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Agency

Office of
Solid Waste and
Emergency Response



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

DEC 21-1987

MEMORANDUM

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

SUBJECT: Revised Enforcement Response Policy

FROM: J. Winston Porter
Assistant Administrator

TO: Regional Administrators
Regions I-X

I am attaching the final revised RCRA Enforcement Response Policy for your implementation. The policy updates guidance on classifying violations, selecting the appropriate enforcement action in response to various RCRA violators, and taking Federal enforcement action in States with authorized programs.

The first Enforcement Response Policy (ERP) was signed by the previous Assistant Administrator, Lee Thomas, almost three years ago. Since that time the Policy has helped the program in making strides toward obtaining compliance with RCRA standards. The regulated community and the nature of program emphasis have changed during this time. We have learned a great deal about the complexities of overseeing authorized State implementation of this program, and the problems those States have in meeting Federal guidelines while working under the States' own laws which often differ substantially from Federal laws.

The revised ERP continues to stress the same principles as its predecessor, that is, the importance of concentrating enforcement efforts on the most serious violators and taking timely and aggressive enforcement action against these violators. Experience has taught us that the category designated to receive the most stringent response should be better defined, so as to emphasize the importance of addressing those facilities which pose the greatest threat to human health and the environment, or which show disregard for the regulatory program. The revised policy does this. Another key change is the broadening of acceptable "appropriate" responses to High Priority Violators to include a variety of "economic sanctions".

In order to effectively implement this policy beginning in FY 1989, its timeframes and key supporting language should be incorporated into the FY 1989 Enforcement Agreements and Grants.

I appreciate the assistance that your staffs have provided us in preparing this revision.

Attachment

ENFORCEMENT RESPONSE POLICY

December, 1987

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I. INTRODUCTION

In December of 1984, the Office of Solid Waste and Emergency Response issued the first RCRA Enforcement Response Policy (ERP). The ERP strengthened the RCRA enforcement program by establishing a scheme for classifying RCRA violations and violators, providing guidance on timely and appropriate enforcement response, and delineating conditions for EPA enforcement action in authorized States. The policy espoused the concept of quickly escalating an action when compliance was not achieved.

The policy was intended to establish an approach for strengthening the RCRA enforcement program by concentrating efforts on the most serious violators. The State/EPA was required to subject High Priority Violators (HPV) to formal enforcement action and penalty assessment.

After almost three years of policy implementation, it is clear that the program has made significant strides in enforcing against the more serious violations, particularly in the areas of ground-water monitoring, closure/post-closure, and financial responsibility. This period of policy implementation has also provided the opportunity to evaluate this policy.

Since the development of the original ERP, new program initiatives have developed as provisions of the 1984 HSWA Amendments have become effective. The December, 1984 ERP placed priority on enforcement against interim status land disposal facilities which were out of compliance with ground-water monitoring, closure/post-closure or financial responsibility requirements. HSWA and overall development of the RCRA program has mandated closer scrutiny of additional segments of the regulated community and other types of violations. This expansion of focus requires a broadening of programmatic emphasis. For example, corrective action requirements and land disposal restrictions direct more attention to hazardous waste treaters, storers and generators, as well as to land disposal facilities.

These and other program changes will cause a major shift in the nature of the compliance monitoring and enforcement program over the next few years. The majority of the RCRA land disposal facilities are closing as the 1988 permitting deadline approaches. Many of these, as well as facilities being permitted, will be under schedules of compliance to perform corrective action. Facilities seeking permits will be subject to permit conditions specifically tailored to operations at each individual facility. The land disposal of many wastes will no longer be permitted - generators will have greater responsibility regarding the disposition of their wastes. These and other major changes occurring in the RCRA-regulated universe demand new inspection strategies and the redefinition and expansion of some of our "serious violation" definitions.

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As before, the goal of the RCRA compliance monitoring and enforcement program is the attainment and maintenance of a high rate of compliance within the regulated community by establishing a comprehensive inspection program and by taking timely, visible, and effective enforcement actions against serious violators. The goal of the enforcement action against the violator is to return the facility to compliance as quickly as possible and deter potential violators through high visibility enforcement actions which impose economic sanctions to penalize violators. The removal of any economic advantage or savings accrued by noncompliance through the use of economic sanctions is also part of the goal of any enforcement action against the most serious violators. (The RCRA Penalty Policy provides guidance on calculating the appropriate penalty.) The revised ERP emphasizes the need, not only to take timely enforcement action, but more importantly, to assure that the action results in a return to compliance.

The Enforcement Response Policy provides response guidance on civil actions - both administrative and judicial - pursuant to Federal and State enforcement efforts. It addresses only responses to violations of RCRA requirements. Use of §3013 to compel monitoring, testing and analysis and §7003 for addressing situations that may present imminent hazards to human health or the environment is set out in the policies on "Issuance of Administrative Orders under Section 3013 of the Resource Conservation and Recovery Act" (9/26/84) and "Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act" (9/21/84). The use of §3008(h) for addressing releases at interim status facilities is discussed in "RCRA Section 3008(h): The Interim Status Corrective Action Authority" (12/16/85). While not initially applicable to §3013, §7003, or §3008(h) actions, ERP guidance does apply when RCRA orders, decrees, or judgments issued under any RCRA provision are violated.

The policy and procedures set forth in this document are intended solely for the guidance of employees of the Environmental Protection Agency and State Enforcement Agencies. They are not intended to, nor do they, constitute rulemaking by the Agency, and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

The revised RCRA Enforcement Response Policy will be effective in FY 1989.

II. THE ERP's RELATIONSHIP TO OTHER AGENCY POLICIES AND GUIDANCES

The RCRA Enforcement Response Policy is one of several documents that, together, define the national RCRA Enforcement Program. The ERP provides a general framework for identifying violations and violators of concern and describing timely and

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appropriate enforcement responses to noncompliance. It should be read in conjunction with the RCRA Implementation Plan (RIP), which establishes annual priorities for compliance monitoring and enforcement actions based on the Agency's past experience in implementing the program and its assessment of future program directions. The RIP contains reporting measures that focus on hazardous waste handler activities which are of particular concern in a given year. Of these, the handlers tracked most carefully are the Significant Non-Compliers (SNC). The SNCs are those types of handlers whose violations, the Agency believes, warrant national enforcement program attention. SNCs will be a subset of the High Priority Violators (HPV). [HPVs are the handlers who because of a variety of considerations, including the nature of their violations, compliance history, and other factors, are to be addressed most expeditiously and most aggressively.] Handler categories designated as SNCs may change from year to year, depending on programmatic needs and areas of emphasis. It should be emphasized, however, that the SNC category does not encompass all violators who should be addressed as described in the Enforcement Response Policy.

Other basic guidances of importance to the RCRA Enforcement Program are the Policy Framework for State/Federal Enforcement Agreements (revised August, 1986) and the National Criteria for a Quality Hazardous Waste Management Program Under RCRA (July, 1986). The Policy Framework is an Agency-wide guidance that calls for enforcement agreements between EPA and the States and describes what those agreements should address, including oversight criteria and measures, information needs, procedures for notification and consultation, and criteria for direct Federal enforcement. The requirements of the RIP and other RCRA directives are made applicable to the States through the State/Federal enforcement agreements. The National Quality Criteria document establishes basic goals, objectives and general performance expectations to assure that EPA and the States have a common understanding of what must be done to effectively implement the RCRA program. The Quality Criteria document also outlines how performance is to be measured and describes how EPA and the States should respond when criteria are not met.

