the Administrator's personal staff should consider themselves to be part of the decision-making team headed by the Administrator. Otherwise, serious practical and legal problems could

arise in insulating decision-makers from staff members who have received or initiated ex parte communications.

The principal curative measure, once an improper ex parte communication has occurred and has been recognized as such, is to make the content and circumstances of the communication a part of the official record of the proceeding and afford the parties a chance to respond on the record. (If the communication was oral, a written memorandum of it must be prepared.) The written communication (or the memorandum summarizing the oral communication) must be forwarded to the Office of the Hearing Clerk, A-110, with a request that copies of it be furnished to all parties. This procedure is designed to nullify the "secret" nature of the communication and thereby preserve the fairness and integrity of the decision-making process.

In cases where an interested party outside the Agency has knowingly and egregiously violated the ex parte rules, the APA permits the Administrator or other adjudicator to render a decision adverse to that person.

GM #43
SO. 1-3

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

SEP 16 1985

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Document Release Guidelines

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

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators
Regional Counsels

Attached are the Agency's new "Enforcement Document Release Guidelines". These Guidelines will provide Agency-wide consistency in the release of enforcement related documents. At the same time, they are designed to release as much information as possible to the public while still satisfying the Agency's legal obligations and maintaining its enforcement program.

Accordingly, the Guidelines will assist program personnel and enforcement attorneys in their decisions to withhold or release enforcement documents requested by the public. As indicated in the document, most of these decisions will be made in response to FOIA requests. Nevertheless, it is important to emphasize that all decisions for the release of any enforcement document should be made on a case by case basis. If there are any questions, the case attorney, the Regional Counsel, or an OECM attorney should be consulted.

Questions regarding these Guidelines, should be addressed to Bill Quinby of my staff. He may be reached at FTS 475-8781.

cc: Associate Enforcement Counsels
Program Enforcement Office Directors

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENFORCEMENT DOCUMENT RELEASE GUIDELINES

Enforcement Document Release Guidelines

Table of Contents

I. Purpose

The purpose of this memorandum is to provide interpretive guidelines for releasing EPA enforcement related documents to the public in situations when the law provides discretion. The Agency seeks to enhance national consistency in the release of Agency documents by providing these guidelines to enforcement attorneys and program personnel. Such consistency will promote fairness to all public interests and ensure that EPA meets its legal responsibilities while protecting the effectiveness of the enforcement program.

This memorandum is intended to provide general guidelines. The decision to release a particular document may vary, depending on the type of document, function of the document in the Agency process, and the status of that process. The memorandum seeks to articulate the common principles which can be applied to situations in which release decisions must be made. Each program office can tailor these guidelines to meet its individual statutory and programmatic needs. If the law provides EPA with the discretion to release documents, these guidelines will assist Agency personnel in their case by case determinations.

Agency personnel should always contact the appropriate case attorney before releasing documents relating to enforcement activities. Notifying the appropriate enforcement attorney is important because of the possible impact on potential or pending enforcement actions and the changing case law related to document release. All decisions for the release of any enforcement document

should be made on a case by case basis, taking into account the guidelines set out in this memorandum.

II. Goal

The EPA recognizes that an effective enforcement program is essential to the Agency's overall mission of protecting the environment. EPA will release as much information as possible to the public consistent with satisfying legal obligations while still maintaining its enforcement program. The Agency will satisfy all statutory requirements to release or withhold documents. If the Agency has discretion to release documents, it should generally release the documents, or portions thereof, unless such release will interfere with the effectiveness of its enforcement effort.

III. Scope

The guidelines apply to any type of enforcement document, and include written information, material recorded on magnetic tape, material contained in a computer, video tape, film, etc. These guidelines apply whether or not there has been a specific request for the document.

The document must be an Agency record. A document is considered an EPA record if it has some or all of the following characteristics: it was produced in the context of Agency work;

its creation or physical possession arose within established Agency procedures, and/or it was distributed to others, including the file. Generally, if a document is within the custody and the control of the Agency, it is considered an Agency record. Personal notes, message slips, appointment calendars, etc., of an Agency staff member may not be an EPA record if they were not circulated to or used by other EPA employees, were unrelated or only partially related to EPA activities, or were used only to jog the memory of the author. Bureau of National Affairs v. U.S Department of Justice 742 F.2d 1484 (D.C. Cir. 1984).

Although the focus of the memorandum is on the release of documents, the import of this guidance pertains to information contained within documents. In most cases, after EPA determines that it will withhold certain information, the Agency will make reasonable efforts to segregate out those portions of documents which can be released. In addition, the principles in the guidance are applicable to the release of information during oral communications with persons outside the Agency.

This guidance does not attempt to address in any detail how or when EPA will release documents requested under the Federal Rules of Procedure during civil and criminal litigation. The release of documents pursuant to discovery proceedings during litigation will depend on the issues being litigated and the strategy employed. Any request for documents outside of established discovery procedures that relate to potential or pending civil and criminal litigation should be brought to the attention of the case attorney.

This guidance also does not apply to requests for information received from Congressional committees or subcommittees. For guidance on handling such requests, Agency personnel should consult previously issued policy statements which are specific to Congressional inquiries, Memoranda of Understanding which EPA has entered into with several committees, and OECM's Congressional Liaison Officer in coordination with the Office of External Affairs and, when appropriate, with the Office of General Counsel.

IV. General Principles

There are a number of statutes, regulations and rules of procedure which place constraints on the Agency's discretion in releasing enforcement documents to the public. These statutes include: the Administrative Procedure Act, (APA); the Freedom of Information Act (FOIA) which is included in the APA, and requires publication and release of certain Agency documents; the Privacy Act which prohibits release of certain information pertaining to individuals; and various environmental statutes which prohibit release of trade secrets and mandate release of certain pollution data. Other rules of procedure, such as Rule 6 of the Federal Rules of Criminal Procedure, require safeguarding grand jury material. The EPA has promulgated regulations which implement FOIA and state Agency policy on how it will use its discretion to release information in certain cases. These statutes and regulations are described more fully in the Appendix (page 24).

Congress has required that agencies release all requested records unless FOIA provides a specific exemption authorizing the withholding of those records. This guidance is based in large part on whether specific documents fall within one of the exemptions from mandatory disclosure. If a document fits within one or more of the exemptions that are discretionary under EPA's regulations (exemptions b(2), b(5) and b(7)), the Agency's decision to release a document should be determined on a case by case basis. The EPA should consider releasing the document if no important purpose would be served by withholding it.

Generally, once EPA releases a document, it may not later withhold the document unless the Agency can show: 1) that it was disclosed under explicitly limited and controlled conditions, and 2) that EPA preserved the rationale for the privilege established in the exemption. An unauthorized leak of a document does not necessarily waive an EPA privilege.

On occasion, a party already engaged in an administrative enforcement proceeding or litigation with the Agency may use FOIA to enhance, replace, or otherwise modify the discovery rules. These rules are traditionally available under the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, discovery rules of other Federal courts and normal Agency discovery procedures. Whether or not there is an established administrative discovery procedure (e.g., the consolidated rules of practice found in 40 C.F.R. Sections 22.01 et seq.) the Agency may consider withholding documents where a privilege exists to withhold the document under a FOIA exemption.

For example, EPA is able to withhold investigatory records compiled for law enforcement purposes the release of which would generally interfere with a prospective or pending enforcement proceeding under exemption 7(A) of FOIA. Investigatory records (files) were defined originally by Congress as "related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Expressed another way, the information must be compiled for a demonstrated law enforcement purpose within the Agency's enforcement authority, or gathered in the good faith belief that the prospective defendant might violate or has violated federal law. This is in contrast to information gathered for routine regulatory purposes or from customary compliance monitoring. However, an evaluation is still necessary to determine whether the release of a document will interfere with an investigation.

Exemption 7 of FOIA contains five additional withholding privileges for investigatory records which EPA will less frequently encounter in an administrative, civil or criminal enforcement context. They are documents whose release would result in at least one of the following five consequences:

7(B) deprive a person of a right to a fair trial or an impartial adjudication,

7(C) constitute an unwarranted invasion of personal privacy,

7(D) disclose the identity of a confidential source,

7(E) disclose investigative techniques and procedures,

7(F) endanger the life or physical safety of law enforcement personnel.

EPA will not provide any person with exempt documents the release of which would harm a case in litigation. Nevertheless, the Agency must respond to any FOIA request on a case by case basis. Agency personnel, including the appropriate attorney, should first determine whether an exemption applies. If an exemption does apply, the Agency may withhold the document, or at its discretion, release it to the requesting party. If an exemption does not apply, EPA must release the document. Under FOIA, a party's rights are neither enhanced nor diminished by his or her status as a private litigant. NLRB v. Robbins Tire and Rubber Co. 437 US 214 (1978).

Various policy memoranda explain the need to segregate and secure those documents related to criminal investigations and enforcement activity (e.g., a Memorandum from the Assistant Administrator dated January 7, 1985, entitled "Functions and General Operating Procedures for the Criminal Enforcement Program"). EPA personnel should follow such guidance to prevent the release of documents related to criminal proceedings. This Document Release guidance is consistent with existing procedures and, as a general matter, is applicable to documents related both to criminal and civil enforcement activity.

V. Releasing General Enforcement Documents

A. Enforcement Policy Document

These documents generally instruct Agency staff on how EPA will conduct its enforcement activities. Examples include a

Memorandum from the Administrator dated September 20, 1982, on enforcement action against stationary air sources which will not be in compliance by December 31, 1982, and a Memorandum from the Assistant Administrator for Air, Noise and Radiation dated September 15, 1982, on issuing notices of violation under the Clean Air Act.

EPA will release to the public those documents containing final enforcement policy. Such documents are signed by at least a Divison Director or equivalent. This policy is consistent with the Agency's objective of informing the public about how it conducts business.

Even if documents contain predecisional or deliberative information, EPA will not necessarily withhold such documents or portions of them under FOIA exemption 5. The Agency will withhold those documents only if an important purpose would be served by so doing. An important purpose for withholding might be found where release would be likely in the future to inhibit honest and frank communications necessary to effective policy making or might inaccurately reflect or prematurely reveal the views of the Agency. Such predecisional documents include draft copies which are often circulated within the Agency for review and comment, documents which discuss recommendations and options for the establishment of enforcement policy, and documents which transmit them if such documents reveal content. These documents play an integral part in development of final enforcement policy.

A waiver of this deliberative process privilege can occur, as in other contexts, if EPA distributes a document outside the

Federal government. Nevertheless, if the Agency can show that the disclosure was limited and controlled, waiver may not apply. For example, disclosure to a state agency may result in waiver unless the responsible office has determined that state comment is important to the Agency decision-making process and has taken steps to ensure that the state will keep the distributed draft confidential (e.g., transmittal of the draft with a cover letter explaining the need for limited distribution, numbering the documents sequentially, and requesting that all copies be returned to EPA after state comment).

B. Enforcement Strategic Planning

These documents relate to enforcement initiatives and strategies which the Agency develops to ensure that sources comply with environmental statutes and regulations. An example is a guidance Memorandum from the Assistant Administrator for Solid Waste and Emergency Response dated June 18, 1982, which broadly describes fiscal year 1983 RCRA permit and inspection numbers. Agency personnel should release documents which pertain to a broad class of sources, but withhold documents which are so specific that an individual source could use the information to circumvent EPA enforcement activity.

