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

DEC 16 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Update of General Enforcement Policy Compendium - Transmittal Memorandum

FROM: Cheryl Wasserman, Acting Director
Office of Enforcement Policy

TO: Associate Enforcement Counsels
Associate General Counsels
HQ Program Enforcement Offices
Regional Counsels
NEIC

The attached documents are an update of the General Enforcement Policy Compendium. This update consists of policies which have been added, revised or deleted since the issuance of the June 11, 1987, update. The policies are:

DOCUMENT NAMES	DATES	GM NUMBERS
Issuance of Enforcement Considerations for Drafting and Reviewing Regulations and Guidelines for Developing New or Revised Compliance and Enforcement Strategies	8/15/85	GM - 58
The Regulatory Development Process: Change in Steering Committee Emphasis and OECM Implementation	2/06/87	GM - 59
Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket	3/10/87	GM - 60
Enforcement Docket Maintenance	4/08/88	GM - 61
Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions	8/14/87	GM - 62
Policy on Invoking Section 9 of the EPA/DOJ Memorandum of Understanding	8/20/87	GM - 63

DOCUMENT NAMES	DATES	GM NUMBERS
Processing of Consent Decrees	9/14/87	GM - 64
Processing of Indirect Referrals	9/29/87	GM - 65
Assertion of the Deliberative Process Privilege (2 documents):		GM - 66
A. Guidance for Assertion of Deliberative Process Privilege	10/3/84	
B. Change in Review Process for Concurrence in Litigation	9/30/87	
Procedures for Assessing Stipulated Penalties	1/11/88	GM - 67
Procedures for Modifying Judicial Decrees	1/11/88	GM - 68
Expansion of Direct Referral of Cases to the Department of Justice	1/14/88	GM - 69
Delegation of Concurrence and Signature of Authority	1/14/88	GM - 70
Case Management Plans	3/11/88	GM - 71
Assuring Timely Filing and Prosecution of Civil Judicial Actions	4/08/88	GM - 72
Process for Conducting Pre-Referral Settlement Negotiations on Civil Judicial Enforcement Cases	4/13/88	GM - 73
Guidance on Certification of Compliance with Enforcement Agreements	6/25/88	GM - 74

There are modifications to existing policies. These policies are:

GM - 11 This policy is obsolete and should be discarded. The index notes that it was deleted and revised. We are attaching a permanent cover page to be put in manual in its place.

GM - 25 This policy has been revised. A new Federal Facility Compliance Strategy was signed on 11/8/88. We have excerpted the enforcement sections of the Strategy and included them here. We are also including a cover page explaining that the previous version is obsolete. The 1984 Strategy should be removed, and the cover page and new document put in the manual in its place.

GM - 41 This policy has been revised. The old one should be discarded and the new one put in its place along with the permanent cover page explaining the changes. The revised index notes that it was replaced.

GM - 46 There was an addendum to this policy issued 8/4/87. The attached cover page should go in the front of the current #46 stating that there is an addendum contained there. The addendum should be added after the current #46.

GM - 57 This policy was revised. The old one should be discarded and the new one put in its place along with the permanent cover page explaining the change. The revised index notes that the old one was replaced.

Also attached is a revised chronological table of contents and a topical index of the currently effective general enforcement policies and guidance documents. The revised table of contents and index replace all previously issued versions.

The complete Compendium now consists of 74 documents numbered sequentially GM-1 through GM-74. Additional copies of the Compendium updates or any of the Compendium documents are available through OECM's Program Development and Training Branch until the supply is exhausted.

It has come to our attention that our mailing list needs substantial updating. Please fill out the attached form confirming your address and interest in receiving compendium updates. Then fold it over so that the OEP return address shows, and mail it back to us within four weeks of the date of this memorandum. If we do not receive this form, we will remove your name from the mailing list.

If you have any questions concerning the Compendium text and/or would like a copy, please contact ~~Linda R. Thompson at FTS 475-8777.~~ 260-6777 (as of 3/94)

Attachments

cc: Associate Administrator for Regional Operations
EPA Library
David Buente, Department of Justice

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Investigations

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460
OFFICE OF THE GENERAL COUNSEL
WATERSIDE MALL

#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, 16 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.

GM-2

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.

Smith, French

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

#3

AUG 2 1 1981

THE ADMINISTRATOR

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

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

Dear Mr. Attorney General:

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

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

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

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

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

Sincerely yours,

Anne M. Gorsuch

cc: Assistant Attorney General
Land and Natural Resources Division

Assistant Attorney General
Civil Division

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Griffin B. Bell

GRIFFIN B. BELL
Attorney General

Date: June 15, 1977

DOUGLAS M. COSTLE
Administrator
Environmental Protection Agency

Date:

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

AUG - 4 1977

#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

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

#5

11 APR 1978

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 f 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

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 Sorrels 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. BECKVER
UNITED STATES ATTORNEY

JAMES STANLEY LENELLE
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. 78-45-A

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, 1978
5:00 P.M.

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 Jac[illegible] an agent of General Motors Corporation (GM) on August 1, 1978, at the GM Willow Run vehicle assembly plant, Ypsilanti, Michig

(Name of person making service)

Acting Chief, Mobile Source Enforcement 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) #NRM-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

[redacted]

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 vehicle's 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.~~ d.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 proportionately 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%	30
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 assembly 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 840B2 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 consistent 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. McHam

EDWARD C. MC HAM
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

#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

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

#7

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

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.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

#8

APR 3 1992

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Draft DOJ/EPA Litigation Procedures

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

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

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

Attachment

ENFORCEMENT GOALS AND OBJECTIVES

of

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

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

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

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

QUANTICO GUIDELINES FOR ENFORCEMENT LITIGATION

1. GOALS AND PURPOSES

For EPA

To achieve compliance with applicable law through effective enforcement.

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

For DOJ

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

2. GENERAL OBSERVATIONS

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

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

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

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

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

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

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

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

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

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

3. RESPECTIVE COMMITMENTS

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

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

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

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

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

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

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

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

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

4. PROCESS

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

B. EPA regional enforcement attorneys are media-specific;

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

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

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

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

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

b. adequacy of agency development of case;

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

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

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

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

2. technical support is committed;

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

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

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

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

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

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

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

L. Coordination for all of these efforts will include

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

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

5. SPECIFIC ISSUES DISCUSSED

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

B. Existing Consent Decrees

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

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

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

4. collection of stipulated penalties.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

#9

30 APR 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Agency Guidelines for Participation in Grand Jury Investigations

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

TO: Associate Adminstrators
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Director, National Enforcement Investigations Center

Federal grand juries are almost always used to develop EPA's criminal cases following referral to the Justice Department. Frequently, EPA employees--including investigators, lawyers and technical personnel--assist in these grand jury investigations under the supervision of the Justice Department. The conduct of Agency employees involved in grand jury investigations is frequently subjected to close judicial scrutiny, since defense counsel routinely challenge aspects the grand jury presentation during post-indictment motions. Accordingly, Agency employees who assist the Justice Department during grand jury investigations must be familiar with, and abide by, the rules of conduct established for this institution by case law and the Federal Rules of Criminal Procedure.

The attached "Agency Guidelines for Participation in Grand Jury Investigations" have been drafted to provide Agency employees with a general knowledge of the most important rules surrounding grand jury investigations. Please take immediate steps to insure that personnel working within your offices who are assigned to assist in grand jury investigations are completely familiar with the details of this guidance document.

Questions on any matter raised in this document should be directed to Peter Beeson, Acting Director, Office of Criminal Enforcement (FTS 382-4543).

Attachment

cc: Carol Dinkins
Assistant Attorney General
Land and Natural Resources Division

AGENCY GUIDELINES

FOR

PARTICIPATION

IN

GRAND JURY INVESTIGATIONS

United States Environmental
Protection Agency

Effective Date: APR 30 1982

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AGENCY GUIDELINES FOR PARTICIPATION IN GRAND JURY INVESTIGATIONS

INTRODUCTION

In the past, EPA has relied extensively on the grand jury to develop its criminal referrals. With the projected hiring of criminal investigators who will be capable of more complete, pre-referral case development, this reliance may decrease somewhat. Given the nature of EPA's criminal jurisdiction, however, the grand jury will always be a significant component of the criminal case development process.

This guidance document is written to provide a general understanding of the grand jury process, and of the particular responsibilities born by EPA employees involved in grand jury investigations. In drafting this document, the Agency has coordinated closely with the Department of Justice, since its participation in grand jury investigations will occur only in partnership with attorneys of the Justice Department and the offices of its local United States Attorneys. In addition, the views of regional offices were solicited on one issue of particular sensitivity: the need for access to confidential grand jury materials by EPA managers.

The guidance contained within is not intended to supplant rules of procedure for the conduct of grand jury investigations contained in the United States Attorneys' Manual, or developed by the specific United States Attorneys. It will, however, provide internal guidelines for EPA employees where no specific Justice Department rules exist. This document will replace any previous Agency guidance on this subject.

Finally, this guidance is strictly advisory in nature, and is not intended to create or confer any rights, privileges or benefits on prospective witnesses or defendants. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Any attempt to litigate any portion of this guidance should be brought directly to the attention of the Office of Criminal Enforcement, EPA Headquarters.

I. BACKGROUND: THE ROLE OF THE GRAND JURY

The grand jury serves two basic functions: investigative and protective. In cases where traditional field investigation techniques have failed to produce adequate evidence to support a criminal prosecution, the grand jury's compulsory process, in conjunction with statutory immunity grants, can be used to compel testimony and the production of documents. This is particularly important in white collar crime cases, in which the loyalty of the investigative targets, together with the private--often inaccessible--settings of the suspect activity, often frustrate more traditional field investigative methods.

The grand jury also acts as a check on independent and overzealous prosecutorial decision-making. The Fifth Amendment to the United States Constitution guarantees that Federal felonies 1/ will be charged by grand jury indictment. Misdemeanors can and often will be charged by indictment. This is not a constitutional requirement, however, and they are sometimes charged in an "information" filed independently by the prosecutor without prior consideration of the underlying evidence by a grand jury. It is the function of the grand jury to determine whether there is probable cause to believe that a Federal offense has been committed by the defendant(s) named in the proposed indictment.

The Supreme Court has described the dual functions of the grand jury as "both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." United States v. Calandra, 414 U.S. 338, 343 (1974). Stated alternatively, the purpose of the grand jury is "to provide a fair method for instituting criminal proceedings" by a body that is "independent and informed." Costello v. United States, 350 U.S. 359, 362 (1956).

1/ A felony is defined at 18 U.S.C. §1 as "any offense punishable by death or imprisonment for a term exceeding one year." Any other offense is a misdemeanor, id. In EPA's statutes, felony provisions are found in Section 3008(d-e) of the Resource Conservation and Recovery Act, 42 U.S.C. §6928(d-e), and for second offenders under Section 309(c)(1) of the Clean Water Act, 33 U.S.C. §1319(c)(1), and Section 113(c)(1)(A) of the Clean Air Act, 42 U.S.C. §7413(c)(1)(A).

"In Berger v. United States, 295 U.S. 78, 88 (1935), the Court described the responsibilities of a prosecutor appearing before a grand jury:

> (A) prosecutor who presents a case to a grand jury has the obligation of preserving the fairness, impartiality, and lack of bias of this important governmental investigative body. He can not inflame or otherwise improperly influence grand jurors against any person...; and he must always remember that he is a representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all....

The obligation placed on the prosecutor is shared by all government personnel assigned to the investigation.

II. THE OPERATION OF THE GRAND JURY

Background: Regular grand juries can be empanelled for up to 18 months, see Rule 6(g), Federal Rules of Criminal Procedure (FRCP). In many districts, terms of regular grand juries are far shorter. "Special" grand juries--normally empanelled to hear a particularly complex and lengthy investigation--sit for a term of 18 months and may be extended for an additional 18 months. 18 U.S.C. §3331.

Federal grand juries consist of not less than sixteen nor more than twenty-three members. Rule 6(a), FRCP. The grand juries are empanelled before the district court, who will then appoint one member to be Foreman, and one to be Deputy Foreman. The Foreman has the power to administer oaths to all witnesses, and signs all indictments. Rule 6(c), FRCP. An indictment may be found with the concurrence of twelve or more jurors. Rule 6(f), FRCP. Sixteen or more jurors must be present for the grand jury to conduct business. Thus, before beginning any session the prosecutor will insure that at least sixteen grand jurors are present.

Authorized Persons Before the Grand Jury: The only persons allowed to be present at a session of the grand jury are "attorney(s) for the government"; the witness under examination; an interpreter if necessary; a stenographer or operator of a recording device; and the grand jurors. Rule 6(d), FRCP. The presence of unauthorized persons before the grand jury is a per se basis for dismissal of an indictment, without a demonstration of prejudice. United States v. Phillips Petroleum, 435 F. Supp. 610 (D. Okl. 1977); United States v. Braniff Airways, Inc., 428 F. Supp. 579 (D. Tex. 1977); United States v. Echols, 413 F. Supp. 8 (D. La. 1975). Adherence to the terms of Rule 6(d) is mandatory.

In the context of Rule 6(d), the phrase "attorney for the government" does not include EPA or other Federal agency attorneys. See Rule 54(c), FRCP. 2/ See also, In re Grand Jury Proceedings, 359 F. 2d 440, 443 (3d. Cir. 1962) (FTC attorney); In re Grand Jury Investigations, 414 F. Supp. 476 (S.D.N.Y. 1976) (SEC attorney); United States v. General Electric, 209 F. Supp. 197, 202 (E.D. Pa. 1962) (TVA attorney). Thus, unless a special appointment is made, 3/ EPA attorneys will appear before the grand jury only as witnesses, and only during those sessions when their testimony is presented.

2/ Rule 54(c), FRCP, defines "attorney for the government," in pertinent part, as:

> ...the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of the United States Attorney....

3/ In those cases in which the particular expertise and experience of an EPA attorney is considered necessary to the successful investigation and prosecution of a criminal case, that attorney can be appointed an authorized assistant of the Attorney General pursuant to 28 U.S.C. §515(a), or of the United States Attorney pursuant to 28 U.S.C. §543. In either case, the EPA attorney would meet the definition of "attorney for the government" found at Rule 54(c), FRCP. Such appointments may only be made at the request of the Justice Department attorney overseeing the investigation.

At least two courts have held that a prosecutor presenting evidence to a grand jury who also testifies as a witness before that grand jury is an "unauthorized person in the grand jury room" in violation of Rule 6(d). United States v. Gold, 470 F. Supp. 1336, 1351 (N.D. Ill. 1979); United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978). In addition, this conduct has been found to violate the ABA's Code of Professional Responsibility. United States v. Birdman, 602 F.2d 547, 551-555 (3d. Cir. 1979). Under no circumstances should an EPA attorney appointed to act as a Special Assistant United States Attorney testify before a grand jury to which that attorney is also presenting evidence as a prosecutor.

The Statutory Recording Requirement: As of August 1, 1979, "all proceedings (before a grand jury), except when the grand jury is deliberating or voting" must be recorded. Rule 6(e)(1), FRCP.

The precise meaning of this mandate has not been clarified by case law; nor do we know--as yet--what sanctions will flow from violations of this requirement. In the absence of decided case law to the contrary, this rule should be interpreted strictly. Beyond the exchange of pleasantries--i.e., personal greetings, observations on the weather, etc.--EPA employees should not engage in conversations with grand jurors unless that coversation is being recorded as part of a formal grand jury session. If a grand juror asks a question prior to or after a formal session, you should politely advise the grand juror that it is not proper to respond at that time, and request that the question be raised again after a recorded session begins.

In the case of an inadvertant breach of this rule, you should immediately notify the prosecutor supervising the investigation, who may in turn wish to ask that the conversation be repeated on the record before the entire grand jury.

The Indictment Process: At the end of an investigation, the prosecutor will ask a grand jury to vote on a recommended indictment. The indictment itself will have been drawn up in advance, and will be presented unsigned to the grand jury for consideration. Procedures on the

manner of presentation will vary by district and the nature of the case. The recommended indictment will normally be marked and introduced as a grand jury exhibit, and the grand jury will be informed that all documents, records and witness transcripts are available for review if necessary. The deliberations of the grand jury are not recorded; in addition, no one is present during deliberations except members of the grand jury itself. If the grand jury votes to indict, the indictment is signed by the Foreman, as well as the United States Attorney, and is returned to a judge in open court. 4/

III. GRAND JURY SECRECY

Confidentiality is often crucial to the success of a criminal investigation. In addition, the Agency has a responsibility to protect the targets of criminal investigations from the adverse publicity that can result from the premature disclosure of a criminal inquiry. UNDER NO CIRCUMSTANCES SHOULD AGENCY OFFICIALS DISCUSS THE EXISTENCE OF A CRIMINAL INVESTIGATION, EITHER WITHIN OR OUTSIDE THE AGENCY, EXCEPT ON A NEED-TO-KNOW BASIS. This rule applies with equal force during EPA's dealings with Federal, State and local officials.

Given the provisions of Rule 6, FRCP, confidentiality is particularly important during grand jury investigations.

The Rule and its Exceptions: Rule 6(e)(2) of the Federal Rules of Criminal Procedure establishes an overall bar to the disclosure of "matters occurring before the grand jury" except as in compliance with the terms of Rule 6(e). Grand jury secrecy is of crucial importance to the preservation of the grand jury as an investigative agency. Grand jury secrecy exists to encourage complete and willing testimony by witnesses; to minimize the risk of flight by prospective defendants; to safeguard the grand jury from extraneous pressures and influences; and to avoid prejudicial disclosures concerning investigative targets. See United States v. Proctor and Gamble, 356 U.S. 677 (1958). A breach of grand jury secrecy is punishable by contempt of court.

Rule 6(e) of the Federal Rules of Criminal Procedure establishes strict procedures to ensure the secrecy of grand jury proceedings. For purposes of this document, we are concerned with the following portions of Rule 6(e):

4/ In appropriate circumstances the indictment can be "sealed", i.e., kept secret, until some future date. This procedure is often used when the defendant is not in custody and may flee.

(2) General Rule of Secrecy - A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to--

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was empanelled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(Emphasis supplied)

In sum, the general rule of secrecy established in Rule 6(e) has two exceptions of particular interest to EPA personnel involved in grand jury investigations: (1) disclosure to an "attorney for the government" (which requires no judicial authorization) and (2) disclosure to government personnel assisting the attorney for the government in the enforcement of Federal criminal law (which requires timely notification to the district court supervising the grand jury investigation).

As was indicated earlier, EPA attorneys do not fall automatically within the category of "attorney(s) for the government." Rule 54(c), FRCP. Thus, except in those cases in which the Agency attorney is appointed an authorized assistant of a Justice Department prosecutor under 28 U.S.C. §§515(a) or 543, the first exception is inapplicable to EPA employees.

Of far greater significance within EPA's context is Rule 6(e)(3)(A)(ii), which authorizes disclosure to government personnel assisting an attorney for the government in the enforcement of Federal criminal law. For example, EPA technical personnel will frequently be asked to review scientific documents received pursuant to grand jury subpoena and to analyze them for the grand jury. Similarly, EPA attorneys familiar with Agency regulations may be asked to determine whether the facts developed in a grand jury inquiry constitute violations of specific regulatory programs. Finally, EPA's criminal investigators will normally be made agents of the grand jury to serve subpoenas, receive and review grand jury materials, and interview subpoenaed witnesses prior to testimony.

Decisions on the scope of disclosure to government personnel under this exception are vested, under Rule 6(e), with the prosecutor supervising the grand jury investigation. The identity of these government personnel must be disclosed to the court that empanelled the grand jury. There is no statutory obligation to give the court prior notice of such disclosure, see In re Grand Jury Proceedings (Larry Smith), 578 F. 2d 836 (3d. Cir. 1978); however, prior notification is the preferable practice where feasible. Finally, the purpose of the disclosure must be to assist in the enforcement of Federal criminal law. Rule 6(e)(3)(A)(ii).

Rule 6(e)(3)(A)(ii) disclosures will be used with restraint and will be limited to situations in which they are necessary for the furtherance of the criminal investigation. Under no circumstances can information disclosed under this provision be communicated--in any form--to any Agency employee not specifically authorized to receive this information under the provisions of Rule 6(e). This would include, for example, even members of EPA's Office of Criminal Enforcement and criminal investigators hired in our field offices. It would also

include, of course, Congressional, State or local officials interested in the matter under investigation. The bar imposed by Rule 6(e) is total.

Disclosure of Grand Jury Materials to Agency Supervisors

In the past, the question has arisen whether an Agency employee assigned to a grand jury investigation and authorized to review grand jury materials must thereafter cease all discussions of his or her work with supervisory personnel.

Strict confidentiality is required for "matters occurring before the grand jury." This phrase should be read to include, at a minimum, the substance of grand jury testimony and any transcripts or memoranda reflecting that testimony; the substance of documents subpoenaed by the grand jury; the identities of witnesses appearing before the grand jury; and the identity of investigative targets, corporate or individual, developed during the grand jury investigation.

On the other hand, grand jury secrecy does not preclude necessary discussion within the Agency of publicly-filed motions relating to the grand jury investigation (i.e., motions to quash grand jury subpoenas); or the discussion of legal issues arising during grand jury investigations, if they can be discussed in the abstract, without reference to evidence developed before the grand jury. Of course, where there is doubt about whether a matter is protected by grand jury secrecy, the question should always be raised with the "attorney for the government" overseeing the investigation prior to disclosure.

On occasion, when unexpected and significant Agency resource commitments are required during the course of a grand jury investigation, limited disclosure of grand jury materials to EPA managers not actively involved in the case may be appropriate. However, such disclosure will be made by, and with the prior approval of, the Justice Department

attorney supervising the investigation; further, it will be limited to the facts necessary for the supervisor to make an intelligent decision on the use of his or her resources. In addition, care must be taken to ensure that the manager receiving this information is not supervising a simultaneous civil, administrative or regulatory proceeding involving any of the investigative targets. Of course, appropriate notification to the Court under Rule 6(e) must occur at the time of the disclosure.

Disclosure of Grand Jury Materials in Parallel or Subsequent Civil/Regulatory Proceedings: The grand jury's sole legitimate investigative purpose is to determine whether probable cause exists to believe that Federal criminal law has been violated. Thus, it has been held that it is an abuse of the grand jury to continue presenting evidence once a decision has been made not to seek an indictment. United States v. Proctor and Gamble Co., 175 F. Supp. 198, 199 (D.N.J. 1959). In a variation of the same theme, the District Court for the Southern District of New York has held that the government may not use the grand jury to inquire into civil as well as criminal liability:

> The grand jury's role is properly confined, and amply respected, when it is held empowered to conduct investigations that are in their inception exclusively criminal. To hold otherwise--to confer court approval upon the kind of concurrent criminal and civil inquiries projected by the instant application-- would expand the already awesome powers of the grand jury beyond tolerable limits.

United States v. Doe, 341 F. Supp. 1350, 1352 (S.N.D.Y. 1972) (emphasis supplied).

These holdings do not mean that evidence acquired by the grand jury in a good faith criminal investigation can not subsequently be used in a civil action. Rule 6(e)(3)(C)(i) establishes that disclosure of matters before the grand jury may also be authorized by court order when that disclosure is "preliminary to or in connection

with a judicial proceeding." 5/

Courts are split on the scope of this exception, and disclosure will not, by any means, follow automatically on the heels of a motion. The government must demonstrate three things to be entitled to a disclosure motion: First, that the grand jury investigation was conducted to ascertain whether or not violations of criminal law had occurred, and not as a subterfuge to obtain grand jury records for a civil investigation or proceedings, In re Grand Jury Subpoenas, April 1978, 581 F. 2d 1103, 1110 (4th Cir. 1978); second, that disclosure of grand jury records would be preliminary to a judicial proceeding, Rule 6(e)(3)(i), FRCP; and third, that there is either a "particularized need" for the records, In re Grand Jury Investigation, Sells Engineering Inc., 642 F.2d 1184 (6th Cir. 1981) or that the records are "rationally related" to the civil proceedings, In re Grand Jury Subpoenas (Baltimore), 581 F.2d. 1103, 1110 (4th Cir. 1978); In re Grand Jury Proceedings (LTV) 583 F.2d 128 (5th Cir. 1978).

Rule 6(e) motions will be made only with the authorization and assistance of the prosecutor who supervised the grand jury investigation.

To avoid both the appearance, as well as the potential, that a grand jury investigation will be misused to accumulate evidence for a noncriminal purpose, employees assigned to work on or review materials accumulated in grand jury investigations should have no responsibilities, either staff or supervisory, on other simultaneous or subsequent civil or regulatory proceedings involving the subject(s)

5/ One court has observed, in this regard:

> Nothing said herein is meant to overlook the Supreme Court's realistic observation that evidence acquired in a legitimate grand jury inquiry may later be usable even though it has been concluded that no indictment should issue. See United States v. Proctor and Gamble, 356 U.S. 677, 684 (1958). That is wholly different from the proposition that the inquiry may start out or continue with the explicit purpose of discovering evidence for civil claims.

United States v. Doe, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972).

of the grand jury investigation. Exceptions to this general prophylactic rule may well be appropriate in certain cases--as, for example, where the subject matter of the grand jury investigation is unrelated to the civil/regulatory matter. However, exceptions should not be made without prior discussions with the Office of Criminal Enforcement, EPA Headquarters, and the Justice Department prosecutor supervising the investigation.

Media Inquiries Concerning Grand Jury Investigations: EPA personnel should never confirm the existence of an ongoing grand jury investigation in response to press inquiries. If pressed, questions should be referred to the Justice Department or local United States Attorney.

IV. CARE AND CUSTODY OF GRAND JURY MATERIALS

This final section recommends procedures to be employed by EPA personnel granted access to and custody of grand jury materials during the course of a criminal investigation--as, for example, when voluminous technical documents are subpoenaed and transferred to EPA personnel for review. As a general rule, procedures for the care and custody of these materials should first be discussed with the Justice Department prosecutor. If local rules or procedures exist, they should be followed. In the absence of such specific local guidance, however, the following procedures, if followed, will provide adequate assurance against breaches of security and subsequent allegations of grand jury abuse.

1. The identity of all Agency employees who will have access to grand jury materials should be included in a notice to the Court pursuant to Rule 6(e)(3)(B). If additional Agency personnel later prove necessary, these additional names should be provided to the Court in a timely fashion.

2. If grand jury materials are to leave the Federal district in which they are subpoenaed (for example, to be transported to a Regional office of review) consideration should be given--along with the prosecutor--to seeking the prior approval of the grand jury. The anticipated transportation of materials from the district might also be included in the 6(e)(3)(B) notice to the Court.

3. Grand jury materials should be transported personally where feasible (rather than by mail). If the postal system is used, the materials should be sent by certified mail, return receipt requested.

4. Grand jury materials should be totally segregated from the regular files of the Agency. Where possible, a separate room should be used, since this allows both control of access and a private working space for personnel authorized to review these materials. Finally, the materials should be clearly labelled to avoid inadvertant disclosures.

5. Grand jury materials, once segregated, should be secured, either in locked file cabinets, behind locked doors, or both. Access to the materials should thereafter be limited solely to personnel on the 6(e) list.

6. A system of accountability for grand jury materials should be established. The system should allow the government to demonstrate, if challenged, the materials that were received, and those that have been returned. Any indexing system that is workable for the prosecutor is acceptable. One traditional system uses the number of the grand jury subpoena, followed by sequential numbers for the documents or exhibits received in response to that subpoena.

N.B. This indexing should occur before the substantive review begins and documents are taken out of their original order. If this is done, it will always be possible to identify the order and date on which documents were received, and the subpoenas to which they responded. It will also facilitate response to subsequent allegations that documents have been lost.

V. CONCLUSION

This document will assist Agency personnel to perform effectively and responsibly in the context of grand jury investigations. Agency employees assigned to grand jury investigations should be thoroughly familiar with its contents before they begin their work. Questions should be directed to the Office of Criminal Enforcement (FTS 382-4543).

#10

Note on Regional Organization Structure of September 15, 1981

Since the Agency issued this memorandum, the Regional structure has changed such that the Regional Counsels report to the Regional Administrators. The Office of General Counsel also retains some authority over the Regional Counsels. (See memorandum entitled "Regional Counsel Reporting Relationship" of August 3, 1983, GM-16.)

It should also be noted that although this memorandum generally discusses the role of the Regional Counsel, the specific legal authority of the Regional Counsel is often covered in the Agency's delegations of authority. In those cases where the Regional Counsels' authority is covered in a delegation, the delegation is determinative of the Regional Counsels' authority.

GM-11

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

#10

OFFICE OF
LEGAL COUNSEL AND ENFORCEMENT

MEMORANDUM

Signed 5/7/82

SUBJECT: Reorganization of the Offices of Regional Counsel

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

TO: Regional Administrators I-X
Regional Counsels I-X

I. INTRODUCTION.

Since September 15, 1981, when the Administrator authorized the Regional reorganizations, nearly all Regions have transferred or detailed their enforcement attorneys and support staffs to the Offices of Regional Counsel. In most cases, former organizations and positions remain intact.

This memorandum contains guidance on completing the reorganization process. The guidance allows flexibility so that varying needs among Regions may be met while at the same time providing for basic organizational consistency. Regional Counsels may choose from among the four basic organizational structures shown on Tabs A, B, C, and D. I have also attached standard position descriptions for each of the new positions to be established in the Offices of Regional Counsel. These position descriptions are attached as Tabs E, F, G, H, I and J.

As soon as the permanent SES Regional Counsel is in place, the Region should begin the process of fully implementing this guidance. Until then, other Regional Counsels and Acting Regional Counsels should take interim steps which are consistent with this guidance, provided that, in each case, the concurrence of the Regional Administrator and my approval are first obtained. Such interim steps should not unduly limit options available to the permanent SES Regional Counsel.

I. THE ADMINISTRATOR'S OBJECTIVES FOR THE REGIONAL REORGANIZATIONS.

The Administrator's objectives for the Regional reorganizations are reflected in this guidance. These objectives are stated in her memorandum of September 15, 1981 (a copy of which is attached as Tab K). The following excerpts from that memorandum apply to the reorganization of the Regional legal offices:

> Redrganization Objectives. Regional organization decisions include consideration of the following objectives:
>
> - Clarifying accountability for regional programs.
> - Facilitating communication links between related Headquarters and regional components.
> - Improving regional policy and management decision-making.
> - Placing functions in organizations where they can best be integrated with related activities.
> - Favoring fewer and larger organizations to avoid subsequent further consolidation and reorganization in a time of declining resources.
>
> . . . . . .
>
> . . . Major features of the authorized organization include the following:
>
> 1. Enforcement functions of permit issuance and related compliance monitoring are assigned to the appropriate program divisions. This includes issuance of notices of violation and administrative orders, after consulting with the Office of Regional Counsel. (Permit coordination functions and placement are optional.)
>
> 2. Legal work associated with Enforcement litigation and current Regional Counsel functions will be performed in newly structured and expanded Offices of Regional Counsel reporting to the General Counsel with the following provisions:
>
> a. Regional Counsels will provide the Regional Administrator with legal advice and assistance for all program areas in an attorney client relationship.

b. The Regional Administrator will continue to initiate enforcement actions. These actions will be based upon guidance from the Enforcement Counsel, Office of Legal and Enforcement Counsel, and with legal concurrence of the Regional Counsel.

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

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

III. BASIC PRINCIPLES FOR REORGANIZATION OF THE OFFICES OF REGIONAL COUNSEL.

I have established the following basic principles for the reorganization of the Offices of Regional Counsel:

A. All Attorneys in the Offices of Regional Counsel. There are to be no series 905 attorneys in any other offices in the Regions without my concurrence. This is to ensure that the Agency speaks with one legal voice.

B. The Attorney-Client Relationship. All attorneys are to serve program clients in the context of an attorney-client relationship. This applies no matter what activities the attorneys are performing. Although attorneys are free to offer program and policy advice when asked to do so, it should be recognized that program and policy decisions (and the consequences of those decisions) are the responsibility of Regional program managers. Where there is a mixture of legal and policy issues, attorneys and program managers are expected to work collaboratively, with each party recognizing the professional responsibilities of the other in seeking a joint resolution of those issues.

C. Organization Along Media Lines. As shown on the four organizational structure options attached to this memorandum, every Office of Regional Counsel should be organized along media lines, as opposed to functional lines. This means that the attorneys are to be grouped according to the different media areas which

they serve (air, water, hazardous waste, etc.) and are to perform both general legal work and enforcement legal work. The media splits are to follow roughly the same media lines as in the Office of General Counsel and in the Regions. With my concurrence, a Region may elect to combine media areas in combinations which are different from those found in the four options provided, but in such a case the burden would be on the Region to show that this would be consistent with the objectives of this memorandum.

IV. HOW THE ORGANIZATIONAL STRUCTURE WOULD WORK.

A. The Regional Counsel. The Regional Counsel reports directly to the Associate Administrator for Legal and Enforcement Counsel and General Counsel. He serves as the principal legal adviser to the Regional Administrator for all legal matters arising within the Region. He has an attorney-client relationship with the Regional Administrator and the Regional program managers. The Office of Legal and Enforcement Counsel provides nationally uniform guidance to the Regional Counsel on the legal aspects of enforcement matters.

B. Deputy Regional Counsel and Enforcement Coordinator. In certain cases, a Regional Counsel may establish a Deputy Regional Counsel and Enforcement Coordinator position. Generally, this would be appropriate only in a Region with a large Office of Regional Counsel staff (such as where the Office contains formal branches). The Deputy would perform enforcement coordination functions and, therefore, the Region would not have a Senior Associate Regional Counsel for Enforcement Coordination. The Deputy would not serve as a team leader. He would have management functions in addition to enforcement coordination. The organizational options available to a Region with a Deputy are the same as Options A, B, C and D, except that the Senior Associate position would be deleted and a Deputy position would be substituted. A Regional Counsel considering the establishment of a Deputy position should furnish justification for the position in connection with his reorganization plan to be submitted as provided in Section IX. A position description for the Deputy will be provided as soon as a request to establish the position has been approved by me. The grade level of the Deputy position would be determined after an analysis of the position by the Regional position classification specialist.

C. The Associate Regional Counsels. The Office will be grouped into teams which are to handle all enforcement and general legal matters arising within their assigned media areas, as shown on the attached options. Each media team will have a team leader who is to be called an "Associate Regional Counsel." This person will be the principal coordinator for that media area and will be responsible for all matters arising within that area. This will ensure that Regional program managers and others dealing with the Office of Regional Counsel will know who is responsible for each legal matter in the Region. The grade level of each Associate Regional Counsel will be

determined after an analysis of his projected duties and responsibilities by the Regional position classification specialist. See the position description attached as Tab H.

1. Management of the Work of Staff Attorneys. Each Associate will be responsible for the work of the staff attorneys working within his media area. Under Options A and B, each Associate will have a defined group of staff attorneys assigned to work with him. Under Options C and D, the Associate will draw upon a pool of staff attorneys. Individual attorneys in the pool could at any given time be dividing their time between two different media.

2. Rotation of Associates. The Associates will be expected to rotate among media areas from time to time so as to broaden their exposure and expertise.

3. Administrative Functions. The Regional Counsel may assign certain administrative functions to the Associate in charge of grants, etc., as one of this Associate's "other duties, as assigned." Such functions could include: administrative management of the Office of Regional Counsel; preparation of all documents needed for resource management within the Office, including the annual program plans and budget submissions; preparation and submission of required reports on Office activities and accomplishments, including current information for automated data systems (coordinating reports on enforcement matters with the Deputy or the Senior Associate Regional Counsel for Enforcement Coordination); oversight of the annual performance evaluation process for all staff members and preparation of documentation required for such process; responsibility for management of the physical properties of the Office, including space procurement and recommendations for allocation of space; management of the process for recruiting and hiring attorneys, interns and clerical personnel; and management of all timekeeping systems.

Since this Associate would normally handle most legal matters for the administrative offices of the Region (personnel, financial management, etc.), assignment of these functions would ensure close coordination between the Office of Regional Counsel and these offices. This would ensure clear accountability for these matters in a uniform manner throughout the Office of Regional Counsel system and close coordination with the Grants, Contracts and General Administration Division of the Office of General Counsel.

D. The Senior Associate Regional Counsel for Enforcement Coordination. In those Regions where there is no Deputy, one of the Associate Regional Counsels (except, under Options A and C, for the Associate in charge of grants, etc., who has no enforcement responsibilities) will be designated the "Senior Associate Regional Counsel for Enforcement Coordination." He will be the enforcement coordinator for the Office and he will also lead one of the media teams. Several Regions suggested that the Senior Associate should not lead a media team, but should only

have coordinating functions. However, coordination functions alone will not support a high grade level and assigning other enforcement functions simply in order to support the grade would be inconsistent with my objective of holding team leaders accountable for all enforcement activities in their respective media areas. Therefore, I have decided not to authorize the establishment of a "floating" Senior Associate, that is, a Senior Associate who is not also a media team leader.

The grade level of the Senior Associate Regional Counsel for Enforcement Coordination will be determined after an analysis of his projected duties and responsibilities by the Regional position classification specialist. For this reason, it may be desirable that the Senior Associate be assigned to lead the media team with the most complex, difficult and nationally significant workload in order to support a high grade level. However, a Senior Associate may instead be assigned to lead a media team with a less heavy workload where it appears that this would also sustain the grade of the position or where grade is not a controlling factor. This decision should be based upon the balancing of all relevant factors including the extent of the actual workload involved in coordinating enforcement functions. See the position descriptions attached as Tabs I and J.

1. The Reason for the "Senior Associate" Title. In those Regions with a Senior Associate, the title "Senior Associate Regional Counsel for Enforcement Coordination" is preferable to the title "Deputy Regional Counsel for Enforcement Coordination." Since the Senior Associate would be in charge of only one of the media teams, it would be confusing to persons dealing with the Office if he were called a "Deputy," since the commonly-understood notion of a "deputy" is that he is a supervisor at a level which is between the senior manager and the operating staff. Regional Counsels in those Regions would have a closer working familiarity with the work of their Offices and not be cut off by a separate organizational layer.

2. Enforcement Responsibilities of the Senior Associate. The Senior Associate Regional Counsel for Enforcement Coordination will be responsible for coordinating all enforcement activity within the Office of Regional Counsel. In addition to carrying his own load of enforcement work, he will ensure that all enforcement policy guidance from the Office of Legal and Enforcement Counsel is received and distributed to the other attorneys and the program offices, that the reporting system is kept current with accurate data, that enforcement cases are assigned to the appropriate media attorneys (and lead roles assigned where more than one medium is involved), that Regional policy determinations are properly staffed from a legal standpoint, and that the Office is generally responsive to the enforcement needs of the Office of Legal and Enforcement Counsel. These enforcement responsibilities are spelled out in the position descriptions attached as Tabs I and J.

3. Acting as Regional Counsel. The Senior Associate will act as the Regional Counsel in the absence of the Regional Counsel.

E. Staff Attorney Positions. Staff attorneys at the GS-11 level will be called "General Attorneys." Staff attorneys at the GS-12 and GM-13 levels will be called "Assistant Regional Counsels."

1. Grouping Staff Attorney in a Media Unit Arrangement. Options A and B provide that the staff attorneys will be grouped in media units, each to be led by an Associate Regional Counsel (except that one media unit will be led by the Senior Associate Regional Counsel for Enforcement Coordination). Although a staff attorney will generally work only in the media area for which his unit is responsible, he can, as needed, be assigned as lead attorney in a matter involving two or more media in which he has expertise. For example, he can take the lead on a case which has both hazardous materials and air quality aspects. He will also rotate among media units, as discussed below.

2. Grouping Staff Attorneys in a Pool Arrangement. Options C and D provide that a staff attorney will not be assigned to a single media area, but will be permitted and encouraged to divide his time between two different media at one time. His work will be coordinated and directed by the Associates (or Senior Associate) with responsibility for the given media areas. As a staff attorney develops expertise in one media area, he can expand the scope of his workload to include matters from a second media area. Then, over time, he can rotate into a third media area while dropping out of one of the original areas. Several Regional Counsels have already tried this pool concept and have reported that it works well and is highly favored by both supervisors and staff attorneys.

3. Multi-media Rotation Policy. I want each Regional Counsel to follow a policy of rotating all staff attorneys through each of the different media areas. Staff attorneys in the unit arrangement will be encouraged to move from media unit to media unit as needs of the Office and preferences of the attorneys permit. Staff attorneys in the pool arrangement will obtain multi-media exposure as described above. Associates will be required to maintain careful records of media assignments so as to ensure that no one is on the same track for too long. The form of Attorney Rotation Record to be used for this purpose is attached as Tab L. I believe that this policy will, over time, provide all of our Regional attorneys with a broadly based experience, thereby improving the quality of their legal advice.

V. THE BENEFITS OF THE MEDIA-ORIENTED LEGAL OFFICE.

The principal benefits which I expect to accrue from organizing the Offices of Regional Counsel along media lines are:

A. One Source of Legal Advice: One Legal Opinion. There will no longer be two sets of attorneys involved in and giving legal and other advice on different aspects of

the same situation, a practice which has sometimes led to confusion within the Agency and caused difficulty for regulated parties and others in dealing with EPA.

B. Acting as "Counsel to the Situation." Instead of approaching a problem with an "enforcement" perspective or a "general legal" perspective, attorneys will be able to act as "counsel to the situation." This will encourage an attorney to develop and apply a broadened perspective and thus improve the quality of his overall legal advice.

C. Better Coordination of Litigation. Where an enforcement action spawns a counter-suit, counterclaim, or an appeal to a Court of Appeals, thereby causing an enforcement case to involve or become a defensive case, the same attorneys will handle the matter as a "situation," thereby ensuring a proper coordination of strategy and a balanced assessment of all legal implications.

D. Better Teamwork With Regional Program Staffs and Headquarters Attorneys. The Regional program offices having enforcement functions, the Office of General Counsel and the Office of Enforcement Counsel are each organized along media lines; it is clear that a media-oriented Office of Regional Counsel will improve professional ties and working relationships with all of these groups. Program personnel will always know who their lawyers are. Attorneys are likely to develop closer working relationships with program staffs when the groups are working together on many issues at the same time as part of a team. The same can be said of professional relationships with Headquarters lawyers, who will get to know the Regional attorneys better by sharing more working experiences with them. Regional attorneys will be available to assist program personnel in developing the factual basis for enforcement actions, including actual field work such as sampling, inspections, and other types of compliance activities. This will foster a better understanding by the attorneys of the roles of their program counterparts, thereby promoting closer teamwork.

E. Improved Legal Expertise of Attorneys. In a functional division, at any given time an attorney must spend his time trying to keep up with a large number of different statutes and regulations governing all the media served by that function. In a media-oriented Office, the attorneys will be allowed to concentrate on keeping up with legal developments in one or at most two media areas at a time. Attorneys become better experts in an area when they are allowed to specialize in that area and keep current on legal developments. The need for Agency attorneys to attain the greatest level of expertise possible is incontrovertible.

F. Better Accountability for Legal Advice. Under the proposed system, it will be clear who is responsible for all of the legal advice in any given situation.

G. No Distinctions Among Groups of Attorneys. I am aware that there are some Regional attorneys who have the

perception that, in the past, one group of attorneys may have been more highly regarded and/or better treated than another. I do not know whether there is any basis for this perception, but any alleged problem will be eliminated by implementing this guidance.

H. Maximum Utilization of Attorney Resources. Staff attorneys can easily be shifted from one type of work to another as workload and priorities change. This is particularly true under the pool arrangement. Further, the new system eliminates redundancy and duplication of effort which existed under the past system; no longer will two sets of attorneys be required to review matters, and the time and energy previously needed to coordinate among different sets of attorneys will now be available for additional legal work. Here are two major examples of how the new arrangement will improve efficiency and coordination:

1. Superfund Site Issues. One attorney should be given the legal lead for each Superfund site. This attorney will be responsible for providing legal advice to the program managers on all alternative legal strategies for handling that site so that all of the issues involved in deciding which course of action (enforcement, cooperative agreement, state action, etc.) will be given a consistent legal analysis. If enforcement actions are initiated, the same attorney will handle them. Conversely, if federal and state funds are to be used, the attorney will advise on the cooperative agreements. The lead attorney will be supported by the specialists in the various media teams where additional skills are needed.

2. Eliminating Duplicative Review of SIP Revisions, Delegation Packages and Other Matters. Whereas, in the past, two sets of attorneys would review SIP revisions, program delegations, etc., each for different reasons, the new role of the staff attorney will be to review a state statute, regulation, etc., both from the point of view of its general compliance with EPA requirements as well as for its "enforceability." This should save a considerable amount of attorney time otherwise spent on duplicative reviews and coordination among reviewers.

VI. PROBLEMS WITH SEPARATION OF FUNCTIONS.

In those rare instances when the Office of Regional Counsel might be called upon to advise a decision-maker on a problem when it is also involved as an advocate for the Agency's official position, such as in an adjudicatory hearing on a permit appeal, it may be necessary for the the Regional Counsel, after consultation with the Office of General Counsel, to make arrangements for separate attorney representation of the different interests.

VII. ENFORCEMENT.

A. Top Priority to Enforcement Work. The Office of Regional Counsel is expected to give top priority to enforcement work, while at the same time carrying out its general legal duties.

B. Establishing Lead Attorney Roles in Enforcement Matters. Whenever both the Office of Regional Counsel and the Office of Enforcement Counsel are to become involved in a particular enforcement litigation matter, a lead attorney shall be assigned to manage and coordinate the litigation activities according to the following principles:

1. Lead Attorney Role Defined. Having the lead attorney role means that the lead attorney shall generally manage the Agency's participation in the conduct of the matter. In particular, he shall: (a) act as the liaison with the Department of Justice and/or the U.S. Attorney on the matter; (b) coordinate the development of the enforcement strategy and the preparation of all documents; and (c) take the lead in negotiations with opposing parties.

2. Basis for Assignments. The lead attorney role shall be assigned on the following basis:

(a). Regional Matters. Normally, the Office of Regional Counsel shall take the lead on matters arising in the Regions, except where the Regional Counsel and the the appropriate supervisor within the Office of Enforcement Counsel agree, after conferring at an early point in the development of the matter, that the matter is of overriding national significance and that the lead role should be assigned to an attorney in the Office of Enforcement Counsel. In cases where the Regional Counsel and the supervisor within the Office of Enforcement Counsel are unable to agree as to which level should be assigned the lead role, the matter will be resolved by the Associate Administrator for Legal and Enforcement Counsel and General Counsel.

(b). Enforcement/Defensive Matters; Appeals. In instances where enforcement litigation and defensive litigation arise involving essentially the same parties and the same set of circumstances, the Associate Administrator for Legal and Enforcement Counsel and General Counsel shall determine the allocation of roles (including, where deemed necessary, the establishment of a lead attorney for the entire matter) so as to ensure that both aspects of the matter are properly represented and that the positions of the respective Offices are well-coordinated. Generally, the Office of General Counsel (or the appropriate Office of Regional Counsel) shall have the lead on all matters before Courts of Appeals, even though the lead on the matter was previously taken by

the Office of Enforcement Counsel. The Associate Administrator for Legal and Enforcement Counsel and General Counsel may make exceptions to this rule in the case of individual enforcement programs.

3. Obligations to Other Attorneys. The lead attorney shall provide other Agency attorneys assigned to the matter with adequate opportunities to contribute to the litigation effort, including participation as supporting counsel in the development of the litigation strategy, the preparation of legal documents, and the conduct of negotiations with opposing parties.

VIII. GENERAL LEGAL MATTERS; RELATIONSHIPS WITH OGC.

The reorganization will not change the working relationships between the Office of General Counsel and the Offices of Regional Counsel. All existing lines of communication and all existing procedures should continue to be used until further notice.

IX. STEPS TO TAKE IN IMPLEMENTING THIS GUIDANCE.

A. Interim Steps. As stated above, a Region should take interim steps towards the final reorganization of the Office of Regional Counsel before the new SES Regional Counsel is in place. Such steps may include such matters as selecting the organizational option, making tentative media team leader selections, and moving attorneys into media teams. Specific requests should be directed to me in writing by the incumbent Regional Counsel or Acting Regional Counsel, together with a brief explanation for the proposal.

B. Reorganization Plans. When the permanent SES Regional Counsel is in place, he should begin at once to prepare a reorganization plan for the final implementation of this guidance. The plan must have the written concurrence of the Regional Administrator. It should include at least the following:

1. An organization chart showing the structure of the Office, based upon one of the four options attached to this memorandum. Larger Regions may establish sub-units within media groups. If official branches or sections are to be established, they should be indicated on the chart.

2. A list of the personnel of the Office, showing their current grade levels, titles and areas of responsibility.

3. A list of the new positions to be established, together with a list of changes, if any, to be made in the attached standard position descriptions. The position descriptions may be altered to fit unusual situations, but no such alteration may be made without my concurrence and

consultation with the Headquarters Personnel Office. Proposed changes in the position descriptions should be stated in the reorganization plan and my approval of the plan will be my concurrence with those changes.

4. A brief description of the procedures to be followed in selecting personnel to fill the newly-created positions.

5. A plan for meeting the needs of any personnel whose existing grade levels and/or skills do not fit into the organizational structure to be established under the reorganization. Individual cases should be discussed with me during the preparation of the reorganization plan.

6. A timetable for implementing the plan.

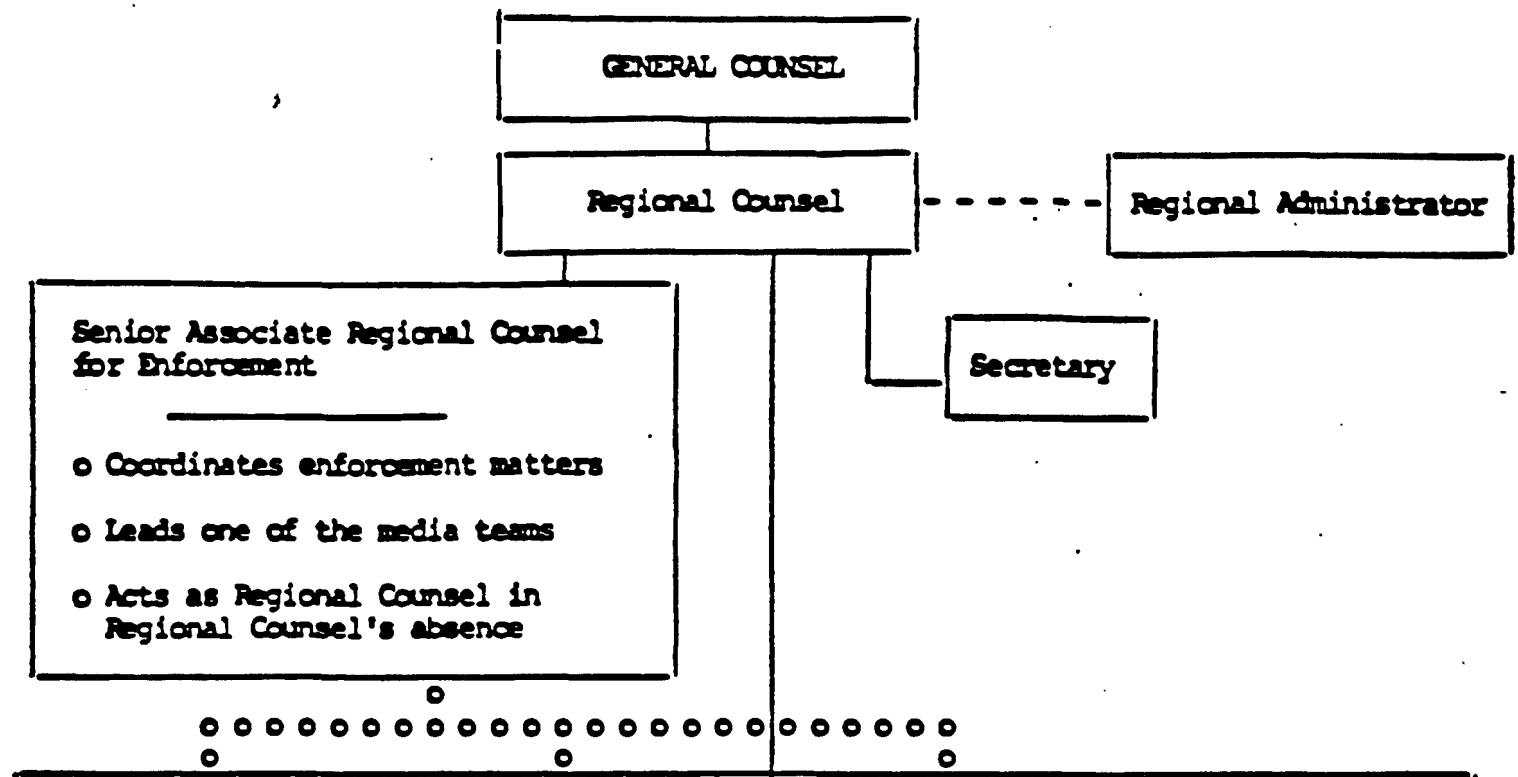
C. Submission of Reorganization Plans and Proposals for Interim Steps. Each SES Regional Counsel should submit a final reorganization plan for my approval within three weeks after the date of this memorandum or three weeks after the date that he begins work in his new position, whichever is later. In Regions where an SES Regional Counsel is not expected to be in place by June 1, 1982, requests for approval of interim steps should be submitted by that date.

D. Approval of Reorganization Plans and Proposals for Interim Steps. I must approve reorganization plans and proposals for interim steps before they are implemented. This means that no new positions may be established or personnel selections made prior to approval.

* * *

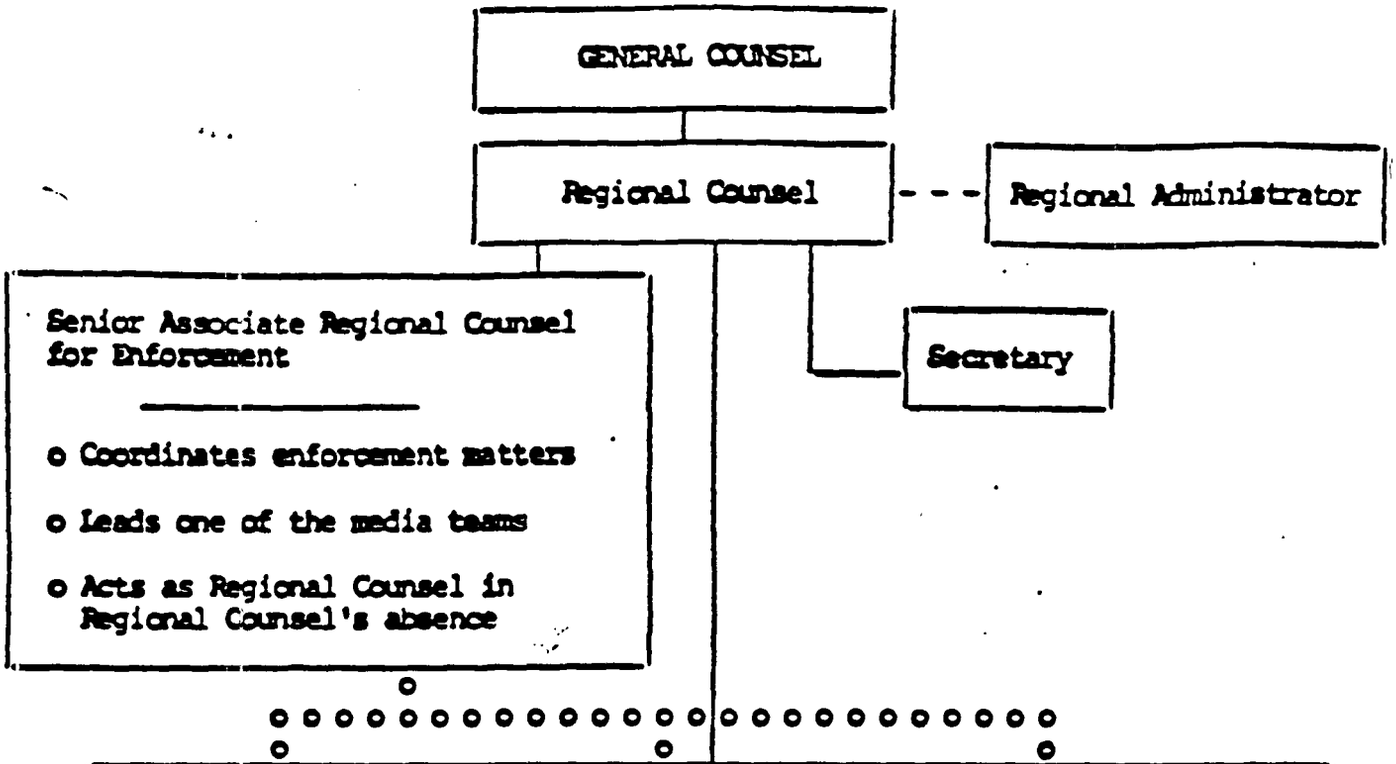
Questions on this guidance may be referred to Robert C. Thompson, Associate General Counsel for Regional Coordination, at 382-4148. For information and guidance on the legal issues arising out of proposed personnel changes, contact Gerald H. Yamada at 755-0768.

TAB A: OPTION A



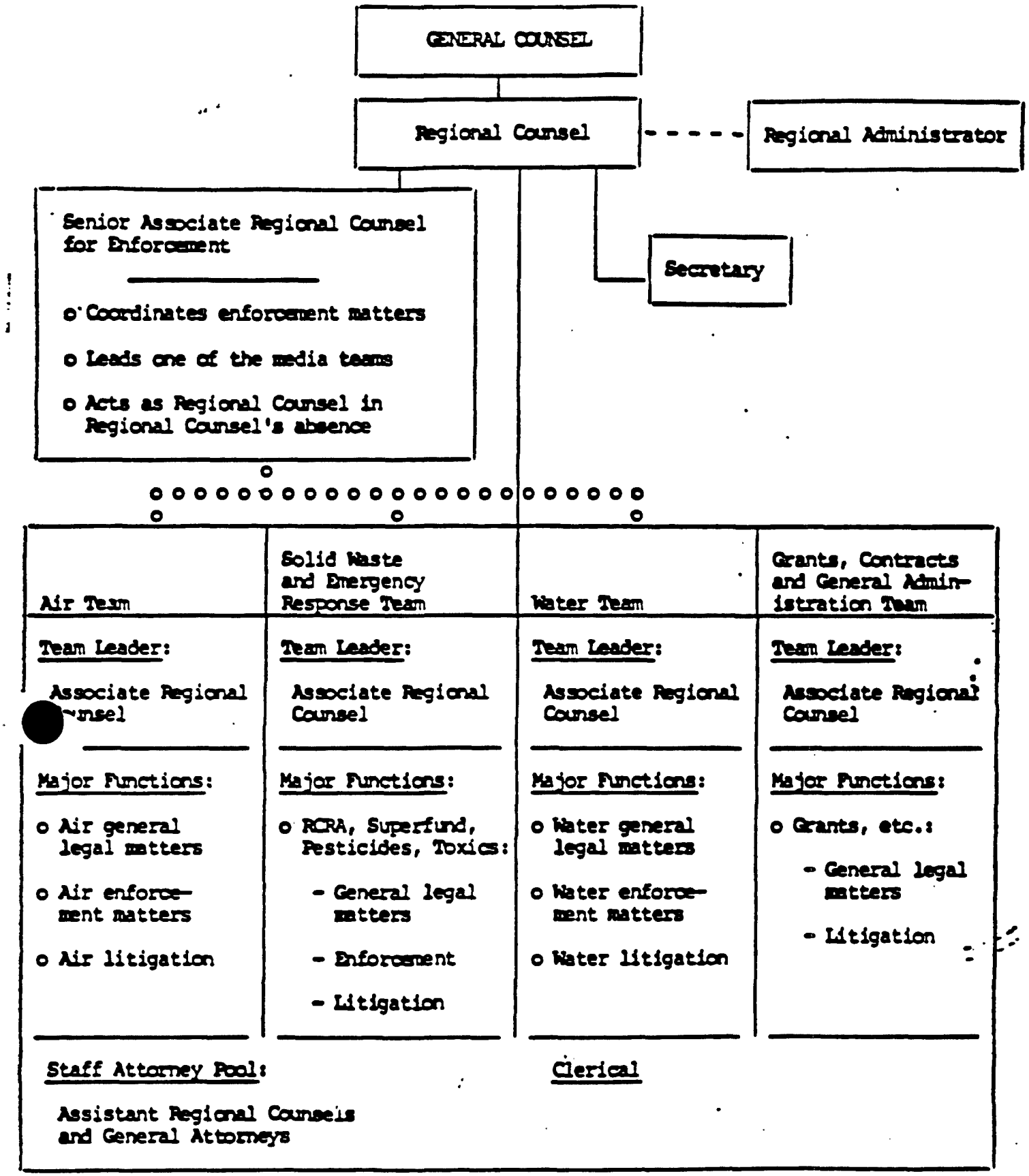
Air Team	Solid Waste and Emergency Response Team	Water Team	Grants, Contracts and General Administration Team
Team Leader: ociate Regional nsel	Team Leader: Associate Regional Counsel	Team Leader: Associate Regional Counsel	Team Leader: Associate Regional Counsel
Staff Attorneys: Assistant Regional Counsels and General Attorneys	Staff Attorneys: Assistant Regional Counsels and General Attorneys	Staff Attorneys: Assistant Regional Counsels and General Attorneys	Staff Attorneys: Assistant Regional Counsels and General Attorneys
Clerical	Clerical	Clerical	Clerical
Major Functions: o Air general legal matters o Air enforcement matters o Air litigation	Major Functions: o RCRA, Superfund, Pesticides, Toxics: - General legal matters - Enforcement - Litigation	Major Functions: o Water general legal matters o Water enforcement matters o Water litigation	Major Functions: o Grants, etc.: - General legal matters - Litigation

____ = direct reporting; o o o = coordination; - - - = attorney-client relationship

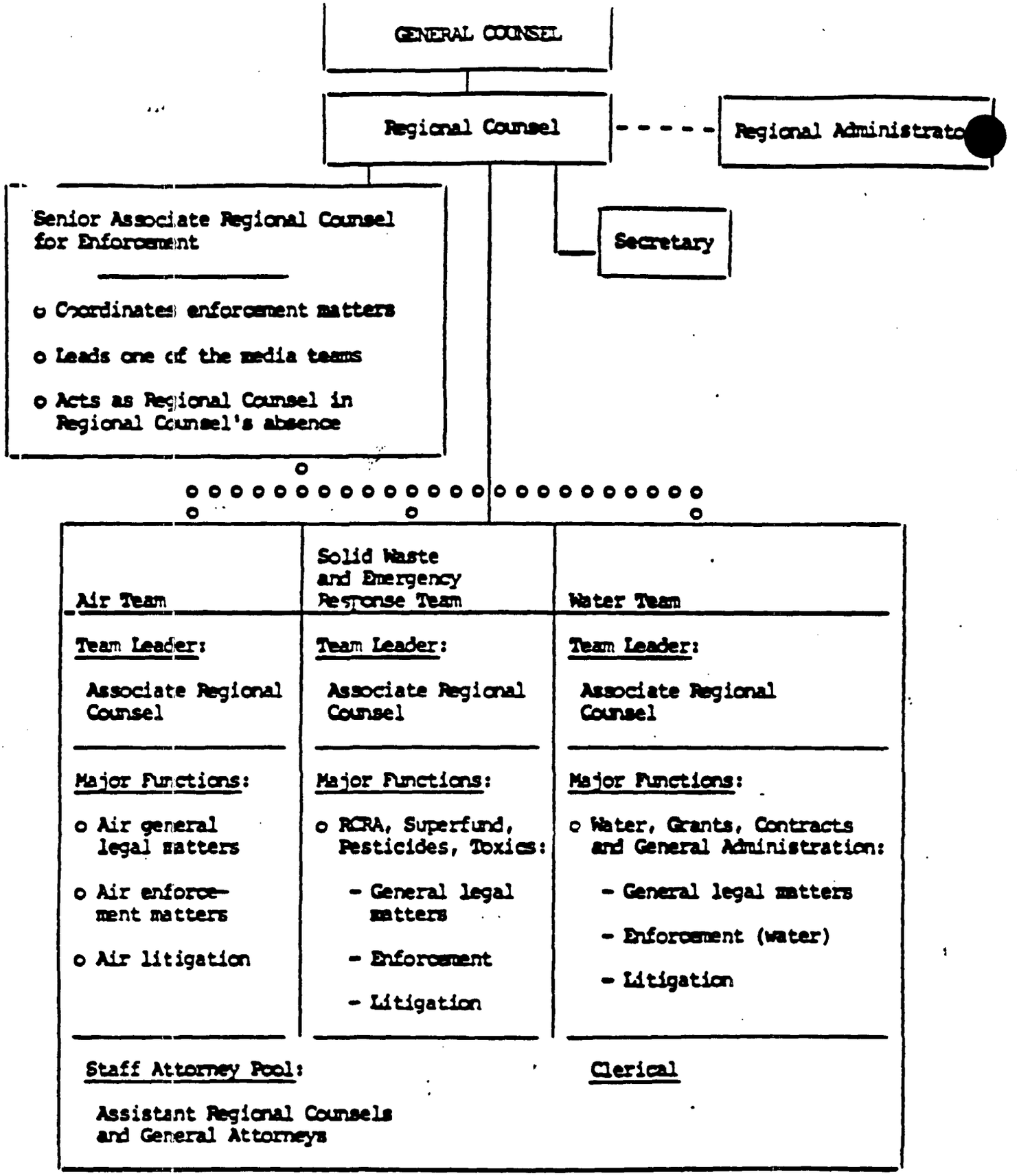


Air Team	Solid Waste and Emergency Response Team	Water Team
Team Leader: Associate Regional Counsel	Team Leader: Associate Regional Counsel	Team Leader: Associate Regional Counsel
Staff Attorneys: Assistant Regional Counsels and General Attorneys	Staff Attorneys: Assistant Regional Counsels and General Attorneys	Staff Attorneys: Assistant Regional Counsels and General Attorneys
Clerical	Clerical	Clerical
Major Functions: o Air general legal matters o Air enforcement matters o Air litigation	Major Functions: o RCRA, Superfund, Pesticides, Toxics: - General legal matters - Enforcement - Litigation	Major Functions: o Water, Grants, Contracts and General Administration - General legal matters - Enforcement (water) - Litigation

_____ = direct reporting; o o o = coordination; - - - attorney-client relationship



KEY: ____ = direct reporting; o o o = coordination; - - - = attorney-client relationship



KEY: _____ = direct reporting; o o o = coordination; - - - = attorney-client relationship

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GS-11 General Attorney
(General Attorney)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

General Attorney
GS-905-11

I. Introduction.

Serves as a General Attorney in the Office of Regional Counsel. Provides legal advice and assistance on legal matters, including enforcement matters, arising in the Region. Advice, assistance and recommendations are provided to the Regional Counsel, senior attorneys and Regional program managers. Has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement Counsel in Headquarters.

II. Major Duties and Responsibilities.

At this level, the General Attorney will be assigned to work on the least complex and routine matters which can be resolved with standard research and analysis, and with a moderate degree of expertise. Examples of this include: the review of routine revisions on state implementation plans under the Clean Air Act, participation in preparation of the less complex notices of violation and administrative orders, conduct of the less complex administrative and judicial litigation, and preparation of advice on routine and less complex legal issues.

A. Legal Research and Problem Resolution. Researches the legal questions which arise under regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended).

B. General Legal Advice. Acting through the Regional Counsel or an Associate Regional Counsel, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice concerning those Regional matters which have been assigned.

C. Legal Advice on Enforcement Matters. Provides legal advice on Regional enforcement matters. Assists in the preparation of legal correspondence, notices of violation, administrative orders, litigation

referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. Conducts investigations into criminal matters in conjunction with Agency criminal investigatory personnel and law enforcement agencies.

D. Legal Advice to Grant Programs. Provides legal advice to managers of EPA grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency, advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

E. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and other documents to be published in the Federal Register, including Agency actions on state air pollution laws, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

F. Litigation Matters. Coordinates defensive and enforcement litigation in connection with specific Regional matters arising under the statutes referred to above. Assists in the conduct of discovery and prepares drafts of motions, briefs, interrogatories, and other documents in connection with cases in litigation. Works closely with attorneys in the Offices of General Counsel and Enforcement Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

G. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgements, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters In many cases, this avoids protracted and expensive litigation and facilitates expeditious administration of Agency programs.

H. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from the Office of General Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

I. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The General Attorney reports to the Regional Counsel. The General Attorney has an attorney-client relationship with Regional program managers and the Office of Enforcement Counsel in Headquarters. Areas of responsibility are assigned by the Regional Counsel. Work assignments are made by the Regional Counsel or by senior attorneys who will direct and coordinate the General Attorney's work in specific subject matter areas. In some cases, work performed at the request of Regional program managers. The work of the General Attorney is closely supervised by senior attorneys on a case-by-case basis to assure that a correct approach is made to research, analysis and formulation of legal advice. Finished work is carefully reviewed in almost all cases to assure consistency with Agency policy, precedential effect and overall quality.

IV. Qualifications.

The General Attorney must have the equivalent of a JD or LLB degree from an accredited law school and must be a member of the bar. Other qualification requirements may be established by the Regional Counsel depending upon the needs of the Office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GS-12 General Attorney
(Assistant Regional Counsel)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

Version of 3/18/82

General Attorney
GS-905-12

I. Introduction.

Serves as an Assistant Regional Counsel in the Office of Regional Counsel. Provides legal advice and assistance and policy recommendations on legal matters, including enforcement matters, arising in the Region. Advice, assistance and recommendations are provided to the Regional Counsel, senior attorneys and Regional program managers. Has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement Counsel in Headquarters.

II. Major Duties and Responsibilities.

At this level, the Assistant will be assigned to work on a broad range of legal problems and issues affecting the Agency's programs. These matters require a thorough knowledge of applicable laws and regulations, and may require extensive legal research and analysis, and consideration of complicated factual and policy issues. Examples of these include: the review of a broad range of revisions of state implementation plans under the Clean Air Act, preparation of notices of violation and administrative orders which affect large amounts of money, or involve a broad range of issues, and the conduct of complicated administrative and judicial litigation.

A. Legal Research and Problem Resolution. Researches the legal questions which arise under regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended).

B. General Legal Advice and Policy Recommendations. Acting through the Regional Counsel or an Associate Regional Counsel, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice and policy recommendations concerning those Regional matters which have been assigned.

C. Legal Advice and Policy Recommendations on Enforcement Matters. Provides legal advice and policy recommendations on Regional enforcement matters. Assists in the preparation of major legal correspondence, notices of violation, administrative orders, litigation referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. Conducts investigations into criminal matters in conjunction with Agency criminal investigatory personnel and law enforcement agencies.

D. Legal Advice and Policy Recommendations to Grant Programs. Provides legal advice and policy recommendations to managers of EPA grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency, advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

E. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and other documents to be published in the Federal Register, including Agency actions on state air pollution laws, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

F. Litigation Matters. Coordinates defensive and enforcement litigation in connection with specific Regional matters arising under the statutes referred to above. Conducts discovery and prepares motions, briefs and other litigation documents. Appears before Federal courts from time to time to conduct trials, hearings and oral arguments. Works closely with attorneys in the Offices of General Counsel and Enforcement Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments

in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

G. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgements, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters. In many cases, this avoids protracted and expensive litigation and facilitates expeditious administration of Agency programs.

H. Representation of the Region. Represents the Region at conferences and meetings held with other Federal departments and agencies, Congressional committees and individual congressmen and senators, the General Accounting Office, governors of states and staff offices of governors, state and local officials, representatives of private industry and farm groups, etc. and in this capacity is required to give expert legal advice with respect to many novel legal situations and problems arising from the administration of Regional programs. Prepares and delivers testimony to state legislative bodies in connection with their deliberations on assumption of responsibilities for programs to be delegated by the Agency.

I. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from the Office of General Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

J. Lead Region Matters. Serves as a coordinator of one or more subject matter areas of interest to the Offices of Regional Counsel. Maintains specialized expertise in such area[s] and serves as a consultant to other attorneys in the Agency. May manage a task force of Regional attorneys in seeking solutions to common legal problems or in preparing guidance documents, model agreements, regulations, pleadings, etc. In this capacity, serves as the liaison between the Office of General Counsel and the Offices of Regional Counsel. Arranges conference calls, meetings and other means of exchanging information among Regional attorneys.

K. Coordination of Work of Junior Attorneys. Where the Assistant is responsible for coordinating the work of junior attorney-advisors, the Assistant reviews all major efforts to assure that written material is clear, precise and of high quality, that work is completed on time, and that oral presentations, whether before courts or other public bodies, are of high quality.

L. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The Assistant Regional Counsel reports to the Regional Counsel. The Assistant has an attorney-client relationship with Regional program managers and the Office of Enforcement Counsel in Headquarters. Areas of responsibility are assigned by the Regional Counsel. Work assignments are made by the Regional Counsel or by senior attorneys who will direct and coordinate the Assistant's work in specific subject matter areas. In some cases, work is performed at the request of Regional program managers. Work will be discussed generally with senior attorneys while in process and finished work will generally be reviewed by senior attorneys to assure consistency with Agency policy, precedential effect and overall quality.

IV. Qualifications.

The Assistant must have the equivalent of a JD or LLB degree from an accredited law school and must be a member of the bar. Other qualification requirements may be established by the Regional Counsel depending upon the needs of the Office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GM-13 General Attorney
(Assistant Regional Counsel)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

Version of 3/18/82

General Attorney
GM-905-13

I. Introduction.

Serves as an Assistant Regional Counsel in the Office of Regional Counsel. Provides legal advice and assistance and policy recommendations on legal matters, including enforcement matters, arising in the Region. Advice, assistance and recommendations are provided to the Regional Counsel, senior attorneys and Regional program managers. Has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement Counsel in Headquarters.

II. Major Duties and Responsibilities.

At this level, the Assistant will be assigned to work on highly complex and unusual matters. These matters require a very high degree of expertise on the part of the Assistant and may require extensive legal research, by more than one attorney and on a number of subjects, and analysis of a wide variety of issues, together with consideration of highly complicated factual and policy issues in response to the specialized needs of program clients. Examples of these include: the review of highly complex and extremely unusual revisions of state implementation plans under the Clean Air Act, participation in the preparation of highly complex and unusual notices of violation and administrative orders, and the conduct of highly complex administrative and judicial litigation.

A. Legal Research and Problem Resolution. Researches the legal questions which arise under regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended).

B. General Legal Advice and Policy Recommendations. Acting through the Regional Counsel or an Associate Regional Counsel, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice and policy recommendations concerning those Regional matters which have been assigned.

C. Legal Advice and Policy Recommendations on Enforcement Matters. Provides legal advice and policy recommendations on Regional enforcement matters. Assists in the preparation of major legal correspondence, notices of violation, administrative orders, litigation referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. Conducts investigations into criminal matters in conjunction with Agency criminal investigatory personnel and law enforcement agencies.