III. APPROPRIATE ENFORCEMENT RESPONSE CONSIDERATIONS

The RCRA Enforcement Program has established a system to define enforcement response priorities which support the Program goals. The definitions were established to assist the Regions and States in directing enforcement resources against the violators who pose the greatest threat to human health or the environment.

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In addition to the protection of human health and the environment is the goal of penalizing noncompliant behavior and removal of the unfair economic advantage non-compliant facilities may enjoy over their competitors, by aggressive use of economic sanctions.

The RCRA Enforcement Program classifies individual "violations" into one of two categories - Class I and Class II - with Class I violations being the more serious of the two. The ERP then considers the owner/operator as a whole to determine, not only appropriate enforcement response, but prioritization of the handlers to receive enforcement response.

To accomplish this, violators are classified into one of three "violation" types - High Priority, Medium Priority, or Low Priority. Classification of a "violation" into one of these three categories takes into account a handler's "violation(s)" as well as a number of other considerations, as noted in the examples outlined below. Finally, the ERP designates the appropriate enforcement response for the "violation" based upon whether the violator is classified as High Priority, Medium Priority, or Low Priority.

This section establishes the RCRA Enforcement Program's definition of classes of violations, violators, and defines timely and appropriate enforcement response. These guidelines will be used by Regional Offices to negotiate an agreement with each State that will specify, among other things, what constitutes timely and appropriate enforcement action. The timeframes set forth in this document are minimum program goals. More stringent timeframes and enforcement responses may be negotiated and should be encouraged, where appropriate. However, timeframe flexibility, as provided for in Section III.C., may also be appropriate in these agreements.

A. Violation Definitions

The RCRA Enforcement Response Policy classifies individual facility violations into one of two categories. Examples of violation classifications are provided in the Appendix.

1. Class I Violation

Deviations from regulations, or provisions of compliance orders, consent agreements, consent decrees, or permit conditions which could result in a failure to:

- a) Assure that hazardous waste is destined for and delivered to authorized treatment, storage, or disposal facilities (TSDFs); or
- b) Prevent releases of hazardous waste or constituents, both during the active and any applicable post-closure periods of the facility operation where appropriate; or

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- c) Assure early detection of such releases; or
- d) Perform emergency clean-up operation or other corrective action for releases.

2. Class-II Violation

Any violation of a RCRA requirement that does not meet the criteria listed above for Class I violations.

Class II violations are defined in the negative, i.e., they include all violations that are not considered Class I, and therefore are those violations which do not involve deviations from requirements which could result in failure to: 1) assure that wastes are destined for only authorized TSDFs, 2) prevent releases, 3) assure detection or 4) perform corrective action for such releases.

B. Violator Definitions and Enforcement Responses

A RCRA handler is classified as a violator based upon the nature of his or her violation(s) along with a number of other factors (e.g., compliance history, previous recalcitrant behavior, etc.). The Enforcement Response Policy establishes three categories of violators - High Priority, Medium Priority, and Low Priority - and define timely and appropriate enforcement response.

1. High Priority Violator

Definition: A High Priority Violator is a handler who:

- o Has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or
- o Is a chronic or recalcitrant violator (This may include some handlers who are regularly found to have many Class I or Class II violations.); or
- o Deviates from terms of a permit, order or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees; or
- o Substantially deviates from RCRA statutory or regulatory requirements.

High Priority Violators (HPV) represent the category of violators that merit the most stringent and immediate enforcement response. These violators should be the highest priorities for enforcement action in conjunction with those program priorities set out annually in the RIP.

The response timeframes allow 45 days from the day an inspection is completed to identify or "discover" the violations.

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Once violation discovery is made, it is expected that, for HPVs, within 90 days a formal administrative enforcement action will be taken, or a referral will be made for judicial or EPA action. If a judicial referral is made, it is expected that the case will be filed within 60 days of referral. These timeframes are discussed in greater detail on page 12.

The goal of any enforcement action against a High Priority violator is to impose sanctions which will:

- o Compel a rapid return to compliance;
- o Penalize the violator and recover economic savings the violator may have accrued; and
- o Deter members of the regulated community from violating the law.

2. Medium Priority Violators

Definition: A Medium Priority Violator is a handler with one or more Class I violations who does not meet the criteria for a High Priority Violator. Handlers with only Class II may also be Medium Priority Violators when the compliance official believes an administrative order is the appropriate response to a facility with only Class II violations.

The appropriate response to the Medium Priority Violator is either the issuance of an administrative order or a less formal response which results in compliance within 90 days of violation discovery. The issuance of an administrative order with penalties is the preferred response to a Medium Priority Violator. If the decision is made to issue an order, the order should be issued within 120 days of violation discovery. A penalty is not required.

Where there is reason to believe a Notice of Violation (NOV) or Warning Letter (WL) will bring about a timely return-to-compliance, this less formal action may be used in response to Medium Priority Violators. If the initial NOV or WL does not result in final compliance or a compliance schedule incorporated in an enforceable order within 90 days of violation discovery, a decision must be made to escalate. Escalation entails either development of a judicial referral or development and issuance of an administrative order. For generators with no violations of land disposal restriction requirements, up to 120 days may be allowed to return the facility to compliance before escalation is required.

If an administrative order is chosen as the escalated response, the State/Region has 60 days to develop and issue the order. If a judicial referral is selected, the State has 90 days to develop and refer the case to the Attorney General, or appropriate State official. The case should then be filed within 60 days of referral.

While it is acceptable for a State/Region to initially address a Medium Priority Violator with an NOV or Warning Letter, no more than one WL or NOV should be issued. If compliance does not result, escalation should immediately follow.

3. Low Priority Violators

Definition: A handler who has only Class II violations who is not a Medium or High Priority Violator.

While EPA and most authorized States have the authority to respond to any Subtitle C violation with an order or referral, a Low Priority Violator will normally receive an NOV or Warning Letter as the initial response within 60 days of violation discovery. If this response does not result in expeditious compliance, normally within 30-60 days of issuance, the Regional Office or authorized State should consider whether the violation warrants issuing an order. In cases involving large numbers of Class II violations, repeated Class II violations, or any other case the enforcement authority considers serious, the handler should be carefully evaluated to determine whether the handler meets any of the High Priority Violator criteria, or may be better addressed as a Medium Priority Violator therefore requiring an enforcement action as described under the appropriate section.

Characteristics of High Priority Violators

The following criteria are set out to assist the agencies in determining the category of violators that must consistently receive the highest priority for enforcement.

- a) A handler who has caused actual exposure, or substantial likelihood of exposure to hazardous waste or hazardous constituents.

Handlers that have caused actual exposure or a threat of exposure are always considered High Priority Violators.