For example, final Agency documents detailing enforcement expenditures for compliance inspections during a fiscal year are documents which EPA should release to the public. On the other hand, EPA should consider withholding documents, or portions thereof, specifically detailing the projected inspection of enforcement targets in various metropolitan areas. These

documents are primarily intended for internal use and their release could enable a source to circumvent environmental statutes and regulations. This rationale will likely be available only in the narrow context of detailed regional plans to implement a specific enforcement effort. If the document is not an investigative record associated with a specific enforcement case, EPA may be able to apply exemption 2 of FOIA. This exemption relates to documents involved with internal agency personnel rules and practices. The case law has extended the exemption to certain predominantly internal documents, the release of which would significantly risk circumvention of agency regulations or statutes. Crooker v. Bureau of Alcohol, Tobacco and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Of course, a regional plan that is in the form of a recommendation rather than a final agency policy could also be withheld under exemption 5's deliberative process privilege.

C. Management/Administrative

These documents relate to the day-to-day operation and management of the Agency. An example is a Memorandum from the Associate Administrator and General Counsel dated November 28, 1983, which explains the requirement for clearance of significant enforcement pleadings.

Although the Agency has discretion to withhold internal personnel rules and routine management documents under FOIA exemption 2, EPA will generally release these documents unless their release would interfere with Agency operations. The

release of most final documents related to routine budget matters and internal Agency management will not interfere with overall Agency activities. If the program office responsible for such operations considers that a release would interfere with Agency operations, it may withhold the documents under exemption 2 of FOIA. Instances of interference are rare, and consultation with the office of General Counsel or Regional Counsel is recommended in such cases.

EPA can also withhold documents containing preliminary enforcement budget information if their release would interfere with the frank exchange of ideas prior to final budget decisions. These documents may be exempted from disclosure under exemption 5.

D. Deliberative Support Documents

These documents accompany other enforcement documents. They include certain transmittal memos, memos containing recommendations, evaluation of enforcement options, suggestions, analyses, etc., related to general enforcement matters.

In most cases, EPA will use its discretion to release documents which are predecisional intra- and interagency documents, unless such production would cause harm to the enforcement process. The rationale for retention includes the protection of open and frank discussion of enforcement options. The Agency can withhold the deliberative portions of such requested documents under exemption 5 of FOIA.1/

1/ "Guidance for Assertion of Deliberative Process Privilege" issued by the Administrator, October 3, 1984; and memorandum from acting General Counsel, same subject, issued April 22, 1985.30

E. Reference Files

These are materials that enforcement personnel use for assistance in performing general Agency business. They include technical files, sample forms, etc. Generally, EPA will make reference documents available to the public with the exception of materials which EPA employees own and materials published by non-federal organizations which already are readily available from other sources. (See 40 C.F.R. §2.100(b) for definition of agency record.)

F. Documents Containing Attorney-Client Communications

These documents which are not necessarily case specific contain communications made in confidence between Agency staff and attorneys for the purpose of obtaining or providing legal advice related to EPA matters in which the "client" is authorized to act.

EPA legal personnel will not disclose, without the client's consent, communications made in confidence to or from an Agency attorney for the purpose of obtaining or providing legal advice related to an EPA matter. EPA may withhold documents containing such information, if drafted by the client or the attorney. Also in order to protect the inadvertent disclosure of the client's confidential factual information it may withhold documents whether or not the communication is made in the context of litigation. The documents may be exempted from disclosure under the attorney-client privilege included in exemption 5. Mead Data Control v. U.S. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1971).

There are instances when the Agency may choose not to claim this privilege and therefore will release documents containing these communications. For example, EPA will release the documents if the program personnel do not consider the factual information confidential either at the time it is communicated or subsequently thereto. If EPA wants to withhold documents, it should be prepared to demonstrate that the program client expected confidentiality. Personnel making intra-regional communications between a program office and a Regional Counsel's office should be sensitive to the fact that the communications may be confidential and not available for disclosure at a later date. For example, the document may be stamped "confidential, not for release under FOIA" thus limiting distribution only to the EPA personnel who need to know and are authorized to act for EPA on the particular matter. EPA should release documents in which the attorney is only stating general Agency policy or if the advice is later adopted as Agency policy. EPA should consider release of documents, or portions thereof, containing attorney-client communications if the release would not harm future frank exchanges between Agency staff and its attorneys.

VI. Releasing Case-Specific Documents

A. Case Files

In General

Documents in case files contain legal and/or technical information related to a specific case or party. Case files are frequently located in a number of offices, including offices

that conduct field investigations, perform technical evaluations, or provide legal assistance.

Case file documents accumulate at these separate offices during different stages in the enforcement process (e.g., while EPA is investigating a party, while EPA is initiating an administrative enforcement action, or after EPA issues a formal enforcement document). Whether EPA will release the information may depend on the stage of the enforcement activity. Release is generally appropriate when the party is in compliance with the law or the compliance status is unknown. Documents containing technical information related to the party's routine compliance monitoring or tracking are available to the public or to potentially responsible parties in CERCLA litigation.

Once EPA identifies a potential violation, it may withhold investigatory documents in order to prevent interference with any potential or pending enforcement proceeding. In such cases, EPA should withhold the documents to prevent harm to any potential enforcement action which may occur by the premature release of evidence or information. If EPA wants to withhold the documents, it has the burden of demonstrating the potential harm to an enforcement proceeding. This decision should be made on a case by case basis. EPA would be able to withhold these requested documents under exemption 7(A) of FOIA. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214 (1978).

In many cases, the Agency will use its discretion and release investigatory data. This policy (with the exception of criminal investigations) serves the useful purposes of helping a source

identify the environmental problem, allowing the source to comment on the accuracy of EPA factual findings, and informing the public of the extent of the environmental problem.

In other instances the Agency will consider withholding of investigatory documents. The further the Agency proceeds in any enforcement action or the more data the Agency interprets, the more reluctant it will be to use its discretion and release documents without a mutual document exchange with the source. The Agency will also be reluctant to release investigatory findings where adequate quality assurance checks have not been made, and the release of the findings could interfere with the enforcement activity. Finally, the necessity to protect confidential information, and the greater need to maintain secrecy in criminal investigations provide valid reasons for the Agency to retain documents. Agency personnel should always discuss investigatory documents which relate to enforcement activity with the case attorney, the Regional Counsel or an OECM attorney prior to the release decision.

Once an enforcement action is concluded, EPA will be more willing to release investigatory documents because their release is less likely to interfere with an enforcement proceeding. Nevertheless, if their disclosure would interfere with other similar or related proceedings, reveal the identify of informers, or if other exemption 7 privileges still apply, EPA may withhold the documents.

Case files may contain information in documents which a company considers confidential business information. As discussed

in the Appendix, part D, EPA is statutorily prohibited from releasing confidential business information.

Attorney Work Product And Attorney-Client Materials

Other types of documents which EPA may withhold are those prepared by, for, or at the request of an attorney in anticipation of litigation. The courts allow EPA to withhold such attorney work product documents in order to create a zone of privacy around the attorney to protect the adversarial process. Hickman v. Taylor, 329 U.S. 495 (1947). While EPA may withhold such documents under exemption 5, it may make a discretionary release of the documents. In such a case, the Agency staff, including the attorney, would determine on a case by case basis that the release would not result in harm to the attorney's ability to operate freely in litigation. In order for EPA to withhold a document under the attorney work product privilege, the document must have been prepared at the time when there was some articulable violation. Litigation need not have been pending; however, there should be some prospect of litigation, either administrative or judicial.

Specific types of documents which may be protectable as attorney work products and which EPA may choose not to release are:

- Investigative reports prepared by field investigators under the general direction of attorneys to verify further a violation, and which would be relied upon by a reviewing attorney;
- Documents prepared at the request of technical staff working with attorneys in anticipation of, or preparing for, an administrative hearing or litigation;

- Reports prepared by consultants under direction of attorneys to assist attorneys in preparation for litigation;
- Reports from experts prepared under direction of attorneys which organize and summarize the evidence for a particular enforcement action;
- Attorney-prepared factual synopses of, and opinions on, a particular case;
- Attorney notes summarizing the facts and observations on the evidence;
- Attorney notes of conversations with program personnel, company representatives, etc.; and,
- Witness interviews conducted by attorneys or employees working on their behalf.

Below are examples of documents which may not be protected as attorney work products, but could be protected as investigatory records if they meet the requirements of exemption 7:

- Routine investigatory reports gathered during regular compliance monitoring; and,
- Verbatim witness reports and statements.

Whether or not a document is an attorney work product will depend on a case by case review of the document in the context of the particular enforcement activity. Even if the attorney work product privilege does not apply, other exemptions, such as for investigatory records (exemption 7), may permit the Agency to withhold the document.

Case files may also contain documents with attorney-client communications. EPA policy related to attorney-client documents is discussed above on pages 12 - 13 in the context of general documents.

Settlement Documents

In negotiating a settlement of an enforcement action, EPA will frequently exchange draft settlement terms with the opposing party. These terms are often embodied in a draft administrative or judicial order. The drafts facilitate Agency consideration of settlement.

The law on whether an agency may withhold settlement documents under exemption 5 of FOIA is currently unresolved. If there is the likelihood that non-parties will equest settlement documents during litigation, the lead counsel should consider seeking a protective order. Or at the minimum he should seek a stipulation between parties that they will not release the settlement documents. Although in this latter case, the stipulation would not negate EPA's obligation to honor a FOIA request, insofar as it is valid.

In all such settlement situations, even if no protective order or stipulation exists at the time of a request under FOIA, EPA may consider withholding such documents under the theory that review and comments are necessary for intra-agency review of the settlement (exemption 5). However, before such records are withheld, consultation with the Office of General Counsel or Regional Counsel is recommended in view of the unsettled law in this area. Any transmittal of settlement documents to an opposing party should explain that the Agency expects that party to keep the documents confidential. It should also contain language indicating that the limited dissemination is only intended to help the Agency decide whether the settlement is appropriate.

The above guidance is consistent with the Agency goal of providing for public participation in the litigation settlement process. If a non-party feels that it needs to protect its interests in particular litigation, the non-party may seek intervention in a civil suit. Depending upon the scope of intervention permitted by the Court, the party-intervenor may participate in resolving the litigation by reviewing a negotiated order or even participating in the negotiations. In addition, the Department of Justice will notify the public in the Federal Register of any proposed judicial consent decree. The public will then have the opportunity to comment on the decree before it becomes final.

Other Documents

Other documents which may be located in case files are law enforcement documents which discuss unique investigative techniques not generally known outside the government. EPA need not disclose such documents when they describe specific investigatory techniques employed to detect violations or report on techniques for a particular investigation (e.g., a document which lists those particular facts which a field investigator will examine during the inspection of a narrow class of sources). EPA should not disclose such documents if the release of the document could assist a potential target of investigation in avoiding EPA's detection of an existing violation. EPA is able to withhold these requested documents under exemption 7(E) of FOIA. Document retention should not extend to routine procedures

already known to the public, such as common scientific tests, technical reports which discuss indicators of compliance, and methods for interviewing witnesses.