D. Legal Advice and Policy Recommendations to Grant Programs. Provides legal advice and policy recommendations to managers of EPA grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency, advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

E. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and other documents to be published in the Federal Register, including Agency actions on state air pollution laws, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

F. Litigation Matters. Coordinates defensive and enforcement litigation in connection with specific Regional matters arising under the statutes referred to above. Conducts discovery and prepares motions, briefs and other litigation documents. Appears before Federal courts from time to time to conduct trials, hearings

and oral arguments. Works closely with attorneys in the Offices of General Counsel and Enforcement Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

G. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgements, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters. In many cases, this avoids protracted and expensive litigation and facilitates expeditious administration of Agency programs.

H. Hearing Officer Duties. Serves as hearing officer in hearing and deciding matters brought before the Agency and assists the Regional Administrator in preparing formal administrative decisions. Some of these decisions (e.g. bid protest decisions arising under the construction grants program) are final Agency action subject to direct review in the Federal courts. At the request of the Regional Counsel, performs responsibilities which the Administrator has delegated to the Regional Counsel, such as rendering decisions on confidentiality of business information under 40 C.F.R. Part 2, which decisions also become final Agency action.

I. Representation of the Region. Represents the Region at conferences and meetings held with other Federal departments and agencies, Congressional committees and individual congressmen and senators, the General Accounting Office, governors of states and staff offices of governors, state and local officials, representatives of private industry and farm groups, etc. and in this capacity is required to give expert legal advice with respect to many novel legal situations and problems arising from the administration of Regional programs. Prepares and delivers testimony to state legislative bodies in connection with their deliberations on assumption of responsibilities for programs to be delegated by the Agency.

J. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from the Office of General

Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

K. Lead Region Matters. Serves as a coordinator of one or more subject matter areas of interest to the Offices of Regional Counsel. Maintains specialized expertise in such area[s] and serves as a consultant to other attorneys in the Agency. May manage a task force of Regional attorneys in seeking solutions to common legal problems or in preparing guidance documents, model agreements, regulations, pleadings, etc. In this capacity, serves as the liaison between the Office of General Counsel and the Offices of Regional Counsel. Arranges conference calls, meetings and other means of exchanging information among Regional attorneys.

L. Coordination of Work of Junior Attorneys. Where the Assistant is responsible for coordinating the work of junior attorney-advisors, the Assistant reviews all major efforts to assure that written material is clear, precise and of high quality, that work is completed on time, and that oral presentations, whether before courts or other public bodies, are of high quality.

M. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The Assistant Regional Counsel reports to the Regional Counsel. The Assistant has an attorney-client relationship with Regional program managers and the Office of Enforcement Counsel in Headquarters. Areas of responsibility are assigned by the Regional Counsel. Work assignments are made by the Regional Counsel or by senior attorneys who will direct and coordinate the Assistant's work in specific subject matter areas. In some cases, work is performed at the request of Regional program managers. Completed work is normally assumed to be accurate with respect to legal citations, treatment of facts, and other aspects of technical treatment. However, all written work is subject to review for soundness of approach and argument, application of legal principles, and consistency with governing policies, procedures, and regulations of the Agency.

IV. Qualifications.

The Assistant must have the equivalent of a JD or LLB degree from an accredited law school and must be a member of the bar. Other qualification requirements may be established by the Regional Counsel depending upon the needs of the Office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GM-14 General Attorney*
(Associate Regional Counsel)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

Attached to this position description are two cover sheets. The cover sheet indicating that the position will be filled by a GM-13 is intended for use in those situations where the incumbent is not yet entitled to assume a GM-14 position due to inadequate time in grade. When the time in grade requirements have been fulfilled, the incumbent will be eligible for promotion to the GM-14 level. The second cover sheet may be used at that point.

*Depending upon the organizational structure of the Office of Regional Counsel, this position could be classified as that of a Supervisory General Attorney.

POSITION DESCRIPTION

(Read instructions on reverse before completing)

1. DUTY LOCATION

2. POSITION NUMBER

3. CLASSIFICATION ACTION

4. REFERENCE OF SERIES AND DATE OF STANDARDS USED TO CLASSIFY THIS POSITION

	b. TITLE	SERV c.	SERIES d.	GRADE e.	NSP-PC f.
OFFICIAL ALLOCATION					
5. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	13	

6. ORGANIZATIONAL TITLE OF POSITION (if any)

Associate Regional Counsel

7. NAME OF EMPLOYEE

8. ORGANIZATION (Give complete organizational breakdown)

a. U.S. Environmental Protection Agency	a.
b.	b.
c.	c.
d.	d. DIPS ORGANIZATION CODE

9. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		d. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	e. SIGNATURE	f. DATE

10. OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL
d. CHECK ONE ☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL		e. FAIR LABOR STANDARDS ACT ☐ NONEXEMPT ☐ EXEMPT

11. REMARKS

This position is identical to Position Description #_____
with the exception of work assignment and review.

12. This position has
☐ NO KNOWN PROMOTION POTENTIAL
☒ KNOWN PROMOTION POTENTIAL TO GRADE 14 IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY

13. CLC

14. ANNUAL POSITION CLASSIFICATION CERTIFICATION

a. SUPERVISOR	INITIALS						
	DATE						
b. CLASSIFICATION OFFICIAL	INITIALS						
	DATE						

15. DISTRIBUTION
a. EMPLOYEE
b. PERSONNEL FOLDER
c. SUPERVISOR
d. CLASSIFICATION
e. ORGANIZATION
f. SERIES
g.
h.

16. DUTIES AND RESPONSIBILITIES

Type on plain bond paper and attach to this form. Use format shown on reverse.

POSITION DESCRIPTION (Read instructions on reverse before completing)	1. DUTY LOCATION	2. POSITION NUMBER

3. CLASSIFICATION ACTION

4. REFERENCE (Series and Date of Standards used to classify this position)

	5. TITLE	5a. SERV	5b. SERIES	5c. GRADE	5d.
5. OFFICIAL ALLOCATION					
6. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	14	

6. ORGANIZATIONAL TITLE OF POSITION (if any)	7. NAME OF EMPLOYEE
Associate Regional Counsel	

7. ORGANIZATION (Give complete organization breakdown)

a. U.S. Environmental Protection Agency	c.
b.	d.
e.	f.
g.	h. OPS ORGANIZATION CODE

8. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		e. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	f. SIGNATURE	g. DATE

9. OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL
d. CHECK ONE ☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL		e. FAIR LABOR STANDARDS ACT ☐ NONEXEMPT ☐ EXEMPT

10. REMARKS

11. THIS POSITION HAS ☒ NO KNOWN PROMOTION POTENTIAL ☐ KNOWN PROMOTION POTENTIAL TO GRADE _____ IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY

12. CLC

13. ANNUAL POSITION CLASSIFICATION CERTIFICATION

a. SUPERVISOR	INITIALS			D		
	DATE					
b. CLASSIFICATION OFFICIAL	INITIALS					
	DATE					

14. DISTRIBUTION
a. EMPLOYEE
b. PERSONNEL FOLDER
c. SUPERVISOR
d. CLASSIFICATION
e. ORGANIZATION
f. SERIES
g.
h.

15. DUTIES AND RESPONSIBILITIES
Type on plain bond paper and attach to this form. Use format shown on reverse.

I. Introduction.

Serves as an Associate Regional Counsel in the Office of Regional Counsel. The Associate has responsibility for providing legal advice and assistance and policy recommendations to the Regional Counsel and Regional program managers in major areas of responsibility. The Associate coordinates and directs the entire workload of the Office in assigned areas of responsibility, and is responsible for the work of other attorneys in the Office who are assigned to work on matters within such areas of responsibility.

II. Major Duties and Responsibilities.

At this level, the Associate will be responsible for all legal aspects of an entire media area within the Region. These matters will involve a wide variety of highly complex and unusual matters requiring extensive knowledge and a very high degree of expertise as well as extensive legal research and analysis, together with consideration of highly complicated factual and policy issues. The Associate will be the principal attorney in the Region for interpreting for the Regional Administrator and the Regional program managers a substantial body of Agency regulations and defending these regulations and Agency actions before Federal trial and appellate courts. Matters assigned may have precedential effects, may have the effect of substantially broadening or restricting the Agency's activities and may have an important impact on major industries in the Region. These matters often involve substantial sums of money and often are rigorously contested by some of the nation's most distinguished, capable and highly paid attorneys. The Associate will direct and coordinate the activities of junior attorneys assigned to help carry out the specific elements of the Associates duties and responsibilities.

A. Legal Research and Problem Resolution. Researches and resolves the legal questions which arise under all regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include (depending upon the specific areas assigned by the Regional Counsel) such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended). In areas assigned by the Regional Counsel, is the focal point within the Region for resolution

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* May be Supervisory General Attorney if appropriate.

of legal issues arising under such statutes (except for matters of national importance which require consultation with the Offices of General Counsel or Enforcement Counsel).

B. General Legal Advice and Policy Recommendations. Either acting directly or through the Regional Counsel, directly, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice and (upon request) policy recommendations concerning those Regional programs, operations and activities in areas assigned by the Regional Counsel so that their major decisions are made with applicable legal considerations in mind.

C. Legal Advice and Policy Recommendations on Enforcement Matters. Provides legal advice and policy recommendations to the Regional program managers responsible for enforcement matters. Assists in the preparation of major legal correspondence, notices of violation, administrative orders, litigation referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. Is responsible for assuring that the Agency's centralized data reporting systems are kept current with information on Regional enforcement matters. Conducts investigations into criminal matters in conjunction with agency criminal investigatory personnel and law enforcement agencies.

D. Legal Advice and Policy Recommendations to Grant Programs. Provides legal advice and policy recommendations to managers of Agency grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency, advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

General Attorney
GM-905-14

E. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and such other documents to be published in the Federal Register, including Agency actions on state air pollution plans, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

F. Litigation Matters. Manages and coordinates defensive and enforcement litigation resulting from the Region's activities under the statutes referred to above. Conducts discovery and prepares motions, briefs and other litigation documents. Appears before courts from time to time to conduct trials, hearings and oral arguments. Works closely with the Offices of Enforcement Counsel and General Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

G. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgments, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters so as to avoid protracted and expensive litigation and facilitate expeditious administration of Agency programs.

H. Hearing Officer Duties. Serves as hearing officer in hearing and deciding matters brought before the Agency and assists the Regional Administrator in preparing formal administrative decisions. Some of these decisions (e.g. bid protest decisions arising under the construction grants program) are final Agency action subject to direct review in the Federal courts. At the request of the Regional Counsel, performs responsibilities which the Administrator has delegated to the Regional Counsel, such as rendering decisions on confidentiality of business information under 40 C.F.R. Part 2, which decisions also become final Agency action.

I. Representation of the Region. Represents the Region at conferences and meetings held with other Federal departments and agencies, Congressional committees and

Individual congressmen and senators, the General Accounting Office, governors of states and staff offices of governors, state and local officials, representatives of private industry and farm groups, etc. and in this capacity is required to give expert legal advice with respect to many novel legal situations and problems arising from the administration of Regional programs. Prepares and delivers advice and testimony to state legislative bodies in connection with their deliberations on assumption of responsibilities for programs to be delegated by the Agency.

J. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from the Office of General Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

K. Coordinating and Directing Legal Work. Coordinates and directs the work of one or more junior attorney-advisors. Makes day-to-day work assignments and reviews all major efforts of such attorney-advisors. The review functions include ensuring that (1) written material is clear, precise, and of high quality, (2) work is completed on time, (3) prompt advice is provided to the Regional managers of programs within assigned areas, and (4) oral presentations, whether before courts or other public bodies, are of high quality. Participates in the recruiting and hiring of attorneys, and provides attorney-advisors under supervision with opportunities for professional growth through work experience and training. Assists the Regional Counsel in conducting performance evaluations of junior attorney-advisors.

L. Lead Region Matters. Serves as a national legal expert in one or more subject matter areas of interest to the Offices of Regional Counsel. Maintains specialized expertise in such area[s] and serves as a consultant to other attorneys in the Agency. May manage a task force of Regional attorneys in seeking solutions to common legal problems or in preparing guidance documents, model agreements, regulations, pleadings, etc. In this capacity, serves as the liaison between the Office of General Counsel and the Offices of Regional Counsel. Arranges conference calls, meetings and other means of exchanging information among Regional attorneys.

General Attorney
GM-905-14

M. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The Associate reports to the Regional Counsel and has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement at Headquarters. Areas of responsibility are assigned by the Regional Counsel, and within those areas of responsibility the Associate has wide latitude in prioritizing workload, directing and coordinating the efforts of staff members, conducting research, preparing documents and exercising judgment and initiative in completing assignments and making legal judgments and policy recommendations. Legal advice, policy recommendations and advocacy during adversarial proceedings are normally considered expert. Within assigned areas of responsibility, the Associate accepts work requests directly from Regional program managers. The Associate is expected to represent the Regional Counsel from time to time in areas of assigned responsibility, although consultation and discussion with the Regional Counsel is required when necessary in connection with major legal judgments or policy recommendations. Completed work is reviewable for consistency with Agency policy, precedential effect and overall quality. The Associate is expected to rotate areas of assigned responsibility with other Associates within the Office of Regional Counsel from time to time. The Regional Counsel is to be consulted generally on matters arising in the course of coordinating and directing the work of junior attorneys who work in the assigned areas of responsibility.

IV. Qualifications.

The Associate must have the equivalent of a JD or LLB degree from an accredited law school and be a member of the bar. Other qualifications requirements may be established by the Regional Counsel, depending upon the needs of the Office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GM-14 General Attorney*
(Senior Associate Regional Counsel for Enforcement)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

Attached to this position description are two cover sheets. The cover sheet indicating that the position will be filled by a GM-13 is intended for use in those situations where the incumbent is not yet entitled to assume a GM-14 position due to inadequate time in grade. When the time in grade requirements have been fulfilled, the incumbent will be eligible for promotion to the GM-14 level. The second cover sheet may be used at that point.

*Depending upon the organizational structure of the Office of Regional Counsel, this position could be classified as that of a Supervisory General Attorney.

POSITION DESCRIPTION (Read instructions on reverse before completing)	1. DUTY LOCATION	2. POSITION NUMBER
3. CLASSIFICATION ACTION		
4. REFERENCE OF SERIES AND DATE OF STANDARDS USED TO CLASSIFY THIS POSITION		

	5. TITLE	SERV c.	SERIES d.	GRADE e.	MSP or PC f.
OFFICIAL ALLOCATION					
6. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	13	

7. ORGANIZATIONAL TITLE OF POSITION (If any)	8. NAME OF EMPLOYEE
Senior Associate Regional Counsel for Enforcement	

9. ORGANIZATION (Give complete organization breakdown)

a. U.S. Environmental Protection Agency	e.
b.	f.
c.	g.
d.	h. DIPS ORGANIZATION CODE

10. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		c. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	d. SIGNATURE	e. DATE

11. OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL

d. CHECK ONE	e. FAIR LABOR STANDARDS ACT
☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL	☐ NONEXEMPT ☐ EXEMPT

12. REMARKS

This position is identical to Position Description #_____ with the exception of work assignment and review.

13. THIS POSITION HAS	14. GLC
☐ NO KNOWN PROMOTION POTENTIAL ☒ KNOWN PROMOTION POTENTIAL TO GRADE 14 IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY	

15. ANNUAL POSITION CLASSIFICATION CERTIFICATION

a. SUPERVISOR	INITIALS					
	DATE					
b. CLASSIFICATION OFFICIAL	INITIALS					
	DATE					

16. DISTRIBUTION

a. EMPLOYEE
b. PERSONNEL FOLDER
c. SUPERVISOR
d. CLASSIFICATION
e. ORGANIZATION
f. SERIES
g.
h.

17. DUTIES AND RESPONSIBILITIES

Type on plain bond paper and attach to this form. Use format shown on reverse.

POSITION DESCRIPTION (Read instructions on reverse before completing)	1. DUTY LOCATION	2. POSITION NUMBER
3. CLASSIFICATION ACTION		
4. REFERENCE (OPM SERIES AND DATE OF STANDARDS USED TO CLASSIFY THIS POSITION		

	5. TITLE	SERV a.	SERIES d.	GRADE e.	
OFFICIAL ALLOCATION					
6. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	14	

7. ORGANIZATIONAL TITLE OF POSITION (If any)	8. NAME OF EMPLOYEE
Senior Associate Regional Counsel	

9. for Enforcement ORGANIZATION (Give complete organization breakdown)

a. U.S. Environmental Protection Agency	e.
b.	f.
c.	g.
d.	h. OPS ORGANIZATION CODE

10. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		d. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	e. SIGNATURE	f. DATE

11. OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL
d. CHECK ONE ☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL		e. FAIR LABOR STANDARDS ACT ☐ NONEXEMPT ☐ EXEMPT

12. REMARKS

13. This position has ☒ NO KNOWN PROMOTION POTENTIAL ☐ KNOWN PROMOTION POTENTIAL TO GRADE ____ IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY	14. CLC

15. ANNUAL POSITION CLASSIFICATION CERTIFICATION

a. SUPERVISOR	INITIALS						
	DATE						
b. CLASSIFICATION OFFICIAL	INITIALS						
	DATE						

16. DISTRIBUTION
a. EMPLOYEE
b. PERSONNEL FOLDER
c. SUPERVISOR
d. CLASSIFICATION
e. ORGANIZATION
f. SERIES
g.
h.

17. DUTIES AND RESPONSIBILITIES

Type on plain bond paper and attach to this form. Use format shown on reverse.

General Attorney*
GM-905-14

I. Introduction.

Serves as the Senior Associate Regional Counsel for Enforcement in the Office of Regional Counsel. The Senior Associate has responsibility for providing legal advice and assistance and policy recommendations to the Regional Counsel and Regional program managers in major areas of responsibility, including coordination of all enforcement activities within the Office. The Senior Associate coordinates and directs the entire workload of the Office in assigned areas of responsibility and is responsible for the work of other attorneys in the Office who are assigned to work on matters within such areas of responsibility. The Senior Associate acts as the Regional Counsel when the Regional Counsel is out of the office.

II. Major Duties and Responsibilities.

At this level, the Senior Associate will be responsible for all legal aspects of an entire media area within the Region, together with coordination of all enforcement activities of the Office. These matters will involve a wide variety of highly complex and unusual matters requiring extensive knowledge and a very high degree of expertise as well as extensive legal research and analysis, together with consideration of highly complicated factual and policy issues. The Senior Associate will be the principal attorney in the Region for interpreting for the Regional Administrator and the Regional program managers a substantial body of Agency regulations and defending these regulations and Agency actions before Federal trial and appellate courts. Matters assigned may have precedential effects, may have the effect of substantially broadening or restricting the Agency's activities and may have an important impact on major industries in the Region. These matters often involve substantial sums of money and often are rigorously contested by some of the nation's most distinguished, capable and highly paid attorneys. The Senior Associate will direct and coordinate the activities of junior attorneys assigned to help carry out the specific elements of the Senior Associates duties and responsibilities.

A. Coordination of Enforcement Matters.

1. Expertise in Enforcement Matters. Develops and maintains expertise in all Agency enforcement policies, including guidance on prioritization of enforcement actions, development of enforcement cases, preparation of administrative letters and orders, preparation of litigation referral packages, management of litigation matters, negotiation and

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* May be Supervisory General Attorney if appropriate.

General Attorney
GM-905-14

settlement of case, etc.

2. Liaison with the Office of Enforcement Counsel. Acts as the Region's principal liaison attorney with the Office of Enforcement Counsel. Receives guidance from the Office of Enforcement Counsel and transmits it to the other attorneys in the Office of Regional Counsel. Keeps the Office of Enforcement Counsel informed on Regional matters, as needed. Attends briefings and training sessions as needed.

3. Liaison with other Legal Offices. Acts as the liaison with other Offices of Regional Counsel on the development of enforcement policies and procedures in connection with lead Region efforts. Acts as liaison with the Department of Justice, the affected U.S. Attorneys and the Attorneys General of states within the Region on overall enforcement policy and procedural matters.

4. Development of Regional Enforcement Policies and Procedures. Assists Regional program managers in developing Regional enforcement policies and procedures and reviews such policies and procedures for consistency with national policies and procedures. This work is done in coordination with the Associate Regional Counsels for the other major areas of responsibility within the Office of Regional Counsel.

5. Coordination of Enforcement Matters in Office of Regional Counsel. Is responsible for informing the other Associate Regional Counsels of developments in enforcement policy. Coordinates legal work on enforcement matters being handled by the Office of Regional Counsel so as to assure that all enforcement activities are consistent with national policies and procedures. Maintains files on current enforcement policies.

6. Multi-media Enforcement Case Assignments. Reviews enforcement matters involving more than one major area of responsibility and makes recommendations to the Regional Counsel as to which Associate Regional Counsel should be given the lead responsibility for handling the matter. Reviews the handling of multi-media enforcement matters so as to assure adequate coordination within the Office.

7. Review of Resources Available for Enforcement Legal Services. Periodically reviews the allocation of resources for enforcement matters within the Office of Regional Counsel and makes recommendations to the Regional Counsel for obtaining adequate resources to meet the requirements of the Region's enforcement efforts.

8. Coordination of Criminal Investigators. Coordinates the work of any criminal investigatory personnel who are assigned to the Office. Ensures that such personnel attend to the highest priority matters in the Region, that they are assigned staff attorneys to work with them to assist in proper case development, and that they properly coordinate their activities with the Office of Inspector General.

B. Acting Regional Counsel Duties. Acts as the Regional Counsel when the Regional Counsel is out of the Office.

C. Legal Research and Problem Resolution. Researches and resolves the legal questions which arise under all regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include (depending upon the specific areas assigned by the Regional Counsel) such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended). In areas assigned by the Regional Counsel, is the focal point within the Region for resolution of legal issues arising under such statutes (except for matters of national importance which require consultation with the Offices of General Counsel or Enforcement Counsel).

D. General Legal Advice and Policy Recommendations. Either acting directly or through the Regional Counsel, directly, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice and (upon request) policy recommendations concerning those Regional programs, operations and activities in areas assigned by the Regional Counsel so that their major decisions are made with applicable legal considerations in mind.

General Attorney
GM-905-14

E. Legal Advice and Policy Recommendations on Enforcement Matters. Provides legal advice and policy recommendations to the Regional program managers responsible for enforcement matters. Assists in the preparation of major legal correspondence, notices of violation, administrative orders, litigation referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. Is responsible for assuring that the Agency's centralized data reporting systems are kept current with information on Regional enforcement matters. Conducts investigations into criminal matters in conjunction with agency criminal investigatory personnel and law enforcement agencies.

F. Legal Advice and Policy Recommendations to Grant Programs. Provides legal advice and policy recommendations to managers of Agency grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency, advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

G. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and such other documents to be published in the Federal Register, including Agency actions on state air pollution plans, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

H. Litigation Matters. Manages and coordinates defensive and enforcement litigation resulting from the Region's activities under the statutes referred to above. Conducts discovery and prepares motions, briefs and other litigation documents. Appears before courts from time to time to

conduct trials, hearings and oral arguments. Works closely with the Offices of Enforcement Counsel and General Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

I. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgments, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters so as to avoid protracted and expensive litigation and facilitate expeditious administration of Agency programs.

J. Hearing Officer Duties. Serves as hearing officer in hearing and deciding matters brought before the Agency and assists the Regional Administrator in preparing formal administrative decisions. Some of these decisions (e.g. bid protest decisions arising under the construction grants program) are final Agency action subject to direct review in the Federal courts. At the request of the Regional Counsel, performs responsibilities which the Administrator has delegated to the Regional Counsel, such as rendering decisions on confidentiality of business information under 40 C.F.R. Part 2, which decisions also become final Agency action.

K. Representation of the Region. Represents the Region at conferences and meetings held with other Federal departments and agencies, Congressional committees and individual congressmen and senators, the General Accounting Office, governors of states and staff offices of governors, state and local officials, representatives of private industry and farm groups, etc. and in this capacity is required to give expert legal advice with respect to many novel legal situations and problems arising from the administration of Regional programs. Prepares and delivers advice and testimony to state legislative bodies in connection with their deliberations on assumption of responsibilities for programs to be delegated by the Agency.

L. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from

the Office of General Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

M. Coordinating and Directing Legal Work. Coordinates and directs the work of one or more junior attorney-advisors. Makes day-to-day work assignments and reviews all major efforts of such attorney-advisors. The review functions include ensuring that (1) written material is clear, precise, and of high quality, (2) work is completed on time, (3) prompt advice is provided to the Regional managers of programs within assigned areas, and (4) oral presentations, whether before courts or other public bodies, are of high quality. Participates in the recruiting and hiring of attorneys, and provides attorney-advisors under supervision with opportunities for professional growth through work experience and training. Assists the Regional Counsel in conducting performance evaluations of junior attorney-advisors.

N. Lead Region Matters. Serves as a national legal expert in one or more subject matter areas of interest to the Offices of Regional Counsel. Maintains specialized expertise in such area[s] and serves as a consultant to other attorneys in the Agency. May manage a task force of Regional attorneys in seeking solutions to common legal problems or in preparing guidance documents, model agreements, regulations, pleadings, etc. In this capacity, serves as the liaison between the Office of General Counsel and the Offices of Regional Counsel. Arranges conference calls, meetings and other means of exchanging information among Regional attorneys.

O. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The Senior Associate reports to the Regional Counsel and has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement at Headquarters. Areas of responsibility are assigned by the Regional Counsel, and within those areas of responsibility the Senior Associate has wide latitude in prioritizing workload, directing and coordinating the efforts of staff members, conducting research, preparing documents and exercising judgment and initiative in completing assignments and making legal judgments and policy recommendations. Legal advice, policy recommendations and advocacy during adversarial proceedings are normally considered expert.

General Attorney
GM-905-14

Within assigned areas of responsibility, the Senior Associate accepts work requests directly from Regional program managers. The Senior Associate is expected to act as the Regional Counsel when the Regional Counsel is out of the office. The Senior Associate is also expected to represent the Regional Counsel from time to time in areas of assigned responsibility, although consultation and discussion with the Regional Counsel is required when necessary in connection with major legal judgments or policy recommendations. Completed work is reviewable for consistency with Agency policy, precedential effect and overall quality. The Senior Associate is expected to rotate areas of assigned responsibility with other Senior Associates within the Office of Regional Counsel from time to time. The Regional Counsel is to be consulted generally on matters arising in the course of coordinating and directing the work of junior attorneys who work in the assigned areas of responsibility.

IV. Qualifications.

The Senior Associate must have the equivalent of a JD or LLB degree from an accredited law school and be a member of the bar. Other qualifications requirements may be established by the Regional Counsel, depending upon the needs of the Office.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF GENERAL COUNSEL

OFFICES OF REGIONAL COUNSEL

BENCHMARK POSITION DESCRIPTION

GM-15 General Attorney*
(Senior Associate Regional Counsel for Enforcement)

NOTE: This position description has been reviewed by the Headquarters Office of Personnel and has been approved for use in the Offices of Regional Counsel. In cases where the duties of the incumbent would not be sufficiently described in this benchmark position description, the Regional Classification Specialist is authorized to make appropriate changes, after conferring the the Headquarters Office of Personnel and with the concurrence of the General Counsel.

Attached to this position description are two cover sheets. The cover sheet indicating that the position will be filled by a GM-14 is intended for use in those situations where the incumbent is not yet entitled to assume a GM-14 position due to inadequate time in grade. When the time in grade requirements have been fulfilled, the incumbent will be eligible for promotion to the GM-15 level. The second cover sheet may be used at that point.

*Depending upon the organizational structure of the Office of Regional Counsel, this position could be classified as that of a Supervisory General Attorney. ——

POSITION DESCRIPTION (Read instructions on reverse before completing)	1. DUTY LOCATION	2. POSITION NUMBER

3. CLASSIFICATION ACTION

4. REFERENCE OF SERIES AND DATE OF STANDARDS USED TO CLASSIFY THIS POSITION

	a. TITLE	b. SERV	c. SERIES	d. GRADE	e. MSP-PC f.
5. OFFICIAL ALLOCATION					
6. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	14	

7. ORGANIZATIONAL TITLE OF POSITION (If any)
Senior Associate Regional Counsel

8. NAME OF EMPLOYEE

9. for Enforcement ORGANIZATION (Give complete organizational breakdown)

a. U.S. Environmental Protection Agency	e.
b.	f.
c.	g.
d.	h. OPPS ORGANIZATION CODE

10. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		d. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	e. SIGNATURE	f. DATE

OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL
d. CHECK ONE ☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL		e. FAIR LABOR STANDARDS ACT ☐ NONEXEMPT ☐ EXEMPT

16. REMARKS

This position is identical to Position Description #_____
with the exception of work assignment and review.

11. THIS POSITION HAS ☐ NO KNOWN PROMOTION POTENTIAL ☒ KNOWN PROMOTION POTENTIAL TO GRADE 15 IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY

12. CLC

13. ANNUAL POSITION CLASSIFICATION CERTIFICATION

a. SUPERVISOR	INITIALS			•			
	DATE						
b. CLASSIFICATION OFFICIAL	INITIALS						
	DATE						

14. DISTRIBUTION
a. EMPLOYEE
b. PERSONNEL FOLDER
c. SUPERVISOR
d. CLASSIFICATION
e. ORGANIZATION
f. SERIES
g.
h.

I. DUTIES AND RESPONSIBILITIES
Type on plain bond paper and attach to this form. Use format shown on reverse.

POSITION DESCRIPTION (Read instructions on reverse before completing)	1. DUTY LOCATION	2. POSITION NUMBER
3. CLASSIFICATION ACTION		
4. REFERENCE OF SERIES AND DATE OF STANDARDS USED TO CLASSIFY THIS POSITION		

	5. TITLE	SERV a.	SERIES d.	GRADE e.	NSFPC f.
OFFICIAL ALLOCATION					
6. SUPERVISOR'S RECOMMENDATION	General Attorney	GM	905	15	

7. ORGANIZATIONAL TITLE OF POSITION (if any)	8. NAME OF EMPLOYEE
Senior Associate Regional Counsel	

9. for Enforcement ORGANIZATION (Give complete organizational breakdown)

a. U.S. Environmental Protection Agency	e.
b.	f.
c.	g.
d.	h. DOPS ORGANIZATION CODE

10. I certify that this is an accurate statement of the major duties and responsibilities of this position and its organizational relationships, and that the position is necessary to carry out government functions for which I am responsible. The certification is made with the knowledge that this information is to be used for statutory purposes relating to appointment and payment of public funds, and that false or misleading statements may constitute violations of such statutes or their implementing regulations.

a. TYPED NAME AND TITLE OF IMMEDIATE SUPERVISOR		f. TYPED NAME AND TITLE OF SECOND LEVEL SUPERVISOR	
b. SIGNATURE	c. DATE	g. SIGNATURE	h. DATE

OFFICIAL CLASSIFICATION CERTIFICATION

a. SIGNATURE OF CLASSIFICATION OFFICIAL	b. DATE	c. BARGAINING UNIT DESIGNATION ☐ PROFESSIONAL ☐ NONPROFESSIONAL

d. CHECK ONE	e. FAIR LABOR STANDARDS ACT
☐ NONSUPERVISORY ☐ SUPERVISORY ☐ MANAGERIAL	☐ NONEXEMPT ☐ EXEMPT

11. REMARKS

11. THIS POSITION HAS ☒ NO KNOWN PROMOTION POTENTIAL ☐ KNOWN PROMOTION POTENTIAL TO GRADE ____ IF POSITION DEVELOPS AS PLANNED AND EMPLOYEE PROGRESSES SATISFACTORILY	12. CLC

13. ANNUAL POSITION CLASSIFICATION CERTIFICATION							14. DISTRIBUTION
a. SUPERVISOR	INITIALS						a. EMPLOYEE
	DATE						b. PERSONNEL FOLDER
							c. SUPERVISOR
							d. CLASSIFICATION
b. CLASSIFICATION OFFICIAL	INITIALS						e. ORGANIZATION
	DATE						f. SERIES
							g.
							h.

15. DUTIES AND RESPONSIBILITIES

Type on plain bond paper and attach to this form. Use format shown on reverse.

Version of 3/18/82

General Attorney*
GM-905-15

I. Introduction.

Serves as the Senior Associate Regional Counsel for Enforcement in the Office of Regional Counsel. The Senior Associate has responsibility for providing legal advice and assistance and policy recommendations to the Regional Counsel and Regional program managers in major areas of responsibility, including one or more major areas of national lead region responsibility and coordination of all enforcement activities within the Office. The Senior Associate coordinates and directs the entire workload of the Office in assigned areas of responsibility, and is responsible for the work of other attorneys in the Office who are assigned to work on matters within such areas of responsibility. The Senior Associate acts as the Regional Counsel when the Regional Counsel is out of the Office.

II. Major Duties and Responsibilities.

The Senior Associate will be responsible for all legal aspects of an entire media area within the Region, together with one or more major national lead region responsibilities and coordination of all enforcement activities of the Office. The Senior Associate's responsibilities include the most complex, difficult, and important matters to be handled by the Office, requiring extensive knowledge and a very high degree of expertise. These matters often require extensive legal research and analysis, together with consideration of highly complicated factual and policy issues. The Senior Associate will be the principal attorney in the Region for interpreting for the Regional Administrator and the Regional program managers a substantial body of Agency regulations and defending these regulations and Agency actions before Federal trial and appellate courts. Matters assigned may have precedential effects, may have the effect of substantially broadening or restricting the Agency's activities and may have an important impact on major industries in the Region. These matters often involve substantial sums of money and often are rigorously contested by some of the nation's most distinguished, capable and highly paid attorneys. The Senior Associate will direct and coordinate the activities of junior attorneys assigned to help carry out the specific elements of the Senior Associate's duties and responsibilities.

A. Major Lead Region Matters. Serves as a national legal expert in one or more major subject matter areas. These areas involve highly complex matters relating to

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* May be Supervisory General Attorney if appropriate

significant aspects of the Agency's policies and programs and require a very high degree of expertise. Maintains specialized expertise in such area[s] and serves as a consultant to other attorneys in the Agency. May manage a task force of Regional attorneys in seeking solutions to common legal problems or in preparing guidance documents, model agreements, regulations, pleadings, etc. In this capacity, serves as the liaison between the Office of General Counsel and the Offices of Regional Counsel. Arranges conference calls, meetings and other means of exchanging information among Regional attorneys.

B. Coordination of Enforcement Matters.

1. Expertise in Enforcement Matters. Develops and maintains expertise in all Agency enforcement policies, including guidance on prioritization of enforcement actions, development of enforcement cases, preparation of administrative letters and orders, preparation of litigation referral packages, management of litigation matters, negotiation and settlement of cases, etc.

2. Liaison with the Office of Enforcement Counsel. Acts as the Region's principal liaison attorney with the Office of Enforcement Counsel. Receives guidance from the Office of Enforcement Counsel and transmits it to the other attorneys in the Office of Regional Counsel. Keeps the Office of Enforcement Counsel informed on Regional matters, as needed. Attends briefings and training sessions as needed.

3. Liaison with other Legal Offices. Acts as the liaison with other Offices of Regional Counsel on the development of enforcement policies and procedures in connection with lead Region efforts. Acts as liaison with the Department of Justice, the affected U.S. Attorneys and the Attorneys General of states within the Region on overall enforcement policy and procedural matters.

4. Development of Regional Enforcement Policies and Procedures. Assists Regional program managers in developing Regional enforcement policies and procedures and reviews such policies and procedures for consistency with national policies and procedures. This work is done in coordination with the Associate Regional Counsels for the other major areas of responsibility within the Office of Regional Counsel.

5. Coordination of Enforcement Matters in Office of Regional Counsel. Is responsible for informing the other Associate Regional Counsels of developments in enforcement policy. Coordinates legal work on enforcement matters being handled by the Office of Regional Counsel so as to assure that all enforcement activities are consistent with national policies and procedures. Maintains files on current enforcement policies.

6. Multi-media Enforcement Case Assignments. Reviews enforcement matters involving more than one major area of responsibility and makes recommendations to the Regional Counsel as to which Associate Regional Counsel should be given the lead responsibility for handling the matter. Reviews the handling of multi-media enforcement matters so as to assure adequate coordination within the Office.

7. Review of Resources Available for Enforcement Legal Services. Periodically reviews the allocation of resources for enforcement matters within the Office of Regional Counsel and makes recommendations to the Regional Counsel for obtaining adequate resources to meet the requirements of the Region's enforcement efforts.

8. Coordination of Criminal Investigators. Coordinates the work of any criminal investigatory personnel who are assigned to the Office. Ensures that such personnel attend to the highest priority matters in the Region, that they are assigned staff attorneys to work with them to assist in proper case development, and that they properly coordinate their activities with the Office of Inspector General.

C. Acting Regional Counsel Duties. Acts as the Regional Counsel when the Regional Counsel is out of the Office.

D. Legal Research and Problem Resolution. Researches and resolves the legal questions which arise under all regulations, lawsuits, enforcement actions, executive orders and other administrative actions involving major Federal statutes affecting the Agency's programs, which may include (depending upon the specific areas assigned by the Regional Counsel) such statutes as the Clean Water Act, the Clean Air Act, the Toxic Substances

Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the National Environmental Policy Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Federal Insecticide, Fungicide and Rodenticide Act (in each case as from time to time amended). In areas assigned by the Regional Counsel, is the focal point within the Region for resolution of legal issues arising under such statutes (except for matters of unusual national importance which require consultation with the Offices of General Counsel or Enforcement Counsel).

E. General Legal Advice and Policy Recommendations. Either acting through the Regional Counsel, or, at the direction of the Regional Counsel, directly, provides the Regional Administrator, Deputy Regional Administrator and the Regional Divisions and Offices with general legal advice and (upon request) policy recommendations concerning those Regional programs, operations and activities in areas assigned by the Regional Counsel so that their major decisions are made with applicable legal considerations in mind.

F. Legal Advice and Policy Recommendations on Enforcement Matters. Provides legal advice and policy recommendations to the Regional program managers responsible for enforcement matters. Assists in the preparation of major legal correspondence, notices of violation, administrative orders, litigation referrals and other enforcement documents and reviews such documents for legal sufficiency and consistency with Agency legal interpretations and policy guidance. In assigned areas, is responsible for assuring that the Agency's centralized data reporting systems are kept current with information on Regional enforcement matters. Conducts investigations into criminal matters in conjunction with Agency investigatory personnel and law enforcement agencies.

G. Legal Advice and Policy Recommendations to Grant Programs. Provides legal advice and policy recommendations to managers of Agency grant programs, including the construction grants program administered under Title II of the Clean Water Act. Advises on the eligibility for Agency funding of cost items under Agency grants, including cost overruns by contractors on Agency-funded projects. Works closely with the Agency's Office of Inspector General in resolving problems arising under audit activities and investigations. Drafts special grant conditions to cover unusual or unique situations. Assists state attorneys in interpreting statutes and regulations administered by the Agency,

advising on the handling of claims matters and generally serving the needs of programs which have been delegated by the Agency to state agencies. Prepares final Agency decisions on bid protests arising under grantee procurement. Conducts the Region's participation in grant appeal proceedings.

H. Drafting of Determinations, Regulations, Notices, etc. Drafts and reviews final Agency determinations, proposed and final regulations, notices and such other documents to be published in the Federal Register, including Agency actions on state air pollution plans, designations of sole source aquifers under the Safe Drinking Water Act, approvals and authorizations of state programs under the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act and other Federal environmental statutes.

I. Litigation Matters. Manages and coordinates the Region's participation in defensive and enforcement litigation resulting from the Region's activities under the statutes referred to above. Conducts discovery and prepares motions, briefs and other litigation documents. Appears before courts from time to time to conduct trials, hearings and oral arguments. Works closely with the Offices of Enforcement Counsel and General Counsel at Headquarters and the Department of Justice or U.S. Attorneys. Assists U.S. Attorneys in seeking indictments in criminal matters and in prosecuting such matters. Coordinates with state attorneys general. Represents the Region in administrative proceedings of EPA and other agencies.

J. Negotiation and Informal Dispute Resolution. Represents the Region in its dealings with outside parties, including negotiation of bilateral agreements, consent orders and judgments, and memoranda of understanding. Represents the Region in negotiating the settlement of disputed matters so as to avoid protracted and expensive litigation and facilitate expeditious administration of Agency programs.

K. Hearing Officer Duties. Serves as hearing officer in hearing and deciding matters brought before the Agency and assists the Regional Administrator in preparing formal administrative decisions. Some such decisions (e.g. bid protest decisions arising under the construction grants program) are final Agency action subject to direct review in the Federal courts. At the request of the Regional Counsel, performs responsibilities which

the Administrator has delegated to the Regional Counsel, such as rendering decisions on confidentiality of business information under 40 C.F.R. Part 2, which decisions also become final Agency action.

L. Representation of the Region. Represents the Region at conferences and meetings held with other Federal departments and agencies, Congressional committees and individual congressmen and senators, the General Accounting Office, governors of states and staff offices of governors, state and local officials, representatives of private industry and farm groups, etc. and in this capacity is required to give expert legal advice with respect to many novel legal situations and problems arising from the administration of Regional programs. Prepares and delivers advice and testimony to state legislative bodies in connection with their deliberations on assumption of responsibilities for programs to be delegated by the Agency.

M. Liaison with Offices of General Counsel and Enforcement Counsel. Serves as liaison between the Region and the Offices of General Counsel and Enforcement Counsel to provide an effective channel of communication in order to assure that the Region obtains legal judgments from the Office of General Counsel and policy advice from the Office of Enforcement Counsel and also to assure that such Offices are able to base such judgments and such advice upon accurate perceptions of the pertinent facts and Regional program objectives.

N. Coordinating and Directing Legal Work. Coordinates and directs the work of one or more attorneys. Makes day-to-day work assignments and reviews all major efforts of such attorneys. The review functions include ensuring that (1) written material is clear, precise, and of high quality, (2) work is completed on time, (3) prompt advice is provided to the Regional managers of programs, and (4) oral presentations, whether before courts or other public bodies, are of high quality. Participates in the recruiting and hiring of attorneys, and provides attorneys under supervision with opportunities for professional growth through work experience and training. Assists the Regional Counsel in conducting performance evaluations of junior attorneys.

O. Other Duties. Performs other duties as assigned.

III. Supervisory Controls.

The Senior Associate reports to the Regional Counsel and has an attorney-client relationship with all Regional program managers for whom work is performed and with the Office of Enforcement at Headquarters. Areas of responsibility are assigned by the Regional Counsel, and within those areas of responsibility the Senior Associate has wide latitude in prioritizing workload, directing and coordinating the efforts of staff members, conducting research, preparing documents and exercising judgment and initiative in completing assignments and making legal judgments and policy recommendations. Legal advice, policy recommendations and advocacy during adversarial proceedings are normally considered expert. Within assigned areas of responsibility, the Senior Associate accepts work requests directly from Regional program managers. The Senior Associate is expected to act as the Regional Counsel when the Regional Counsel is out of the Office. The Senior Associate is also expected to represent the Regional Counsel from time to time in areas of assigned responsibility, although consultation and discussion with the Regional Counsel are required when necessary in connection with major legal judgments or policy recommendations. Completed work is reviewable for consistency with Agency policy, precedential effect and overall effectiveness. The Senior Associate is expected to rotate areas of assigned responsibility with other Associates within the Office of Regional Counsel from time to time.

IV. Qualifications.

The Senior Associate must have the equivalent of a JD or LLB degree and be a member of the bar. Other qualifications requirements may be established by the Regional Counsel, depending upon the needs of the Office.

2. Basis for Assignments. The lead attorneys role shall be assigned on the following basis:

(a). Regional Matters. Normally, the Office of Regional Counsel shall take the lead on matters arising in the Regions, except where the Regional Counsel and the the appropriate supervisor within the Office of Enforcement Counsel agree, after conferring at an early point in the development of the matter, that the matter is of overriding national significance and that the lead role should be assigned to an attorney in the Office of Enforcement Counsel. In cases where the Regional Counsel and the supervisor within the Office of Enforcement Counsel are unable to agree as to which level should be assigned the lead role, the matter will be resolved by the Associate Administrator for Legal and Enforcement Counsel.

(b). Enforcement/Defensive Matters; Appeals. In instances where enforcement litigation and defensive litigation arise involving essentially the same parties and the same set of circumstances, the Associate Administrator for Legal and Enforcement Counsel shall determine the allocation of roles (including, where deemed necessary, the establishment of a lead attorney for the entire matter) so as to ensure that both aspects of the matter are properly represented and that the positions of the respective Offices are well-coordinated. The Office of General Counsel (or the appropriate Office of Regional Counsel) shall have the lead on all matters before Courts of Appeals, even though the lead on the matter was previously taken by the Office of Enforcement Counsel.

3. Obligations to Other Attorneys. The lead attorney shall provide other Agency attorneys assigned to the matter with adequate opportunities to contribute to the litigation effort, including participation as supporting counsel in the development of the litigation strategy, the preparation of legal documents, and the conduct of negotiations with opposing parties.

VIII. GENERAL LEGAL MATTERS; RELATIONSHIPS WITH OGC.

The reorganization will not change the working relationships between the Office of General Counsel and the Offices of Regional Counsel. All existing lines of communication and all existing procedures should continue to be used until further notice.

IX. STEPS TO TAKE IN IMPLEMENTING THIS GUIDANCE.

A. Completion of Interim Reorganization. A Region which has not yet made arrangements for its enforcement attorneys to report to the Regional Counsel should do so without delay, regardless of the status of its overall reorganization.

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

THE ADMINISTRATOR

15 SEP 1981

MEMORANDUM

SUBJECT: Regional Organization Structure

TO: Associate Administrators
Assistant Administrators
Regional Administrators
Staff Office Directors

This memorandum provides guidance for regional organization and will subsequently be incorporated into the Agency Organization and Functions Manual.

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

- Clarifying accountability for regional programs.
- Facilitating communication links between related Headquarters and regional components.
- Improving regional policy and management decision-making processes.
- Placing functions in organizations where they can best be integrated with related activities.
- Favoring fewer and larger organizations to avoid subsequent further consolidation and reorganization in a time of declining resources.

In organizing to carry out these objectives, regions will select one of the two organization patterns described below.

Recommended Organization. Regional Administrators are authorized to establish a regional structure and organization of functions as outlined in Attachment 1. Major features of the authorized organization include the following:

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

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

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

b. The Regional Administrator will continue to initiate enforcement actions. These actions will be based upon guidance from the Enforcement Counsel, Office of Legal and Enforcement Counsel, and with legal concurrence of the Regional Counsel.

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

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

3. Two staff offices are authorized — an Office of Congressional and Intergovernmental Liaison and an Office of Public Affairs.

4. The preferred option for policy and management functions is to establish an Office of Assistant Regional Administrator for Policy and Management. The Assistant Regional Administrator will function as a key member of the regional management team by guiding the internal decision-making processes, including the analysis and evaluation of issues requiring policy or management decisions by the Regional Administrator. The other option is to structure with a Management Division as discussed later.

a. The management systems and analysis function will include the development of program strategies, including State/EPA Agreements, program evaluations, and analytic studies.

b. Internal equal employment opportunity functions will be strengthened by being integrated as part of the personnel management program with oversight and assistance from an E.E.O. officer in the Office of the Assistant Regional Administrator.

c. As currently operating in some regions, all grants administration functions, including those for construction grants, will be consolidated in this office.

d. Environmental Assessment (EIS) functions will be carried out under direction of the Assistant Regional Administrator.

5. Three programmatic divisions are authorized: Water Management; Air and Waste Management; and Environmental Services. Written requests to establish separate divisions for Air Management and for Waste Management will be considered, primarily for larger regions. Approval by the Assistant Administrator for Administration will be based on the overall rationale for the request measured against the objective of achieving organizational efficiency and economy.

6. External civil rights compliance and minority business enterprise functions are assigned to the Water Management Division to be integrated with the construction grants program.

7. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund) coordination and remedial action functions are assigned to the Air and Waste Management Division. Superfund and CWA Section 311 emergency response activities will be performed by the Environmental Services Division.

8. Toxics and Pesticides program activities are assigned to the Air and Waste Management Division. The Pesticide sampling function is to be integrated with other field activities in the Environmental Services Division.

Optional Organization. Regional Administrators may elect, with approval from the Assistant Administrator for Administration, to adopt the alternative regional organization reflected in Attachment 2. Selection of this structure should depend on the Regional Administrator's management style and other management considerations. This option reflects a regional Management Division concept with less responsibility in the policy and decision-making process than that assigned to an Assistant Regional Administrator. Under this alternative, placement of the Environmental Assessment and State/EPA agreement functions is optional. The same flexibility exists to request separate Air Management and Waste Management Divisions.

State Liaison. The extent and kind of liaison that Regional Offices develop and maintain with each State is left to the discretion of the Regional Administrator. IPA assignments may be a viable option. Consideration of on-site State Offices (ranging from one employee

to a full operating contingency), is encouraged where such Offices can contribute effectively to enhancing our relationship with the States and to improving EPA's efforts to delegate its progr[redacted].

However, a number of factors must be weighed before deciding to establish a State Office. Criteria for use in making these decisions are included in Attachment 3. If State Offices with substantial programmatic functions are established their placement may vary from the approved organizational alignments

Achieving Efficiency and Economy. Establishment of subordinate organization structures and positions within them below the Division and Office level is at the Regional Administrator's discretion. However, this shall be accomplished observing sound organizational judgment and position management principles contained in EPA guidance documents. Grade levels of positions must be supportable by appropriate position classification standards. This guidance is reflective of the management philosophy of this Administration. To achieve and maintain an acceptable management posture within each region, Regional Administrators are expected to establish a viable personnel management function in the region at a level consistent with its importance to our management objectives and to consult with the Personnel Officer regarding management issues on a regular basis.

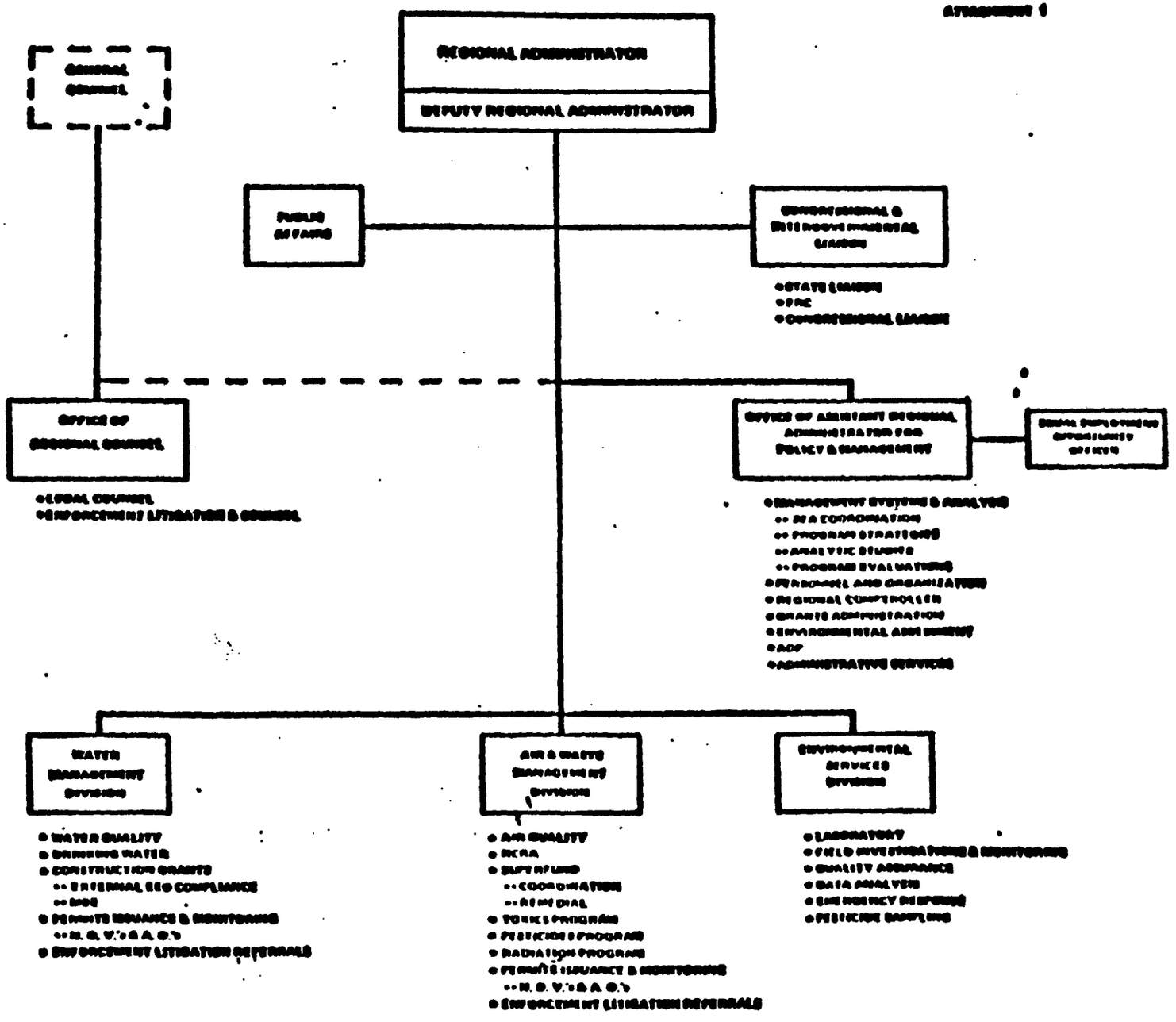
Implementation. New Regional Administrators are authorized to implement the recommended organization structure as early as possible, consistent with management's responsibilities to employees and employee unions. Acting Regional Administrators should consult with Clif Miller (FTS 755-0442) or Seth Hunt (FTS 327-3895), Special Assistants to the Administrator, prior to implementation of any reorganization.

The main purpose of regional reorganization is to provide a more effective structure which is closely aligned to the Headquarters organization. Our experience to date with the Headquarters organization has been gratifying in that it provides for stronger and more consistent management and has received widespread favorable reaction. In this, as in any organization, its effectiveness will depend on its people. I am confident that EPA personnel will help make EPA an effective, well managed entity.

Anne M. Gorsuch

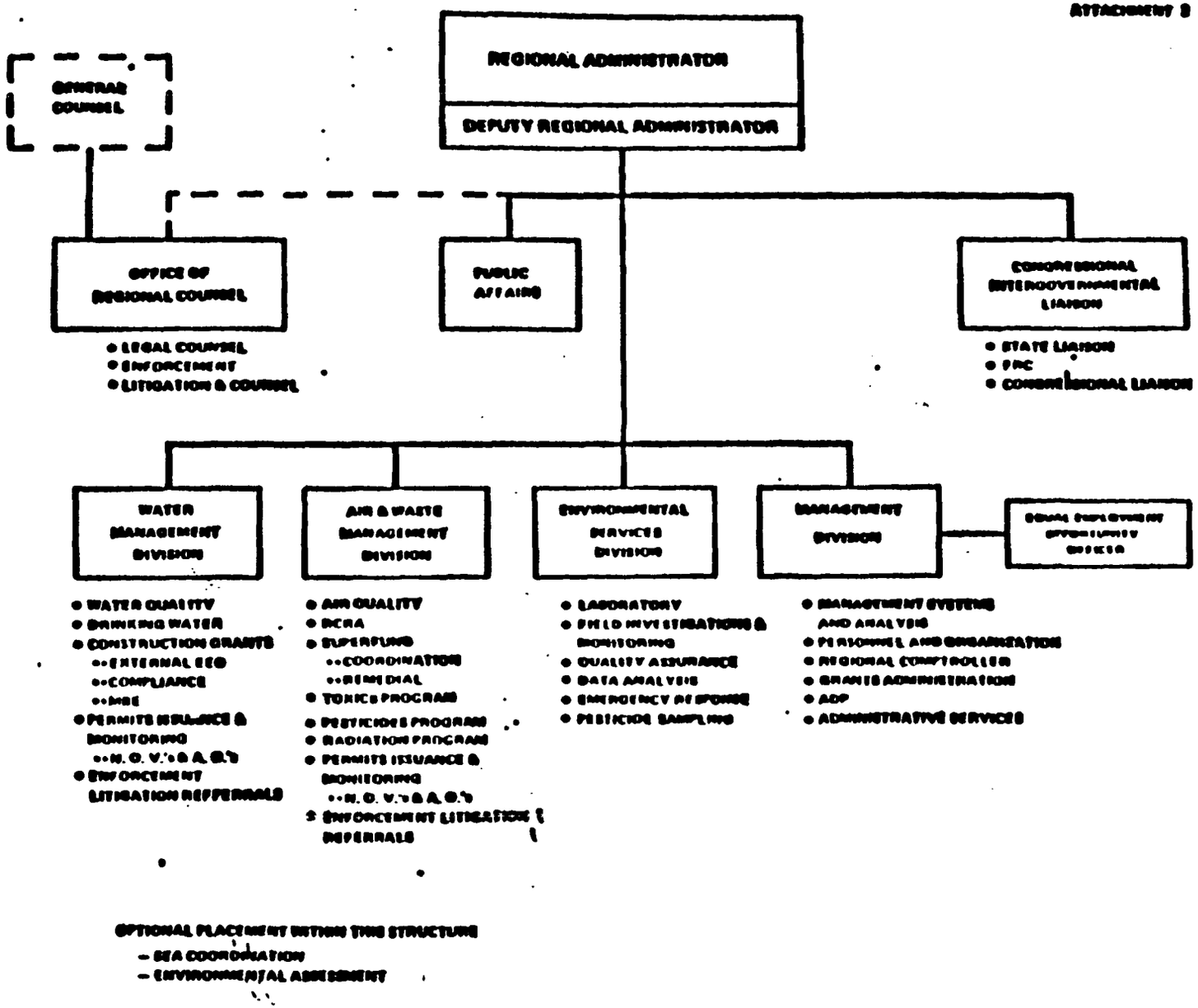
AUTHORIZED EPA REGIONAL ORGANIZATION

ATTACHMENT 1



ALTERNATIVE EPA REGIONAL ORGANIZATION

ATTACHMENT 2



OPTIONAL PLACEMENT WITHIN THIS STRUCTURE
- SEA COORDINATION
- ENVIRONMENTAL ASSESSMENT

Criteria for State Offices

1. Type of Office to be established (coordination/liaison, operations, mini-regions, single or multi-programs, etc.) and the programs to be represented--Are the proposed functions and activities the best way of achieving the Office's purpose, what priority are the programs within the Regional Office, and are they the ones with which the State needs the most assistance?

2. State and Regional Office purpose, goals, and objectives--Are they in concert and will the office further the goals and objectives of the Region and EPA?

3. Status of state programs/assumption of delegated authority--Are the State programs at the proper stage of development where a State Office could make a significant impact and will the Office further the goal of delegating more responsibility to the State?

4. Receptivity to EPA presence--Is there a genuine interest in as well as a need for an EPA State Office?

5. Cost of establishing and operating the office and moving people--Do the financial costs outweigh the anticipated benefits?

6. Effect on resources within the Regional Office--Will State Offices fragment and deplete the critical mass of expertise within the Regional Office? (This will vary depending on the size of the Regional Office and the number and size of State Offices.)

7. The quality of employees available for the particular Office--Are they experienced and highly motivated?

8. Accessibility by public transportation--Is the location remote and difficult to reach so that direct communications are less frequent?

9. Past and current relationship between top management and the staff levels within the Regional Office and the State--Is there a strong commitment and backing from top management along with a history of trust and a good working relationship between the staffs?

Version of 3/5/82

OFFICE OF REGIONAL COUNSEL
ATTORNEY ROTATION RECORD

_____
Attorney

I. Major Areas of Responsibility.

	Dates Assigned From	To
1. Air		
2. Water		
a. NPDES		
b. Non-NPDES Clean Water Act		
c. Safe Drinking Water Act		
d. Other		
(1) _____		
(2) _____		
3. Grants, Contracts and General Administration		
a. Construction grants		
b. Program grants (including State/EPA Agreements)		
c. NEPA		
d. FOIA		
e. Personnel		
f. Conflict of interest		
g. Other		
(1) _____		
(2) _____		
4. Hazardous Substances and Emergency Response		
a. RCRA Delegation Matters		
b. Other RCRA Matters		
c. Superfund and Section 311 of Clean Water Act		
d. TOSCA and FIFRA		
e. Other		
(1) _____		
(2) _____		
5. Lead Region		
a. _____		
b. _____		
c. _____		
d. _____		
6. Coordination of Enforcement Matters		

GM - 11, Coordination of Policy Development, is obsolete and was deleted in November 1988.

#12

Note on General Operating Procedures for the Civil Enforcement Program

There have been many changes in the structure and function of Agency's enforcement program, since the Agency issued this memorandum. OECM is currently preparing a summary of the changes. The summary should be ready the next time the Compendium is updated.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

JUL 8 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: General Operating Procedures for the Civil Enforcement Program

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

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

I. Introduction

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

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

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

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

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

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

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

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

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

- Clarifying accountability for regional programs.

- Facilitating communication links between related Headquarters and regional components.

- Improving regional policy and management decision-making.

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

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

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

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

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

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

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

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

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

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

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

II. Enforcement Objectives

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

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

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

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

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

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

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

III. Roles and Relationships

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Delegations and Concurrence Requirements.

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

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

V. Reporting Requirements and OLEC Oversight

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

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

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

VI. Reviewing Compliance and Determining Responses.

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

- Identifying noncomplying sources and potential enforcement targets.

- Coordinating enforcement actions with States, as appropriate.

- Determining the appropriate Agency response to violations, including:

    - Requests for information (formal or informal).

    - Informal discussions with the source.

    - Warning letters or notices of violation.

    - Administrative orders or administrative civil penalty complaints.

    - Referrals to Headquarters for civil judicial action.

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

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

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

VII. Escalation

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

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

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

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

VIII. The Case Development Process

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

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

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

-- provide information on program enforcement issues and priorities;

-- refine procedures for handling enforcement actions generally; and

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

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

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

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

IX. The Referral Process

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

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

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

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

X. Headquarters Review of Case Development

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

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

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

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

XI. After EPA Refers a Case to DOJ

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

XII. Negotiations

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

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

XIII. Enforcing Consent Decrees and Final Orders

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

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

XIV. Appeals

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

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

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

XV. Communications/Press Relations

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

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

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

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

XVI. Reservation

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

XVII. Delegation of Authority

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

XVIII. Superseded Policy

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

SEP 7 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Case Referrals for Civil Litigation

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

TO: Regional Counsels

A review of our recent enforcement referrals for proposed civil litigation 1/ and conferences with the Department of Justice. have revealed that certain points relating to case development and litigation activities must again be emphasized and some new "ground rules" should be set forth. This memorandum is intended to supplement the General Operating Procedures memorandum governing EPA's enforcement activity which was issued on July 6, 1982.

Quality of Referrals

I want to stress that a case should not be forwarded to Headquarters for referral to DOJ unless you fully intend that the case should be filed. Sending a case forward merely to get credit for the case is a waste of your time and ours. We want to concentrate on properly developed cases that will actually be filed, not merely paper to be referred to DOJ that results in no action. In addition, referrals to Headquarters and DOJ for the purpose of applying pressure on a party to settle should not be made unless the Regional Office is willing to carry the case through a suit.

My review of the past numbers of referrals by EPA to DOJ compared to the actual number of cases that are filed reveals that past practices resulted in a considerable disparity between the two numbers. You, and especially the Regional Administrator, should be prepared to support a case that is referred to Headquarters all the way through trial.

1/ This memorandum applies only to referrals for civil litigation. Guidance for referral of cases for criminal proceedings will be addressed in a subsequent memorandum.

Case Development Process

We expect that DOJ and Headquarters' involvement in the case development process will continue to be intensive in hazardous waste and Superfund cases in the future. This is because these are new areas of the law, without much precedent. In the more mature areas (air and water cases) we expect the case development process to be more informal. For example, in many cases the coordination between Headquarters, DOJ attorneys and Regional attorneys may be accomplished by infrequent meetings and telephone contacts.

The need for Headquarters Enforcement Counsel or DOJ involvement in a case at an early stage depends upon sound judgment. If the case, even though in a mature program, presents national issues, contains novel problems, requires extra support, or has other areas in which you or your attorneys would like support from or the views of Headquarters, the Department of Justice or both, we will provide it. However, we do not want to make the case development process a burden on the Regions in air and water cases which do not require it.

It is essential that Regional attorneys apprise Headquarters and DOJ counsel of new cases which are under development as soon as sufficient information is acquired about the cases to enable a determination to be made that they have potential for referral. This is necessary in order that the Regions, Headquarters and DOJ can plan resource needs, litigation support and budgetary requests. We anticipate that increased use of our computer system by the Regional Offices will aid in the advance notification of emerging cases.

Referral Package

As the case development process, including early DOJ involvement, becomes widespread, we will be able to significantly reduce the supporting paperwork you send to EPA Headquarters to accompany a referred case. In order to achieve this result, it is highly desirable for the Regional attorney to acquaint the appropriate Headquarters and DOJ attorneys with developing cases by telephone and at regional meetings at an early stage. In any event, as described in the following paragraph, certain basic information in the form of a referral memorandum should accompany the litigation report at the time the case is formally referred to Headquarters, in addition to the more comprehensive litigation report.

When a case is forwarded to Headquarters for referral to DOJ, the referral memorandum, at a minimum, should include identification of the potential defendants, a factual summary, identification of issues, status of past Agency enforcement efforts, and the names of Agency and DOJ attorneys who are involved in the case, including the lead attorney. This should be accompanied by the litigation report, together with a copy of the relevant papers in the case file and such other accompanying explanatory memoranda or analyses as have been agreed to between the Regional attorney, the Headquarters attorney and the DOJ attorney working on the case.

One particular need in a case referral is to identify the problems that may exist with the case. In the past many documents forwarding cases to EPA Headquarters have been pure advocacy documents. By this I mean they stressed only the positive side of a case. However, once the case was referred to DOJ and work began, problems that might complicate the prosecution of the case would then be revealed. In order to properly focus your resources and ours, it is necessary that initial forwarding paperwork include a description of all problems that may accompany the prosecution of the case. Further, if problems are identified after the case has been forwarded to Headquarters, the referral paperwork should be supplemented to include these problems. Early involvement by Headquarters, and DOJ where appropriate, should provide for early identification and resolution of such problems. Your credibility with Headquarters and EPA's credibility with DOJ are not aided by selling a case that must be "unsold" when reality sets in.

Lead Attorney

The lead attorney responsibility establishes an accountable party for the progress of the case. It has become apparent that many times the failure of a case to move forward is a direct result of the lack of an identifiable lead attorney who bears the responsibility for the progress of that case. Responsibility cannot be vaguely shared between two or three attorneys. Someone has to have the lead designation if for no other reason than to act as a focal point, prescribe milestones, and make appropriate reports.

At such time as you begin the case development process there should be a clear understanding between the Agency attorneys about who will take the lead in the case development phase. Ordinarily the lead attorney in the development phase will be a Regional attorney. However, in cases of national significance

or cases without precedent, the lead attorney, even in the development phase, may be an attorney from Headquarters or DOJ. After the case has been referred to DOJ, there should again be a conference between the appropriate Regional, Headquarters and DOJ attorneys to determine if the lead in the case should shift. If so, the new lead attorney should be designated and his/her identity clearly understood by all parties to the case, including technical support personnel. When the case is filed, the lead responsibility should again be agreed to by the attorneys and conveyed to all other parties involved in prosecuting the case. At all times, the computer system should be kept current on the identity of the lead attorney.

Regardless of who has the lead, the responsibility for the initial documentation of statutory violations and development of supporting data that justifies referral of a case to DOJ for litigation always rests with EPA attorneys. In addition, I expect that EPA attorneys will be responsible for developing and maintaining a thorough understanding of the facts of the case, the issues involved or which may be raised, Agency policies which affect or may be affected by the case, and to serve as spokesperson on the case development and litigation team for EPA's views.

When a case is referred to the Department of Justice, the Department will, in consultation with EPA, and in accordance with the Memorandum of Understanding between the agencies, designate a lead case attorney. The DOJ lead attorney will be responsible for and have authority to require development of case strategy and tactics; evaluate the quality and quantity of evidence necessary to prove the government's case; assign and coordinate responsibilities to litigation team members, including technical personnel; and insure that all necessary government personnel are fully informed of case progress. The lead attorney will also communicate as the government's spokesperson with defendants; and undertake the necessary case preparation to move the matter expeditiously to trial.

Generally, the lead attorney after referral of a case will be from the Department of Justice or United States Attorneys Office. This is consistent with the Attorney General's statutory responsibility for litigation involving the United States and its Agencies and the Memorandum of Understanding. On a case by case basis EPA attorneys may be assigned lead responsibility. When this occurs, the EPA attorney assigned lead responsibility will be supervised by the Chief of the Environmental Enforcement Section of the DOJ with respect to litigation matters.

It is essential that all litigation team members understand their respective responsibilities and cooperate in the litigation effort. Experience demonstrates that cases which are actively moved to trial provide a full opportunity for each attorney to gain meaningful experience in litigation. Without this support our litigation effort cannot succeed.

The computer system should at all times reflect the identity of the lead case attorney. In each case, EPA will designate an EPA attorney who will continue to be responsible for coordinating agency input.

Further Clarification

I realize that this guidance does not prescribe exact procedures for every conceivable situation. However, I am looking to you as Regional Counsels to exercise your best professional judgment in supervising your Regional attorneys. Please let me know in those instances where attorneys from Headquarters and the Regional attorneys are unable to reach agreement on the handling of cases. Further, the Headquarters Associate Enforcement Counsel and I stand ready to help you in any dealings with DOJ, if necessary.

Goal

I want to emphasize that the goal of EPA is for expeditious, efficient, and successful prosecution of our enforcement cases. It does not matter who gets the credit or the lead; what does matter is whether the cases are worth the time of all the parties involved, are filed and prosecuted in a timely manner, and achieve protection for the public and the environment.

cc: Robert M. Perry
Steve Ramsey
Associate Enforcement Counsels

#14

Note on General Operating Procedures for the Criminal Enforcement Program

This memorandum is no longer current. OECM is in the process of thoroughly revising this memorandum, and will issue a new version of these procedures by the next time the Compendium is updated.

...ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OCT 12 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Criminal Enforcement Priorities for the Environmental Protection Agency

FROM: Robert M. Perry
Associate Administrator

TO: Regional Counsels, Regions I-X

Criminal case development and referrals will constitute an important component of EPA's overall enforcement effort. The success of the criminal enforcement program will depend on the Agency's ability to act with professionalism, and with one mind, in identifying, investigating and referring cases for criminal prosecution.

To achieve this objective, our Criminal Enforcement Division is currently recruiting a staff of 25 experienced criminal investigators. In addition, the Office of Legal and Enforcement Counsel, working with the assistance and guidance of EPA's media program offices, has developed the attached "Criminal Enforcement Priorities" for the Agency. These guidelines have been drafted so that the objectives and interests of EPA's program offices are reflected in, and furthered by, the Agency's criminal enforcement efforts. In addition, the implementation of these guidelines will guarantee that the legal and investigative resources of the Office of Legal and Enforcement Counsel, and the technical resources of EPA's program offices, are focussed on cases of the most serious environmental misconduct.

The attached Criminal Enforcement Priorities are effective immediately, and replace any existing Agency guidance on this subject. Please ensure that these priorities are circulated with the appropriate Regional program offices. Any questions on these priorities can be directed to Peter Beeson, Director, Criminal Enforcement Division, Office of Legal and Enforcement Counsel (FTS 382-4543).

Attachment

cc: Assistant Administrators
Regional Administrators, Regions I-X

#14

CRIMINAL ENFORCEMENT PRIORITIES

United States Environmental
Protection Agency
Effective Date: OCT 12 1982

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PREFACE

A broad range of potential overlap exists among the criminal, civil and administrative enforcement options provided by most environmental statutes. Theoretically at least, the Agency is free to pursue criminal sanctions in every situation presenting evidence supporting the requisite elements of proof.

As a matter of enforcement policy and resource allocation, such an unrestrained use of criminal sanctions is neither warranted nor practical. The commitment of investigative and technical resources necessary for the successful prosecution of a criminal case is high. More importantly, a criminal referral for investigation or prosecution can entail profound consequences for the subject of the referral, and should reflect a considered, institutional judgment that fundamental interests of society require the application of Federal criminal sanctions to a particular set of facts. Accordingly, criminal referrals will be confined to situations that--when measured by the nature of the conduct, the compliance history of the subject(s) or the gravity of the environmental consequences--reflect the most serious cases of environmental misconduct.

This memorandum provides guidelines for the use of criminal sanctions under all environmental statutes. It is divided into two parts. Part I sets out several general factors that Agency personnel should consider in determining whether a criminal referral is warranted in a specific situation. These factors will apply with equal force to referral decisions under each of the Agency's statutes, thereby ensuring cross-media consistency in the use of this enforcement option. Part I has also been drafted so as to reflect guidelines for the exercise of Federal prosecutorial discretion found in the Justice Department's Principles of Federal Prosecution.

Following this general overview, Part II establishes investigative priorities in each of the Agency's program areas. The purpose of this section is to focus the limited criminal investigative resources of the Office of Legal and Enforcement Counsel on the most serious cases of environmental misconduct. These media-specific priorities will be fluid, and will be modified to reflect additional regulatory programs in the Agency as they develop. In addition, the creation of investigative priorities does not preclude the possibility of a criminal referral for conduct not falling within these priorities. Each case will be considered on an individual basis. Further--to emphasize the obvious--these guidelines relate only to the use of criminal sanctions, and do not reflect administrative or civil enforcement priorities.

These guidelines, and internal office procedures adopted in accordance with these guidelines, are not intended to, do not, and may not be relied upon to create a right or benefit--substantive or procedural--enforceable at law by a party to litigation with the United States. Any attempt to litigate any aspect of these guidelines should be brought immediately to the attention of the Criminal Enforcement Division, Office of Legal and Enforcement Counsel, EPA Headquarters.

These guidelines are effective immediately, and replace any existing guidance on criminal enforcement priorities within the Agency.

PART I: THE DECISION TO PURSUE CRIMINAL SANCTIONS

This Agency's choice among its varying enforcement options--civil, administrative and criminal--is, and must remain, a discretionary judgment that balances essentially subjective considerations. No litmus paper test exists that will reliably distinguish cases falling into each category. This section discusses the varying factors, or considerations, that should be addressed as EPA reaches an institutional decision on the appropriate enforcement option to employ in addressing a specific violation. In essence, it is a discussion of those factors that will normally distinguish a criminal case from all the others.

A. The Scienter Requirement

An individual who engages in conduct prohibited by statute or regulation can be prosecuted civilly or administratively without regard to the mental state that accompanied the conduct. Criminal sanctions, on the other hand, will ordinarily be limited to cases in which the prohibited conduct is accompanied by evidence of "guilty knowledge" or intent on the part of the prospective defendant(s). Referred to as the scienter requirement, this element of proof exists under virtually every environmental statute enforced by the Agency.1/ For example, falsification of records under the Resource Conservation and Recovery Act must be done "knowingly," (42 U.S.C. §6928(d)(3)); violation of hazardous air pollutant standards under the Clean Air Act must be done "knowingly," (42 U.S.C. §7413(c)(1)(c)); and failure to establish or maintain records required under the Toxic Substances Control Act must occur "knowingly or willfully," 15 U.S.C. §2615(b).