Evaluating when a handler "...caused a substantial likelihood of exposure to hazardous waste..." should be done on the basis of the case-specific information. All violations at a site should be considered in making this determination. Additional factors such as the quantity of waste involved, toxicity, environmental persistence, or other hazard posed by the waste, waste management practices, proximity of human and environmental receptors (including employees), exposure pathways, etc. should be considered.

In examining whether there is a substantial likelihood of exposure caused by a violator, the focus should be on the potential of a situation to cause exposure. Examples of violators who cause a substantial likelihood of exposure include, but are not limited to, handlers that:

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- o Fail to install or maintain an adequate ground-water monitoring system at a facility (i.e. one capable of producing samples indicating all releases to the groundwater);
 - o Fail to prevent unauthorized entry into the hazardous waste management area (by livestock or humans);
 - o Systematically, or substantially deviate from manifest requirements (especially any violation which could result in a failure to deliver hazardous waste to an authorized TSDF or failure to file a discrepancy report); or
 - o Fail to clean up spills.
- b) Chronic or recalcitrant handlers (this may include some handlers who are regularly found to have many Class I or Class II violations)

Repeated violations (even if minor in themselves) or failure of a handler to quickly correct violations in the past may characterize a handler as a High Priority Violator.

Again, this criterion should be evaluated based on case-specific information, and should consider the following:

- o Does the handler have a history of repeated Class I and/or Class II violations that indicate a general unwillingness or inability to comply with applicable requirements?
- o Is the facility regularly found to have Class I violations, or Class II violations which are not quickly resolved, or is regularly found with the same type of violations?

Where a person or corporation owns several facilities it should be routine to consider all such facilities in answering the above questions, whenever possible.

- c) A handler who deviates from the terms of a permit, order or decree by not meeting requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees.

The following should be considered:

- o Failure to perform work of the minimum quality, as stipulated in orders, decrees or permits should indicate HPV status.

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- o Does the facility have any violations of the permit, order, or decree that may interfere with the facility's ability to timely and fully comply with the terms of the document?
 - o Where compliance schedules in orders are missed HPV designation is indicated unless circumstances delaying compliance are beyond the facility's control, and where the responsible government entity (EPA or the State) was promptly notified of the problem and agreed to, and documented, the necessary schedule changes.
- d) A handler who substantially deviates from RCRA statutory or regulatory requirements.

The following should be considered:

- o Does the facility have any violations listed as examples in the Appendix as indicating HPV status? These have been determined to be essential to the integrity of the RCRA program or to create a potential threat to human health or the environment.
- o Does the facility have any serious violations? Taken together these may represent a substantial deviation from program requirements.

The Enforcement Response For High Priority Violators

Facilities designated as Significant Non-Compliers (SNC) should be the first violators subject to enforcement action in the Regions and States, followed by other High Priority Violators. High Priority Violators represent the most serious RCRA violators and consequently should receive the swiftest and most stringent enforcement response available. Every HPV should be the object of a formal enforcement action as well as penalized with an economic sanction or penalty. Terms of final agreements will be documented through an enforceable order or decree.

The appropriate enforcement response against a High Priority Violator is one which achieves compliance with RCRA or the authorized State equivalent, achieves a final or enforceable order or remedy within an expeditious timeframe and incorporates the compliance terms and/or schedule into an enforceable order or decree. This response is selected and implemented based on consideration of the following factors:

- 1) Compliance should be achieved as quickly as possible;
- 2) The violator should be penalized in as short a timeframe as possible (see the EPA Penalty Policy for ability-to-pay considerations for final settlements); and

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- 3) The target violator, as well as other generators, facility owners/operators and transporters, should be deterred or prevented from causing or allowing future violations.

Therefore, the enforcement response is not defined by the type of legal action (i.e. administrative, civil, or criminal) which must be taken, but is defined by whether or not the particular action is designed to a) achieve the desired result, and b) achieve that result in a timely fashion. Compliance must be achieved in accordance with RCRA or the authorized State equivalent. Criminal prosecution of a handler is encouraged where criminal conduct may have occurred. Timeframes are generally much longer for such cases, however, violations should not be allowed to continue which pose a threat to human health or the environment. Civil action to compel a return to compliance should be taken in such a case. A parallel process may be possible for continued pursuit of criminal charges.^{1/}

Examples of appropriate High Priority Violator enforcement response actions are those that will result in cessation of violating activity, an enforceable compliance order or decree and economic sanctions against the violator by:

- o Judicial or administrative imposition of civil penalties against the corporation as well as, where appropriate, responsible corporate officials;
- o Temporary or permanent shut-down of the hazardous waste management activities at the facility;
 - by administrative order
 - by seeking injunctive relief in the courts.
 - by permit or license revocation or suspension;
- o Seeking to have a violator held in contempt - when violation is of a court decree (or any administrative order (AO) in those states which punish the violator of an AO by contempt);

^{1/} Agency guidelines on parallel proceedings were issued on January 23, 1984. (See memorandum "Policy and Procedures on Parallel Proceedings at EPA", AA OECM to AAs, RAs, Regional Counsels, and Director, NEIC, January 23, 1984). Also see memorandum from Courtney Price "Functions and General Operating Procedures for the Criminal Enforcement Program" (January 7, 1985).

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- o Denial of any pending or future permits to operate any facility in the State, as well as denial or revocation of the violating facility permit, i.e. "permit bars";^{2/}
- o Some other permit actions;^{3/}

[Any non-monetary economic sanction must have a quantifiable economic impact at least as great as the monetary penalty which would have been sought. EPA will compare the economic impact with the EPA Penalty Policy.]

Enforcement actions should be publicized to serve notice on the regulated community as well as the general public that violators are caught and punished. A stipulation that the violator place a public notice in local newspapers admitting guilt is often an effective addition to a final settlement.

^{2/} The term "permit bar" as used in this document is a statutory requirement which authorizes or mandates the automatic and immediate denial or withholding of a permit (including a permit amendment, modification, or renewal) based upon the present existence of a violation of any program requirement at any facility in the State. The "permit bar" shall be deemed an economic sanction only within those States which do not require a prior hearing or "finding" of violation before the permit bar becomes effective. Further, the "permit bar" shall not be deemed an appropriate economic sanction unless (1) the permit action, if granted, will provide a significant economic benefit to the applicant, and (2) the right or privilege to operate which would be granted by the permit will be immediately terminated or operation otherwise prevented, if the permit is denied or withheld.

^{3/} Any State may petition a Region to request that certain types of permit actions be deemed "appropriate economic sanctions" for addressing High Priority Violators. The petition shall demonstrate to the Region that all objectives, purposes, and results which can be achieved by an order/civil penalty action, will be achieved by use of the proposed permit action. If the Region, with concurrence of the Office of Waste Programs Enforcement, finds the proposed permit action equivalent to or more stringent than an order/civil penalty action for purposes of this policy, the petition may be granted.

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The actions specified above are designed to achieve the results specified in this section. For all actions specified above, formal enforcement action must be issued, referred,^{4/} and/or effective within 90 days of the discovery of the violation(s).