EPA will generally release to the public enforcement documents which it issues to sources during formal enforcement actions (other than pre-final settlement documents). Examples of such documents include notices of violation under the Clean Air Act, administrative orders, and pleadings which are filed with an administrative hearing officer or court. Since the decision in Cohen v. EPA, 575 F. Supp. 425 (D.D.C. 1983), EPA has decided to release, except in very limited circumstances, the names of potentially responsible parties for hazardous waste site clean-up in response to FOIA requests. EPA will enter the names into the data base of a computer system and will provide requesters with a list of potentially responsible parties who have received notice letters. (See Memorandum from Gene A. Lucero, Director of the Office of Waste Programs Enforcement to Waste Management Division Directors dated December 9, 1983.)

Documents may be in enforcement files which relate to how EPA should use its enforcement discretion to prosecute a particular polluter. As a general matter, EPA need not release such documents if to do so would cause harm to the enforcement process. The EPA is able to withhold these documents, if predecisional, because under exemption 5 they would compromise the deliberative process of the Agency, as attorney work product, and/or as attorney-client privileged. In addition, they may be withheld if they are investigatory documents, the release of which would interfere with a

potential or pending enforcement action (exemption 7(A)). EPA will release documents containing general enforcement discretion policy statements, unless it is clear that their release would interfere with enforcement proceedings and therefore qualify them as investigatory records.

The need to withhold documents discussing enforcement discretion may diminish once a final decision is made or a case is concluded. At that time, in responding to a FOIA request after final action, the office considering a document release should assess whether the release of a predecisional deliberative document or an attorney-client communication would hinder free and frank discussion. The attorney work product privilege is not necessarily lost if litigation, or the potential for litigation, no longer exists. FTC v. Grolier, Inc. 103 S.Ct. 2209 (1983). Even in the case of concluded or halted criminal actions, additional concerns might preclude the release of the documents. EPA will not release documents if they disclose the identity of a confidential source, confidential information, or investigative techniques and procedures, or if this release would endanger the life or physical safety of law enforcement personnel. These exemptions under FOIA related to criminal cases are found in exemptions 7(D), (E) and (F). (See page 6.)

B. Case Status Reports

These are manually created or computerized documents in which the Agency reports enforcement activities. The documents may be related to compliance tracking, general enforcement planning, and

ongoing specific enforcement actions including active cases against violating sources.

These case status reports serve a number of functions, including compliance monitoring. The Agency will make available to the public documents containing information relating to tracking various matters related to pollution sources. The EPA will consider withholding documents (including non-public documents after a case is referred or filed) once a source is identified as violating an environmental standard. Whether the Agency will release a document after it makes that identification depends on the degree to which its release will interfere with enforcement proceedings. For example, the release of a list of suspected violating sources for which EPA is completing its investigations might interfere with the normal enforcement process. The EPA is able to withhold these requested investigatory reports under exemption 7(A) of FOIA. Other case status reports are used as litigation planning and management tools. These reports, whether prepared by attorneys or program personnel working with the attorneys, might fall within the category of attorney work product as discussed above.

VII. Conclusion

All determinations for the release of any document must be made on a case by case basis, in light of applicable legal authorities and the guidelines discussed in this document. Enforcement attorneys are available at headquarters and in all regional legal offices for additional consultation on these

matters. Regions are encouraged to establish internal procedures to ensure that the Regional Counsel is notified of all written requests for enforcement-related documents.

The policies and procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

APPENDIX

There are a number of statutes and regulations which place constraints on the Agency's discretion to release enforcement documents to the public. The statutes listed below expressly require or prohibit disclosure of records; the regulations address EPA policy.

A. Administrative Procedure Act (APA)

The Freedom of Information Act (FOIA) is contained in Section 552 of the APA. 5 U.S.C. § 552. Congress enacted FOIA for the express purpose of increasing disclosure of agency records. The first part of FOIA mandates the disclosure of certain agency documents. An agency is required to publish in the Federal Register certain enumerated types of material. In addition, FOIA requires all agencies to index and make available for public inspection and copying other enumerated types of material. Such documents include statements of policy and interpretation adopted by the agency, administrative staff manuals, and instructions to staff that affect members of the public. Finally, FOIA requires disclosure, on request, of all reasonably described records, unless the documents can be classified within one or more of the nine categories of records that are exempt from the disclosure requirements. Court decisions have clarified which documents are properly classified as exempt from mandatory disclosure.

Although FOIA permits the Agency to withhold certain documents from disclosure, it does not provide guidance on how the Agency should use its discretion to release "exempt" or

"privileged" documents. Because FOIA contains an exemption from release for certain documents it does not automatically mean EPA should withhold them.

Accordingly, EPA has promulgated regulations which clarify how the Agency will utilize its discretion to release documents which it could withhold as exempt under the statute. These regulations are found in 40 C.F.R. Part 2.

B. The FOIA Regulations

The Agency has determined that it will not release any document which falls within certain of the exemptions unless it is so ordered by a federal court or in "exceptional circumstances" with the approval of the Office of General Counsel or Regional Counsel. 40 C.F.R. Section 2.119. These documents include those related to national defense or foreign policy; documents for which a statute prohibits disclosure; trade secrets; personnel/medical and related files, release of which would constitute an unwarranted invasion of personal privacy; reports prepared by, or for, an Agency responsible for regulating financial institutions; and geological and geophysical information. On the other hand, the regulations allow the Agency to utilize its discretion in deciding whether to release requested documents related to internal personnel practices, intra-agency or interagency memoranda, and investigatory records. Disclosure of such records is encouraged if no important purpose would be served by withholding the records. 40 C.F.R. Section 2.119(a)

C. Privacy Act

Congress enacted the Privacy Act in 1974 to promote governmental respect for the privacy of citizens. 5 U.S.C. § 552a. Section 3(b) of the Act prohibits agencies, except in 12 specified instances, from releasing or disclosing any record maintained in a system of records pertaining to an individual (other than to that individual) without prior written consent of the individual. If EPA must release a document in response to a FOIA request, it is exempt from the nondisclosure provisions of the Privacy Act.

D. Confidentiality

The environmental statutes which EPA enforces prohibit the release of documents or information that contain trade secrets or confidential commercial or financial information. This prohibition is usually located in the individual section of the statute dealing with EPA investigatory authority, e.g., Section 114 of the Clean Air Act, 42 U.S.C. § 7414; Section 308 of the Clean Water Act, 33 U.S.C. § 1318; Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927; and Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604. In addition, The Trade Secrets Act, 18 U.S.C. § 1905, contains an independent prohibition against certain release of confidential business information by agencies. Section 1905 makes it a crime for a federal employee to disclose such information.

On September 1, 1976, EPA promulgated procedures and substantive rules on how to handle information that may be confidential.

These regulations at 40 C.F.R. Part 2, Subpart B, establish basic rules governing the handling of business information. The regulations at 40 C.F.R. § 2.204 require that before documents are released, EPA personnel must determine whether the documents are confidential, or whether the business asserts a claim of confidentiality. In general, if there is a claim, the material cannot be released prior to a review and confidentiality determination by the appropriate EPA legal office and notice to the submitter. Agency guidance explaining the procedures for handling business information under the regulations can be found in a Memorandum from the Deputy Administrator dated November 6, 1980, and entitled "Disclosure of Business Information under FOIA."

E. Statutes Requiring Disclosure

Many of the environmental statutes EPA enforces generally require the disclosure of certain information. For example the Clean Air Act requires that information EPA obtains under Section 114, other than trade secrets, shall be available to the public. CERCLA has a similar provision in Section 104(e)(2). Where the environmental statute generally requires disclosure of information obtained under the investigatory authority, EPA will interpret this language consistent with FOIA.

F. The Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure

Although exemption 5 has not been construed to incorporate every privilege in civil discovery, generally, those documents which are privileged under Rule 26 of the Federal Rules of Civil Procedure are documents which the Agency can withhold under FOIA.

Federal rules of procedure do not in themselves qualify under exemption 3 of FOIA, which protects information specifically exempted from disclosure by statute. However, when Congress subsequently modifies and enacts a rule of procedure into law the rule may qualify under the exemption. For example, it has been held that because Congress altered Rule 6(e) of the Federal Rules of Criminal Procedure (concerning matters occurring before a grand jury), that rule satisfies the "statute" requirement of exemption 3. Therefore, grand jury material in the hands of Agency personnel can be withheld under FOIA. Other rules require the release of certain documents to criminal defendants.

G. Bibliography

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3. Federal Information Disclosure 2 Vols. James T. O'Reilly, McGraw-Hill, 1979 (Supplement Available);

4. Guidebook to the Freedom of Information and Privacy Acts, Clark Boardman Co., Ltd., 1983.

MI.1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

MI. 1-1
GM #66

OCT 3 1984

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Guidance for Assertion of Deliberative Process Privilege

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators

The following guidance covers the assertion of the deliberative process privilege in response to depositions, motions to compel discovery and questions posed at a trial or hearing.1/

By separate action today, I have approved a delegation of authority authorizing you to assert this privilege on behalf of EPA. The guidance should be consulted and applied when exercising the authority to assert this privilege. (See delegation entitled "Assertion of Deliberative Process Privilege.) The guidance covers three areas:

- When should EPA assert the privilege?
- Who should assert the privilege?
- How should one assert the privilege?

The purpose of this privilege is to prevent disclosure of certain documents or other materials containing personal advice, recommendations or opinions relating to the development of

1/ This guidance does not cover assertion of this privilege in Freedom of Information Act matters. Nor does it cover other discovery privileges such as attorney work product, attorney client, etc. Finally, proper objections may lie to discovery that are not based on any privilege such as objections to discovery of legally irrelevant evidence.

Agency policy, rulemaking, use of enforcement discretion, the settlement of cases, etc. Public disclosure of such material would be likely either to inhibit the honest exchange of views or inaccurately reflect or prematurely disclose the views of the Agency.

I. Background

The deliberative process privilege applies to information which is generated as part of the process leading to a final Agency decision or action on a matter. The function of the privilege is to encourage the honest and free expression of opinion, suggestions and ideas among those formulating policy for government agencies. United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973).

Inherent in this rationale is the assumption that, absent the privilege, the range of fresh ideas will be limited by fear of later public scrutiny of internal statements and suggestions. Thus, effective and innovative government will suffer. This purpose has been recognized in deciding that the privilege applies to documents "so candid or personal in nature that public disclosure is likely in the future to stifle the honest and frank communication within the agency." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The privilege likewise "covers recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinion of the writer rather than the policy of the agency." Id. Perhaps the most encompassing definition holds that "it is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd 384 F.2d 979, cert. denied 389 U.S. 952 (1967).

There are several limitations upon the otherwise broad reach of the privilege. First, the document or other written material must be predecisional, meaning generated before the policy to which it pertains was adopted by the Agency. In the case of mental impressions or opinions, predecisional means that the information sought in discovery consists of thoughts that were never communicated in writing as part of the policy setting or rulemaking process. Any document written to explain or support an established policy is not privileged. NLRB v. Sears, Roebuck and Co., 421 U.S. 132 (1975). Furthermore even

if a document was predecisional when prepared, it can lose that status "if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 866. The privilege also does not apply to matters which are purely factual in nature unless such factual material is inextricably bound within truly deliberative or opinion matters. Smith v. FTC, 403 F. Supp. 1000 (D. Del. 1975).