1/ One exception to this general rule is the Refuse Act, 33 U.S.C. §407, which has generally been interpreted as a "strict liability" statute. See, e.g. United States v. White Fuel Corporation, 498 F.2d 619 (1st Cir. 1974). In addition, a prosecution for illegal discharges under the Clean Water Act can be based on negligent or willful conduct, 33 U.S.C. §1319(c)(1). "Negligence" is not, strictly speaking, a form of scienter.

The requirement to prove a culpable mental state, as well as a prohibited act, is certainly the clearest distinction between criminal and civil enforcement actions. Special care will be taken both in investigations, and in drafting criminal referral packages, to assemble and highlight evidence available to meet the specific statutory scienter requirement.

B. The Nature and Seriousness of the Offense

Resources currently available to EPA for criminal case development are limited. In addition, this Agency is only one of dozens that are making demands on the limited prosecutorial staffs of the Justice Department. As a matter of resource allocation, therefore, as well as enforcement philosophy, EPA will investigate and refer only the most serious forms of environmental misconduct.

Of primary importance to this assessment is the extent of environmental contamination or human health hazard that resulted from, or was threatened by, the prohibited conduct. This determination depends in turn on considerations such as the duration of the conduct; the toxicity of the pollutants involved; the proximity of population centers; the quality of the receiving land, air or water; the amount of Federal, State or local cleanup expenditures; and public sentiment supporting strong enforcement action in response to a specific situation.

Also of significance in assessing the seriousness of the illegal conduct is the impact--real or potential--on EPA's regulatory functions. This factor is of particular importance in cases of the falsification or concealment of records, reports or information. For example, even if a technical falsification case can be made, criminal sanctions may not be appropriate if the distortion of information could not reasonably have been expected to have a significant impact on EPA's regulatory process or decision-making. Where the materiality of the falsification is clear, however, criminal sanctions should be pursued. For example, falsification activity might cause EPA to register a pesticide with demonstrated carcinogenic potential; to omit effluent limitations for toxic pollutants in an NPDES permit; or to postpone necessary regulatory action. In such situations, the need for criminal sanctions should be considered.

C. The Need for Deterrence

Deterrence of criminal conduct by a specific individual (individual deterrence) or by the community at large (general deterrence) has always been one of the primary goals of the criminal law. Where the offense is deliberate and results in serious environmental contamination or human health hazard, the need to achieve deterrence through the application of strong punitive sanctions will almost always exist.

The goal of deterrence may, on occasion, justify a criminal referral for an offense that appears relatively minor. This would be true, for example, for offenses that--while of limited importance by themselves--would have a substantial cumulative impact if commonly committed. This might also be true when addressing violations by an individual with an extended history of recalcitrance and noncompliance.

D. Compliance History of the Subject(s)

The compliance history of the subject(s) of a potential criminal referral is relevant, and should be considered in determining the appropriateness of criminal sanctions. As a general rule throughout Federal criminal enforcement, first offenders will be treated less severely than recidivists. Stated alternatively, criminal sanctions become more appropriate as the incidents of noncompliance increase. The occurrence of past enforcement actions against a company, or the failure of civil/administrative enforcement, is certainly not a prerequisite to a criminal referral. However, a history of environmental noncompliance will often indicate the need for criminal sanctions to achieve effective individual deterrence.

E. The Need for Simultaneous Civil or Administrative Enforcement Action

Simultaneous civil and criminal enforcement proceedings are legally permissible, United States v. Kordel, 397 U.S. 1, 11 (1970), and on occasion are clearly warranted. However, separate staffs will be appointed with the initiation of a grand jury investigation, if not before. Further, the pursuit of simultaneous proceedings provides fertile grounds for legal challenges to one or both proceedings that, even if unsuccessful, will consume additional time and resources. Thus, parallel proceedings should be avoided except where clearly justified.

In this regard, it should be noted that some of the goals of a criminal prosecution, including a degree

of deterrence and punishment, can be achieved through a civil action that secures substantial civil penalties in addition to injunctive relief. Moreover, recent experience indicates that while some cases may result in periods of incarceration, criminal sentences will often be limited to monetary fines and a probationary period. In light of this reality, the use of the additional time and resources necessary to pursue a criminal investigation--as well as a civil enforcement action--is often not justified.

PART II: CRIMINAL ENFORCEMENT PRIORITIES

The previous section has discussed the general considerations that will guide this Agency's decisions on the investigation and referral of criminal cases. Part II details the substantive investigative priorities that will be pursued in the Office of Legal and Enforcement Counsel's developing criminal enforcement program. The priorities are listed by statute. The order of listing is random, and is not intended to achieve further ranking either within each statute or on a cross-media basis. Unless otherwise stated below, all listed categories of conduct are considered equally significant and worthy of investigation within the constraints of our limited criminal investigative resources.

The criminal investigative staff of the Office of Legal and Enforcement Counsel, acting in partnership with the legal and technical staffs of the Agency, will focus criminal enforcement efforts in the future primarily on cases falling within the categories listed below. The issuance of these priorities is not, however, intended to preclude the possibility of a criminal referral in other cases.2/ As was indicated previously, each case will be considered on its own merits.

A. Investigative Priorities: Resource Conservation and Recovery Act (RCRA):

1. Knowing Endangerment

Section 3008(e) of RCRA, 42 U.S.C. §6928(e), establishes the crime of "knowing endangerment." The provision carries maximum penalties of up to five years of imprisonment and a $1,000,000.00 fine, and reflects a Congressional mandate to pursue strong criminal sanctions for knowing, life-threatening conduct that violates RCRA statutory prohibitions or interim status standards and regulations. RCRA and its legislative history indicate that the "knowing endangerment" provision is intended to apply only in the most serious instances of environmental misconduct. Where the elements of proof can be met, however, EPA will give a high priority to the investigation, referral and prosecution of "knowing endangerment" cases.

2/ For example, because the enforcement provisions of the Safe Drinking Water Act, 42 U.S.C. §§300f et. seq., contain comparatively mild monetary penalties--and no potential terms of incarceration--the statute is not listed as a criminal enforcement priority. This does not, however, preclude the possibility of a criminal referral under the Safe Drinking Water Act to address aggrevated cases of non-compliance.

2. Illegal Transportation and Disposal of Hazardous Waste

Section 3008(d)(1-2) of RCRA, 42 U.S.C. §6928(d)(1-2), carries felony penalties of two years of imprisonment and a $50,000.00 fine for the knowing transportation of hazardous wastes to an unpermitted facility (Section 3008(d)(1)) and the knowing disposal of hazardous wastes without obtaining a permit (Section 3008(d)(2)). Both provisions are potentially applicable to midnight dumping in its various forms, i.e., in abandoned sites, company yards, open fields or waterways, or unpermitted waste disposal facilities. A high investigative priority will be placed on illegal transportation or disposal activities that result in, or threaten, serious environmental contamination or human health hazard.

3. Falsification of RCRA Records

Section 3008(d)(3) of RCRA, 42 U.S.C. §6928(d)(3), carries misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for the knowing falsification of material information in records "maintained or used for purposes of compliance" with RCRA. Emphasis will be placed on falsification activity that has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

4. Destruction, Concealment or Alteration of RCRA Records

Section 3008(d)(4) of RCRA, 42 U.S.C. §6928(d)(4), carries misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for incidents of knowing destruction, concealment or alteration of records maintained under RCRA regulations. As in falsification cases, emphasis will be placed on conduct that has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

B. Investigative Priorities: Comprehensive Environmental Response, Compensation and Liability Act (Superfund):

1. Failure to Notify of the Release of a Hazardous Substance

Section 103(b)(3) of Superfund, 42 U.S.C. §9603(b)(3), carries misdemeanor penalties of one year of imprisonment

and a $10,000.00 fine for failure to notify the appropriate Federal agency of a release of a hazardous substance in amounts equal to or greater than those determined pursuant to Section 102 of Superfund. The Agency will place a high investigative priority on cases where the "release" results in, or threatens, significant environmental contamination or human health hazard.

2. Destruction or Falsification of Superfund Records

Section 103(d)(2) of Superfund, 42 U.S.C. §9603(d)(2), carries misdemeanor penalties of one year of imprisonment and a $20,000.00 fine for the knowing destruction or falsification of specified Superfund records. Investigative priority should be placed on conduct that has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

C. Investigative Priorities: Clean Water Act (CWA):

1. Violations of the NPDES Permit Program

Section 309(c)(1) of the CWA, 33 U.S.C. §1319(c)(1), carries misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for the willful violation of conditions or limitations in NPDES permits issued by the Administrator or a State. The NPDES permit program is a mature regulatory scheme and the primary mechanism for monitoring and controlling water pollution under the CWA. The Agency will place a high investigative priority on willful NPDES permit violations that result in, or threaten, significant environmental contamination or human health hazard.

2. Falsification of CWA Records and Monitor Tampering

Section 309(c)(2) of the CWA, 33 U.S.C. §1319(c)(2), establishes misdemeanor penalties of six months of imprisonment and a $10,000.00 fine for knowing falsification of records and for tampering with monitoring devices "required to be maintained" under the CWA. Investigative priority should be placed on cases in which the falsification or tampering has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

3. Unpermitted Discharges

Section 301 and 309(c)(1) of the CWA, 33 U.S.C. §§1311, 1319(c)(1)), establish misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for willful discharges into navigable waters without an NPDES or "dredge and fill" permit.3/ A high investigative priority will be placed on willful, unpermitted discharges that cause, or threaten, significant environmental contamination or human health hazard.

D. Investigative Priorities: The Clean Air Act (CAA):

1. Violations of State Implementation Plans

Section 113(c)(1)(A) of the CAA, 42 U.S.C. §7413 (c)(1)(A), carries misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for knowing violations of State implementation plans. SIPs are the cornerstone of a well-established and mature regulatory program and constitute the CAA's primary mechanism for implementing and enforcing air quality standards for criteria pollutants. A high investigative priority will be placed on cases of knowing violation of SIP limitations that result in, or threaten, significant environmental contamination or human health hazard.

2. Violations of Hazardous Air Pollutant Standards

Section 113(c)(1)(C) of the CAA, 42 U.S.C. §7413 (c)(1)(C), establishes misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for knowing violations of standards for hazardous air pollutants. A high investigative priority will be placed on knowing violations of these standards that result in, or threaten, significant environmental contamination or human health hazard.

3/ Also applicable are the provisions of the Refuse Act, 33 U.S.C. §407, which establish misdemeanor penalties of one year of imprisonment (including a 30-day minimum sentence) and a $2,500.00 fine.

3. Falsification of CAA Records and Monitor Tampering

Section 113(c)(2) of the CAA, 42 U.S.C. §7413(c)(2), establishes misdemeanor penalties of six months of imprisonment and a $10,000.00 fine for knowing falsification of records and for tampering with monitoring devices "required to be maintained" under the CAA. A high investigative priority will be placed on cases in which the falsification or tampering has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

E. Investigative Priorities: The Toxic Substances Control Act (TSCA):

1. Violations of Section 4 Testing Rules or the Section 5(b) Premanufacture Notification Program

Sections 15(1) and 16(b) of TSCA, 15 U.S.C. §§2614(1) and 2615(b), establish misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for knowing or willful violations of any rule promulgated under Section 4 or any requirement prescribed by Section 5 of TSCA. A high investigative priority will be placed on violations that have a significant impact on the Agency's ability to act under Section 4(f)(1), 15 U.S.C. §2603(f)(1), and on situations of falsified test data submitted pursuant to Section 5(b), 15 U.S.C. §2604(b), and the premanufacture notification program.

2. Failure to Report Substantial Risk Information

Sections 8(e), 15(3)(B) and 16(b) of TSCA, 15 U.S.C. §§2607(e), 2614(3)(B) and 2615(b), establish misdemeanor penalties of one year of imprisonment and $25,000.00 fine for knowing or willful failure to submit information to EPA which reasonably supports the conclusion that a chemical substance or mixture manufactured, processed, or distributed in commerce presents a substantial risk of injury to health or the environment. A high investigative priority will be placed on all violations of this reporting requirement.

3. Violation of PCB or Dioxin Regulations

Sections 15(1)(C) and 16(b) of TSCA, 15 U.S.C. §§2614(1)(C) and 2615(b), establish misdemeanor penalties of one year of imprisonment and a $25,000.00 fine for knowing or willful

violations of rules issued under Section 6 of TSCA. The Agency has issued regulations governing polychlorinated biphenyls and the disposal of dioxin-contaminated pesticide wastes. A high investigative priority will be placed on knowing or willful violations of these regulations that result in, or threaten, significant environmental contamination or human health hazard.

F. Criminal Enforcement Priorities: The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA):

1. Failure to Report Information on the Unreasonable Adverse Effects of a Registered Pesticide

Section 14(b) of FIFRA, 7 U.S.C. §1361(b), establishes misdemeanor penalties for the knowing violation of any provision of the Act. Section 12(a)(2)(N) provides that it is unlawful to fail to submit information required by Section 6(a)(2). This section requires a registrant to report to EPA any information regarding unreasonable adverse effects on the environment which the registrant has after the time of registration. A high investigative priority will be placed on knowing violations of this reporting requirement.

2. Falsification of FIFRA Records

Sections 12(a)(2)(M) and 14(b) of FIFRA, 7 U.S.C. §§136j(a)(2)(M) and 1361(b), establish misdemeanor penalties for the knowing falsification of specified records maintained or filed under FIFRA, including registration data. A high investigative priority will be placed on falsification activity that has--or could reasonably be expected to have--a significant impact on EPA's regulatory process or decision-making.

3. Violation of Suspension or Cancellation Orders

Sections 12(a)(2)(J), 12(a)(2)(K) and 14(b) of FIFRA, 7 U.S.C. §§136j(a)(2)(J), 136j(a)(2)(K) and 1361(b), establish misdemeanor penalties for knowing violations of the terms of cancellation and suspension orders issued under Section 6 of FIFRA. A high investigative priority will be placed on knowing violations that result in, or threaten, significant environmental contamination or human health hazard.

4. Violation of Stop Sale Orders

Sections 12(a)(2)(I) and 14(b) of FIFRA, 7 U.S.C. §§136j(a)(2)(I) and 1361(b), establish misdemeanor penalties for knowing violations of the terms of stop sale orders under Section 13(a). A high investigative priority will be placed

on knowing violations that result in, or threaten, significant environmental contamination or human health hazard.

5. Unlawful Uses of Pesticides

Sections 12(a)(2)(G) and 14(b) of FIFRA, 7 U.S.C. §§136j(a)(2)(G) and 1361(b), establish misdemeanor penalties for the knowing use of a pesticide in a manner inconsistent with its labelling. If referred by a State with primary use enforcement responsibilities, a high investigative priority will be assigned to misuse cases that result in, or threaten, significant environmental contamination or human health hazard.

6. Illegal Distribution of Unregistered Pesticides

Sections 12(a)(1)(A) and 14(b) of FIFRA, 7 U.S.C. §§136j(a)(1)(A) and 1361(b), establish misdemeanor penalties for the knowing distribution, receipt etc. of an unregistered pesticide. The pesticide registration process outlined in Section 3 of FIFRA, 7 U.S.C. Section 136(a), is the cornerstone of EPA's program to monitor and regulate the safety of pesticides. A high investigative priority will be placed on illegal transactions involving unregistered pesticides that result in, or threaten, significant environmental contamination or human health hazard.

G. Investigative Priorities: The Marine Protection, Research, and Sanctuaries Act (MPRSA)

1. Unauthorized Ocean-Dumping

Section 105(b) of the MPRSA, 33 U.S.C. §1415(b), establishes misdemeanor penalties of one year of imprisonment and a $50,000.00 fine for the knowing violation of regulations or permits issued under the ocean-dumping program. The Agency will place a high investigative priority on violations that result in, or threaten, significant environmental contamination or human health hazard.

H. Criminal Enforcement Priorities: Willful Contempt of Environmental Consent Decrees

18 U.S.C. §401(3) establishes criminal sanctions for contempt of court resulting from "disobedience or resistence to (the court's) lawful writ, process, order,

rule, decree, or command." The punishment, which may be by fine or imprisonment, is left to the discretion of the court. Historically, most of the EPA's civil litigation referrals have been settled in judicially-enforceable consent decrees containing requirements for plant modification, upgrading or installation of pollution control equipment, and other forms of injunctive relief. Insuring compliance with the terms of these consent decrees will be a significant element of this Agency's enforcement program. A high investigative priority will, therefore, be placed on incidents of willful or deliberate noncompliance with the terms of environmental consent decrees that result in, or threaten, significant environmental contamination of human health hazard.

Note on General Operating Procedures for the Criminal Enforcement Program

This memorandum is no longer current. OECM is in the process of thoroughly revising this memorandum, and will issue a new version of these procedures by the next time the Compendium is updated.

#15

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

OCT 8 7 1982

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: General Operating Procedures for the Criminal Enforcement Program

TO: Associate Administrators
Assistant Administrators
Regional Administrators
Staff Office Directors

EPA's criminal enforcement program is of central importance to the Agency's overall enforcement efforts. Most importantly, it has the capacity to achieve substantial environmental benefits through the deterrence of the most serious environmental misconduct. In addition, successful criminal prosecutions will convey a strong message to the regulated community that the Agency will not hesitate to pursue the strongest sanctions in appropriate cases.

The need for clear, uniform, Agency-wide guidance is particularly strong in the area of criminal enforcement. The criminal investigative process is characterized by constitutional safeguards and procedural constraints not found in civil and administrative enforcement matters. The government's burden of proof at trial--"beyond a reasonable doubt"--is also appropriately demanding.

Coinciding with the recruitment of GS-1811 criminal investigators to assist in criminal case development in every Region, I have asked the Associate Administrator for Legal and Enforcement Counsel to take the lead in preparing a document to establish operating procedures, roles and responsibilities for EPA's various offices in administering the Agency's criminal enforcement program.

The attached guidance document sets forth the management structure and operating procedures that will characterize EPA's criminal enforcement program. Decisions contained in this document have been reached following extensive coordination by the Associate Administrator for Legal and Enforcement Counsel with the Assistant Administrators, all Regional offices and the Department of Justice. They will result in the development of a criminal enforcement program that is a credit to the Agency and a credible deterrent within the regulated community. I strongly endorse the General Operating Procedures that the Associate Administrator has formulated and I expect all EPA offices with enforcement responsibilities to follow these procedures in discharging those duties.

I wish to underscore three points. First, this document establishes procedures for centralized management from EPA Headquarters of many aspects of the criminal enforcement program. For example, criminal investigators hired under the program will be Headquarters employees; Area offices will have inter-Regional investigative responsibilities; and the role of Regional Administrators in criminal enforcement is limited. These management decisions are necessary given the nature of criminal enforcement generally and the Agency's relative lack of experience in criminal case development. It is reasonable to anticipate a more "regionalized" management approach in the future as the Agency gains increased familiarity with criminal investigations and prosecutions. During this initial development stage, however, I have instructed the Associate Administrator to provide close, centralized supervision of case development activities. The management decisions contained in this document reflect those instructions.

Second, I wish to emphasize the importance of training Agency staff who will be working with investigators in the development of criminal cases. The training provided EPA's technical personnel through the Federal Law Enforcement Center is excellent and provides a firm foundation in the basics of criminal investigative work. I strongly encourage continued participation by the Regions and program offices in this program.

Finally, as in civil enforcement, I am looking to the Associate Administrator for Legal and Enforcement Counsel to advise me on the development of policy in the criminal enforcement program and to ensure that EPA's offices fully and effectively implement my policy in this as in all other areas of enforcement. Moreover, I am specifically authorizing the Associate Administrator to perform the following duties (while working closely with other affected offices):

- construing, interpreting, or amending the guidance in this document, and
- issuing follow-up guidance for implementing these general operating procedures.

With the implementation of this program, EPA is taking a significant new enforcement initiative. Implemented in a professional and responsible manner this program has the potential for substantial benefits to the environment. It is important to recognize, however, that the Agency is entering new and in many ways unfamiliar territory. Care, attention and the highest degree of professionalism must characterize our efforts in this specialized field. I am asking for the full cooperation of all offices in the implementation of this program pursuant to the attached guidance.

Anne M. Gorsuch

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

29 OCT 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: General Operating Procedures for the Criminal Enforcement Program

FROM: Robert M. Perry
Associate Administrator
and General Counsel

TO: Associate Administrator
Assistant Administrators
Regional Administrators
Staff Office Directors

As you are aware, the Administrator has asked this office to take the lead in preparing General Operating Procedures for EPA's various offices in administering the Agency's criminal enforcement program. This guidance is attached.

These procedures have been developed after extensive coordination with the Assistant Administrators and the Regional offices. The assistance of these offices has been highly valuable and has resulted in procedures that reflect the interests of the various offices of the Agency while simultaneously creating an effective and responsive criminal enforcement capability.

I look forward to working with your offices in the implementation of this crucial enforcement effort. Questions on this document may be directed to Peter Beeson, Associate Enforcement Counsel for Criminal Enforcement (FTS 382-4543).

Attachment

GENERAL OPERATING PROCEDURES FOR THE CRIMINAL ENFORCEMENT PROGRAM

United States Environmental Protection Agency

Effective Date: 29 OCT 1982

I. INTRODUCTION: OBJECTIVES OF THE CRIMINAL ENFORCEMENT PROGRAM

The guidelines, procedures and resource decisions contained in this document reflect fundamental values and objectives that must characterize EPA's criminal enforcement program. A brief overview of these objectives will be helpful as background to the policies and procedures that follow.

The Agency's criminal enforcement program has been designed based upon the following objectives:

1. Integrity in the Criminal Enforcement Process: Criminal case development is one of the most important--and certainly the most sensitive--aspect of the Agency's enforcement program. As such, it is imperative that the criminal investigative process be insulated from outside influence or inquiries. The criminal enforcement program has been structured so as to ensure the absolute integrity of the investigative process.

2. Confidentiality and Security in the Criminal Investigative Process: Almost as important as the integrity of the investigative process is the security and confidentiality surrounding criminal case development. A breach in security can threaten the success of the investigation and the safety of the investigator. In addition, it can destroy EPA's credibility with other law enforcement agencies. Finally, premature disclosure of a criminal investigation can unfairly prejudice the investigative target(s), since the public often perceives the fact of an investigation as tantamount to guilt. The criminal enforcement program will be managed, therefore, in a manner that will guarantee the security of the investigative process. This means, among other things, that only people with a demonstrated "need to know" will review the work product of the Agency's investigative staff.

3. Experienced Staff and Supervisory Personnel: Criminal enforcement can be no more effective than the people who participate in and supervise the process. An important goal in structuring this program has been to guarantee that the criminal investigative process is managed and overseen by personnel experienced in the criminal case development process--experienced criminal investigators and experienced criminal prosecutors.

4. Reliable Access to Technical Support: Unlike the more traditional areas of criminal enforcement, EPA's cases are often technically sophisticated. Proof of the identity of pollutants is necessary in most prosecutions and technical personnel are frequently involved--as team members--during interviews, in conducting site inspections and record searches, in the surveillance and documentation of illegal discharges or emissions, and as experts before the grand jury and at trial.

Technical support for EPA's criminal cases will be the primary responsibility of the Regional program offices. However, substantial technical assistance will also be drawn from the National Enforcement Investigations Center in Denver, Colorado. In addition, in criminal investigations stemming from Headquarters-managed programs (for example, the premanufacture notification program under §5 of the Toxic Substances Control Act) technical assistance will be provided by the Headquarters staff of the appropriate Assistant Administrator.

5. Close Coordination with the Justice Department, Local United States Attorneys and Outside Law Enforcement Agencies: The effectiveness of EPA's criminal enforcement program will depend on its ability to establish relationships of mutual trust and respect with the Department of Justice and the United States Attorneys (who will prosecute EPA's referrals), and with outside law enforcement agencies such as the FBI (who will provide investigative assistance and law enforcement powers in specific investigations). This program has been designed, therefore, in a manner that will facilitate the development of long-term relationships between OLEC's investigative staff and outside offices or agencies.

6. Consistent, Even-Handed Use of Criminal Sanctions: Finally, an underlying objective of EPA's criminal enforcement program will be to achieve consistent, even-handed use of this enforcement option throughout the country. While the subject matter of criminal dockets may vary from Region to Region, uniform procedures and policies will be adopted that will ensure a consistent exercise of the Agency's prosecutorial discretion on criminal enforcement matters.

II. MANAGEMENT OF THE CRIMINAL ENFORCEMENT PROGRAM

Historically, criminal sanctions have played only a minor role in the Agency's overall enforcement program. As a result, our institutional experience in this specialized form of case development is limited.

The Administrator is committed to the development of a professional, in-house criminal enforcement capability. It is essential to the fulfillment of this Agency's obligation to employ all available enforcement options in addressing significant instances of environmental misconduct.

The Administrator has delegated the responsibility to the Associate Administrator for Legal and Enforcement Counsel and General Counsel to implement and carry out this program. The Associate Administrator and General Counsel will maintain operational control for this program through the Office of Enforcement Counsel.

One significant step toward the implementation of this program will be the recruitment by the Associate Administrator and General Counsel of experienced criminal investigators to assist in Regional case development. 1/ However, unlike other aspects of the Agency's enforcement program, which have been delegated in significant measure to the Regional offices, management of this investigative staff, and of the Agency's criminal enforcement program generally, will be centralized at EPA Headquarters. Regional legal and technical staffs will remain, as in the past, indispensable players in the overall criminal case development process. However, the particular sensitivity of criminal

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1/ The FY 1982 and FY 1983 budgets for the Agency set aside positions for professional criminal investigators in the Regional OLEC decision unit. These investigators will be 1811 series investigators whose exclusive function will be the investigation of potential criminal activity. They will not, at present, have law enforcement powers, i.e., the authority to make arrests or to carry weapons. They will, where circumstances warrant, be eligible for "annually based" premium pay--authorized by 5 U.S.C. §5545(c)(2)--as well as the special retirement benefits accorded to law enforcement officers under 5 U.S.C. §8336(c)(1).

enforcement generally, combined with the limited historical experience of the Agency, dictate a centralized management approach during the developmental stages of this program.

The Area Office: A central component of this management approach will be the development of "Area Offices" to house the majority of criminal investigators who are to be supervised by the Associate Enforcement Counsel for Criminal Enforcement, Office of Enforcement Counsel.

Under the "Area Office" approach, criminal investigator positions contained in the FY 1982 and FY 1983 budgets will become Headquarters rather than Regional resources, and will be part of the staff of the Criminal Enforcement Division. Recruitment of these investigators shall be accomplished as expeditiously as possible. Following selection by the Associate Administrator and General Counsel, investigators will be assigned to duty stations in four Area Offices in host Regions in Philadelphia, Atlanta, Chicago and Seattle.

These Area Offices will have inter-Regional investigative responsibilities. The Philadelphia Area Office will cover Regions I, II and III; Atlanta's Area Office will cover Regions IV and VI; Chicago's Area Office will cover Regions V and VII; and Seattle's Area Office will cover Regions VIII, IX and X.

Each Area Office will be supervised by a "Special-Agent-In-Charge" (SAIC); at least three additional investigators (Special Agents) will be assigned to each office. Within this staff, specific investigators will be assigned primary responsibility for investigations in non-host Regions to ensure an equitable distribution of investigative resources among all Regions. The SAIC will manage the day-to-day investigative activity of the unit, and will make initial decisions on investigative priorities among the potential cases within the office's geographical area of responsibility. The SAIC will also conduct the initial performance evaluations of the Special Agents in the Area Office.

From EPA Headquarters, the Criminal Enforcement Division will monitor the investigative activity in each of the Area Offices. The Associate Administrator and General Counsel shall have operational control of the Area Office investigative units and shall have the authority to allocate EPA's limited investigative resources among the Regions. Further, while day-to-day investigative decisions will be made in the Area Office under the supervision of an SAIC, the Associate Enforcement Counsel for Criminal Enforcment will have the right to direct the investigative activity of any Area Office in cases of national significance or particular sensitivity. The Associate Enforcement Counsel for Criminal Enforcement will also review and concur in performance evaluations of Area Office Special Agents and conduct the initial performance evaluations of SAICs.

A smaller criminal enforcement unit, also staffed by experienced criminal investigators, will be located at the National Enforcement Investigations Center in Denver, Colorado. The jurisdiction of this unit will, unlike Area Offices, be nationwide in scope, focusing on cases that span the jurisdiction of two or more Area Offices. Investigators assigned to this unit will also participate, where appropriate, in investigations in which the NEIC is providing technical support. The NEIC unit--like the Area Offices--will be managed on a day-to-day basis by an SAIC, who will report in turn to the Criminal Enforcement Division at EPA Headquarters.

An organizational chart reflecting the management of the the investigative component of the criminal enforcement program is included as Attachment A to this memorandum.

Advantages to the Area Office Management Approach:

A centrally-controlled criminal enforcement program structured around the "Area Office" concept presents several decided advantages over other management options that have been considered:

- It provides excellent insulation of the criminal investigative process, avoiding even the appearance of vulnerability to outside influences or pressures.

- It combines an adequate number of investigators in one office to respond to significant criminal activity.

- It places responsibility for first and second level supervision of the investigative process--and for performance evaluations of staff investigators--in the hands of personnel with demonstrated, substantial experience in criminal case development.

- It provides added flexibility in the shifting of investigative resources between Regions to respond in emergency situations.

- It parallels the management and organizational structures of criminal investigative units in other Federal agencies, and will assist EPA in inspiring the trust and confidence of outside law enforcement agencies--such as the FBI--that will play an important role in EPA's developing criminal enforcement program.

- It guarantees consistent treatment of administrative matters, such as overtime pay, promotions and performance evaluations, for all Agency investigators.

In sum, the centrally-controlled, "Area Office" approach will, I believe, provide a framework for the development of a professional investigative component.

Support for the Field Investigative Units: Basic administrative and logistical support for the Area Offices and the criminal enforcement unit at NEIC will be the primary responsibility of the host Regions in Philadelphia, Atlanta, Chicago and Seattle, and of the Director, NEIC. More specifically, the host Regions and the NEIC will provide the following day-to-day support functions:

(1) Processing and distribution of paychecks;
(2) Procurement requests;
(3) Time and attendance cards;
(4) Funds control;
(5) Property management;
(6) Secure office space with furniture;
(7) Utilities;
(8) Travel planning and voucher processing;
(9) Parking;
(10) Personnel processing.

The Associate Administrator and General Counsel will have responsibility for the following functions:

(1) Recruitment;
(2) Supervision and program direction;
(3) Development of performance standards;
(4) Performance appraisals;
(5) Review and approval of promotions and bonuses;
(6) Budgeting; 2/
(7) Travel approval;
(8) Overtime and premium pay approval;
(9) Allocation of investigative resources.

III. ROLES AND RELATIONSHIPS

The resources necessary to support criminal case development from the initiation of an investigation to the completion of a criminal prosecution can be extensive. In addition, criminal investigations and referrals must be coordinated with related enforcement or regulatory functions within the Agency. This memorandum describes the basic roles and relationships of key players in the criminal enforcement process. It will be followed by additional procedures where necessary to ensure early, effective coordination between the investigative staff and the legal and technical staffs of the affected Regional or Headquarters offices.

OLEC: The Enforcement Counsel Matters

The Associate Administrator and General Counsel will review and approve criminal referrals to the Justice Department. Through the Enforcement Counsel, the Associate Administrator and General Counsel will supervise and direct the activities of the Criminal Enforcement Division, and

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2/ Secretarial support for the Area Offices will be budgeted for, and provided by, the Office of Legal and Enforcement Counsel. In addition, I have asked my staff to coordinate with the Comptroller to analyze the resources necessary for effective support of all Agency investigators in matters such as travel and specialized investigative equipment.

will also ensure consistent and complementary use of civil and criminal enforcement options available to the Agency. In this regard, Enforcement Counsel attorneys will coordinate with the Criminal Enforcement Division during the review of Regional civil referrals that they feel may be appropriate for criminal sanctions.

OLEC: Criminal Enforcement Division

The Associate Enforcement Counsel for Criminal Enforcement, under the direction of the Enforcement Counsel, will monitor and supervise the Area Offices and the NEIC investigative unit in all investigative activity. The Criminal Enforcement Division will provide all legal support for Headquarters-managed investigations; review all criminal referrals to the Justice Department; expand Agency training programs for investigative and technical personnel; coordinate hazardous waste referrals to the Federal Bureau of Investigation; provide regular liaison with the Land and Natural Resources Division and local United States Attorneys; and formulate procedural and substantive guidance for the conduct of Agency investigations.

The Associate Enforcement Counsel for Criminal Enforcement will also assume primary responsibility for recruitment of the Agency's investigative staff; evaluation of the performance of this staff; monitoring of the use of premium pay (over-time pay) by Agency investigators; and recommending how investigative resources should be allocated among the Regions.

OLEC: The National Enforcement Investigations Center

Historically, the National Enforcement Investigations Center has provided strong technical support in a number of EPA criminal cases. In addition, NEIC has been a key player in the coordination of the Agency's ongoing and highly-successful training program for EPA technical personnel at the Federal Law Enforcement Training Center at Glynco, Georgia. Primary responsibility for technical support of criminal case development must be carried by the Regional program offices; however, the National Enforcement Investigations Center will continue to assume responsibility for technical support in Agency criminal investigations that have inter-Regional ramifications or that exceed the resources of the technical

staffs of individual Regions. Requests for this assistance will be processed in the same manner as any other request for the technical assistance of NEIC in an enforcement matter.

OLEC: General Counsel Matters

In criminal enforcement matters, as in other areas of Agency activity, the Associate Administrator for Legal and Enforcement Counsel and General Counsel, through the Deputy General Counsel, is responsible for interpreting laws and supporting regulations to ensure consistent and appropriate Agency positions on all legal issues. General Counsel attorneys will assist in resolving legal issues involving environmental statutes that arise during investigations, during the review of criminal referrals, or during the prosecution of criminal cases.

OLEC: The Regional Counsel

The SAIC will look to Regional Counsels for legal advice on EPA's statutes and regulations during the investigative process. To facilitate this consultation, a Regional attorney will be designated to work with the criminal investigative staff at the initiation of every investigation. 3/ This attorney will act as primary in-house counselor during the pre-referral investigative process--a role that is of particular importance due to the complexity of EPA's environmental statutes and the technical nature of the underlying regulations. Regional attorneys assigned to specific investigations will also coordinate the preparation of criminal referral packages.

3/ In cases of inter-Regional dimensions, the Regional Counsel responsible for the Federal District in which the referral is anticipated will generally be designated as lead Regional Counsel, unless the Associate Administrator and General Counsel makes another designation, for purposes of consultation during the investigative process, preparation of the referral package, and review and concurrence in the referral recommendation.

Regional Counsels will have a concurrence role on the initiation of all investigations, and on all criminal referrals to EPA Headquarters. This procedure has been adopted to ensure the legal sufficiency of all referrals, and to integrate the Regional offices into fundamental decisions on the exercise of the Agency's prosecutorial discretion.

As a general rule, Regional attorneys will not participate in the field investigation. This would not be an appropriate use of our limited and excellent legal staffs. Accordingly, while Agency investigators will be instructed to coordinate closely with Regional attorneys throughout the investigative process, the management of the investigation will be the primary responsibility of the Special Agent, acting under the immediate supervision of the SAIC.

When criminal investigations are being conducted by the Headquarters investigation unit, legal support will be provided by attorneys assigned to the Criminal Enforcement Division. However, this does not preclude the assignment of attorneys from the Headquarters civil litigation enforcement divisions or the Regional Counsel staffs to these cases on a selected basis.

The Regional Administrators:

Over a year ago, EPA adopted a policy removing Regional Administrators from a decision-making role in matters pertaining to the initiation, investigation, referral or closing of criminal cases. The primary purpose of this policy was to insulate these highly visible Agency officials from the pressures that inevitably arise with the initiation of a criminal investigation.

The Administrator is in agreement that the purpose behind this policy is a beneficial one. In addition, the policy is a natural corollary of the centralized management structure established by this memorandum. Finally, Regional Counsels, who will be working closely with the OLEC investigative staff, will be in an excellent position to reflect the Regional position on decisions to initiate or refer criminal cases. Accordingly, the policy will continue, and Regional Administrators will not be asked to assume the responsibility

of decisions on the scope and focus of investigative activity, including decisions to initiate, investigate, refer or close criminal cases.

It is important to note that the Regional Administrator, like any other Agency official, will be kept apprised of criminal enforcement matters where necessary to achieve effective coordination of criminal investigations and other Agency activity.4/ This will be the case, for example, during those rare occasions when a decision is made to pursue parallel civil/criminal enforcement proceedings, or during investigations of companies or individuals who are involved with the Agency on other, unrelated matters. Recognition of these situations will be the responsibility of the Regional Counsel, the OLEC investigative staff and the technical and legal personnel assigned to the investigation.

The Assistant Administrators

As the national program managers, the Assistant Administrators will work with the Office of Legal and Enforcement Counsel in the establishment of Agency-wide and media-specific criminal enforcement priorities. These priorities will provide the framework for decisions on the allocation of our limited investigative and technical resources in the criminal case development process.

As in other enforcement areas, Assistant Administrators are also responsible for providing technical support (including appropriate Headquarters support for investigations stemming from Headquarters-managed programs), and for providing resources in Regional program budgets to support criminal case development. The Office of Legal and Enforcement Counsel will continue to work closely with the Assistant Administrators in providing projections of anticipated resource needs, and to ensure adequate technical support for criminal case development.

4/ It goes without saying that information on criminal investigations is highly sensitive, and should be exchanged with restraint. In addition, matters occurring before the grand jury must be protected in accordance with the mandate of secrecy established by Rule 6(e) of the Federal Rules of Criminal Procedure. Internal Agency coordination on criminal matters must occur within these constraints.

The Regional Program Offices

Regional program offices will play an integral role in the criminal case development process, and in many cases will be asked to assign a technical person to be a member of the investigative team. Accordingly, prior to the initiation of most investigations, a request will be made to the Regional program office for technical assistance. In addition, in all investigations the Regional program office will be contacted to ensure that no administrative actions against the investigative target are pending or contemplated. While every effort must be made to support meritorious investigations falling within the criminal enforcement priorities of the Agency, it is recognized that each Regional program office acts under finite budget constraints. If resource difficulties are anticipated, this fact must be highlighted at the earliest stage, so that alternative sources of support (such as the NEIC) can be explored. To facilitate this early coordination, each Regional program office should designate a "contact" person for liaison on criminal enforcement activities. This liaison activity must, of course, be conducted with appropriate sensitivity to the need for confidentiality in criminal matters.

Because of the integral role of Regional technical personnel, the Office of Legal and Enforcement Counsel has made a special effort over the past year to provide basic training in criminal case development through the Federal Law Enforcement Training Center in Glynco, Georgia. Approximately 100 technical personnel from every Region (as well as the NEIC staff) have received this training. The need for Agency personnel to be sensitive to, and familiar with, the demanding constitutional and statutory safeguards surrounding criminal case development is self-evident. Accordingly, this training will continue. Regional program offices are asked to ensure that employees who participate in compliance inspections, or who are regularly involved in enforcement support activities, attend this training. It is crucial to the development of a professional program.

The Justice Department

Through its primary investigative Agency--the Federal Bureau of Investigation--the Justice Department will provide investigative support for the development of selected cases involving illegal hazardous waste activity, or

requiring full law enforcement powers (i.e., the authority to arrest, to carry weapons and to execute criminal search warrants).

Further, the Justice Department and local United States Attorneys will be available for advice during investigations, and will provide the prosecutorial support for all EPA criminal referrals. At present, Regional attorneys are working closely with the Justice Department on several important prosecutions. While the role of EPA attorneys in criminal litigation is necessarily more limited, every effort will be made to develop a significant role for EPA attorneys in the prosecution of criminal cases in conjunction with the Justice Department.

IV. REPORTING PROCEDURES

Standardized Agency forms are being developed to document witness interviews and investigative developments, as well as the opening and closing of investigations. These forms will be printed in quadruplicate, and will be disseminated for Agency-wide use following the hiring of investigators. One copy of each form will be set aside upon use during field investigations; these copies will be sent on a regular basis to the Criminal Enforcement Division, where a second, complete Agency file will be maintained on each investigation. The reports will provide one basic method of monitoring field investigative activity at EPA Headquarters. Special-Agents-In-Charge in each Area Office will be responsible for ensuring that reporting requirements are met by their investigative staffs. The Associate Enforcement Counsel for Criminal Enforcement will keep the Associate Administrator and General Counsel and the Enforcemenent Counsel informed, on a regular basis, of ongoing case development activity.

V. INITIATION AND CONDUCT OF AN INVESTIGATION

In Section III, above, the roles of various Agency offices were described. Section V is provided as a general description of the interaction of these offices during a routine investigation; of course, these general principles are flexible, and can change to accommodate the facts of specific cases.

An initial "lead" or allegation of potential criminal activity may come to the Agency from any of several sources, including State agencies, routine compliance inspections, disgruntled plant employees or citizen groups. Regardless of its source, it should be transmitted immediately to the Special-Agent-In-Charge of the responsible Area Office, who will assign a Special Agent to the lead for follow-up.

If the reliability of the lead is unclear, the Special Agent will conduct a preliminary inquiry solely to determine the credibility of the allegation, and to make an initial assessment of the need for more thorough investigation. This initial inquiry will be brief, and will involve no extensive commitment of resources or time. The sole purpose is to reach an initial determination on the need for a complete investigation.

If, in the opinion of the Special Agent and the Special-Agent-In-Charge, the lead warrants thorough investigation, the Special Agent will immediately contact the Regional Counsel in the Region where the investigation is to be conducted. The Regional Counsel will ensure that no civil enforcement action is pending or contemplated against the investigative target, and will assign an attorney to work with the investigator during the case development process. The Regional attorney and Special Agent will also contact the appropriate Regional program office to ensure that no administrative enforcement action is pending or contemplated. In addition, where the need for technical support during the investigation is contemplated, the Regional program office will be asked to assess the availability of technical resources, and when appropriate to designate a specific individual to work with the Special Agent during the course of the investigation. These activities will be carried out in consultation with the Criminal Enforcement Division.

If no pending administrative/civil enforcement actions exist involving the investigative target, a case file will be opened by the Special Agent and a copy of a case opening report sent immediately to the Criminal Enforcement Division, EPA Headquarters. While simultaneous administrative/civil and criminal enforcement actions are legally permissible, they will be the exception, rather than the rule. As a general rule, an administrative or civil proceeding will be held in abeyance pending the resolution of the criminal investigation. One exception to this general rule will be those situations in which emergency remedial response is mandated. In these situations, however, the criminal investigation will not be initiated without the prior approval of the appropriate Regional Counsel and the Enforcement Counsel. If there is disagreement concerning the need for a criminal investigation, the matter will be referred to the Associate Administrator and General Counsel for action.

The opening of a case file and submission of a case opening report does not commit the Agency to proceed with a criminal referral at the culmination of the investigation; nor does it reflect an Agency decision that criminal conduct has occurred, or that criminal sanctions are the exclusive or appropriate remedy. All enforcement options remain open, and should be considered, throughout the ensuing investigation and the formal referral to the Justice Department.

Management of the investigation will be the primary responsibility of the Special Agent, acting under the supervision of the Area Office Special-Agent-In-Charge. The Special Agent will be responsible for determining the basic investigative approach, and will take the lead in conducting interviews, assembling and reviewing records, planning and executing surveillances, coordinating with State, Federal or local law enforcement agencies, planning and executing searches, developing informants, and performing other investigative matters. A technical person will work with the Special Agent during those portions of an investigation requiring technical expertise.

In pursuing an investigation, the Special Agent will be responsible for completing all required reports, (interview summaries; reports of investigation etc.) and for coordination with the Criminal Enforcement Division as required prior to specific investigative developments. As a general operating practice, only one member of the investigative team will record, or document, any stage or development in the investigation.

In every investigation opened by the OLEC investigative staff, a Regional attorney will be assigned to work with the Special Agent managing the investigation. The Regional attorney will act as primary in-house counselor during the pre-referral investigative process. This role is of particular importance due to the complexity of EPA's environmental statutes, and the technical nature of the underlying regulations. In addition, legal issues frequently arise during the case development process concerning the use of statutory discovery devices; the pursuit of parallel criminal and civil proceedings; the confidentiality of business information; delegations of authority within the Agency; State statutes and enforcement proceedings; internal EPA policy and guidance; and elements of proof under EPA's environmental criminal provisions. It will be the responsibility of the Special Agent to consult with,

and seek the guidance of, the Regional attorney on these and similar issues throughout the pre-referral investigative process.

VI. REFERRAL PROCEDURES

At present, criminal referrals are recommended by Regional Counsels, reviewed within EPA Headquarters by the Criminal Enforcement Division and the Enforcement Counsel, approved by the Associate Administrator for Legal and Enforcement Counsel and General Counsel, and--upon approval --directed simultaneously to the Land and Natural Resources Division and the appropriate local United States Attorney. With the implementation of a centrally-controlled program structured around the Area Office concept, these procedures will be changed somewhat.

As in the past, criminal cases will be developed as thoroughly as possible prior to referral to the Justice Department. During this process, informal coordination between investigative staffs and the Justice Department and local United States Attorneys is encouraged. However, formal referral of criminal cases for further investigation by grand jury, or for prosecution, will require the prior approval of the Associate Administrator and General Counsel.

A referral recommendation will be developed when the independent field investigation has been exhausted, or when it can or should proceed no further without the initiation of a grand jury investigation by the Justice Department. At this point, the results of the investigation will be assembled in a referral package. The preparation of the overall referral package will be the responsibility of the Regional attorney assigned to the investigation. Drafting responsibilities will be shared by members of the investigative team.

The Special Agent will be responsible for summarizing for the report the factual evidence developed in the case. Much of this evidence will already be documented in interview summaries and investigative reports completed during the investigative process. Accordingly, the factual portion of

the report will be a concise summary of the case, followed by exhibits documenting the evidence that will be proved at trial.

The Regional attorney will be responsible for a thorough and coordinated presentation of the statutes and regulations underlying the referral. This section will be of crucial importance in determining whether a referral should be made. Once a referral is sent to the Justice Department, this section will be helpful in briefing the Justice Department and local United States Attorneys on the complexities of environmental laws and regulations, and should assist in minimizing delays in prosecutorial support that result from a lack of familiarity with environmental statutes.

The technical person assigned to the case will be responsible for presenting the technical portion of the package, including a description of the violating facility, technical evidence acquired during the investigation, and a statement of environmental impact.

The present referral package format will continue in use unless changed by the Associate Administrator and General Counsel.

Once the package is prepared, it will be reviewed by the Special-Agent-In-Charge and the Regional Counsel, who will act as joint signatories. Technical portions of the package will also be reviewed by the Regional or Headquarters program office, or the NEIC--depending on the source of technical support. During this technical review, the availability of technical resources to support litigation should also be reviewed and specifically confirmed by the appropriate technical office.

Following completion of the referral package and concurrence in the referral recommendation by the Special-Agent-In-Charge and the Regional Counsel, three copies of the referral package and all exhibits should be directed to the Associate Enforcement Counsel for Criminal Enforcement, Criminal Enforcement Division (EN-329); U.S. Environmental Protection Agency; 401 M St. S.W.; Washington, D.C. 20460.

No copies of the referral package will be sent to the local United States Attorney or the Justice Department until Headquarters has reviewed the referral and the Associate Administrator and General Counsel has approved the referral.

If either the Special-Agent-In-Charge or the Regional Counsel believe the referral should not be made, that official should include a statement of the reasons underlying this position and make an alternative recommendation (i.e., close out investigation; change to civil referral; change to administrative action etc.). The package will nevertheless be directed to the Criminal Enforcement Division for review; a final referral decision will be made by the Associate Administrator and General Counsel.

The Headquarters review will focus on the adequacy of case development; adherence to the criminal enforcement priorities of the Agency; legal issues of first impression; consistency with related program office policy; 5/ and general prosecutive merit. In cases involving particularly complex issues of law, the Criminal Enforcement Division will also consult with General Counsel attorneys. If, following this review process, the referral recommendation is accepted, referral packages will be directed simultaneously to the U.S. Attorney and to the Justice Department. Appropriate cover letters will be drafted by the Criminal Enforcement Division.

Situations may arise in which an emergency referral to the local United States Attorney is necessary. For example, immediate resort to the grand jury's compulsory process may be required in investigations of ongoing illegal activity, or when there are grounds to anticipate the flight of a witness. Such situations will be limited. When they arise, SAICs, following coordination with the Regional Counsel, will contact the Criminal Enforcement Division. Following consultation with the Associate Administrator and General Counsel, telephonic

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5/ Each Assistant Administrator is encouraged to appoint one individual to coordinate with the Criminal Enforcement Division on criminal enforcement matters. Subject to the normal constraints on dissemination of information concerning criminal cases, consultation will occur during the referral review process, to ensure that a specific case does not raise policy issues that should be brought to the attention of the Associate Administrator and General Counsel prior to the referral decision.

authorization for an emergency referral will be granted in appropriate cases. Copies of all materials transmitted to the local U.S. Attorney in connection with the emergency referral will then be directed immediately to the Criminal Enforcement Division and the Environmental Enforcement Section, Land and Natural Resources Division, Department of Justice.

VII. POST-REFERRAL PROCEDURES

Following referral to the Justice Department, control of the case shifts to the prosecutor assigned to the referral. Normally, the prosecutor will be a member of the local United States Attorney's office. In cases of national significance, or beyond the resources of the United States Attorney, the case may be managed by the Environmental Enforcement Section, Land and Natural Resources Division. In addition, the Land and Natural Resources Division is currently monitoring the progress of environmental criminal referrals throughout the country.

The Special Agent responsible for the investigation will act as primary liaison with the Justice Department or the local United States Attorney. This Special Agent will perform and coordinate additional investigation as required, and will normally be designated a special agent of the grand jury if a grand jury presentation or investigation is initiated.

In most cases, the EPA attorney assigned to work with the investigative staff in the development of the case will be responsible for fulfilling requests for legal assistance during the litigation of the case. Program office staff must be available to provide technical support as needed.

Most of EPA's criminal cases will be developed further through the grand jury following referral. Stringent, closely-monitored rules govern the conduct of grand jury investigations. Agency officials will be responsible for familiarizing themselves completely with these rules prior to participating

in a grand jury investigation. 6/

VIII. PLEA BARGAINING

Negotiations of settlements in criminal cases, i.e., plea bargaining, is the primary responsibility of the Justice Department. Following the referral of a criminal case, Agency officials should never enter into independent negotiation or discussion with the subject(s) of that referral without prior coordination and approval by the Justice Department attorney overseeing the case. It is, of course, entirely appropriate for Agency officials working on the criminal prosecution--including investigators, attorneys and technical personnel--to provide input, suggestions and advice during the negotiation process. Moreover, the Agency would expect to be consulted on any final settlement.

IX. REQUESTS FOR ASSISTANCE IN CRIMINAL INVESTIGATIONS CONDUCTED BY THE JUSTICE DEPARTMENT AND THE FBI

EPA may receive requests for technical, legal or investigative assistance in environmental criminal cases that are initiated independently by the Justice Department or the Federal Bureau of Investigation.

It will be the policy of EPA to provide support for these requests to the extent resources permit. Requests for legal or investigative assistance in criminal investigations from the Justice Department or the FBI will be reviewed in advance by the Criminal Enforcement Division, the Enforcement Counsel, and the Associate Administrator and General

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6/ Agency guidelines on grand jury investigations were circulated by OLEC on April 30, 1982. (See Memorandum, "Agency Guidelines for Participation in Grand Jury Investigations;" Associate Administrator for Legal and Enforcement Counsel and General Counsel to Assistant Administrators, Regional Administrators, Regional Counsels and Director, NEIC, 4/30/82). Agency officials should consult these guidelines prior to participation with the Justice Department in a grand jury investigation.

Counsel. Accordingly, regional offices that receive any such requests should forward the request to the Criminal Enforcement Division for final determination by the Associate Administrator and General Counsel.

Any request for technical assistance should be forwarded to the appropriate program office for determination.

X. SECURITY OF CRIMINAL INVESTIGATIONS

Information on criminal investigations must be provided with restraint, and only to persons who have a "need to know" the information. Additionally, special attention must be given to the care and custody of written materials pertaining to an investigation. This point is of particular importance when circulating a referral package for review. OLEC investigative units will be equipped with secure office space, filing cabinets, and evidence vaults. Similar security measures should be utilized by program office and Regional Counsel staff assigned to an investigation.

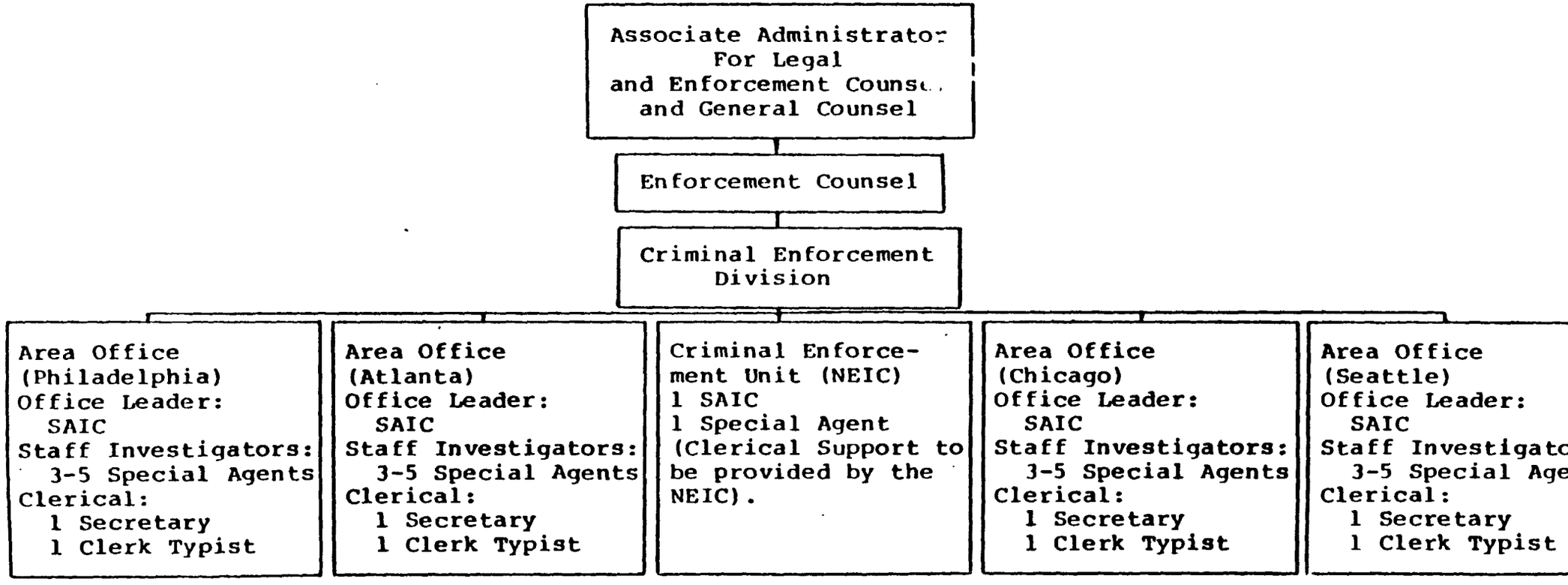
Active criminal investigations shall never be discussed with personnel outside of the Agency except as is necessary to pursue the investigation and to litigate the case. Accordingly, requests for information on active investigations from the news media should be politely but firmly denied. Moreover, Agency officials should never confirm the existence of an ongoing field or grand jury investigation in response to outside inquiries.

Finally, in the event of inquiries from Congress, my staff will work closely with the Congressional Liaison Office prior to releasing any information or making any public statements.

XI. RESERVATION

The policy and procedures set forth herein, and internal office procedures adopted pursuant hereto, are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or not in compliance with internal office procedures that may be adopted pursuant to these materials.

ATTACHMENT A
Organizational Chart
Investigative Component of the Criminal Enforcement Program



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

#16

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Regional Counsel Reporting Relationship

FROM: Alvin L. Alm
Deputy Administrator Designate

TO: Assistant Administrators
Associate Administrators
Regional Administrators
Regional Counsels

As part of an overall review of headquarters-regional matters, I have recently reviewed the relationship among the Regional Counsels, the Regional Administrators, the Office of General Counsel, and the Office of Enforcement Counsel, and have met with a number of you to discuss this topic. My central desire has been to reconcile the need for strong legal support to allow the Regional Administrators to succeed in their duties with the need for national consistency in interpreting and applying the laws under which the agency operates. The decisions which follow are an effort to meet both goals.

Accountability of the Regional Administrators for Enforcement. The Regional Administrator, rather than the Regional Counsel, will be fully accountable for enforcement activities and enforcement results. I believe this is preferable to the current system, under which accountability is divided between the Regional Administrator and the Regional Counsel. With my decisions today, the Regional Administrators now have control of the full range of resources needed for an effective regional enforcement program and thus are the appropriate focus of accountability for that function. The Assistant Administrator for Enforcement will have the same policy-setting, review, and oversight responsibilities as the other Assistant Administrators have for their regional counterparts.

Allowance holder for Regional Counsel resources. The Regional Administrator will be the allowance holder for Regional Counsel budget allocations. Administering these allowances in headquarters has proved cumbersome and confusing, with no offsetting benefits. The allowance holder shift will take effect October 1, 1983, for FY 1984.

Program direction of Regional Counsels. The Regional Administrator is the policy-maker for his region, and is the Regional Counsel's client. Accordingly, the Regional Counsel and his staff must be responsive to the policies and priorities established by his client, the Regional Administrator. This means that the activities of the Regional Counsel will be determined on a day-to-day basis by the Regional Administrator, and that the Regional Counsel is accountable for the quality, timeliness, and adequacy of the legal services provided to the Regional Administrator.

Selection and rating of Regional Counsels. Given the complexity of EPA's regulatory programs, and the possibility of confusion and damage from divergent legal approaches, I think we should continue to maintain a single national law office of which the Regional Counsels are parts. Accordingly, the lead responsibility for selecting the Regional Counsel and his staff shall remain with the General Counsel, with the concurrence of the Regional Administrator on the selection of the Regional Counsel. Similarly, the General Counsel shall review and rate the performance of the Regional Counsel, in consultation with the Assistant Administrator for Enforcement, and with the concurrence of the Regional Administrator. The General Counsel shall also have the lead in establishing rating and promotion criteria for attorneys in the Regional Counsel offices.

National Consistency. The General Counsel shall review pleadings filed in regional cases to the extent necessary to assure consistency in Agency legal arguments and statements on issues of national significance. The General Counsel should speak for EPA in interpreting the law. The Regional Counsels must of course deal with interpretive problems in carrying out their duty to advise the Regional Administrators. However, the Regional Counsels should consult with the Office of General Counsel to the extent necessary to assure consistency in Agency statements on legal issues.

These decisions will make the delivery of legal services more efficient Agency-wide, and will help support an effective, vigorous enforcement program. Additional directives will detail how these general decisions will be implemented.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OCT 19 1983 #17

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 13 1983

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 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.

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

pehalties 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.B. 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 14, 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.

#18

IMPLEMENTATION OF DIRECT REFERRALS FOR CIVIL CASES

EPA GENERAL ENFORCEMENT POLICY # GM - 18

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: DEC 1 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

NOV 28 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

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

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

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

I. BACKGROUND

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

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

II. PROCEDURES FOR CASES SUBJECT TO DIRECT REFERRAL

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

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

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

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

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

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

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

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

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

(e) significant or precedential legal or factual issues;

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

(g) lead Regional legal and technical personnel;

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

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

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

Department of Justice Responsibilities

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

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

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

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

Headquarters OECM Responsibilities

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

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

Settlements in Cases Subject to Direct Referral

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

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

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

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

III. CASES NOT SUBJECT TO DIRECT REFERRAL

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

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

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

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

IV. MEASURING THE EFFICACY OF THE DIRECT REFERRAL AGREEMENT

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

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

Attachment

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

OFFICE OF THE
ADMINISTRATOR

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

Dear Hank:

As a result of our meeting on Thursday, September 8, 1988 and the subsequent discussions of respective staffs, we are in agreement that, subject to the conditions set forth below, the classes of cases listed herein will be referred directly from EPA's Regional Offices to the Land and Natural Resources Division of the Department of Justice in Washington, D.C.

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

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

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

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

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

      (ii) all cases against minor industrial dischargers;

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

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

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

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

(i) cases involving the steel industry;

(ii) cases involving non-ferrous smelters;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Alvin L. Alm

Alvin L. Alm
Deputy Administrator

Approved:

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

#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)

#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.

PT.1-1
GM-21

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.

- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.

- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.

- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise, regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.[1]/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.

- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

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

Courtney M. Price
Assistant Administrator for
Enforcement and Compliance Monitoring

Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

PT. 1-2
GM-22

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS: IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Contents Page

Appendix (Con't)

Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:
  - a. the relevent measure of economic benefit for various types of violations,
  - b. the information needed,
  - c. where to get assistance in computing this figure and
  - d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence
- Cooperation/noncooperation through pre-settlement action.
- History of noncompliance.

- Ability to pay.

- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

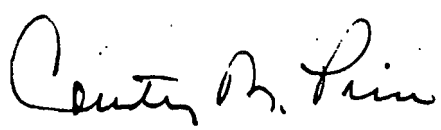
Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.



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Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the Methodology for Computing the Economic Benefit of Noncompliance. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Metholology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability of the events constituting the violation.
- Whether the violator took reasonable precautions against the events constituting the violation.
- Whether the violator knew or should have known of the hazards associated with the conduct.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied is also relevent in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the $\pm$ 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:4/

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).

- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.

- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

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NOV 21 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Guidance Concerning Compliance with the Jencks Act

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels
Associate Enforcement Counsels
Director, NEIC

Background

The Jencks Act (18 U.S.C. §3500) provides that in a federal criminal prosecution, after a witness called by the United States has testified on direct examination, the court, on motion of the defendant, shall order the United States to produce any "statement", as defined in the Act, in the possession of the United States that relates to the subject matter as to which the witness has testified. Any witness called by the United States is subject to the Jencks Act. Therefore, the "statements" of environmental engineers, technicians, laboratory personnel, criminal investigators, inspectors, and EPA lawyers may be ordered turned over to the defense if any of these individuals testifies for the Government. The need for a complete understanding of the requirements of the Jencks Act, by all EPA personnel, cannot be underestimated. The identity of government witnesses cannot be accurately predicted in advance, and the sanctions for losing, destroying or misplacing "Jencks Act material" can be severe.

The Act (the text of which is set forth in Appendix A) has generated a considerable amount of case law. Litigation has mainly concerned questions as to what is a "statement" and what sanctions should be imposed should the Government fail to produce Jencks Act material. This memorandum will discuss these points and the procedures which must be used to preserve the material.

Issue

What written materials will be considered "statements" subject to production to the defense during the course of criminal litigation?

Discussion

A "statement" is defined in part in 18 U.S.C. §3500(e) as (1) a written statement made by the witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness and recorded contemporaneously with the making of such oral statement.

"(e)(1) Statements": Under subsection (e)(1), a written statement can be a report written by an agent and adopted by the witness. That is, if an agent writes up a report and either reads it back to the witness or lets the witness read it and then has the witness, in writing or orally, approve what has been written, then the witness has "adopted" the statement and it becomes the witness's statement. This statement or report does not have to be written at the time of the interview of the witness. If an agent talks to a witness, types up a report a few days later and shows the report to the witness who approves it, it is an "(e)(1) statement" of the witness. A document written by a witness, whether signed or unsigned, is also a statement and, if turned over to an agent, must be retained as Jencks Act material.

Criminal investigators or agents intentionally obtaining statements from potential witnesses are not the only EPA personnel who may create "(e)(1) statements." If an EPA technician or inspector writes a report which a facility manager reads and certifies as being accurate, then this report may be considered the "statement" of the facility manager. The manager has "adopted" the report. Also, the notes or laboratory reports of a technician or inspector are "(e)(1) statements" as to that technician or inspector. If the technician or inspector testifies, then these notes or reports must be turned over to the defense if they relate to the subject matter of the direct testimony. It does not matter who records the statement or for what purpose; it remains Jencks Act material. EPA technical personnel must keep any notes that they have made of interviews with facility personnel (or other potential witnesses) as well as notes recording actions which may later be the subject of a criminal prosecution.

"(e)(2) Statements": Statements which are "(e)(2) statements" include not only tape recordings, but any notes which can be considered a "substantially verbatim recital" of a witness's oral statement. If an agent takes notes quoting, or writing down in a substantially verbatim form, the words of a witness and these notes are taken either at or near the time of the witness's oral statement, these notes become the witness's "(e)(2) statement". The agent taking the notes is viewed in the manner of a stenographer who accurately memorializes the witness's words. The witness does not have to approve or adopt the agent's notes. He does not have to even know that notes were being taken. If the agent has captured the witness's words on paper, then these words are the witness's statement even if he is unaware that he is making a statement.

Agents who testify in court become witnesses whose statements also must be turned over to the defense. Investigative reports, written interpretations or impressions of a case, and written analyses of case problems and issues may all be "statements" of an agent. For instance, a report of a witness interview may not be a witness's "(e)(1)" or "(e)(2)" statement because it does not directly quote the witness or capture the witness's words in a substantially verbatim form. However, it may be the "(e)(1) statement" of the agent who wrote the report. "The written report of the agent, however, is just as much a verbatim statement of the agent who prepares it as a written statement of an informer, incorporated in the report, is the statement of the informer." Holmes v. United States, 271 F.2d 655, 658 (4th Cir. 1959).

"Running resumes" of F.B.I. agents, detectives or EPA agents are "(e)(1) statements" of the agent and may be producible. If a Criminal Enforcement Division Special Agent testifies, it can be anticipated that his/her notes, reports to SAICs, case referral reports, and investigative reports will be producible if the direct testimony covers areas which are discussed in these previously written documents. United States v. Sink, 586 F.2d 1041 (5th Cir. 1978), cert. denied, 443 U.S. 912 (1979); Holmes v. United States, supra. Although it is incumbent upon the trial judge to separate out personal evaluations and "discussions of legal and practical problems of a prosecution" from the "running resumes" (or from any document which contains Jencks Act material), the writer who includes extraneous material always runs the risk of a judge deciding against excision. United States v. Pfingst, 377 F.2d 177, 195 (2d Cir.), cert. denied, 412 U.S. 941 (1973). Material in an agent's report which is sensitive or which might affect the security of EPA's investigative techniques is not exempt from Jencks Act requirements. West v. United States, 274 F.2d 885 (6th Cir. 1960), cert. denied, 365 U.S. 819 (1961).

Notes, reports, etc., in the hands of any EPA employee—including criminal investigators, lawyers and technical persons—are considered "in the possession of the government." Therefore, if an EPA employee fails to disclose Jencks Act material to the prosecutor, that failure will be held against the Government even though it is the agent rather than the prosecutor who has failed to preserve something. United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975); United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978); United States v. Williams, 604 F.2d 1102 (8th Cir. 1979). As soon as a case is opened by the Criminal Enforcement Division, the agent assigned to the case should inventory all existing notes and reports concerning potential government witnesses in the possession of, or known to, all Agency personnel involved in the case, and inform them of their obligation to retain such material. Copies of this Agency's guidance on the Jencks Act should also be distributed to such personnel.

Courts will require the Government to turn over any material which fits the "statement" definition if it relates to the subject matter of the witness's direct testimony. Any material which either is not a statement of the witness or does not relate to the subject matter of the witness's direct testimony will be excised from the document. A judge may not exercise his or her own judgment as to what material is important, helpful or necessary for the defense. If it is a statement that relates to the direct testimony, it must be turned over.

Courts have broadly interpreted the phrase "relates to the subject matter as to which the witness has testified," in Section (b) of the Act. However, courts have more restrictively defined "statements" under Section (e). Acknowledging that it is unfair to cross-examine a witness using material which does not represent what the witness in fact said, courts have excluded material that is really the agent's words or impressions rather than those of the witness. In Palermo v. United States, 360 U.S. 343 (1959), the Court affirmed the denial of the production of a 600-word memorandum in which the Government agent summarized a three and a half hour interrogation of a witness who testified at trial. In one of the first Supreme Court decisions discussing the "statement" definition of the Jencks Act, the Court attempted to clarify what courts may exclude:

> [S]ummaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.

360 U.S. at 353. If a court describes an agent's notes as "rough", "random" or "brief", it will be signaling its finding that the notes are not "statements" as to the witness referred to in the notes.

To determine whether notes accurately reflect a witness's words, courts will consider the extent to which the writing conforms to the witness's language (e.g., "I dumped it because I thought the load was hot."); 1/ the number of pages of notes in relation to the length of the interview (e.g., one page of notes after three hours of interviewing); 2/ the lapse of time between the interview and its transcription; 3/ the appearance of the substance of the witness's remarks (i.e., are they in quotation marks? in sentence form?); 4/ and the presence of comments or ideas of the interviewer. 5/

The Jencks Act clearly gives the court the authority to determine, after an in camera inspection, what is Jencks Act material and what is not. It is not the Government's function to excise material; rather, any notes or memoranda which conceivably could be viewed as Jencks Act material should be provided to the prosecutor for review by the courts.

1/ Palermo v. United States, supra.

2/ United States v. Judon, 581 F.2d 553 (5th Cir. 1978); United States v. Durham, 587 F.2d 799 (5th Cir. 1979); Goldberg v. United States, 425 U.S. 94 (1976); Palermo v. United States, supra.

3/ Campbell v. United States, 365 U.S. 85 (1961).

4/ United States v. Muckenstrum, 515 F.2d 568 (5th Cir.), cert. denied, 423 U.S. 1032 (1975); United States v. Pennett, 496 F.2d 293 (10th Cir. 1974); United States v. Hines, 455 F.2d 1317 (D.C. Cir. 1971).

5/ United States v. Pfingst, supra.

Issue

When must Jencks Act material be made available to the defense and what are the sanctions if it is not made available?

Discussion

If a prosecutor decides to follow strictly the letter of the law, he or she need not turn over Jencks Act material until after the witness has testified at trial for the Government. However, because of the delay which this creates (while the defense reviews the material), most courts expect that a prosecutor will agree to turn over Jencks Act material either at the start of each day of trial or before the witness testifies on direct examination. Some prosecutors even allow the defense to examine the material before trial.

As in any area of the law, different courts interpret the Jencks Act differently. Prosecutors who are aware of previous rulings by a court on Jencks Act issues will conform their practice accordingly. Therefore, what one prosecutor considers Jencks Act material, another may not. EPA personnel must accommodate themselves to the practice of the prosecutor within their jurisdiction.

The Congressional purpose of the Act is to allow the defendant to have, for impeachment purposes, "relevant and competent statements of a governmental witness in possession of the Government touching the events or activities as to which the witness has testified at trial." Campbell v. United States, supra, 365 U.S. at 92. If the defense's ability to cross-examine is impeded by the deliberate or inadvertent loss, by the Government, of Jencks Act material, the Court may decide not to allow the witness to testify at all or to strike the witness's entire testimony. Of course, the effect of completely excluding the testimony of a Government witness may be significant.

Although the Act does not require the automatic imposition of sanctions for failure to preserve potential Jencks Act material, courts have warned law enforcement agencies of their duty to promulgate procedures to ensure preservation.

> [S]anctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced, and attempted in good faith to follow rigorous and systematic procedures designated to preserve all discoverable evidence gathered in the course of a criminal investigation. The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse.

United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971) (footnote omitted)(emphasis in original).

In light of the sanctions that can flow from a failure to preserve Jencks Act material, as well as Government's inherent responsibility to preserve discoverable evidence, it is incumbent upon EPA to develop procedures that will ensure this end.

Issue

What procedures should be implemented throughout the Agency to preserve Jencks Act material?

Discussion

As a general rule, after a matter is referred to the Criminal Enforcement Division for investigation, investigators from that Division will be responsible for reports written to document factual developments in ongoing cases. This would include, for example, interview write-ups, surveillance reports, documentation of the receipt of physical evidence, etc. One clear exception to this general rule will be Agency technical personnel who will continue to draft reports documenting sampling data and analysis, chain of custody information, etc.

If more than one investigator is involved in an investigation, only one report should be written documenting a specific event unless circumstances mandate otherwise.

All work notes should be retained by Agency personnel working on the criminal investigation until the final disposition of the case. This potential Jencks Act material must be kept in secured files when not in immediate use. Any notes taken at the time of the event, or at the time of the interview, as well as reports composed from the notes must be retained. Intermediate drafts need not be retained.

Investigative reports and technical reports should not include the writer's subjective thoughts, impressions or general opinions concerning a case. If it is thought necessary to reduce to writing information that is not strictly factual, this should be kept separately in secured files. It is more likely that material which is arguably not producible under the Act will be withheld from the defense if it is kept apart from material which is clearly Jencks Act material. Rather than disputing in court which portions of reports should be excised, everything within a report should be relevant and objective material. Extraneous material which does not directly relate to a case should not be included in investigative reports on that case.

APPENDIX A

§3500 Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion hereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interest interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

#24

NOV 22 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Working Principles Underlying EPA's National Compliance/Enforcement Programs

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

TO: Assistant Administrators
Associate Administrators
Regional Administrators, Regions I - X

The working principles for EPA's national compliance/enforcement programs set out below were developed by the Compliance/Enforcement Task Group and are intended to establish the framework and philosophy for the compliance and enforcement programs administered by EPA.

I believe it is important for us to strive to apply the principles set out below in managing the compliance/enforcement components of the Agency's programs. To that end, please make sure Office Directors and staff members with responsibilities in these areas receive copies of this memorandum so they that can use it as a guide in making choices for managing these programs.

I expect these principles to be dynamic and to change as we proceed to implement the program specific compliance and enforcement strategies the Task Group has developed.

The fundamental objective of EPA's national compliance/enforcement program administered by EPA and the States is to protect public health and the environment through a comprehensive effort to foster full and expeditious compliance with environmental laws and regulations. Different components of the national program are designed to achieve this goal through --

-- setting program goals and priorities to achieve the environmental benefits;

-- identifying the regulated community to understand the scope of the problem;

-- promoting compliance by the regulated community;

-- monitoring compliance by the regulated community to reliably detect violations of laws and regulations and establish program priorities;

-- responding appropriately to detected violations;

-- working with State and local governments to achieve national compliance and enforcement goals;

-- continually evaluating our progress in meeting our goals and objectives in each area of the compliance/enforcement program and refining our efforts accordingly;

-- building public confidence in our compliance and enforcement efforts.

Each of these components will be discussed in more detail below.

I. Setting Program Goals and Priorities to Achieve Environmental Benefits

- Federal and State governments must share responsibility for developing and implementing national compliance and enforcement strategies.