In addition to the above list of economic sanctions, two other possible situations need to be noted where an action (enforceable administrative order) may result in an economic sanction and correct the compliance problem at a facility. One such example may be a CERCLA type action which results in significant economic sanctions in addition to clean-up costs (e.g. CERCLA §106 action with economic sanctions at a RCRA HPV facility). A second example may be where a State has EPA-authorized corrective action authority which carries a penalty (where a release is a violation under State law). While these two situations provide the economic sanction (penalty) necessary to be considered an appropriate response to a High Priority Violator, the Federal corrective action order authority under RCRA does not. For a Federal corrective action under §3008(h), a separate action would be necessary to impose an economic sanction. Generally, even where the §3008(h) order returns a facility to full compliance, another action would be expected to impose the economic sanction, in order to satisfy ERP requirements.

C. Timeframes

In the majority of cases ERP timeframes should be met. In this revision to the ERP a ceiling of 10% per year is being established as the number of cases allowed to exceed standard ERP timeframes. Only those reasons specifically permitted by the policy will justify extensions to ERP timeframes. Should a State or Region exceed standard ERP timeframes on more than 10% of its cases during a given fiscal year, the Region or Headquarters EPA will need to evaluate the reasons for all timeframe exceedances. The evaluation will help determine what changes may be needed to the Region's/State's procedures, or whether, in fact, case load or other circumstances justify allowing a greater percentage of the cases to exceed ERP timeframes. This limit to exceeding ERP timeframes will be reevaluated each year, and appropriate changes will be noted in the RIP.

^{4/} States that do not have administrative penalty authority, or other administrative means of imposing economic sanctions, should refer High Priority Violators to the Attorney General (AG), or other appropriate legal official, for judicial action or reach agreement with EPA regarding Federal action.

The Agency recognizes that circumstances may arise where the enforcement response timeframes specified may be insufficient to prepare and initiate the appropriate enforcement responses specified in this policy. It is also recognized that instances may occur where immediate action is appropriate. The Agency expects that the Region or the State will take appropriate enforcement action much more expeditiously than provided for by the ERP established timeframes in the following cases:

- o Where a release or other violation poses an immediate threat to human health and the environment; or
- o Where activities of the owner/operator must be stopped or redirected, such as cases in which the Agency or the State seeks to immediately halt improper construction or installation.

Within the framework of this guidance, flexibility may be necessary regarding the timeliness of an enforcement response, particularly regarding the following timeframes:

- o The timeframe from inspection to violation discovery;
- o The timeframe for formal enforcement action in the case of High Priority Violators; and
- o The timeframe from referral to filing, in the case of civil referrals, both to the AG and to DOJ.

In cases where these timeframes will be exceeded due to the case-specific circumstances described below, the States and Regions must monitor case development. In cases where timely enforcement action (as defined by this policy) will not be feasible, the Regions and States must be prepared to justify the delay and develop an alternative schedule for case resolution.

In all cases in which the State or Region deviates from ERP timeframes, the States and Regions must closely track case progress and adhere to their alternative case resolution schedule. In addition, in the event that the Region does not find the State's reasons for the delay within ERP guidelines, the Region may decide to take Federal action.

1. Violation Discovery Timeframe

A violation is discovered as of the date when the case development staff determines, through review of the inspection report, record review, and/or data (e.g. laboratory reports), that a violation has occurred. The violation discovery date for evaluation purposes, assumed in the National Quality Criteria and restated here, is 45 days from the date of inspection.

Cases in which circumstances may require more than 45 days from inspection to violation discovery are cases in which:

- o The laboratory analyzing samples taken during an inspection can not return the results to the Region or State within 45 days from the day of inspection;^{5/}
- o Analytical results of samples taken during an inspection are inconclusive, thus requiring additional sampling and analysis to confirm the discovery of the violation(s);
- o Contractor inspection report is not received by the State or Region in a timely manner.^{5/}

2. HPV Formal Enforcement Timeframe

In the case of High Priority Violators, 90 days from violation discovery is the established timeframe for issuing, referring, and/or initiating formal enforcement action. Because formal enforcement action is required, unissued drafts and informal discussions within 90 days of violation discovery are not considered timely and appropriate actions.

Where a violation may pose a potential threat to human health or the environment, the correction of that violation is of paramount importance. If a State has administrative order authority and no administrative penalty authority, the State may use the administrative process to force the facility into compliance on a fast-track, while pursuing a penalty by referral to the AG, or other appropriate authority on a somewhat longer timeframe.

Cases in which circumstances may require greater than 90 days from violation discovery to formal enforcement are cases involving:

- o Site abandonment;
- o Potential criminal conduct which is under investigation; or
- o Need for outside technical experts.

^{5/} The regulating agency is responsible for assuring that contracts stipulate that reports and other deliverables are made available in a timely manner so that ERP timeframes may be met.

3. Referral to Filing Timeframe

In all cases involving either State referral to the AG or other appropriate legal authority or referral of a case by EPA to the Department of Justice, the established timeframe is 60 days from case referral to filing. However, some complicated cases may require more than 60 days. ^{6/}

Circumstances which may require more than 60 days from civil referral to case filing are cases in which:

- o Additional data or information collection is requested by the Attorney General's office or DOJ for case development;
- o The Attorney General or DOJ is investigating to determine if criminal prosecution is appropriate;
- o Cases involving other media (e.g. air pollution violations were also involved at the facility); or
- o Novel legal issues or defenses.

IV. ESTABLISHING PRIORITIES

The Regions and States should prioritize their enforcement efforts in the following order: 1) Significant Non-Compliers, 2) High Priority Violators, 3) Medium Priority Violators, and 4) Low Priority Violators. However, enforcement actions need not be taken against all High Priority Violators before any actions are initiated against Medium Priority Violators. Because the different categories of violators merit different levels of response with varying resource requirements, most Regions and States will want to respond to a mix of the various categories of violators. This is an acceptable approach, although the Regions and States should keep in mind that oversight activities will focus first on Significant Non-Compliers. Therefore, the emphasis must be on these and other High Priority Violators.

^{6/} In order to assist the State Attorney General (AG) or other appropriate legal authority in meeting established timeframes, the State should provide both technical and funding support to that authority. It is the responsibility of the program office to fully prepare a case so that it is complete when referred for judicial filing. This preparation includes conferring with the legal staff in advance of referral in order to know and develop what the legal staff need to support the anticipated enforcement action. After referral, the program office must be prepared to provide further case development support.

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V. EPA ACTION IN AUTHORIZED STATES

States with authorized programs have the primary responsibility for ensuring compliance with the RCRA program requirements. Nevertheless, EPA has the authority to take independent enforcement action in authorized States.

It is EPA's policy to take enforcement actions in authorized States when:

- o The State asks EPA to do so and provides justification based on unique case specific circumstances;
- o The State fails to take timely and appropriate action;
- o The State is not authorized to take the action; or
- o A case could establish a legal precedent -
(such cases are expected to arise infrequently.)