II. When to Assert the Privilege

Although the law allows the Agency to assert this privilege in a wide variety of situations, it does not require the Agency to exercise that right. Indeed, it is EPA policy that the Agency will not assert the privilege in every case where it applies. The Agency has a responsibility to the public to provide the relevant facts which underlie a particular policy. This responsibility suggests that we disclose data and the reasons supporting a policy on occasion which might otherwise fall within the scope of the privilege.

The Agency should release documents or other materials otherwise subject to the deliberative process privilege except where:

- release of the documents or other matters may cause harm to the public interest (See Section IV (5) for definition of harm),
- the documents or other matters are subject to another privilege which would justify nondisclosure, or
- release of the material would be unlawful.[2/]

Documents or other materials should not be withheld solely because they would reveal flaws in the case or information embarrassing to the government.

III. Who Should Assert the Privilege

In general, the head of the office responsible for developing the document or material in question should assert the

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2/ It is the responsibility of counsel to decide whether the materials are subject to some other privilege or their release is unlawful.

privilege on EPA's behalf where appropriate. Thus, if a litigant makes a discovery request at a regional office seeking production of matters which originated with a Headquarters program office, the decision to assert the privilege should probably be made by the head of that Headquarters program office. Of course, if the document was produced in a regional office, the Regional Administrator would assert the privilege, if appropriate.

IV. How to Assert the Privilege

The guidance contained in this section should be followed in asserting the deliberative process privilege. The deliberative process privilege may be claimed only for documents or other materials which are truly deliberative or recommendatory in nature and consist of advisory matter or personal opinion rather than factual matter or Agency policy. Material or documents which are essentially factual in nature or which embody policies upon which the Agency has relied may not be withheld under the claim of deliberative process privilege. Furthermore, material which is clearly factual and which can be excised from deliberative material must be extracted and disclosed.

At a deposition, trial, or hearing, or similar circumstances where it is impracticable for the Agency to have a high official on call to claim the privilege, the privilege may initially be asserted by the attorney representing the Agency. He or she will raise and protect any potential claim of privilege by objecting to a question posed and directing the witness not to answer. If necessary - for example, in order to respond to a motion to compel - the attorney must furnish an affidavit from the appropriate Agency official which formalizes and supports the assertion of the privilege. The affidavit would be furnished to opposing counsel and, when appropriate, to the hearing officer or trial judge.

In formally asserting the privilege, the delegatee should comply with the following:

1) All delegatees must obtain the advance concurrence of the Office of General Counsel before asserting the privilege.

2) The privilege shall be claimed by executing an affidavit to be furnished to opposing counsel and, when appropriate, to the hearing officer or trial judge.

3) Where appropriate, the affidavit shall identify each document, portion of the document or other matter for which the privilege is claimed.

4) The affidavit shall specify that the delegatee has personally reviewed each document or other matter for which the privilege is being claimed.

In cases involving an extraordinarily large amount of material, the delegatee need only review a representative sample. It is understood that these will be extreme cases. In addition, the process of selecting the representative sample will be under close scrutiny. Alternatively, the delegatee may rely upon a personal briefing of a responsible Agency employee with personal knowledge of the matters for which the claim of privilege is sought or upon a comprehensive affidavit of such a responsible Agency employee in lieu of a briefing. The affidavit of the delegatee shall state the extent of the review and whether he or she is relying upon the briefing or affidavit of another.

5) The affidavit shall contain a statement that in the judgment of the affiant (delegatee), disclosure of the documents or other matters may cause an identifiable harm to the public interest. For these purposes, "harm" may be found where public disclosure is likely in the future to inhibit honest and frank communication necessary to effective policy making or might inaccurately reflect or prematurely reveal the views of the Agency. Documents or other materials should not be withheld solely because they would reveal flaws in the case or information embarrassing to the government.

6) Any agency official wishing to assert this privilege must be prepared to provide the material in question to the court for an in camera review.

William D. Ruckelshaus

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Revision:2/27/84:3/1/83:3/6/84:3/30/84:4/5/84:4/9/84:4/12/84
5/7/84:5/10/84:7/27/84

GENERAL, ADMINISTRATIVE, AND MISCELLANEOUS

1-49. Assertion of the Deliberative Process Privilege

1. AUTHORITY. To assert the deliberative process privilege in judicial and administrative litigation with respect to documents, portions of documents, or other materials within the control of the Agency.

2. TO WHOM DELEGATED. Deputy Administrator, Assistant Administrators, General Counsel, Inspector General, Associate Administrators, and Regional Administrators.

3. LIMITATIONS. All delegatees must obtain the concurrence of the General Counsel before asserting the deliberative process privilege.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

5. ADDITIONAL REFERENCES.

a. Rule 501, Federal Rules of Evidence;

b. Rule 26, Federal Rules of Civil Procedure; and

c. See the Memorandum of October 3, 1984, from William D. Ruckelshaus, Administrator, to Assistant Administrators, General Counsel, Inspector General, Associate Administrators, and Regional Administrators entitled "Guidance for Assertion of Deliberative Process Privilege."

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

APR 22 1985

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Deputy Administrator
Assistant Administrators
Inspector General
Associate Administrators
Regional Administrators

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: Assertion of the Deliberative Process Privilege

On October 3, 1984, the Administrator delegated to you the authority to assert the deliberative process privilege in litigation on the condition that you obtain the General Counsel's concurrence before asserting the privilege (see attached). This memorandum sets forth the procedures for obtaining that concurrence.

In general, the head of the office responsible for developing the document or material in question should assert the privilege. In all cases, the official asserting the privilege should prepare a memorandum requesting the General Counsel's concurrence. If the litigating attorney needs to file an affidavit to support the privilege, a draft affidavit should also be forwarded for review. The Associate General Counsels, Associate Enforcement Counsels, and Regional Counsels will be available to take the lead in preparing these documents. The official must explain both the basis for the conclusion that the materials fall within the deliberative process privilege and the reasons why release of the documents may cause harm to the public interest. Depending on the stage of the litigation, the explanation should be either in the affidavit or in the memorandum. A representative sample of the documents should be provided to the General Counsel along with the affidavit or memorandum. The extent to which the asserting official must review and describe the documents is addressed in the Administrator's memorandum.

Attachment

cc: Regional Counsels
Associate General Counsels
Associate Enforcement Counsels

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

SEP 30 1987

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Change in Review Process for Concurrence in Assertions of Deliberative Process Privilege in Litigation

FROM: Francis S. Blake
General Counsel

TO: Associate General Counsels

As you know, in accordance with the directive of the former Administrator, my concurrence is required in any assertion of the deliberative process privilege by the Agency in response to depositions, motions to compel discovery or questions posed at trial or hearings. The attached memoranda set out the procedures which already are in place and which remain in effect for obtaining my concurrence.

Until now, the Grants, Contracts and General Law Division has been responsible for reviewing requests for my concurrence. Effective immediately, requests for concurrence will be reviewed by the OGC division with programmatic responsibility for the documents or testimony in question, rather than only the Grants, Contracts and General Law Division. For example, requests to assert the deliberative process privilege in Superfund cost recovery cases will be brought to the attention of the Solid Waste and Emergency Response Division, and requests in Clean Air Act administrative hearings will be directed to the Air and Radiation Division.

The request for concurrence in asserting the privilege should be sent to me, along with the division's recommendation.

The Contracts and Information Law Branch of the Grants, Contracts and General Law Division will be available to discuss the standards to be applied and procedures to be followed in this review process. Contact Tom Darner at 382-5460 to request assistance.

cc: Assistant Administrators
Regional Counsels
Regional Administrators

GM-87
MI.1-2

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

MAY 3 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Strengthening the Agency's Administrative Litigation Capacity

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Regional Counsels
Regions I-X

In my memorandum to you of January 31, 1989, entitled "Issues Relating to Administrative Litigation", I asked for comment on a proposed process for dealing with decisions on whether or not to appeal ALJ decisions. Your comments were generally supportive of the proposal. Following discussion of this issue at its most recent meeting, the Enforcement Management Council affirmed the proposal contained in the earlier draft with the modifications set out below. Accordingly, we are instituting a process, beginning July 1, 1989, to provide for the incorporation of national program and other Regional perspectives in the decision whether or not to appeal adverse ALJ decisions. This memorandum describes the mechanism.

Administrative enforcement is a significant and dynamic element of the Agency's enforcement program. As new programs develop and mature programs evolve, decisions by the ALJs and the Chief Judicial Officer (CJO) mold and influence the direction of these programs. Adverse decisions can not only cause problems relative to the specific issue and program giving rise to the decision but can also, particularly when rendered at the CJO level, significantly impact enforcement programs outside of the one immediately addressed in the decision. For this reason it is important that the Agency's enforcement managers pay proper attention to the decisions issued by the ALJs and CJO. As I noted earlier, the process set out below was affirmed at the most recent meeting of the Enforcement Management Council. This

process is also in line with the agreement reached at the Atlanta Regional Counsels' meeting.

In order to initiate the next phase of this effort, please designate an attorney in your office who will serve as the standing contact for receipt of materials relating to appeals of administrative decisions. This contact will receive material as identified below for all media for appropriate distribution and action in your Region. This person does not necessarily have to be the person representing the Region on the substantive conference calls that will take place but will, as necessary, facilitate the Region's participation. Please send the name of your designee to Fred Stiehl (LE-134P), by June 1, 1989. Fred will prepare a master list and distribute it to all Regions.

Starting in July, the affected Region is to provide to the relevant Associate Enforcement Counsel in OECM and the designated standing contacts in the other Regions a notice and an opportunity to consult on all adverse decisions of the ALJs and all favorable decisions that are appealed to the Chief Judicial Officer by Respondents. This process will allow for consideration of issues of national interest that may go beyond the concerns of the involved Region. The process will be initiated by sending a "fax" of a copy of the decision and a brief summary of the decision by the Regional Counsel Branch Chief to the appropriate OECM Branch Chief, the appropriate OGC Branch Chief, and the ORC standing contacts within 3 days of receipt of the adverse decision. That transmission will also notify all parties of the time of an OECM-Regional Office conference call to discuss appeals issues. This call should take place as soon as possible after receipt of the summary, but no later than 4 calendar days after the "fax" is sent.[1]/ OGC will be invited to participate in this call if they choose to do so. If your Region wishes to participate in the appeal decision, your contact should advise the initiating Regional Counsel Branch Chief of your views prior to the phone call to OECM and can choose to participate in the call. The Regional Counsel Branch Chief will advise OECM if a conference operator is needed to include more than one Region in the call. In the event of agreement to file an appeal, the discussion will center on identifying issues for appeal, what support will be available to

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[1]/ A workgroup is considering amendments to the Consolidated Rules of Practice is lengthen the time for appeal. Until such time as the rules are changed, however, the Agency has 20 days from service of the order to file this notice of appeal and supporting briefs. 40 C.F.R. 22.30.

assist the lead office, and how the national and regional perspectives can be incorporated into the briefs. The views of the Headquarters program office will be solicited by the Associate Enforcement Counsel and factored into the discussion between the Region and Headquarters. In the event there is disagreement at the Branch Chief level as to whether to appeal, the question will be elevated to the Regional Counsel and the Associate Enforcement Counsel for resolution.