- EPA's national compliance and enforcement programs will be based on realistic and attainable goals, considering the size of the regulated community and the scope of the requirements governing its activities.

- Although statutes enforced by EPA may require strict compliance in all cases, EPA must establish priorities for enforcement since it is unlikely that EPA could respond with the same level of effort to each detected violation. Individual programs may establish both long term and short term goals to achieve full, expeditious compliance. In establishing and pursuing these specific goals, national strategies for compliance/enforcement activities will base priorities and targets on the following factors:

-- Likelihood that a violation by a source or category of sources will result in pollution presenting a significant risk to human health and the environment (based on, for example, the pollutant(s) at issue, the type and size of the source, or the likely scope of exposure to the excess pollution).

-- Likelihood that a source or category of sources will violate environmental laws or regulations (based on, for example, their sophistication or compliance history, the newness or complexity of the regulations, or the economic incentives for noncompliance).

-- Likelihood that an action will contribute significantly toward assuring a credible enforcement presence (for example, if the action is precedential in nature, highly visible to the regulated community, or necessary to ensure that some attention is paid to a particular compliance/ enforcement area.)

- National programs must achieve a balance between those compliance and enforcement actions which most clearly result in significant, immediate environmental benefit and those designed primarily to support a credible enforcement presence (and the environmental benefits which that presence produces less directly).

- The type of compliance or enforcement action chosen in individual cases will depend on the priority or relative importance of the action in light of the considerations listed above and the amount of resources necessary to pursue a given type of action relative to other possible actions.

II. Identifying the Regulated Community to Understand the Scope of the Problem

- To the extent practicable, EPA's national compliance and enforcement programs must be able to identify parties subject to environmental laws and regulations according to the types of requirements governing their activities and the types of activities they perform. Such "inventories" are useful to establish priorities and select targets across a program. This identification also aids in evaluating the effectiveness of compliance/enforcement programs.

- EPA will pursue all available, cost-effective means for identifying the regulated community, including in-house investigators and regulatory mechanisms.

- Priority will be given to identifying those parties in the regulated community who, if in noncompliance, would have a significant impact on the environment, public health or the credibility of the enforcement program.

III. Promoting Compliance by the Regulated Community

- Compliance promotion entails ensuring that the regulated community has adequate information, tools, and techniques available to achieve compliance and the incentive to use them. Compliance promotion includes:

  -- clarifying responsibilities for the regulated community;

  -- providing technical information on compliance techniques; and,

  -- encouraging voluntary efforts to achieve, maintain and monitor compliance.

- EPA will promote compliance by resolving issues affecting permit issuance and by issuing required permits in a timely manner. Permits should clearly state the compliance responsibilities of the permittee.

- Regulated parties bear responsibility for ensuring their own compliance. Nevertheless, because preventing violations is more beneficial for environmental protection than remedying the violations after they occur, national programs should provide for compliance promotion activity.

- A credible enforcement presence based on credible enforcement responses is a prerequisite to ensure that regulated parties have incentive to follow through on compliance promotion efforts.

- Discretion and flexibility should generally be given to an individual regulated party for deciding on the best ways it can prevent noncompliance.

- Compliance promotion activities should focus on making accessible meaningful information on compliance techniques and systems for monitoring compliance and correcting noncompliance.

- Compliance promotion activities should focus most seriously on situations which involve newly-imposed or complicated requirements or inexperienced, unsophisticated parties.

IV. Monitoring Compliance: Collecting and Assessing Compliance Information

- Objectives of compliance monitoring by the Federal government and States include:

  -- collecting evidence necessary to support enforcement actions regarding identified violations;

  -- reviewing source compliance to identify potential violations;

  -- 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; and,

  -- helping to establish an enforcement presence.

- Priorities for compliance monitoring activities should be set by EPA to achieve the objectives set out above. Factors to consider in setting priorities among these objectives and targeting compliance monitoring activities should include:

  -- the seriousness of violations which have been identified in the past for a particular source or category of sources;

  -- the extent to which compliance patterns already have been identified;

  -- the extent of source review needed to establish a credible enforcement presence; and,

  -- the criteria listed in Part I above.

- Methods for compliance monitoring will depend upon the objective of the monitoring activity and the resource requirements associated with the activity. Thus, evidence collection efforts to support enforcement actions will employ more resource-intensive methodologies (e.g., on-site inspections by expert, in-house criminal investigators) than will surveys of regulated community compliance patterns (which can rely more easily on contractors or self-monitoring reports).

- Regulated parties should keep track of their own compliance status using any required methods, as well as whatever other means they deem reasonable to provide themselves with reliable information.

- Where reliable, cost-effective and authorized by law, national programs will rely on enforceable self-reporting requirements as a primary screening tool for identifying potential violations.

- Because of the importance of self-reporting to the Agency's task of compliance monitoring, national programs will place high priority upon enforcement actions, including criminal prosecutions, in cases of deliberate distortion and/or falsification of self-reporting data.

- National programs should use any available legal authorities to collect useful information, but must ensure that information requests are precisely formed to avoid imposing any unnecessary information collection requirements and should carefully consider the extent to which the requests may inhibit the regulated party's own voluntary self-compliance efforts.

- All information requests not qualifying under the enforcement exemption must conform to the requirements of the Paperwork Reduction Act.

- Programs should identify and use, where cost-effective, all sources of information concerning violations (including citizen groups and outside regulatory and law enforcement agencies).

- Clear protocols should be identified to provide adequate assurance of the quality and reliability of compliance monitoring data in light of the purpose for which the data will be used.

- Compliance monitoring activity must, where feasible, assess regulated parties' success at <u>maintaining compliance</u> as well as at achieving it initially.

- To the extent feasible, national programs will track compliance patterns across all segments of the regulated community in order to target enforcement intiatives by identifying the relative seriousness of problem areas. Where not presently feasible, national programs should attempt to identify and pursue ways for attaining that capability.

V. Responding to Violations (Enforcement Responses)

- Federal or State officials, as appropriate, will evaluate each detected violation and make a conscious decision as to the appropriate enforcement response.

- Enforcement responses to violations will seek to balance the following goals:

  -- Correction of the violation as quickly as practicable in light of governing law, technological feasibility and ongoing environmental risk.

  -- Deterrence of future violations by the same party or other parties.

  -- Equitable treatment of the regulated community through a uniform approach to selecting enforcement responses and by taking responses which remove significant benefits the violator may gain through noncompliance.

  -- Punishment of serious, willful wrong-doing by imposition of criminal sanctions.

  -- Effective use of enforcement resources through the least resource-intensive enforcement response which still permits achievement of the other national enforcement goals.

- Priorities for targeting violations for enforcement responses should be based on criteria listed in Part I. Government officials may decide according to these criteria that a technical violation merits such low priority that no further response action need be considered.

- The severity of the response necessary to pursue these national enforcement goals will depend upon the following considerations:

  -- the range of responses authorized by law;

  -- the actual or potential harm to public health and the environment presented by the violation;

-- other significant public expense or injury caused by the violation;

-- economic benefit accruing to the violator;

-- the violator's efforts to identify, report, and correct the violation independent of the enforcement response;

-- the violator's previous history of compliance/non-compliance;

-- the culpability of the violator;

-- the sufficiency of evidence demonstrating a violation linked to the party in question;

-- the likelihood that a given response may establish good or bad precedent; and,

-- the importance of the action to maintaining a credible enforcement presence.

- These same factors, as well as a violator's ability to pay, should be considered in deciding whether to pursue civil penalties, and for what amount. The economic benefit to a violator from noncompliance is a particularly important objective to consider in deciding on an appropriate amount. Civil penalty actions are appropriate, even if the underlying violation has been corrected, if necessary to establish adequate deterrence against future violations or to restore equity relative to other members of the regulated community which have been in compliance.

- The form of the enforcement response (e.g., administrative vs. judicial) is not important per se, as long as the response can achieve desired results. Programs will chose responses based on the facts of the case and the factors set out above. Each available enforcement tool (including judicial litigation) must be used often enough to establish the credibility of that tool and provide real incentives for regulated parties to pursue solutions in the context less drastic measures (e.g., negotiations).

- If a lower level enforcement response does not result in achievement of the objectives for that response, EPA will escalate its enforcement response accordingly.

- Negotiated resolution of enforcement actions should be viewed as a cost-effective way of responding to violations as long as the response still achieves national enforcement goals. However, a credible threat of litigation or enforceable administrative action is necessary for an effective negotiation program.

- Negotiations and other response activity must adhere to definitive, government-established schedules to ensure expeditious completion and remedy. Government officials must

  -- apprise the alleged violator of the violation quickly so as to facilitate its correction;

  -- develop prior to the start of negotiations a common and clear understanding of the desired remedy or relief; and,

  -- in litigative enforcement matters, communicate through the attorneys representing each side.

- Government officials must avoid taking any actions or making representations which may foreclose possible future enforcement actions in a case, particularly in the event that new information subsequently comes to light.

- To preserve a credible enforcement presence, the use of exemptions or relaxation of operative permit provisions instead of enforcement responses as a means of addressing committed violations should be avoided unless exemptions or revisions are truly warranted (i.e., the source qualifies for exemption through straightforward application of criteria).

- When Agency officials have determined that a response to a violation should be developed as a potential criminal enforcement action, civil proceedings typically should await completion of the criminal action unless injunctive relief is necessary.

- Unless expressly exempted, non-profit institutions, including government entities, have the same compliance responsibilities as entities operated for profit. The factors set out below, in light of the seriousness of the violations, may affect the length of the violator's compliance schedule or the amount of penalties imposed, but not the institution's ultimate obligation to comply. Nevertheless, because of the unique characteristics of these institutions, selection of responses to violations by these institutions must carefully consider:

  -- the availability of funds to the institution to meet the costs of compliance;

  -- the extent, if any, to which economic benefit from non-compliance may have motivated the institution or have disadvantaged complying competitors; and,

  -- the ability of the institution to pay penalties.

- EPA will respond to violations by Federal facilities through the mechanisms provided by Executive Order 12088.

- Enforcement responses to violations once initiated, must be completed expeditiously and monitoring must be undertaken to ensure that affected parties comply with the requirements which the responses impose.

- Administrative or judicial orders should be drafted in a manner which facilitates their enforcement. Requirements and responsibilities should be clear and capable of being enforced.

- Significant violations of requirements imposed in prior enforcement responses to address comparable violations merit responses of their own which are at least as severe as the prior response. Such a response should include, in appropriate cases, actions for civil or criminal contempt. Responses which are inadequate to bring continuing violations to a halt can undermine the establishment of a credible enforcement presence.

VI. Coordinating Federal and State Activities

- Most environmental protection statutes provide States with the lead role in compliance and enforcement activities once EPA has authorized the State program.

- EPA retains the lead compliance and enforcement role for statutory programs requiring national administration (e.g., programs which regulate nationally-marketed products). Otherwise, it has been EPA policy to transfer the administration of such compliance and enforcement programs to State and local governments in a manner consistent with applicable statutory requirements.

- EPA and the States must work together to develop national and local strategies and to plan their respective roles in implementing these strategies. Roles may vary according to the programs and States involved, but in all cases should be articulated clearly at the planning stage of strategy implementation.

- EPA responsibilities include formulating national compliance and enforcement goals and priorities; development of necessary policy, guidance, and procedures; overseeing State performance; providing grants, technical assistance, and training to States; and pursuing compliance and enforcement action directly for nationally-administered programs and for other cases where necessary to ensure successful implementation of national strategies. Such activities should reflect early and continuing consultation with States.

- State responsibilities include direct implementation of authorized compliance and enforcement programs consistent with national strategy and policy; putting federal grants and technical assistance to effective use; contributing meaningfully to the development of national policy and strategy; and providing EPA with information necessary to oversee and evaluate State activities and national program implementation.

- Oversight of State activities by EPA is undertaken to ensure that compliance/enforcement responsibilities are being carried out by the States. Moreover, oversight is a tool EPA uses to improve both Federal and State enforcement programs by identifying problem areas and aiding States in resolving problems identified.

- EPA must base its oversight of State compliance and enforcement activities according to clearly articulated measures of State success in pursuing the goals of the national compliance/enforcement program.

- States must provide EPA with the information necessary to perform oversight. EPA must define information needs clearly and uniformly, limit information gathering to that necessary to oversee State activities and national program implementation, and avoid frequent changes to the scope of reporting requirements, to the extent feasible.

- EPA will take the following action (or a combination of these actions) when oversight identifies an ineffective state compliance and enforcement program (depending on the degree of ineffectiveness)

  -- provide more training for State employees or technical, or on-site administrative assistance; or

  -- implement more detailed reporting requirements;

  -- take a more active role in compliance and enforcement actions;

  -- withdraw State program authorization (but only in the most extreme cases).

  EPA will consider providing additional funds to help States improve effectiveness if it is clear that inadequate funding is causing the ineffectiveness, that additional funding at the State level is not readily available, and that Federal funds are available.

- The level of scrutiny EPA gives to individual State actions will depend on:

  -- demonstrated State success in implementing a given program, i.e., achieving acceptable rates of compliance;

  -- the extent to which the State requests direct involvement;

  -- the environmental importance of a given individual action; and,

  -- the minimum level necessary to ensure the integrity of the national enforcement effort.

- Where legal authority exists, States generally will have primary responsibility for monitoring compliance and pursuing responses to identified violations. However, EPA has ultimate responsibility for ensuring effective national enforcement of environmental laws. Therefore, EPA will take an active role in matters in which the State is unable or unwilling to act, adequately or expeditiously, or if the matter is one which has national implications or precedential impact. EPA will exercise this authority based upon clear criteria and will assure proper coordination with State programs.

- States will have flexibility in choosing appropriate enforcement responses, which need not be identical to the response which EPA might have chosen. Nevertheless, EPA will take its own action, despite ongoing State action, if EPA finds that State response to a significant violation is not expeditious or is clearly inappropriate or inadequate to achieve the relevant goals of an enforcement response (as listed in Section V).

- EPA will not expect States to take enforcement actions which are more severe or expeditious than EPA itself would take in practice under comparable authorities.

- Both EPA and the States are responsible for keeping each other informed on significant ongoing compliance and enforcement activity of interest to the other to promote proper coordination, mutually-supportive action, and effective use of resources at both levels of government.

VII. Implementing, Evaluating and Refining Strategies

- Regional offices and State agencies, in consultation with each other, must develop their own plans for implementing national program strategies.

- Each national program must track compliance and enforcement activity implementing its national strategy in order to

  -- evaluate the success of the program in achieving the strategies goals;

  -- maintain understanding of patterns of compliance and noncompliance in the regulated community.

- EPA will pursue the establishment of national tracking systems which can facilitate strategy evaluation and refinement by indicating, at a minimum:

  -- compliance rates and patterns for significant sources;

  -- the extent of compliance review activity (i.e., inspections, self-monitoring reports, etc.);

  -- the extent of complete and expeditious implementation of enforcement responses.

- Periodic evaluation of strategy implementation on the national, Regional, and State level will be undertaken within EPA to influence the annual budget process and operating guidance.

- Periodic refinement of strategies will take place based on formal evaluation results and other relevant information. Refinement can focus both on new ways to achieve the original goals of the program or on achieving new goals established for the refined strategy.

VIII. Building Public Confidence in EPA's Enforcement and Compliance Programs

- A credible enforcement program is the foundation of an effective national strategy which ensures that regulated parties have the requisite incentive to achieve full and expeditous compliance. National programs must possess the following characteristics to promote establishment of a credible enforcement presence:

  -- Fairness. Oversight of the activities of regulated parties must be conducted in an unbiased manner. Enforcement responses must be commensurate with the seriousness of a violation, yet be flexible enough to account for extraordinary circumstances relevant to the violation. Violators should not benefit from their violations relative to parties which are in compliance.

-- Certainty. Compliance requirements must be defined with sufficient clarity and precision to communicate expected standards of behavior. The national programs must be effective in identifying significant violations and establish an adequate likelihood that any kind of violation can be detected. Responses to identified violations must be consistent, expeditious and follow these principles and specific national guidance.

-- Uniformity. EPA should follow a uniform view of which actions constitute a violation of a given legal requirement. EPA and States should employ reasonably similar treatment toward parties in comparable situations.

-- Openness. Final actions taken in the compliance and enforcement areas will be available for public scrutiny to the extent allowed by law and the extent to which the success of future enforcement activity is not jeopardized.

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.

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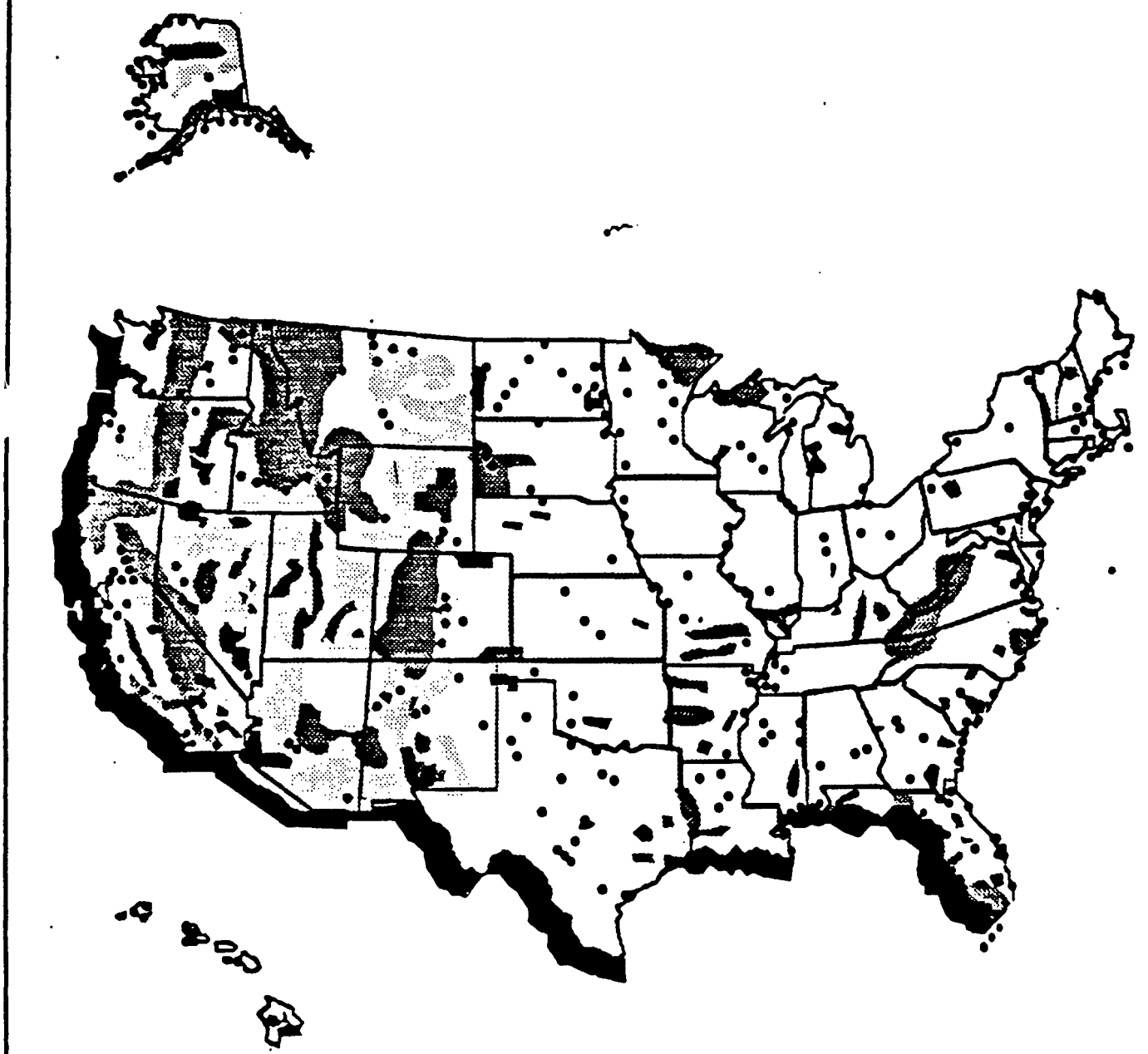
November 1988

#25

Federal Facilities Compliance Strategy



EPA

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 availiability 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. designing over-ght criteria for mely enforcement sponse, each prog-m will attempt to pture the following ncepts:	Yes	Yes	Yes	Yes	Yes	Yes--1/5/ 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.
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 ci cumstance

. "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 ch meets minimum al requirements, judicial referral initiated is 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 baed 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 specic 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 l 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[redacted] rule [redacted] signif. violations that EPA refers to State
Scope of Coverage: a minimum, signi- ant noncompliers to be addressed. ansions to larger verse to be con- ered 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

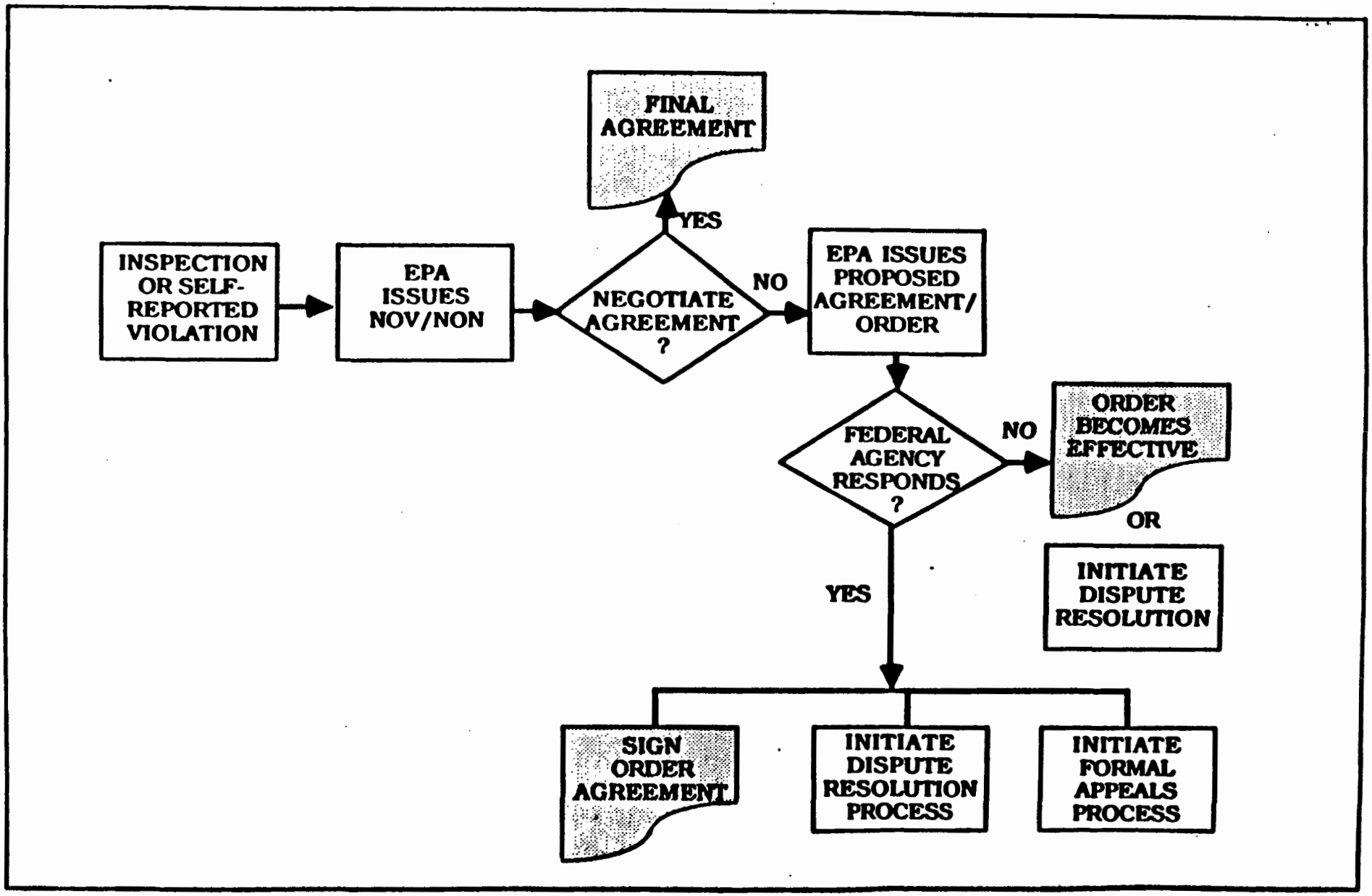
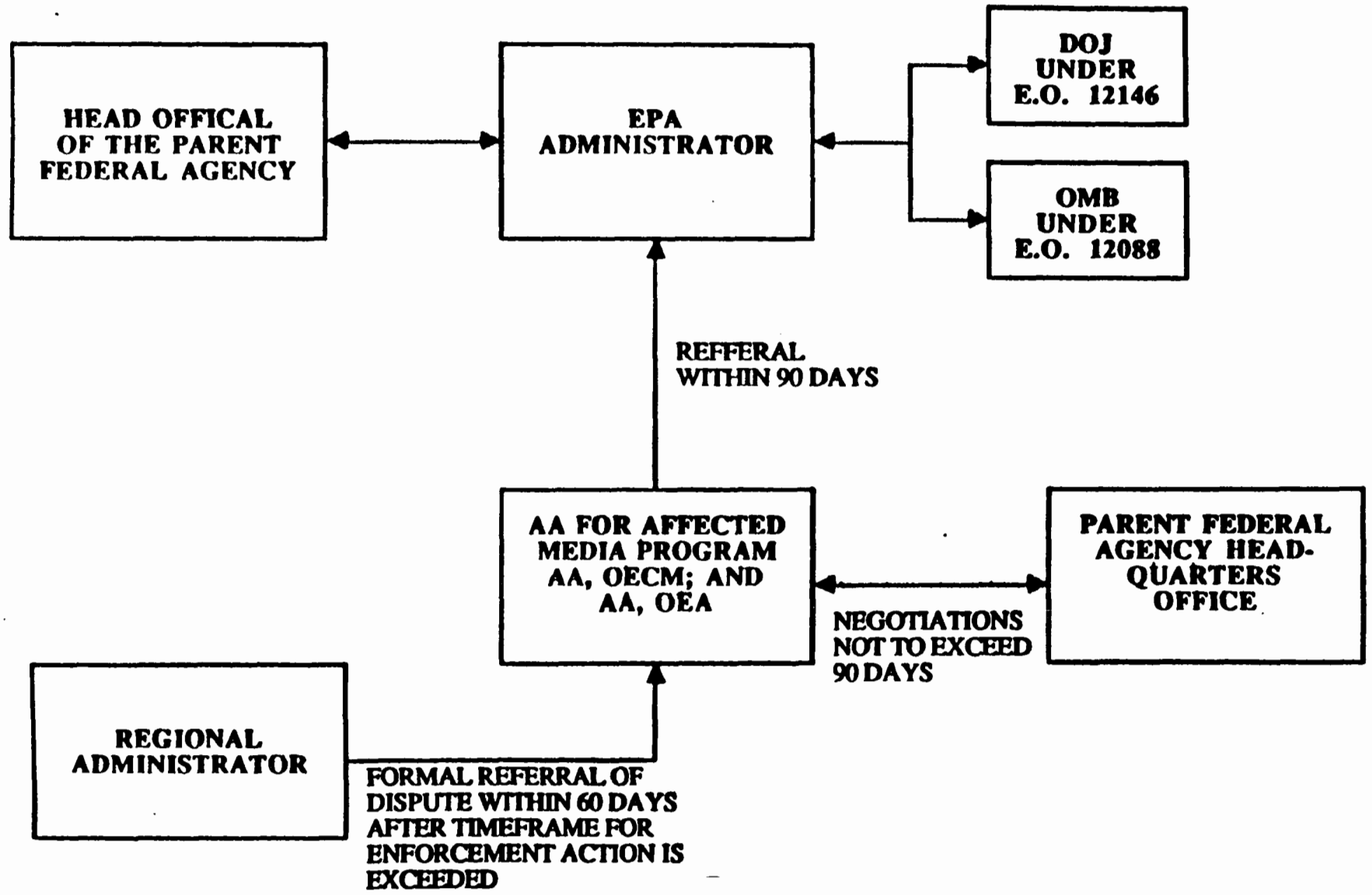


EXHIBIT VI-2
(Continued)

FEDERAL FACILITIES DISPUTE RESOLUTION PROCESS



EXHIB

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.	Except if pollution abatement is to be paid by the Federal facility for the furnished equipment.	PRIVATE PARTY
COCO(E):	Same as COCO, however, contractor may be furnished government equipment to manufacture a product or provide a service.		
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 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.

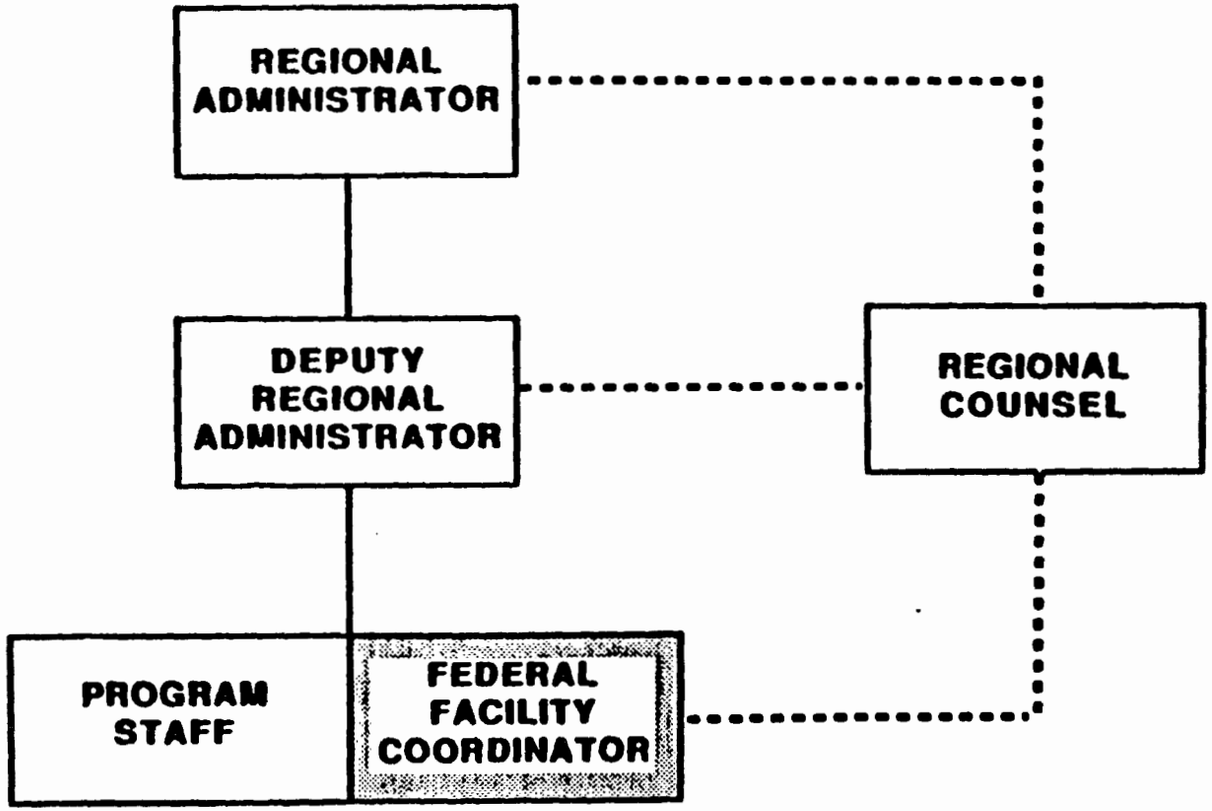
OECM also provides assistance and expertise in the use of alternative dispute resolution procedures for resolving compliance problems at Federal facilities.

B.4 Office of General Counsel

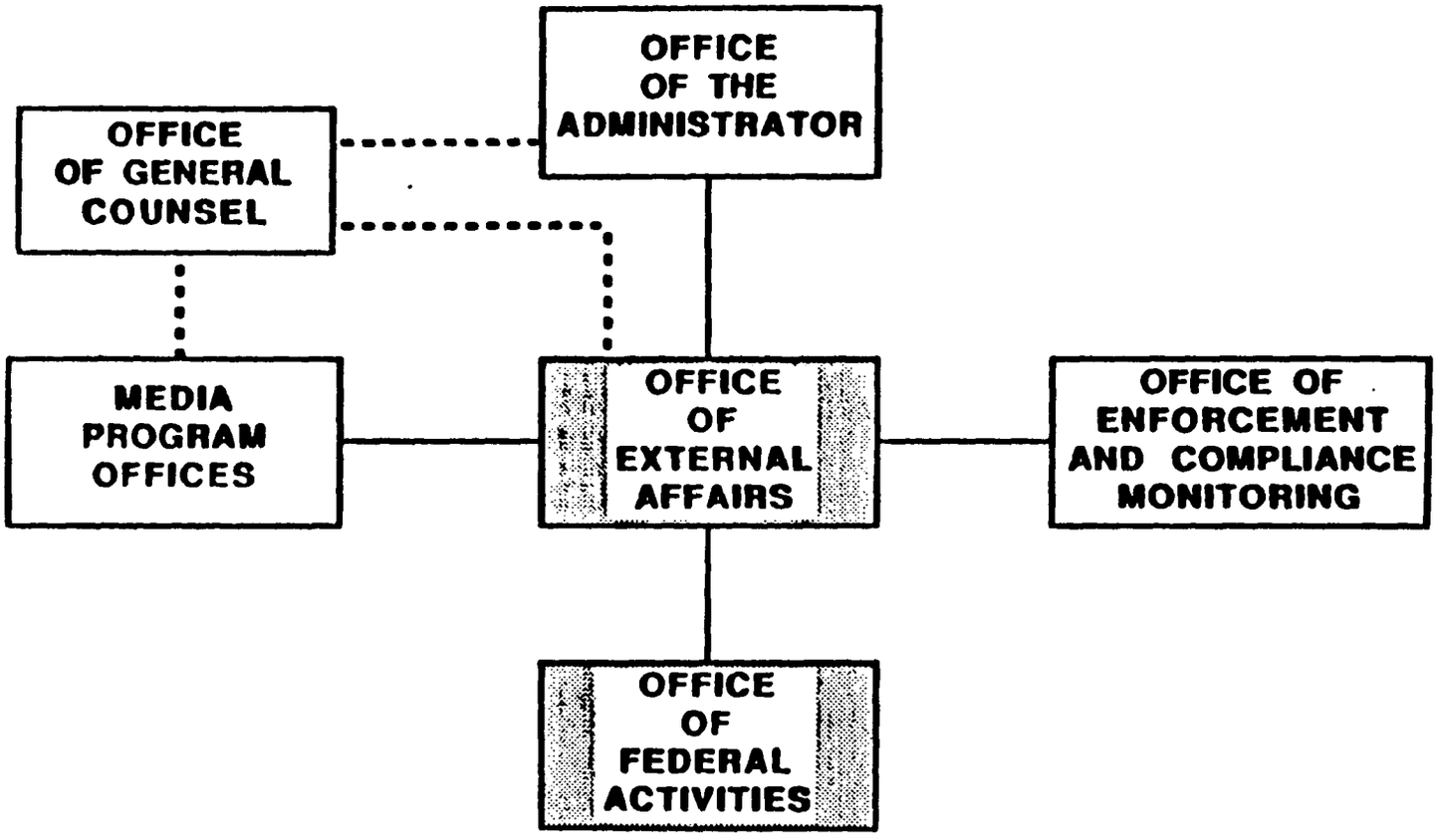
OGC provides legal advice and assistance to the Administrator, OEA, media program offices and the Regional counsels on legal matters and interpretations related to Federal facility compliance with the environmental statutes. OGC also plays a major role in resolving interagency legal disputes and in making referrals to the Department of Justice under Executive Order 12146 when necessary.

EXHIBIT VIII-1

EPA REGIONAL OFFICE STAFF



EPA HEADQUARTERS OFFICE STAFF



#26

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

MAR 8 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Headquarters Review and Tracking of Civil Referrals

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

TO: Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Associate Enforcement Counsels

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

I. CLASSIFICATION OF REFERRALS

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

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

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

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

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

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

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

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

II. EVALUATION OF DIRECT REFERRALS

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

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

A. Appropriateness of direct referral

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

B. Format of the cover memorandum

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

C. Substantive adequacy of direct referrals

Each direct referral package should contain the following elements:

1. An adequate cause of action;

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

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

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

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

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

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

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

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

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

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

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

III. TRACKING ALL REFERRALS IN THE COMPUTER DOCKET

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

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

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

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

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

IV. REFERRALS REQUIRING CONCURRENCE

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

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

1. A clear statement of a cause of action;

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

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

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

V. MANAGING THE CIVIL ENFORCEMENT DOCKET

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

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

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

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

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

Attachments

cc: Office Directors, OECM

INDEX OF ATTACHMENTS

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

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

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

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

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

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

#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

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

JUN 13 1984

#28

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/

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]/

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[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.
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> 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

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

#29

JUN 15 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Counting and Crediting Civil Judicial Referrals

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

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X

PURPOSE

The purpose of this memorandum is to provide guidance as to what constitutes a civil judicial referral and as to which activities by Regional offices relating to judicial referrals will be credited for accountability purposes.

This guidance addresses issues associated with the following types of referral situations:

- multi-facility referrals;
- adding counts to previously referred cases;
- contempt actions;
- modifying or amending consent decrees;
- cases returned to Regions and re-referrals; and
- the effective date of a referral.

BACKGROUND

For approximately three years, OECM and its predecessors have relied primarily on the use of the automated DOCKET as the official Agency record of the number of referrals of civil cases to Headquarters, the number of referrals to the Department of Justice, and as the tracking system for the current status of active judicial enforcement cases. For the most part, the DOCKET system has proved to be very satisfactory, provided an effort is made to maintain the information in the system up-to-date. The system currently reflects the best information available about our judicial enforcement system.

The information in the DOCKET system also serves as a measure used in the Strategic Planning and Management System (SPMS) and, therefore, the crediting of certain activities provides measures used to evaluate Regional offices. Because information in DOCKET is used for this purpose, we must be certain we are properly crediting the activities of the Regional offices, and that everyone with responsibilities in these areas knows the ground rules for the system.

MULTI-FACILITY REFERRALS

THE DOCKET SYSTEM WILL MAINTAIN BOTH A "FACILITY" AND A "CASE" COUNT, AND THE REGIONAL OFFICES WILL BE GIVEN CREDIT FOR REFERRALS ON THE "FACILITY" BASIS. THIS GIVES THE AGENCY FLEXIBILITY IN ITS APPROACH TO COUNTING REFERRALS AND AN ADDITIONAL DIMENSION IN QUANTIFYING THE EXTENT OF OUR JUDICIAL ENFORCEMENT PROGRAM.

DISCUSSION: Cases against multiple facilities owned or operated by the same defendant may be and frequently are joined by the Regions into one referral, or if made the subject of separate referrals, are frequently joined into the same case by the Department of Justice or the courts. The question then becomes whether those cases are to count as one referral or multiple referrals, depending on the number of facilities.

There are several compelling and logical reasons for counting such referrals on a facility basis, rather than strictly on the case basis, at least insofar as internal Agency record-keeping is concerned. The resources required to discover, develop and manage these cases must generally be considered on the facility basis, since each facility is usually separate and unique, and requires being addressed

independently regardless of whether they are consolidated into the same proceeding because of commonality of the parties. In addition, the Regions can easily achieve credit for a referral on each facility on the case basis by preparing separate referrals for each facility. This procedure, however, would only achieve an expenditure of additional time and paperwork, which should not be encouraged.

On the other hand, it would be impossible to use a facility basis of counting referrals to the exclusion of the case basis. There are occasions when the number of cases referred or pending by EPA are significant, and it would be misleading to the public, Congress or other interested persons to represent the Agency as having the number of cases pending which are reflected by the number of facilities involved.

Since DOCKET currently maintains information on both a case and a facility basis, it is a simple matter to continue to utilize that information, and for internal purposes, to credit the Regional offices with the number of referrals represented by the number of facilities included in the cases. An additional advantage to maintaining this dual system of counting is that it would give the Agency, the public and Congress a more accurate picture of the extent of the Agency's enforcement program.

ADDING COUNTS TO PREVIOUSLY REFERRED CASES

THERE IS A PRESUMPTION THAT CREDIT FOR A NEW REFERRAL WILL NOT BE GIVEN FOR THE ADDITION OF A NEW CAUSE OF ACTION TO AN EXISTING CASE. IF A REGIONAL OFFICE THINKS CREDIT FOR A NEW REFERRAL IS APPROPRIATE IN SUCH A PARTICULAR SITUATION, THEN THE BURDEN IS ON THAT REGIONAL OFFICE TO DEMONSTRATE: (1) THAT THE NEW CAUSE OF ACTION IS SIGNIFICANTLY DISTINCT AND DIFFERENT FROM THE ORIGINAL CAUSE(S) OF ACTION; (2) THE EVIDENCE REQUIRED TO SUPPORT THE NEW CAUSE OF ACTION IS SO DIFFERENT THAT SUBSTANTIAL ADDITIONAL RESOURCE REQUIREMENTS ARE IMPOSED UPON THE REGIONAL OFFICE; AND (3) THAT THE NEW CAUSE OF ACTION ARISES FROM CIRCUMSTANCES UNFORESEEN AT THE TIME OF THE ORIGINAL REFERRAL. THE ADDITION OF NEW CAUSES OF ACTION UNDER §107 OF CERCLA TO CASES WHICH WERE ORIGINALLY FILED FOR INJUNCTIVE RELIEF UNDER RCRA OR CERCLA WILL NORMALLY QUALIFY AS EXCEPTIONS.

DISCUSSION: The issue of whether to allow an additional referral due to the addition of a cause of action which was not included in the original referral arises most frequently

in hazardous waste cases which were initiated as suits for injunctive relief under the "imminent and substantial endangerment" provisions of RCRA and/or CERCLA, and which are subsequently being converted to cost-recovery actions under §107 of CERCLA due to cleanup of the site.

Occasionally, however, causes of action are authorized to be added to pending cases which were inadvertently omitted in the initial referral, or which are intended to merely fortify the legal basis for the Government's claims, but do not require significant additional evidence to support those claims.

It is difficult to expound a universal policy stating that the addition of a cause of action to an existing suit will or will not be counted as a new referral under all circumstances. The test here should be: Is the new cause of action so distinct and different from the original cause(s) of action, and is the evidence required to support the new cause of action so different, that in deference to the resource requirements imposed upon the Region to support it, the Region should be credited with a new referral? In addition, the circumstances under which the case was originally referred without the new cause of action should be examined to determine whether, in the exercise of good legal judgment and diligence, the new cause of action should have been included at that time.

Under the test set forth above, credit should usually be given for the addition of a cause of action under §107 of CERCLA, since those normally change the objectives of the case from those originally involved, and raise substantial new legal and evidentiary requirements.

Decisions as to whether the presumption has been overcome for these cases will be made by the appropriate Associate Enforcement Counsel in consultation with the Regional Counsel. If the AEC and RC cannot agree, the issue should be raised to me and the appropriate Regional Administrator for resolution.

CONTEMPT ACTIONS

THE REGIONAL OFFICES CURRENTLY RECEIVE AND WILL CONTINUE TO RECEIVE CREDIT FOR A NEW REFERRAL FOR THE REFERRAL OF CONTEMPT ACTIONS FOR VIOLATION OF CONSENT DECREES.

DISCUSSION: There are several reasons why this activity should be credited as a new referral. First, the monitoring of consent decrees to ensure compliance by the defendant is an Agency priority, and should be encouraged. To refuse to credit the Regions with referrals for contempt of those decrees discourages the assignment of resources to those monitoring efforts.

Second, the amount of resources necessary to conduct the monitoring of consent decrees may be as substantial as that required to determine the initial violation upon which the decree is based.

Third, from a "bookkeeping" viewpoint, the original case is removed from the active case docket when the consent decree is entered, and placed on the consent decree docket. Therefore, there is no problem of "double counting" of such cases on the active docket. In any event, contempt cases are usually so noted in the docket, and can be related to the original cases if necessary for historical counting purposes.

AMENDMENT OR MODIFICATION OF CONSENT DECREES

A PRESUMPTION EXISTS THAT MODIFICATION OR AMENDMENT TO AN EXISTING CONSENT DECREE WILL NOT RESULT IN CREDIT FOR A NEW REFERRAL. HOWEVER, THE REGION CAN REBUT THAT PRESUMPTION AND GAIN CREDIT FOR A NEW REFERRAL BY DEMONSTRATING (1) THAT THE MODIFICATION OR AMENDMENT IS SIGNIFICANT AND SUBSTANTIAL IN RELATION TO THE CASE AS A WHOLE; (2) THAT IT AROSE FROM CIRCUMSTANCES WHICH WERE UNFORESEEN AT THE TIME OF ENTRY OF THE ORIGINAL DECREE; AND (3) THAT IT REQUIRED THE COMMITTMENT OF SUBSTANTIAL AND SIGNIFICANT RESOURCES TO INVESTIGATE AND NEGOTIATE IN EXCESS OF THOSE WHICH WOULD HAVE BEEN EXPENDED FOR TRACKING COMPLIANCE WITH THE ORIGINAL DECREE.

DISCUSSION: As in the case with the addition of a new cause of action to a pending suit, it is difficult to state a simple policy regarding the credit of a new referral for an amendment to an existing consent decree. The resources required to determine or confirm the need for such amendments varies from case to case, and with the complexity of the problem giving rise to the necessity to amend the decree. Some amendments arise from circumstances which were unanticipated at the time the original decree was entered, and can be very

complex and resource-intensive. In such cases, it would be fair to encourage the Regional Offices in their tracking of consent decrees to allow them credit for a new referral for an amendment to a consent decree. However, most amendments are merely to extend a deadline for completion of construction or for other minor adjustments, and do not require a significant committment of resources to negotiate or accomplish over those which would be required to track the performance of the original decree.

. Decisions as to whether the presumption has been overcome in these cases will be made by the appropriate Associate Enforcement Counsel in consultation with the Regional Counsel. If the AEC and RC cannot agree, the issue should be raised to me and the appropriate Regional Administrator for resolution.

REFERRALS RETURNED TO REGIONS AND RE-REFERRALS

REFERRALS ARE CREDITED IN THE QUARTER INDICATED BY THE DATE SHOWN ON THE COVER MEMORANDUM FROM THE REGIONAL OFFICE. RETURNED REFERRALS WILL NOT BE DEDUCTED FROM REGIONAL TOTALS. THEREFORE, ADDITIONAL CREDIT WILL NOT BE GIVEN FOR RE-REFERRALS. A SEPARATE CATEGORY OF CASES RETURNED TO THE REGION WILL BE MAINTAINED BY DOCKET AND OECM WILL TRACK THE NUMBER OF CASES RETURNED ON A QUARTERLY AND REGIONAL BASIS. CASES RETURNED TO THE REGIONS AND NOT RESUBMITTED TO HEADQUARTERS WITHIN 90 DAYS WILL BE RECLASSIFIED AS CONCLUDED CASES DECLINED BY EPA.

DISCUSSION: After a case has been referred from the Regional Office to Headquarters or the Department of Justice (depending on whether it is a regular or "direct" referral), that case may be returned by Headquarters or DOJ to the Regional Office for a number of reasons, usually for additional development.

At the present time, the DOCKET maintains data on a category of cases designated as "Returned to Region", so that there is a record of returned referrals. These cases are counted as active enforcement cases because the category is used for cases Headquarters expects will be pursued after further development. Therefore, we have never attempted to deduct those returned cases from the Regional totals in arriving at a net number of referrals.

Deducting returned cases from the number of referrals leads to many questions as to whether the case will be

deducted from the total of referrals for the fiscal year and/or quarter in which the case was originally referred, or the year in which the case was returned to the Region, if those years are not the same. This could lead to a constant readjustment of the number of referrals for any given quarter.

Due to the usual demand for specific and definite numbers of referrals from within and without the Agency at the conclusion of a quarter or a fiscal year, it is highly desirable to have a relatively definite number of referrals ascertained as soon as possible after the conclusion of the quarter and fiscal year. In order to achieve this, and for simplicity in recordkeeping, it is preferable to maintain on a regional and quarterly basis the number of referrals and the number of cases returned to that Region. This will provide an indication of the number of cases a specific Region has referred which required return for further development, without requiring re-calculation of quarterly and fiscal year referral numbers.

However, we need to be certain that these cases do not continue to be counted as active cases when they are not resubmitted by the Regions. Therefore, if a case returned to the Region is not resubmitted to Headquarters within 90 days, the case will normally be reclassified as a concluded case which was declined by EPA.

EFFECTIVE DATE FOR CASE REFERRALS

CASE REFERRAL PACKAGES (OR COPIES THEREOF, IN THE CASE OF DIRECT REFERRALS) ARE CREDITED IN THE QUARTER AND FISCAL YEAR ACCORDING TO THE DATE OF THE COVER MEMORANDUM FROM THE REGION, PROVIDED THAT THE REFERRAL PACKAGE IS RECEIVED BY HEADQUARTERS WITHIN FIVE CALENDAR DAYS FOLLOWING THE CLOSE OF A FISCAL QUARTER.

DISCUSSION: While this is admittedly a minor issue, it is one which has proved troublesome in the past, particularly at the end of fiscal years and quarters. Some referral packages dated immediately prior to the end of the fiscal year or of a quarter have been received well into the following months, necessitating a readjustment in the number of referrals over a considerable time period. Due to the interest in these numbers within and without the Agency, it is desirable that those numbers be fixed as soon as possible following the end of a quarter.

Use of the date on the package would not necessarily resolve the concerns expressed above, and would still require readjustment in referral numbers over a period of time due to delays in the mail service. Use of the date on

which the package was received in Headquarters may not be entirely fair to the regional offices due to delays in mail service and to potential delays in internal Headquarters mail distribution. The allowance of a reasonable specified time beyond the end of the quarter would allow for delays in mail service, and seems fair to both Headquarters and regional concerns.

Regions do not receive credit for any referral unless and until that referral is received and entered in the DOCKET system. This is particularly true of "direct" referrals, where a copy of the referral package must be forwarded to Headquarters to be entered into the DOCKET.

EFFECTIVE DATE OF THIS GUIDANCE

THE PROCEDURES SET OUT IN THIS GUIDANCE WILL BECOME EFFECTIVE BEGINNING WITH REFERRALS RECEIVED IN THE FOURTH QUARTER OF FISCAL YEAR 1984.

cc: Associate Enforcement Counsels
OECM Office Directors

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

JAN 23 1984

#30

MEMORANDUM

SUBJECT: Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels
Director, NEIC

Background

Civil or administrative actions pursued simultaneously with criminal investigation or prosecution of the same party(ies), and relating to the same essential subject matter, are called parallel proceedings. Violations of most of the environmental laws within EPA's jurisdiction carry the potential of both civil and criminal sanctions. EPA's enforcement options therefore often include administrative proceedings or referral to the Department of Justice for civil or criminal litigation. In addition, EPA will occasionally seek to conduct a criminal investigation in a matter also requiring a remedial response to eliminate environmental contamination or potential human health hazards. In short, the potential for parallel proceedings at EPA is high.

In the face of due process arguments to the contrary, it has been held unequivocally that parallel proceedings are constitutional. Recognizing that the government often must pursue both civil and criminal routes to protect the public, the Supreme Court in United States v. Kordel, 397 U.S. 1 (1970), established the legality of parallel proceedings. This case involved an in rem action for the seizure of certain misbranded drugs, as well as a criminal referral with respect to those responsible for the misbranding. The Court pointed out that prompt action in both the civil and the criminal courts can be necessary to protect the public interest. This same rationale can be used in the environmental field, where misconduct may create a danger which can only be addressed by a civil or administrative action for remedial relief. Proceeding civilly, however, does not foreclose pursuit of other remedies, such as a criminal prosecution, where appropriate.

> It would stultify enforcement of Federal law to require a governmental agency such as the FDA invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

397 U.S. at 11. Since Kordel, other courts have sanctioned parallel proceedings barring "special circumstances".

> The SEC cannot always wait for Justice to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can Justice always await the conclusion of the civil proceedings without endangering its criminal case. Thus, we should not block parallel investigations by these agencies in the absence of "special circumstances" in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government.

SEC v. Dresser Industries, Inc., 628 F.2d 1368, (D.C. Cir.)(en banc) cert. denied, 449 U.S. 993 (1980).

Notwithstanding the legality of parallel proceedings, a number of circumstances militate in favor of keeping such dual actions to a minimum. Inherent in the simultaneous pursuit of civil, administrative and/or criminal sanctions is the possibility of legal challenges and administrative difficulties. First, it would be an inappropriate use of Agency resources, as well as a questionable exercise of enforcement discretion, for EPA to seek criminal and civil sanctions in every case where both are legally permissible. Because of considerations discussed within this memorandum, separate staffs will often be used for the civil/ administrative action and the parallel criminal investigation. The number of EPA staff involved in an enforcement action against one party may, therefore, be doubled while not substantially changing the nature of the relief obtained.

Further, when parallel actions are initiated by the government, 1/ defense allegations of abuse often arise. Whatever the substance of the charges, the delay and effort occasioned by the need to respond to and litigate these charges can counterbalance the potential benefits of the dual actions. Typical objections to parallel proceedings include the allegation that the government

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1/ Parallel actions may develop when a defendant in a criminal case initiates a civil suit against the government or when an individual or corporation who is the plaintiff in a civil action becomes a defendant in a criminal case involving the same matters. In such a situation, even though the government has not created the dual actions, similar parallel proceedings issues arise.

has acted deceptively by seeking more than one type of relief without promptly notifying the party involved, or that the government is using one of the actions to assist the other. Conversely, the government may find that the criminal defendant seeks to obtain information about the prosecution of the criminal case through the use of civil discovery devices.

Because of the above stated resource and legal considerations, parallel proceedings should be undertaken only when clearly warranted by the facts of a given situation.

Issue

Under What Circumstances Are Parallel Proceedings Warranted?

Policy

In light of the limited criminal investigative resources available to the Agency, criminal investigations and referrals are necessarily limited to situations of the most significant and/or flagrant environmental misconduct. Accordingly, the issue of parallel proceedings should arise in only a limited number of cases.

Within this limited category of cases, if the environmental misconduct is ongoing, or if circumstances otherwise necessitate injunctive relief or remedial action, a parallel proceeding is appropriate. Where there is no need for injunctive or remedial relief, and the purpose of a civil/administrative action would be limited to the assessment of penalties for past misconduct, parallel proceedings will normally be avoided and the civil action held in abeyance while the criminal enforcement process proceeds. In such situations, Agency officials should monitor the criminal case closely to ensure that it is developed as expeditiously as possible.

Discussion

This policy supports the use of parallel proceedings in those situations in which the public interest necessitates dual actions, i.e., cases involving significant and flagrant environmental misconduct that also require injunctive/remedial response through the civil enforcement apparatus. However, where the purpose of enforcement is limited to the assessment of penalties, the simultaneous pursuit of civil as well as criminal sanctions through parallel proceedings is discouraged.

By so limiting the use of parallel proceedings, unnecessary legal challenges as well as resource strains will be avoided. In addition, the policy recognizes the reluctance frequently manifested by Federal prosecutors to penalize a defendant through both administrative/civil and criminal sanctions.

Finally, by deferring the civil proceedings until after the completion of the criminal action in penalty-only cases, the government will be able to take advantage of the doctrine of res judicata. That is, identical issues which have been resolved in the government's favor in the criminal case do not have to be relitigated in the civil action. On the other hand, any issues or verdicts contrary to the government's position in the criminal case will not bind the court hearing the subsequent civil case because of the lesser burden which the government (if plaintiff) must bear in a civil action.

Issue

In Those Situations in Which Parallel Proceedings Are Necessary, When Should Notice of the Existence of the Parallel Proceeding Be Given to the Common Subjects?

Policy

Notice that a criminal investigation has commenced, or that a referral for criminal prosecution has been made, is not a legal requirement. A target does not have to be made aware of the enforcement steps that the Agency is pursuing or contemplating. However, the Agency should consider giving notice of the potential for a criminal prosecution to the common subject(s) at the initiation of every parallel proceeding. A statement advising the subject(s) that "the Agency is free to choose civil, criminal or administrative enforcement actions and taking one type of action does not preclude pursuing another type of action" may be appropriate. Whether or not the Agency elects to affirmatively make such a statement, this type of answer should be given routinely to questions from targets about the existence of, or the potential for, parallel actions. The Agency must be careful never to affirmatively misrepresent the potential for a criminal case.

Discussion

Before a criminal investigation is initiated, the Special Agent from the Office of Criminal Investigations routinely contacts the Regional Counsel and the regional program office in the region where the investigation is to be conducted. This is to discover whether administrative/civil enforcement action is pending or contemplated. This initial coordination is meant to ensure that a parallel proceeding does not occur without the knowledge of appropriate Agency personnel. When a civil action commences, it would likewise be advisable for the Regional Counsel and/or regional program offices to check with the Office of Criminal Investigations if there is any question of the existence of a criminal investigation.

Notice of the potential for parallel civil and criminal proceedings should be given to the subject(s), either orally or in writing (depending upon the previous methods of communication in the particular matter or upon the nature of the situation), whenever it will not unduly jeopardize pursuit of the criminal inquiry. The timing, as well as the mechanics of how and who should give the notice, should be decided jointly by the attorneys and agents assigned to the criminal enforcement case and the Agency personnel assigned to the civil/administrative action. Unilateral notification without coordination by personnel assigned to either case can disrupt and confuse the parallel investigations and should not occur.

While not always legally mandated, this prophylactic measure allows the common subject to protect himself against self-incrimination by moving the court for a stay, a protective order, or other relief in the civil proceeding, while shielding the government from subsequent charges of deception or abuse of the civil proceeding. In cases in which parties have testified or have provided incriminating information, courts have been critical of the government where there have been previous misrepresentations or unfulfilled promises of immunity. See, e.g., SEC v. ESM Government Securities, Inc., 645 F.2d 310 (5th Cir. 1981); United States v. Parrott, 248 F. Supp. 196 (D.D.C. 1965); United States v. Guerina, 112 F. Supp. 126 (E.D. Pa. 1953); United States v. Rand, 308 F. Supp. 1231 (N.D. Ohio 1970).

If the Agency chooses not to notify the target of the start of a criminal investigation, the execution of a criminal search warrant, the presentation of credentials by an EPA criminal investigator in an interview context, or the issuance of grand jury subpoenas will accomplish the same function by making the criminal focus obvious. So long as the Agency has not previously misrepresented the potential for a criminal action, it can not be accused of being deceptive just because the targets have not been notified until the investigation has become public knowledge.

If directly asked whether a criminal investigation has been undertaken or whether such an investigation (or prosecution) is contemplated, an EPA employee may of course decline to reply. However, in some circumstances a court may find that silence constitutes a form of deception. (See below). An alternative response would be a statement that "the Agency is free to choose civil, criminal or administrative enforcement actions and taking one type of action does not preclude pursuing another type of action". It is clear, however, that the government cannot deny the existence of a criminal investigation or referral or mislead the party into believing that cooperation with the civil action will preclude a criminal case, if this is untrue. SEC v. ESM Government Securities, Inc., supra. In United States v. Fields, 592 F.2d 638, 643 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979), the Court criticized the conduct of two SEC employees who (while negotiating a consent decree in a civil suit) failed to disclose that a criminal referral had been made. The District Court concluded that defense counsel had interpreted the SEC's silence

regarding the referral as an agreement not to make the referral. Perhaps the key fact in the case, however, was that the defense had made it expressly known that it was entering into the decree to avoid a referral. Although the Second Circuit held that dismissing the indictment was too severe a sanction, it did chastise the SEC for its conduct and warned against such misleading silence in the future. Id. at 647. See also United States v. Rodman, 519 F.2d 1058 (1st Cir. 1975).

In a series of cases involving the Internal Revenue Service, courts have held that, in the absence of affirmative misrepresentations, a taxpayer has not established that information was obtained through deceit and trickery. Specifically discounting silence as per se fraud, one court stated that "silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading". United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970). In United States v. Tonahill, 430 F.2d 1042, 1044 (5th Cir. 1970), the Court found that, when specifically asked whether they were investigating a crime, IRS Special Agents did not engage in impermissible trickery when they did not directly answer that a "criminal investigation" was occurring but instead stated that "their function was to reconcile the large discrepancies to see if they were the result of innocent errors".

Where circumstances require that notice of the potential for a criminal prosecution be delayed until the investigation (either field or grand jury) is completed,2/ then not only must the government be extremely careful not to mislead the party but information provided by the common subject in the parallel civil proceeding will generally not be transferred to the attorneys and agents involved in the criminal inquiry. The transfer of information from a civil to a parallel criminal enforcement action when the party is unaware that he may be the subject of a criminal investigation has not been directly addressed and condemned by the courts.3/ However, such a procedure would invite allegations of improper use of the civil proceedings to further the criminal investigation.

2/ If there is strong likelihood of evidence destruction, witness intimidation, or ongoing criminal activity, reasons certainly exist to delay disclosure or notice of the potential for a criminal investigation or referral.

3/ Where defendants have been aware of the parallel proceeding and have objected in advance to their statements being transferred from an agency to the Department of Justice, courts have nevertheless approved such transfers. SEC v. Dresser Industries, Inc., supra.

Issue

Should Miranda-type Warnings Be Given Under Any Circumstances To Subjects of Parallel Proceedings?

Policy

Full Miranda warnings are unnecessary in non-"custodial" settings. However, modified warnings should be given before a common subject is required to provide evidence testimonial in nature[4/] during civil proceedings. That is, warnings should occur before a common subject is deposed, and before an administrative hearing or trial is held at which a party may testify. An administrative request for business documents is not considered "testimony" and need not trigger a disclosure of a criminal investigation. Schmerber v. California, 384 U.S. 757 (1966).

Discussion

These warnings are separate and apart from the "notice" discussed earlier in this memorandum. "Notice" pertains to a statement from the Agency that a matter may result in both criminal and civil action by the Agency. It is issued to avoid criticism that the Agency has acted deceptively or that it has misrepresented the nature of its contacts with an individual or company. "Warnings", on the other hand, are a response to the Fifth Amendment considerations which arise whenever an individual is compelled by the government to provide information. It informs the individual that his responses may be used against him in subsequent proceedings.

Full Miranda warnings, or advice of rights, are not required, or advisable, in connection with the compulsion of testimony in the civil proceeding, since the testimony is not elicited in a "custodial" setting.[5/] A warning which will adequately inform the party may consist of a simple statement that violations of environmental statutes may subject an individual to both civil and criminal sanctions and that statements made by the individual may be used against him in any further proceedings. Warnings are crucial when the subject is asked to give testimonial evidence and she/he

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4/ "Testimonial evidence" is that which is communicative in nature or "from the witness's own mouth." Private papers (such as a diary) or oral testimony come within the zone of privacy protected by the Fifth Amendment but ordinary documents or books which may include incriminating information do not. United States v. Fisher, 425 U.S. 391 (1976).

5/ The Supreme Court in United States v. Miranda, 384 U.S. 436 (1966) held that a suspect's Sixth Amendment right to the assistance of counsel attaches as soon as government agents take him into custody or otherwise restrict his freedom of action in any significant way.

is not represented by counsel. The Court in United States v. Kordel, supra, expressly distinguished the facts in that landmark case from the situation in which a party is unrepresented by counsel in the civil proceeding, noted the Fifth Amendment considerations at issue, and implied that it might have held differently if the defendant had not had counsel.

Issue

Where Parallel Proceedings Are Initiated, When and How Should Staffs Be Separated?

Policy

If the defendant or target is on notice of the existence of the parallel proceeding and no grand jury work has begun, staffs may be interchanged.

Once a grand jury investigation is initiated, personnel with access to grand jury materials should have no further involvement in the parallel civil action in light of the statutory requirements pertaining to grand jury secrecy. Because almost every environmental criminal case will require grand jury investigation prior to indictment, and because at least partial separation of civil and criminal staffs will be required after the initiation of the grand jury investigation, it is usually best to separate staffs at the time of initiation of the parallel proceeding.

Discussion

The separation of staffs does not require a separation of supervisory personnel so long as grand jury material is not disclosed to any supervisor who is involved in supervising staff working on the civil or administrative proceedings.6/ Supervisors who are not involved in the civil/administrative proceedings and who believe it necessary to become familiar with the grand jury investigation, should raise this issue with the Justice Department prosecutor supervising the case.

6/ Even the recent Supreme Court opinions (United States v. Sells Engineering, Inc., _____ U.S. _____, 33 Crim. L. Rep. 3243 (June 30, 1983); United States v. Baggot, _____ U.S. _____, 33 Crim. L. Rep. 3259 (June 30, 1983)), which have directly discussed the topic of "grand jury material" have not clarified what is meant by this term. Broadly interpreted, "grand jury material" might be considered to include not only the testimony of grand jury witnesses and the documents subpoenaed by the grand jury but also any of the substantive matters which are the subject of the grand jury investigation.

Separating the staffs which are working on each action can also negate the defense argument that one proceeding is being used to develop the other. Although the courts have approved parallel proceedings, there must be a legitimate purpose for each proceeding. A "legitimate purpose" is found where independent goals exist for each action and neither action is being pursued solely to advance or strengthen the other. Public interest considerations justifying parallel proceedings would disappear should the government abuse its power to initiate both actions by interfering with the independent integrity of either action. A separation of staffs avoids the conflict in roles that may be perceived if there is involvement in both of the actions. The appearance of a conflict or of an abuse of the grand jury process (by assisting in a parallel civil action) is also avoided by the early separation of staffs.

Issue

May Information Developed in Criminal Proceedings Be Provided for Use in Parallel Civil Proceedings and Vice-versa?

Policy

Grand jury material may never be passed to anyone working on a parallel civil proceeding. In fact, grand jury material may never be discussed with anyone who is not on the so-called "6(e)" list. Fed. R. Crim. P. 6(e). Information developed in criminal field investigations may be passed to civil staff for their use. However, such information must be clearly documented to show where and when the information was obtained so that allegations of grand jury abuse may be countered at a subsequent date. The Agency should be prepared to demonstrate that the information passed to the civil side from personnel working on the criminal case was not obtained by the use of a grand jury.

Information obtained in civil cases from subjects of a parallel proceeding may be provided to personnel working on the criminal case, if the subjects were on notice of the potential for a parallel criminal proceeding when the information was provided by the subjects, and if warnings were given prior to testimonial situations. If the subjects were not on notice or were not given warnings, then information provided by them should not be turned over to personnel working on the criminal case.

Discussion

Where there has been no notice (of the potential for a criminal proceeding) or warnings (of the Fifth Amendment considerations) or there are other indicia of potential unfairness to the target,

information obtained in a civil proceeding from the subject of a parallel criminal proceeding should be isolated and withheld. See United States v. Kordel, supra, 397 U.S. at 12.

In SEC v. Dresser Industries, Inc., supra, the Court did not object to the transfer of information from government attorneys involved in civil/administrative matters to prosecutors on the criminal side. "Where the agency has a legitimate non-criminal purpose for the investigation, it acts in good faith under the [United States v. LaSalle National Bank, 437 U.S. 298 (1978)] conception even if it might use the information gained in the investigation for criminal enforcement purposes as well." 628 F.2d at 1387 (footnote omitted). Notice was not an issue in this case because the company records were subpoenaed simultaneously by both the SEC and the grand jury, placing the company on notice of the parallel proceeding. Moreover, it would not be legitimate for information to go in the opposite direction (i.e., information obtained through a grand jury passing to the civil/administrative enforcement authorities).7/

Finally, it should be noted that the bar on exchange of information from a civil to a criminal proceeding pertains only to information obtained (1) from the common target--corporate or individual, and (2) after the initiation of the parallel proceeding. Information in the possession of the government prior to the initiation of a criminal investigation may be freely exchanged.

Information sought by an agency which has already been subpoenaed by a grand jury, while not available from the members of the prosecution team, can be obtained by the civil side of the agency by use of civil discovery devices, if it is sought for its own sake and not for the purpose of uncovering what took place before the grand jury. United States v. Interstate Dress Carriers, Inc., 280 F.2d. 52, 54 (2d Cir. 1960), cited in SEC v. Dresser Industries, Inc., supra, 628 F.2d at 1382; accord, Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Minn. 1975); United States v. Saks and Co., 426 F. Supp. 812 (S.D.N.Y. 1976); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972). This is consistent with the general proposition that, so long as each investigation and proceeding has it own legitimacy, then the tools available to each may be used accordingly.

7/ The Federal grand jury exists for and can satisfy only one purpose--to enforce Federal criminal law. Information developed in the course of a grand jury proceeding may not be made available for use in administrative or civil proceedings absent a court order. Fed. R. Crim. P. 6(e). A "special circumstance" indicating an improper use of a parallel proceeding is the use of a grand jury to help a civil or administrative case. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958); United States v. John Doe, 341 F. Supp. 1350 (S.D.N.Y. 1972).

Issue

To What Extent May the Government Use Civil Discovery Tools When There Is a Pending Parallel Action?

Policy

So long as the above stated policies on notice, warnings, and separate staffing are pursued, the government may use whatever civil discovery tools are available to pursue legitimate aims in the civil proceeding. Civil discovery may not, however, be used to pursue evidence solely relevant to the criminal case. At the court's discretion, stays or protective orders may be granted upon a party's motion.

Discussion

The presumption under the Federal Rules of Civil Procedure is that discovery should be available to each party to the fullest extent possible. On the other hand, the Federal Rules of Criminal Procedure limit discovery to only that information specifically covered within the rules. Prior to trial, a criminal defendant has the right to obtain from the government any statements alleged to have been made by the defendant to agents of the government, the defendant's criminal record, and documents, tangible objects and any reports of examinations or tests which the government intends to use as evidence in its case in chief.

In a criminal action, this difference (in discovery rules) can lead to an unfair advantage being gained, by either side, through the use of the more liberal civil discovery rules. For example, information about defense witnesses, strategy, and anticipated testimony (otherwise unavailable prior to a criminal trial) can be uncovered by the government through the use of interrogatories, depositions and/or requests to produce. Similarly, a defense attorney, by initiating a civil suit against the government or as a respondent in a civil suit, could take advantage of the civil discovery rules to depose government witnesses and file interrogatories to reveal information normally unavailable to a criminal defendant. Therefore, courts have been sensitive to the need to ensure the integrity of each branch of the parallel proceeding.

In SEC v. Dresser Industries, Inc., supra, the Court held that the limitations placed on the use of the IRS administrative summons enunciated in United States v. LaSalle National Bank, supra, are inapplicable to the SEC. Accord, SEC v. First Financial Group of Texas, 659 F.2d 660 (5th Cir. 1980). Under LaSalle, the IRS is precluded from using its administrative summons authority after a case has been referred to the Department of Justice for criminal prosecution. EPA, like the SEC but unlike the IRS, possesses statutory authority to pursue investigations of both a civil and a criminal nature. Therefore, while the IRS has no practical authorized purpose for issuing a summons after a referral

to Justice, if EPA decides to pursue both civil and criminal cases, its summons authority continues undiminished even after referral, provided that the purpose is to develop the civil action. SEC v. Dresser Industries, Inc., supra, 628 F.2d at 1381.8/ Many of the IRS cases can be viewed as sui generis because of the particular statutory authority under which that agency operates.

Courts historically have been sympathetic to claims by both the government and individuals that civil discovery rules are being exploited to benefit the party in the criminal proceeding. In deciding the appropriate remedy, the court will weigh the public and the plaintiff's interest in the speedy resolution of the civil suit against the potential for prejudice to the defendant and the interest in maintaining the procedural integrity of the criminal justice system. SEC v. Control Metals Corp., 57 F.R.D. 52 (S.D.N.Y. 1972); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). Both the government and individuals/ corporations have successfully sought stays of civil proceedings. Unless the interests of justice weigh against the equitable relief of a stay, courts generally will grant stays of the entire civil proceeding, or at least of the discovery process, pending the disposition of the criminal matter. Protective orders can also be employed to prevent the transfer of information between branches of government or to limit the scope of the information transferred.

Difficulties can be anticipated in EPA-initiated cases when the government must oppose a stay because of its need to proceed civilly and criminally. The defendant will seek to use civil discovery to depose government witnesses while resisting the government's attempts to uncover defenses. If the government can negotiate a stipulated injunctive relief together with a stay of the remainder of the civil suit pending the criminal disposition, some of these difficulties may be resolved. Otherwise, a mixture of partial stays and narrowly framed protective orders may be the only alternative.

Protective orders or stays (Fed. R. Civ. P. 26(c),(d)) may be granted at the discretion of the trial judge. At least one court has found it to be violative of due process to force the defendant to go forward in an administrative hearing while a criminal proceeding is pending. Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1965).

8/ This is distinguishable from the situations discussed in the EPA guidance on the "Guidelines for the Use of Administrative Discovery Devices in the Development of Potential Criminal Cases." In that guidance, the issues were presented in the context of cases which were going to be either civil/administrative or criminal actions, but not both. If an Agency decision is made that a case should be referred for criminal prosecution alone, then it would be clearly improper to use administrative discovery devices after such referral.

However, there are other alternatives to a stay, such as a narrowly framed protective order, sealing the responses to interrogatories, or precluding the use of the products of civil discovery at criminal trials, which can be employed instead of an all-encompassing stay. McSurely v. McClellan, 426 F. Supp. 664 (D.D.C. 1970).

Claims of Fifth Amendment privilege are an oft-cited reason for a request for a stay. If a civil defendant is "compelled" to testify, his testimony cannot later be used to incriminate him. But a civil defendant is not compelled to testify merely because the fact-finder may draw adverse inferences from his failure to testify. Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976). Some courts have granted stays where a defendant must either invoke the Fifth Amendment, and thereby jeopardize his civil/administrative case, or provide information which may be used against him in the criminal case. United States v. American Radiator and Standard Sanitary Corp., 272 F. Supp. 691 (W.D. Pa.), rev'd on other grounds, 383 F.2d 201 (3d Cir. 1967), cert. denied, 390 U.S. 922 (1968); Dienstag v. Bronsen, 49 F.R.D. 327 (S.D.N.Y. 1970); Perry v. McGuire, 36 F.R.D. 272 (S.D.N.Y. 1964); Paul Harrigan and Sons v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D. Pa. 1953).

Other courts have sympathized with the defendant but refused to grant protective orders, a stay or other relief despite Fifth Amendment issues. In SEC v. Rubinstein, 95 F.R.D. 529 (S.D.N.Y. 1982), the Court cited a statutory authorization to pass information from the SEC to the Department of Justice, and prior judicial approval of such action in United States v. Fields, supra, and in SEC v. Dresser Industries, Inc., supra, and denied the motion to seal discovery.

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

#31

JUL 18 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance for Implementing EPA's Contractor Listing Authority

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

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Assistant Administrator for External Affairs
Assistant Administrator for Policy, Planning
and Evaluation
General Counsel
Inspector General
Regional Administrators

I. Purpose

The purposes of this document are to briefly describe: 1) EPA's contractor listing authority, 2) the interim agency policy prior to final promulgation of revisions to the listing regulations at 40 C.F.R. Part 15, and 3) the proposed revisions to 40 C.F.R. Part 15. Further, the document gives some general guidance on when to bring a contractor listing action, and explains how the Agency's Strategic Planning and Management System will account for listing actions as enforcement responses.