The previous section described what is considered timely and appropriate action in response to various categories of violators. The timelines set out in that section establish trigger points at which EPA should initiate action if the State response is not considered adequate. Where alternative schedules have been agreed to by EPA and the State, these will define timely action on a case specific basis. If the State has failed to take formal enforcement action within the appropriate timeframe, the Regional Office should notify the State that EPA will take action. The Regional Office may also choose to take an enforcement action to impose a penalty against a High Priority Violator if the State's action failed to include a penalty at least equal to that which could have been obtained through the administrative process.^{7/}

The Memorandum of Agreement (MOA) or Understanding (MOU) or Grant Agreement between EPA and each State should set out the process for providing notice to the State. The Regional Office may need to conduct its own case development inspection, and prepare additional documentation before proceeding to initiate an action. Only if the Region feels the State has made reasonable progress in appropriately addressing the facility should the Region hold off federal response when the timeframe or alternative schedule agreed to by EPA is not met by an authorized State.

^{7/} EPA may also consider taking enforcement actions seeking penalties if it feels that the economic sanction imposed by a State was inadequate, particularly when non-compliance continues. Before initiating any penalty-only action, EPA must weigh the benefit of that action against the need to take action against other handlers that are out of compliance with RCRA.

In order to facilitate achievement of "timely and appropriate" enforcement responses against noncompliant facility owners and operators State/EPA coordination is essential. Regular case status meetings, written and telephone contacts should supplement use of monthly Compliance Monitoring and Enforcement Log (CMEL) sheets. Status updates on specific cases are especially important when alternative schedules are being followed.

State Referrals to EPA

In carrying out the responsibilities for the enforcement of RCRA, authorized States sometimes find it necessary and desirable to refer certain cases to the Region for Federal enforcement. As with other responses, if the State decides to refer an HPV to EPA, this must be done within 90 days of Violation Discovery. In such cases it is not expected that the Regions would start the timeframe "clock" all over again; nor is it anticipated that the Region will need as much time to develop a complaint or DOJ referral.

For HPV cases a complaint should be issued, or referral made to DOJ, within 90 days of receipt of the referral package. The State should provide any case development information available to the Region as part of the referral package. This should provide a reduction in the time needed for Regional case development, allowing the Region to address the situation more expeditiously. There is some flexibility in the timeframes, however, so that where necessary, a Region may verify the nature of the violations through a case development inspection. Where a referral arises from a joint inspection, familiarity with the case should expedite Regional handling of the case. If a Region finds more time is necessary in dealing with a State's referrals, the Region should work out an agreement with the State to provide early notice of referrals in advance of the "timely" referral date indicated by the policy (i.e. where the State's "appropriate" response must be a referral to EPA because it cannot otherwise appropriately address a violator).

VI. EPA ACTION AT FEDERAL FACILITIES ^{8/}

EPA and the States are responsible for implementing the timely and appropriate enforcement criteria at Federal facilities in the same manner that the criteria are applied to non-Federal facilities. However, due to certain limitations on EPA's enforcement authorities at Federal facilities there will be some differences in EPA's response to these facilities which are HPVs.

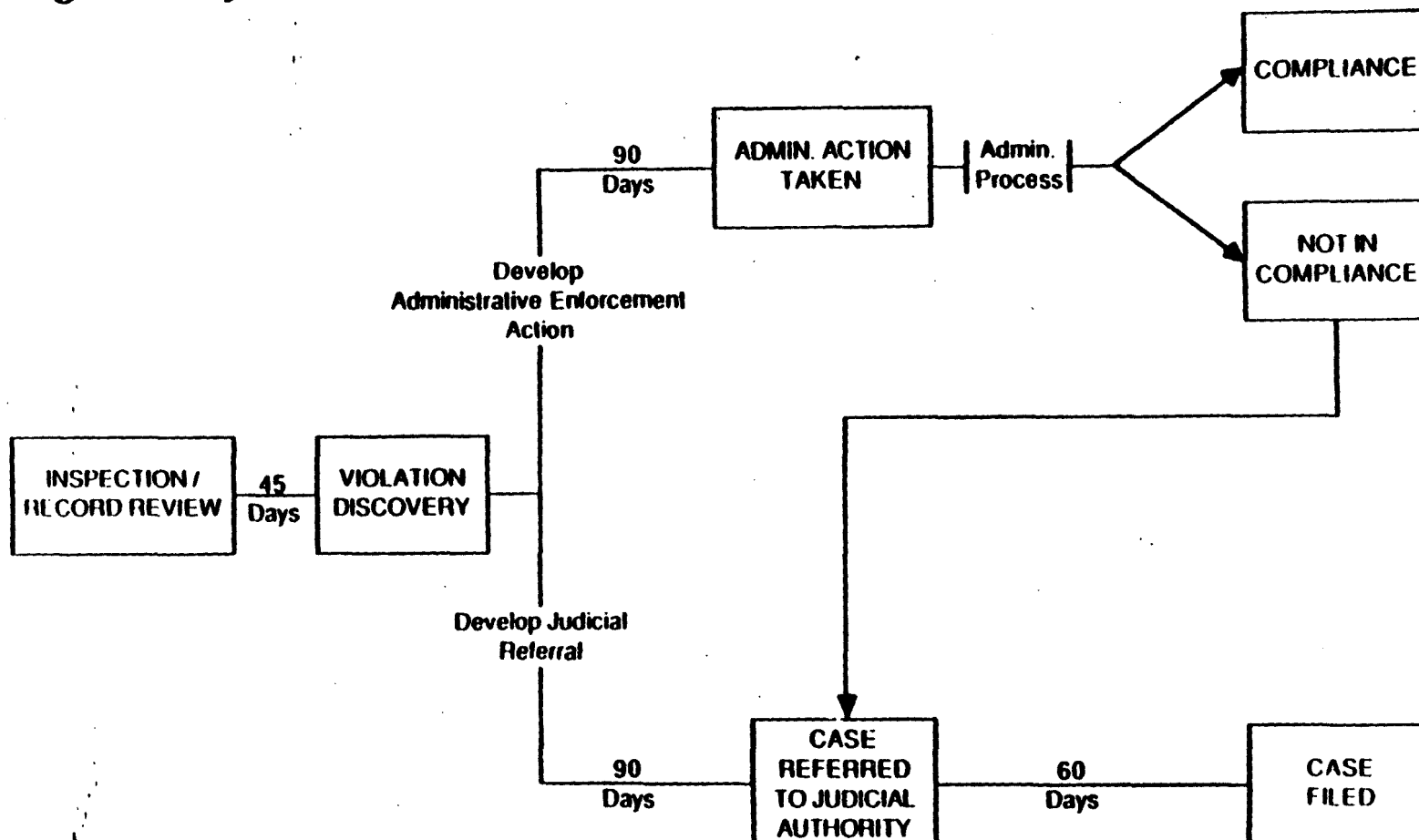
The Agency remains committed to supporting Federal Facilities in their efforts to comply with RCRA. While the appropriate response to a High or Medium Priority Violator is a formal enforcement action, where a Federal Facility is determined to fit into one of these violator categories, EPA will issue a Notice of Noncompliance (NON) as the initial enforcement action. Since the issuance of a NON is parallel to the issuance of a RCRA §3008(a) administrative complaint, the NON must specify the violations, remedy, and timeframes for implementing the remedy in the same manner that an administrative complaint would. This action will be taken against High Priority Violator facilities within 90 days of violation discovery. After the NON has been issued, EPA will work with the Federal Facility to develop a Federal Facility Compliance Agreement (FFCA) which will describe actions the Federal Facility will take in order to return to compliance. The terms and conditions of the final FFCA will be enforceable through citizens suits, and State actions under citizens suit provisions. The requirement for economic sanctions against High Priority Violators will not apply when EPA is the lead enforcement agency.