Given the very short time available to file appeals, this process will assure, at minimum cost, national program input and regional consistency in a timely manner. The process should be evaluated in light of our experience after one year to see if adjustments are appropriate.

cc: Deputy Regional Administrators
Enforcement Management Council
Headquarters Enforcement Office Directors
Deputy General Counsel for Legislation, Litigation, and Regional Operations
Associate Enforcement Counsels

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

#2

19 APR 1976

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO: All Attorneys - Office of General Counsel and
Office of Enforcement
Regional Counsel

FROM: Robert V. Zener
General Counsel

Stanley W. Legro
Assistant Administrator for Enforcement

SUBJECT: Professional Obligations of Government Attorneys

We believe it might be useful to discuss some of the obligations that we have as attorneys for the Agency, both under the Canons of Professional Ethics and under various provisions of law. The following is not intended to be a complete statement of a government attorney's professional obligations; rather, it is intended to highlight some matters which may deserve attention.

1. Confidential commercial or financial information. The Agency frequently is the recipient of confidential commercial or financial information. Under 18 U.S.C. 1905, disclosure of such information without consent of the firm involved is against the law, and the Agency's regulations carry out this prohibition. 40 C.F.R. 2.119. Of course, this prohibition is binding on all employees of the Agency. But we think it especially appropriate to remind Agency attorneys of this obligation of confidentiality, since Agency attorneys are so frequently entrusted with this type of information.

2. Civil or criminal investigations. Agency attorneys are frequently involved in investigations which could lead to referral of cases to the Department of Justice for civil or criminal prosecution. Extreme care should be taken in making any public statement

concerning such investigation, particularly where a possible criminal violation is involved. Neither the fact that an investigation is in progress nor the fact that a case has been referred to the Department of Justice should be disclosed except where authorized by current policy or specifically authorized. And in any event, a public statement should not go beyond the comment that an investigation is in progress; no conclusions should be stated. Any statement that the Agency believes a violation has occurred may be unfair to the company or individuals involved, and could prejudice the Agency's position in the enforcement action.

3. Attorney-client communications. The professional obligations of an attorney to his client attach to a government attorney's relationship to his agency. This includes the confidentiality of attorney-client communications. This also includes the obligation to represent the client's interest within the bounds of the law and professional ethics. The following points deal with specific problem areas:

i) Communications with the Department of Justice. These should be held in confidence unless the consent of the attorney involved at the Department of Justice is obtained.

ii) Legal advice. In the case of written opinions, some judgment has to be exercised with respect to public release. Some written opinions may constitute "statements of * * * interpretations which have been adopted by the agency", in which case they must be disclosed under the Freedom of Information Act, 5 U.S.C. 552(a)(2)(B). In some cases, a written opinion is supplied on the understanding that it will be widely distributed and made available to the public. On the other hand, written opinions may be supplied on a confidential basis, in which case the confidence should be respected. In any case, oral opinions are to be held in confidence unless the program people involved agree to disclosure.

iii) Support of Agency positions. An attorney's duty is to represent his client's position; and this duty applies to government attorneys. Of course, while a question is the subject of internal debate, an attorney is free to take any position he feels is reasonable and lawful on an issue; and this could include disagreement with the position taken by any particular program office. However,

once the Agency has taken a position, the attorney should support it in dealings with the outside world. If he feels he cannot support it, he should request to be reassigned from that matter or resign.

iv) Dealing with outside parties represented by an attorney. When you are dealing with outside parties whom you know to be represented by an attorney in connection with the matter in question, the Canons of Ethics require you to communicate with the attorney, unless the attorney consents to direct communication with his client. This can be especially significant in enforcement actions, where it would be highly unethical to attempt to obtain leads and evidence through direct communication with a party you know to be represented by an attorney on that particular matter, unless the party's attorney has agreed to this method of proceeding. Enforcement attorneys can, of course, participate in general or routine plant inspections and investigations. However, once the company becomes aware of any potential enforcement action and their counsel assumes responsibility for the matter, consent from opposing counsel would be necessary before any interviewing of company employees occurs during subsequent inspections. See Disciplinary Rule 7-104(a)(1) of the American Bar Association's Code of Professional Responsibility.

4. Commitments on behalf of the Agency. EPA lawyers are often asked to make commitments to persons dealing with the Agency which would bind EPA to taking (or not taking) certain actions or authorize the other party to embark on a certain course of conduct. Such commitments may significantly impact on other parts of the Agency and it is important that final commitments not be made until the necessary coordination with the affected offices has been accomplished. This is, of course, a problem of working in a large organization, but as a matter of fairness to outside parties and effective representation of the Agency, it is essential that there be internal agreement before such commitments are made. Of course, the practicalities of negotiation frequently make it necessary to reach an agreement at the staff level with outside parties without first obtaining the necessary approvals within the Agency. In this situation, the outside parties should be advised that approval within the Agency is necessary before the Agency is committed.

5. Ex Parte Communications. EPA attorneys are involved in a number of different types of formal adversary proceedings, e.g., FIFRA cancellations or NPDES hearings. Usually an independent decision maker is involved, such as a Federal court judge or an ALJ, but sometimes the decision maker may be an EPA employee assigned to that particular proceeding. Where formal APA procedures apply or the Agency's rules of practice limit ex parte communication, it is

important that these prohibitions against ex parte communications be observed. To insure continued public confidence in the integrity of our proceedings, it is imperative that there be no actual or apparent improper influence by the staff presenting the Agency's case to the presiding officer.

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

MI.1-4
GM #28

JUN 13 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Liability of Corporate Shareholders and Successor Corporations For Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

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

TO: Assistant Administrator for
Solid Waste and Emergency Response
Associate Enforcement Counsel for Waste
Regional Administrators
Regional Counsels

Introduction

The following enforcement memorandum, which was prepared in cooperation with the Office of General Counsel, identifies legal principles bearing on the extent to which corporate shareholders and successor corporations may be held liable for response costs that arise as a result of a release of a hazardous substance from an abandoned hazardous waste facility. In the discussion section pertaining to each part, the memorandum reviews the law on the subject from established traditional jurisprudence to current evolving standards. Although general rules of liability are delineated, these principles must be carefully applied to the unique fact pattern of any given case.

I. THE LIABILITY OF CORPORATE SHAREHOLDERS UNDER CERCLA

Background

Normally, it is the corporate entity that will be held accountable for cleanup costs under CERCLA. In certain

instances, however, EPA may want to extend liability to include corporate shareholders. This may arise, for example, where a corporation, which had owned or operated a waste disposal site at the time of the contamination, is no longer in business. The situation may also occur if a corporation is still in existence, but does not have sufficient assets to reimburse the fund for cleanup costs. There are two additional policy reasons for extending liability to corporate shareholders. First, this type of action would promote corporate responsibility for those shareholders who in fact control the corporate decision-making process; it would also deter other shareholders in similar situations from acting irresponsibly. Second, the establishment of shareholder liability would aid the negotiation process and motivate responsible parties toward settlement.

Traditional corporation law favors preserving the corporate entity, thereby insulating shareholders from corporate liability. Nevertheless, as will be discussed below, there are exceptions to this general principle that would allow a court to disregard corporate form and impose liability under CERCLA on individual shareholders.

Issue

What is the extent of liability for a corporate shareholder under CERCLA for response costs that arise as a result of a release of a hazardous substance from an abandoned hazardous waste facility?

Summary

The question of whether EPA can hold a shareholder of a corporation liable under CERCLA is a decision that must turn on the unique facts specific to given situation. Generally, however, in the interests of public convenience, fairness, and equity, EPA may disregard the corporate entity when the shareholder controlled or directed the activities of a corporate hazardous waste generator, transporter, or facility.

Discussion

Section 107(a)(2) of CERCLA provides that any owner or operator of a facility which releases a hazardous substance shall be liable for all necessary response costs resulting from such a release. Section 101(20)(A)(iii) of CERCLA clearly states that the term "owner or operator" as applied to abandoned facilities includes "any person who owned, operated, or otherwise

controlled activities at such facility immediately prior to such abandonment" (emphasis added).

In addition, Sections 107(a)(3) and 107(a)(4) of CERCLA impose liability for response costs on any person who arranged for the disposal or treatment of a hazardous substance (the generator), as well as any person who accepted a hazardous substance for transport to the disposal or treatment facility (the transporter).

The term "person" is defined in CERCLA Section 101(21) as, inter alia, an individual, firm, corporation, association, partnership, or commercial entity. A shareholder may exist as any of the forms mentioned in Section 101(21). Therefore, a shareholder may be considered a person under CERCLA and, consequently, held liable for response costs incurred as a result of a release of a hazardous substance from a CERCLA facility if the shareholder:

- Owned, operated, or otherwise controlled activities at such facility immediately prior to abandonment [CERCLA Section 107(a)(2); Section 101(20)(A)(iii)];
- Arranged for the disposal or treatment (or arranged with a transporter for the disposal or treatment) of the hazardous substance [CERCLA Section 107(a)(3)]; or
- Accepted the hazardous substance for transport to the disposal or treatment facility selected by such person [CERCLA Section 107(a)(4)].

Notwithstanding CERCLA's statutory language, courts normally seek to preserve the corporate form and thus maintain the principle of limited liability for its shareholders. 1/ In fact, fundamental "to the theory of corporation law is the concept that a corporation is a legal separate entity, a legal being having an existence separate and distinct from

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1/ See Pardo v. Wilson Line of Washington, Inc., 414 F.2d 1145, 1149 (D.C. Cir. 1969); Krivo Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), modified per curiam, 490 F.2d 916 (5th Cir. 1974); Homan and Crimen, Inc. v. Harris, 626 F.2d 1201, 1208 (5th Cir. 1980).

that of its owners." [2]/ This concept permits corporate shareholders "to limit their personal liability to the extent of their investment." [3]/ Thus, although a shareholder may be considered a "person" under CERCLA (and therefore subject to the Act's liability provisions), the application of corporate law would tend to shield the shareholder from such liability.

Nevertheless, a court may find that the statutory language itself is sufficient to impose shareholder liability notwithstanding corporation law. [4]/ Alternatively, to establish shareholder liability, a court may find that the general principles of corporation law apply but, nonetheless, set aside the limited liability principle through the application of the equitable doctrine of "piercing the corporate veil."

Simply stated, the doctrine of piercing the corporate veil refers to the process of disregarding the corporate

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[2]/ Krivo Industrial Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), modified per curiam, 490 F.2d 916 (5th Cir. 1974).

[3]/ Id.