II. Background

The Clean Air Act[1] and the Clean Water Act[2], as implemented by executive order[3] and Federal regulation,[4] authorize EPA to

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1/ Clean Air Act, Section 306, 42 U.S.C §7606.
2/ Clean Water Act, Section 508, 42 U.S.C. §1368
3/ Executive Order 11738, September 12, 1973
4/ 40 C.F.R. Part 15

preclude certain facilities from obtaining government contracts, grants, or loans, if the facility is violating pollution control standards. Commonly called "contractor listing", this program assures that each Federal Executive Branch agency undertakes procurement and assistance activities in a manner that will result in effective enforcement of the air and water acts. Contractor listing also ensures that owners of noncomplying facilities do not receive an unfair competitive advantage in contract awards based on lower production costs.

In the past, EPA has seldom used contractor listing in the enforcement program. Currently, one facility (Chemical Formulators, Inc., Nitro, West Virginia)[5] is on the List of Violating Facilities. Contractor listing can be an effective enforcement tool, and EPA policy calls for Regional Office enforcement personnel to actively consider the viability of this option to obtain compliance with Clean Air Act and Clean Water Act standards.

With a view toward improving and streamlining the contractor listing program, EPA has proposed revisions to 40 C.F.R Part 15 (copy attached). The proposed revisions provide additional procedural protections to facilities which are the subject of listing recommendations and expand the range of situations which may trigger the listing sanction.

III. Interim Listing Policy While Regulations Undergoing Revision

A. Grounds: By statute, EPA must list a facility which has given rise to a person's conviction under Section 309(c) of the CWA or Section 113(c)(1) of the CAA, and that person owns, leases, or supervises such facility (mandatory listing). Otherwise, prior to promulgation of the revised Part 15 regulations, EPA may list a facility only on the following grounds set forth in the current Section 15.20(a)(1) (1979) (discretionary listing). Specifically, EPA may list a facility only if there is continuing or recurring non compliance at the facility and

- The facility has given rise to an injunction, order, judgment, decree, or other form of civil ruling by a Federal, State, or local court issued as a result of noncompliance with clean air or clean water standards, or the facility has given rise to a person's conviction in a State or local court for noncompliance with clean air or clean water standards, and that person owns, leases, or supervises the facility.

- The facility is not in compliance with an order under Section 113(a) of the CAA or Section 309(a) of CWA, or has given rise to the initiation of

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5/ 46 F.R. 16324, March 12, 1981

court action under Section 113(b) of the CAA or 309(b) of the CWA, or has been subjected to equivalent State or local proceedings to enforce clean air or clean water standards.

B. Procedures: Prior to promulgation of the revised regulations, EPA will employ the procedures proposed in the revised regulations for discretionary listing and the procedures in the current regulations [Section 15.20(a)(2)(1979)] for mandatory listing, explained below. EPA will use the procedures proposed in the revised regulations for discretionary listing because these regulations provide greater procedural protections than the current regulations[6]. Because the revised mandatory listing regulations authorize less procedural protections than the current procedures, however, EPA will continue to employ the current regulations until the revised mandatory listing procedures are legally effective.

We recognize that some confusion may result during the interim period, so you should not hesitate to contact the EPA Listing Official[7] to resolve any problems. Upon promulgation of the final rules, we will revise this guidance as necessary.

IV. The Listing Program and the Proposed Revisions to Part 15

Even under the revised regulations as proposed, the basic framework for listing actions is substantially the same as established by the present regulations. The proposed revisions to Part 15 clarify the distinctions between mandatory and discretionary listing, and establish some different procedures for each type of listing.[8]

A. Mandatory Listing

If a violation at a facility gives rise to a criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, listing of the facility is mandatory if the convicted person owns, leases or supervises the facility. Not only is listing mandatory, but section 15.10 makes the listing effective

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6/ One exception is that EPA will continue to use the Listing Review Panel to review decisions of the Case Examiner. The Panel consists of the AAs for OECM and Policy, Planning and Evaluation, the General Counsel, and a representative from the Office of the Deputy Administrator who shall serve as a non-voting member.

7/ I have designated Edmund J. Gorman of the Office of Legal and Enforcement Policy (LE-130A) as EPA's Listing Official. He can be reached at (FTS) 426-7503.

8/ Hereinafter all citations are to the proposed revised Part 15 regulations unless otherwise expressly stated.

automatically upon a conviction. As soon as a conviction occurs, the Associate Enforcement Counsel for Criminal Enforcement must notify the Listing Official.

The Listing Official is responsible for sending written notification to the facility and to the Federal Register. Both documents must state the basis for and the effective date of the mandatory listing.

Removal from the mandatory list may occur only if: (1) the Assistant Administrator certifies that the facility has corrected the condition that gave rise to the criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, or (2) a court has overturned the criminal conviction.

B. Discretionary Listing

1. Basis for Discretionary Listing

Discretionary listing may occur if the recommending person can show a "record of continuing or recurring noncompliance," and that a requisite enforcement action has been initiated or concluded. The proposed revisions broaden the discretionary listing authorities by including additional statutory provisions under which EPA can bring enforcement actions that can trigger applicability. Under the proposed regulations, any of the following enforcement actions may serve as a basis for listing if there is also a record of continuing or recurring noncompliance at the facility:

1. A federal court convicts any person under Section 113(c)(2) of the CAA, if that person owns, leases, or supervises the facility.

2. A State or local court convicts any person of a criminal offense on the basis of noncompliance with clean air or clean water standards if that person owns, leases, or supervises the facility.

3. A federal, state, or local court issues an injunction, order, judgment, decree, or other form of civil ruling as a result of noncompliance with clean air or clean water standards at the facility.

4. The facility is the recipient of a Notice of Noncompliance under Section 120 of the CAA.

5. The facility has violated an administrative order under:

   - Section 113(a) CAA
   - Section 113(d) CAA
   - Section 167 CAA
   - Section 303 CAA
   - Section 309(a) CWA

6. The facility is the subject of a district court civil enforcement action under:

   - Section 113(b) CAA
   - Section 204 CAA
   - Section 205 CAA
   - Section 211 CAA
   - Section 309(b) CWA

2. Initiating the Discretionary Listing Process

The listing process begins with a recommendation to list filed by a "recommending person" with the Listing Official. Recommending persons include any member of the public, Regional Administrators, the Assistant Administrator for Air and Radiation, the Assistant Administrator for Water, the Associate Enforcement Counsel for Air, the Associate Enforcement Counsel for Water, and Governors. The recommendation to list is a written request that: (1) states the name, address, and telephone number of the recommending person, (2) describes the facility, and (3) describes the alleged continuing or recurring noncompliance, and the parallel enforcement action. Section 15.11(b).

The Listing Official must review the recommendation to determine whether it meets the requirements of Section 15.11(b). If it does, the Listing Official then must transmit the recommendation to the Assistant Administrator for Enforcement and Compliance Monitoring who shall in his/her discretion, decide whether to proceed with the listing action. If he/she decides to so proceed, the Listing Official then must notify the facility of the filing of a recommendation to list. The facility then has 20 working days to request EPA to hold a listing proceeding. If the facility requests the proceeding, the Listing Official must schedule it and notify the recommending person and the facility of the date, time, and location of the proceeding. The Assistant Administrator must designate a Case Examiner to preside over the listing proceeding.[9]

9/ If the facility does not make a timely request for a listing proceeding, the Assistant Administrator will determine whether to list the facility based upon the recommendation to list and any other available information.

3. The Discretionary Listing Proceeding

The discretionary listing proceeding is informal, i.e., there are no formal rules of evidence or procedure. The recommending person and the facility may be represented by counsel, present relevant oral and written evidence and, with the approval of the Case Examiner, either party may call, examine, and cross-examine witnesses. The Case Examiner may refuse to permit cross-examination to the extent it would: (1) prematurely reveal sensitive enforcement information which the government may legally withhold, or (2) unduly extend the proceedings in light of the usefulness of any additional information likely to be produced. Section 15.13(b). A transcript of the proceeding along with any other evidence admitted in the proceeding constitutes the record. For the Case Examiner to approve a recommendation to list, the recommending person must persuade the Case Examiner that he/she has proved each element of a discretionary listing by a preponderance of the evidence.

The Case Examiner must issue a written decision within 30 working days after the proceeding. The Listing Official then must notify the recommending person and the facility of the Case Examiner's decision. The party adversely affected may appeal the decision to the General Counsel. The appeal, which is filed with the Listing Official, must contain a statement of (1) the case and the facts involved, (2) the issues, and (3) why the decision of the Case Examiner is not correct based on the record of the proceeding considered as a whole. The General Counsel must issue a final decision, in writing, as soon as practicable after reviewing the record. The Listing Official then must send written notice of the decision to the recommending person and to the facility, and must publish the effective date of the listing in the Federal Register if the General Counsel upholds the Case Examiner's decision to list.

Removal from the list of Violating Facilities can occur in any of the following circumstances:

1. Upon reversal or other modification of the criminal conviction decree, order, judgment, or other civil ruling or finding which formed the basis for the discretionary listing, which reversal or modification removes the basis for the listing;

2. If the Assistant Administrator for OECM determines that the facility has corrected the condition(s) which gave rise to the listing;

3. If, after the facility has remained on the discretionary list for one year on the basis of Section 15.11(a)(4) or Section 15.11(a)(5) and a basis for listing under Sections 15.11(a)(1), (2), or (3) does not exist, then removal is automatic; or

4. If the Assistant Administrator for OECM has approved a plan for compliance which ensures correction of the condition(s) which gave rise to the discretionary listing.

The removal process begins with a request for removal filed with the Listing Official by the original recommending person or by the facility. The Assistant Administrator for OECM then must review the request and issue a decision as soon as possible. The Listing Official then must transmit the decision to the requesting person.

If the Assistant Administrator for OECM denies a request for removal, the requesting person may file a written request for a removal hearing. A Case Examiner designated by the Assistant Administrator then conducts a removal hearing. The removal hearing is an informal proceeding where formal rules of evidence and procedure are not applicable. The parties to the proceeding may be represented by counsel and may present written and oral testimony. In addition, with the approval of the Case Examiner, the parties may call, examine, and cross-examine witnesses to the extent that any further information produced will be useful in light of the additional time such procedures will take. The Case Examiner must base his/her written decision solely on the record of the removal hearing.

Within 20 working days of the date of the Case Examiner's decision, the party adversely affected may file with the Listing Official a request for review by the Administrator. The Administrator will determine if the Case Examiner's decision is correct based upon the record of the removal hearing considered as a whole. The Administrator then must issue a final written decision.

V. Increased Use of Discretionary Listing.

We believe that the revisions to the discretionary listing regulations are only the first step in the improvement of our contractor listing program as an effective enforcement tool. The second step, actually using the listing authority, will gain for us the necessary experience in this area. Note that for purposes of the Strategic Planning and Management System, regions may show recommendations to list as enforcement actions taken in tracking regional progress toward bringing significant violators into compliance.

Currently, our lack of experience in this area inhibits our ability to offer explicit guidance based upon known formulas. However, we believe that some general points are worth noting.

Listing is a very severe sanction and, therefore, should usually be reserved for the most adversarial situations. If such an adversarial situation already involves time consuming litigation, however, recommending persons employed by EPA should consider the additional resource requirements associated with both the listing proceeding and the potential judicial challenges to the administrative action. When enforcement litigation is in progress, recommending persons employed by EPA should also consider whether the listing proceeding will provide grounds for collateral attack against EPA's case, and whether such attack would be a benefit or hindrance to successful prosecution of the underlying judicial litigation.

In some cases, listing may be an effective alternative to litigation. Note specifically that EPA has the option of using listing as an enforcement response if a facility fails to comply after being subject to an administrative or judicial order. Note further that EPA may bring a listing proceeding based on present "recurring or continuing" violations and a prior judicial or administrative judgment even if the prior action did not address the present violations. Specifically, EPA should consider listing actions for violating facilities for which previously concluded enforcement actions have not stopped the violator from continuing practices constituting a pattern of chronic noncompliance.

Listing may be especially effective if the value of the facility's government contracts, grants, and loans exceeds the cost of compliance. If the value of these assets is less than the compliance costs, listing probably would not provide adequate incentive to comply. On the other hand, if the value of such assets is considerably greater than the cost of compliance, a listing proceeding could conceivably impede progress toward resolving the environmental problem because the facility is more likely to vigorously contest the listing both at the administrative and Federal court levels. Therefore, we believe that listing will be most appropriate for "middle ground cases" for which there is an ongoing parallel action, i.e., ones where the government contract, grants and loans for the facility in question exceed compliance costs but not considerably.

Finally, a listing proceeding is likely to be more efficient, and therefore more effective, if the continuing or recurring noncompliance involves unambiguous and clearly applicable clean air or clean water standards. If the standards are fraught with complications pertaining to the appropriate compliance test method or procedure, for example, the listing proceeding is probably ill-suited to handle such issues.

Prior to filing a recommendation to list, recommending persons employed by EPA must consult with my office to ensure that a recommendation to list comports with national policy and priorities and is otherwise appropriate. We expect that experience, as usual, will prove to be the best teacher. As we gain experience and after final promulgation of the revisions, we will provide further guidance.

Attachment

cc: Assistant Attorney General for Land and Natural Resources
Associate Enforcement Counsels
OECM Office Directors
Regional Counsel I-X
Steve Ramsey, Chief Environmental Enforcement Section, DOJ
Director, Stationary Source Compliance Division
Director, Enforcement Division, Office of Water

ENVIRONMENTAL PROTECTION AGENCY

40 C.F.R. Part 15.

Administration of the Clean Air Act and the Clean Water Act with Respect to Federal Contracts, Loans, and Grants.

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed rule. 2530-3

SUMMARY: EPA is responsible for implementing several suspension and debarment programs. This action is to revise 40 C.F.R. Part 15, the regulation that establishes a special air and water enforcement-related suspension and debarment program. Commonly referred to as the "contractor listing program", this program makes a facility ineligible for contracts, grants, or loans issued by an Executive Branch agency if the facility has a record of poor compliance with Federal clean air or clean water standards. EPA is revising 40 C.F.R. Part 15 to ensure that the program established by this regulation is consistent with existing legal requirements and is more easily understood.

DATES: Comments. Comments must be received on or before (45 days from publication in Federal Register).

ADDRESSEES: Comments: Comments should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention: Docket Number G-84-01, U.S. Environmental Protection Agency, 401 M St., S.W., Washington. D.C. 20460.

Docket Number G-84-01, containing supporting information used in developing the proposed standard, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery 1, Waterside Mall, 401 M St., S.W., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Edmund J. Gorman, Listing Official, Office of Enforcement and Compliance Monitoring, Environmental Protection Agency, Room 3219I (LE-130A), 401 M St. S.W., Washington, D.C. 20460. Telephone: (202) ~~426-7503.~~ 475-8777

SUPPLEMENTARY INFORMATION: Section 306 of the Clean Air Act (42 U.S.C. §7401 et seq.) and Section 508 of the Clean Water Act (33 U.S.C. §1251 et seq.), as implemented by Executive Order 11738 (38 F.R. 25161, September 12, 1973) authorize EPA to establish procedures for ensuring that Executive Branch agencies conduct their procurement and assistance programs in a manner consistent with the President's responsibility of ensuring compliance with the Clean Air Act (CAA) and the Clean Water Act (CWA).

On April 16, 1975, EPA promulgated 40 C.F.R. Part 15 to provide procedures for ensuring that Executive Branch agencies conduct their procurement and assistance programs in accordance with the President's responsibility for ensuring compliance with CAA and CWA standards. 40 C.F.R. Part 15 accomplishes this by establishing the List of Violating Facilities, a list of facilities which are ineligible for any nonexempt contract, grant, or loan issued by an Executive Branch agency. 40 C.F.R. Part 15 provides

procedures for placing a facility on this list because of a criminal conviction under section 113(c)(1) of the CAA or section 309(c) of the CWA or because of a record of continuing or recurring noncompliance with CAA or CWA standards. 40 C.F.R. Part 15 also provides procedures for removing a facility from the list where there is sufficient indication that the CAA or CWA noncompliance problems at the facility have been or are being corrected.

The purposes of this revision to 40 C.F.R. Part 15 are:

- to conform the language of the regulation more closely with statutory authority.
- to make even more certain that EPA provides adequate procedural due process for facilities which are candidates for placement on the discretionary List of Violating Facilities. The revision does not provide for a formal evidentiary hearing. Instead, it provides for fairness and flexibility through an informal proceeding.
- to improve readability and make the regulatory requirements easier to understand.
- to reflect EPA organizational changes made since the regulation was promulgated.

The most noteworthy revisions include:

- making automatic the listing of facilities that gave rise to criminal convictions under section 113(c)(1) CAA and section 309(c) CWA as required by those statutes.
- adding as a basis for discretionary listing facilities with continuing or recurring violations ~~at facilities~~ which have been the subject of enforcement actions under

sections 113(d), 120, 167, 204, 205, 211, and 303 of the CAA, and

-- stating more explicitly the procedural opportunities which EPA will afford facilities party to listing or removal actions.

Executive Order 12291

Under Executive Order 12291, EPA is required to judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This is not a major regulation because it will not entail a major increase in costs or prices for consumers, individual industries, Federal, State, or local Government agencies, or geographic regions.

Regulatory Flexibility Act

EPA has determined, pursuant to the Regulatory Flexibility Act, that this regulation will not have a significant economic impact on a substantial number of small entities because the decision to "list" any facility is made on a case-by-case basis.

/S/ WILLIAM D. RUCKELSHAUS

William D. Ruckleshaus
Administrator

Date

PART 15--ADMINISTRATION OF THE CLEAN AIR ACT AND THE CLEAN WATER ACT WITH RESPECT TO CONTRACTS, GRANTS, AND LOANS

Subpart A--Administrative Matters

Sec.

Subpart B--Procedures for Placing a Facility on the List of Violating Facilities

Subpart C--Procedures for Removing a Facility from the List of Violating Facilities

Authority: 42 U.S.C. § 7401 et seq.; 33 U.S.C. § 1251 et seq.; Executive Order 11738 of September 10, 1973 (38 F.R. 28161).

SUBPART A--ADMINISTRATIVE MATTERS

§ 15.1 Policy and purpose.

(a) It is the policy of the Federal Government to improve and enhance environmental quality. This regulation is issued to ensure that each agency in the Executive Branch of the Federal Government empowered to enter into contracts for the procurement of goods, materials, or services or to extend Federal assistance by way of grant, loan, or contract undertakes such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Clean Water Act.

(b) This regulation establishes the List of Violating Facilities, procedures for placing a facility on the List of Violating Facilities, removing a facility from the List of Violating Facilities, and procedures for ensuring that agencies in the Executive Branch of the Federal Government undertake their procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act and the Clean Water Act.

§ 15.2 Scope

(a) This regulation applies to all agencies in the Executive Branch of the Federal Government which award contracts, grants, or loans. This regulation also applies to contractors and subcontractors and to recipients of funds under grants and loans. The debarment or suspension that results from a mandatory or discretionary listing is facility specific and does not apply to other facilities of the same company.

(b) This regulation only applies to contracts, grants, or loans involving the use of facilities located inside the United States.

(c) The rights and remedies of the Government hereunder are not exclusive and do not affect any other rights or remedies provided by law.

§ 15.3 Administrative responsibility.

(a) Except for the power to issue rules and regulations, the Assistant Administrator for Enforcement and Compliance Monitoring and the General Counsel are delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Administrator of the Environmental Protection Agency under Executive Order 11738.

[(b) The Assistant Administrator and the General Counsel are authorized to redelegate the authority conferred by this regulation.]

§ 15.4 Definitions.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her designee.

Agency means any department, agency, establishment, or instrumentality in the Executive Branch of the Federal Government, including corporations wholly owned by the Federal Government which award contracts, grants, or loans.

Air Act means the Clean Air Act, as amended (42 U.S.C. § 7401 et seq.).

Air Pollution Control Agency means any agency which is defined in section 302(b) or section 302(c) of the Air Act.

Applicant means any person who has applied but has not yet received a contract, grant, or loan and includes a bidder or proposer for a contract which is not yet awarded.

Assistant Administrator means the Assistant Administrator for Enforcement and Compliance Monitoring, United States Environmental Protection Agency, or his or her successor.

Borrower means any recipient of a loan as defined below.

Case Examiner means an EPA official familiar with pollution control issues who is designated by the Assistant Administrator to conduct a listing or removal proceeding and to determine whether a facility will be placed on the List of Violating Facilities or removed from such list.

Clean air standards means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Air Act, an approved implementation procedure or plan under section 111(c) or section 111(d), respectively, of the Air Act or an approved implementation procedure under section 112(d) of the Air Act.

Clean water standards means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is established pursuant to the Water Act or contained in a permit issued to a discharger by the United States Environmental Protection Agency, or by a State under an approved program, as authorized by section 402 of the Water Act, or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act.

Compliance means compliance with clean air standards or clean water standards. For the purpose of these regulations, compliance also shall mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the United States Environmental Protection Agency, or an air or water pollution control agency, in accordance with the requirements of the Air Act or the Water Act and regulations issued pursuant thereto.

Contract means any contract or other agreement made with an Executive Branch agency for the procurement of goods, materials, or services (including construction), and includes any subcontract made thereunder.

Contractor means any person with whom an Executive Branch agency has entered into, extended, or renewed a contract as defined above, and includes subcontractors or any person holding a subcontract.

Facility means any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operations owned, leased, or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract, grant, or loan. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility, except where the Assistant Administrator determines that independent facilities are co-located in one geographic area.

General Counsel means the General Counsel of the U.S. Environmental Protection Agency, or his or her designee, and successor.

Governor means the governor or principal executive officer of each State.

Grant means any grant or cooperative agreement awarded by an Executive Branch agency including any subgrant or subcooperative agreement awarded thereunder. This includes grants-in-aid, except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. § 1221 et seq.

Grantee means any person with whom an Executive Branch agency has entered into, extended, or renewed a grant, subgrant, or other assistance agreement defined under "grant" above.

List of Violating Facilities means a list of facilities which are ineligible for any agency contract, grant or loan.

Listing Official means an EPA official designated by the Assistant Administrator to maintain the List of Violating Facilities.

Listing proceeding means an informal hearing conducted by the Case Examiner held to determine whether a facility should be placed on the List of Violating Facilities.

Loan means an agreement or other arrangement under which any portion of a business, activity, or program is assisted under a loan issued by an agency and includes any subloan issued under a loan issued by an agency.

Person means any natural person, corporation, partnership, unincorporated association, State or local government, or any agency, instrumentality, or subdivision of such a government or any interstate body.

Recommendation to list means a written request which has been signed and sent by a recommending person to the Listing Official asking that EPA place a facility on the List of Violating Facilities.

Recommending person means a Regional Administrator, the Associate Enforcement Counsel for Air or the Associate Enforcement Counsel for Water (or their successors), the Assistant Administrator for Air and Radiation or the Assistant Administrator for Water (or their successors), a Governor, or a member of the public.

State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territories of the Pacific Islands.

Water Act means the Clean Water Act, as amended (33 U.S.C. § 1251 et seq.).

Water pollution control agency means any agency which is defined in section 502(1) or section 502(2), 33 U.S.C. §§ 1362 (1), (2), of the Water Act.

§ 15.5 Exemptions

(a)(1) Transactions of $100,000 and under. Except as provided in section 15.5(b) below, contracts, grants, and loans not exceeding $100,000 are exempt from these regulations. This exemption

includes contracts for indefinite quantities as long as the purchaser has reason to believe that the amount to be ordered in any year under such an agreement will not exceed $100,000.

(a)(2) Assistance to abate, control, or prevent environmental pollution. Except as provided in section 15.5(b) below, a contract, grant, or loan will be exempt from these regulations when the principal purpose of a contract, grant, or loan is to assist a facility or facilities to comply with any Federal, State, or local law, regulation, limitation, guideline, standard, or other requirement relating to the abatement, control or prevention of environmental pollution.

(b) The exemptions in section 15.5(a) do not apply where work under the contract is to be performed at a facility that has been placed on the List of Violating Facilities on the basis of a criminal conviction under section 113(c)(1) of the Air Act or section 309(c) of the Water Act, and the person convicted owns, supervises, or leases the facility.

(c) Authority of Agency Head to Grant Exemptions.

(1) Individual exemptions. Where an Agency head determines that it is in the paramount interest of the United States to enter into, renew, or extend a contract, grant, or loan in connection with any facility that is on the List of Violating Facilities, he or she may exempt the agreement from the provisions of this regulation for a period of one year. The Agency head granting the exemption shall notify the Assistant Administrator of the exemption as soon before or after granting the exemption as may

practicable. The justification for such an exemption, or any renewal thereof, shall fully describe the purpose of the contract, grant, or loan and shall show why the paramount interest of the United States requires the exemption.

(2) Class exemptions. Where an agency head determines that it is in the paramount interest of the United States for the agency to enter into, extend, or renew any class of contracts, grants, or loans, he or she may exempt the class of agency contracts, grants, or loans from the provisions of this regulation by rule or regulation after consultation with the Administrator.

SUBPART B-PROCEDURES FOR PLACING A FACILITY ON THE LIST OF VIOLATING FACILITIES

§ 15.10 Mandatory listing.

The Listing Official must place a facility on the List of Violating Facilties if the facility which gave rise to the conviction is owned, leased, or supervised by any person who has been convicted of a criminal offense under section 113(c)(1) of the Air Act or section 309(c) of the Water Act. The mandatory listing is automatically effective upon conviction.

§ 15.11 Discretionary listing.

(a) The Listing Official must place a facility on the List of Violating Facilities if there is a final agency action under section 15.12(d), 15.14(c), or 15.14(d) which determines that there is a record of continuing or recurring noncompliance with clean air standards or clean water standards at the facility recommended for listing and that:

(1) A federal court has convicted any person under section 113(c)(2) of the Air Act if that person owns, leases, or supervises a facility recommended for listing;

(2) A state or local court has convicted any person of a criminal offense on the basis of noncompliance with clean air standards or clean water standards if that person owns, leases, or supervises a facility recommended for listing;

(3) A federal, state, or local court has issued an injunction, order, judgment, decree, or other form of civil ruling as a result of noncompliance with clean air or clean water standards at a facility recommended for listing;

(4) The facility has violated any administrative order issued under section 113(a), 113(d), 167, and 303 of the Air Act or section 309(a) of the Water Act has been violated, if the violator owns, leases, or supervises a facility recommended for listing;

(5) EPA has issued a Notice of Noncompliance under Section 120 of the CAA as a result of noncompliance at the facility; or

(6) EPA has filed an enforcement action in court under sections 113(b), 167, 204, 205, or 211 of the Air Act or section 309(b) of the Water Act due to noncompliance with clean air standards or clean water standards at the facility recommended for listing.

(b) A recommendation to list from a recommending person initiates the process for discretionary listing. A recommendation to list must contain:

(1) The name, address, and telephone number of the person filing the recommendation;

(2) A description of the facility alleged to be in noncompliance with clean air standards or clean water standards, including the name and address of the facility;

(3) A description of the alleged continuing or recurring non-compliance, including any available data and any other pertinent information supporting the allegation of noncompliance; and

(4) A description of the criminal, civil, or administrative action or conviction under section 15.11(a)(1), (a)(2), (a)(3), (a)(4), or (a)(5) which is pertinent to the facility and the alleged continuing or recurring noncompliance.

(c) The Listing Official shall review each recommendation to list to ensure it complies with all of the requirements under section 15.11(b). If there is a deficiency in a recommendation the Listing Official must return it to the recommending person for correction. If there is no deficiency in the recommendation to list, the Listing Official shall transmit the recommendation to the Assistant Administrator. The Assistant Administrator, in his or her discretion, may

(i) decline to proceed, or

(ii) designate a Case Examiner in accordance with section 15.12(a), or

(iii) decide to list the facility in accordance with section 15.12(d).

(d) A recommending person may withdraw a recommendation to list at any time before the conclusion of the listing proceeding. The recommending person should withdraw the recommendation to list if the conditions which gave rise to the recommendation to list have been corrected or if the facility recommended for listing is on a plan for compliance which has been approved by either the Assistant Administrator or the recommending person and which will ensure that the condition(s) which gave rise to recommendation to list will be corrected.

§ 15.12 Notice of filing of recommendation to list and opportunity to have a listing proceeding.

(a) The Listing Official shall send to the facility named in the recommendation to list written notice that a recommendation that the facility be placed on the List of Violating Facilities has

been filed with the Listing Official and has been transmitted to the Assistant Administrator. Within twenty (20) working days of the receipt of the notice, any person who owns, leases, or supervises the facility may request the Assistant Administrator to designate a Case Examiner to hold a listing proceeding to determine the propriety of the proposed listing.

(b) If a listing proceeding is requested, the Listing Official shall schedule a listing proceeding and notify in writing the recommending person and the person requesting the listing proceeding of the date and time of the listing proceeding.

(c) The Listing Official shall respond to any requests from the recommending person and the person requesting the listing proceeding concerning the procedures for discretionary listing.

(d) If there is no timely request for a listing proceeding under section 15.12(b) above, the Listing Official will place the facility named in the recommendation to list on the List of Violating Facilities on the basis of discretionary listing if, upon reviewing the recommendation to list and any other available information, the Assistant Administrator determines that there is a record of continuing or recurring noncompliance with clean air standards or clean water standards at the facility recommended for listing and the requisite criminal, civil, or administrative enforcement action has been taken or criminal conviction has occurred. Such a determination by the Assistant Administrator constitutes final agency action.

§ 15.13 Listing proceeding.

(a) No listing proceeding for mandatory listing. Mandatory listing is effective upon conviction and no listing proceeding will be provided when a facility is listed on the basis of mandatory listing. For purposes of updating the List of Violating Facilities, the Associate Enforcement Counsel for Criminal Enforcement shall notify the Listing Official of the conviction as soon as it occurs.

(b) Listing proceeding for discretionary listing.

(1) A listing proceeding for discretionary listing shall be conducted in an informal manner without formal rules of evidence or procedure. The recommending person and the person requesting the listing proceeding under section 15.12(a) above may be represented by legal counsel, present oral and written evidence relevant to the proposed listing, and, with the approval of the case examiner, may call, ask questions of, and cross-examine witnesses, except to the extent any testimony would prematurely reveal sensitive enforcement information which the government may legally withhold or would unduly extend the proceedings in light of the usefulness of any additional information likely to be produced. The Case Examiner may take official notice of facts, law, and any other information available to him or her. The Case Examiner may also request any party to supplement the record by submitting additional information.

(2) The listing proceeding shall be transcribed, and EPA shall make available a transcribed record of the proceeding to any person, at cost upon request.

(3) To demonstrate an adequate basis for listing a facility, the recommending person must show by a preponderance of the evidence that there is a record of continuing or recurring noncompliance at the facility named in the recommendation to list and that the requisite enforcement action has been taken.

(c) Case Examiner's decision. Not later than thirty (30) working days after conclusion of the listing proceeding and any supplementation of the record, the Case Examiner shall issue a written decision on whether or not to list the facility based on the record of the listing proceeding and shall file that decision with the Listing Official.

(d) Notification of Case Examiner's decision. The Listing Official shall notify in writing the recommending person and the person who requested the listing proceeding under section 15.12(a) of the Case Examiner's decision and of the opportunity to request the General Counsel to review the Case Examiner's decision under section 15.14.

§ 15.14 Review of the Case Examiner's decision.

(a) Within twenty (20) working days after the Case Examiner's decision, the party adversely affected may file with the Listing Official a written request asking the General Counsel to review the Case Examiner's decision. The request to review the Case Examiner's decision must contain:

(1) a statement of the case and the facts involved in the recommendation to list;

(2) a statement of the issues presented by the recommendation to list; and

(3) a statement showing why the decision of the Case Examiner is not correct based on the record of the listing proceeding considered as a whole.

(b) The party adversely affected may raise on review only those issues raised before the Case Examiner, unless the General Counsel determines that there is good cause to include consideration of any new issues.

(c) If the Listing Official receives a timely request for review of the Case Examiner's decision, the General Counsel shall review the record of the listing proceeding to determine if the decision of the Case Examiner is correct based on the record of the listing proceeding considered as a whole. As soon as practicable after receiving the request for review, the General Counsel shall issue a final decision in writing which is based on this determination and explains the basis for the final decision. The General Counsel's decision shall constitute final agency action. The General Counsel shall file the decision with the Listing Official.

(d) The Case Examiner's decision constitutes a final agency action for purposes of discretionary listing unless a timely request for review of the Case Examiner's decision is filed with the Listing Official in accordance with section 15.14(a).

§ 15.15 Effective date of discretionary listing.

(a) Discretionary listing is effective immediately upon the issuance of a final agency action filed with the Listing Official to place the facility recommended for listing on the List of Violating Facilities, or upon the failure to file a timely written request for a listing proceeding under section 15.12(d).

(b) Discretionary listing remains effective until a removal occurs under section 15.26

§ 15.15 Notice of listing.

(a) Mandatory listing. The Listing Official shall send written notice to the facility which shall state that the facility has been placed on the List of Violating Facilities on the basis of mandatory listing and the effective date of such listing.

(b) Discretionary listing. The Listing Official shall send written notice to the recommending person and any person who requested a listing proceeding informing them of the effective date of the discretionary listing. The Listing Official shall send written notice to the facility if no listing proceeding was requested.

(c) Federal Register notice. The Listing Official shall publish the effective date of the placement of the facility on the List of Violating Facilities in the Federal Register in accordance with section 15.40.

SUBPART C--PROCEDURES FOR REMOVING A FACILITY FROM THE LIST OF VIOLATING FACILITIES

§ 15.20 Removal of a mandatory listing.

When the Listing Official has placed a facility on the List of Violating Facilities on the basis of mandatory listing under section 15.10, the facility shall remain on the List of Violating Facilities until the Assistant Administrator certifies that the condition giving rise to mandatory listing has been corrected.

§ 15.21 Removal of a discretionary listing.

(a) When the Listing Official has placed a facility on the List of Violating Facilities on the basis of discretionary listing under section 15.11, the Listing Official shall remove the facility from the List of Violating Facilities as provided below:

(1) If the conviction, decree, order, judgment, or other form of civil ruling or finding which formed the basis for discretionary listing under section 15.11(a) has been reversed or otherwise modified to remove the basis for discretionary listing;

(2) If the Assistant Administrator has determined that the condition(s) which gave rise to discretionary listing have been corrected; or,

(3) Automatically after one year of a discretionary listing under section 15.11(a)(4), (a)(5) or (a)(6), unless before the expiration of the one-year period a basis for mandatory listing arises under section 15.10 or a basis for discretionary listing arises under 15.11(a)(1), (a)(2), or (a)(3).

(b) The Listing Official shall remove a facility from the List of Violating Facilities at the direction of the Assistant Administrator if the facility is on a plan for compliance which has been approved by the Assistant Administrator and which will ensure that the condition(s) which gave rise to discretionary listing will be corrected.

§ 15.22 Request for removal from the List of Violating Facilities.

(a) The original recommending person or any person who owns, leases, or supervises a facility that is on the List of Violating Facilities may file with the Listing Official a request to remove the facility from the List. This request must set forth the proposed basis for removal from the List under section 15.20 or 15.21.

(b) The Assistant Administrator shall review the request for removal and shall issue a decision as expeditiously as practicable after receiving the request as to whether the facility will be removed from the List of Violating Facilities.

(c) The Listing Official shall send written notice to the person requesting removal informing that person of the Assistant Administrator's decision concerning removal and of the opportunity to request a removal hearing under section 15.23 if the Assistant Administrator denies the request for removal.

§ 15.23 Request for removal hearing.

(a) Within twenty (20) working days after the Assistant Administrator denies a request for removal from the List of Violating Facilities, the facility or the original recommending person may file with the Listing Official a written request for a removal hearing under section 15.24.

(b) If a timely request for a removal hearing under section 15.23(a) is not filed, any person who may make a request for removal under section 15.22(a) may file a new request for removal under section 15.22(a) if a new basis for removal under section 15.20 or 15.21 arises at a later date.

§ 15.24 Removal hearing.

(a) A removal hearing shall be conducted by a Case Examiner designated by the Assistant Administrator. The person requesting the removal hearing must demonstrate at the removal hearing by a preponderance of the evidence that a basis for removal is present.

(1) The person requesting the removal hearing and the Agency may be represented by legal counsel, present oral and written evidence relevant to the proposed removal, and, with the approval of the Case Examiner, call, ask questions of, and confront witnesses to the extent it is relevant to the issue of removal and to the extent that any additional information produced will be useful in light of the additional time such procedures will take.

(2) The removal hearing shall be transcribed and a transcribed record of the proceeding shall be made available to the owner, operator, or lessee of the facility or to any person represented at the hearing at cost upon request.

(b) The Federal, State, or local authority responsible for the enforcement of clean air standards or clean water standards with respect to the listed facility may participate in the removal hearing.

(c) The Case Examiner's decision concerning removal shall be based solely upon the record in the removal hearing.

The decision shall constitute final agency action.

(c) If a timely request asking the Administrator to review the Case Examiner's decision under section 15.25(a) is not filed, the Case Examiner's decision constitutes final agency action at the expiration of such period.

(d) If the request for removal is denied upon review, any person who may file a request for removal under section 15.22(a) may file a new request for removal under section 15.22(a) if a new basis for removal under section 15.20 or 15.21 arises at a later date. The new request shall set forth the new basis claimed for removal.

§ 15.26 Effective date of removal.

(a) Mandatory listing. Removal of a facility placed on the List of Violating Facilities on the basis of mandatory listing shall be effective immediately upon the certification by the Assistant Administrator that the condition(s) which gave rise to the mandatory listing under section 15.10 has been corrected, or upon the issuance of a final agency action filed with the Listing Official to remove the listed facility from the List of Violating Facilities under Sections 15.24 or 15.25.

(b) Discretionary listing. Removal of a facility placed on the List of Violating Facilities on the basis of discretionary listing shall be effective immediately upon the expiration of one year under 15.21(a)(3) or upon ~~the~~ the Assistant Administrator's decision to remove the listed facility based upon a timely written request for removal under section 15.22(a), or upon the issuance of a final agency action filed with the Listing Official to remove

(d) The Listing Official shall send written notice to the person requesting the removal hearing and the Federal, State, or local authority responsible for the enforcement of clean air standards or clean water standards with respect to the listed facility, informing them of the decision of the Case Examiner and of the opportunity to request the Administrator to review the Case Examiner's decision under section 15.25.

§ 15.25 Request for review of the decision of the Case Examiner.

(a) Within twenty (20) working days of the date of the Case Examiner's decision under section 15.24, the party adversely affected by the Case Examiner's decision may file with the Listing Official a request for the Administrator to review the Case Examiner's decision. The request shall contain:

(1) a statement of the issues presented by the request for removal;

(2) a statement of the case and the facts involved in the request for removal; and

(3) a statement showing why the decision of the Case Examiner is not correct based upon the record of the removal hearing considered as a whole.

(b) Upon receiving a timely request for review of the removal hearing, the Administrator shall review the record of the removal hearing to determine if the decision of the Case Examiner is correct based upon the record of the removal hearing considered as a whole. As soon as practicable after receiving the request for review, the Administrator shall issue a final decision in writing which shall be based on this determination and shall set forth the reasons for the decision.

SUBPART D-AGENCY COORDINATION

§ 15.30 Agency responsibilities.

Each agency shall take appropriate steps to ensure that all officers and employees whose duties include ensuring that all agency contracts, grants, and loans are in compliance with applicable requirements are familiar with the requirements set forth in Executive Order 11738, this regulation, 48 F.R. 42102 (September 19, 1983), and 49 F.R. 8834 (March 8, 1984).

§ 15.31 Agency regulations.

(a) Any agency responsible for promulgating contract, grant, and loan regulations, shall ensure that its regulations require every non-exempt agency contract, grant, and loan and every subagreement issued thereunder to include the following provisions:

(1) A promise by the contractor, grantee, or borrower that he or she will not use any facility on the List of Violating Facilities in the performance of any nonexempt contract, grant, or loan.

(2) A promise by the contractor, grantee, or borrower that he or she will notify the awarding agency if a facility he or she intends to use in the performance of the contract, grant, or loan is on the List of Violating Facilities or has been recommended to be placed on the List of Violating Facilities.

(3) A promise by the contractor, grantee, or borrower that in the performance of the contract, grant, or loan, he or she will comply with all requirements of the Air Act and the Water Act, including the requirements of section 114 of the Air Act and section 308 of the Water Act, and all applicable clean air standards and clean water standards.

the listed facility from the List of Violating Facilities under sections 15.24 or 15.25.

(c) Federal Register notice. The Listing Official shall publish the effective date of the removal of the facility from the List of Violating Facilities in the Federal Register in accordance with section 15.40.

§ 15.27 Notice of removal.

The Listing Official shall send written notice to the recommending person and any person who made a timely written request for removal under section 15.22(a) informing them of the effective date of the removal of the facility from the List of Violating Facilities. The Listing Official shall publish the effective date of the removal in the Federal Register in accordance with section 15.40.

§ 15.32 Contacting the Assistant Administrator.

(a) Any agency employee whose duties include ensuring that all agency contracts, grants, and loans are in compliance with applicable requirements, shall promptly report to his or her agency head, or the designee of the agency head, any condition which may involve noncompliance with clean air standards or clean water standards at any facility that is being used, or will be used in an agency contract, grant, or loan. The report shall include at a minimum the following information:

(1) The name, telephone number, and agency of the employee discovering the condition.

(2) The name of the facility at which the condition exists.

(3) A description of the condition.

(4) The contract, grant, or loan the agency has issued or may issue, extend, or renew to the facility at which the condition exists.

(b) The agency head, or his or her designee, shall transmit any reports made under section 15.32(a) to the Assistant Administrator as soon as practicable, after he or she receives the report. In response to the report, the Assistant Administrator shall take any action that is consistent with the policy and purpose of this regulation.

§ 15.33 Investigation by the Assistant Administrator prior to awarding a contract, grant, or loan.

(a) If the Assistant Administrator is notified under section 15.32(b)

(a) that a condition which may involve noncompliance with clean air standards or clean water standards exists at a facility that is or may be used in the performance of any nonexempt agency contract, grant, or loan, the Assistant Administrator may, after consultation with the awarding agency involved, request that the award, extension, or renewal of the nonexempt contract, grant, or loan be withheld for fifteen (15) working days to determine if a basis exists for placing the facility on the List of Violating Facilities under sections 15.10 and 15.11.

(b) If the Assistant Administrator requests that an award, extension, or renewal of a contract, grant, or loan be withheld under section 15.33(a), the awarding agency shall comply with the Assistant Administrator's request unless it determines that the delay is substantially contrary to the best interests of the government. The awarding agency shall promptly notify the Assistant Administrator of any such determination.

(c) At the end of the fifteen (15) day working period, the Assistant Administrator shall notify the awarding agency and the applicant of the results of any investigation undertaken under section 15.33(a).

§ 15.34 Referral by the Assistant Administrator to the Department of Justice.

The Assistant Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be

brought or other appropriate action be taken whenever the Assistant Administrator becomes aware of a breach of any provision required to be included in a contract, grant, or loan under section 15.31.

SUBPART E-MISCELLANEOUS

§ 15.40 Distribution of the List of Violating Facilities

(a) The List of Violating Facilities shall be transmitted to the General Services Administration and published in the Federal Register on or about February 1 and August 1 of each year, and updated in the Federal Register as necessary to reflect changes to the list as they occur. The list shall contain the following information:

(1) the name of each facility on the List;

(2) the location of the facility;

(3) the basis for the listing;

(4) the effective date of the listing; and

(5) any removal of any facility from the List.

§ 15.41 Reports.

(a) Agency reports. Each Agency head will report each exemption granted under §15.5(b) to the Administrator. Reports should be made by November 1 of each year and should indicate all exemptions granted during the previous fiscal year.

(b) Reports by the Administrator.

(1) The Administrator shall report annually to the President on the measures he or she has taken toward implementing the purpose and intent of section 306 of the Air Act, section 508 of the Water Act, Executive Order 11738, and this regulation, including but not limited to the progress and problems associated with such implementation.

(7) The Administrator shall notify the President and the Congress annually of all exemptions granted or in effect under section 15.5 during the preceding year.

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

#32

AUG 08 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Implementation of Mandatory Contractor Listing

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

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
Associate Enforcement Counsel for Air Enforcement
Associate Enforcement Counsel for Water Enforcement
Associate Enforcement Counsel for Criminal Enforcement
Assistant Attorney General for Land and Natural Resources
Regional Counsels I-X

Introduction and Purpose

Pursuant to statutory requirements, the proposed revisions to 40 CFR Part 15 require that the List of Violating Facilities ("the List") automatically include any facility which gives rise to a criminal conviction of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. Any facility on the List is ineligible to receive any non-exempt Federal government contract, grant, or loan. Removal of a facility from the List occurs only if I certify that the condition giving rise to the conviction has been corrected or if a court reverses or vacates the conviction. This memorandum establishes the procedure to implement the mandatory portion of the contractor listing program. 1/

1/ Guidance on implementation of the discretionary listing authority issued on July 18, 1984.

Procedure for Mandatory Listing

I. A federal district court must enter a guilty verdict or guilty plea of a person under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. The convicted person must own, operate, lease, supervise or have a financial interest in the facility which gave rise to the conviction. Note that criminal convictions under Section 113(c)(2) of the Clean Air Act and criminal convictions entered by a State or local court do not qualify a facility for mandatory listing.

II. Upon notification of an entry of a guilty verdict or guilty plea by the clerk of the district court, the Department of Justice must immediately notify the Associate Enforcement Counsel for Criminal Enforcement (LE-134E). This notification must occur even if the defendant still awaits sentencing, has moved for a new trial or a reduced sentence, or has appealed the conviction.

III. The Associate Enforcement Counsel for Criminal Enforcement must independently verify that the court has entered the guilty verdict or guilty plea.

IV. Upon such verification, the Associate Enforcement Counsel for Criminal Enforcement shall notify EPA's Listing Official (LE-130A) in writing, of the name and location of the facility and of the condition giving rise to the guilty verdict or guilty plea.

V. The Listing Official shall then update the List by publishing a notice in the Federal Register, and shall notify the Associate Enforcement Counsel for Air or Water; the appropriate Regional Counsel; the Compliance Staff, Grants Administration Division, Office of Administration and Resource Management; the General Services Administration, and the facility. A facility remains on the mandatory List indefinitely until it establishes a basis for removal.

Procedure for Removal from the Mandatory List

I. Any person who owns, operates, leases, supervises, or has a financial interest in the listed facility may file with the Listing Official a request to remove that facility from the List. The request must establish one of the following grounds for removal:

A. The condition at the facility that gave rise to the conviction has been corrected.

B. The conviction (not just the sentence) was reversed or vacated.

II. The Listing Official must transmit the request for removal to the Assistant Administrator for OECM.

III. The Assistant Administrator for OECM, or her or his designee, shall review the request for removal and shall consult the appropriate Regional Counsel to determine whether the condition at the facility giving rise to the conviction has been corrected, or if the conviction has been reversed or vacated.

IV. The Assistant Administrator for OECM shall determine as expeditiously as practicable whether to remove the facility from the list.

V. If the Assistant Administrator for OECM decides to remove the facility from the list, a written notification of such determination shall be sent to the facility and to the Listing Official who shall promptly publish a notice of removal in the Federal Register.

VI. If the Assistant Administrator for OECM decides not to remove the facility from the List, the Listing Official shall send written notice of the decision to the person requesting removal. The notice shall inform the person owning, operating, leasing, supervising or having a financial interest in the facility of the opportunity to request a removal hearing before a Case Examiner (See 40 CFR Part 15 for the selection and duties of the Case Examiner).

VII. If the Case Examiner, or the Administrator upon appeal of the Case Examiner's decision, decides to remove the facility from the List, the Listing Official shall be notified. The Listing Official shall then promptly remove the facility from the List. If the Case Examiner or the Administrator upon appeal, decides not to remove the facility from the list, then the Listing Official shall send written notice of the decision to the person requesting removal.

It is important to note that any decision regarding the listing or removal of a facility from the List does not affect any other action by any government agency against such a facility, including debarment from government contracting.

I believe these procedures will enable us to conduct the mandatory listing program in an efficient manner. If you have any questions, please contact EPA's Listing Official, Allen J. Danzig, at (FTS) 475-8777.

cc: Stephen Ramsey, DOJ
Belle Davis, GAD/OARM
Judson W. Starr,/DOJ

#33

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

NOV 5 1984

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment

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

TO: Regional Administrators
Associate Enforcement Counsels
OECM Office Directors

I. PURPOSE

This guidance amplifies the material in the Appendix of GM-22, "Framework for Statute-Specific Approaches to Penalty Assessment." The Appendix presents a description of how to calculate the economic benefit of noncompliance as part of developing a civil penalty. A new computer model, BEN, is a refinement of the methodology for calculating the economic benefit of noncompliance.

By refining the methods by which we calculate the economic benefit of noncompliance, we will:

1. Respond to the problems that enforcement and program offices identified concerning methods for calculating the economic benefit component of a civil penalty;

2. Ensure among the media programs appropriate consistency in calculating the economic benefit component of a civil penalty;

3. Ensure that the economic benefit of noncompliance continues to be a fairly valued, reasonable component of a civil penalty; and

4. Ensure that the assumptions and data used in BEN to calculate the economic benefit component can be defended at either an administrative hearing or a judicial proceeding.

II. SCOPE

This guidance describes BEN, the new computer model, in terms of how this model resolves the identified problems related to the use of CIVPEN. EPA personnel can use BEN to calculate the economic benefit a violator gains from delaying capital expenditures for pollution control equipment or from avoiding the costs of operating and maintaining pollution control equipment. Exhibit I summarizes BEN.

EPA personnel cannot use BEN to calculate the economic benefit component of a civil penalty if a violator's action does not involve a delayed or avoided expenditure. Under these circumstances, program offices may elect to develop statute-specific formulas as provided in GM-22 for calculating the economic benefit component of a civil penalty. These formulas would be used to develop civil penalties in response to actions such as certain TSCA marking/disposal violations or RCRA reporting violations. The rule of thumb in the general penalty policy would not be appropriate for these types of violations.

OPPE is considering the feasibility of developing a second computer model or rule of thumb formula that could be applied uniformly to violations that do not involve delayed or avoided expenditures.

III. NEW CIVIL PENALTY POLICY APPROACH

Regional personnel may use the rule of thumb described in GM-22 to develop a preliminary estimate of the economic benefit component of a civil penalty. The rule of thumb is for the convenience of EPA and is not intended to give a violator a lower economic benefit component in a civil penalty. Regional personnel should consider whether an estimate of economic benefit derived with the rule of thumb would be lower than an estimate calculated with BEN. For example, the longer the period of noncompliance, the more the rule of thumb underestimates the economic benefit of noncompliance.

If EPA proposes and a violator accepts the rule of thumb calculation, Regional personnel can develop the civil penalty without further analysis of economic benefits. If a violator disputes the economic benefit figure calculated under the rule of thumb, a more sophisticated method to develop the economic benefit component of the penalty is required.

In general, if the estimate under the rule of thumb is less than $10,000, the economic benefit component is not needed to develop a civil penalty;[1] the other factors in GM-22 still apply. If the rule of thumb estimate is more than $10,000, Regional personnel should use BEN to develop an estimate of the economic benefit component.

IV. USING BEN TO CALCULATE ECONOMIC BENEFIT OF NONCOMPLIANCE

EPA personnel should use the revised computer model BEN whenever:

1. the rule of thumb indicates that the economic benefit of noncompliance is greater than $10,000; or

2. the violator rejects the rule of thumb calculation.

BEN uses 13 data variables. At the option of the user, BEN substitutes standard values for 8 of the 13 entries, and the user only provides data for 5 variables. (See Exhibit I.)

BEN also has the capability for EPA personnel to enter for those 8 variables the actual financial data of a violator. In appropriate cases, EPA should notify a violator of the opportunity to submit actual financial data to use in BEN instead of the 8 standard values. If a violator agrees to supply financial data, the violator must supply data for all the standard values.

V. ADVANTAGES OF BEN OVER OTHER CALCULATION METHODS

The computer model BEN has advantages over previously used methods for calculating the economic benefit component of a civil penalty. BEN does not require financial research by EPA personnel. The five required variables are information about capital costs, annual operation and maintenance costs, and the dates for the period of noncompliance. Further, BEN has the flexibility to allow a violator who cooperates with EPA to provide actual financial data that may affect the penalty calculation.

1/ Although the general penalty policy cut off point is $10,000, each program office may establish a cut off point for the program's medium-specific policy.

An economic benefit component calculated with BEN can be defended in an administrative or judicial proceeding on the grounds that the standard values used in BEN are derived from standard financial procedures and the violator had an opportunity to provide financial data to help develop the civil penalty.

The use of BEN or statute-specific formulas when appropriate gives the Regional Offices flexibility in determining the economic benefit of noncompliance. Regional personnel have a consistent method for developing a civil penalty under several statutes for multiple violations that involve delayed capital costs and avoided operation and maintenance costs.

BEN is easy for a layman to use. The documentation is built into the program so that a Regional user always has updated documentation and can use the program with minimal training. States are more likely to follow EPA's lead in pursuing the economic benefit of noncompliance through civil penalty assessments because the method available from EPA to serve as a model does not require extensive financial research.

cc: Regional Enforcement Contacts
Program Compliance Office Directors

Exhibit I

BEN

A. Accessed via terminal to EPA's IBM computer in Durham, N.C.

B. Can be run in either of two modes:

1. Standard mode:

a) Requires 5 inputs:

i. Initial Capital Investment

ii. Annual Operating and Maintenance Expense

iii. First Month of Noncompliance

iv. Compliance Date

v. Penalty Payment Date

b) Relies on realistic standard values for remaining variables:

i. A set of standard values for private companies

ii. A set of standard values for municipally-owned or not-for-profit companies

c) Would be used for final calculation of economic benefit unless the violating firm objected and supplied all its own financial data

2. Specific mode:

a) Requires 13 inputs

b) Would be used if violating firm supplied data or if EPA staff researched data

C. Is easy to use

1. Optional on-line documentation will guide inexperienced users through each step of the model

2. Written documentation will be available by December 1984

D. Is based on modern financial principles

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

#34

NOV 16 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances

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

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

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

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- on the basis that revisions to the underlying legal requirement are being considered;

- on the basis that the Agency has determined that the party is not liable or has a valid defense;

- on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or

- on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)

- in extremely unusual cases in which a no action assurance is clearly neccessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the _____ Act and supports the actions which (State) is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

I am requesting that any definitive written or oral no action commitment receive the advance concurrence of my office. This was a difficult decision to reach in light of the valid concerns raised in comments on this policy statement; nevertheless, we concluded that Headquarters concurrence is important because the precedential implications of providing no action commitments can extend beyond a single Region. We will attempt to consult with the relevant program office and respond to any formal request for concurrence within 10 working days from the date we receive the request. Naturally, emergency situations can be handled orally on an expedited basis.

All instances in which an EPA official gives a no action promise must be documented in the appropriate case file. The documentation must include an explanation of the reasons justifying the no action assurance.

Finally, this policy against no action assurances does not preclude EPA from fully discussing internally the prosecutorial merit of individual cases or from exercising the discretion it has under applicable law to decide when and how to respond or not respond to a given violation, based on the Agency's normal enforcement priorities.

cc: Associate Enforcement Counsels
OECM Office Directors
Program Compliance Office Directors
Regional Enforcement Contacts

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

#35

JAN 4 1985

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

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

FROM: Alvin L. Alm
Deputy Administrator

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

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

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

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

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

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

Attachment

EPA POLICY ON IMPLEMENTING NATIONALLY MANAGED OR COORDINATED ENFORCEMENT ACTIONS

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

A. Criteria for Nationally Managed or Coordinated Enforcement Cases

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

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

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

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

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

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

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

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

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

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

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

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

-- favorable venue considerations.

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

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

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

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

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

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

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

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

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

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

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

C. Case Development -- Roles and Responsibilities

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

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

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

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

D. Press Releases and Major Communications

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

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

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

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

#36

FEB 16 1994

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels

Introduction

Most of the environmental statutes for which the U.S. Environmental Protection Agency (EPA) has responsibility contain one or both of the following information-gathering provisions: (1) provisions which empower EPA to require responses to requests for information; and (2) provisions conferring upon EPA the right to enter and inspect physical premises. This document has been prepared to provide guidance concerning the use of these provisions in the investigation of cases assigned to EPA's Office of Criminal Investigations. This guidance supersedes any previous EPA document which addresses the issues arising from the use of administrative discovery devices in the development of a criminal case.

This guidance was developed through an examination of the use of administrative discovery devices in cases that have resulted in criminal prosecutions. Because there is currently very little case law concerning such provisions in environmental statutes, a review was made of cases under similar statutory schemes. The guidance is a rather conservative application of the broad principles established in these decisions.

The use of administrative discovery devices in parallel proceedings--that is, instances in which both a criminal investigation and a civil or administrative proceeding concerning the same circumstances take place simultaneously--is not addressed in this document. This issue is addressed in separate guidance on parallel proceedings.

The importance of this guidance cannot be over-stated. Where the use of administrative discovery devices is found to be improper, the ultimate remedy may be suppression of evidence in the subsequent criminal prosecution.

This guidance is strictly advisory in nature. It is not intended to create or confer any rights, privileges or benefits. This policy is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil and criminal. Any attempts to litigate any portion of this guidance should be brought to the attention of the Criminal Enforcement Division, Office of Enforcement and Compliance Monitoring, EPA Headquarters.

I. USE OF EPA'S INFORMATION REQUEST AUTHORITY

Background

For purposes of this guidance, the term "information request authority" will be used to describe those provisions contained in EPA-administered statutes which provide the Agency with the authority to compel the production of information. Sections 308 of the Clean Water Act and 11(e) of the Toxic Substances Control Act are typical of such provisions. Courts have upheld the use of such provisions both in cases where the information sought is relevant to investigations into pending charges and where it is relevant to investigations into whether charges should issue.1/ Information requests pursuant to these provisions are enforceable upon a showing that the information is relevant to a purpose properly authorized by Congress.2/

The enforcement provisions of environmental statutes contain both civil and criminal provisions. Therefore, evidence obtained through the use of such information request authority may subsequently be used in a criminal prosecution. This fact raises concerns that such summons authority will be used, in some instances, solely for purposes of gathering evidence for a criminal prosecution; such a use has been viewed as infringing upon the role of the grand jury.

Issue

To what extent can the information request authority granted to EPA under the environmental statutes be utilized to gather evidence of statutory violations in cases under development by EPA's Office of Criminal Investigations?

1/ Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 (1946).

2/ United States v. Morton Salt Company, 338 U.S. 632 (1950).

Guidance

EPA's information request authority may properly be used in cases being developed by EPA's Office of Criminal Investigations until the case is referred to the Department of Justice. The decision to refer a case, however, may not be artificially delayed solely to pursue further evidence through the use of this authority. Where an investigation is being directed by the Justice Department even though no formal referral from EPA has been made, EPA's information request authority should not be used as an investigative tool. This situation, however, should be distinguished from the situation where the Justice Department has merely been advised of an investigation and has not exhibited any control over its course.

The various environmental statutory provisions which grant authority to request information from members of the regulated community also contain limitations on the type of information which may be obtained through the use of this authority. Care should be taken to draft any request to conform to these limitations. In addition, it should be noted that a request based on this statutory authority may only be made by an Agency employee to whom the authority has been delegated by the Administrator. Reference should be made to a properly updated EPA Delegations Manual to ensure that any request is made by an employee with proper authority. Finally, each such request should contain a notice indicating that violations of the particular statute may be the subject of either civil or criminal penalties.

Discussion

The starting point for a discussion on the proper use of information request provisions is a review of instances where the Courts have found the use to be absolutely improper. The Supreme Court has made it clear that information requests may not be used to gather evidence in a criminal investigation once the case has been referred to the Department of Justice for criminal prosecution.3/ La Salle involved the use of an administrative summons in a tax fraud investigation by a Special Agent of the IRS Intelligence Division. Although the statute provides both civil and criminal remedies for violations, the agent testified that the purpose of his investigation was to uncover any criminal violations of the IRS code. During the course of his investigation and prior to referral of the case to the Department of Justice, the agent issued an administrative summons for records. The bank challenged the use of the summons as improper claiming that the summons was issued solely to aid in a criminal investigation.

3/ United States v. La Salle National Bank, 437 U.S. 298 (1978).

Although the Supreme Court held that the summons should be enforced, it used this case as an opportunity to elaborate on the bounds of such summons authority. An administrative summons must be used in good faith and for a Congressionally authorized purpose. Use solely to pursue a criminal investigation is not good faith. However, a case may not be considered criminal until an "institutional decision" is made to prosecute criminally. The intent of the individual agent is not dispositive of this issue. This institutional decision generally occurs at the point of referral to the Department of Justice. However, the Court made it clear that a delay in submitting a case to the Department of Justice merely to gather additional evidence for the prosecution through use of administrative discovery devices would not be tolerated. The Court also indicated the Agency cannot use this administrative authority merely to become an information gathering tool for other agencies regardless of the referral status of the criminal case.

Although the wisdom of the La Salle decision has been questioned, the results have been followed in all other cases addressing this issue succeeding that decision. Therefore, the "institutional decision" to prosecute criminally should signal the end to a use of all administrative discovery devices in any EPA case. As a matter of policy, no use of administrative discovery devices to secure evidence should be made once a case has been referred to the Department of Justice.

A more difficult issue, within EPA's context, is whether an "institutional decision" to use criminal sanctions may occur at a point before referral to the Department of Justice. It is clear that merely bringing an allegation of misconduct to the attention of the Office of Criminal Investigations for investigation does not constitute an "institutional decision" in favor of criminal prosecution. Many of these investigations will, in fact, become the basis for administrative or civil sanctions, where initial allegations cannot be substantiated, or where the case is otherwise lacking in prosecutorial merit. Further, EPA's referral procedure for criminal cases requires review at Headquarters before a case is referred. The final decision rests with the Assistant Administrator for Enforcement and Compliance Monitoring. Until that point is passed, the Agency may yet choose to proceed by civil action. Accordingly, this policy adopts the La Salle holding that an "institutional decision" occurs at the point of criminal referral, not before.

Information request authority may not be used in situations where the Agency is perceived as merely an information gathering tool for another agency. The Supreme Court in La Salle has made it clear that where this is the case, evidence obtained may be suppressed at trial. Of particular concern are those instances where EPA has been requested to assist in an ongoing criminal investigation by the Justice Department. Accordingly, a decision by EPA to participate in such an investigation constitutes an

"institutional decision" to proceed criminally that requires approval by the Assistant Administrator for Enforcement and Compliance Monitoring, and precludes thereafter any use of information request authority in that case.

Justice Department involvement in an investigation prior to referral does not necessarily negate the Agency's ability to use administrative discovery devices. Where the Justice Department has merely been advised of the investigation and exhibits no control over it, administrative discovery devices may be used. However, where the Justice Department attorney has assumed the role of prosecutor and is directing the investigation, EPA should refrain from making use of these tools. This will be the case whether the investigation is initiated by EPA or whether the Justice Department requests assistance with an ongoing investigation.

It is necessary to remember that the character of the information request authority does not change when utilized to gather evidence in cases assigned to EPA's Office of Criminal Investigations. Any limitations on the use of this authority and the type of information which may be sought continue to apply. The individual statute and Agency guidance on the use of such authority should be consulted before information request authority is utilized.

Additionally, most environmental statutes grant such authority directly to the Administrator. The Administrator has delegated this authority to various Agency employees. Reference should be made to a properly updated EPA Delegations Manual to ensure that any request is made by an Agency employee with appropriate authority.

Finally, each information request made in a case being developed by the Office of Criminal Investigations should contain a notice indicating that the statute under which the request is made contains both civil and criminal sanctions for violations. Such notice will negate any argument that the individual receiving the request was misled into believing that only civil or administrative sanctions could be imposed.

II. USE OF ADMINISTRATIVE INSPECTIONS AND ADMINISTRATIVE SEARCH WARRANTS

Background

Each of the statutes enforced by EPA provides the Administrator with the authority to conduct inspections to determine, inter alia, the state of compliance with statutory requirements. Statutory inspection authority is enforceable, where consent is withheld, through the use of an administrative search warrant.

The Supreme Court has determined that the Fourth Amendment guarantee against unreasonable searches and seizures has equal force for searches authorized by such regulatory schemes as for those necessary to obtain evidence of a crime.5/ In making this determination, however, the Court has also recognized the inherent differences between criminal searches and regulatory inspections of commercial enterprises. The enforcement of regulatory schemes such as those created by environmental statutes require regular inspections. These inspections are limited in scope, and involve business premises rather than private homes. Therefore, compliance inspections are considered to pose a lesser threat to expectations of privacy. To require a showing of probable cause in the traditional criminal law sense for an administrative warrant would frustrate the enforcement of these systems.

As a result, the Supreme Court established a new standard for administrative warrants, which can best be termed "administrative probable cause." This standard requires a balancing of interests. "If a valid public interest justifies the intrusion contemplated then there is probable cause to issue a suitably restrictive warrant."6/ The issuance of an administrative warrant can be justified upon a showing that the premises to be inspected were selected on the basis of a "...general administrative plan for the enforcement of the [statute in question]," or upon specific evidence of an existing violation of regulatory requirements.7/ The Supreme Court was also willing to create an exception from the need for even an administrative warrant in the case of certain "pervasively regulated" industries such as mining, firearms and liquor.8/ That exception, however, is very narrow.

The issues addressed by this guidance arise from the fact that most enforcement provisions of environmental statutes contain both civil and criminal penalties for violations. Therefore, most inspections conducted to determine compliance with a particular statute or regulation may result in the discovery of evidence subsequently offered in a criminal prosecution. Because inspections may be conducted pursuant to an administrative warrant requiring a less demanding showing of probable cause, there is concern that such inspections will be used to circumvent the traditional standards for criminal search warrants.

5/ Camera v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

6/ Camera v. Municipal Court, supra at 539 (1967).

7/ Marshall v. Barlow's Inc., 436 U.S. 306 (1978).

8/ Donovan v. Dewey, 452 U.S. 594 (1981); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972).

Issue

To what extent may administrative search warrants, based on EPA's statutory inspection authorities, be used to gather evidence in cases developed by the Office of Criminal Investigations?

Guidance

Administrative inspections may be conducted to gather evidence of statutory violations until probable cause exists to believe that a crime has been committed and it is clear that the predominant purpose of such an inspection is to gather evidence of a crime. This does not preclude the use of such inspections to substantiate allegations. Rather, it limits the use of this administrative discovery device once there is actual evidence of a crime rising to the level of probable cause and further use of inspections are for purposes of developing various aspects of the government's criminal case. Once this point is reached, entry must be gained only through pure consent (i.e. consent gained without the assertion of statutory inspection authority) or a criminal warrant.

Administrative inspections and warrants should not be used to gather evidence for a criminal inquiry directed by the Department of Justice even though no formal referral of the case has been made by EPA.

Discussion

Although the La Salle decision (see discussion in previous section concerning Information Request Authority) deals with the administrative summons authority of the IRS rather than inspection authority, the rationale of that case is of value in inspection situations as well. This position appears to have support in case law regarding statutory schemes similar to the environmental statutes. Although most of the cases examined were decided prior to La Salle, evidence gathered during administrative inspections has been found to be admissible in criminal trials only where the inspections were properly conducted prior to the referral decision by the Agency. Thus, as a starting point, the guidelines adopted for use of information request authority as a result of the La Salle decision also apply to administrative inspections. At a minimum, administrative inspections--either by consent or under administrative warrants--should not be conducted once a case has been referred to the Department of Justice with a recommendation for criminal prosecution. Similarly, if a criminal investigation is being directed by an attorney from the Department of Justice, administrative inspections should not be conducted to gather evidence for the case even though the case has not yet officially been referred to the Department.

Where the institutional decision to prosecute has not yet been made--i.e., where the case is under development by the Office of Criminal Investigations prior to the initiation of the referral process--courts have permitted the use of administrative inspections within particular parameters. Evidence gathered during the execution of an administrative warrant may be admissible during a criminal trial provided that the inspection under the warrant was properly limited to the scope of authority provided by the statute.9/ This has been the case even though the administrative inspection was conducted as a result of allegations of criminal misconduct.10/ However, where the evidence in question could not be discovered in a properly limited inspection, these cases require the government to obtain the informed consent of the facility or a criminal warrant based on traditional criminal probable cause, prior to conducting a search.

Both Goldfine and Consolidation Coal were decided prior to La Salle. These cases each involve the admissibility of evidence gained during searches conducted pursuant to an administrative warrant based on administrative inspection authority and administrative probable cause. Each search occurred prior to referral to the Justice Department for criminal prosecution. In Goldfine, the broader of these cases, the evidence was obtained during an audit by a DEA Compliance Officer. The defendants, owners of a pharmacy, were not informed at the time of the audit that their activities were under investigation. The investigation at that point included reports of large orders of controlled substances, surveillance of the pharmacy and arrests of some of its customers.

Consolidation Coal involved the validity of an inspection based on an administrative warrant supported by an affidavit which recited an allegation by an unnamed ex-employee that the company was systematically evading the respirable coal dust concentration standards. The company claimed that the criminal standard of probable cause should have been used to judge the affidavit. The company was indicted 16 months after this inspection for violations of the Coal Mine Health and Safety Act of 1969.

9/ United States v. Goldfine, 538 F2d 815 (9th Cir.) cert. denied 439 U.S. 1069 (1977).

10/ United States v. Consolidation Coal Company, 560 F2d 214 (6th Cir. 1977) vacated and remanded 436 U.S. 942 [for further consideration in light of Marshall v. Barlow's Inc., supra] judgment reinstated 579 F2d 1011 (6th Cir. 1978) cert. denied 439 U.S. 1069 (1979).

In these cases, each court concluded that the inspections were sanctioned by the statutes pursuant to which they were undertaken. The fact that these inspections were based upon a suspicion of criminal misconduct did not erase their regulatory character. Each statute, like environmental statutes, contained both civil and criminal sanctions and no final decision had been made to choose one type of sanction over another. The real issue was the scope of the search. Thus, the courts concluded that, in order for the evidence to be admissible, the search must retain the character of an administrative inspection. It cannot extend beyond the bounds authorized by the statute. This result has been supported in at least one case since the La Salle decision.11/

An administrative inspection may not change in character when it is conducted in support of an investigation assigned to the Office of Criminal Investigations. The authority granted is that belonging to any EPA inspector conducting a compliance inspection. The person conducting the inspection must have properly delegated authority. Care should be taken to follow the Agency procedures for administrative inspections. This includes such practices as the splitting of samples. Finally, if a criminal investigator accompanies the inspection team, credentials will be presented so that the facility is aware of the participation of the Office of Criminal Investigations.

The next case which has impact on this issue is Michigan v. Tyler.12/ This case raises the issue of whether a criminal warrant is required once an investigation has progressed to the point where probable cause to obtain such a warrant has been gained. It does not address the use of administrative inspections and administrative search warrants in criminal investigations. It is included here because other courts have referred to this opinion in cases involving the administrative inspection issue.

Michigan v. Tyler involves the admissibility of evidence of arson gained during a number of warrantless, non-consensual searches of the burned premises both during and after the fire. The Supreme Court concluded that while in the building to put out the blaze, firefighters may seize any evidence of arson which

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11/ In United States v. Prendergast, 585 F2d 69 (3d Cir. 1978), the Court considered its decision in light of La Salle. It concluded that no violation of the La Salle standard had occurred because DEA had not made a commitment to a criminal prosecution prior to obtaining a warrant. 585 F2d at 71 n.1.

12/ 436 U.S. 499 (1978).

is in plain view. Officials may remain in the building for a reasonable period after the fire has been extinguished to investigate the cause. However, if during the investigation they discover probable cause to believe that arson was committed and they wish further entry after the fire has been extinguished to gather evidence, a warrant upon a showing of traditional criminal probable cause must be obtained.13/

The Supreme Court's decision was based on its view of the privacy expectations of an owner of a burned building. Initially, the owner's expectation of privacy must give way to a need of entry by firefighers to fight a blaze. However, once the fire is extinguished an expectation of privacy returns despite the condition of the building. From that point on, the Court concluded, a search warrant is required for further entry onto the premises.

In United States v. Lawson,14/ the District Court for Maryland turned to Michigan v. Tyler while reviewing the admissibility of evidence gained during an administrative search conducted by DEA agents. The Court found that the agent applied for the warrants at the request of the Assistant United States Attorney after the Agency had made an "institutional commitment" to a criminal prosecution. In reviewing the case law on use of administrative warrants, the Court cited Michigan v. Tyler as requiring a criminal search warrant for entry whenever "the purpose behind the search shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution."15/ Clearly, once a case has been referred to the Department of Justice for a criminal prosecution, this point has been reached. However, the Lawson Court left open the question of whether this point can be reached at an earlier stage in the investigation prior to the institutional decision to refer the case for criminal prosecution.

In United States v. Jamieson-McKames Pharmaceuticals,16/ the Eighth Circuit also reviewed the application of Michigan v. Tyler. This case concerned regulatory inspections by DEA agents prior to referral of the case for prosecution. The Court concluded that Tyler did not have application to a pervasively-regulated

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13/ Michigan v. Tyler, supra at 508.

14/ 502 F. Supp. 158 (MD, 1980).

15/ United States v. Lawson, supra at 165.

16/ 651 F2d 532 (8th Cir. 1981).

industry such as drug manufacturing.17/ In a pervasively-regulated industry, there is a limited expectation of privacy. Therefore, the rationale for the Tyler decision was inapplicable. The Court concluded that a criminal warrant was not required despite the fact that evidence was available prior to the inspection to indicate that a criminal violation may have occurred. The Court returned to the rationale of Goldfine and Consolidation Coal and held that the warrants based on administrative probable cause were valid in this situation as long as the intrusion was limited to the purpose specified in the statute. This result has also been supported by the Sixth Circuit.18/

The full impact of Michigan v. Tyler on administrative inspection cases is not yet clear. Although La Salle seems to limit use of administrative discovery devices in investigations of criminal misconduct only after an institutional decision to prosecute is made, Michigan v. Tyler can be read as a limit on the use of these devices prior to referral, at that point where probable cause exists to believe a crime has been committed.

Where an investigation focussing on potential criminal violations has progressed to a stage where there is probable cause to believe that a crime has been committed and the predominant purpose for an inspection is to gather evidence of the crime, administrative inspection authority should not be utilized. Rather, entry should be obtained by pure consent (i.e., consent obtained without the assertion of statutory inspection authority) or by use of a criminal search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure.