EPA should encourage the States to take the enforcement lead and pursue appropriate action against Federal Facilities. States, at a minimum, should issue administrative orders against Federal Facilities which are HPVs. States may also be able to pursue other actions under their own authorities. States are expected to take appropriate enforcement actions within the timeframes set forth in this document.

^{8/} This Section does not apply to Government-Owned Contractor-Operated (GOCO) facilities. GOCOs should be treated the same as private facilities.

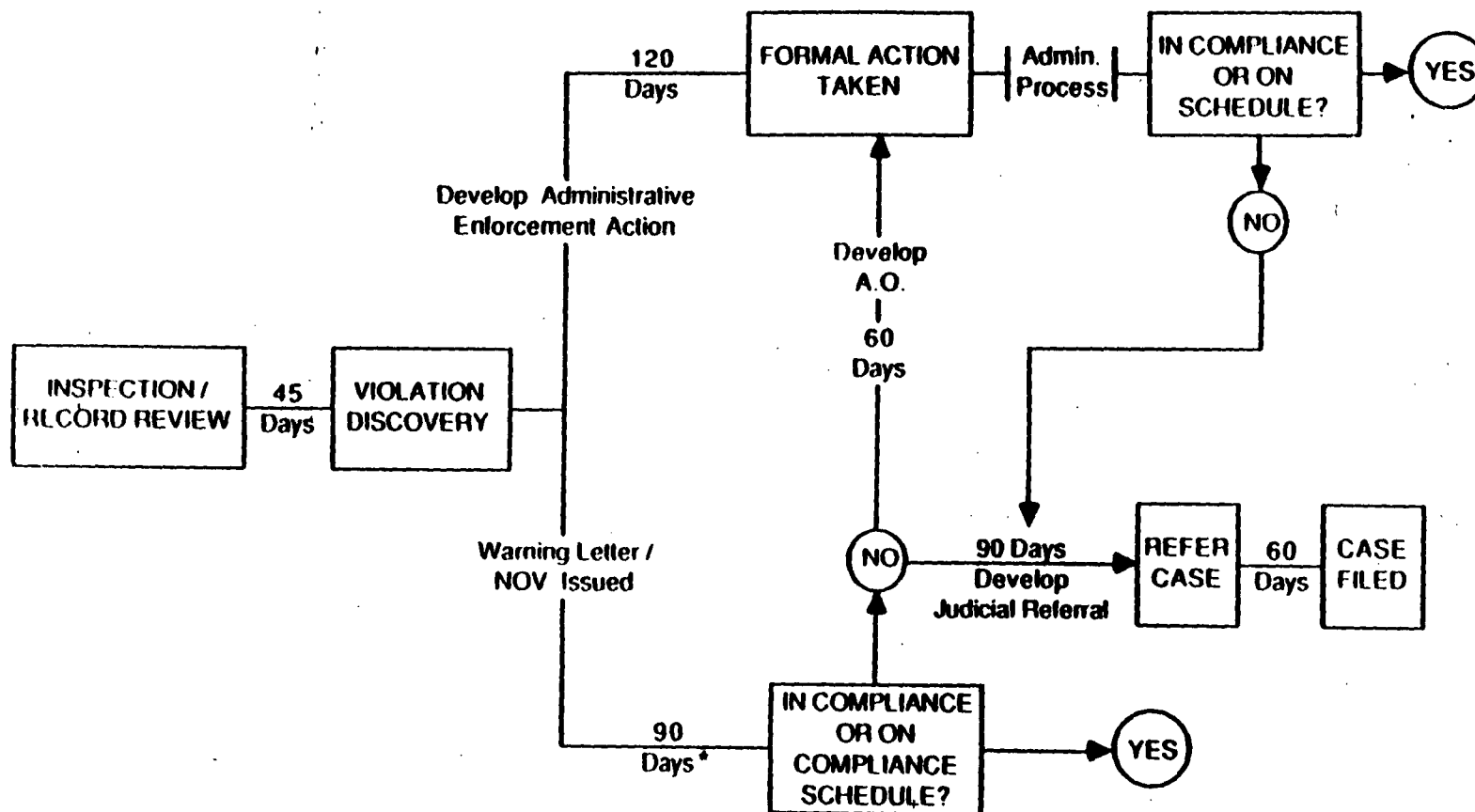
Enforcement Response Timeline

High Priority Violators



Enforcement Response Timeline

Medium Priority Violators



* 120 Days for Non-Land Disposal Restriction Generator Violations



APPENDIX

Violation Classification Examples and How to Classify Violators

Violation Classification examples are presented to help guide compliance officials in making case-specific decisions necessary in determining violation classification as well as classification of the violation for purposes of determining appropriate enforcement response.

The Violator characteristics are briefly restated here. The Medium Priority Violator is a handler with one or more Class I violations not meeting criteria to be designated a High Priority Violator. The High Priority Violator is a handler who caused or poses substantial likelihood of exposure to waste or constituents; is a chronic or recalcitrant violator; or substantially deviates from the program requirements or terms of a permit, order or decree by failing to perform work as required or in a timely manner. Violations of certain program requirements (such as examples provided in this appendix) will be considered to be "substantial deviations", requiring HPV status. Examples of these violations are listed in this appendix as "HPV". In looking at handlers which do not have these particular violations, the compliance official should consider the combined effect of violations, the results of previous inspections at the facility, as well as the violator's responsiveness in rectifying previous violations, in determining whether the violator is an HPV.

The Class I violation is defined as a deviation from regulations, Compliance Orders, or permits which could result in a failure to: assure hazardous waste is destined for and delivered to authorized TSDFs; prevent releases; assure early detection of releases; or perform corrective action for releases. The Class II violation is defined in the negative; violations not meeting criteria for Class I designation are classified as Class II.

As indicated in the ERP text, classification of the handler violator category is made using information about the likelihood of exposure, the violations (extent of deviation from requirements), violation history (have the same requirements been a compliance issue in the past?), and past experience in dealing with handler (in the past has enforcement escalation been necessary, or has the initial WL/NOV been sufficient to obtain compliance?).

If in past dealings with a facility informal actions have not been successful in addressing violations, resulting in a delay in returning the facility to compliance, the compliance official should consider whether an informal action is likely to obtain compliance in this case. Where formal action is taken an economic sanction may well be appropriate, even though not required in

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response to Medium Priority Violators. If a handler has in the past not responded to formal actions (orders) issued in response to violations, this should indicate a handler needs to be treated as a High Priority Violator. If past orders against a handler have not been taken seriously, with the facility not carrying out terms in good faith or have resulted in drawn-out disputes, HPV status is indicated.