[4]/ See United States v. Northeastern Pharmaceutical and Chemical Company, Inc., et al., 80-5066-CV-S-4, memorandum op. (W.D. Mo., 1984). In Northeastern Pharmaceutical the district court noted that a literal reading of Section 101(20)(A) "provides that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste." (Memorandum op. at 36.) The court went on to find that there was sufficient evidence to impose liability on one of the defendants pursuant to this statutory definition of "owner and operator," and the Section 107(a)(1) liability provision of the Act. The fact that the defendant was a major stockholder did not necessitate the application of corporate law, and thus the principle of limited liability: "To hold otherwise and allow [the defendant] to be shielded by the corporate veil 'would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA].'" (Memorandum op. at 37, citation omitted.)

entity to hold either corporate shareholders or specific individuals liable for corporate activities. 5/

In order to determine whether to disregard corporate form and thereby pierce the corporate veil, courts generally have sought to establish two primary elements. 6/ First, that the corporation and the shareholder share such a unity of interest and ownership between them that the two no longer exist as distinct entities. 7/ Second, that a failure to disregard the corporate form would create an inequitable result. 8/

The first element may be established by demonstrating that the corporation was controlled by an "alter ego." This would not include "mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked

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5/ See Henn, LAW OF CORPORATIONS §§143, 146 (1961). This doctrine applies with equal force to parent-subsidiary relationships (i.e., where one corporation owns the controlling stock of another corporation).

6/ Generally, courts have sought to establish these elements in the context of various theories, such as the "identity," "instrumentality," "alter ego," and "agency" theories. Although these terms actually suggest different concepts, each employs similiar criteria for deciding whether to pierce the corporate veil.

7/ See United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977); FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980).

8/ See Automotriz Del Golfo de Cal. S.A. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1 (1957); DeWitt Truck Broker, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 689 (4th Cir. 1976). Some jurisdictions require a third element for piercing the corporate veil: that the corporate structure must have worked an injustice on, or was the proximate cause of injury to, the party seeking relief. See e.g., Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972); Lowendahl v. Baltimore & O.R.R., 247 A.D. 144, 287 N.Y.S. 62, 76 (1936), aff'd 272 N.Y. 360, 6 N.E.2d 56 (Ct. App. 1936), but see, Brunswick Corp. v. Waxman, 599 F.2d 34, 35-36 (2d Cir. 1979).

so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." [9]

In analyzing this first element, courts have generally considered the degree to which corporate "formalities have been followed [so as] to maintain a separate corporate identity." [10] For example, the corporate veil has been pierced in instances where there had been a failure to maintain adequate corporate records, or where corporate finances had not been kept separate from personal accounts. [11]

The second element of the test is satisfied when the failure to disregard the corporate entity would result in fraud or injustice. [12] This would occur, for example, in cases where there has been a failure to adequately capitalize for the debts normally assocated with the business undertaking, [13] or where the corporate form has been employed to misrepresent or defraud a creditor. [14]

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[9] Berger v. Columbia Broadcasting System, Inc., 453 F.2d 991, 995 (5th Cir. 1972), cert. denied, 409 U.S. 848, 93 S.Ct. 54, 34 L.Ed.2d 89 (1972).

[10] Labadie Coal Co. v. Black, 672 F.2d 92, 96 (D.C. Cir. 1982); See DeWitt Truck Broker, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 686 n. 14 (collecting cases) (4th Cir. 1976).

[11] Lakota Girl Scout C., Inc. v. Havey Fund-Rais. Man., Inc., 519 F.2d 634, 638 (8th Cir. 1975); Dudley v. Smith, 504 F.2d 979, 982 (5th Cir. 1974).

[12] Some courts require that there be actual fraud or injustice akin to fraud. See Chengelis v. Cenco Instruments Corp., 386 F. Supp 862 (W.D. Pa.) aff'd mem., 523 F.2d 1050 (3d Cir. 1975). Most jurisdictions do not require proof of actual fraud. See DeWitt Truck Brokers v. W. Ray Flemming Fruit Co., 540 F.2d 681, 684 (4th Cir. 1976).

[13] See Anderson v. Abbot, 321 U.S. 349, 362, 64 S.Ct. 531, 88 L.Ed. 793 (1944); Machinery Rental, Inc. v. Herpel (In re Multiponics, Inc.), 622 F.2d 709, 717 (5th Cir. 1980).

[14] See FMC Fin. Corp. v. Murphree, 632 F.2d 413, 423 (5th Cir. 1980).

In applying the dual analysis, courts act under considerations of equity; therefore, the question of whether the corporate veil will be lifted is largely one of fact, unique to a given set of circumstances. However, the substantive law applicable to a case may also have great importance. For example, in applying state corporation law, state courts have been generally reluctant to pierce the corporate veil. [15]/ Federal courts, however, in applying federal standards, have shown more willingness to disregard the corporate entity and hold individuals liable for corporate actions. [16]/

In many instances federal decisions do draw upon state law and state interpretations of common law for guidance. [17]/ However, federal courts that are involved with federal question litigation are not bound by state substantive law or rulings. [18]/ In such cases, either federal common law

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[15]/ See discussion in Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 Harvard L.R. 853, 855 (1982).

[16]/ It is well settled that a corporate entity must be disregarded whenever it was formed or used to circumvent the provisions of a statute. See United States v. Lehigh Valley R.R., 220 U.S. 257, 259, 31 S.Ct. 387, 55 L.Ed. 458 (1911); Schenley Distillers Corp. v. United States, 326 U.S. 432, 437, 66 S.Ct. 247, 90 L.Ed. 181 (1945); Kavanaugh v. Ford Motor Co., 353 F.2d 710, 717 (7th Cir. 1965); Casanova Guns, Inc. v. Connally, 454 F.2d 1320, 1322 (7th Cir. 1972).

[17]/ See Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105 (9th Cir. 1979); Rules of Decision Act, 28 U.S.C. §1652 (1976). Generally, federal courts will adopt state law when to do so is reasonable and not contrary to existing federal policy. United States v. Polizzi, 500 F.2d 856, 907 (1974). See also discussion in note 19, infra.

[18]/ UNITED STATES CONSTITUTION art. VI, cl. 2.

or specific statutory directives may determine whether or not to pierce the corporate veil. 19/

19/ See Anderson v. Abbot, 321 U.S. 349, 642 S.Ct. 531, 88 L.Ed. 793 (1944); Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1981). For a general discussion of federal common law and piercing the corporate veil see, note 15, supra. The decision as to whether to apply state law or a federal standard is dependent on many factors:

> "These factors include the extent to which: (1) a need exists for national uniformity; (2) a federal rule would disrupt commercial relationships predicated on state law; (3) application of state law would frustrate specific objectives of the federal program; (4) implementation of a particular rule would cause administrative hardships or would aid in administrative conveniences; (5) the regulations lend weight to the application of a uniform rule; (6) the action in question has a direct effect on financial obligations of the United States; and (7) substantial federal interest in the outcome of the litigation exists.
>
> Even with the use of these factors, however, whether state law will be adopted as the federal rule or a unique federal uniform rule of decision will be formulated remains unclear. The courts have failed to either mention the applicable law or to state the underlying rationale for their choice of which law to apply." Note, Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?, 13 Pac. L.J. 1245, 1249 (1982) (citations omitted).

In discussions concerning CERCLA, the courts and Congress have addressed several of the above mentioned factors. CERCLA. For example, the need for national uniformity to carry out the federal superfund program has been clearly stated in United States v. Chem-Dyne, C-1-82-840, slip op. (S.D. Ohio, Oct. 11, 1983). In Chem-Dyne, the court stated that the purpose of CERCLA was to ensure the development of a uniform rule of law, and the court pointed out the dangers of a variable standard on hazardous waste disposal practices that are clearly interstate. (Slip op. at 11-13.) See also, Ohio v. Georgeoff, 562 F. Supp. 1300,

The general rule applied by federal courts to cases involving federal statutes is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." 20/ In applying this rule, "federal courts will look closely at the purpose of the federal statute to determine whether that statute places importance on the corporate form." 21/ Furthermore, where a statute contains specific directives on when the corporate entity may be disregarded and individuals held liable for the acts or debts of a valid corporation, courts must defer to the congressional mandate. 22/

Thus, even under general principles of corporation law, courts may consider the language of statute in determining whether to impose liability on corporate shareholders. Therefore, a court may use the statutory language of CERCLA either as a rationale for piercing a corporate veil (when corporation law is applied) or as an independent statutory basis for imposing liability (notwithstanding the general principles of corporation law). 23/

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19 (continued)/

1312 (N.D. Ohio, 1983); 126 Cong. Rec. H. 11,787 (Dec. 3, 1983).

The Chem-Dyne court stated that "the improper disposal or release of hazardous substances is an enormous and complex problem of national magnitude involving uniquely federal interests." (Slip op. at 11.) The court further noted that "a driving force toward the development of CERCLA was the recognition that a response to this pervasive condition at the State level was generally inadequate: and that the United States has a unique federal financial interest in the trust fund that is funded by general and excise taxes." (Slip op. at 11, citing, 5 U.S. Code Cong. & Ad. News at 6,142.) See also, 126 Cong. Rec. at H. 11,801.

20/ Capital Telephone Company, Inc. v. F.C.C., 498 F.2d 734, 738 (D.C. Cir. 1974).

21/ Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1981).

22/ Anderson v. Abbot, 321 U.S. 349, 365, 64 S.Ct. 531, 88 L.Ed 793 (1944).

23/ See discussion, supra, note 4.

Conclusion

The Agency should rely upon the statutory language of the Act as the basis for imposing liability on any person who controlled or directed the activities of a hazardous waste facility immediately prior to abandonment, or on any person who is a generator or transporter, notwithstanding the fact that that individual is a shareholder. Additionally, and alternatively, the Agency may rely on the general principles of corporation law to pierce the corporate veil by applying the current federal standard of public convenience, fairness, and equity. However, when seeking to pierce the corporate veil, the Agency should be prepared to apply the traditional dual test previously discussed in order to provide additional support for extending liability to corporate shareholders.

II. THE LIABILITY OF SUCCESSOR CORPORATIONS UNDER CERCLA

Background

Section 107(a)(2) of CERCLA extends liability for response costs to "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." Situations may arise, however, where a corporation, which previously had owned or operated a hazardous waste facility, now transfers corporate ownership to another corporation. In such cases, it is important to determine whether the liability of the predecessor corporation's action regarding the disposal of hazardous waste is also transferred to the successor corporation. 24/

Issue

What is the extent of liability for successor corporations under CERCLA?

24/ The discussion that follows is equally applicable to successor corporations of generators and transporters associated with hazardous substances released from CERCLA facility.

Summary

When corporate ownership is transferred from one corporation to another, the successor corporation is liable for the acts of its predecessor if the new corporation acquired ownership by merger or consolidation. If, however, the acquisition was through the sale or transfer of assets, the successor corporation is not liable unless:

a) The purchasing corporation expressly or impliedly agrees to assume such obligations;

b) The transaction amounts to a "de facto" consolidation or merger;

c) The purchasing corporation is merely a continuation of the selling corporation; or

d) The transaction was fraudulently entered into in order to escape liability.

Notwithstanding the above criteria, a successor corporation may be held liable for the acts of the predecessor corporation if the new corporation continues substantially the same business operations as the selling corporation.

Discussion

The liability of a successor corporation, according to traditional corporation law, is dependent on the structure of the corporate acquistion. 25/ Corporate ownership may be transferred in one of three ways: 1) through the sale of stock to another corporation; 2) by a merger or consolidation with another corporation; or 3) by the sale of its assets to another corporation. 26/ Where a corporation is acquired through the purchase of all of its outstanding stock, the corporate entity remains intact and retains its liabilities, despite

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25/ See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980).