III. WARRANTLESS INSPECTIONS

Background

The language of the inspection provisions of environmental statutes can be read to grant authority to conduct inspections without a warrant where entry is denied. Although the Supreme

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17/ The Eighth Circuit in this case determined that the drug manufacturing industry falls within the exception to a warrant requirement created in Colonnade Catering Corp. v. United States, supra and United States v. Biswell, supra. This is not necessarily the case with environmental statutes. See discussion on warrantless inspections, infra.

18/ United States v. Acklen, 690 F2d 70 (6th Cir. 1982).

Court has sanctioned warrantless inspections for certain pervasively-regulated industries,19/ this has not been the case for every regulatory program. In Marshall v. Barlow's Inc., the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site unless he received the owner's consent or possessed a warrant. The Court indicated that warrantless entry would be upheld only in very rare cases--pervasively-regulated industries with a long history of government regulation or where the government could demonstrate that a warrant requirement would substantially impair the regulatory scheme.

Issue

Are warrantless inspections authorized under environmental statutes where entry is denied following the assertion of statutory inspection authority?

Guidance and Discussion

At least one Court has indicated that the result of the Barlow's decision was equally applicable to environmental statutes.20/ The Court commented that in light of Barlow's a warrant was required for entry pursuant to the Clean Air Act absent consent by an authorized individual. The Agency has also taken this position in guidance to Agency inspectors after the Barlow's decision.21/ We will not deviate from the that guidance. Where consent to inspect is not granted, an administrative warrant should be sought. This applies to all statutes including the Federal Insecticide, Fungicide and Rodenticide Act.

19/ Donovan v. Dewey, supra (mining facilities), United States v. Biswell, supra (firearms), and Colonnade Catering Corp. v. United States, supra (liquor).

20/ Public Service Company v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981)

21/ One possible exception recognized in Agency guidance is an inspection conducted pursuant to authority under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). There is a long history of federal regulation concerning pesticide manufacture. The first federal statute in this area was enacted in 1910. In addition, these regulations are limited to one industry rather than applying a set of regulations to industry across the board. Finally, in an administrative case decided after Barlow's, a civil penalty was assessed against the owner of a FIFRA regulated establishment for refusal to allow a warrantless inspection, N. Jonas & Co. Inc., I.F.&R. Docket No. III-121C (July 27, 1978). Despite this fact, the Agency has taken the position that inspections under FIFRA should be conducted pursuant to a warrant where consent is not given.

IV. APPLICATIONS FOR ADMINISTRATIVE WARRANTS IN CASES ASSIGNED TO THE OFFICE OF CRIMINAL INVESTIGATIONS

Background

As indicated in the previous section, unless consent is granted, an administrative warrant will be necessary in order to gain entry to conduct an administrative inspection under any of EPA's statutes. The Supreme Court in Marshall v. Barlow's Inc. offered guidance on the type of showing necessary to justify the issuance of an administrative warrant. Probable cause to support the issuance of an administrative warrant may be based upon a showing either (1) that there is specific evidence of an existing violation of regulatory requirements or (2) that the decision to inspect is based on a neutral inspection scheme.22/ This showing must demonstrate that the public interest in conducting the inspection outweighs the invasion of privacy which the inspection may entail.23/

Issues

When should such warrant be obtained? What type of showing must be made in order to obtain an administrative search warrant? How should the inspection be characterized?

Guidance

On routine inspections, EPA generally has not sought an administrative warrant until an inspector has been refused entry. The law, however, does not preclude the Agency from seeking a warrant before entry is denied. Where surprise is crucial to the inspection or prior conduct makes it likely that warrantless entry will be refused, a warrant should be sought prior to inspection.

Neutral inspection schemes should be used as a basis for administrative warrants only where there is no evidence of an existing violation. Since cases assigned to the Office of Criminal Investigations will almost invariably involve specific allegations of misconduct, the neutral inspection scheme rationale will normally be inapplicable. Once evidence of a potential violation has been discovered, this evidence should be used as

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22/ Neutral inspection schemes are those which are non-discriminatory, such as a scheme which requires the inspection of every third facility on the list of facilities with NPDES permit.

23/ Camera v. Municipal Court, supra.

the basis for obtaining a warrant. The evidence available should be described with specificity in the affidavit supporting the warrant. For example, if the warrant is sought on the basis of an employee's complaint, the affidavit should set forth in detail the substance of the complaint, the circumstances in which the complaint was provided and the relationship of the complainant to the facility to be inspected. In addition, the application should include all corroborative evidence available. The application must also describe the alleged violation. Simply stating that there are reasonable grounds to believe that some violation of an environmental statute had occurred will not be sufficient. Both potential civil and criminal violations should be listed.

Finally, the application should also state with specificity the objects of the search. This should be done with the same degree of detail that would be used if applying for a criminal warrant. However, the scope of the search described must be limited to the traditional scope of an administrative inspection. The objects of the search may not be outside of that authority. In addition, where an alleged violation is the basis for a warrant, the objects of the search must relate to that violation.

The use of administrative discovery devices in investigations assigned to the Office of Criminal Investigations also raises an issue regarding the appropriate characterization of the investigation. Because an institutional decision to refer the case for criminal prosecution has not been made, the case is not exclusively criminal in nature. However, care must be taken not to mislead the individual to believe that criminal charges will not be contemplated. If the issue is raised, EPA officials should indicate that environmental statutes contain both criminal and civil penalties, and that the Agency considers all enforcement options open.

Discussion

Recent cases concerning administrative inspections under OSHA have raised issues concerning the standard of probable cause required for the issuance of administrative warrants and the scope of an inspection where the warrant is based on a complaint rather than a neutral inspection scheme. The rationale used by the courts in these decisions arguably also has application in the area of inspections under environmental statutes.

Several circuit courts have concluded that where a complaint alleging a violation is the basis for an administrative warrant, the information necessary to establish probable cause for such a warrant will be more extensive than that required for a warrant based upon a neutral inspection scheme.24/ This showing, however, is still significantly less than that necessary to establish probable cause for a criminal search warrant. These decisions are based on the view that questions of reliability of evidence and probability of violation are not raised when a warrant is issued pursuant to a neutral inspection scheme since the subject of the inspection is chosen through the application of neutral criteria. The magistrate need only ensure that the inspection comports with the legislative or administrative guidelines concerning such inspections.

Where the inspection is based upon evidence of a violation, there are no assurances that the target was not chosen for purposes of harassment. Therefore, these courts require that the affidavit contain sufficient information to allow the magistrate to make an independent assessment of the reliability of the claim that a violation exists. For example, in cases involving employee complaints, the ideal affidavit would indicate the person who had received the complaint, the relationship of the complainant to the target facility--i.e., employee, customer, competitor--the underlying facts and any steps taken to verify the complaint.25/ If the complaint was made in writing, a copy should be attached.

Although this requirement has not yet been adopted in all circuits or by the Supreme Court, it may be assumed that such a requirement may be placed on EPA in a number of jurisdictions. Therefore, affidavits for administrative warrants issued in conjunction with a case assigned to the Office of Criminal Investigations should set forth in detail the substance of the

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24/ Donovan v. Sarasota Concrete Co., 693 F2d 1061 (11th Cir. 1982); Marshall v. Horn Seed Co., Inc., 647 F2d 96 (10th Cir. 1981); Burkart Randall Division of Textron Inc. v. Marshall, 625 F2d 1313 (7th Cir. 1980).

25/ Marshall v. Horn Seed Co., Inc., supra at 103.

violation and provide all corroborative evidence available. The application should also specifically describe the alleged violation.26/

The scope of an administrative inspection also presents an issue. As previously noted, such inspections do not lose their administrative character simply because their purpose is, in part, to corroborate an allegation that may become part of a criminal prosecution. Any limitations contained in the statutes apply with equal force and must be observed.

A further issue is raised where inspections are conducted pursuant to an administrative warrant issued as a result of an allegation of a violation. The Eleventh Circuit, in an OSHA case, concluded that where an administrative warrant was obtained as a result of a complaint regarding a localized condition at the facility, the search should be limited to that localized area.27/ The thrust of this opinion is that the scope of the inspection should be limited to what is reasonably related to the violation which is the basis for the warrant. Although there are other decisions to the contrary,28/ as a matter of policy such inspections should be limited to those areas which bear a relationship to the violation alleged.

26/ Weyerhaeuser v. Marshall, 592 F2d 373, 378 (7th Cir. 1979) In that case the Court concluded that a showing of probable cause had not been made where the warrant application contained the following language:

> "2. On June 24, 1977, the Occupational Safety and Health Administration (OSHA) received a written complaint from an employee of Weyerhaeuser Company, a corporation. This complaint alleged, in pertinent part, that violations of the Act exist which threaten physical harm or injury to the employees, and an inspection by OSHA was requested. Based on the information in the complaint, OSHA has determined that there are reasonable grounds to believe that such violations exist, and desires to make the inspection required by Section 8(f)(1) of the Act." 592 F2d at 378 n.1.

27/ Donovan v. Sarasota Concrete Co., supra at 1069. The complaint dealt with improper maintenance of cement-mixer trucks. However, OSHA inspectors used the administrative warrant issued on the basis of this complaint to inspect the entire facility including the trucks.

28/ See, e.g., Hern Iron Works, Inc. v. Donovan, 670 F2d 838 (9th Cir. 1982); In re Establishment Inspection of Seaward International v. Marshall, 510 F. Supp. 314 (W.D. Va. 1980) aff'd without opinion 644 F2d 880 (4th Cir. 1981).

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

#37

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MAR 12 1985

MEMORANDUM

SUBJECT: The Role of EPA Supervisors During Parallel Proceedings

FROM: Randall M. Lutz
Director, Office of Criminal Enforcement

TO: General Distribution

Attached is a copy of the recently issued guidance explaining the role of EPA supervisors during parallel civil and criminal proceedings. All supervisors and staff who may become involved in matters that have both criminal and civil enforcement potential should become familiar with the guidelines set forth in the memorandum.

Although the concepts in the guidance may appear difficult upon a first reading, it is necessary to have a full understanding of the issues in order to make an informed decision about whether the supervisor should remain on the civil side of the case or the criminal side (or in rare circumstances, on both sides).

Questions concerning the guidance should be directed to Peter Murtha or myself (FTS 557-7410, 703-557-7410).

Attachment

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

MAR 12 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: The Role of EPA Supervisors During Parallel Proceedings

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

TO: Assistant Administrators
Office Directors
Regional Administrators
Regional Counsels
Inspector General
Director, NEIC

I. Introduction

The Agency's mission is on occasion best served by the pursuit of simultaneous civil/administrative enforcement actions and criminal investigations and prosecutions of the same party(ies) and relating to the same essential subject matter, i.e., parallel proceedings.1/ Parallel proceedings are applicable, for example, where a person's willful environmental misdeed both merits a criminal sanction and requires a "cleanup" response. Such proceedings require special caution by both supervisors and staff in their use. Failure by Agency personnel to recognize and understand the unique problems raised by parallel proceedings could delay or otherwise jeopardize both the civil/administrative and criminal proceedings. This guidance establishes supervisory procedures for persons whose responsibilities involve management of staff who work on both sides of the parallel proceedings.

1/ Supervisors who do not exercise such dual responsibilities are not covered specifically in this document. These individuals, as well as non-supervisory personnel who could be potentially involved in parallel proceedings, should refer to the memorandum entitled "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency," issued on January 23, 1984 ("General Parallel Proceedings Guidance") (Attachment).

This guidance is designed to avoid two primary pitfalls associated with parallel proceedings. First, for a variety of reasons, 2/ care must be taken to ensure that each side of parallel proceedings has a legitimate and independent basis. Second, safeguards must be employed to guarantee that grand jury proceedings, and the information developed therein, are devoted exclusively (except as noted at Section (V)(A), pp. 6-7 note 10; and Section (V)(D), pp. 9-10, infra) to their sole intended use: prosecution of criminal cases.

Each supervisor subject to this guidance is responsible for ensuring that staff are aware of and conform to the procedures set forth below. Particular care should be taken to note the evolving nature of these requirements as the criminal matter proceeds from a mere allegation made to the Agency to an active grand jury investigation. Supervisors are encouraged to supplement this guidance by developing policies and practices for individual cases as needed to achieve its objectives.

II. The Supervisory Role Prior to the Active Involvement of the Department of Justice (DOJ)

Prior to the active involvement of DOJ 3/ in the criminal case, the Agency supervisor generally may continue managing his/her staff on both sides of the parallel actions.4/ The degree of permissible involvement by the supervisor in the criminal investigation is not dependent upon the course or the stage of the civil/administrative action.

2/ See General Parallel Proceedings Guidance at 1-4.

3/ In this context, "DOJ" refers to any United States Attorney's Office, as well as to DOJ Headquarters, but does not include the Federal Bureau of Investigation.

4/ This guidance presumes that ordinarily DOJ would become actively involved in a case soon after EPA became aware that there was probable cause to believe that a particular individual or entity had committed a potentially criminal violation. This will be the case whether DOJ's involvement is initiated by informal contacts, e.g., by the case agent from EPA's Office of Criminal Investigations, or through the formal referral (continued)

At no point may a supervisor request that any personnel working on the criminal case use any criminal investigative or discovery tools for the primary purpose of benefitting the Agency's position in the civil/administrative matter or vice versa. Strictly as a matter of law, information obtained by the criminal and the civil/administrative staffs ordinarily may be freely exchanged at this stage, assuming that each proceeding is designed to meet its own distinct and legitimate goal. (In many cases, however, preserving the secrecy of the criminal investigation and preventing the disclosure of documents to the defendant through the liberal civil/administrative discovery process would militate against the use by the civil/administrative staff of documents or other information produced by the criminal investigation team.) Nonetheless, supervisors may wish to consider withdrawing from their case supervision duties 5/ on one side of the parallel proceedings to minimize the possibility that abuse of either process is alleged later.

Even prior to criminal referral a defendant/respondent in a civil/administrative proceeding may not be misled into believing that information he/she/it supplies will not be used in a criminal proceeding.6/ Moreover, individuals who are not aware that they are targets of the parallel criminal investigation and who give testimonial evidence at an administrative hearing, a civil trial, or in the form of interrogatories or depositions, may have a Fifth Amendment privilege which, arguably, has not been waived. In such a situation, DOJ will evaluate the matter in a effort

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process. Generally, the assignment of a DOJ prosecutor to a criminal matter at any stage, e.g., to obtain a criminal search warrant, would constitute "active involvement." In any event, ordinarily DOJ will be presumed to be "actively involved" no later than the date of its receipt of the criminal referral from the Assistant Administrator for Enforcement and Compliance Monitoring.

5/ Case supervision, in this context, includes the supervisor advising the staff about such matters as strategy, investigative procedures, legal issues and the course of the case development for a specific case.

6/ If the Agency attempted to use information in a criminal proceeding that was gained through such misrepresentations, the defendant could argue that the evidence should be suppressed, or (in extreme cases) that the indictment should be dismissed, due to violation of the right to due process and (in the case of individuals) the right against self-incrimination. (Corporations, in contrast to individuals, are not protected by the Fifth Amendment's self-incrimination clause.) See General Parallel Proceedings Guidance at 4-6.

to determine whether or not it is appropriate to transmit such evidence to members of the criminal enforcement team.7/ Where the criminal target has been made aware of the existence or potential for parallel criminal action, however, such information may be freely exchanged.

Staff members working on the parallel civil/administrative case must document when and under what circumstances any testimonial information from a current or potential criminal individual target--who has not been made aware of the potential for criminal enforcement--was obtained before transmitting that information to a supervisor who has not withdrawn from the criminal action. Such material should be specially marked to prevent inadvertent disclosure. This will alert the supervisor to consult with DOJ prior to reviewing such material or disseminating it to Agency personnel pursuing the criminal matter.

III. After the Active DOJ Involvement: The Supervisor's Decision Whether to Withdraw from the Criminal (or the Civil) Matter

Prior to the commencement of the grand jury, there is no strict legal bar to an Agency supervisor being a member of the prosecution team and directing the civil/administrative matter. Once DOJ begins to direct the day-to-day investigative activities of the prosecution team, the Agency supervisor who has been performing case supervision activities on either side of a parallel investigation or prosecution should re-evaluate his/her continuing role in the investigations. To avoid any appearance that one proceeding is being used to impermissibly bolster the other, it is generally the better practice for a supervisor to withdraw from one side of the parallel proceeding or the other. Discretionary withdrawal will reduce the possibility that the Agency will need to defend its position regarding the conduct of an investigation or prosecution.

An Agency supervisor who chooses to retain case supervisory responsibilities and become a part of the prosecution team will work under the direction of the prosecutor(s) 8/ in designing and conducting the investigation and prosecution.

7/ See General Parallel Proceedings Guidance at 6, 9-10.

8/ Often, there will be one prosecutor from the Environmental Crimes Unit of the Land and Natural Resources Division of DOJ Headquarters and another from the United States Attorney's Office where the prosecution is being brought, in which case joint guidance to the prosecution team would be provided.

A supervisor who has chosen to withdraw from case supervision duties associated with one side of parallel proceedings is not precluded from being informed about non-sensitive information concerning the proceeding from which he/she has withdrawn necessary for the performance of his/her routine management functions. Supervisors can know the amount of staff and laboratory support required, the need for outside consultants, the dates and expense of travel, the duration of the investigation, and the facilities and individuals being investigated except as precluded by Fed. R. Crim. P. 6(e) (see pp. 6-7, infra), etc.

IV. The Role of the Agency Supervisor in Parallel Proceedings After the Active Involvement of DOJ in the Criminal Matter but Prior to the Commencement of a Grand Jury Investigation

A. Permited Communications and Decision-making

An Agency supervisor may generally be privy to all information about both cases (except that supplied by an individual unaware of a parallel criminal investigation, see Section II, at 3-4, supra) and may fully participate in all Agency decision-making concerning them. Notwithstanding this rule, it is wise for a supervisor to consider whether his/her involvement in the case supervision of both sides of parallel proceedings is truly desirable, given the possibility that allegations of abuse of either process could arise.

Where the Agency supervisor is both part of a prosecution team and involved in the case supervision of the civil/administration matter, the following rules must be adhered to:

1. With Respect to the Criminal Investigation. Communications by the supervisor pertaining to the criminal case must be directed only to members of the prosecution team or to those Agency or DOJ units devoted exclusively to criminal investigations and prosecutions, i.e., the Criminal Division of the local United States Attorneys' Offices, DOJ's Environmental Crimes Unit, EPA's Office of Criminal Investigations and EPA's Criminal Enforcement Division.

2. With Respect to the Civil/Administrative Investigation. Communications by the supervisor pertaining to the civil/administrative matter must be directed only to Headquarters, Regional program and/or NEIC staff involved in the civil/administrative matter. Such communications shall be withheld from all Agency personnel on the prosecution team and those Agency units devoted exclusively to criminal investigations and prosecutions.

3. Staff Meetings and Documents. Supervisors should hold separate staff meetings for the personnel working on the respective sides of parallel proceedings to the extent that the case will be discussed. Supervisors must not allow distribution of information, documents, memoranda or other writings which should be withheld from respective parts of their staffs.

B. Alerting Supervisors to Commencement of Grand Jury Proceedings

Supervisors directly involved in the management (but not case supervision) of a criminal matter must be aware of exactly when a grand jury proceeding is commenced to assure that he/she will not inadvertently learn about grand jury information. In situations in which the supervisor is not integrally involved with the prosecution team and therefore might not automatically be informed of such event, his/her staff pursuing the criminal matter should be alerted to immediately so inform (or request the DOJ prosecutor(s) to so inform) him/her. This notification must be limited solely to the fact that the grand jury will investigate the same essential matter being pursued in the civil/adminstrative proceeding, and must not include what has transpired in the grand jury.9/

In most cases, once a case is referred to DOJ for investigation or prosecution, a grand jury will be initiated soon thereafter. Thus, the guidance presented in this section regarding the supervisor's role during parallel proceedings usually will quickly be supplanted by the even more stringent guidance pertaining to the period after the initiation of the grand jury decribed below.

V. The Role of the Agency Supervisor After the Commencement of a Grand Jury Investigation

A. Access to Grand Jury Material under Rule 6(e)

An Agency supervisor is not allowed to have access to grand jury material 10/ unless specifically authorized (see below) due to the limitations on disclosure found in Rule 6(e) of the Federal Rules of Criminal Procedure. A limited exception to

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9/ Alerting such supervisors to the commencement of the grand jury is intended solely as a prophylactic measure to prevent disclosure of priviledged material. Supervisors who have been so alerted must not inform anyone of the existence of a grand jury and, if pressed on the matter, should refer the person requesting the information to the DOJ prosecutor(s).

10/ To prevent unauthorized dissemination of grand jury material, it is necessary to define "grand jury material." The broadest view of this term would include: all witness testimony, the names of grand jury witnesses, the subject matter of the grand (continued)

the general rule of nondisclosure, Rule 6(e)(3)(C)(ii), specifi that only "such government personnel as are deemed necessary by an attorney for the government [i.e., the DOJ prosecutor(s) and Agency attorneys that have been designated as Special Assistant United States Attorneys for particular cases]" to assist in the enforcement of federal criminal law are to be granted such access (emphasis supplied). Rule 6(e) has two primary purposes: to preserve grand jury secrecy and to prevent prosecutorial abuse. Thus, some courts have narrowly construed this provision to allow only agents and experts actively involved in the investigation to have access to grand jury material. It is the policy of DOJ not to place an individual on the so-called "6(e) list,"11/ allowing access to grand jury material, merely because that individual supervises a person who is on the list.

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jury investigation, summarizations of grand jury testimony, documents submitted to the grand jury, the direction and focus of the grand jury investigation, conclusions reached as a result of the grand jury investigation, and information obtained as a result of grand jury testimony. See, e.g., Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856 (D.C. Cir. 1981). However, documents which are obtained by means independent of the grand jury or created for a purpose independent of the grand jury are typically not within the scope of Rule 6(e). See, e.g., United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960). (To be prudent, it is best to check with the DOJ prosecutor(s) to ascertain what precisely constitutes "grand jury material" under the interpretation of a particular federal district court.) Therefore, documents and records which would be otherwise available as part of a civil/administrative proceeding can generally (depending upon the prosecutor's evaluation of the law of the relevant court) continue to be available to the civil/administrative staff (and the supervisor if he/she has withdrawn from the criminal matter) even if the grand jury has been presented with copies of these same records and documents. Such "otherwise available" documents could include, for example, information produced pursuant to an administrative letter audit or inspection or materials produced by the criminal investigations team prior to the convening of the grand jury, such as interview reports, sampling results, audits, etc. (however, see caveat concerning sharing of criminal and civil information at Section II, p. 3). Additionally, grand jury material used in open court or contained in the public court papers in the criminal case may then be utilized in the civil/administrative proceeding.

11/ The DOJ prosecutor(s) are required under Rule 6(e) to promptly disclose to the court a list of the names of the government personnel assisting in the prosecution to whom grand jury material has been disclosed.

B. Mandatory Withdrawal from the Civil/Administrative Action by a Supervisor on the 6(e) List

When a supervisor believes that it is necessary to have access to grand jury material, it may be appropriate for him/her to join the criminal prosecution team (if he/she has not already done so). In such a case, a request together with the reasons therefor should be made to the DOJ prosecutor(s) for the supervisor to be placed on the 6(e) list.

After a grand jury has been convened, if a supervisor is part of the prosecution team then he/she must without exception withdraw completely and immediately from all responsibilities involving the parallel civil/administrative action other than routine management functions.

Note that failure to conform to the nondisclosure requirements of Rule 6(e) may lead to a variety of court sanctions which could have significant adverse effects on the Agency's criminal case, the individuals involved and the Agency's entire criminal enforcement program. These potential sanctions include contempt citations, the removal of the prosecuting attorney(s) from the case, disclosure of the grand jury material to the opposing party, and, in extreme cases, dismissal of the indictment.

C. Requests for Information by a Supervisor Not on the 6(e) List

It is essential that substantive information about a parallel criminal case released to a supervisor who is not on the 6(e) list be within permissible bounds. Where the supervisor anticipates that he/she will make numerous inquiries regarding the criminal matter, the supervisor should request routine briefings by the DOJ prosecutor(s), who would determine what information may be revealed.

Alternatively, once a grand jury proceeding has begun, all communications concerning the transfer of information potentially subject to Rule 6(e) between such a supervisor and his/her staff who are on the 6(e) list should be made only in writing.12/

12/ The disclosure of management-related information clearly not within the purview of Rule 6(e) (see discussion at Section III, p. 5, supra) would not need to be so documented. If the "in writing" approach is taken, it would be useful for the supervisor to maintain a log for each such parallel proceeding indicating, with respect to each such request for information: the date of the information request, to whom the request was made, a brief indication of the response to the request, and, if information was disclosed, the reason it was not privileged.

This procedure allows the staff member responding to the reques to determine carefully (if necessary, after consultation with the prosecutor(s)) which material (for example, because of its pre-grand jury genesis or because of its independent source) may be properly disclosed. However, this procedure would probably prove more cumbersome than briefings by the prosecutor(s) and could have the added cost of possibly creating material which arguably could be required to be turned over to the defense under the Brady doctrine.13/

Under rare circumstances, a supervisor might not anticipate that a question to Agency personnel could elicit grand jury material. To avoid inadvertent transfer of improper information, the Agency will consider both the supervisor and the respective staffs to be responsible for ensuring that privileged information is not disclosed. A staff member must decline to respond to a supervisor's information request which would disclose grand jury information. Similarly, a supervisor must decline to respond to a staff member's information request that would disclose any information revealed by the defendant/respondent in the civil/administrative proceeding which (as discussed at Section II, pp. 3-4, supra) might be inappropriate to disclose. (In either case it would also be appropriate to refrain from disclosing information and to refer the person requesting the information to the DOJ prosecutor(s) concerned with the matter.) The supervisor must rely upon the judgment of the staff member, and vice versa, in withholding the requested information when necessary.

D. Request by Agency Supervisor on the 6(e) List to Disclose Grand Jury Information to Agency Civil/ Administrative Personnel

Supervisors on the 6(e) list who believe that there exists a "particularized need" for grand jury material to be disclosed to their staff working on a pending (or anticipated) parallel civil suit may not release, directly request the court to release, or request their staff to seek the release of, that material.14/

13/ The Brady doctrine, in essence, requires that upon specific request by a criminal defendant, a prosecutor must disclose evidence favorable to the accused that is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963).

14/ It is DOJ policy that only "attorneys for the government" may request the disclosure of grand jury material. Moreover, if a supervisor were to disclose to his/her staff (not on the 6(e) list) the existence of such material so that they might then seek it, it is probable that such disclosure, in and of itself, would violate Rule 6(e).

However, the supervisor may request the DOJ prosecutor(s) to seek the release of such material. See United States v. Sells Engineering, Inc., ___ U.S.___, 103 S. Ct. 3133, 3168-69 (1983). DOJ prosecutors who through a grand jury investigation become aware of information which is unknown to the Agency and for which the Agency has a "particularized need"--for example, evidence of a serious public health hazard--may initiate appropriate action through the courts to seek disclosure.15/

VI. Communications with DOJ

If a supervisor wishes to communicate with DOJ with respect to a particular investigation or litigation in connection with the practices set forth herein, but has not yet established a DOJ contact for that particular matter, he/she should use generally the following procedures. Headquarters and other non-Regional supervisors should contact the Office of Criminal Enforcement (FTS 557-7410) and request the assistance any of the staff attorneys. Regional supervisors should request the assistance of the Criminal Enforcement Contact within the Regional Counsel's Office for his/her Region. These attorneys will help ensure that necessary contacts with the appropriate DOJ prosecutor(s) are expeditiously made.

VII. Reservations

The policies and procedures set forth herein, and internal office procedures adopted pursuant hereto, are not intended, do not, and may not be relied upon to, create a right or benefit, substantive or procedural, enforcible at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or not in compliance with internal office procedures that may be adopted pursuant to these materials.

15/ Ordinarily, DOJ should designate the lead EPA attorney on the pending civil litigation (generally the Regional Attorney assigned to the case), if one has been established, to receive such information. However, if no lead attorney has been established, the information may be transferred to the appropriate Regional Counsel.

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

#38

APR 15 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Remittance of Fines and Civil Penalties

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

TO: Associate Enforcement Counsels
Director, Office of Compliance Analysis and
Program Operations
Regional Counsels

This is to inform you of a new Agency remittance procedure instituted by the EPA Office of the Comptroller. The procedure applies to payments on all debts owed EPA, including civil penalties assessed by the Agency.

All EPA orders requiring payment of fines or civil penalties--or letters transmitting those orders--will include language consistent with the new procedure, which is described below.

EPA has adopted the Department of Treasury's Nationwide Lockbox System for receipt of payments on debts owed to the Agency. Under the Lockbox System, debtors are directed to remit payments to the Post Office Box address used by the designated EPA lockbox bank. Payments received at that "lockbox" are deposited immediately by the responsible bank, and the Agency receives a copy of the remittance and all accompanying documents within one working day. Users of the system have found that the lockbox has several benefits: Improved cash management, increased physical security for the checks, stronger internal controls, and a reduced administrative burden.

For your information, I have attached a listing that shows, for each region and for EPA Headquarters, the lockbox address to which payments of penalties owed the Agency will be sent. (Remittances for Superfund billings nationwide are sent to a single lockbox address.)

Chief Administrative Law Judge Edward Finch is directing all Agency administrative law judges and hearing clerks to implement this new procedure.

The new procedure supersedes the requirement in the Consolidated Rules of Practice (CROP), 40 CFR §22.31(b), that payment is to be forwarded directly to the regional hearing clerk. This paragraph in the CROP will be formally revised in the near future. Because this revision is procedural only, it may be implemented prior to the completion of formal rulemaking.

Under the new procedure, the servicing financial management offices will contact the appropriate hearing clerk as soon as they receive notification of a remittance, and will provide the hearing clerk with a copy of the check and accompanying documents. Accordingly, questions concerning the status of a civil penalty may be directed to either of those offices. In addition, the headquarters Financial Reports and Analysis Branch (FTS 382-5131) maintains a computerized record of civil penalty receivables and collections nationwide.

More detailed procedures for penalty collections are being developed by EPA's Office of the Comptroller. In the meantime, any questions concerning the lockbox procedure should be directed to your financial management office.

Attachment

cc: General Counsel
Edward B. Finch, Chief Administrative Law Judge
Assistant Administrators
Associate Administrators
Regional Administrators
C. Morgan Kinghorn, Comptroller

LOCKBOX DEPOSITORIES

REGION	LOCKBOX BANK	ADDRESS FOR REMITTING PAYMENT
Region 1 - Boston	Mellon Bank	EPA - Region 1 (Regional Hearing Clerk) P.O. Box 360197M Pittsburgh, PA 15251
Region 2 - New York	Mellon Bank	EPA - Region 2 (Regional Hearing Clerk) P.O. Box 360188M Pittsburgh, PA 15251
Region 3 - Philadelphia	Mellon Bank	EPA - Region 3 (Regional Hearing Clerk) P.O. Box 360515M Pittsburgh, PA 15251
Region 4 - Atlanta	The Citizens and Southern National Bank	EPA - Region 4 (Regional Hearing Clerk) P.O. Box 100142 Atlanta, GA 30384
Region 5 - Chicago	The First National Bank of Chicago	EPA - Region 5 (Regional Hearing Clerk) P.O. Box 70753 Chicago, IL 60673
Region 6 - Dallas	Mellon Bank	EPA - Region 6 (Regional Hearing Clerk) P.O. Box 360582M Pittsburgh, PA 15251
Region 7 - Kansas City	Mellon Bank	EPA - Region 7 (Regional Hearing Clerk) P.O. Box 360748M Pittsburgh, PA 15251
Region 8 - Denver	Mellon Bank	EPA - Region 8 (Regional Hearing Clerk) P.O. Box 360859M Pittsburgh, PA 15251

Region 9 - San Francisco	Mellon Bank	EPA - Region 9 (Regional Hearing Clerk) P.O. Box 360863M Pittsburgh, PA 15251
Region 10 - Seattle	Mellon Bank	EPA - Region 10 (Regional Hearing Clerk) P.O. Box 360903M Pittsburgh, PA 15251
Headquarters - Washington, D.C.	Mellon Bank	EPA - Washington (Hearing Clerk) P.O. Box 360277M Pittsburgh, PA 15251
All Superfund Billings	Mellon Bank	EPA - Superfund P.O. Box 371003M Pittsburgh, PA 15251

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

#39

MAY 22 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Settlement Negotiations

FROM: Richard H. Mays
Senior Enforcement Counsel

TO: Regional Counsels

During the past year, a number of Regions have submitted settlements for OECM approval that had been communicated to and tentatively agreed upon with a defendant without Headquarters knowledge, involvement or approval. In some of these instances, defendants were told that the Region was willing to settle for no penalty, where a penalty was clearly in keeping with Agency policy.

A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. This policy has been set forth in two memoranda by the Assistant Administrator for Enforcement and Compliance Monitoring. See "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983," and "Headquarters Review and Tracking of Civil Referrals."

The basis for this policy is the need for the Agency to speak with one voice which reflects a national as well as Regional perspective. This purpose is frustrated if individual staff members or Regional offices unilaterally establish an Agency negotiation settlement position which may be contrary to Agency policy or positions taken in other casess. OECM review ensures consistency of Agency positions in all settlements. Failure to follow that policy could also lead to potentially embarrassing changes of position in a case, since no enforcement settlement can be final until the Assistant Administrator for Enforcement and Compliance Monitoring has signed it.

A primary purpose of OECM review is to ensure that Agency policies and guidelines are being followed. It is not our purpose or desire to substitute our judgment for that of the Region or to "nitpick" the Region's product when it follows Agency policy. OECM will approve an Agency settlement position or draft decree that falls within existing, broad policy boundaries. In the absence of existing policy on a particular issue, OECM will approve a position that will promote -- or not hinder -- the Agency's enforcement efforts in other cases.

The vast majority of Regional recommendations conform to Agency guidance and are approved. Nevertheless, in the recent past a number of Regional settlement positions that had already been communicated to and tentatively agreed upon with the defendant have been presented to our office, placing OECM and the Region in a potentially embarrassing position. These cases are appearing with increasing frequency, and it is clear that they can interfere with the effectiveness of the Agency's enforcement effort, and create inconsistent results and precedents.

Consequently, OECM will not assign any weight to Regional recommendations that Headquarters should approve a settlement position made without prior authorization because it already had been communicated to the defendant. If such a proposed settlement contravenes Agency policy, if it would establish bad precedent for future cases, or if it would produce results inconsistent with those obtained in previously-approved settlements, it will be returned to the Region for further negotiations.

cc: Courtney M. Price, Assistant Administrator, OECM
Deputy Regional Administrators
Associate Enforcement Counsels
Regional Water Program Division Directors
Regional Waste Program Division Directors
Regional Air Program Division Directors
Headquarters Program Compliance Office Directors
David Buente, Department of Justice
Linda Fisher, Office of the Administrator
LaJuana Wilcher, Office of the Deputy Administrator

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

#40

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.

#41

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

AUG 25 1986

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy Framework for State/EPA Enforcement Agreements

FROM: A. James Barnes
Deputy Administrator

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

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

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

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

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

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

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

Attachments

cc: Steering Committee on the State/Federal Enforcement Relationship

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS

August 1986
(originally issued June 1984)

OFFICE OF ENFORCEMENT
AND COMPLIANCE MONITORING

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

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

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

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

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

Policy Framework Overview

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

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

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

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

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

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

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

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

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

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

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

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

F. State Reporting (pages 31-35)

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

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

Appendices

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

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

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

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

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

1. What Form Should the Agreements Take?

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

2. What is the Scope of the Agreements?

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

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

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

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

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

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

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

4. What Flexibility do Regions Have?

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

a. Oversight Criteria:

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

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

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

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

(ii) Appropriate Enforcement Response:

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

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

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

5. Procedures and Protocols on Notification and Consultation:

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

6. State-Specific Priorities:

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

7. What Does it Mean to Reach Agreement?

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

B. OVERSIGHT CRITERIA AND MEASURES: DEFINING GOOD PERFORMANCE

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

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

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

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

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

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

CRITERION #2 Clear and Enforceable Requirements

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

CRITERION #3 Accurate and Reliable Compliance Monitoring

There are four objectives of compliance monitoring:

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

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

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

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

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

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

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

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

CRITERION #4 High or Improving Rates of Continuing Compliance

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

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

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

CRITERION #5 Timely and Appropriate Enforcement Response

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Oversight of Penalty Practices:

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

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

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

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

3. Development and Use of Civil Penalty Policies:

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

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

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

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

4. Consideration of Economic Benefit of Noncompliance:

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

CRITERION #7 Accurate Recordkeeping and Reporting

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

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

CRITERION #8 Sound Overall Program Management

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

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

C. OVERSIGHT PROCEDURES AND PROTOCOLS

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

1. Approach

The goal of oversight should be to improve the State (or Regional) compliance and enforcement program. To accomplish this, oversight should be tailored to fit State performance and capability. The context must be the whole State compliance and enforcement program, although EPA's focus for audit purposes will be on national 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. EPA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements Process.

b. State Enforcement is not "Timely and Appropriate"

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

(i) Untimely State Enforcement Response:

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

(ii) Inappropriate State Action:

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

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: ANNUAL PRIORITIES AND PROGRAM GUIDANCES

Annual Priorities for Implementing Agreements

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

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

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

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

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

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

APPENDIX A

XISTING 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

OTE: Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
"National Guidance for Oversight of NPDES Programs FY 1987." (issued 4/18/86) 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 4/18/86) •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)		

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

JUL 24 1985

#42

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Form of Settlement of Civil Judicial Cases

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

TO: Regional Counsels
Associate Enforcement Counsels

This memorandum is intended to confirm the Agency's general policy regarding the form of settlement of civil judicial enforcement cases. The need for a statement of Agency policy on the form of settlement recently arose because a case had been settled without a consent decree, and the defendant later refused to abide by the terms of the informal settlement. In order to make sure that the problem does not recur, OECM is reducing this policy to writing.

Agency policy is that after a complaint is filed, all civil judicial cases should be settled only (1) by consent decree, or (2) where appropriate, by a stipulation of dismissal. This second approach should be utilized only when the settlement requires payment of a penalty, and the penalty has been paid in full at the time of settlement. In such cases, the continued jurisdiction provided by a consent decree is not needed or required. This form of settlement policy is the established practice of the Department of Justice, and all EPA enforcement attorneys should continue to abide by it.

Extraordinary and compelling circumstances may arise when EPA, in consultation with DOJ, might wish to settle a case without the use of a consent decree or a stipulation of dismissal. If such a situation arises, then the involved Agency attorneys should obtain my advance concurrence before representing to the defendants any willingness to settle a case without either a consent decree or stipulation of dismissal.

Regardless of which form of settlement is used, a copy of the settlement documents should be provided to the Docket Control Office following my concurrence in the settlement so that the appropriate data can be entered.

cc: F. Henry Habicht, II

#13

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

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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 request 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.

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

#44

OCT 2 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques

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

TO: Assistant Administrator for Water
Assistant Administrator for Solid Waste and Emergency Response
Assistant Administrator for Air and Radiation
Assistant Administrator for Pesticides and Toxic Substances
Regional Administrators
Regional Counsels

I. Purpose

This memorandum identifies obstacles to quick resolution of our enforcement cases, suggests options for resolving some of these cases more expeditiously and with better results, advises you of resources available for such resolution, and solicits potential cases in which the use of these resources could enhance your enforcement efforts.

II. Background

A. Identified Problems

Enforcement personnel in the regions and headquarters share frustration over the pace of some enforcement actions. They agree that the length and complexity of some of these cases burden available enforcement resources beyond their programmatic or strategic value. Further, there are a great many smaller cases, the resolution of which by means of administrative or judicial litigation is very time consuming.

Obstacles to expeditious resolution of enforcement actions are strewn throughout the negotiation and litigation processes. With regard to negotiations, these obstacles include:

- a large number of defendants, rendering case management unwieldy;

- multiple plaintiffs with different agendas;

- failure of multiple defendants to establish an efficiently operating steering committee or otherwise reach agreement among themselves on settlement issues in the waste enforcement area;

- personality conflicts between opposing negotiators;

- inflexible negotiating postures resulting from each party's overestimation of the strength of its case;

- sophisticated technical circumstances surrounding some cases including uncertainties about technical remedies, leading to myriad disputes over issues of fact; and

- controversial issues of law and fact.

In addition, there are obstacles inherent to the process of litigation itself. These include lengthy and complicated discovery procedures, the failure of a judge to quickly rule on motions or schedule hearings, and the intense effort which must be made to educate the trier of fact on both legal and technical issues.

In an effort to resolve enforcement actions more quickly but without making legal or policy concessions, the Agency has begun to examine various alternatives to traditional methods of negotiation and litigation.

We can make resources available to you and your staff to resolve these cases more quickly with quality outcomes. These resources involve alternative dispute resolution (ADR) procedures successfully employed in other litigation situations, and include the use of experts in ADR and training in ADR techniques.

B. ADR Mechanisms

In addition to negotiation, ADR mechanisms potentially useful in enforcement cases include mediation, fact-finding, mini-trials and arbitration.

Mediation is the facilitation of negotiations by a neutral third-party who has no power to decide the issues. As in traditional negotiation, the object is for the parties to

reach a mutually acceptable agreement. Also as in negotiation, the parties retain the power to decide the issues, and the process is informal, voluntary and nonbinding. The difference is that the parties select an outside facilitator, often with specialized subject matter expertise, to aid in the process of negotiation. Mediation can be used to address problems such as an unwieldy number of defendants or plaintiffs, a poorly operating steering committee in the waste enforcement area, personality conflicts between the opposing negotiators, or a number of smaller actions that have been batched together.

Fact-finding involves the investigation by a neutral third-party, with specialized subject matter expertise, selected by the disputants, of issues the parties have specified. The process is voluntary and may be binding or nonbinding, but if the parties agree, the material presented by the parties to the fact finder may be admissible in a subsequent hearing. The procedures are informal because fact-finding is an investigatory process. The object of this ADR mechanism is to narrow factual or technical issues in dispute, and usually results in a report or testimony.

In a mini-trial, the parties present their positions to representatives of the principals, preferably with authority to settle the dispute and, in some cases, to a neutral third-party. The "trial" is preceded by limited discovery and preparation. The proceeding is an abbreviated hearing with testimony and cross-examination as the parties agree. Representatives of the principals (vice-president of a company and a Regional Administrator, for example) are the decision-makers with the neutral advisor acting as referee. The neutral third-party usually has specialized subject matter expertise in trial procedures and evidence, and advises the parties regarding possible court rulings. Immediately after the mini-trial, the parties re-enter negotiations, sometimes with the aid of the neutral third-party. This ADR mechanism is useful in narrowing legal issues in dispute, and in giving parties a more realistic view of the strength of their respective cases.

Arbitration involves a hearing before a neutral third-party decision-maker who usually has subject matter expertise. The parties select the arbitrator, the procedures to be followed, and the issues to be heard. An arbitration is procedurally less formal than a trial and can be binding or nonbinding. As in fact-finding, nonbinding arbitration narrows issues in dispute. Binding arbitration resolves the dispute.

III. Process

We would like to offer Headquarters assistance for appropriate cases in which you may be interested in using an ADR mechanism.

The first step to obtain such assistance is Regional identifica of cases where ADR may expedite settlement. Headquarters, the region and DOJ (if the case has been referred) will discuss the possibility of using ADR in any case nominated as a candidate. If one or more ADR techniques look promising, the case will be discussed with someone familiar with ADR (either in-house or a consultant) supplied by OECM. If everyone determines the case is a good candidate, the litigation team will approach the defendants with a suggestion for using ADR to resolve the dispute. If the parties agree, they will design procedures for using a particular ADR technique for a specified period of time. OECM will aid in the selection and will cover the cost of any charges to the Agency for the time of any outside ADR expert. If the chosen case is not resolved within the time period specified for using the ADR method, it will continue toward trial.

Please contact Richard Robinson, Director, Legal Enforcement Policy Division (FTS 382-2860, LE 130A, E mail Box EPA 2261), by November 8, 1985, with your cases any comments on this effort, or if you would like more information about ADR.

Thank you for your attention to this matter.

cc: Administrator
Deputy Administrator
General Counsel

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

-45

OCT 30 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Division of Penalties with State and Local Governments

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

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

This memorandum provides guidance to Agency enforcement attorneys on the division of civil penalties with state and local governments, when appropriate. In his "Policy Framework for State/EPA Enforcement Agreements" of June 26, 1984, Deputy Administrator Al Alm stated that the EPA should arrange for penalties to accrue to states where permitted by law. This statement generated a number of inquiries from states and from the Regions. Both the states and the Regions were particularly interested in what factors EPA would consider in dividing penalties with state and local governments. In addition, the issue was raised in two recent cases, U.S. v Jones & Laughlin (N.D. Ohio) and U.S. v Georgia Pacific Corporation (M.D. La.). In each case, a state or local governmental entity requested a significant portion of the involved penalty. Consequently, OECM and DOJ jointly concluded that this policy was needed.

EPA generally encourages state and local participation in federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent that penalty division is permitted by federal, state and local law, and is appropriate under the circumstances of the individual case. Penalty division advances federal enforcement goals by:

1) encouraging states to develop and maintain active enforcement programs, and

2) enhancing federal/state cooperation in environmental enforcement.

However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencement of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

4) For contempt actions, the state or local government must have participated in the underlying action giving rise to the contempt action, been a signatory to the underlying consent decree, participated in the contempt action by filing pleadings asserting claims for penalties, and been actively involved in both litigating the case and any negotiations connected with that proceeding.1/

The penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality. Penalty division may be accomplished more readily if specific tasks are assigned to particular entities during the course of the litigation. But in all events, the division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. Penalty division should not take place until the end of settlement negotiation. The subject of penalty division is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

cc: F. Henry Habicht II, Assistant Attorney General
Land and Natural Resources Division

1/ If the consent decree contains stipulated penalties and specifies how they are to be divided, the government will abide by those terms.

GM - 46 The Agency issued an addendum to this policy on **August 4, 1987.** That addendum is located in this section right after the original policy.

#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 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]."

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

#47

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 ($\surd$) 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

	1	2	3	4
Regulation Review Packages (Red Border, Consent Calendar, GAO Reports and Reports to Congress)	-------> CCU (Log-in and assign to appropriate OECM media division)	----------> OECM Media Division (Review and signature)	----------> CCU (Distribution)	----------> OPPE

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

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JAN 30 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Model Litigation Report Outline and Guidance

FROM: Richard Mays
Senior Enforcement Counsel

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

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

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

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

cc: Chief, Land and Natural Resources Division, DOJ

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

Model Litigation Report - Outline

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

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

b. Date and manner violations identified.

c. Dates and duration of violations.

d. Pending regulatory changes.

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

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

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

b. Pre-referral negotiations.

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

d. Prior enforcement history of defendant.

8. Injunctive Relief:

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

b. Feasible alternatives.

c. Cost and technology considerations.

9. Penalties:

a. Proposed civil penalty and legal authority.

b. Penalty analysis/calculation.

c. Present financial condition of defendant.

10. Major Issues:

a. Issues of national or precedential significance.

b. Bankruptcy Petitions.

11. Significance of Referral:

a. Primary justification for referral.

b. Program strategy.

c. Agency priority.

d. Program initiatives outside of stated strategy.

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

12. Litigation Strategy:

a. Settlement potential/plan for settlement.

b. Need for interrogatories and requests for admissions.

c. Potential for summary judgment.

d. Need for preliminary injunction.

e. Identity of potential witnesses.

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

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

h. Resource commitments.

i. New evidence.

13. Attachments, where applicable:

a. Index to attachments.

b. Draft complaint.

c. Draft discovery.

d. Draft consent decree.

e. Draft motions.

f. Table of Violations.

g. Documentation of violations.

h. Permits and contracts.

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

j. Penalty analysis/calculation; BEN printout.

k. Diagram of facility.

l. Case Plan.

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

n. Other relevant information.

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

Model Litigation Report - Guidance

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

1. Cover Page:

   a. Region, Act involved and judicial district.

   b. Name and address of detendant.

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

   c. Name and address of facility.

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

   d. Regional contacts (program/legal).

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

   e. Stamp date Region refers report on cover page.

2. Table of Contents:

   Include headings, all sub-headings and page numbers.

3. Synopsis of the Case:

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

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

4. Statutory Bases of Referral: 1/

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

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

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

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

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

5. Description of Defendant:

a. Description of facility.

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

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

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

b. State of incorporation of defendant.

Include state of incorporation and the principal place of business.

c. Agent for service of process.

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

d. Defendant's legal counsel.

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

e. Identity of other potential defendants.

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

6. Description of Violations:

a. Nature of violations.

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

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

b. Date and manner violations identified.

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

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

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

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

d. Pending regulatory changes.

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

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

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

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

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

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

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

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

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

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

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

b. Pre-referral negotiations.

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

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

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

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

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

8. Injunctive Relief:

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

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

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

b. Feasible alternatives.

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

c. Cost and technology considerations.

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

9. Penalties:

a. Proposed civil penalty and legal authority.

1) Bottom line and opening negotiation figure.

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

2) Statutory maximum amount.

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

b. Penalty analysis/calculation.

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

c. Present financial condition of defendant.

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

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

10. Major Issues:

a. Issues of national or precedential significance.

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

b. Bankruptcy Petitions.

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

11. Significance of Referral:

a. Primary justification for referral.

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

b. Program strategy.

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

c. Agency priority.

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

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

d. Program initiatives outside of stated strategy.

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

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

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

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

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

12. Litigation Strategy:

a. Settlement potential/plan for settlement.

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

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

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

b. Need for interrogatories and requests for admissions.

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

c. Potential for summary judgment.

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

d. Need for preliminary injunction.

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

e. Identity of potential witnesses.

1) Government's case

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

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

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

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

2) Defendant's case.

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

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

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

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

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

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

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

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

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

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

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

h. Resource commitments.

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

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

i. New evidence.

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

13. Attachments, where applicable:

a. Index to attachments.

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

b. Draft complaint.

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

c. Draft discovery.

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

d. Draft consent decree.

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

e. Draft motions.

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

f. Table of Violations.

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

g. Documentation of violations.

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

h. Permits and contracts.

Include copies of all applicable permits and contracts.

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

Attach all correspondence relative to the violation/case.

j. Penalty analysis/calculation; BEN printout.

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

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

k. Diagram of facility.

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

l. Case Plan.

Attach a case plan here if prepared by the Region.

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

n. Other relevant information.

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

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

#49

FEB 3 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Implementation of Guidance on Parallel Proceedings

FROM: Terrell E. Hunt, Director
Office of Criminal Enforcement
and Special Litigation

TO: Regional Counsels, Regions I - X

I. Background and Purpose

Policies have been issued within the last two years that address the legal issues which arise in parallel proceedings and suggest procedures for (1) determining to pursue a parallel proceeding, and (2) establishing appropriate supervisory safeguards to insure the integrity of parallel criminal and civil or administrative proceedings.[1]

This memorandum briefly reviews the rationale for management caution in this area and shares with all of you the approach that has been taken in some instances. We seek to assure consistent practice in this area by implementing standard procedures for making the "finding" to engage in parallel proceedings, and for documenting the supervisory "wall" established to preserve the integrity of the respective criminal/civil-administrative processes.

II. Issues that Arise In Parallel Proceedings

The existence of parallel criminal/civil proceedings provide defense counsel in the criminal case an opportunity to obtain valuable information that would not otherwise be available to them, to engage in procedural tactics that may delay or complicate the prosecution, and to raise affirmative defenses. These defenses may include an allegations of abuse of the grand

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1/ See, "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency," Courtney M. Price, Assistant Administrator, January 23, 1984; "The Role of EPA Supervisors During Parallel Proceedings", Courtney M. Price, Assistant Administrator, March 8, 1985.

jury process (Rule 6(e)1)[2], Fifth Amendment violations[3], and improperly using civil discovery or administrative means to obtain information for the criminal case[4].

In the absence of clear guidance from the case law in this area, we seek to take every precaution to minimize the availability of such tactics and allow a strong response where such defenses are raised. It is essential that we follow existing guidance in (1) deciding consciously (and at the policy level) to engage in a parallel proceeding, in (2) separating the technical and legal support staffs[5] on the respective cases, and in (3) documenting both the decision and the separation of staffs.

The Offices of Regional Counsel execute all criminal and civil actions and concur in the issuance of all administrative complaints. ORC can serve as the focal point in identifying parallel actions and in applying the appropriate procedures.

III. Procedures for Seeking Authorization for Engaging in Parallel Enforcement Actions

These potential problems in parallel criminal/civil actions motivated the Assistant Administrator to require Headquarters review and approval of any parallel proceeding[6]. The Assistant Administrator notifies the Regional Administrator after parallel action has been approved[7]. In seeking approval to engage in a parallel enforcement action, the region must identify the respective actions that are proposed to be taken and set forth the circumstances requiring parallel action. Typically, the justification will focus on the following matters:

(A) The nature of the misconduct of the potential defendants in the criminal/civil-administrative actions, and the applicability of the respective remedies to the misconduct of the respective defendants;

(B) The urgency of any environmental and/or health risks posed by such alleged misconduct, and the best use of available authorities to respond to such risks; and

(C) The regulatory context within which the violation arises and the application of enforcement sanctions which will send the strongest deterrent message to the regulated community.

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[2] "Policy and Procedures on Parallel Proceedings", Id. at 9.
[3] Id., at 5.
[4] Id., at 9.
[5] Id. at 8, 11.
[6] "Functions and General Operating Procedures for the Criminal Enforcement Program," Courtney M. Price, Assistant Administrator, January 7, 1985, at 7, 8.
[7] Id. at 8.

A good recent example of a letter requesting a parallel proceeding and communicating the rationale therefore was submitted by Region VIII in the "Eagle-Picher" case. That request, together with the subsequent approval, is attached as Attachment No. 1.

IV. Procedures for Documenting the Separation of Technical and Legal Support Staff

One of the primary reasons for the approval of the Assistant Administrator is the necessity of monitoring the separation of the technical and legal staffs assigned to the respective cases. Documents listing the legal and technical staff separation arrangements should be drafted immediately after the parallel proceeding is approved by the Assistant Administrator.[5] The documents should include at a minimum:

(A) The identity of the matter;

(B) The date of Assistant Administrator's approval of the parallel proceeding;

(C) The names of persons who will provide technical or legal support to each case and their criminal or civil-administrative designation;

(D) A statement that the list will be revised if necessary for changes in personnel involved.

An example of the documentation of the technical staff separation in a Region VI case is attached as Attachment No. 2. The chart provided by the Region is a good format to follow. A document from the Regional Counsel listing the legal staff separation should also be included as an attachment to the letter. The Regional Administrator or Deputy Regional Administrator should sign the document. The document and any revisions should be kept on file in the Regional Office, with a copy sent to the Assistant Administrator for filing at Headquarters.

Attachments (2)

cc Deputy Regional Administrators, Regions I - X
Tom Gallagher, NEIC
David Buente, DOJ
Judson Starr, DOJ/ECU

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY Attachment No. 1

REGION VIII

ONE DENVER PLACE — 999 18TH STREET — SUITE 1300

DENVER, COLORADO 80202-2413

REF 8RC

MEMORANDUM JUN 28 1985

*****ENFORCEMENT CONFIDENTIAL*****

TO: Terrell E. Hunt, Associate Enforcement Counsel for Criminal Enforcement and Special Litigation

FROM: Robert L. Duprey, Director
Hazardous Waste Management Division

Thomas A. Speicher
Regional Counsel

SUBJECT: Request for Concurrence on Initiation of Civil Parallel Proceeding, Eagle-Picher Industries

ISSUE: The Regional Office intends to file a RCRA administrative complaint and compliance order requiring installation of groundwater wells and site cleanup and seeking penalties. Issuance of this action constitutes a parallel proceeding as there is an on-going criminal investigation at this site.

DESCRIPTION OF THE PARALLEL PROCEEDING: Eagle-Picher Industries, Inc., (EPI) has been under criminal investigation since August of 1984. Information received by EPA indicated that EPI personnel illegally buried drummed hazardous waste at the site, located in Colorado Springs, Colorado. We understand that the U.S. attorney has reviewed the criminal case and that an indictment is pending a request for immunity.

Routine RCRA compliance inspections conducted in 1983 indicated that the EPI facility was not in compliance with the hazardous waste regulations. Significant violations of the regulations were confirmed by samples collected during the joint criminal and civil investigations that occurred in 1984. The most significant violations are lack of any groundwater monitoring wells and spills and leaks of hazardous waste that have resulted in surface and subsurface soil contamination.

The assistant U.S. attorney assigned to the criminal case has indicated that the criminal action deals solely with the one instance of illegal drum burial. The administrative action the Region proposes to issue deals with groundwater monitoring violations at four surface impoundments located away from the drum burial site, as well as spillage/disposal of hazardous waste at a loading dock and at other sites which are removed from the drum burial site. The criminal and administrative counts are therefore separate and distinct, without overlapping subject matter.

NECESSITY OF A PARALLEL PROCEEDING: Significant environmental and political issues have been identified at the EPI site. The available information is summarized below and supporting data and facts are included in the attachments.

(1) Four hazardous waste ponds, two of which are not lined, are used to store hazardous waste containing cadmium. There are no groundwater monitoring wells. Refer to attachment A - Draft Complaint, for specific information.

(2) Spilled and discharged hazardous waste has resulted in soil contamination.

(3) Contamination of off-site soils, adjacent surface water, and groundwater is suspected. EPA contractors are now being used to investigate possible releases from the site for issuance at a later time of a corrective action order.

(4) The company is not financially sound according to an analysis performed by Region VIII's financial analyst. This evaluation is based on the company's liability resulting from asbestos litigation and is detailed in attachment B. Our financial analyst strongly urges that we proceed with enforcement action before the company seeks protection under bankruptcy.

(5) The facility was identified in 1984 as a "significant non-complier" because of the major violations of the groundwater monitoring requirements. EPA policy dictates that enforcement actions be issued against significant non-compliers as soon as possible. Additionally, the facility is listed in the Dingell report as "lacking groundwater" wells and no enforcement action has been taken.

(6) The public, news media, and Senator Kramer have all expressed concern over the significant environmental issues at the site and have requested that EPA require site clean-up as soon as possible. Refer to attachment C which includes correspondence and relevant newspaper articles.

(7) The Region's intention to file an administrative complaint has been discussed with the assistant U.S. attorney assigned to the criminal case. He has indicated that the Region may proceed with its intended course of action and has no objection to the complaint and compliance order with proposed penalties.

There are several pertinent issues raised in Courtney Price's January 23, 1984, memo on parallel proceedings that have been addressed. Please refer to attachment D for specific comments.

SUMMARY: Significant environmental and political issues make it necessary for EPA to pursue a civil action at the EPI facility. The civil action has a legitimate purpose and is not being instituted to strengthen the criminal case. The criminal investigation at EPI is limited in scope, and the civil action for cleanup and groundwater monitoring with proposed penalties will address areas of the site unaffected by the criminal proceeding.

Separate technical and legal staff have been assigned to the civil and criminal matters. EPI is aware of the criminal investigation and knows that civil compliance problems exist at the site. The assistant U.S. attorney conducting the criminal case has no objection to the Region proceeding with the civil action.

If further information is desired please contact Lorraine Ross of the Office of Regional Counsel at FTS 564-1473.

REQUEST FOR ACTION: Region VIII requests concurrence on the initiation of a civil administrative action which will constitute a parallel proceeding in this matter. Do you concur?

_____ YES

_____ NO

Attachments A - D

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

JUL 30 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Initiation of Contemporaneous Civil Administrative Proceeding, Eagle-Picher Industries

FROM: Terrell E. Hunt, Director
Office of Criminal Enforcement
and Special Litigation

TO: Robert L. Duprey, Director
Hazardous Waste Management Division

Thomas A. Speicher
Regional Counsel

We concur with your request to proceed with an administrative action against Eagle-Picher Industries which would run contemporaneously with the on-going criminal investigation. We agree that the environmental and health risks at the site and the tenuous financial status of the firm warrant timely administrative action.

Over the past few weeks, Randy Lutz, Director of the Office of Criminal Enforcement, has conferred by telephone with Dianne Shannon about the nature and scope of the proposed administrative action. Clarity in this matter is important in determining whether a classical parallel proceeding would result from the filing of the adminsitrative case. As we understand it, the Region has now determined that its administrative case will not include counts for waste burial which are the sole subject of the criminal case. Accordingly, the administrative case will not include any counts which would be included in the indictment, and is not, strictly speaking, a parallel proceeding.

Our concurrence relies heavily upon your assurance that the U.S. Attorney conducting the criminal case has no objection to the civil action. I have discussed the matter with NEIC's Ken Wahl, the agent handling the criminal case, who noted that NEIC/OCI has supported contemporaneous civil action in this matter since it was first discussed last December. We strongly endorse your decision to assign separate technical and legal staff to the respective criminal and administrative matters.

I appreciate the substantial effort you have made to document the case and seek our review of the matter.

cc/ Richard H. Mays, OECM
Judson Starr, DOJ/ECU
James L. Prange, Ken Wahl, NEIC/OCI

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

OCT 17 1985

Honorable Dick Whittington
Regional Administrator, Region VI
U.S. Environmental
Protection Agency
1201 Elm Street
Dallas, Texas 75270

Re: Parallel Civil/Criminal Proceeding Against [redacted]

Dear Dick:

I am writing to you in your capacity as Region 6 Enforcement Contact to enlist your assistance in properly coordinating proceedings against [redacted]

A criminal referral against [redacted] and three of its corporate officers was approved by me on September 30, 1985, and mailed to the Office of the United States Attorney for the Southern District of Texas in Houston, Texas. Last week, I approved a concurrent civil referral under the Clean Water Act, seeking necessary injunctive relief as well as civil penalties against [redacted] The decision whether to pursue these remedies simultaneously or sequentially is an important matter of regulatory policy and prosecutorial judgment on which the Agency and Department will consult. At this early stage, however, the procedures indicated in my January 23, 1984 and March 12, 1985 memoranda concerning "parallel proceedings" by the Agency should be instituted. I understand that the region has already taken steps to implement that guidance for this case. Separation of staff and supervisory personnel and responsibilities working on the civil case from those working on the criminal case, should be effectuated immediately.

I would appreciate your reiterating to the appropriate Region 6 staff the importance the Agency places upon avoiding any potentially improper entanglements of the two proceedings. I further request that an appropriate Region 6 official advise Terrell E. Hunt, Director, Office of Criminal Enforcement and Special Litigation, of the specific procedures being implemented to ensure the separate development and prosecution of these proceedings.

I am grateful for your assistance in this very important matter.

Sincerely yours,

Courtney M. Price
Assistant Administrator

Enclosure

cc: David T. Buente, Esq.
Acting Chief, Environmental Enforcement Section
Land and Natural Resources Division
Department of Justice

Judson W. Starr, Esq.
Director, Environmental Crimes Unit
Land and Natural Resources Division
Department of Justice

James Neet, Esq.
Office of Regional Counsel, Region VI
U.S. Environmental Protection Agency

Thomas Kohl
Resident-Agent-In-Charge
Office of Criminal Investigations
Dallas Resident Office
U.S. Environmental Protection Agency

James L. Prange
Assistant Director
Office of Criminal Investigations (NEIC)

Honorable F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division

Honorable Daniel K. Hedges
United States Attorney
Southern Distict of Texas

Glenn L. Unterberger
Associate Enforcement Counsel - Water
U.S. Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VI
INTERFIRST TWO BUILDING. 1201 ELM STREET
DALLAS. TEXAS 75270

November 20, 1985

MEMORANDUM

SUBJECT: Parallel Proceeding Against [redacted]

FROM: Dick Whittington, P.E.
Regional Administrator (6A)

TO: Terrell E. Hunt, Director
Office of Criminal Enforcement and
Special Litigation (LE-134P)

In response to Courtney Price's letter of October 17, 1985, I am taking this occasion to advise you of the specific procedures which have been implemented by Region VI to ensure the separate development and prosecution of potential parallel proceedings against [redacted] As I am sure you are aware, the [redacted] criminal referral involves alleged violations of multiple environmental statutes and Sections of Title 18 of the United States Code. Although the existing civil referral contains only water counts, our assumption is that additional RCRA counts will be added at a later date. Because of the multi-media aspects of this case, support activity from Region VI could potentially come from four divisions within the Region -- the Water Management Division, the Hazardous Waste Management Division, the Environmental Services Division and the Office of Regional Counsel.

In order to avoid any potentially improper entanglements of the proceedings, Region VI has identified separate litigation support teams to provide technical and legal assistance to the prosecution of each case. Additionally, efforts are currently underway to ensure that all potential participants in either prosecution effort are aware of all requirements set forth in memoranda issued by Courtney Price on March 12, 1985, and January 23, 1984, respectively. I have attached a chart showing the make-up of the litigation teams. If you have any further questions regarding this matter, please contact Jim Neet, Deputy Regional Counsel at FTS 729-9984.

Attachment

	Name	Position	Reg. VI Ofc.	Area of Expertise	Supervisor
Criminal	1. Mark Potts	Engineer	Water Enf.	Water	Roger Hartung
	2. Dave Sullivan	Env. Sci.	Env.Serv.Div.	RCRA/CERCLA	Charley Gazda
	3. Mary Kale	Attorney	Reg. Counsel	Legal	Barbara Greenfield
Civil	1. Bruce Hale	Engineer	Water Enf.	Water	Jack Ferguson
	2. Harriet Tregoning	EPS	RCRA Enf.	RCRA	Bill Taylor
	3. Ralph Corley	Attorney	Reg. Counsel	Legal	Jim Collins

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

#50

AUG 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Expanded Civil Judicial Referral Procedures

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

TO: Regional Administrators
Program Office Enforcement Division Directors

Purpose

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

Expansion of Direct Referral Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The following cases under the Clean Water Act:

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

   b. all cases against minor industrial dischargers;

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

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

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

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

   a. cases involving the steel industry;

   b. cases involving non-ferrous smelters;

   c. cases involving NESHAPs;

d. post - 1982 date cases.

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

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

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

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

Pre-referral Negotiations

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

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

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

"Hold Action" Requests

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

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

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

Filing Proofs of Claim in Bankruptcy

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

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

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

Attachments

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

Appendix A

Categories of Direct Referral Cases As of September 2, 1986

General

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

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

Clean Air Act

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

   a. cases involving the steel industry;

   b. cases involving non-ferrous smelters;

   c. NESHAPs cases other than asbestos and vinyl chloride; and

   d. lead sources.

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

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

Clean Water Act

1. All cases involving discharges without a permit by industrial dischargers.

2. All cases against minor industrial dischargers.

3. All cases involving failure to monitor or report by industrial dischargers.

4. Referrals to collect stipulated penalties from industrials under consent decrees.

5. Referrals to collect administrative spill penalties under Section 311(j) of the CWA.

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

Safe Drinking Water Act

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

RCRA

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

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

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

TSCA & FIFRA

All TSCA & FIFRA collection actions for unpaid administratively assessed penalties.2/

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

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

AUG 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

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

Re: Direct Referrals

Dear Hank:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The following cases under the Clean Water Act:

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

   b. all cases against minor industrial dischargers;

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

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

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

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

   a. cases involving the steel industry;

   b. cases involving nonferrous smelters;

   c. cases involving NESHAPs;

   d. post - 1982 date cases.

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

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

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

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

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

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

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

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Approved:

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

cc: Richard H. Mays
Senior Enforcement Counsel

#51

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

OCT 28 1986

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Calculating After Tax Net Present Value of Alternative Payments

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

TO: Assistant Administrators
Regional Administrators

PURPOSE

This guidance provides a methodology for calculating the after tax net present value of an environmentally beneficial project proposed by a violator to mitigate a portion of a civil penalty. We developed this guidance in reponse to requests from both the Regions and Headquarters on how to evaluate a project's real cost to a violator. The Associate Enforcement Counsels, Regional Enforcement Contacts, Regional Counsels, and the Chief of the Environmental Enforcement Section at Department of Justice have reviewed this guidance. In addition, the Tax Litigation Division of the Internal Revenue Service and the Corporate Finance Division of the Securities and Exchange Commission reviewed pertinent language in this document. We hope it will be useful. The policy on alternative payments is set forth in the February 16, 1984, uniform civil penalty policy.

BACKGROUND

The 1984 civil penalty policy provides flexibility for EPA to accept, under specified conditions, a violator's investment in environmentally beneficial projects to mitigate part of a civil penalty. The policy allows the use of these alternative payments as an incentive for settlement. The policy does not contemplate a dollar-for-dollar reduction in the civil penalty equal to the cost of an acceptable alternative payment project. Furthermore, EPA will not accept more than the after tax net present value

of an alternative payment project. The Agency also can choose to accept less than that amount. 1/

EPA must carefully balance the benefits of fostering settlements by approving alternative payment projects against the benefits of achieving the broadest deterrent impact from enforcement actions. Allowing these projects to mitigate part of a penalty may reduce the deterrent effect of an action on the regulated community.

A civil penalty is not tax deductible under 26 U.S.C. §162(f); therefore, the full amount of the penalty is a liability to a violator.2/ Conversely, if a violator invests in an alternative payment project, that investment may be tax deductible. EPA must use the after tax value of a proposed investment when determining whether and by how much to mitigate a civil penalty.3/

In addition to considering the tax effects of an alternative payment project, EPA must evaluate the cost of the project in terms of its present value. An alternative payment project usually requires expenditures over time.4/ Therefore, the Agency also must reduce the after-tax value of the cash flows invested in an alternative payment project to its net present value at the date of settlement.

1/ Proposed alternative payment projects may not be used to mitigate the entire amount of a civil penalty. The Agency plans to issue further policy clarifying the use of alternative payments in settlement negotiations.

2/ A written agreement specifiying the tax implications of the civil penalty is essential. The agreement should be a legally binding contract. The agreement should state that the civil penalty is punitive and deterrent in purpose and is a non-deductible expense.

3/ In addition to tax benefits, a firm also can generate positive, image-enhancing publicity from the project developed for the alternative payment; however, the penalty policy requires that any publicity a violator generates about the project must include a statement that the project is undertaken in settlement of an enforcement action by EPA or an authorized state.

4/ A dollar today is worth more than a dollar a year from now for two reasons: 1) if a dollar today is held in a no-interest checking account, inflation erodes the value of that dollar over the year; and 2) if a dollar today is invested at a rate higher than the rate of inflation, that dollar increases in value by the amount of earnings in excess of the inflation rate.

The BEN computer model can calculate the after tax net present value of a violator's proposed alternative payment. Appendix A of the BEN User's Manual provides the procedure for calculating after tax net present value of capital investment, operation and maintenance costs, and one-time costs.

USING BEN TO CALCULATE THE AFTER TAX NET PRESENT VALUE OF ALTERNATIVE PAYMENTS

To use BEN to calculate after tax net present value of an alternate payment project, respond to the BEN questions as follows:

1. Enter the case name (variable 1);

2. For variables 2 through 4, enter the incremental costs for the alternative payment project of:

   a. Pollution control equipment;

   b. Operation and maintenance;

   c. One-time expenditure;

3. Substitute the date of settlement of the enforcement action for the first month of non-compliance (variable 5);

4. Enter the compliance date or completion date of the alternative investment for variables 6 and 7;

5. Select standard values for variables 8 through 13;[5/]

6. Select output option 2.

5/ Decreasing the tax rate used in BEN increases the amount of a civil penalty and also increases the after-tax cost of an alternative investment. Therefore, a violator has an incentive to provide a lower marginal tax rate for an alternative payment project than the one used to calculate the civil penalty. Both the civil penalty calculation and the alternative payment calculation must use the same tax rate. The annual inflation rate and the discount rate should be the same as the rates used in the civil penalty calculation.

Calculation C in output option 2 expresses the after tax net present value of the alternative payment on the date of settlement, which is the date substituted for the first month of noncompliance (variable 5). This figure is the maximum amount by which EPA may mitigate a civil penalty. Attachment A is an example of a proposed alternative payment project with the BEN output showing the after tax net present value of the investment.

If you have any questions about calculating the after tax net present value of a proposed alternative payment, call Susan Cary Watkins of my staff (FTS 475-8786).

Attachment

cc: Regional Counsels
Associate Enforcement Counsels
Compliance Office Directors

ATTACHMENT A

ALTERNATIVE PAYMENT EXAMPLE

Suppose a violator offers to invest over the next 20 months $500,000 in pollution control equipment. The equipment will provide environmental benefits beyond those that result from meeting legal requirements for compliance. The after tax net present value in 1986 dollars of a $500,000 investment over a period of 20 months is $299,562. Therefore, the value of the alternative payment in this example is $299,562, although the violator must commit to investing $500,000. Exhibit 1 shows how the BEN model displays the data.

If EPA approves the alternative payment project in the example, the Agency may propose an adjusted penalty target figure that is as much as $299,562 less than the initial penalty target figure.[1/] Other adjustment factors also may reduce the initial penalty target figure.

The effects of inflation and return on a dollar are smaller over shorter periods of time. Consequently, the difference between the after tax net present value of an alternative payment and the total amount of the alternative payment decreases as the time between the date of settlement and the date of the final alternative payment decreases. If the violator in the example could invest $500,000 in pollution control equipment in less than 2 months after settlement, the net present value of the investment would be $76,742 greater (See Exhibit 2).

For using the BEN model to calculate the after tax net present value of the proposed alternative payment for this example the data required are:

1. Case Name: Alternative Payment Example
2. Capital investment: 500000 1986 dollars
3. One-time nondepreciable expenditure: 0
4. Annual O&M expense: 7000 1985 dollars
5. Month of settlement: 4, 1986
6. Compliance date: 12, 1987
7. Penalty payment date: 12, 1987

1/ The Agency is never obligated to mitigate a civil penalty by the full amount of the after tax net present value of an alternative payment project. For example, EPA might mitigate a civil penalty by only half of the after-tax net present value of the project.