Just as the violator classification is a case-specific decision, the classification of a violation as a Class I or II often must consider site specific information as well. While some violations are easily categorized as being a Class I, or a Class I requiring HPV response; others must take into account conditions at the facility and extent of deviation from the requirements. An example of the former is operating a treatment, storage, or disposal facility without a permit or interim status. In every case this should be classified as a Class I violation, and HPV response is required, as indicated on page 5 of this appendix. On the other hand, while a "systematic failure ...or substantial deviation from manifest requirements" requires an HPV response, lesser deviations from the manifest requirements may be considered Class I violations requiring only a Medium Priority Violator status; the most minor violations (e.g., omission of generator ID number) may be a Class II.

The examples presented are a small sample of violations fitting each category. Those dealing with ground-water monitoring violations are most detailed, following the thought process which is used to make the violator classification. The other examples briefly describe a situation or type of violation, then note the appropriate designation.

Ground-Water Monitoring Requirement Violations/Violator Classification

Example 1.

Inadequate well number or placement

In evaluating violations of subpart F for classification, the compliance official must realize that a system may trigger assessment monitoring and still be grossly inadequate. In order for the appropriate assessment plan to be designed and implemented, all releases, and extent of releases (including rate and chemistry) must be detected. Thus, a system which fails to cover a significant pathway due to insufficient numbers or inappropriate location of wells, or inadequate understanding of the subsurface geology, is a Class I violation. [It involves a deviation from a regulation or permit requirement "which could result in a failure to assure early detection of such releases".]

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Such a handler should be considered a High Priority Violator (HPV) because the system inadequacies may allow a plume or part of a plume to migrate unaddressed, or postpone detection until a large volume of waste or leachate has been released. [This violation has caused a "substantial likelihood of exposure".]

Example 2.

Ground-water monitoring well screens are too long, dilution causes low indicator readings. While corrective action is indicated (i.e. samples indicate need for further investigation of possible release), levels are too low to trigger assessment monitoring (or compliance monitoring). This is a violation of the ground-water monitoring system performance standard and is a Class I violation because the ground-water monitoring system was inadequate to trigger the appropriate monitoring system response.

As long as the corrective action process proceeds to provide the necessary characterization to allow the release to be appropriately addressed, this handler does not have to be characterized as an HPV. However, if o/o delays response, HPV designation may be indicated.

Example 3.

Damage to a well may impede follow-up sampling critical to a site evaluation or other inspection. A case in point is where an initial sampling indicates need for further sampling from a specific well to further evaluate a possible release. Upon returning to the well at a later date, the well is found to be damaged so as to prevent the taking of reliable samples. This is a Class I, and the handler must be considered to be an HPV due to the nature of the violation and the suspicious circumstances.

Example 4.

Sampling and analysis

Regulations require that sampling and analysis of ground water be performed at certain intervals. Failure to sample at proper intervals or for all required parameters could result in the failure to detect changes in ground-water quality... Class I violation - HPV may be indicated depending on extent of deviation from requirements. Class I violation and HPV status would be required where a facility fails to perform sampling or analysis when required or uses poor techniques or procedures which invalidate results.

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Example 5.

40 CFR §265.93 (b) thru (e) requires owner/operator of facility to make comparison between upgradient and downgradient ground-water monitoring wells. If significant increases (or pH decreases) are confirmed, a ground-water assessment program must be implemented. Failure to comply with these requirements for comparing well data or implementing a ground-water assessment program is a Class I violation, HPV response is indicated.

Example 6.

Records of data and analyses from facilities GWM systems are to be kept for specified periods of time. Minor deviations from these requirements which do not impede compliance monitoring or enforcement efforts may be Class II violations.

Example 7.

Analyses from GWM systems must be submitted to the appropriate State or Federal authority. Parameters exceeding maximum contaminant levels and/or significant differences from background concentrations must be identified, failure to submit analysis of GWM data or to notify appropriate State or Federal official of increases in indicator parameters is a Class I violation. Where violation results in delay to further investigation of possible release, HPV designation is indicated.

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Examples of Violation and Violator Classification

- o Failure to carry out waste analysis for a waste stream. (unless o/o is properly applying "knowledge-of-process") HPV
- o Operating without a permit or interim status. HPV
- o Failure to comply with 90 day storage limit by generator. (Gross deviation from requirement or failure to rectify upon notice elevates this to HPV.) Class I
- o Commencing construction prior to permit approval at a new facility or new part of a facility where permit is required before such construction is commenced. HPV
- o Complete failure to respond to a §3007 request. HPV
- o Systematic failure of a generator or transporter to comply with the manifest system or substantial deviation from manifest requirements. [More routine manifest violations of a limited nature may not require HPV designation, such as where one manifest out of a large number was not signed (and the waste was properly handled and disposed of anyway). In such a case, a Class I violation is appropriate, however HPV designation is not required. The most minor manifest violation (e.g. omission of a generator ID number) may be a Class II.] HPV
- o Failure to satisfy manifest discrepancy reporting requirements. HPV
- o Failure to prevent the unknown entry or prevent the possibility of the unauthorized entry of persons or livestock into the waste management area of the facility. HPV
- o Failure to properly handle ignitable, reactive, or incompatible wastes as required by 264 and 265.17(b)(1), (2), (3), (4), and (5). HPV
- o Disposal of hazardous waste in a regulated quantity at a non-regulated TSDF. HPV
- o Improper disposal of waste in violation of the land disposal restrictions. HPV
- o Mixing, solidifying, or otherwise diluting waste to circumvent land disposal restrictions. HPV
- o Incorrectly certifying a waste for disposal/treatment in violation of the land disposal restrictions. HPV
- o Failure to submit notifications/certifications as required by land disposal restrictions. HPV

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- o Deficient waste determination (land ban). Class I
- o Failure of an o/o of a TSDF to have a closure or post post-closure plan or cost estimates. HPV
- o Failure to maintain a copy of the closure plan or financial assurance documentation at the facility when it is maintained when it is maintained at the corporate headquarters and/or regional corporate office. (Failure to supply documentation upon request is a Class I violation.) Class II
- o Minor deviations from timeframes set out for facility closure. Class II
(except as related to requirement that o/o submit closure plan at least 180 days before beginning closure - Class I, possibly HPV depending upon deviation and potential impact).
- o Failure to submit professional engineer's certification of closing to proper State or Federal official. Class I
- o Failure of o/o to retain professional engineer to oversee closure activities and certify conformance with closure plan. HPV
- o Failure to establish or maintain financial assurance for closure and/or post closure care. HPV
- o Failure of o/o to provide updated documentation for financial test for closure, post-closure, and/or liability insurance, within 90 days of the close of the company's fiscal year. Class I
- o Failure to submit an originally signed duplicate of the trust agreement to the RA. Class I
- o Failure to submit biennial report Class II
- o Failure to meet general inspection requirements (265.15) for developing a written inspection plan. Class I
If inspections are not conducted or hazardous conditions are not corrected. HPV
- o Failure to designate the facility emergency coordinator. Class I

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- o Failure to follow emergency procedures contained in the response plan which could result in serious harm. Therefore failure to carry out the following types of activities during an emergency would be considered a Class I violation and indicate a HPV: HPV