26/ Note, Torts - Product Liability - Successor Corporation Strictly Liable for Defective Products Manufactured by the Predecessor Corporation, 27 Villanova L.R. 411, 412 (1980) (citations omitted) [hereinafter cited as Note, Torts - Product Liability].

the change of ownership." [27] By the same token, a purchasing corporation retains liability for claims against the predecessor company if the transaction is in the form of a merger or consolidation. [28] Where, however, the acquisition is in the form of a sale or other transferance of all of a corporation's assets to a successor corporation, the latter is not liable for the debts and liabilities of the predecessor corporation. [29]

There are four exceptions to this general rule of non-liability in asset acquisitions. A successor corporation is liable for the actions of its predecessor corporation if one of the following is shown:

1) The purchaser expressly or impliedly agrees to assume such obligations;

2) The transaction amounts to a "de facto" consolidation or merger;

3) The purchasing corporation is merely a continuation of the selling corporation; or

4) The transaction is entered into fraudulently in order to escape liability. [30]

The application of the traditional corporate law approach to successor liability has in many instances led to particularly

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[27] N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1157 (Super. Ct. Law Div. 1980).

[28] Id. A merger occurs when one of the combining corporations continues to exist; a consolidation exists when all of the combining corporations are dissolved and an entirely new corporation is formed.

[29] See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980), citing, Jackson v. N.J. Manu. Ins. Co., 166 N.J. Super. 488, 454 (Super. Ct. App. Div. 1979), cert. denied, 81 N.J. 330 (1979).

[30] Id., Note, Torts - Product Liability, supra note, 26 at 413 n. 15-18.

harsh and unjust results, especially with respect to product liability cases. [31]/ Therefore, in an effort to provide an adequate remedy and to protect injured consumers, courts have broadened the exemptions to the general rule by either modifying or recasting the "de facto" and "mere continuation" exemptions to include an element of public policy. [32]/

More recently, however, the general rule has been abandoned altogether by several jurisdictions and, in essence, a new theory for establishing successor liability has evolved based upon the similarity of business operations. [33]/ The new approach has been cast by one court in the following way:

> "[W]here...the successor corporation acquires all or substantially all of the assets of the predecessor corporation for cash and continues

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[31]/ See McKee v. Harris-Seybold Co., 109 N.J. Super. 555, 264 A.2d 98 (Super. Ct. Law Div. 1970), aff'd per curiam, 118 N.J. Super. 480, 288 A.2d 585 (Super. Ct. App. Div. 1972); Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D. Colo. 1968).

[32]/ See N.J. Transp. Dep't v. PSC Resources, Inc., 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980); See also, Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), cert. denied, 421 U.S. 965 (1975); Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1975); Turner v. Bituminous Gas Co., 397 Mich. 406, 244 N.W.2d 873 (1976).

[33]/ The theory has also been referred to as the "product-line" approach. In adopting this new approach to successor liability, some courts have abandoned the traditional rule of non-liability in asset acquisitions. See e.g., Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977). Other courts have considered the new approach as an exemption to the general rule. See e.g., Daweko v. Jorgensen Steel Co., 290 Pa. Super. Ct. 15, 434 A.2d 106 (1981); Note, Torts - Product Liability, supra note, 26 at 418 n. 38. And, a few jurisdictions have rejected the new approach. See Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977); Tucker v. Paxson Mach. Co., 645 F.2d 620 (8th Cir. 1981).

> essentially the same manufacturing operation as the predecessor corporation the successor remains liable for the products liability claims of its predecessor." 34/

This theory of establishing successor liability differs from the "de facto" and "mere continuation" exemptions in that the new approach does not examine whether there is a continuity of corporate structure or ownership (e.g., whether the predecessor and successor corporation share a common director or officer). Instead, according to the new theory, liability will be imposed if the successor corporation continues essentially the same manufacturing or business operation as its predecessor corporation, even if no continuity of ownership exists between them. 35/

Until recently, this new approach for establishing successor liability was confined mostly to product liability cases. However, a recent New Jersey decision extended its application to the area of environmental torts. The Superior Court of New Jersey, in N.J. Transportation Department v. PSC Resources, Inc. 36/, rejected the traditional corporate approach to successor liability where the defendant and its predecessor corporation had allegedly discharged hazardous wastes. The court reasoned that the underlying policy rationale for abandonment of the traditional approach in defective product cases is applicable to environmental torts. Therefore, the court held that a corporation which purchased assets of another corporation and engaged in the practice of discharging hazardous waste into a state-owned lake is strictly liable for present and previous discharges made by itself and the predecessor corporation because the successor continued the same waste disposal practice as its predecessor.

34/ Ramirez v. Amstead Indus., Inc., 171 N.J. Super. 261, 278, 408 A.2d 818 (Super. Ct. App. Div. 1979), aff'd, 86 N.J. 332, 431 A.2d 811 (1981).

35/ See Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); some form of acquisition, however, is still required. See Meisal v. Modern Press, 97 Wash. 2d 403, 645 P.2d 693.

36/ 175 N.J. Super. 447, 419 A.2d 1151 (Super. Ct. Law Div. 1980);

A similar "continuity of business operation" approach has been used in cases involving statutory violations. [37] The Ninth Circuit, for example, held in a case involving the Federal Insecticide, Fungicide, and Rodenticide Act [FIFRA] [38], that "EPA's authority to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to protect the national environment." [39] Furthermore, the court noted that "[t]he agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act." [40] After establishing that there had been violations of FIFRA by the predecessor corporation, the court found that there was substantial continuity of business operation between the predecessor and successor corporations to warrant imposition of successor liability.

Although CERCLA is not primarily a regulatory statute, public policy considerations and the legislative history of the Act clearly indicate that federal law would be applicable to CERCLA situations involving successor liability. [41] Therefore, it is reasonable to assume that courts would similarly adopt the federal "continuity of business operation approach" in cases involving CERCLA.

Conclusion

In establishing successor liability under CERCLA, the

37/ See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed2d 388 (1973); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975).

38/ 7 U.S.C. §136 et seq.

39/ Oner II, Inc. v. United States Environ. Protection Agency, 597 F.2d 184, 186 (9th Cir. 1979).

40/ Id.

41/ See discussion, supra, n. 19; One of Congress' primary concerns in enacting CERCLA was to alleviate the vast national health hazard created by inactive and abandoned disposal sites. See e.g., Remarks of Rep. Florio, 126 Cong. Rec. H. 9,154 (Sept. 19, 1980), 126 Cong. Rec. H. 11,773 (Dec. 3. 1980).

Agency should initially utilize the "continuity of business operation" approach of federal law. However, to provide additional support or an alternative basis for successor corporation liability, the Agency should be prepared to apply the traditional exemptions to the general rule of non-liability in asset acquisitions.

cc: A. James Barnes, General Counsel

12/1/94

REVISER'S NOTE

Interim Guidance on Review of Indian Lands Enforcement Actions (MI.1-5)

Portions of the Interim Guidance on Review of Indian Lands Enforcement Actions (Document Number MI.1-5) are inapplicable as a result of the creation of the American Indian Environmental Office (AIEO) within the Office of Water. Policy and management issues related to enforcement actions should now be coordinated with the AIEO instead of OFA and its Senior Legal Advisor.

MI.1-5

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

OCT 21 1992

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Interim Guidance on Review of Indian Lands Enforcement Actions

FROM: Thomas L. McCall, Jr. AD McCall
Acting Deputy Assistant Administrator
for Federal Facilities Enforcement

TO: Deputy Regional Administrators
Enforcement Counsels
Regional Counsels

Under EPA's Indian Policy Implementation Guidance issued by Deputy Administrator Alvin L. Alm on November 8, 1984, Regional Administrators proposing to initiate direct EPA actions against Tribal facilities "should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel." At the time this guidance was issued, the Office of Federal Activities, which is responsible for coordination of the EPA Indian Program and has the lead in all general policy issues affecting Native Americans, was a part of the Office of External Affairs. As you know, the name of the Office of Enforcement and Compliance Monitoring has been changed to the Office of Enforcement, the Office of External Affairs has been eliminated as such and the Office of Federal Activities is now a part of the Office of Enforcement under my supervision.

I have become increasingly concerned that although OFA - Headquarters and its regional counterparts - is charged with the responsibility for coordination of the EPA Indian program, it is not always consulted in the process of initiating enforcement actions on Indian lands. The issues of Tribal sovereignty and the federal responsibilities on Indian lands complicate all enforcement actions against Tribal governments. Excluding the program management from enforcement decisions runs a great risk of enforcement actions that are inconsistent with program management decisions and deprives program managers of enforcement information relevant to their decisions.

Therefore, I am assigning responsibility to coordinate policy and management issues, and legal issues in consultation with the Office of General Counsel, to the Senior Legal Advisor

of OFA. The Senior Advisor will coordinate Headquarters and regional review of the proposed enforcement action. The designation of this Senior Executive Service-level person is intended to provide the maturity and stature to expeditiously and thoroughly coordinate review of the policy and legal issues involved. The Senior Legal Advisor will make appropriate recommendations to me based on the review, and I will advise the Assistant Administrator for Enforcement concerning his enforcement options for both civil and criminal actions; however, nothing herein is intended to infringe upon the delegated authority of either the Directors of Civil or of Criminal Enforcement to determine which alleged environmental violations warrant investigation or referral to the Department of Justice.

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 Assistant Administrator for Enforcement, who will act in consultation with the Office of Federal Activities, including its Senior Legal Advisor, and the General Counsel.

If there are any questions concerning the procedure outlined above, please let me know.

WE CONCUR:

Robert Van Heuvelen
Director of Civil Enforcement

Earl Devaney
Director of Criminal Enforcement

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be to give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands. To meet this objective, the Agency will pursue the following principles:

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action 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.

In those cases 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 the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.

William D. Ruckelshaus

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

NOV 8 1984

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Indian Policy Implementation Guidance

FROM: Alvin L. Alm
Deputy Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel

INTRODUCTION

The Administrator has signed the attached EPA Indian Policy. This document sets forth the broad principles that will guide the Agency in its relations with American Indian Tribal Governments and in the administration of EPA programs on Indian reservation lands.

This Policy concerns more than one hundred federally-recognized Tribal Governments and the environment of a geographical area that is larger than the combined area of the States of Maryland, New Jersey, Connecticut, Massachusetts, Vermont, New Hampshire and Maine. It is an important sector of the country, and constitutes the remaining lands of America's first stewards of the environment, the American Indian Tribes.

The Policy places a strong emphasis on incorporating Tribal Governments into the operation and management of EPA's delegable programs. This concept is based on the President's Federal Indian Policy published on January 24, 1983 and the analysis, recommendations and Agency input to the EPA Indian Work Group's Discussion Paper, Administration of Environmental Programs on American Indian Reservations (July 1983).

TIMING AND SCOPE

Because of the importance of the reservation environments, we must begin immediately to incorporate the principles of EPA's Indian Policy into the conduct of our everyday business. Our established operating procedures (including long-range budgetary and operational planning activities) have not consistently focused on the proper role of Tribal Governments or the special legal and political problems of program management on Indian lands. As a result, it will require a phased and sustained effort over time to fully implement the principles of the Policy and to take the steps outlined in this Guidance.