EXHIBIT 2

OUTPUT OPTION 2

ALTERNATIVE PAYMENT EXAMPLE APRIL 24, 1986

A.	PRESENT VALUE COST OF PURCHASING THE INITIAL POLLUTION CONTROL EQUIPMENT ON TIME AND OPERATING IT THROUGHOUT ITS USEFUL LIFE	$ 303688
B.	PRESENT VALUE COST OF ON-TIME PURCHASE AND OPERATION OF INITIAL POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$ 379682
C.	PRESENT VALUE COST OF DELAYED PURCHASE AND OPERATION OF POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$ 376304
D.	ECONOMIC BENEFIT OF A 1 MONTH DELAY AS OF INITIAL DATE OF NONCOMPLIANCE (EQUALS B MINUS C)	$ 3378
E.	THE ECONOMIC BENEFIT OF A 1 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 1 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE	$ 3425

->->->->-> THE ECONOMIC SAVINGS CALCULATION ABOVE <-<-<-<-<-<- USED THE FOLLOWING VARIABLES:

USER SPECIFIED VALUES

1.	CASE NAME=	ALTERNATIVE PAYMENT EXAMPLE
2.	INITIAL CAPITAL INVESTMENT =	$ 500000 1986 DOLLAR
3.	ONE TIME NONDEPRECIABLE EXPENDITURE =	$ 0
4.	ANNUAL O&M EXPENSE=	$ 7000 1986 DOLLAR
5.	FIRST MONTH OF NONCOMPLIANCE=	11, 1987
6.	COMPLIANCE DATE=	12, 1987
7.	PENALTY PAYMENT DATE=	12, 1987

STANDARD VALUES

8.	USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT =	15 YEARS
9.	INVESTMENT TAX CREDIT RATE =	10.00 %
10.	MARGINAL INCOME TAX RATE =	50.00 %
11.	ANNUAL INFLATION RATE=	6.00 %
12.	DISCOUNT RATE =	10.00 %
13.	AMOUNT OF LOW INTEREST FINANCING =	$ 0

EXHIBIT 1

OUTPUT OPTION 2

ALTERNATIVE PAYMENT EXAMPLE — APRIL 16, 1986

A.	PRESENT VALUE COST OF PURCHASING THE INITIAL POLLUTION CONTROL EQUIPMENT ON TIME AND OPERATING IT THROUGHOUT ITS USEFUL LIFE	$ 236478
B.	PRESENT VALUE COST OF ON-TIME PURCHASE AND OPERATION OF INITIAL POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$ [illegible]
C.	PRESENT VALUE COST OF DELAYED PURCHASE AND OPERATION OF POLLUTION CONTROL EQUIPMENT PLUS ALL FUTURE REPLACEMENTS	$ 299562
D.	ECONOMIC BENEFIT OF A 20 MONTH DELAY AS OF INITIAL DATE OF NONCOMPLIANCE (EQUALS B MINUS C)	$ 58620
E.	THE ECONOMIC BENEFIT OF A 20 MONTH DELAY AS OF THE PENALTY PAYMENT DATE, 20 MONTHS AFTER THE INITIAL DATE OF NONCOMPLIANCE	$ 77252

->->->->-> THE ECONOMIC SAVINGS CALCULATION ABOVE <-<-<-<-<- USED THE FOLLOWING VARIABLES:

USER SPECIFIED VALUES

1.	CASE NAME= ALTERNATIVE PAYMENT EXAMPLE		
2.	INITIAL CAPITAL INVESTMENT =	$ 500000	1986 DOLLARS
3.	ONE-TIME NONDEPRECIABLE EXPENDITURE =	$ 0	
4.	ANNUAL O&M EXPENSE=	$ 7000	1986 DOLLARS
5.	FIRST MONTH OF NONCOMPLIANCE=	4, 1986	
6.	COMPLIANCE DATE=	12, 1987	
7.	PENALTY PAYMENT DATE=	12, 1987	

STANDARD VALUES

8.	USEFUL LIFE OF POLLUTION CONTROL EQUIPMENT =	15 YEARS
9.	INVESTMENT TAX CREDIT RATE =	10.00
10.	MARGINAL INCOME TAX RATE=	50.00
11.	ANNUAL INFLATION RATE=	6.00
12.	DISCOUNT RATE =	18.00 %
13.	AMOUNT OF LOW INTEREST FINANCING =	$ 0

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

#52

MEMORANDUM

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

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

TO: Addressees

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

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

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

Attachments

Addressees:

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

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

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

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

I. Purpose

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

II. Background

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

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

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

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

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

III. Statement of Policy

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

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

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

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

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

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

a. Scope of the Audit Requirement

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

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

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

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

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

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

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

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

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

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

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

b. Agency Oversight of the Audit Process

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

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

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

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

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

c. Agency Requests for Audit-Related Documents

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

d. Stipulated Penalties for Audit-Discovered Violations

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

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

e. Effect of Auditing on Agency Inspection and Enforcement

1. Inspections

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

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

2. Civil Penalty Adjustments

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

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

3. Confidentiality

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

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

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

IV. Coordination of Multi-Facility Auditing Settlements

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

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

Attachments

FOOTNOTES

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

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

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

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

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

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

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

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

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

10. See Attachment F.

11. See Attachment C.

12. See Attachment D.

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

14. See Attachments E and F.

15. Attachments C-G.

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

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

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

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

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

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

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

23. See Attachment F.

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

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

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

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

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

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

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

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

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

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

34. See Attachment F, §25.b.

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

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

SUMMARY OF ATTACHMENTS

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

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

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

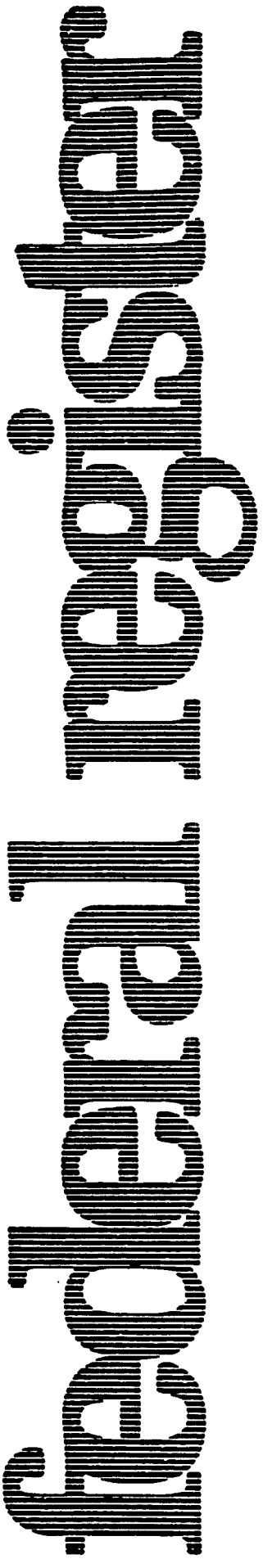
Attachment D: Model Environmental management audit provision, with requirement for submission of plan for improvement of environmental management practices, to be completed on an enforceable schedule.

Attachment E: Model Environmental compliance and management audit provision, with all audit results submitted to EPA, all Agency enforcement prerogatives reserved.

Attachment F: Model Environmental compliance and management audit provision, with extensive Agency oversight, audit results disclosed, stipulated penalties applied to most prospective violations, and all Agency enforcement prerogatives reserved for other violations. [Most appropriate for party with an extensive history of noncompliance.]

Attachment G: Model Emergency environmental management reorganization provision. [Appropriate for cases where a party's environmental management practices are wholly inadequate and action is necessary without waiting for the results of an audit.]

Attachment A



Wednesday
July 9, 1986

Part IV

Environmental Protection Agency

Environmental Auditing Policy Statement; Notice

ENVIRONMENTAL PROTECTION AGENCY

[E-FRL-3046-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:

Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2726;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assesament) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it is important to communicate this fact to [illegible]icy and state personnel, and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its decretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting non regulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "[illegible]ironmental problems" to refer to the [illegible]rlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmenta problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly [illegible]ed to regulated entities' [illegible]onmental auditing programs. EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities[1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006, February 1984; "Annotated Bibliography on Environmental Auditing," Fifth Edition, September 1985, both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports [3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[5] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

[3] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other means, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expenditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office or responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(*1*), environmental management effectiveness(*2*), and other matters (*3*) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(*1*) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:
Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local governments are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(*2*) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures;

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;
5. Incorporate environmental protection into written operating procedures;
6. Apply best management practices and operating procedures, including "good housekeeping" techniques;
7. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;
10. Utilize best available process and control technologies;
11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (above and minimum legal requirements);
12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;
13. Exploit source reduction, recycle and reuse potential wherever practical; and
14. Substitute materials or processes to lower use of the most-hazardous substances possible.

15. Visitors could also assess environmental risks and uncertainties.

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Attachment B

Revised 10/17/86

A REPRESENTATIVE SAMPLE OF

ENVIRONMENTAL AUDITING SETTLEMENTS ACHIEVED TO DATE*

REGION II:

Crompton and Knowles Corporation, Consent Agreement and Final Order (CAFO), II TSCA-PCB-82-0108, 1/28/86. Compliance audit of 28 facilities, covering TSCA PCB requirements, with certification of compliance. EPA attorney: Randye Stein, FTS 264-8157.

REGION V:

BASF Wyandotte Corporation, CAFO, TSCA-V-C-410, 4/25/86. In settlement of a premanufacture notification action under TSCA, BASF agreed to conduct an audit (actually called a "review") of all chemicals subject to TSCA §5 inventory requirements that are produced, imported or used by 13 BASF facilities. BASF also agreed to certify that (1) all chemicals manufactured by or imported/purchased from its parent or an affiliate company are listed on the TSCA Chemical Substances Inventory; and (2) to the best of its knowledge, all chemicals purchased from unrelated parties are listed on the TSCA inventory. EPA attorney: Art Smith, FTS 886-4253.

Chemical Waste Management, Inc. (Vickery, Ohio facility), CAFO, TSCA-V-C-307, RCRA-V-85R-019, 4/5/85. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Rodger Field, FTS 886-6726; Michael Walker, FTS 475-8697.

Detroit Metropolitan (Wayne County Airport), CAFO, TSCA-V-C-468, 7/30/86. PCB compliance audit of all facilities with certification of compliance and submission of inventory of each facility which specifies general location and quantity of all PCBs and PCB items subject to the requirements of 40 CFR Part 761. EPA attorney: Dorothy Attermayer, FTS 886-6776.

Michigan Department of Mental Health, CAFO, TSCA-V-C-231, 1/4/85. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

Michigan Department of Corrections, CAFO, TSCA-V-C-187, 10/9/83. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

Owens-Corning Fiberglas Corporation, CAFO, TSCA-V-C-101, 6/8/84. PCB compliance audit of 63 facilities, with certification of compliance. EPA attorney: Michael Walker, FTS 475-8697.

* Note: Some of the settlements identified herein may not fall within the strict definition of "environmental auditing" but contain requirements sufficiently similar to auditing to warrant their inclusion.

Potlatch Corporation, CAFO, TSCA-V-C-137, 8/31/83. PCB compliance audit of all facilities, with certification of compliance. EPA attorney: David Sims, FTS 353-2094.

Ren Plastics, an operating unit of Ciba-Geigy Corp. (E. Lansing, Michigan), CAFO, TSCA-V-C-411, 2/12/86. CAFO requires review of the chemicals manufactured by Ciba-Geigy plants with certification that all chemicals are on the TSCA inventory. Respondent also agreed to conduct an environmental seminar for plant personnel with a section on TSCA compliance; respondent intends to continue refining its employee training program. EPA attorney: Dorothy Attermeyer, FTS 886-6776.

REGION VI:

USA v. Georgia-Pacific Corporation, Nos. 84-457-B and 85-136-B (D.LA., entered 2/6/86). Clean Air Act Consent Decree requires implementation of compliance plan produced by presettlement audit, covering CAA National Emissions Standard for vinyl chloride. EPA attorney: Elliott Gilberg, FTS 382-2864.

REGION IX:

Chemical Waste Management, Inc. (Kettleman Hills, California facility), CAFO, RCRA-0984-0037, TSCA-09-84-0009, 11/7/85. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Bill Wick, FTS 454-8039; Keith Onsdorff, FTS 382-3072.

REGION X:

Allstate Insurance Company, CAFO, X83-09-09-2614, 5/25/84. PCB audit of 140 buildings nationwide, formulation of PCB inspection plan and guidelines to be distributed to facility managers, and follow-up training conferences and review of program implementation. EPA attorney: Ted Rogowski, FTS 399-1185.

Bonneville Power Administration, Memorandum of Agreement with EPA, 2/20/85. MOA provides for: (1) training of personnel conducting TSCA inspections, CERCLA preliminary assessments, and site investigations; (2) conduct of environmental audits covering TSCA PCB requirements; (3) testing and evaluation of facilities to determine status of compliance with TSCA and to assess threatened or actual release of "hazardous substances" as defined by CERCLA; and (4) remedial actions to be taken based upon risk assessment that utilizes criteria and information in the National Contingency Plan. EPA attorney: Ted Rogowski, FTS 399-1185.

Chem Security Systems, Inc. (Arlington, OR), CAFOs, TSCA 1085-07-42-2615P, 12/26/85; and RCRA 1085-06-08-3008P, 12/2/85. Four compliance audits (performed quarterly over a one-year period), covering all RCRA requirements and PCB requirements under TSCA. EPA attorney: Barbara Lither, FTS 399-1222.

Crown Zellerbach Corporation, CAFO, X83-06-08-2614, 11/30/83. Settlement provides for refinement of existing corporate-wide compliance program for TSCA PCB requirements, including certification of compliance. EPA attorney: Ted Rogowski, FTS 399-1185.

Roseburg Lumber Company, CAFO, X83-05-02-2614, 1/10/85. Settlement provides for development of a training program and manual describing PCB compliance requirements and procedures; and a program to bring 12 facilities into full compliance with TSCA PCB requirements within one year of settlement. EPA attorney: Ted Rogowski, FTS 399-1185.

Washington State University, CAFO, X83-05-02-2614, 5/30/84. Settlement provides for development of guidance manual for employees regarding proper handling of PCBs, followed by training sessions to ensure employees' familiarity with PCB compliance procedures. EPA attorney: Ted Rogowski, FTS 399-1185.

HEADQUARTERS:

American Petrofina Company of Texas, Nos. 1217 and 1293, 9/5/85. Consolidated Clean Air Act Settlement Agreement requires institution of annual visitation program by Respondent to verify the existence of proper unleaded gasoline handling procedures at all branded gasoline retail outlets. EPA attorneys: Rich Kozlowski, FTS 382-2633; Rich Ackerman, FTS 382-4410.

Ashland Oil, Inc. (Catlettsburg, KY refinery), No. _____ (E.D. Kentucky, entered _____). Clean Water Act consent decree requires the performance of a "Wastewater Treatment System Engineering Study" by an independent party and the implementation of those recommendations agreed upon by the parties. Settlement also mandates the commencement of a "Best Management Practices Study" in order to minimize potential significant releases; includes the development of a toxicity testing and control plan and establishes a stipulated penalty schedule for daily and monthly violations of effluent limits contained in Defendant's NPDES permit. EPA attorney: Joseph Moran, FTS 475-8185.

BASF Systems Corporation, CAFO, TSCA-85-H-04, 5/28/86. Environmental management audit and development of procedures for handling chemical substances imported from BASF's German parent corporation. BASF will pay a stipulated penalty of $10,000 per "safe" chemical not listed on the TSCA Chemical Inventory. EPA will apply the TSCA PMN penalty policy to violations for unregistered "bad" chemicals discovered in the "review" process. EPA attorney: Michael Walker, FTS 475-8697.

Chapman Chem. Co., et al., FIFRA 529, et al., Filed 9/30/85. The industry parties to the settlement agreement agreed to implement and participate in a voluntary Consumer Awareness Program to provide users of treated wood products with use, handling, and precautionary information. The focus of the program is a Consumer Information Sheet which contains language approved by the Agency. Industry agreed to conduct an audit of the program within a year after settlement and to submit the results of the audit to EPA within 30 days of its completion. EPA attorney: Cara Jablon, FTS 382-2940.

Chemical Waste Management, Inc. (Emelle, Alabama facility), CAFO, TSCA-84-H-03, 12/19/84. Management audit covering all RCRA and TSCA requirements. Audit also addresses personnel training, spill response, operations and maintenance, interim stabilization, and quality control and assurance. EPA attorneys: Keith Onsdorff, FTS 382-3072; Alex Varela, FTS 475-8690; Arthur Ray, FTS 382-3050.

Conoco Inc. and Kayo Oil Company, CAA (211)-449, 520, 596, 709, and 710, 8/31/83. Settlement Agreement requires (or confirms): (1) revision of Conoco's Jobber Franchise Agreement to include provision for unleaded gasoline sampling on a quarterly basis at each Conoco Jobber retail outlet; (2) all drivers of Conoco company cars to certify that no tampering has occurred which would allow the introduction of leaded gasoline into a vehicle requiring unleaded gasoline; (3) posting of public information notices designed to inform Kayo customers of problems related to fuel switching; and (4) training to inform Kayo employees of EPA unleaded fuels regulations. EPA attorneys: Rich Kozlowski, FTS 382-2633; Rich Ackerman, FTS 382-4410.

Department of Defense, Federal Facility Compliance Agreement, 12/30/83. Agreement covers all DoD facilities where PCBs are stored for disposal; establishes compliance plan designed to achieve and maintain compliance with all applicable PCB storage and disposal requirements. EPA attorney: Deeohn Ferris, FTS 475-8690.

Diamond Shamrock Corporation, CAFO, TSCA-85-H-03, 7/15/85. Compliance audit of 43 facilities, covering all TSCA requirements. EPA attorneys: Deeohn Ferris, FTS 475-8690; Bob Pittman, FTS 475-8690.

General Electric Co. (Waterford, NY facility), No. 84-CV-681 (N.D.N.Y., entered _____). Clean Water Act consent decree requires the implementation of an engineering study to insure compliance with Defendant's N/SPDES permit. Settlement also requires monthly progress reports to be submitted to EPA with provisions for stipulated civil penalties for discharge violations. EPA attorney: Joseph Moran, FTS 475-8185.

Mac Oil Company d/b/a Circle Oil, No. FOSD-1908, 5/21/85. Clean Air Act Settlement Agreement requires: (1) institution of an unleaded gasoline sampling and testing program at all facilities receiving unleaded gasoline from Respondent; (2) inspections of the gasoline pumps at all facilities to which Respondent delivers gasoline to determine compliance with nozzle, label and warning sign requirements; and (3) maintenance of a company unleaded gasoline policy that informs all employees, agents and common carriers of gasoline handling and compartment labeling procedures. EPA attorney: Dean Uhler, FTS 382-2947.

National Convenience Stores, Inc. d/b/a Stop 'n Go, Nos. FOSD-1140 and FOSD-1404, 8/16/84. Consolidated Settlement Agreement requires: (1) institution of a program for compliance with EPA unleaded fuels regulations at all retail gasoline outlets that Respondent operates under any name, including periodic verification that nozzle requirements are met; and (2) submission to EPA of a Certificate of Compliance. EPA attorney: Rich Kozlowski, FTS 382-2633.

Phillips Petroleum Company, Consolidated Clean Air Act Settlement Agreement, 3/11/85. Settlement requires Phillips to: (1) establish, implement and maintain a program for unleaded gasoline quality assurance among its branded marketers and retailers; (2) conduct a threephase program of sampling unleaded gasoline at all branded retail outlets in the United States; (3) conduct annual inspections of ten percent of its branded retail outlets in the United States for compliance with EPA unleaded gasoline regulations; (4) at the time of contract renewal, review with its marketers and retailers their contractual obligations pertaining to the sale, handling, and distribution of unleaded gasoline; and (5) conduct a review of its Unleaded Gasoline Quality Assurance Program after the first year of operation and submit a written report to EPA assessing the program's effectiveness in improving the quality of unleaded gasoline and reducing the potential or actual number of violations of the regulatory limits for lead. EPA attorney: Rich Kozlowski, FTS 382-2633.

R.I. Marketing, Inc., No. FOSD-1611, 10/5/84. Clean Air Act Settlement Agreement requires institution of a fuel switching preventative action program, at each of approximately 200 retail outlets, designed to prevent leaded gasoline from being introduced into vehicles requiring unle ed fuel. EPA attorney: Rich Kozlowski, FTS 382-2633.

Savoca's Service Center, Inc., No. FOSD-2101, 10/17/85. Clean Air Act Settlement Agreement requires institution of a fuel switching preventative action program, at all retail outlets, designed to prevent leaded gasoline from being introduced into vehicles requiring unleaded fuel. EPA attorney: Rich Kozlowski, FTS 382-2633.

Union Carbide Corporation, CAFO, TSCA-85-H-06, 2/26/86. Settlement provides for development of a training program emphasizing pre-manufacture notification requirements under TSCA, followed by a test program to monitor responses for compliance with TSCA. EPA attorney: Alex Varela, FTS 475-8690.

United American Fuels, Inc., No. FOSD-1578, 12/18/84. Clean Air Act Settlement Agreement requires implementation of a fuel additive quality control and testing program. EPA attorney: Rich Kozlowski, FTS 382-2633.

USA v. Parma, Ohio, No. C-85-208, (N.D. Ohio, February 28, 1985). Clean Air Act Consent Judgment requires Defendant to: (1) replace catalytic converters that had been removed illegally; (2) inspect (periodically for two years) all city vehicles for tampering with emission controls; (3) tune-up and test (periodically for two years) all city vehicles for emissions; (4) report all tampering found to EPA and take appropriate remedial measures; (5) train mechanics in compliance with EPA standards; (6) distribute pamphlets discussing tampering and fuel switching to all households in Parma, Ohio; and (7) display for one year posters cautioning against tampering and fuel switching. EPA attorney: Debra Rosenberg, FTS 382-2649.

USA v. State of Maine, No. 84-0152-B (D. Maine, November 19, 1985) Clean Air Act Consent Decree requires State to (1) inspect all Maine Forest Service vehicles for tampering with emission control devices, and correct deficiencies; (2) inspect each gasoline fueling facility owned or operated by the Maine Department of Conservation for compliance with label, notice and nozzle size requirements, and correct deficiencies; (3) publicize to Maine Forest Service personnel and the public the importance of complying with mobile source requirements; and (4) implement fully the catalytic converter and inlet restrictor inspection program mandated by State law, and audit at least 90 percent of licensed inspection facilities to verify compliance. EPA attorney: Richard Friedman, FTS 382-2940.

Note: The settlements identified herein relating to mobile source enforcement under the Clean Air Act are representative of approximately 200 such settlements that have been achieved to date.

Attachment C

MODEL ENVIRONMENTAL COMPLIANCE AUDIT PROVISION FOR CONSENT DECREES OR AGREEMENTS

A.1. Defendant/Respondent shall, within sixty days after the effective date of this Decree/Agreement [and where a continuing audit requirement is appropriate, add: and not less often than annually thereafter for a five-year period], audit the status of [applicable statutory] compliance at the [site of facility(ies)] and take prompt remedial action against all violations found.

A.2. Defendant/Respondent shall, within sixty days after completion of the compliance audit required by paragraph 1, submit to EPA's [name of EPA office overseeing compliance with Decree/Agreement] a certification that, to the best of its knowledge, Defendant/Respondent is in compliance with all [applicable statutory and regulatory] requirements or has developed a schedule for achieving compliance subject to EPA approval.

A.3. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

MODEL ENVIRONMENTAL MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES OR AGREEMENTS

B.1. Defendant/Respondent shall propose to EPA's [name of EPA office overseeing compliance with Decree/Agreement] by written submittal to [name of Agency contact] within thirty (30) days of the effective date of this Decree/Agreement, the scope of work for the services of a [third party or internal] auditor who shall be expert in environmental auditing, environmental management systems and [applicable statutory program(s)] management operations. Such auditor shall be independent of and in no way responsible to production management. This scope of work and auditor shall be agreed upon by EPA and Defendant/Respondent in writing, prior to the auditor's commencing the performance of the professional services more fully set forth below. The auditor will be retained and the scope of work will be designed to review and make recommendations regarding the improvement of Defendant's/Respondent's environmental compliance and management policies, practices, and systems at the [site of facility(ies)] and in the Defendant's/Respondent's corporate offices having responsibility for supervision of compliance activities at such facility(ies).

2. Within one hundred twenty (120) days after agreement upon the scope of work and the auditor, the auditor shall submit a written Environmental Audit Report to the Defendant/Respondent. This Report shall:

a. Identify and describe the existing facility environmental management operations and the corporate offices responsible for overall company-wide environmental compliance and management systems, policies and prevailing practices as they affect [applicable statutory and regulatory] compliance at the [site of facility(ies)].

b. Evaluate such operations and systems, practices and policies and identify and describe fully the perceived weaknesses in such operations and systems, practices and policies by comparing them, to the extent practicable, to:

i. their ability to promote compliance with [applicable statutory and regulatory] requirements;

ii. the existing practices, programs and policies of other [applicable industry] corporations operating within the continental United States, including consideration of the available literature and consultant's experience pertinent to regulatory compliance programs, practices and policies currently operative in the [applicable industry] in the continental United States;

iii. the history of [facility] operations in terms of the facility's(ies') compliance programs, compliance record

and environmental management practices over the previous five years [or longer if necessary or relevant].

The auditor shall apply its expertise and judgment to the foregoing information, using such factors as the auditor believes to be relevant and appropriate, which factors shall be stated in the report.

c. Based on the evaluation required in paragraphs 2.a. and b. above, the auditor shall identify and describe fully with supporting rationales the perceived areas, if any, where Defendant's/Respondent's environmental management systems, practices and policies may be improved as they affect the [facility(ies)] regarding [applicable statutory] compliance obligations, listing specific options for any improvements at the [facility(ies)] in the following areas:

i. environmental compliance program management operation, staffing, education and experience requirements.

ii. compliance management budget, lines of authority to Defendant's/Respondent's corporate offices responsible for overall company-wide environmental compliance and management systems, policies, and practices, and relationship to the operating facility(ies) manager.

iii. personnel training for individual employee compliance obligations and [applicable medium-specific activities].

iv. Operations and Maintenance (O&M) procedures for [applicable medium-specific pollution control] equipment.

v. evaluation of [applicable industry] operations and pollution control equipment in terms of adequacy of design and compatibility with [applicable medium-specific substances] being passed through such equipment.

vi. quality and thoroughness of implementation of all waste and wastewater [or other pollutant source] analysis plans for both incoming and outgoing waste [or other pollutant] streams, whether directly discharged, emitted, released to the ambient environment, or conveyed off-site in bulk shipments.

vii. preparation of Quality Assurance and Quality Control programs for sampling and analysis and for environmental testing procedures, including [facility(ies)] laboratories and contract laboratories for [facility(ies)].

viii. preparation of records needed to provide the [facility(ies)] management with an adequate data base to accurately determine compliance with all applicable statutory and regulatory requirements, with particular attention to waste [or other

pollutant] generation (including quantity and chemical composition), movements, treatment, and ultimate disposition by location of waste [or other pollutant] source, handling points and final disposition. This evaluation shall encompass proposals for state-of-the-art data management systems providing timely access to all of the above records to be maintained by an onsite computer.

ix. preparation of self-monitoring reports required to be filed with the State and EPA.

x. preparation and review of Incident Reports evaluating causes of [applicable medium-specific pollution control] equipment malfunctions, improper [applicable medium-specific substances] handling, or breakdowns, with specific recommendations for corrective steps and preventive O&M, along with procedures for reporting these recommendations to corporate headquarters.

3. Within 30 days after Defendant's/Respondent's receipt of the Audit Report, Defendant/Respondent shall submit to EPA that portion of the Audit Report which contains the recommendations of the auditor, together with a report of Defendant's/Respondent's good faith evaluation of each option it has selected for adoption and the reasons for rejecting other options. The report by Defendant/Respondent shall set forth the specific actions the company shall take and a schedule, not to exceed sixty (60) days [or longer if necessary] from the date that EPA receives and evaluates the schedule, for implementation of the recommendations adopted by Defendant/Respondent.

4. Any failure by Defendant/Respondent to meet the schedule for implementing the audit program set forth in this Decree/Agreement shall result in stipulated penalties of [$_____] (in addition to whatever sanctions the court/ALJ may impose for contempt), payable by Defendant/Respondent to the U.S. Treasury, for each day such schedule is not met.

B. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

A Note Concerning Application of the Model Provisions

Attachments C-G represent model provisions for the incorporation of environmental auditing requirements within enforcement settlements. These models are based upon medium-specific settlements and necessarily reflect the circumstances surrounding those settlements. Accordingly, Agency negotiators should not hesitate to alter them as necessary to meet the needs of a particular case. An attempt has been made to fashion the models in such a manner that they can be used in any enforcement settlement; however, some language has been retained which applies to only one or two EPA programs. Even where specific language is found to be inapposite, the general headings under which such language is found should provide helpful guidance to Agency personnel in identifying the categories of issues which a particular type of auditing settlement should address.

MODEL ENVIRONMENTAL COMPLIANCE AND MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES AND AGREEMENTS

C.1. Defendant/Respondent shall conduct environmental audits of its facility(ies) [of appropriate frequency and duration] in accordance with the Audit Workplan attached hereto as Exhibit B [company specific; not included]. The first such audit shall commence on or about three months from the effective date of this Decree/Agreement. Each of the audits shall be completed in accordance with the schedule set forth in the Audit Workplan.

2. The performance standard of each such audit is to complete a detailed and professional investigation as set forth in the Audit Workplan of the facility's recordkeeping practices and environmental management operations during the [applicable period]. In accordance with the Audit Workplan, the following audit reports shall be prepared and submitted, with copies of supporting documentation, to EPA within thirty days following the initiation of each such audit:

a. A report on all [pollutants] whose locations (as reported in the facility records) differ from their observed physical location or whose physical locations cannot be corroborated by existing records kept at the facility.

b. A report of all quantity variations (of 10% or more by volume or weight, or any variation in piece count) between [pollutants] received and [pollutants] disposed of at the facility.

c. A report on Defendant's/Respondent's activities at the facility in terms of whether or not they comply with the procedures required under the [Pollutant] Analysis Plan for [pollutant] acceptance. Defendant/Respondent shall include with this report the results of a minimum of three laboratory (including Defendant's/Respondent's laboratory) analyses of blind standards (i.e., pre-analyzed samples whose concentrations are unknown to the laboratories participating in the audit) to be provided by the audit team to evaluate Defendant's/Respondent's ability to quantify representative hazardous constituents in various media.

d. A report of any observed deviations from Defendant's/Respondent's written operating procedures, including documentation on any untimely response to the repair and/or replacement of deteriorating or malfunctioning [pollutant] containers, structures, or equipment.

e. Recommendations as to potential significant improvements and/or modifications which should be made to Defendant's/Respondent's operating procedures to achieve compliance with [applicable statutory and regulatory] requirements.

3. Nothing in this Decree/Agreement shall preclude EPA from instituting enforcement actions against Defendant/Respondent for any violations of [applicable statutory and regulatory] requirements which are not cited within the Complaint giving rise to this Decree/Agreement.

Appendix 1

DEFENDANT'S/RESPONDENT'S FACILITIES

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MODEL ENVIRONMENTAL COMPLIANCE AND MANAGEMENT AUDIT PROVISION FOR CONSENT DECREES AND AGREEMENTS*

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* This provision is only appropriate for a party with an extensive history of noncompliance. It requires a high level of Agency oversight. Based on a draft settlement document, the provision reflects a pro-Agency bias and thus is more susceptible than other model provisions to the give and take of the negotiation process. While the provision only addresses requirements under RCRA and TSCA, audit provisions under other statutes may be crafted by using as a framework the headings contained in this provision.

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TABLE OF CONTENTS (Continued)

1. Purposes of Consent Decree/Agreement. In order to achieve the mutual goal of ensuring full compliance with applicab environmental laws, regulations, and permits by Defendant's/ Respondent's active facilities in an efficient and coordinated manner, Defendant/Respondent and EPA hereby enter into a Consent Decree/Agreement under which:

(1) independent auditors to be retained by EPA and paid for by Defendant/Respondent shall, subject to EPA oversight, audit each facility and report to both parties on their assessment of Defendant's/Respondent's compliance with RCRA and TSCA and their implementing permits, rules and regulations;

(2) the independent auditors shall perform an analysis of Defendant's/Respondent's environmental management systems, practices and policies, as they affect inter-facility and intra-facility transactions (as defined in Paragraphs 5(11) and 5(12) of this Decree/Agreement);

(3) Defendant/Respondent shall pay penalties for violations of the aforementioned statutes, permits, rules and regulations according to the Penalty Schedule set forth as Appendix 2 to this Decree/Agreement; and

(4) EPA shall accept the penalties provided in Appendix 2 as full and complete settlement and satisfaction of any of its civil claims for violations detected by the audit firm (with certain exceptions as set forth in Paragraphs 23, 24, and 25 of this Decree/Agreement)

TERMS OF SETTLEMENT

DEFINITIONS

5. Whenever the following terms are used in this Decree/ Agreement, the definitions specified herein shall apply:

(1) Compliance Report and Plan: A document to be submitted by Defendant/Respondent to EPA, pursuant to Paragraph 19 of this Decree/Agreement, which:

(a) describes in full detail every corrective action taken in response to a Facility Audit Report;

(b) in the case of violations which are not corrected within 60 days of submittal of the Facility Audit Report, describes every action to be taken in response to any

violations or findings in the Facility Audit Report; and

(c) certifies under oath the accuracy of information contained in the Compliance Report and Plan.

(2) Confidential Business Information (CBI)

(a) Information/Documents Determined Not to Be Entitled to CBI Protection. It is agreed between the parties that portions of documents containing the following information shall not be eligible for CBI treatment:

(i) The fact that any chemical waste was disposed of at any Defendant/Respondent facility.

(ii) The location of disposal of any chemical waste at any Defendant/Respondent facility.

(iii) Any information contained or referred to in any manifest for any chemical waste disposed of at any Defendant/Respondent facility.

(iv) The identity and quantity of any chemical waste disposed of at any Defendant/Respondent facility.

(v) Any monitoring data or analysis of monitoring data pertaining to disposal activities at any Defendant/Respondent facility, including monitoring data from any well, whether or not installed pursuant to 40 C.F.R. Part 265, Subpart F, or 40 C.F.R. Part 254, Subpart F (RCRA Groundwater Monitoring Requirements).

(iv) Any permit applications submitted to EPA or to any state pursuant to federal or state statute or regulation.

(vii) Any information regarding planned improvements in the treatment, storage or disposal of chemical wastes at any Defendant/Respondent facility.

(viii) Any hydrogeologic or geologic data.

(ix) Any groundwater monitoring data.

(x) Any contingency plans, closure plans, or post-closure plans.

(xi) Any waste analysis plans.

(xii) Any training and/or inspection manuals and schedules.

(xiii) Any point source discharge or receiving water monitoring data.

(b) The status of information not listed in Section (a) above shall be determined in accordance with 40 CFR Part 2, which provides for CBI treatment of information where:

(i) Defendant/Respondent has taken reasonable measures through the issuance and observance of companywide policies and procedures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(ii) The information is not, and has not been, reasonably obtainable without Defendant's/ Respondent's consent by other persons (other than governmental bodies which are bound by and observing Defendant's/ Respondent's claims of CBI as to that information) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(iii) Disclosure of the information is likely to cause substantial harm to Defendant's/ Respondent's competitive position.

(3) Corporate Management Report and Plan: A document submitted by Defendant/Respondent to EPA, pursuant to Paragraph 27 of this Decree/Agreement, describing in full detail what actions Defendant/Respondent has taken or will take to implement the findings of the Corporate Management Systems Report.

(4) Corporate Management Systems Report: A fully integrated separate report prepared pursuant to the Corporate Management Systems Report Protocol set forth in Appendix 3 of this Decree/Agreement and submitted by Defendant/Respondent to EPA pursuant to Paragraph 26 of this Decree/Agreement.

(5) Corrective Action: Any action taken by Defendant/Respondent in order to come into compliance with any federal, state or local statutory or regulatory requirement for the treatment, storage, or disposal of any Hazardous Substance.

(6) Facility Audit Reports: Reports to be submitted by the Audit Firm to EPA, pursuant to Paragraph 19 of this Decree/Agreement, which:

(a) describe in detail the procedures followed in the facility audit, the facility itself, the regulatory history of the facility, and the facility's current compliance status;

(b) describe in detail each violation detected during the audit;

(c) provide any other information which, in the judgment of the Audit Firm, merits Agency review;

(d) for each violation reported, provide the relevant statutory or regulatory section; the particular area of the facility where the violation was found (if appropriate); the dates during which the violation occurred or existed (if it can reasonably be determined); and any other relevant or appropriate information.

(7) Hazardous Substances: Those materials meeting the definition contained in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601 et seq., §9601(14).

(8) Hazardous Wastes: Those materials meeting the definition contained in 42 U.S.C. §6903(5) and the regulations promulgated at 40 C.F.R. Part 261.

(9) Independent Audit Firm ("Audit Firm"): A firm selected by EPA, pursuant to Paragraph 6 of this Decree/Agreement, for the purpose of performing the Facility Compliance and Management Systems Audits described herein. For the purpose of this Decree/Agreement, the Independent Audit Firm must exercise the same independent judgment that a Certified Public Accounting firm would be expected to exercise in auditing a publicly held corporation. In addition, the Independent Audit Firm must:

(a) not own stock in Defendant/Respondent or any parent, subsidiary, or affiliated corporation;

(b) have no history of participation in any previous contractual agreement with Defendant/Respondent or any parent, subsidiary, or affiliated corporation; and

(c) have no other direct financial stake in the outcome of the Facility Compliance or Management Systems Audits outlined in this Decree/Agreement.

(10) Inter-facility Transactions: Any letters, contracts, memoranda, or other communications between two or more offices or facilities owned or operated by Defendant/Respondent.

(11) Intra-facility Transactions: Any letters, contracts, memoranda, or other communications between two or more locations or offices at a single Defendant/Respondent Facility.

(12) Manifest: The shipping document EPA form 8700-22 and, if necessary, EPA form 8700-22A (as required by 40 C.F.R. Part 262) or equivalent.

(13) New Violation: Any statutory or regulatory violation not reported in the Facility Inspection Report.

(14) Plaintiff: The United States of America, for the Administrator of the United States Environmental Protection Agency (collectively, "the Agency" or "EPA").

(15) Records: Any Defendant/Respondent or consultant report, document, writing, photograph, tape recording or other electronic means of data collection and retention which bears upon Defendant's/Respondent's compliance with EPA, state and local rules and regulations

(16) Facility: Any facility which treats, stores, or disposes of hazardous waste as those terms are defined at 42 U.S.C. §§6903(3), 6903(33), and 6903(34).

(17) Uncorrected Violation: Any violation reported in a Facility Inspection Report which remains uncorrected for 60 days or more after the completion and submission of the Facility Inspection Report pursuant to Paragraph 19 of this Decree/Agreement.

GENERAL AUDIT PROCEDURES

6. Preliminary Matters

(1) Scope of Work

(a) Defendant/Respondent shall submit to the Agency within thirty (30) days of the effective date of this Decree/Agreement the Scope of Work for audits of the Defendant/Respondent facilities listed in Appendix 1 for RCRA and TSCA violations. EPA shall have thirty (30) days from the date of receipt of this Scope of Work and proposed Audit Firm to submit to Defendant/Respondent in writing any proposed modifications in the scope of work.

(b) Defendant/Respondent shall have fifteen (15) days from the date of receipt of EPA's proposed modifications within which to submit in writing its comments upon those proposed modifications.

(b) Within ten (10) days of receipt of Defendant's/Respondent's comments, the Agency shall issue its final decision as to the Scope of Work, which shall be binding upon Defendant/Respondent.

(2) Establishment of Trust

(a) Within thirty (30) days of the date of this Decree/Agreement, Defendant/Respondent shall establish an irrevocable trust fund ("Trust"), the form and text of which shall be approved by EPA. If no fund is approved by EPA within thirty (30) days of the date of this Decree/Agreement, a form supplied by EPA shall be used. The Trustee shall be a bank selected by Defendant/Respondent, which must be approved by EPA.

(b) The Administrator of EPA shall have special power of appointment (and the only power of appointment) over all income and all assets of the Trust. That power may be exercised only to make appointments of funds in accordance with this Decree/Agreement. If, at the conclusion of all tasks set forth in this Decree/Agreement, there remains trust income or assets which have not been appointed by exercise of such special power, then all such remaining unappointed assets shall be delivered forthwith to Defendant/Respondent. Defendant/Respondent shall fund the Trust by placing $_____ in the hands of the Trustee within forty-five (45) days after the date of this Decree/Agreement.

(3) Selection of Audit Firm

(a) Within forty-five (45) days after the date of this Decree/Agreement, EPA shall notify Defendant/Respondent of its selection of a proposed Audit Firm. Defendant/Respondent shall have fifteen (15) days from the date of receipt of EPA's proposed Audit Firm to accept, reject, or comment upon this selection. Reasons for which Defendant/Respondent may reject the proposed Audit Firm are limited to lack of sufficient national reputation; inexperience in performing environmental compliance and management audits; inadequate staffing levels; and failure to qualify as an Independent Audit Firm as defined in Paragraph 5(10) of this Decree/Agreement.

(b) In the event EPA and Defendant/Respondent are unable to agree on selection of an Audit Firm, the parties shall submit to Dispute Resolution as set forth in Paragraph 32 of this Decree/Agreement.

7. Audit Seminar. Before the Audit Firm begins the audits, and within 60 days of the date EPA and Defendant/Respondent agree upon the Scope of Work and Audit Firm as described above, the Agency shall conduct a seminar for employees of the Audit Firm who are to conduct the audits. This seminar shall serve the purpose of assuring that the Audit Firm employees who will be conducting the audits are familiar with all protocols required by Agency policies and procedures to be utilized in conducting compliance audits. The Agency may conduct the audit seminar at the National Enforcement Investigations Center (NEIC) near Denver, Colorado or at the Audit Firm's office. The Agency shall not be responsible for transportation, lodging or other costs associated with attendance by the audit firm employees at the seminar.

8. Observation of EPA Protocols. The Audit Firm shall be required by contract with Defendant/Respondent to observe the protocols presented at the audit seminar. Such protocols include but are not limited to: (1) NEIC's Multi-Media Compliance Audit Procedures; (2) the EPA Office of Administration's Environmental Auditing Protocol; (3) the NEIC Policy and Procedure Manual; and (4) the Corporate Management Systems Report Protocol provided in Appendix 3 of this Decree/Agreement (See Paragraph 26 below).

9. Review of Work Plan.

(1) Within 30 days of the Audit Seminar, the Audit Firm shall submit to Defendant/Respondent and EPA a proposed Work Plan which shall specify the Audit Firm's plan for implementing the Scope of Work. Said

Work Plan shall include the auditing protocols to be used by the Audit Firm; a schedule for conducting facility audits and completion of all other tasks set forth in the Scope of Work; and the names and resumes of those Audit Firm employees who will be primarily responsible for performance of the tasks set forth in the Scope of Work. The proposed Work Plan shall not specify the order of audits or otherwise provide Defendant/Respondent with advance notice of specific audits.

(2) EPA and Defendant/Respondent shall have 30 days from the date of receipt of the proposed Work Plan to submit in writing any proposed revisions to the proposed Work Plan.

(3) The Audit Firm shall have fifteen (15) days from the date of receipt of these revisions within which to submit in writing its comments on these proposed revisions.

(4) Within ten (10) days of receipt of the Audit Firm's comments, EPA shall issue its final decision as to the work plan, which shall be binding on both Defendant/Respondent and the Audit Firm.

(5) The provisions of this Paragraph shall also be set forth as provisions of the contract between Defendant/Respondent and the Audit Firm for the performance of the subject audits.

10. Facilities to be Audited. The Audit Firm shall, subject to the provisions set forth herein, conduct comprehensive RCRA/TSCA Compliance Audits (see Paragraphs 11 through 25) and a Management Systems Audit (see Paragraphs 26 and 27) of the facilities listed in Appendix 1 of this Decree/Agreement. The designation of RCRA/TSCA as the primary areas of audits shall not prohibit the Audit Firm from auditing and reporting violations of any other environmental statutes or regulations should those violations come to the attention of the Audit Firm audit team during the inspe tions. Notice of individual facility audits shall be provided to NEIC at least thirty (30) days prior to scheduled visits. Advance notice of individual facility inspections shall not be provided to Defendant/Respondent.

FACILITY COMPLIANCE AUDITS

Review of Records

11. Records to be Examined.

a. Records Relevant to Compliance with RCRA.

Facility audits may include a review of any facility record of Defendant/Respondent or its predecessors from November 1980. Other records pre-dating November 1980 which bear on the facility's compliance after November 1980 may also be examined, but only to the extent that they are necessary to render judgment regarding any event occurring after November 1980.

b. Records Relevant to Compliance with TSCA.

Facility audits may include a review of any facility record of Defendant/Respondent or its predecessors from April 1978 which is relevant to compliance with TSCA and its implementing regulations. Other records pre-dating April 1978 which bear on the facility's compliance after April 1978 may also be examined, but only to the extent that they are necessary to render judgment regarding any event occurring after April 1978.

c. Records to be Examined by the Audit Firm. Records to be examined include but are not limited to:

(1) all records required by federal, state or local law to be maintained by Defendant/Respondent.

(2) facility operating records, including but not limited to waste profile sheets, containing waste pre-acceptance data, receiving logs, analytical verification data, waste tracking data for intra-facility movement of received wastes or wastes generated on-site, waste storage data, waste treatment data, and data reflecting the disposition of received wastes.

(3) corporate and facility guidelines, policies and internal operating rules pertaining to facility operations, inspections, personnel training, and recordkeeping procedures.

(4) corporate guidelines, policies and internal operating rules pertaining to emergency response, site closure, and postclosure activities.

(5) applications, licenses, permits and approvals (including state permits and approvals), RCRA operation plans, or other regulatory documents pertaining to on-site activities at the facility.

(6) environmental monitoring plans for the facility.

(7) waste treatability studies.

(8) PCB operations plans, letters of approval, pumping logs, and records pertaining to the processing or handling of transformers, capacitors, and/or any other PCB articles, items and containers.

(9) manifests for wastes entering or leaving any Defendant/Respondent facility.

(10) records of use, maintenance and decommissioning of vehicles used on-site and/or off-site for the transportation of RCRA/TSCA wastes to, from, and within any Defendant/Respondent facility.

(11) vehicle washing records.

(12) any effluent data, including data on any direct discharge to surface water or any discharge to a publicly owned treatment facility, which Defendant/Respondent is required to keep pursuant to any federal, state, or local permit or regulation.

12. Access to Documents. The Audit Firm and representatives of the Agency, including contractors, shall have full, unfettered access to all documents bearing upon compliance with RCRA or TSCA kept at each facility or at Defendant's/Respondent's corporate headquarters, regardless of whether these records are deemed by Defendant/Respondent to constitute CBI or deemed by the Audit Firm to indicate or support a violation. The Defendant/Respondent shall retain and make available to EPA copies of any Defendant/Respondent document(s) examined by the Audit Firm which indicate or support any violation detected during the audit program. The Audit Firm shall prepare and provide to EPA a full and complete index of all documents that it examines to ensure that the Defendant/Respondent retains these records for subsequent EPA inspection.

13. Public Access to Records. Each document submitted by Defendant/Respondent to the Audit Firm or EPA pursuant to this Decree/Agreement shall be subject to public inspection unless it is determined by EPA (following a claim made by Defendant/Respondent) to be CBI in accordance with Paragraphs 5(2) and 14 of this Decree/Agreement.

14. Assertion of Confidential Business Information Claims.

a. Defendant/Respondent recognizes that EPA will treat as TSCA CBI only that information claimed confidential which EPA uses for purposes related to TSCA.

b. Claims that information is CBI shall be made on or before the date on which such information is provided to the Audit Firm or EPA.

15. Tentative Observance of CBI Claims. Any information claimed by Defendant/Respondent and asserted to meet the criteria set forth in Paragraph 5(2) will be treated by EPA as confidential in accordance with 40 C.F.R. §§2.201 through 2.215 and any relevant special confidentiality regulations at 40 C.F.R. §§2.301 et seq. pending any final determination that the information is not CBI.

16. Preservation of Records. Defendant/Respondent shall preserve all Records examined by the Audit Firm for three years after submission of its Corporate Management Report and Plan to EPA (See Paragraph 27 below). Nothing in this provision shall authorize destruction of any document required by law or regulation to be preserved for any period of time in excess of three years.

17. Examination of Groundwater Monitoring Information. The Audit Firm shall be required to examine and submit to EPA groundwater monitoring plans and data for each Defendant/Respondent facility listed in Appendix 1 of this Decree/Agreement.

18. Audit Schedule/Agency Access to Defendant's/Respondent's Facilities. All audits by the Audit Firm of the sites listed in Appendix 1 of this Decree/Agreement shall be completed within 180 days of EPA approval of the Work Plan as described in Paragraph 9 above. Representatives of the Agency, including contractors, may accompany audit teams from the Audit Firm on site audits performed by the Audit Firm and oversee he performance of the audits by the audit teams for the purpose of ensuring that the audit procedures and protocols required by the contract are followed.

19. Facility Audit Reports. As each separate facility audit is completed, the Audit Firm shall, no later than 30 days thereafter, simultaneously submit to Defendant/Respondent and the Agency a copy of a Facility Audit Report as defined in Paragraph 5(7). The failure of the Facility Audit Report to include all of the required information for any violation specified in the report shall not be grounds for avoidance of any penalty which is payable under the Penalty Schedule set forth in Appendix 2. The Agency shall not be bound by any

determination of the Audit Firm indicating that Defendant/ Respondent is in compliance with any applicable statutory or regulatory requirement.

20. Correction of Violations/Submission of Compliance Plans. In addition to paying the penalties set forth in the Penalty Schedule below, Defendant/Respondent shall:

(1) correct any violation indicated within a Facility Audit Report as soon as is physically possible.

(2) No later than 60 days after it has received an individual Facility Audit Report, submit to the Agency a Compliance Report and Plan.

The Agency shall not be bound by any Defendant/Respondent determination that it has achieved compliance, that the compliance was physically impossible to achieve, or that the times for corrective actions proposed by Defendant/Respondent to achieve compliance are reasonable. All corrective actions mandated by this Decree/ Agreement shall be undertaken in accordance with applicable federal, state and local law.

PENALTIES AND CORRECTIVE ACTION

21. For Missed Audit Deadlines. Defendant/Respondent shall pay the following stipulated penalties for any failure by Defendant/ Respondent to comply with any time requirement set forth in this Decree/Agreement:

Period of Failure to Comply	Penalty per Day of Delay
1st day through 14th day	$ 5,000.00
15th day through 44th day	$10,000.00
45th day and beyond	$15,000.00

For Violations of RCRA/TSCA

22. Payment of Penalties. For every violation of RCRA or TSCA reported in each Facility Audit Report, Defendant/ Respondent shall pay a penalty based on the Penalty Schedule provided as Appendix 2 of this Decree/Agreement. The listing of the violation in a Facility Audit Report shall be conclusive and binding on Defendant/Respondent, and the amount set forth in the Penalty Schedule shall be due and payable by certified check to the "Treasurer of the United States." The check shall be remitted to:

[appropriate EPA lockbox address]

within 30 days of receipt of the applicable Facility Inspection Report. Penalties shall accrue from the date the violation is determined to have begun to the date such violation is corrected

or abated. Subject to the rights reserved in Paragraph 25 below, EPA will not take further enforcement action on those violations for which penalties are paid and corrective action taken in compliance with this Decree/Agreement.

23. Unlisted Violations. In the event that the audit firm reports statutory or regulatory violations other than those listed in Appendix 2, Defendant/Respondent shall correct such violations as soon as is physically possible. In addition, the parties will, for a period of 60 days following receipt of the Facility Audit Report in which such unlisted violations are contained, attempt to settle by negotiation the appropriate remedy and penalties Defendant/Respondent shall pay for such unlisted violations. In such negotiations, the parties will compare each unlisted violation to the most similar listed violation, if possible. In the event of failure of the parties to achieve settlement of unlisted violations within 60 days, EPA shall be free to take any enforcement measure authorized by law.

24. Uncorrected or New Violations. Beginning on the date EPA receives a Facility Audit Report, Defendant/Respondent shall have sixty (60) days to correct violations cited therein. For any previously reported violation discovered to be uncorrecte at the end of such sixty (60)-day-period, Defendant/Respondent shall pay a civil penalty of $25,000 per day for each day of continued noncompliance unless, within sixty (60) days, Defendant/Respondent has notified the Agency in accordance with Paragraph 20 that compliance is physically impossible and has obtained a final decision from the Agency verifying such physical impossibility. If, during the audit period or during the first post-audit inspection, the Agency discovers violations which were not reported to the Agency by the Audit Firm, for such violations Defendant/Respondent shall pay a civil penalty as set forth in the Penalty Schedule (Appendix 2). In addition, the Agency reserves the right to initiate civil or criminal action (or both) with regard to any previously reported and uncorrected violation and any violation not previously reported.

25. Reserv tion of Rights.

a. Reservation of States' and Local Governments' Right to Inspect Defendant's/Respondent's Facilities.

Nothing in this Decree/Agreement shall limit the authority of EPA or any state or local government to enter and inspect any Defendant/Respondent facility.

b. Reservation of Agency's Right to Seek Relief.

Except as provided in Sections 21 through 24 above, nothing in this Decree/Agreement shall be construed to limit the ability of the United States to take any enforcement action authorized by law.

MANAGEMENT SYSTEMS AUDIT

26. Corporate Management Systems Report. No later than 60 days after the last Facility Audit Report is submitted to Defendant/Respondent and EPA, the Audit Firm shall submit to Defendant/Respondent and EPA a Corporate Management Systems Report as defined in Paragraph 5(4) of this Decree/Agreement.

27. Corporate Management Report and Plan. No later than 90 days after it has received the Corporate Management Systems Report, Defendant/Respondent shall submit to the Agency its own Corporate Management Report and Plan describing in full detail what actions it has taken or will take to implement the findings of the Corporate Management Systems Report.

MISCELLANEOUS TERMS

28. Submission of Reports. Any reports produced by the Audit Firm, including Facility Audit Reports and the Corporate Management Systems Report, shall be submitted simultaneously to EPA and Defendant/Respondent. The Audit Firm shall not share draft copies of such reports with Defendant/Respondent unless such drafts are simultaneously submitted to EPA. The requirements of this Paragraph shall be set forth as a requirement in the contract between Defendant/Respondent and the Audit Firm for the performance of the audits described herein.

29. Effective Date of Decree/Agreement. This Decree/Agreement shall be considered binding and in full effect upon approval by the Federal district court judge/administrative law judge to whom this matter has been assigned.

30. Notice. All submissions and notices required by this Order shall be sent to the following address(es):

[insert address(es) of EPA office(s) overseeing Decree/Agreement]

31. Modification. This Decree/Agreement may be modified upon written approval of all parties hereto, and concurrence of the Federal District Court Judge/administrative law judge assigned to this matter.

32. Dispute Resolution.

(1) The parties recognize that a dispute may arise between Defendant/Respondent and EPA regarding plans, proposals or implementation schedules required to be submitted, regarding tasks required to be performed by Defendant/Respondent pursuant to the terms and provisions of this Decree/Agreement, or regarding whether Defendant/Respondent has incurred liability to pay stipulated penalties under Paragraphs 19 through 24. If such a dispute arises, the parties will endeavor to settle it by good faith negotiations among themselves. If the parties cannot resolve the issue within a reasonable time, not to exceed thirty (30) calendar days, the position of EPA shall prevail unless Defendant/Respondent files a petition with the court/administrative law judge setting forth the matter in dispute. The filing of a petition asking the court/administrative law judge to resolve a dispute shall not extend or postpone Defendant's/Respondent's obligations under this Decree/Agreement with respect to the disputed issue.

(2) In presenting any matter in dispute to the court/administrative law judge, Defendant/Respondent shall have the burden of proving that EPA's interpretation of the requirements of this Decree/Agreement are arbitrary, capricious, or otherwise not in accordance with the law.

33. Continuing Jurisdiction of the District Court/Administrative Law Judge. The district court/administrative forum in which this Decree/Agreement is entered shall retain jurisdiction until all obligations set forth herein are satisfied.

34. Relation to RCRA Permitting Process. Notwithstanding any other provision of this Decree/Agreement, EPA hereby reserves all of its rights, powers and authorities pursuant to the provisions of 42 U.S.C. §§6901 et seq. (RCRA) governing permits for facilities, and the regulations promulgated thereunder.

35. Violations Not Covered by RCRA or TSCA. No stipulated penalty or other remedy agreed to shall cover or apply to non-RCRA, non-TSCA violations. The parties shall be left to their respective rights, liabilities and defenses with regard to these matters.

36. Continuing Audit Requirement. For the five-year-period beginning on the date that Defendant/Respondent submits to the Agency the Corporate Management Report and Plan required by Paragraph VII. 27. of this Decree/Agreement, Defendant/Respondent shall conduct comprehensive audits not less often than annually of the compliance of its facilities with [applicable statutory and regulatory requirements]. After the initial audit by a third party consultant (as required by this Decree/Agreement), such audits may be conducted by such a consultant or by an independent audit staff of the company not responsible to production management. Reports of the results of such audits shall be furnished to the [appropriate corporate environmental official and plant manager]. Within thirty (30) days after completion of each final annual audit report, Defendant/Respondent shall submit to EPA a report of incidents of noncompliance identified by the audit and steps that will be taken to correct any continuing noncompliance and prevent future incidents of noncompliance.

Appendix 2

PENALTY SCHEDULE

	RCRA Violation	Penalty
I.	Groundwater Monitoring 40 C.F.R. §§ 264.91 and 265.91	$22,500.00 per missed sampling event
II.	Unsaturated Zone Monitoring 40 C.F.R. §§ 264.97 through 264.100 and 265.92 through 265.94	$22,500.00 per missed sampling event
III.	Waste Analysis Plans: Content and Implementation 40 C.F.R. §§ 264.13(a) and (b), and 265.13(a) and (b)	$25,000.00
IV.	Bulk Liquids in Landfill 40 C.F.R. §§ 264.314(a) and 265.314(a)	$22,500 per day of occurrence
V.	Containerized Liquids Disposal in Landfill 40 C.F.R. §§ 264.314(b) and 265.314(b)	$22,500.00 per day of occurrence
VI.	Waste Tracking within TSD facility 40 C.F.R. § 264.222	$25,500.00
VII.	Maintenance of Minimum Freeboard level for Surface Impoundment 40 C.F.R. § 264.226(c)	$6,500.00 per freeboard violation
VIII.	Ignitable/Reactive Disposal in Landfill 40 C.F.R. §§ 264.312 and 265.312	$9,500.00 per cell, per day
IX.	Land Disposal (direct application to unlined surface soils) of non-biodegradeable wastes 40 C.F.R. §§ 264.272(a) and 265.272(a)	$22,500.00 per day

	RCRA Violation	Penalty
X.	Trial test of waste compatibility prior to discharge into surface impoundment 40 C.F.R. § 265.225	$22,500.00 per day of event
XI.	Trial test of waste solidification process prior to landfill 40 C.F.R. §265.402	$22,500,00 per day
XII.	Failure to control wind dispersal of land treatment waste disposal zones 40 C.F.R. §§ 264.272(e) and 265.273(f)	$22,500.00 per unit
XIII.	Incompatible wastes placed into surface impoundment 40 C.F.R. §§ 264.230 and 265.230	$22,500.00 per day
XIV.	Unauthorized expansion of TSD facility during Interim status 40 C.F.R. §270.72	$20,000.00 per day or as needed to recapture all profits gained
XV.	Closure of Units w/o demonstration of compliance with facility closure plan 40 C.F.R. §§ 264.113 and 265.113	$25,000.00 per unit
XVI.	Inadequate closure/ post-closure inspection/maintenance plans 40 C.F.R. §§ 264.112 and 265.112	$15,000.00 per unit
XVII.	Absence of post-closure groundwater monitoring program 40 C.F.R. §§ 264.117(a)(1) and §265.117(a)(2)	$22,500.00 per day

	RCRA Violation	Penalty
XVIII.	Failure to update closure/ post closure plan cost estimates 40 C.F.R. §§ 264.144(c) and 265.114(c)	$3,000.00 per day
XIX.	No schedule included for closure activities 40 C.F.R. §§ 264.112(a) and 265.112(a)	$6,500.00 per plan milestone omitted
XX.	Inadequate Part A Applications, absence of identified operating units 40 C.F.R. §270.13	$9,500.00 per unit not properly identified
XXI.	Inadequate Part B Application 40 C.F.R. §270.14	$9,500.00 per unit not properly identified
XXII.	Absence of complete facility Inspection Plan, units omitted 40 C.F.R. §§ 264.15(b) and 265.15(b)	$2,250.00 per unit emitted, per day
XXIII.	Failure to record on facility inspections reports repairs or remedial measures taken 40 C.F.R. §§ 264.15(b) and 265.15(d)	$2,250.00 per omission
XXIV.	Failure to inspect freeboard levels of surface impoundments 40 C.F.R. §§ 264.226(b), (c) and 265.226(a)	$2,250.00 per occurrence
XXV.	Operating Record Omissions failure complete grid maps of landfilled lifts of waste 40 C.F.R. §§ 264.309 and 265.309	$2,250.00 per omission

	RCRA Violation	Penalty
XXVI.	Failure to record on-site generated hazardous wastes i.e. truck washing facility 40 C.F.R. § 262.41(b)	$9,500.00 per unrecorded event
XXVII.	No training provided to employee assigned to do waste analyses 40 C.F.R. §§ 264.16 and 265.16	$3,000.00 per untrained employee
XXVIII.	No analyses performed on materials added to on-site waste piles 40 C.F.R. § 265.252	$22,500.00 per event
XXIX.	Records not provided to Agency within 48 hours of request. 40 C.F.R. §§ 264.74 and 265.74	$6,500.00 per day of delay
XXX.	Fence not installed around all operating areas of TSD facility 40 C.F.R. §§ 264.14 and 265.14	$1,000.00
XXXI.	Emergency Contingency Plan Inadequacies 40 C.F.R. §§ 264.52 and 265.52	$2,225.00 per component deficiency
XXXII.	Failure to Meet Financial Responsibility Requirements 40 C.F.R. Part 264, Subpt. H and Part 265, Subpt. H	$25,000.00 per day of delay

	TSCA Violation	Penalty
XXXIII.	Improper Disposal of PCBs 40 C.F.R. §§ 761.60 (a)-(d).	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation

	TSCA Violation	Penalty
	--220-1,000 gallons or 150-750 cubic feet of PCB contaminated material	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material	$5,000.00 per day, per violation
XXXIV.	Failure to Dispose of PCBs by Jan. 1, 1984. 40 C.F.R. § 761.65(a)	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation
	--220-1,100 gallons or 150-750 cubic feet of PCB contaminated material.	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material.	$5,000.00 per day, per violation
XXXV.	Failure to Dispose of PCBs within one year of removal from service. 40 C.F.R. § 761.65(a)	
	--1,100 or more gallons or 750 or more cubic feet of PCB contaminated material.	$25,000.00 per day, per violation
	--220-1,100 gallons or 150-750 cubic feet of PCB contaminated material.	$17,000.00 per day, per violation
	--less than 220 gallons or 150 cubic feet of PCB contaminated material.	$5,000.00 per day, per violation
XXXVI.	Improper Processing of PCBs 40 C.F.R. § 761.20(a)	$20,000.00 per day, per violation

	TSCA Violation	Penalty
XXXVII.	Improper Distribution of PCBs (sale) in commerce. 40 C.F.R. § 761.20(a)	$20,000.00 per day, per violation
XXXVIII.	Improper treatment and testing of waste oils. 40 C.F.R. §§ 761.60(g)(2)(i) and (ii)	$25,000.00 per day, per violation
XXXIX.	Improper Use of PCBs 40 C.F.R. § 761.20(a)	$25,000.00 per day, per violation
XXXX.	Improper use of PCBs (road oiling; dust control; sealants) 40 C.F.R. § 761.20(d)	$25,000.00 per day, per violation
XXXXI.	Improper use of PCBs - Transformers 40 C.F.R. § 761.30(a) - Capacitors 40 C.F.R. § 761.30(1) - Heat transfer systems 40 C.F.R. § 761.30(d)	$20,000.00 per day, per violation
XXXXII.	PCB Storage Violations - 40 C.F.R. § 761.65(b) (facility criteria) - 40 C.F.R. § 761.65(c)(7)(ii) (spill plan development) - 40 C.F.R. § 761.65(c)(8) (management of liquids in storage)	$15,000.00 per day, per violation
XXXXIII.	Recordkeeping Violations (storage for disposal) 40 C.F.R. § 761.180(a)	$10,000.00 per day, per violation
XXXIV.	Recordkeeping violations (disposal facilities) Incinerators 40 C.F.R. § 761.180(c) Chemical waste landfills 40 C.F.R. § 761.180(d)	$15,000.00 per day, per violation

	TSCA Violation	Penalty
XXXXV.	Marking Violations 40 C.F.R. § 761.40(a)	$15,000.00 per day, per violation
XXXXVI.	Failure to Date PCB Items placed into storage 40 C.F.R. § 761.180(a)	$5,000.00 per day, per violation
XXXXVII.	Violation of any condition of a PCB chemical waste landfill (40 C.F.R. § 761.75) or incinerator (40 C.F.R. § 761.70) application approval.	$25,000.00 per day, per violation
XXXXVIII.	Failure to decontaminate PCB container, tanker trucks, etc. 40 C.F.R. § 761.79	$25,000.00 per day, per violation

CORPORATE MANAGEMENT SYSTEMS REPORT PROTOCOL

The Corporate Management Systems Report shall:

(1) Identify and describe the existing facility waste management operations and the Environmental Management Department's systems, policies and prevailing practices as they affect Defendant's/Respondent's corporate compliance with RCRA and TSCA.

(2) Evaluate such operations, systems, practices, and policies and identify and describe fully the perceived weaknesses in such operations, systems, practices, and policies by comparing them, to the extent practicable, to the existing practices, programs and policies of other RCRA and TSCA waste management corporations operating within the continental United States and to generally accepted corporate management practices.

(3) Based on the evaluation required in paragraphs (1) and (2) above, the consultant shall identify and describe fully with supporting rationales the perceived areas, if any, where Defendant's/Respondent's inter- and intra-facility waste management operations and corporate to operating level environmental management systems, practices and policies may be improved. The Corporate Management Systems Report shall list specific options for improvements in the following areas:

(a) Corporate data management practices pertaining to the following items:

i. compliance budgets;

ii. staffing;

iii. training;

iv. auditing;

v. incident reporting, including but not limited to manifest exception reports and any unpermitted disposal, release, or discharge;

vi. quality assurance test reporting;

vii. quality control reporting;

viii. generator waste profile reports, facility pre-acceptance reports, and acceptance analysis as these items compare to each facility's stated basis for accepting or rejecting individual waste loads; and

ix. facility mass balance records reflecting the internal disposition of all wastes received for final disposal.

(b) Corporate data evaluation practices, capabilities and policies pertaining to reports to and from compliance officers, internal and external environmental audits, regulatory agency notices of violation and all other compliance data documents which when evaluated may lead to changes in TSD operating procedures or directives by corporate management to modify any individual or multi-facility TSD facility operating procedures.

MODEL EMERGENCY ENVIRONMENTAL MANAGEMENT REORGANIZATION PROVISION FOR CONSENT DECREES OR AGREEMENTS

E.1. The objective of this provision is to provide a management structure at the corporate headquarters level that will ensure that comprehensive environmental policies and procedures are developed by top management and fully implemented company-wide at all facilities.

2. Defendant/Respondent shall propose to EPA's [name of EPA office overseeing compliance with Decree/Agreement] by written submittal to [name of Agency contact] within thirty (30) days of the effective date of this Decree/Agreement, a plan for reorganization of the corporate management structure with respect to environmental affairs. This reorganization proposal shall be agreed upon by EPA and Defendant/Respondent in writing, prior to implementation of the reorganization.

a. The management plan shall provide for the creation of a new position of Director, Environmental Affairs [or other appropriate title] to exercise the responsibilities set forth herein. The Director, Environmental Affairs shall report directly to [a corporate Vice President or other appropriate top management official not directly responsible for manufacturing/production activities]. The position shall at all times be filled by an experienced executive with a background in [appropriate industrial field] and in environmental management and compliance.

b. It shall be the responsibility of the Director, Environmental Affairs to develop appropriate corporate environmental policies and procedures and to oversee their implementation at all company facilities to ensure compliance with applicable Federal, State and local environmental statutes and regulations. In the development of such policies and procedures, the recommendations of the environmental audit conducted at the [facility] by an outside consultant as described herein shall be given full consideration.

c. Defendant/Respondent shall also establish such additional technical and support positions reporting directly to the Direct _, Environmental Affairs as are necessary to meet the objective of this provision. Neither the Director nor staff shall be assigned additional responsibilities not related to environmental compliance. Defendant/Respondent shall provide adequate budgetary support to the environmental staff.

3. Within ninety (90) days of EPA's approval of the environmental management plan, the company shall appoint the Director, Environmental Affairs and appropriately qualified staff.

4. Within two hundred seventy (270) days of EPA's approval of the environmental management plan, the Director, Environmental

Affairs shall complete development and begin the implementation of appropriate corporate environmental policies and procedures to meet the objective of this provision.

5. Within eighteen (18) months of the effective date of this Decree/Agreement, Defendant/Respondent shall fully implement the corporate environmental policies and procedures at all company facilities. This shall include any necessary organizational or personnel changes at the individual facility level.

6. Recognizing the corporate responsibility to maintain compliance with all applicable environmental statutes and regulations, Defendant/Respondent agrees to maintain a permanent corporate environmental management staff. The organization, makeup and functions of this staff may be modified from time to time as dictated by changes in corporate facilities or operations or the requirements of environmental statutes and regulations.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

#53

NOV 26 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance on Implementing the Discretionary Contractor Listing Program

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrator for Air and Radiation
Assistant Administrator for Water
General Counsel
Inspector General
Regional Administrators, Regions I-X
Regional Counsels, Regions I-X

I. Purpose

This document establishes Agency policy and procedures for implementing the discretionary contractor listing program in EPA enforcement proceedings. It should be read in conjunction with the final revisions to the contractor listing regulations (40 CFR Part 15, 50 FR 36188, September 5, 1985), and the guidance document, "Implementation of Mandatory Contractor Listing" (General Enforcement Policy No. GM-32, August 8, 1984). The procedures to be followed in all contractor listing actions are contained in the rule and are summarized in an Appendix to this document. This policy applies only to discretionary listing proceedings and supersedes the "Guidance for Implementing EPA's Contractor Listing Authority" (General Enforcement Policy No. GM-31, July 18, 1984).

The revisions to the contractor listing regulations, together with this guidance document and other management initiatives, should encourage greater use of the Agency's listing authority and should expedite the process for listing a facility.

II. Background

The Clean Air Act (CAA), Section 306, and the Clean Water Act (CWA), Section 508, as implemented by Executive Order 11738, authorize EPA to prohibit facilities from obtaining federal government contracts,

grants or loans (including subcontracts, subgrants and subloans), as a consequence of criminal or civil violations of the CAA or CWA. Commonly called "contractor listing," this program provides EPA with an effective administrative tool to obtain compliance with the CAA and CWA where administrative or judicial action against a facility has failed to do so.

On July 31, 1984, EPA proposed revisions to the contractor listing regulations (40 CFR Part 15 (49 FR 30628)) to simplify and clarify the procedural opportunities which EPA will provide to parties to listing or removal actions and to provide for mandatory (i.e., automatic) listing of facilities which give rise to criminal convictions under Section 113(c)(1) of the CAA or Section 309(c) of the CWA. Final rules were promulgated on September 5, 1985 (50 FR 36188).

III. Appropriate Cases for Discretionary Listing Recommendations

In numerous cases, initiation of a listing action has proved to be effective in achieving more expeditious compliance and case settlements. While regional offices should consider making contractor listing recommendations in every case where the criteria of 40 CFR Part 15 are met, listing is a tool to be used in conjunction with other enforcement actions. (See IV. Standard of Proof in Listing Proceedings, page 4.) The circumstances surrounding each case will dictate whether a listing action should be initiated. In particular, use of listing may be appropriate in the following cases:

A. Violations of Consent Decrees

Regional offices should strongly consider making listing recommendations for all cases of noncompliance with consent decrees under the CAA or CWA. The recommendation should be prepared at the earliest possible time after the Region learns of noncompliance with the decree, but no later than the filing of a motion to enforce the decree. Initiation of the listing action should be supplementary to, and not in lieu of, a motion to enforce the decree. Where a consent decree covers CAA or CWA violations as well as violations of other environmental statutes, such as the Resource Conservation and Recovery Act (RCRA) or the Toxic Substances Control Act (TSCA) (where EPA does not have contractor listing authority), a listing recommendation also should be considered.

B. Continuing or Recurring Violations Following Filed Civil Judicial Actions

Where EPA has filed a civil judicial enforcement action, the Regional Office should initiate a listing action at the earliest possible time after it determines that: (1) noncompliance is ongoing, (2) the defendant is not making good faith efforts to

comply, and (3) an expeditious settlement does not appear likely. For example, a defendant may make a firm settlement offer that is far below the economic savings it realized from its noncompliance, making settlement unlikely.

Similarly, where EPA initiates a multi-media civil enforcement action against violations under the CAA or CWA and other environmental statutes (such as RCRA or TSCA), and continuing water or air compliance problems exist without good faith corrective efforts, the Region should consider bringing a listing action. Therefore, it is important that all CAA and CWA counts be included in a multi-media enforcement action.

C. Violations of Administrative Orders

Where noncompliance continues after an administrative order has been issued under the CAA or CWA, and the Regional Office determines that the facility is not making sufficient efforts to come into compliance, a listing recommendation should be considered. Initiation of a listing action generally should not be in lieu of filing a civil judicial action to enforce the administrative order, but should support the civil action. The Regional Office should consider initiating a listing action at the same time that it files the civil judicial action.

D. Multi-Facility Noncompliance within a Single Company

Contractor listing can be an effective tool to address a pattern of noncompliance within a single company. Where continuing or recurring CAA or CWA violations occur at two or more facilities within the same company, and EPA previously has taken an enforcement action against each, the Regional Office should consider making listing recommendations in all such cases.

While each facility's continuing or recurring noncompliance must be proved separately (i.e., one may not use one violation from branch facility A and one violation from branch facility B to constitute the minimum two violations required), one listing recommendation describing noncompliance at two or more facilities may be submitted to the Assistant Administrator for the Office of Enforcement and Compliance Monitoring (OECM). A joint listing proceeding may be held concerning all facilities. Joint consideration of two or more facilities' violati ı will require fewer Agency resources than listing each facility separately. It will also discourage companies from switching government contracts from a listed facility to another facility without taking steps to correct the violations which gave rise to the listing.

To accomplish this, the Regional Office, with headquarters staff support, should review the EPA enforcement docket to see if a potential listing candidate has committed CAA or CWA violations at other company facilities. Note that a company's facilities may be known by the parent company name or by the names of company

subsidiaries. Regional offices may obtain information on other company facilities from Charlene Swibas, Chief, Information Services Section, NEIC (FTS 776-3219), who will search EPA's Facility Index System which lists this information for all EPA regions, or provide a Dunn and Bradstreet report containing this information.

The Region may also request data on administrative orders issued against a company under the headquarters Permit Compliance System (for CWA violations) and the Compliance Data System (for CAA violations). In some cases EPA has issued administrative orders and filed civil enforcement actions against company facilities which are located in more than one region. Such multi-regional inquiries may be coordinated with the Headquarters participating attorney and the Agency's Listing Official.

E. Other Circumstances Where Listing is Appropriate

The regulation provides two other situations where listing may be appropriate. First, EPA can list a facility after it has issued a Notice of Noncompliance under Section 120 of the CAA. The threat of listing in combination with noncompliance penalties can impose a sufficiently severe economic cost on a facility to encourage efforts to achieve both compliance and quicker settlements. Second, Regional Offices may recommend listing when a state or local court convicts any person who owns, operates, or leases a facility of a criminal offense on the basis of noncompliance with the CAA or the CWA. They also may recommend listing when a state or local court has issued an injunction, order, judgement, decree (including consent decrees), or other civil ruling as a result of noncompliance with the CAA or CWA.