Response activities include: activating alarm and/or notify appropriate emergency officials; assessing extent and seriousness of release; reporting findings of spills outside a facility; containing hazardous waste; monitoring any shut-down operations; properly treating, storing and disposing of the spill; and cleaning up completely after the accident.
- o Storage of waste in a container that is not in good condition. Class I

- General use of containers which are in poor condition. HPV
- o Failure to give police, fire department, and hospitals information that will be needed if there is an emergency at the facility. [NOTE: HPV is indicated if fire department is not made aware of risks and special equipment needed to respond to emergencies at facility or lack of preparedness poses potential threat to human health.] Class I
- o Failure to label a H.W. drum with required information. Class I

- If this incorrect labeling could cause an inappropriate response to a spill or leak and subsequent release or potential harm to human health or the environment. HPV

- a general failure to follow drum labeling requirements or lack of knowledge of drum contents. HPV
- o Failure to date containers/tanks with accumulation date. HPV
- o Failure to placard or incorrectly placarding a vehicle carrying hazardous waste. Class I

- Multiple placard violations, past similar problems or if there is a spill or accident during transportation and this results in inappropriate response. HPV
- o Failure to conduct adequate personnel training. Class I

- Failure to maintain complete records. Class II
- o Deviations from export rule requirements. Class I

- Systematic failure to comply with export rule or substantial deviation from requirements. HPV

FY87 HEADQUARTERS LIBRARY ACCOMPLISHMENTS

The FY87 major accomplishments of the Headquarters library are listed below according to different library functions. But I wish to stress that the entire staff is involved in one way or another in many of these areas. As members of a working team we do not restrict ourselves to any single function or section.

GENERAL

- ° Throughout the library procedures were streamlined whenever possible, from operational procedures to statistics keeping.
- ° The library increased its visibility through more active staff participation in EPA programs.
- ° We were more responsive to users' needs.
- ° We analyzed our services to determine usefulness and consider improvements.

LIBRARY SERVICES

ACQUISITIONS/COLLECTION DEVELOPMENT

- ° Creation and maintenance of the Acquisitions database to track materials at every step of the ordering process.
 - Database allows production of specialized reports based on different criteria.
 - Reports from the database have been sent to other network libraries to help their collection development effort.
 - It facilitates journal subscriptions renewals decision process.
- ° Massive effort to identify materials to be purchased for the Management collection.
- ° Responded promptly and effectively to sudden availability of end-of-year money.

BIBLIOGRAPHIES

- ° Chemical Emergency Preparedness and Prevention, at the request of the Preparedness Staff, OSWER.
- ° Waste Minimization, for the Office of Solid Waste.
- ° Youth Bibliographies, at the request of the Office of Youth Affairs, for distribution to schools

nationwide.

- Environmental books for young people, K-6 and 7-12 grades.
- Articles on the popular press on five environmental topics.
- ° Role of federal managers in affirmative action programs, at the request of the Office of Civil Rights, to be used by the EPA task force on affirmative action.

CATALOGING

- ° Compilation of the EPA Network Journal Holdings report.
- ° New forms and procedures for providing support to the regional and laboratory libraries.
 - New coding sheets.
 - Cataloging articles published in the Library News.
- ° Active participation on the online catalog project.

CIRCULATION

- ° Overdue notices were produced more frequently.
 - Procedures were streamlined.
 - Better response from library borrowers.
- ° Responded quickly to users' suggestions. e.g.:
 - Issued new circulation printouts with improved access to documents.
 - Kept better control of current issues of popular magazines.

COLLECTION MAINTENANCE

- ° Improved access to various components of the collection.
 - e.g. List of pesticide data sheets.
- ° Intensive weeding of the collection.

DATABASE SERVICES

- ° Analysis of Selective Dissemination of Information (SDI) service to determine usefulness and consider improvements.

INTERLIBRARY LOAN

- ° Expanded contacts with other environmental and scientific librarians in the Washington area.
- ° Established a faster turnaround time when responding to requests.

- ° Eliminated unnecessary (duplicative) recordkeeping.

OUTREACH

- ° Developed specific information products for EPA programs, e.g.
 - Extensive reading list for the staff of the Assistant Administrator in the Office of Water.
- ° Participation in agency-wide programs, e.g.
 - Alternative technologies clearinghouse project.
 - Presentation to the Clean Air Act task force and subsequent support of information seeking effort.
 - Participation in evaluation of Groundwater Information Center and database operations.
 - Youth program.
- ° Improved access to information.
 - Production of combined HQ/OTS journal subscription list. We are also including OTS's new acquisitions in the What's New.
 - Microfiche finding aid.
 - Contacts database, subsequently expanded to be used by PIC and INFOTERRA.
 - Developing a file of information on clearinghouses and an advisory service.
 - Participation in Reports Roundtable group.
- ° Improvements on production and format of the What's New.
- ° Contacts with other libraries, clearinghouses, inter-agency task forces to exchange ideas and information products.
- ° Consulted by different EPA programs to provide feedback on new products, e.g.
 - EDRS (Enforcement Document Retrieval System), OECM.
 - Directory of Environmental Statisticians.

REFERENCE

- ° Creation of a vertical file for easy subject access to a variety of brochures, pamphlets and other ephemeral literature which otherwise would not be available in the library.
- ° New form to keep track of ready-reference questions.
 - Helps analyze current trends.
 - Identifies materials needed in the collection.

SPECIAL SERVICES

HAZARDOUS WASTE COLLECTION

- Database grew to contain close to 1800 records.
- Developed a hierarchical thesaurus of the keywords used in the database.
- Participation in active marketing of the collection through demonstrations, training and installation in different EPA offices.

MANAGEMENT

- Developed a special collection on management topics.
- Identified books, journals and videocassettes for the collection.
- Developed and produced special information products,
 - Bibliographies.
 - What's New in Management.
- Developed a database for the collection.

RISK

- Took over production of the updates to the risk guide.

TRANSLATIONS/INFOTERRA

- Improved quality and quantity of INFOTERRA responses.
- Completed update of the Source Directory.
- Improved format of the What's New in Translations.
- Revised Procedures Manual.

ADMINISTRATIVE FUNCTIONS

EQUIPMENT

- Improvement in equipment with the arrival of a new CANON micrographics reader/printer, more are on order.
- Selected by Dun and Bradstreet as one of six libraries to test a prototype CD-ROM database.
- Supply order forms were revised to facilitate library's and PIC's ordering process.

- ° Have received new software packages.

SPACE

- ° The Technical Services staff moved to Waterside Mall in October. The move increased their participation in the daily operation of the Main library.

STAFF CHANGES

- ° Added two new positions to the staff.
- ° Overall improvement in the quality and skills of the library staff.

STAFF TRAINING AND DEVELOPMENT

- ° Increased participation in outside workshops and training sessions.
- ° Internal training sessions, e.g. Wordstar, DBase, Lotus. As a result the majority of the staff uses one or more of these programs.
- ° Technicians' seminars to encourage sharing of individual expertise.
- ° Production of Nexis Daily Update to improve ability of staff to answer questions on current issues.