Some Regions and Program Offices have already made individual starts along the lines of the Policy and Guidance. I believe that a clear Agency-wide policy will enable all programs to build on these efforts so that, within the limits of our legal and budgetary constraints, the Agency as a whole can make respectable progress in the next year.

As we begin the first year of operations under the Indian Policy, we cannot expect to solve all of the problems we will face in administering programs under the unique legal and political circumstances presented by Indian reservations. We can, however, concentrate on specific priority problems and issues and proceed to address these systematically and carefully in the first year. With this general emphasis, I believe that we can make respectable progress and establish good precedents for working effectively with Tribes. By working within a manageable scope and pace, we can develop a coordinated base which can be expanded, and, as appropriate, accelerated in the second and third years of operations under the Policy.

In addition to routine application of the Policy and this Guidance in the conduct of our everyday business, the first year's implementation effort will emphasize concentrated work on a discrete number of representative problems through cooperative programs or pilot projects. In the Regions, this effort should include the identification and initiation of work on priority Tribal projects. At Headquarters, it should involve the resolution of the legal, policy and procedural problems which hamper our ability to implement the kinds of projects identified by the Regions.

The Indian Work Group (IWG), which is chaired by the Director of the Office of Federal Activities and composed of representatives of key regional and headquarters offices, will facilitate and coordinate these efforts. The IWG will begin immediately to help identify the specific projects which may be ripe for implementation and the problems needing resolution in the first year.

Because we are starting in "mid-stream," the implementation effort will necessarily require some contribution of personnel time and funds. While no one program will be affected in a major fashion, almost all Agency programs are affected to some degree. I do not expect the investment in projects on Indian Lands to cause any serious restriction in the States' funding support or in their ability to function effectively. To preserve the flexibility of each Region and each program, we have not set a target for allocation of FY 85 funds. I am confident, however, that Regions and program offices can, through readjustment of existing resources, demonstrate significant and credible progress in the implementation of EPA's Policy in the next year.

ACTION

Subject to these constraints, Regions and program managers should now initiate actions to implement the principles of the Indian Policy. The eight categories set forth below will direct our initial implementation activities. Further guidance will be provided by the Assistant Administrator for External Affairs as experience indicates a need for such guidance.

1. THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS WILL SERVE AS LEAD AGENCY CLEARINGHOUSE AND COORDINATOR FOR INDIAN POLICY MATTERS.

This responsibility will include coordinating the development of appropriate Agency guidelines pertaining to Indian issues, the implementation of the Indian Policy and this Guidance. In this effort the Assistant Administrator for External Affairs will rely upon the assistance and support of the EPA Indian Work Group.

2. THE INDIAN WORK GROUP (IWG) WILL ASSIST AND SUPPORT THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS IN DEVELOPING AND RECOMMENDING DETAILED GUIDANCE AS NEEDED ON INDIAN POLICY AND IMPLEMENTATION MATTERS. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD DESIGNATE APPROPRIATE REPRESENTATIVES TO THE INDIAN WORK GROUP AND PROVIDE THEM WITH ADEQUATE TIME AND RESOURCES NEEDED TO CARRY OUT THE IWG'S RESPONSIBILITIES UNDER THE DIRECTION OF THE ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS.

The Indian Work Group, (IWG) chaired by the Director of the Office of Federal Activities, will be an important entity for consolidating the experience and advice of the key Assistant and Regional Administrators on Indian Policy matters. It will perform the following functions: identify specific legal, policy, and procedural impediments to working directly with Tribes on reservation problems; help develop appropriate guidance for overcoming such impediments; recommend opportunities for implementation of appropriate programs or pilot projects; and perform other services in support of Agency managers in implementing the Indian Policy.

The initial task of the IWG will be to develop recommendations and suggest priorities for specific opportunities for program implementation in the first year of operations under the Indian Policy and this Guidance.

To accomplish this, the General Counsel and each Regional and Assistant Administrator must be actively represented on the IWG by a staff member authorized to speak for his or her office. Further, the designated representative(s) should be afforded the time and resources, including travel, needed to provide significant staff support to the work of the IWG.

3. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD UNDERTAKE ACTIVE OUTREACH AND [illegible] TRIBES, PROVIDING ADEQUATE INFORMATION TO ALLOW THEM TO WORK [illegible] AN INFORMED WAY.

In the first thirteen years of the Agency's existence, we have worked hard to establish working relationships with State Governments, providing background information and sufficient interpretation and explanations to enable them to work effectively with us in the development of cooperative State programs under our various statutes. In a similar manner, EPA managers should try to establish direct, face-to-face contact (preferably on the reservation) with Tribal Government officials. This liaison is essential to understanding Tribal needs, perspectives and priorities. It will also foster Tribal understanding of EPA's programs and procedures needed to deal effectively with us.

4. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD ALLOCATE RESOURCES TO MEET TRIBAL NEEDS, WITHIN THE CONSTRAINTS IMPOSED BY COMPETING PRIORITIES AND BY OUR LEGAL AUTHORITY.

As Tribes move to assume responsibilities similar to those borne by EPA or State Governments, an appropriate block of funds must be set aside to support reservation abatement, control and compliance activities.

Because we want to begin to implement the Indian Policy now, we cannot wait until FY 87 to formally budget for programs on Indian lands. Accordingly, for many programs, funds for initial Indian projects in FY 85 and FY 86 will need to come from resources currently planned for support to EPA-and State-managed programs meeting similar objectives. As I stated earlier, we do not expect to resolve all problems and address all environmental needs on reservations immediately. However, we can make a significant beginning without unduly restricting our ability to fund ongoing programs.

I am asking each Assistant Administrator and Regional Administrator to take measures within his or her discretion and authority to provide sufficient staff time and grant funds to allow the Agency to initiate projects on Indian lands in FY 85 and FY 86 that will constitute a respectable step towards implementation of the Indian Policy.

5. ASSISTANT AND REGIONAL ADMINISTRATORS, WITH LEGAL SUPPORT PROVIDED BY THE GENERAL COUNSEL, SHOULD ASSIST TRIBAL GOVERNMENTS IN PROGRAM DEVELOPMENT AS THEY HAVE DONE FOR THE STATES.

The Agency has provided extensive staff work and assistance to State Governments over the years in the development of environmental programs and program management capabilities. This assistance has become a routine aspect of Federal/State relations, enabling and expediting the States' assumption of delegable programs under the various EPA statutes. This "front end" investment has promoted cooperation and increased State involvement in the regulatory process.

As the Agency begins to deal with Tribal Governments as partners in reservation environmental programming, we will find a similar need for EPA assistance. Many Regional and program personnel have extensive experience in working with States on program design and development; their expertise should be used to assist Tribal Governments where needed.

6. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD TAKE ACTIVE STEPS TO ALLOW TRIBES TO PROVIDE INFORMED INPUT INTO EPA'S DECISION-MAKING AND PROGRAM MANAGEMENT ACTIVITIES WHICH AFFECT RESERVATION ENVIRONMENTS.

Where EPA manages Federal programs and/or makes decisions relating directly or indirectly to reservation environments, full consideration and weight should be given to the public policies, priorities and concerns of the affected Indian Tribes as expressed through their Tribal Governments. Agency managers should make a special effort to inform Tribes of EPA decisions and activities which can affect their reservations and solicit their input as we have done with State Governments. Where necessary, this should include providing the necessary information, explanation and/or briefings needed to foster the informed participation of Tribal Governments in the Agency's standard-setting and policy-making activities.

7. ASSISTANT AND REGIONAL ADMINISTRATORS SHOULD, TO THE MAXIMUM FEASIBLE EXTENT, INCORPORATE TRIBAL CONCERNS, NEEDS AND PREFERENCES INTO EPA'S POLICY DECISIONS AND PROGRAM MANAGEMENT ACTIVITIES AFFECTING RESERVATIONS.

It has been EPA's practice to seek out and accord special consideration to local interests and concerns, within the limits allowed by our statutory mandate and nationally established criteria and standards. Consistent with the Federal and Agency policy to recognize Tribal Governments as the primary voice for expressing public policy on reservations, EPA managers should, within the limits of their flexibility, seek and utilize Tribal input and preferences in those situations where we have traditionally utilized State or local input.

We recognize that conflicts in policy, priority or preference may arise between States and Tribes as it does between neighboring States. As in the case of conflicts between neighboring States, EPA will encourage early communication and cooperation between Tribal and State Governments to avoid and resolve such issues. This is not intended to lend Federal support to any one party in its dealings with the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the interests of both.

Several of the environmental statutes include a conflict resolution mechanism which enables EPA to use its good offices to balance and resolve the conflict. These procedures can be applied to conflicts between Tribal and State Governments that cannot otherwise be resolved. EPA can play a moderating role by following the conflict resolution principles set by the statute, the Federal trust responsibility and the EPA Indian Policy.

8. 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 EPA Indian Policy recognizes Tribal Governments as the key governments having responsibility for matters affecting the health and welfare of the Tribe. Accordingly, 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 we do to noncompliance by the private sector off-reservation.

Actions to enable and ensure compliance by Tribal facilities with Federal statutes and regulations include providing consultation and technical support to Tribal leaders and managers concerning the impacts of noncompliance on Tribal health and the reservation environment and steps needed to achieve such compliance. As appropriate, EPA may also develop compliance agreements with Tribal Governments and work cooperatively with other Federal agencies to assist Tribes in meeting Federal standards.

Because of the unique legal and political status of Indian Tribes in the Federal System, 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. Regional Administrators proposing to initiate such action should first obtain concurrence from the Assistant Administrator for Enforcement and Compliance Monitoring, who will act in consultation with the Assistant Administrator for External Affairs and the General Counsel. In emergency situations, the Regional Administrator may issue emergency Temporary Restraining Orders, provided that the appropriate procedures set forth in Agency delegations for such actions are followed.

9. ASSISTANT ADMINISTRATORS, REGIONAL ADMINISTRATORS AND THE GENERAL COUNSEL SHOULD BEGIN TO FACTOR INDIAN POLICY GOALS INTO THEIR LONG-RANGE PLANNING AND PROGRAM MANAGEMENT ACTIVITIES, INCLUDING BUDGET, OPERATING GUIDANCE, MANAGEMENT ACCOUNTABILITY SYSTEMS AND PERFORMANCE STANDARDS.

In order to carry out the principles of the EPA Indian Policy and work effectively with Tribal Governments on a long-range basis, it will be necessary to institutionalize the Agency's policy goals in the management systems that regulate Agency behavior. Where we have systematically incorporated State needs, concerns and cooperative roles into our budget, Operating Guidance, management accountability systems and performance standards, we must now begin to factor the Agency's Indian Policy goals into these same procedures and activities.

Agency managers should begin to consider Indian reservations and Tribes when conducting routine planning and management activities or carrying out special policy analysis activities. In addition, the IWG, operating under the direction of the Assistant Administrator for External Affairs and with assistance from the Assistant Administrator for Policy, Planning and Evaluation, will identify and recommend specific steps to be taken to ensure that Indian Policy goals are effectively incorporated and institutionalized in the Agency's procedures and operations.

Attachment