IV. Standard of Proof in Listing Proceedings

It will be the responsibility of the Office of Regional Counsel to represent the Agency at any listing proceeding (where one is requested by the affected facility). According to 40 CFR Section 15.13(c), "[t]o demonstrate an adequate basis for listing a facility, the record must show by a preponderance of the evidence that there is a record of continuing or recurring non-compliance at the facility named in the recommendation to list and that the requisite enforcement action has been taken."

"Requisite enforcement action" can be established by reference to an issued administrative or court order, or a filed civil judicial action. "Continuing or recurring" violations are understood to mean two or more violations of any standard at a facility, which violations either occur or continue to exist over a period of time. Such a violation occurs even when different standards are violated and time has elapsed between violations. Thus, in a listing proceeding, it is not necessary to prove all violations of CAA or CWA standards alleged in the underlying enforcement action. Nonethel

the regional attorney must carefully review the sufficiency of the evidence and evaluate anticipated defenses.

V. Fairness Concerns in EPA Use of Contractor Listing

It is the intent of this guidance document to encourage the use of the Agency's contractor listing authority in appropriate cases. However, it must be recognized that listing is a severe sanction. Before making a recommendation in any case, the Regional Office should determine that the continuing or recurring noncompliance involves clearly applicable CAA or CWA standards. Likewise, Agency enforcement personnel must be careful in using listing terminology during discussions with defendants. During settlement negotiations, for example, it is certainly proper for EPA to advise a defendant of the range of available EPA enforcement authorities, including contractor listing. However, EPA personnel must distinguish between a listing recommendation (made by a "recommending person," usually the Regional Administrator, to the Assistant Administrator for OECM), a notice of proposed listing by the Agency to the affected facility (which is sent by the Listing Official after a preliminary decision to proceed is made by the Assistant Administrator for OECM), and a final decision to list which is made either by an Agency Case Examiner at the end of a listing proceeding, or by the Assistant Administrator for OECM if no listing proceeding is requested. Where appropriate, EPA personnel should explain that the Regional Administrator's listing recommendation does not constitute a final Agency decision to list.

VI. Press Releases on Contractor Listing Actions

EPA will use press releases and other publicity to inform existing and potential violators of the CAA and the CWA that EPA will use its contractor listing authority in appropriate situations. The November 21, 1985, "Policy on Publicizing Enforcement Activities" (GM-46), states that "[i]t is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list)...." As discussed in that policy, the press release should be distributed to both the local media in the area of the violative conduct and the trade press of the affected industry.

VII. Coordination with the Department of Justice

To ensure that information presented during a listing proceeding will not compromise the litigation posture of any pending legal action against a party, EPA will coordinate with the Department of Justice (DOJ) before a recommendation to list is made to the Assistant Administrator for OECM. If the recommending party is an EPA regional office official, he or she shall coordinate with the appropriate DOJ attorney before a recommendation is submitted to the Listing Official. He or she shall also provide the DOJ attorney's comments to the Listing Official as part of the recommendation

package. If the recommending party is not an EPA official, the Listing Official shall coordinate with the EPA Office of Regional Counsel and the appropriate DOJ attorney before a recommendation to list is presented to the Assistant Administrator for OECM.

VIII. Applicability of Contractor Listing to Municipalities

Municipalities are subject to listing under appropriate circumstances. State and local governments and other municipal bodies are specifically identified by 40 CFR §15.4 as "persons" whose facilities may be listed. The standards for recommending that a municipal facility be listed are the same as those for listing other facilities. Listing may not be the most effective enforcement tool in many municipal cases because often the only federal funds received by a municipal facility are grant funds to abate or control pollution, which are exempted from the listing sanction by 40 CFR §15.5. However, listing still should be considered in cases where a municipal facility receives nonexempt funds or where the principles underlying the listing authority otherwise would be furthered by a recommendation to list.

IX. Use of Listing in Administrative Orders

Enforcement offices may wish to inform violating facilities early in the enforcement process of the possibility of being listed. Many facilities do not know about the listing sanction; such knowledge may provide additional impetus for a facility to take steps to come into compliance. For example, some EPA regions notify facilities whose violations make them potential candidates for listing of this possibility in the cover letter which accompanies an administrative order requiring them to take action to correct their noncompliance.

X. Obtaining Information Concerning Government Contracts Held by a Facility Under Consideration for Listing

After an EPA recommending person, usually the Regional Administrator, has submitted a listing recommendation to the Listing Official, the regional office attorney handling the case may require the facility to provide a list of all federal contracts, grants, and loans (including subcontracts, subgrants, and subloans). To insure that such a requirement is not imposed prematurely, the regional office attorney should require this information from a facility only after advising the Listing Official of his or her intention to do so. Requiring this information from the facility is not a prerequisite for listing a facility.

Requiring this information from a facility may be accomplished by telephone or through a letter similar to the models provided in Attachments D and E. Attachment D is a model letter requesting information from a facility which is violating an administrative order issued under the authority of the Clean

Water Act for violating its National Pollutant Discharge Elimination System (NPDES) permit. Attachment E is a letter to a facility which EPA and the Department of Justice have filed a civil suit against for violating the Clean Air Act. Regional office attorneys may elect to have such a request letter serve as notification to the facility that EPA is considering instituting a listing action, or they may wish to inform the facility before sending such a letter. Which approach is taken will depend on the regional office attorney's judgment of the notification's effects on the overall case against the facility.

XI. Headquarters Assistance in Preparing and Processing Listing Recommendations

In order to encourage the use of the contractor listing authority in appropriate cases, OECM staff have been directed to assist regional offices in preparing listing recommendations. Attached are model listing recommendations indicating the level of detail and support that should be provided with recommendations. (See Attachments A, B, and C for model listing recommendations.) Where a listing recommendation is sufficient, the Assistant Administrator for OECM will decide whether to proceed with the listing action under Section 15.11(c) (i.e., by directing the Listing Official to issue a notice of proposed listing to the affected facility) within two weeks after receiving the recommendation. Questions concerning contractor listing may be directed to the Agency Listing Official, Cynthia Psoras, LE-130A, FTS 475-8785, E-Mail Box EPA2261.

Attachments

cc: John Ulfelder
Senior Enforcement Counsel
Associate Enforcement Counsel for Air
Associate Enforcement Counsel for Water
Director, Office of Water Enforcement and Permits
Director, Stationary Source Compliance Division
Director, Office of Compliance Analysis and Program Operations
Director, NEIC
Director, Water Management Division (Regions I-X)
Director, Air Management Division (Regions I, III, V and IX)
Director, Air and Waste Management Division (Regions II and VI)
Director, Air, Pesticides and Toxics Management Division (Region IV)
Director, Air and Toxics Division (Regions VII, VIII and X)
David Buente, Department of Justice (DOJ)
Nancy Firestone, DOJ

The Listing Program and Final Revisions to 40 CFR Part 15

A. Mandatory Listing

If a violation at a facility gives rise to a criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, listing of the facility is mandatory (and effective upon conviction under 40 CFR Section 15.10). As soon as a conviction occurs, the Director of the Office of Criminal Enforcement, within the Office of Enforcement and Compliance Monitoring (OECM), must verify the conviction and notify the Listing Official. The Listing Official sends written notification to the facility and to the Federal Register. Both documents must state the basis for and the effective date of the mandatory listing.

Removal from the mandatory list may occur only if: (1) the Assistant Administrator certifies that the facility has corrected the condition that gave rise to the criminal conviction under Section 113(c)(1) of the CAA or Section 309(c) of the CWA, or (2) a court has overturned the criminal conviction. The August 8, 1984, memorandum, "Implementation of Mandatory Contractor Listing," (GM-32) discusses the procedures for mandatory listing in more detail.

B. Discretionary Listing

1. Basis for Discretionary Listing

The following enforcement actions may serve as a basis for discretionary listing if there is also a record of continuing or recurring noncompliance at a facility:

a. A federal court finds any person guilty under Section 113(c)(2) of the CAA, if that person owns, leases, or supervises the facility.

b. A state or local court convicts any person of a criminal offense on the basis of noncompliance with clean air or clean water standards if that person owns, leases, or supervises the facility.

c. A federal, state, or local court issues an injunction, order, judgment, decree (including consent decrees) or other form of civil ruling as a result of noncompliance with the CWA or CWA at the facility.

d. The facility is the recipient of a Notice of Noncompliance under Section 120 of the CAA.

e. The facility has violated an administrative order under:

- CAA Section 113(a)
- CAA Section 113(d)
- CAA Section 167
- CAA Section 303
- CWA Section 309(a)

f. The facility is the subject of a district court civil enforcement action under:

- CAA Section 113(b)
- CAA Section 167
- CAA Section 204
- CAA Section 205
- CAA Section 211
- CWA Section 309(b)

2. The Discretionary Listing Process

a. Listing Recommendation and Notice of Proposed Listing

The discretionary listing process begins when a "recommending person" files a listing recommendation with the Listing Official. Recommending persons may include any member of the public, Regional Administrators, the Assistant Administrator for Air and Radiation, the Assistant Administrator for Water, the Associate Enforcement Counsel for Air, the Associate Enforcement Counsel for Water, and the Governor of any State. The recommendation to list: (1) state the name, address, and telephone number of the recommending person; (2) identifies the facility to be listed, and provides its street address and mailing address; and (3) describes the alleged continuing or recurring noncompliance, and the requisite enforcement action (see 40 CFR Section 15.11(b)). The recommendation to list should describe the history of violations in detail, including the specific statutory, regulatory, or permit requirements violated. In addition, regional offices may include as attachments to the listing recommendation documents prepared for other purposes, such as complaints, litigation reports, and other explanatory material which describes the nature of the violations. (See Attachments for model listing recommendations.)

The Listing Official must determine whether the recommendation meets the requirements of Section 15.11(b). If the recommendation is sufficient and the Assistant Administrator for OECM decides to proceed under Section 15.11(c), the listing official will contact the regional office to ensure that it still wishes to proceed. If the decision is made to proceed, the listing official provides notice of the proposed listing to the owner or operator of the affected facility and provides the owner or operator of the facility 30 days to request a listing proceeding. A listing proceeding is not a formal hearing; rather, it is an informal administrative proceeding presided over by an Agency Case Examiner. If the facility's owner or operator requests a listing proceeding, the Listing Official must schedule it and notify the recommending person and

the owner or operator of the date, time, and location of the proceeding. The Assistant Administrator designates a Case Examiner to preside over the listing over the listing proceeding.1/

b. Listing Proceeding

The Federal Rules of Civil Procedure and Evidence are not used during listing proceedings. The Agency and the facility may be represented by counsel and may present relevant oral and written evidence. With the approval of the Case Examiner, either party may call, examine, and cross-examine witnesses. The Case Examiner may refuse to permit cross-examination to the extent it would: (1) prematurely reveal sensitive enforcement information which the government may legally withhold, or (2) unduly extend the proceedings in light of the usefulness of any additional information likely to be produced (see Section 15.13(b)). A transcript of the proceeding along with any other evidence admitted in the proceeding constitutes the record. The Agency must prove each element of a discretionary listing by a preponderance of the evidence (see Section 15.13(c)).

The Case Examiner must issue a written decision within 30 calendar days after the proceeding. The party adversely affected may appeal the decision to the General Counsel. The appeal, which is filed with the Listing Official, must contain a statement of: (1) the case and the facts involved, (2) the issues, and (3) why the decision of the Case Examiner is not correct based on the record of the proceeding considered as a whole. The General Counsel must issue a final decision, in writing, as soon as practicable after reviewing the record. The Listing Official then must send written notice of the decision to the recommending person and to the facility, and must publish the effective date of the listing in the Federal Register if the General Counsel upholds the Case Examiner's decision to list.

c. Removal from the List of Violating Facilities

Removal from the List of Violating Facilities can occur in any of the following circumstances:

1. Upon reversal or other modification of the criminal conviction decree, order, judgment, or other civil ruling or finding which formed the basis for the discretionary listing, where the reversal or modification removes the basis for the listing;

1/ If the owner or operator of the facility does not make a timely request for a listing proceeding, the Assistant Administrator will determine whether to list the facility based upon the recommendation to list and any other available information.

2. If the Assistant Administrator for OECM determines that the facility has corrected the condition(s) which gave rise to the listing;

3. Automatically if, after the facility has remained on the discretionary list for one year on the basis of Section 15.11(a)(4) or Section 15.11(a)(5) and a basis for listing under Sections 15.11(a)(1), (2), or (3) does not exist; or

4. If the Assistant Administrator for OECM has approved a plan for compliance which ensures correction of the condition(s) which gave rise to the discretionary listing.

The original recommending person or the owner or operator of the facility may request removal from the list. The Assistant Administrator for OECM then must review the request and issue a decision as soon as possible. The Listing Official then must transmit the decision to the person requesting removal.

If the Assistant Administrator for OECM denies a request for removal, the requesting person may file a written request for a removal proceeding to be conducted by a Case Examiner designated by the Assistant Administrator. The Federal Rules of Civil Procedure and Evidence are not used during a removal proceeding. The Case Examiner's written decision must be based solely on the record of the removal proceeding.

Within 30 calendar days after the date of the Case Examiner's decision, the owner or operator of the facility may file with the Listing Official a request for review by the Administrator. The Administrator will determine if the Case Examiner's decision is correct based upon the record of the removal proceeding considered as a whole. The Administrator then must issue a final written decision.

Attachment A

MODEL LISTING RECOMMENDATION
BASED ON ADMINISTRATIVE ENFORCEMENT ACTION

DATE: 10/01/86

SUBJECT: Recommendation to List Violating Facility

FROM: Regional Administrator, Region XI

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division (LE-130A)

The purpose of this memorandum is to recommend that the [name of facility and type of operations conducted at the facility] owned and operated by John Doe at [street address, city and state] be placed on the EPA List of Violating Facilities because of violations of clean air standards. Information concerning the recurring violations and the history of action taken thus far by the Agency is set forth below. Copies of pertinent supporting materials are attached. [Attach technical documents describing the violation, the administrative order, and other documents describing the enforcement action taken.]

This plant is subject to the New Source Performance Standards (NSPS) for Asphalt Concrete Plants. 40 CFR Part 60, Subpart I (1986).

On July 5, 1985, the Region XI Director, Air Management Division, notified [owner and operator] that on the basis of performance tests conducted December 19, 1984, the facility was in violation of 40 CFR 60.92(a)(1), in that it was discharging gases into the atmosphere, and those gases contained 256.5 milligrams of particulate matter per dry standard cubic meter (0.114 grain per dry standard cubic foot) The allowable discharge of particulate matter into the atmosphere is 90 milligrams per dry standard cubic meter (0.04 grain per dry standard cubic foot).

On August 14, 1985, the Region XI Regional Administrator issued an Administrative Order pursuant to Section 113(a)(3) of the Clean Air Act. That order required, in part, that [name of facility] operate its [specific portion of the plant or processes causing the violations] in compliance with the NSPS for Asphalt Concrete Plants, 40 CFR Part 60, Subpart I, and to conduct performance tests for emissions of particulate matter within sixty days following the effective date of the Administrative Order.

Performance tests were completed on September 1, 1985, and the particulate emissions were 373.5 milligrams per dry standard cubic meter (0.166 grain per dry standard cubic foot). Thus, [name of facility] is not in compliance, and has violated the Administrative Order. Further, the violation

of the NSPS has been a continuing violation in that the particulate emissions have been greater than the permissible limits since the December 19, 1985, test date.

The recommending person for this listing recommendation is Regional Administrator, Region XI, EPA, Government Office Building, City, 51st State; her telephone number is (FTS) 123-4567.

This action is authorized under discretionary listing, 40 CFR 15.11(a)(4) (1986). It meets the regulations' two requirements that: there is "continuing or recurring noncompliance with clean air standards ... at the facility recommended for listing" and that the facility has violated an administrative order issued under Section 113(a) of the Clean Air Act.

If you have any questions, please contact Attorney, at (FTS) 123-4568, or Engineer, at (FTS) 123-4569.

Attachments
[technical documents, Administrative Order,
documents describing the previous enforcement actions taken]

Attachment B

MODEL LISTING RECOMMENDATION BASED ON JUDICIAL ENFORCEMENT ACTION

MEMORANDUM

SUBJECT: Recommendation for Listing

FROM: Regional Administrator, EPA Region 12

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division, LE-130A

This is a recommendation that the [facility name and address] be placed on the EPA List of Violating Facilities, pursuant to Section 306 of the Clean Air Act, Executive Order 11738, 40 CFR Part 15, and the October 1986 guidance from the Assistant Administrator for Enforcement and Compliance Monitoring. This action is authorized under 40 CFR 15.11(a)(6) (1986). This recommendation is based on violations alleged in the civil action currently being pursued against [facility name] in the United States District Court for the Fifty Second State. [Facility name] operates four coal-fired boilers (boilers nos. 2-5) at the [facility] without adequate air pollution control equipment.

As indicated in the attached counterclaim, motion for partial summary judgment, and affidavits, [facility name] has been in violation of the Federal New Source Performance Standards (NSPS) for particulate emissions since startup of the boilers, more than five years ago. The United States issued a notice of violation to [facility name] regarding mass emission violations at the [facility name] boilers nos. 2-5 on May 30, 1981. [Facility name] has not substantially modified the particulate emission control system for these four boilers since that time. Particulate stack testing conducted as recently as January 1986 shows continuing violations of the boilers. The complaint, attached to this memo, was filed by defendant on June 15, 1985. The United States then filed a counterclaim on August 1, 1985. The Government's Motion for Partial Summary Judgment as to liability, filed on or about December 12, 1985, was granted in part on April 8, 1986, wherein the court denied [facility name's] claim that the four boilers were not covered by NSPS. The remainder of the Motion, requesting judgment on the counterclaim for enforcement, is pending before the court.

The [facility name] plant is located in [City and State] which is a secondary nonattainment area for Total Suspended Particulates.

The attached affidavits contain summaries of mass violations at the [facility name's] boilers nos. 2-5. All data summarized

were obtained from stack tests performed on the [facility name] boilers by the [owner and operator corporation] and stack tests performed by a consultant retained by the [owner and operator corporation].

Based on the information contained above and in the attachments to this recommendation, I request that the Assistant Administrator for Enforcement and Compliance Monitoring find that there is adequate evidence of continuing or recurring violations of Clean Air Act standards at the [facility name] and place this facility on the EPA List of Violating Facilities pursuant to the procedures set forth in 40 CFR Part 15.

For further information please contact Attorney on (FTS) 987-654 or Technical Specialist (FTS) 987-655.

(Signed)

Regional Administrator

Attachments

[technical documents, consultant's report, documents describing the judicial enforcement action]

ATTACHMENT TO MODEL LISTING RECOMMENDATION BASED ON JUDICIAL ENFORCEMENT ACTION

MEMORANDUM

SUBJECT: Attachment to Recommendation for Listing

FROM: Regional Administrator, EPA Region 12

TO: Cynthia Psoras
Listing Official
Legal Enforcement Policy Division (LE-103-A)

Description of Violations

The four coal-fired boilers at [facility name] are subject to 40 CFR part 60, Subpart D, "Standards of Performance for Fossil-Fuel-Fired Steam Generators for which Construction is Commenced after August 17, 1971," and 40 CFR part 60, Subpart A, "General Provisions," which are applicable to all categories of sources for which New Source Performance Standards (NSPS) have been promulgated.

Subpart D includes emission limits for particulate matter, opacity, sulfur dioxide and nitrogen oxides (40 CFR §60.42). It also requires installation, calibration, maintenance and operation of continuous emission monitoring ("CEM") systems for opacity, sulfur dioxide and nitrogen oxides (40 CFR §45(a)). Each of the facility's boilers nos. 2, 3, 4, and 5 is subject to these emission limitations and CEM requirements. When [owner and operator] constructed the facility's boilers 2-5 between 1978 and 1980, it equipped each of the boilers with a double alkali venturi scrubber for combined control of sulfur dioxide and particulate matter. These scrubbers successfully control sulfur dioxide emissions but they have never achieved the Subpart D particulate emission limit, 40 CFR §60.42(a)(1). [Owner and operator] also equipped the boilers with continuous monitoring systems for opacity, sulfur dioxide and oxygen (it was exempt from the NOX CEM requirement, pursuant to 40 CFR §60.45(b)(3)). The sulfur dioxide monitoring system has never operated properly.

Subpart A includes requirements related to operation and maintenance of CEM systems (40 CFR §60.13); notification and recordkeeping (40 CFR §60.7) and performance testing (40 CFR §60.8k). Under 40 CFR §60.13, all CEM systems installed under applicable subparts must:

a. be installed and operational prior to conducting performance tests (emissions tests) - §60.13(b);

b. Undergo a performance evaluation (monitor

certification test) during or within 30 days of the performance tests - §60.13(c);

c. undergo regular calibration and maintenance - §60.13(d)(1).

[Facility name] violated all these provisions. It never performed a monitor performance evaluation on, and has never operated and maintained, its sulfur dioxide CEM system.

Under 40 CFR §60.7, owners and operators of NSPS sources must:

a. Notify EPA of the anticipated date of initial start-up of an affected facility postmarked not less than 30 days prior to such date -.§60.7(a)(2);

b. Notify EPA of the actual date of initial start-up postmarked within 15 days of such date §60.7(a)(3);

c. Submit quarterly reports of "excess emissions" (emissions exceeding applicable emission limits) as measured by continuous monitoring systems - §60.7(c).

[Facility name] failed to notify EPA of the anticipated or actual start-up of boilers 4 and 5. [Facility name] has never submitted any excess emissions reports to EPA.

Under 40 CFR §60.8, owners/operators are required to conduct performance tests of affected facilities not later than 180 days after initial start-up. [Facility name] violated this provision with respect to boilers 4 and 5.

It is [facility name's] customary practice to operate one or more of the boilers during the winter heating season. The steam that is generated is used for space heating and production. The boilers are not operated, or are operated using only natural gas as fuel, in the warmer months. E ~h heating season since the NOV was issued (in August 1980), boilers 2 and 3 have been regularly operated. Each day a boiler is operated, particulate emissions from that boiler exceed the limit, and violations of the CEM regulations occur because the sulfur dioxide CEM remains inoperative. This winter, [facility name] has informed us that they will not operate the boilers using coal for fuel and will only use natural gas. However, they have made no commitment to permanently cease operating the boilers using coal.

The Motion for Summary Judgment

On September 25, 1985, the District Court for the Central District of the Fifty Second State ruled on EPA's motiion for partial summary judgment with respect to the Agency's counterclaim for enforcement. EPA's motion dealt only with the alleged violations of the subpart D particulate emissions limit. It did not deal with the monitoring, notification and reporting violations. EPA introduced into evidence six stack tests conducted on boilers nos. 2-5, all of which showed the tested boiler to be exceeding the limit. The court ruled that on the six days on which those tests occurred, [facility name] violated the subpart D particulate standard. Enclosed is a copy of the transcript of the September 26, 1985, hearing on the Motion for Summary Judgment. Judge X ruled from the bench following oral argument by the parties. See pages 21-25. The judge stated that he would issue a written order, but he has not done so yet. We will furnish you with a copy upon receipt.

An evidentiary hearing is scheduled for March 1, 1985, to establish days of violation other than the six stack test days.

(signed)

Regional Administrator

Attachment D

MODEL LETTER TO A FACILITY VIOLATING THE CLEAN WATER ACT REQUESTING A LIST OF ITS FEDERAL CONTRACTS, GRANTS, AND LOANS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John Smith
President
XYZ Corporation
1000 Corporate Lane
Fifty Second State 12345

Dear Mr. Smith:

The XYZ Corporation was issued National Pollutant Discharge Elimination System (NPDES) permit number FS0100524 by the Regional Administrator of EPA, Region XI, pursuant to Title 33, United States Code, Section 1342. This permit authorizes the discharge of pollutants into the Blue River in accordance with the effluent limitations, monitoring requirements, and other provisions of the permit. On May 6, 1986, EPA issued Administrative Order #86-1570 to the XYZ Corporation pursuant to the authority granted under Title 33, United States Code, Section 1319(a)(3) for exceeding the effluent limitations for biochemical oxygen demand and total suspended solids. As discussed in our letter to you of July 6, 1986 you are currently in violation of this Administrative Order.

Under the provisions of Title 33, United States Code, Section 1368(a), a facility owned, leased, or supervised by a "person" (defined to include a corporation such as XYZ Corporation) who commits "continuing or recurring" violations of the Clean Water Act may be placed on a "List of Violating Facilities" and prohibited from receiving Federal contracts, grants and loans. The prohibition under Title 33, United States Code, Section 1368(a) is implemented by the Environmental Protection Agency (EPA) under regulations promulgated at Title 40 of the Code of Federal Regulations Part 15, entitled "Administration of The Clean Air Act and Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans." These regulations state that a facility may be placed on the "List of Violating Facilities" for a violation of an administrative order under Title 33, United States Code, Section 1319(a).

Under Title 33, United States Code, Section 1318, EPA has authority to require the owner or operator of any point source to make such reports and to provide such other information as are deemed reasonably necessary to carry out the

objectives of the Clean Water Act, Title 33, United States Code, Section 1251 et seq.

Accordingly, for the purposes of implementing Title 33, United States Code, Section 1368(a), EPA hereby invokes its authority under Title 33, United States Code, Section 1318, and requires XYZ Corporation, as the owner and operator of a point source, identified in NPDES permit number FS0100524, to provide the information specified below no later than 15 calendar days from receipt of this letter. The submittal should be addressed to:

Regional Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region XI

Information to be Submitted to EPA

1. Identify, by contract number, contracting agency and contract date, all Federal contracts held by the facility for the procurement of personal property or nonpersonal services, for which XYZ Corporation is either the prime contractor or subcontractor.

2. Identify, by grant number, granting agency, and grant date, all Federal grants received by the facility, including grants-in-aid, for which XYZ Corporation is either the grantee (prime recipient of a grant) or a subgrantee (the holder of an agreement or an arrangement under which any portion of the activity or program is being assisted under the grant).

3. Identify, by loan number, lending agency, and loan date, all Federal loans for which XYZ Corporation is a borrower or subborrower.

4. Identify, by bid number, agency and date, all bids submitted by XYZ Corporation for future Federal contracts or subcontracts.

5. Identify, by grant application number, agency and date, all grant applications submitted by XYZ Corporation for any future Federal grant or subgrant.

6. Identify, by loan application number, agency and date, all loan applications submitted by XYZ Corporation for future Federal loans or subloans.

7. Identify, by percentage estimate, the extent to which XYZ Corporation's business is connected, in any degree, to Federal contracts, grants and loans.

8. Identify the effect, if any, of the prohibition of Title 33, United States Code, Section 1368(a), upon the business of XYZ Corporation.

This inquiry does not constitute an official notification that XYZ Corportion is under consideration for placement on the "List of Violating Facilities." If deemed appropriate, such a notice will be initiated by the Listing Official, Office of Enforcement and Compliance Monitoring, EPA.

Under Title 33, United States Code, Section 1318(b), XYZ Corporation may assert a business confidentiality claim with respect to part or all of the information submitted to EPA in the manner described at 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to XYZ Corporation.

Care should be taken in ensuring that the response to this letter is complete and accurate because Title 33, United States Code, Section 1319(c)(2) provides criminal penalties for knowingly or willfully submitting false information to EPA in any report required by the Clean Water Act. In addition, Title 18, United States Code, Section 1001 provides criminal penalties for knowingly or willfully submitting false information to a federal official.

This information request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, Title 44 United States Code, Sections 3501 et seq.

Should you have any questions, please contact me at (123) 456-7890.

Sincerely yours,

Regional Attorney
Region XI

Attachment E

MODEL LETTER TO A FACILITY VIOLATING THE CLEAN AIR ACT REQUESTING A LIST OF ITS FEDERAL CONTRACTS, GRANTS, AND LOANS

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John Smith
President
ABC Corporation
1000 Corporate Lane
Fifty Third State 12345

Dear Mr. Smith:

On May 5, 1986, in the Southern District of the Fifty Third State, the Department of Justice instituted a civil suit against the ABC Corporation for continuing and recurring violations of Title 42, United States Code, Section 7413(b).

Title 40 of the Code of Federal Regulations, Part 15, entitled "Administration of The Clean Air Act and Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans," promulgated pursuant to Title 42, United States Code, Section 7606(a) and Executive Order 11738 (38 FR 25161, September 12, 1973) authorize EPA to establish a "List of Violating Facilities." Facilities on this List are prohibited from receiving Federal contracts, grants, and loans. A facility who commits "continuing or recurring" violations of the Clean Air Act may be placed on the List. These regulations state that a facility may be placed on the List after EPA, through the Department of Justice, has filed a civil enforcement action in federal court under Title 42, United States Code, Section 7413(b).

Under Title 42, United States Code, Section 7414(a), EPA has authority to require the owner or operator of any emission source to make such reports and to provide such other information as are deemed reasonably necessary to carry out the objectives of the Clean Air Act, Title 42, United States Code, Section 7401 et seq.

Accordingly, for the purposes of implementing Title 42, United States Code, Section 7606(a), EPA hereby invokes its authority under Title 42, United States Code, Section 7414, and requires ABC Corporation as the owner and operator of a emission source, to provide the information specified below no later than 15 calendar days from receipt of this letter.

The submittal should be addressed to:

Regional Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region XI

Information to be Submitted to EPA

1. Identify, by contract number, contracting agency and contract date, all Federal contracts held by this facility for the procurement of personal property or nonpersonal services, for which ABC Corporation is either the prime contractor or subcontractor.

2. Identify, by grant number, granting agency, and grant date, all Federal grants received by this facility, including grants-in-aid, for which ABC Corporation is either the grantee (prime recipient of a grant) or a subgrantee (the holder of an agreement or an arrangement under which any portion of the activity or program is being assisted under the grant).

3. Identify, by loan number, lending agency, and loan date, all Federal loans for which ABC Corporation is a borrower or subborrower.

4. Identify, by bid number, agency and date, all bids submitted by ABC Corporation for future Federal contracts or subcontracts.

5. Identify, by grant application number, agency and date, all grant applications submitted by ABC Corporation for any future Federal grant or subgrant.

6. Identify, by loan application number, agency and date, all loan applications submitted by ABC Corporation for future Federal loans or subloans.

7. Identify, by percentage estimate, the extent to which ABC Corporation's business is connected, in any degree, to Federal contracts, grants and loans.

8. Identify the effect, if any, of the prohibition of Title 42, United States Code, Section 7606(a), upon the business of ABC Corporation.

This inquiry does not constitute an official notification that ABC Corportion is under consideration for placement on the "List of Violating Facilities." If deemed appropriate, such a notice will be initiated by the Listing Official, Office of Enforcement and Compliance Monitoring, EPA.

Under Title 42, United States Code, Section 7414(c), ABC Corporation may assert a business confidentiality claim with respect to part or all of the information submitted to EPA in the manner described at 40 C.F.R. § 2.203(b). Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA without further notice to ABC Corporation.

Care should be taken in ensuring that the response to this letter is complete and accurate because Title 42, United States Code, Section 7413(c)(2) provides criminal penalties for knowingly submitting false information to EPA in any report required by the Clean Air Act. In addition, Title 18, United States Code, Section 1001 provides criminal penalties for knowingly or willfully submitting false information to a federal official.

This information request is not subject to the approval requirements of the Paperwork Reduction Act of 1980, Title 44 United States Code, Sections 3501 et seq.

Should you have any questions, please contact me at (123) 456-7890.

Sincerely yours,

Regional Attorney
Region XI

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

#54

NOV 12 1986

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Referral Letters for Forwarding Judicial Referrals and Consent Decrees to the Department of Justice

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: All OECM Attorneys

During the past few weeks I have had an opportunity to review numerous civil judicial referral packages. The referral letters prepared for my signature are carefully and accurately drafted and reflect high quality work by OECM attorneys. However, some of the information currently included in our referral letters is unnecessary inasmuch as the Department of Justice already has access to this information through other channels. Also, there are certain inconsistencies in the formats used by each division which should be addressed.

This memorandum and the attached Model Civil Referral Letter and Model Letter Recommending Approval of Settlement are intended to help standardize and streamline the preparation of referral letters by OECM staff attorneys. Beginning December 1, 1986, referral letters sent to me for signature should follow the formats shown in these model letters.

Please note that both model letters indicate that the Region is responsible for sending a litigation report to the Environmental Enforcement Section of DOJ. Nevertheless, we should continue the current practice of contacting DOJ on an informal basis to assure that they have received this report.

Also, please note that the only attorney names which should appear in the body of the referral letter are those of the OECM and Regional staff attorneys assigned to the case.

If you have any questions regarding this memorandum please call Julie Becker at 382-4137.

Attachments

MODEL CIVIL JUDICIAL REFERRAL LETTER

Date

Honorable F. Henry Habicht II
Assistant Attorney General
U.S. Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Re: [facility name and location]

Dear Mr. Habicht:

I am referring the above-referenced matter to the Department of Justice for civil action. This matter, which was referred to us by our Region __ office, is [brief description of matter, e.g., "a Clean Water Act case for NPDES permit violations by a POTW."]

A copy of the litigation report has been forwarded to the Environmental Enforcement Section of the Lands and Natural Resources Division. [Discussion of any unresolved issues or issues or facts warranting special attention.]

Once this matter is transmitted to the U.S. Attorney's Office, please have your staff send copies of your transmittal to the EPA Regional and Headquarters participating attorneys identified below. Please also have them advise the U.S. Attorney's Office to inform the EPA participating attorneys when this action is filed.

The Agency's participating attorneys are:

[Name, address and phone number of Regional attorney]

[Name, address and phone number of Headquarters attorney]

Sincerely yours,

Thomas L. Adams, Jr.
Assistant Administrator

Enclosure(s)

cc: Regional Administrator

Regional Counsel

Division Director for the appropriate Headquarters program office

David Buente, Chief
Environmental Enforcement Section
Department of Justice

MODEL LETTER RECOMMENDING APPROVAL OF SETTLEMENT

Date

Honorable F. Henry Habicht II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Re: [facility/case name, location, docket number]

Dear Mr. Habicht:

I am referring the above-referenced [complaint and] consent decree to Department of Justice for your signature and filing in the appropriate U.S. District Court. This matter, which was referred to us by our Region __ office, is [brief description of matter, e.g., "a Clean Water Act case for NPDES permit violations by a POTW."]

[If this is a new referral: "A copy of the litigation report has been forwarded by the Region to the Environmental Enforcement Section of the Land and Natural Resources Division."] [Brief discussion of any unresolved issues or issues or facts warranting special attention.]

Once this [matter/consent decree] is transmitted to the U.S. Attorney's Office, please have your staff send copies of your transmittal to the EPA Regional and Headquarters participating attorneys identified below. Please also have them advise the U.S. Attorney's Office to inform the EPA participating attorneys when the decree is lodged.

The Agency's participating attorneys are:

[Name, address and phone number of Regional attorney]

[Name, address and phone number of Headquarters attorney]

Sincerely yours,

Thomas L. Adams, Jr.
Assistant Administrator

Enclosure(s)

cc: Regional Administrator

Regional Counsel

Division Director for the appropriate Headquarters program office

David Buente, Chief
Environmental Enforcement Section
Department of Justice

For CERCLA §107 cases only:
Ivery Jacobs
Financial Management Specialist
EPA Headquarters

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C. 20460

DEC 12 1986

#55

MEMORANDUM

SUBJECT: Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program

FROM: Thomas L. Adams, Jr.
Assistant Administrator
for Enforcement and Compliance Monitoring

Jennifer Joy Wilson
Assistant Administrator for External Affairs

TO: Regional Administrators
Deputy Regional Administrators
Assistant Administrators
Regional Counsels
Director, National Enforcement Investigations Center (NEIC)
Director, Office of Public Affairs
Assistant Director for Criminal Investigations (NEIC)
Regional Press Officers
Regional Media Criminal Enforcement Contacts
All SAICs and RAICs, Office of Criminal Investigations
Office of Regional Counsel Criminal Enforcement Contacts

I. INTRODUCTION

A significant amount of media attention is being received by the Agency's developing criminal enforcement program. This memorandum, which is based to a significant extent on current Justice Department media information guidelines, 28 C.F.R. § 50.2 (attached), establishes Agency-wide guidance for response to media inquiries on active and freshly concluded criminal cases.1/

1/ The Agency's general media policy on enforcement activities (see memorandum entitled "Policy on Publicizing Enforcement Activities," from Courtney M. Price and Jennifer Joy Manson, dated November 21, 1985 (general media policy)) does not specifically consider the unique problems which may be encountered in a criminal enforcement setting. Accordingly, the Agency's media policy in criminal enforcement matters will be derived solely from this specific criminal enforcement guidance, except for the distribution of media materials (see Section III of this memorandum, infra at 9).

§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.

(a) *General.* (1) The availability to news media of information in criminal and civil cases is a matter which has become increasingly a subject of concern in the administration of justice. The purpose of this statement is to formulate specific guidelines for the release of such information by personnel of the Department of Justice.

(2) While the release of information for the purpose of influencing a trial is, of course, always improper, there are valid reasons for making available to the public information about the administration of the law. The task of striking a fair balance between the protection of individuals accused of crime or involved in civil proceedings with the Government and public understandings of the problems of controlling crime and administering government depends largely on the exercise of sound judgment by those responsible for administering the law and by representatives of the press and other media.

(3) Inasmuch as the Department of Justice has generally fulfilled its responsibilities with awareness and understanding of the competing needs in this area, this statement, to a considerable extent, reflects and formalizes the standards to which representatives of the Department have adhered in the past. Nonetheless, it will be helpful in ensuring uniformity of practice to set forth the following guidelines for all personnel of the Department of Justice.

(4) Because of the difficulty and importance of the questions they raise, it is felt that some portions of the matters covered by this statement, such as the authorization to make available Federal conviction records and a description of items seized at the time of arrest, should be the subject of continuing review and consideration by the Department on the basis of experience and suggestions from those within and outside the Department.

(b) *Guidelines to criminal actions.* (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

(9) Since the purpose of this statement is to set forth generally applicable guidelines, there will, of course, be situations in which it will limit the release of information which would not be prejudicial under the particular circumstances. If a representative of the Department believes that in the interest of the fair administration of justice and the law enforcement process information beyond these guidelines should be released, in a particular case, he shall request the permission of the Attorney General or the Deputy Attorney General to do so.

(c) *Guidelines to civil actions.* Personnel of the Department of Justice associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal records of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) An opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

[Order No. 469-71, 36 FR 21028, Nov. 3, 1971, as amended by Order No. 603-75, 40 FR 22119, May 20, 1975]

In developing this guidance, the Agency has been aware of its responsibility to provide accurate information to the public on Agency activities while at the same time respecting the rights of individuals and organizations facing criminal investigations and prosecutions. This guidance strives to outline the fullest range of information -- consistent with a prudent approach guaranteeing constitutional rights and safeguarding Agency investigations -- which may be disclosed.

Accurate reporting of charges brought and convictions obtained in EPA criminal cases is an important component of the deterrent effect that such cases are expected to have upon unlawful conduct. On the other hand, great care must be taken to ensure that the reputations of targets are not unfairly prejudiced and that the right to a fair trial is respected. Further, the Agency maintains a strong interest in ensuring that its criminal investigations are neither compromised nor impeded and that its Special Agents are not endangered by the disclosure of confidential or otherwise nondisclosable information.

II. MEDIA RELATIONS DURING ACTIVE INVESTIGATIONS

A. General Guidelines

On occasion, EPA personnel will encounter members of the media during the pursuit of active investigative operations, for example, during the execution of a criminal search warrant. Agency personnel should not obstruct or prevent representatives of the media from conducting their professional activities, so long as these activities are lawful and do not improperly interfere with the carrying out of investigative functions by the Agency. A brief statement may be provided by the appropriate Special Agent-in-Charge (SAIC), Resident Agent-in-Charge (RAIC), lead Special Agent or public affairs officer (after clearance with the SAIC, RAIC or lead Special Agent) concerning the nature of the investigative activity, e.g., "The Agency is involved in the execution of a search warrant." Beyond a simple statement confirming investigative activity witnessed by the public, no further comments should be made ordinarily by any Agency personnel. Inquiries beyond these limited statements should be referred to either the local United States Attorney's Office (if a prosecutor has been assigned) or to the Environmental Crimes Unit (ECU) (FTS 633-2490) of the Department of Justice (collectively referred to as "DOJ") for any further comment.

Prior to an investigative event which is likely to generate publicity (or, in instances where pre-event secrecy must be maintained, as soon thereafter as is practicable), the SAIC or RAIC of the investigating field or resident office of the National Enforcement Investigations Center's (NEIC) Office of Criminal Investigations (OCI) should notify the Office of Regional Counsel (ORC). SAICs and RAICs will be responsible also for ensuring that throughout the course of the criminal investigation the ORC

staff attorney assigned to the case and the Office of Criminal Enforcement (OCE) staff attorney assigned to the Region are supplied with copies of relevant documents containing public information, which are likely to be necessary to respond to media inquiries, for example, applications for search warrants. (Of course, documents which are under court seal may not be distributed to Office of Public Affairs (OPA) or Headquarters Press Office (HPO) personnel.)

When it is advisable to notify the public of apparent health or environmental hazards which are also the subject of a criminal investigation, HPO or regional OPA personnel or designated spokespersons are authorized to provide the necessary information or to tell the public that it will be notified if a health threat arises. These statements must, however, avoid discussion of any related criminal inquiry or of the source of the information (e.g., a disgruntled employee) where an informant may be involved. They should also be cleared routinely with the appropriate SAIC or RAIC and DOJ to insure that information is released in a manner that does not adversely affect the criminal inquiry.

The media may on occasion make requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which relate directly or indirectly to a criminal investigation. It is usually the primary responsibility of the criminal contact person for the program to which the FOIA request has been directed to alert the appropriate SAIC/RAIC of the request. It is essential that any responses to such requests be made only after the concurrence of the SAIC/RAIC and the appropriate ORC attorney (or, if no ORC attorney has been assigned, the ORC criminal enforcement contact) or the appropriate OCE attorney. Failure to follow this procedure may inadvertently signal the existence of a confidential criminal investigation or might otherwise provide information which could compromise the case.

Moreover, certain information gathered by EPA under its statutory powers -- in contrast to material gathered under a criminal search warrant -- appears likely to be subject to mandatory disclosure upon request, including a media inquiry. The Office of General Counsel (OGC) has stated that it intends to issue a guidance document indicating what the Agency would be required to release under these various provisions. For now, if a request is made for information which is arguably subject to release under such a provision, and concerns a target of a criminal investigati (as well as the same basic sul ct matter as the investigation), no release of information may be made without the consent of the SAIC or RAIC and the appropriate ORC or OCE attorney (with the consultation of DOJ as appropriate). The decision whether to release such material will be reached on a case-by-case basis, pending the incorporation of the OGC guidance into OECM policy.

EPA personnel will at no time encourage or assist the media in photographing or televising an accused person, any aspect of an active investigation, or any facility involved in an Agency investigation. Moreover, the Agency will not ordinarily make available photographs of an accused. Information which is authorized to be disclosed to the media should be provided equally to all members of the media, subject to any limitations imposed by law or court order.

Finally, any conflicts among Agency personnel as to when or what information may be disclosed to the public must be resolved at the Headquarters level, after Headquarters' consultation with DOJ and the Assistant Director for Criminal Investigations of NEIC. The Office of Criminal Enforcement and the Headquarters Press Office should be contacted as soon as possible.

B. Inquiries Concerning Particular Criminal Targets Before the Lodging of Formal Charges

The existence of any criminal investigation being conducted within the Agency must never be acknowledged or commented upon. To acknowledge even the existence of an investigation might prejudice the rights of an individual or compromise an investigation. When asked, Agency personnel must respond: "It is Agency policy to neither confirm nor deny the existence of a criminal investigation." Of course, to be effective, this response must be utilized habitually even when it is known that no criminal investigation is planned or under way. In the event that this response proves insufficient to quell a particular inquirer, Agency personnel may direct the inquirer to the appropriate SAIC or RAIC (who will generally be much more accustomed to handling persistent inquirers), but under no circumstances may acknowledge the existence or nonexistence of an investigation or provide any information related to it.

Where a representative of another organization or agency has acknowledged the existence of or commented upon a criminal investigation, and has publicly stated that EPA is conducting an investigation, it might be necessary to make, in some rare circumstances, a very limited response in order to prevent further unwarranted damage to the investigation and/or the privacy or reputation of the individual(s) involved and preserve the credibility of the Agency. However, such exceptions will be made only on a case-by-case basis, and must be approve in advance by the Office of Criminal Enforcement in consultation with the Assistant Director for Criminal Investigations of NEIC.

At any time after a DOJ prosecutor has been assigned or the case has been referred to DOJ, EPA personnel will not respond to media inquiries or volunteer comments on the case, whether oral or written, for attribution or not, without the prior express approval of DOJ, until the case is concluded absolutely.

C. Media Inquiries and Media Releases After Formal Charges Are Filed

Subsequent to lodging of formal charges (i.e., via indictment, information or criminal complaint), and until the absolute conclusion of the case 2/, EPA personnel will not respond to media inquiries on a case without the prior approval of DOJ. Accordingly, such media inquiries will normally be forwarded to the lead prosecutor -- either with the local office of the United States Attorney or the ECU -- assigned to the case. Comments by DOJ will be consistent with its media guidelines found at 28 C.F.R. § 50.2.

To the extent that the Agency wishes to issue a DOJ-authorized media release 3/ at the time formal charges are made or at the occurrence of other critical events in the prosecution, EPA will honor DOJ policy and not issue a release without the prior approval of DOJ. See United States Attorney's Manual, Title I-5.570. DOJ diligently will endeavor to revise, reject or otherwise comment on such proposed media release as soon as possible or within two work days of its receipt at DOJ. In any event, consistent with DOJ guidelines, disclosure of only the following information will be permitted under Agency policy: 1) information from (or copies of) public documents (e.g., the indictment, court pleadings filed, etc.) or 2) incontrovertible facts -- which have been verified by the drafter(s) of the media statement or the person(s) providing the information directly to the media -- relating to the following subjects:

(1) The defendant's name, age, residence, employment, and (with the approval of the SAIC/RAIC) similar background information;

(2) The identity of the investigating and/or arresting agency(ies) and (with the approval of the SAIC/RAIC) the length and/or scope of an investigation (provided no information released could implicate a person not charged, particularly where an investigation continues after charging some but not all targets); and

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2/ See Section II (D)(3) of this memorandum, infra.

3/ The term "media release" as used herein includes, among other things: 1) Traditional Media Release (Written statement; maximum three pages; can involve more than one "story"; usually has quotes from EPA personnel); 2) Note to Correspondents (Short statement; usually a few paragraphs; gives the basic facts); and 3) Press Advisory (Written statement; contains several (3 or 4) "stories" in one release issued at end of week).

(3) The time and place of arrest.

Even the release of this limited information needs to be evaluated in the context of whether, due to unique circumstances, it could arguably prejudice the defendant's right to a fair trial.

D. When Media Releases Should Be Issued

The Agency has a strong interest in informing the public and the regulated community about its successful criminal enforcement efforts. Such information will serve to promote awareness of and respect for environmental laws, as well as to deter potential violators from engaging in criminal activity. 4/

Several threshold issues must be determined prior to preparing a media release. First, a decision must be made whether or not a particular criminal enforcement activity warrants a media release, and, if so, whether it should be national or regional in scope. Second, agreement must be reached regarding the form the media release is to take. (See note 3, supra).

In order to maximize the value of such publicity, while carefully safeguarding the rights of the accused, the following general considerations -- which are keyed to the stage of the criminal proceedings -- should serve as guides on a case-by-case basis:

1. Filing of charges. Two major concerns will make the issuance of an Agency media release at this stage rare: 1) the extreme sensitivity of commenting on criminal cases prior to trial and 2) the difficulty in providing timely information to the media posed by Rule 6(e) of the Federal Rules of Criminal Procedures 5/. However, the Agency should routinely encourage and support the issuance of a media release by DOJ. Appropriate OCI and OCE (or ORC) representatives should request that DOJ

4/ Significant enforcement events may require or benefit from communications activities other than media releases, such as notifications to Congressional delegations, states and environmental and industry groups. When considering the announcement of an event, the criminal enforcement program should notify the Assistant Administrator for External Affairs, whose office wil assist in developing a communications strategy.

5/ Rule 6(e) bars absolutely the dissemination of grand jury material to any person not specifically authorized under court rule. Usually (among Agency personnel) only the Special Agent assigned to the case and (perhaps) the assigned ORC and/or OCE attorney and/or the chief Agency technical expert would be so authorized. Thus, Rule 6(e) would, as a practical matter, prohibit the circulation of a draft media release prior to the

allow EPA an opportunity to comment on such (and any other EPA criminal-enforcement related) DOJ media releases. In cases of unusual national significance (e.g., a precedent-setting prosecution or one of unique programmatic significance) the Agency will consider issuing its own DOJ-approved media release, particularly when DOJ does not intend to issue its own media release.

2. Criminal conviction. Cases resulting in a criminal conviction, either through guilty verdict after trial or by the entering of a guilty plea by the defendant, should ordinarily be considered candidates for a traditional national media release. Among the factors which might militate in favor of such release are whether the case involves: 1) a felony conviction (either for an environmental violation or an offense under Title 18 of the United States Code (e.g., knowing false statements to a federal agency, 18 U.S.C. § 1001)), 2) multiple misdemeanors which could result in incarceration for more than 1 year, 3) an issue of legal or programmatic significance (e.g., the national asbestos enforcement strategy), 4) nationally recognizable defendants, 5) significant harm or potential harm to the public health or environment, 6) a conviction of a high-level corporate manager (other than of a small business) or 7) a conviction obtained after trial. (The issuance of a national media release does not preclude the issuance of a regional release as well; however, both releases would need to be approved by DOJ and care must be exercised to ensure the consistency of the releases.) This list of factors is merely illustrative; the decision whether or not to issue a national release must be made on a case-by-case basis.

Less nationally significant cases resulting in convictions may still be of interest regionally or to trade publications and thus would be appropriately handled by a regional media release and/or Headquarters press advisory or by a phone call to the general media or trade press. Regions are free to develop their own procedures for the issuance of regional media releases tailored to their unique circumstances, but they must provide for the critical roles to be played by OCI and DOJ as outlined in this guidance. It would appear to be good practice that all such regional releases be approved within EPA by both the appropriate SAIC/RAIC and the ORC criminal enforcement contact.

At this stage of the proceeding, because the case is still open, DOJ approval of the media release is mandatory.

Footnote 5/ continued:

time the indictment was actually handed down, thus making the drafting, reviewing and approving activities necessary to the issuance of a media release very difficult on a timely basis.

3. Sentencing.

Criminal cases resulting in sentences which include the following would be typically strong candidates for a traditional national media release: 1) (other than de minimus) incarceration, 2) significant fines relative to the criminal conduct, 3) unusual or significant "clean-up" or restitution provisions, 4) use of the Alternative Fines Act (so long as application of this law to environmental crimes remains novel); or 5) provisions which otherwise highlight a successful prosecution. As with convictions, many cases which are not of great national significance would nonetheless merit a regional or limited Headquarters media release. Cases where the penalties imposed are insignificant or disproportionately minor compared with the crime committed should be carefully analyzed to determine whether soliciting publicity might harm the Agency's enforcement strategies.

Even after sentencing has been completed, a case is not necessarily over. As to one or more defendants, motions for a new trial may be pending, appeals may yet be noted or may be pending, and after an unsuccessful appeal the case may yet come before the Supreme Court. After sentencing, DOJ regards a case as open until all possible avenues of appeal are either exhausted or the time allowed for noting such appeals has expired. Therefore, until there is no possibility whatsoever of a new trial, the case is not considered absolutely concluded and closed, and DOJ approval of a media release is still required.

III. PROCEDURES FOR PREPARING A NATIONAL MEDIA RELEASE

After the decision to issue a national media release has been made, the following general procedures will be utilized in preparing it:

1. OCE will ordinarily have notified the Headquarters Press Office in advance of the upcoming significant event and will ensure that HPO has a copy of all public documents that it may desire. 6/

2. The staff OCE attorney assigned to the case will inform HPO of the occurrence of the significant event (e.g., a guilty plea was entered on a particular date) and will provide additional information requested by HPO or will supply HPO with the necessary contact person. (It may be mutually decided by OCE and ORC that the ORC staff attorney should have the lead on the national media release. If so, the ORC attorney will be responsible for all of

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6/ In the event the Agency's criminal enforcement program wishes to issue a media release at the time of an indictment, it will notify the HPO of its desire and supply the necessary information and documents as soon as possible after the indictment.

the OCE functions listed in these general procedures for preparing a media release and for keeping OCE informed as to its status.)

3. HPO will have the lead responsibility for preparing the actual media action. The OCE (or ORC) attorney will assist in the drafting of the media release as requested by HPO.

4. HPO is responsible for coordination with the regional OPA and for obtaining a concurrence from OCE (and ORC, where applicable). (OCE concurrence will be required even where the ORC attorney has the lead.) The OCE (or ORC) attorney will be responsible for consulting with the appropriate SAIC/RAIC or lead Special Agent and with DOJ prior to providing a concurrence. HPO may issue press advisories regarding convictions and sentencing based upon OCE non-confidential "Weekly Highlight" material, providing it obtains the prior concurrence of OCE (which in turn will consult with OCI and DOJ), which ordinarily will be given quickly.

5. Distribution of media material will be accomplished by HPO as indicated in the general media policy.

In order to be effective it is essential that a media release be issued as contemporaneously as possible with the event it is publicizing. Therefore, it is critical that Agency personnel involved in the particular criminal enforcement proceeding provide HPO (and/or the regional OPA) with all necessary information, as well as review and concurrence, on an expedited basis.

IV. MEDIA INQUIRIES ON THE CRIMINAL ENFORCEMENT PROGRAM GENERALLY

The Agency encourages good media relations and accurate media coverage of the Agency's criminal enforcement program generally, as in all other aspects of the Agency's activities. To ensure the accuracy of responses to media inquiries, and to protect against inadvertent prejudice to the rights of defendants in active cases, these inquiries will be directed to the Headquarters Press Office (FTS 382-4355; E-Mail Box EPA 1704), the Director of the Office of Criminal Enforcement (FTS 475-9660; E-Mail Box EPA 2261), or to the Assistant Director for Criminal Investigations, at the National Enforcement Investigations Center in Denver (FTS 776-3215; E-Mail Box EPA 2390).

V. RESERVATIONS

The policies and procedures set forth herein, and internal office procedures adopted pursuant hereto, are not intended to, do not, and may not be relied upon to, create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. The Agency reserves the right to take any action alleged to be at variance with these policies and procedures or not in compliance with internal office procedures that may be adopted pursuant to these materials.

Attachment

cc: Director, Environmental Crimes Unit, Department of Justice
Associate General Counsel; Grants, Contracts and General Law Division
Jonathan Cannon, Office of General Counsel

GM - 57, was revised on June 20, 1988. The 1987 version has been replaced with the 1988 version.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 16 1986

#56

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Determining a Violator's Ability to Pay a Civil Penalty

FROM: Thomas L. Adams, Jr.
Assistant Adminstrator for
Enforcement and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators

I. PURPOSE

This guidance amplifies the discussion in the Uniform Civil Penalty Policy on how to adjust a penalty target figure when a violator claims paying a civil penalty would cause extreme financial hardship. This guidance was developed to meet the commitment made in the Uniform Civil Penalty Policy issued February 16, 1984, and in response to Regional Office requests for amplification of the "Framework for Statute-Specific Approaches to Penalty Assessments" (GM-22).

II. APPLICABILITY

This guidance applies to the calculation of civil penalties under medium-specific policies issued in accordance with the Uniform Civil Penalty Policy that EPA imposes on:

1. **For-profit** publicly or closely held entities; and

2. **For-profit** entities owned by not-for-profit entities.

This guidance does not apply to:

1. The calculation of civil penalties that EPA imposes on municipalities and other not-for-profit entities; or

2. A violator who files for bankruptcy or is in bankruptcy proceedings after EPA initiates the enforcement action.

III. SCOPE

This guidance only gives a general evaluation of the financial health of a violator and the possible effects of paying a civil penalty for the purpose of settlement negotiations. It describes when to apply the ability to pay factor and provides a methodology for applying the factor using a computer program, ABEL.

The guidance does not prescribe the amount by which EPA may reduce a civil penalty if the ability to pay factor is applied. The methodology in this guidance will not calculate a specific dollar amount that a violator can afford in civil penalties nor does it provide a way to predict whether paying a certain amount for a civil penalty will cause an already financially troubled firm to go out of business.

For an ability to pay analysis, EPA needs specific financial information from a violator (see section V). EPA includes the financial data in a litigation report only when the data are requested by the Department of Justice or offered by the violator.

IV. THE ABILITY TO PAY FACTOR

Under the Uniform Civil Penalty Policy, EPA may consider using the ability to pay factor to adjust a civil penalty when the assessment of a civil penalty may result in extreme financial hardship. Financial hardship cannot be expressed in absolute terms. Any limitation on a violator's ability to pay depends on how soon the payments must be made and what the violator has to give up to make the payments. A violator has several options for paying a civil penalty:

1. Use cash on hand;

2. Sell assets;

3. Increase debt by commercial borrowing;

4. Increase equity by selling stock;

5. Apply toward a civil penalty for a period of time what would otherwise be distributed as profit; or

6. Use internally-generated future cash flows by deferring or eliminating some planned future investments.

Each of these options will affect a for-profit violator's operations to some degree. EPA must decide whether to adjust

a proposed penalty amount and by how much, taking into account the gravity of the violation and other criteria in medium-specific guidance.

V. INFORMATION TO DETERMINE ABILITY TO PAY

If ability to pay is at issue, EPA may request from a violator any financial information the Agency needs to evaluate the violator's claim of extreme financial hardship. A violator who raises the issue has the burden of providing information to demonstrate extreme financial hardship.

Financial information to request from for-profit entities may include the most recent three to five years of:

1. Tax returns;

2. Balance sheets;

3. Income statements;

4. Statements of changes in financial position;

5. Statements of operations;

6. Retained earnings statements;

7. Loan applications, financing agreements, security agreements;

8. Annual reports; or

9. Business services, such as Compustat, Dun and Bradstreet, or Value Line.

Tax returns are the most complete and in the most consistent form for analysis. Tax returns also provide financial information in a format for direct input into ABEL. Annual reports are the most difficult to analyze and may require the assistance of a financial analyst.

When requesting information informally or through interrogatories or discovery, EPA should ask for three to five years of tax returns along with all other financial information that a violator regularly maintains as business records. If a violator refuses to give EPA the information to evaluate the violator's ability to pay, EPA should seek the full calculated penalty amount under the assumption that the violator can pay.

VI. CONFIDENTIALITY OF FINANCIAL INFORMATION

A violator can claim confidentiality for financial information submitted to EPA. In accordance with the regulations on confidential business information, 40 CFR 2.203, EPA must give notice to a violator that the violator may assert a business confidentiality claim. EPA's notice must contain the information required in 40 CFR 2.203. The notice must include a statement that if the violator submits financial information without a confidentiality claim, EPA may release the information without further notice to the violator.

The violator can make a claim of confidentiality for financial information in a cover letter accompanying the information. Information in published annual reports would not be entitled to confidential treatment.

VII. APPLYING THE ABILITY TO PAY FACTOR

Under the terms of a consent decree, a violator pays a civil penalty in addition to making any capital investment necessary to come into compliance. EPA considers the costs of attaining compliance when applying the ability to pay factor to a civil penalty calculation.

EPA determines whether to apply the ability to pay factor using a four-step process:

1. Determine, if possible, whether a violator plans to claim extreme financial hardship;

2. Determine whether criteria in the Uniform Civil Penalty Policy and medium-specific guidance require consideration of ability to pay;

3. Evaluate the overall financial health of a violator's operations by analyzing financial information provided by a violator or from other sources, such as business services; and

4. Project the probabilities of a violator having future internally-generated cash flows to evaluate how paying a proposed civil penalty may affect a violator's financial decisions.

VIII. FINANCIAL COMPUTER PROGRAM

EPA's computer program, ABEL, assists in evaluating the financial health of for-profit entities, based on the estimated strength of internally-generated cash flows. ABEL uses financial information on a violator to evaluate the overall financial health of a violator (step 3 above). The program uses standard

financial ratios to evaluate a violator's ability to borrow money and pay current and long-term operating expenses.

ABEL also projects the probable availability of future internally-generated cash flows to evaluate some of a violator's options for paying a civil penalty (step 4 above). EPA is developing a user's manual to provide self instruction in the use of ABEL in addition to the documentation and help aids in the computer program.

Exhibit 1 is a hypothetical use of ABEL to evaluate a violator's financial health. If the ABEL analysis indicates that a violator may not be able to finance a civil penalty with internally-generated cash flows, EPA should check all available financial information for other possible sources of cash flows for paying a civil penalty.

For example, in corporate tax returns, item 26 of Schedule A (cost of goods sold) sets forth deductions for entertaining, advertising, and professional dues. Schedule E shows the compensation of officers. In Schedule L (balance sheets), item 8 sets forth investments that may include certificates of deposit or money market funds. These types of assets and expenses do not directly affect operations and may vary considerably from year to year without adversely affecting the violator's operations. Because a civil penalty should be viewed as a one-time expense, these kinds of assets and expenses could be sources of cash for a civil penalty.

Using the sources of financial information from the example above, liquid assets such as certificates of deposit and money market funds could be used to pay a penalty. Expenses for advertising, entertaining, or professional dues could be reduced for a short period to pay a civil penalty. A corporate officer might even be willing to take less compensation for a short period. A combination of options like these may produce enough cash flow to pay a civil penalty without causing the violator extreme financial hardship in meeting operating expenses.

Attachment

EXHIBIT 1

Assumption that Violator is Financially Healthy

Assume that EPA has calculated an economic benefit for Company X of $140,000 and a gravity component of $110,000 for a total proposed penalty of $250,000. EPA presents the proposed penalty after several negotiation sessions, and the CEO for Company X then claims that the company cannot afford to pay that much. In support of the claim, the CEO produces accounting statements showing that the firm paid no income taxes for the previous three years and had less than $100,000 in net income for those years.

EPA requests tax returns and other financial information for the most recent three years of Company X. EPA enters the tax return information in ABEL and receives the output in Attachment A. The Phase 1 analysis from ABEL is not dispositive of the issue, so EPA performs a Phase 2 analysis.

The Phase 2 analysis indicates that Company X can finance a civil penalty of $250,000 from internally-generated cash flows, even after planning for $400,000 in pollution control investments and $50,000 for annual O&M expenses. The table in Phase 2 shows a 99 percent probability that Company X will have future cash flows with a net present value of $370,061 available to pay a civil penalty.

Assumption that Violator Is Not Financially Healthy

Assume again that EPA has calculated a total penalty amount of $250,000. Company Z claims extreme financial hardship. If the ABEL analysis indicates that Company Z would have little probability of generating $250,000 in cash flows during the next five years, EPA would go back to the financial data supplied by the violator and look for items that may indicate a source of cash, including loans outstanding to corporate officers, entertainment expense deductions, company cars or airplanes, amount of compensation for corporate officers, compensation for relatives of corporate officers who do not have clearly defined duties.

If the ABEL Phase 1 analysis indicates that Company Z may have additional debt capacity (debt/equity ratio), EPA would look in the tax returns for the amount of long term debt the violator is carrying and analyze any loan applications the violator submitted in response to EPA's request for financial information. Frequently, firms can borrow additional money for operations and free up cash flow to pay civil penalties.

Even a firm on the verge of bankruptcy may choose to settle an enforcement action with a civil penalty provision in the consent decree. EPA should always seek some civil penalty. ABEL and other financial analysis provide a range of penalty amounts for the purpose of settlement negotiations.

DATA FOR ABEL EXAMPLE

ANALYSIS DATE: NOVEMBER 24, 1986

DEBT EQUITY RATIOS

1985	0.58	A RATIO LESS THAN 1.5 INDICATES THE FIRM MAY HAVE ADDITIONAL DEBT CAPACITY
1984	2.91	A RATIO GREATER THAN 1.5 INDICATES THE FIRM MAY HAVE DIFFICULTY BORROWING
1983	1.59	A RATIO GREATER THAN 1.5 INDICATES THE FIRM MAY HAVE DIFFICULTY BORROWING

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

CURRENT RATIOS

1985	1.10	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS
1984	1.20	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS
1983	1.03	A RATIO LESS THAN 2.0 MAY INDICATE LIQUIDITY PROBLEMS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

BEAVER'S RATIOS

1985	0.22	A RATIO GREATER THAN 0.20 INDICATES HEALTHY SOLVENCY
1984	0.20	A RATIO BETWEEN 0.10 AND 0.20 IS INDETERMINATE
1983	0.30	A RATIO GREATER THAN 0.20 INDICATES HEALTHY SOLVENCY

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

TIMES INTEREST EARNED

1985	1.02	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS
1984	1.64	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS
1983	1.30	A RATIO LESS THAN 2.0 MAY INDICATE SOLVENCY PROBLEMS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

ABEL INTERPRETS THE OVERALL RESULTS OF THE FINANCIAL RATIOS AS FOLLOWS:

ALTHOUGH THE FIRM MAY FACE CURRENT CASH (OR LIQUIDITY) CONSTRAINTS, ITS LONG-TERM PROSPECTS ARE GOOD AND IT SHOULD BE ABLE TO FINANCE PENALTIES AND INVESTMENTS. A PHASE TWO ANALYSIS IS RECOMMENDED.

ABEL NOTES THAT THE FIRM'S MOST RECENT DEBT-EQUITY RATIO IS SUBSTANTIALLY BETTER THAN ITS HISTORIC AVERAGE.

ABEL NOTES THAT THE FIRM'S MOST RECENT TIMES INTEREST EARNED IS SUBSTANTIALLY POORER THAN ITS HISTORIC AVERAGE.

DO YOU WISH TO CONTINUE WITH THE PHASE TWO ANALYSIS (Y OR N)?

Y

DO YOU WISH TO ANALYZE A CIVIL PENALTY (P) OR A NEW INVESTMENT (I)?

P

PLEASE INPUT THE INITIAL PROPOSED SETTLEMENT PENALTY AMOUNT IN CURRENT DOLLARS (E.G., 5000); IF THERE IS NO TARGETED PENALTY, ENTER 0.

250000

BEFORE PROCEEDING WITH THE CIVIL PENALTY ANALYSIS, ABEL WILL REQUIRE CERTAIN ADDITIONAL INFORMATION REGARDING ANY INVESTMENTS WHICH MAY BE REQUIRED IN ORDER FOR THE FIRM TO ACHIEVE COMPLIANCE.

ENTER THE DEPRECIABLE CAPITAL COST OF THE NEW INVESTMENT (E.G., 1000.00); IF THERE IS NO NEW INVESTMENT, ENTER 0

200000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN (E.G., 1984)

1985

ENTER ANY NON-DEPRECIABLE, NON-TAX DEDUCTIBLE COSTS ASSOCIATED WITH THE NEW INVESTMENT. IF THERE IS NO COST THAT MEETS THIS REQUIREMENT PLEASE ENTER 0.

100000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN (E.G., 1984)

1985

ENTER ANY NON-DEPRECIABLE, BUT TAX
DEDUCTIBLE COSTS ASSOCIATED WITH THE NEW INVESTMENT.
IF THERE IS NO COST THAT MEETS THIS REQUIREMENT
PLEASE ENTER 0.

100000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN
(E.G., 1984)

1985

ENTER THE ANNUAL O&M COST OF THE NEW INVESTMENT.
IF THERE IS NO O&M COST, ENTER 0

50000

PLEASE ENTER WHAT YEAR DOLLARS THIS IS EXPRESSED IN
(E.G., 1984)

1985

THE FOLLOWING STANDARD VALUES ARE USED IN THIS SECTION OF
ABEL:

1. REINVESTMENT RATE = 0.0
2. NOMINAL DISCOUNT RATE =13.69%
3. INFLATION RATE = 4.41%
4. MARGINAL INCOME TAX RATE =50.00%
5. INVESTMENT TAX CREDIT =10.00%

DO YOU WISH TO HAVE THESE ITEMS EXPLAINED (Y OR N)?

N

DO YOU WISH TO CHANGE ANY OF THESE INPUTS (Y OR N)?

N

ABEL IS READY TO PROVIDE OUTPUT. YOU HAVE THE CHOICE
OF THREE OUTPUT OPTIONS:

1. PRINT ONLY THE POSSIBILITY OF THE PRESENT VALUE OF THE FIRM'S FIVE YEAR PROJECTED CASH FLOW EXCEEDING EITHER AN INITIAL PROPOSED SETTLEMENT PENALTY OR A REQUIRED INVESTMENT.

2. PRINT A TABLE SHOWING THE NET AVAILABLE CASH FLOW WITH AN ANALYSIS OF THE TABLE.

3. PRINT A DETAILED TABLE SHOWING THE COMPONENTS OF THE FIRM'S CASH FLOWS. THIS OPTION MAY BE HELPFUL TO FINANCIAL ANALYSTS BUT IS NOT RECOMMENDED FOR MOST USERS.

PLEASE ENTER YOUR CHOICE (1,2 OR 3).

2

THERE IS A 99.9 % CHANCE THAT THE FIRM CAN FINANCE THE PROPOSED SETTLEMENT PENALTY OF $ 250000.00BASED ON THE STRENGTH OF INTERNALLY GENERATED CASH FLOWS FOR THE NEXT FIVE YEARS. THE ANALYSIS AT THIS POINT DOES NOT DEMONSTRATE CONCLUSIVELY THE FIRM'S ABILITY TO PAY THE PROPOSED PENALTY. TO MAKE A DETERMINATION, ONE MUST LOOK AT THE FIRM'S OTHER OPTIONS, INCLUDING INCREASING EQUITY, SELLING ASSETS, OR LEVERAGING UNLEVERED ASSETS.

ABEL IS READY TO BEGIN OUTPUT. IF YOU WISH, PLEASE POSITION YOUR PRINTER TO THE START OF A NEW PAGE. PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

DATA FOR ABEL EXAMPLE

ANALYSIS DATE: NOVEMBER 24, 1986

PROBABILITY	NET PRESENT VALUE AVAILABLE	EQUIVALENT ANNUAL CHARGE
50.0	716944.31	280891.31
60.0	679230.25	266115.37
70.0	638832.69	250288.00
80.0	591428.31	231715.62
90.0	525838.50	206018.06
95.0	471726.56	184817.56
99.0	370061.81	144986.37

THE ABOVE DATA ARE PRESENTED IN CURRENT-YEAR DOLLARS

PLEASE ENTER A CARRIAGE RETURN TO CONTINUE

THIS TABLE SHOWS THE PROBABILITY THAT THE VIOLATOR CAN FINANCE CIVIL PENALTIES OF A GIVEN AMOUNT. FOR EXAMPLE, THERE IS A 95.00 % CHANCE OF FINANCING A LUMP SUM PENALTY OF UP TO $ 471726.56 BASED ON THE STRENGTHS OF PROJECTED INTERNALLY GENERATED CASH FLOWS. THIS IS EQUIVALENT TO ALLOWING THE FIRM TO MAKE THREE EQUAL ANNUAL PAYMENTS OF $ 184817.56. THE ANALYSIS AT THIS POINT DOES NOT DEMONSTRATE CONCLUSIVELY THE FIRM'S ABILITY TO PAY THE PROPOSED PENALTY. TO MAKE A DETERMINATION, ONE MUST LOOK AT THE FIRM'S OTHER OPTIONS, INCLUDING INCREASING EQUITY, SELLING ASSETS, OR LEVERAGING UNLEVERED ASSETS.

DO YOU WISH TO PERFORM THE PHASE TWO ANALYSIS FOR THIS CASE AGAIN (Y OR N)?

N

DO YOU WISH TO ANALYZE ANOTHER CASE (Y OR N)?

N

#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 • Final Regulations: Definition of Instances of Non-Compliance Reportable in QNCR, 8/26/85 • QNCR Guidance, 3/86 • Inspection Strategy and Guidance, 4/85	• FY 85 Initiatives on Compliance Monitoring and Enforcement Oversight, 6/29/84. • Final Guidance on PWS Grant Program Implementation, 3/20/84. • Regulations: NIPDWR, 40 CFR Parts 141, 142. • Guidance for PWSS Program Reporting Requirements, 7/9/84.	• Timely and Appropriate Enforcement Response Guidance, 6/28/84. rev. 4/11/86 • Compliance Data System Guidelines for FY 1986, 2/86. • Guidance on Federally-Reportable Violations, 4/11/86. • Compliance Monitoring Strategy, 3/31/88.	• Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA, 6/86. • RCRA Penalty Policy, 5/8/84. • FY 1988 RCRA Implementation Plan, 3/31/87, to be reissued for FY 89 by 4/1/88. • RCRA Enforcement Response Policy, issued 12/21/84, revised 12/21/87.	• Final FY 88 Enforcement and Certification Grant Guidance, 3/10/87. • Interpretative Rule: FIFRA State Primacy Enforcement Responsibilities, 40 CFR Part 173, 1/15/83 • Final TSCA Grant Guidance for the Cooperative Agreement States, 3/10/87.

* Planned guidance is underlined.

Water-NPDES	Drinking Water	Air	RCRA	FIFRA/TSCA
• Revised Enforcement Management System, 3/86.	• FY 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems, 3/[illegible]/85.	• Asbestos Strategy, 3/31/88.	• Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies, 6/12/84.	
• NPDES Federal Penalty Policy, 2/11/86.	• Guidance on FY 88 UIC Enforcement Agreements, 4/87.	• Class B VOC Source Compliance Strategy, 3/87.	• Compliance Monitoring and Enforcement Log - form for recording monthly compliance data from States and Regions.	
• Strategy for Issuance of NPDES Minor Permits, 2/86.	• FY 87 SPMS & OWAS Targets for the PWSS Program, (SNC definitions), 7/10/86.			
• Guidance for Reporting and Evaluating POTW Non-Compliance with Pretreatment Implementation Requirements, 9/30/87.	• Guidance on FY 88 PWSS Enforcement Agreements, 4/87.		• Technical Enforcement Guidance on Ground-Water Monitoring, Interim Final, 8/85.	
• Implementation of the Pretreatment Permits and Enforcement Tracking System, 3/24/87 (letter)	• Guidance on Use of AO Authority Under SDWA Amendments, 1/20/87.		• Compliance Order Guidance for Ground Water Monitoring, 8/85.	
• National Municipal Policy, published 3/28/84, and guidance, 3/84.	• FY 88 UIC Reporting Guidance, 4/87.		• Loss of Interim Status Guidance, 8/85.	
• NMP Enforcement Strategy, 9/22/87.	• UIC Program Guidance #53, 12/86.		• RCRA State Oversight Inspections, 12/87.	
	• PWSS Compliance Strategy, 4/1/87.			

Water-NPDES	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.			