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

#58

AUG 15 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

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

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

TO: Assistant Administrators
Office of General Counsel

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

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

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

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

Attachment

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

PART I Enforcement Considerations for Drafting and Reviewing Regulations

PURPOSE

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

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

APPLICABILITY

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

CHECKLIST FOR DEVELOPING ENFORCEABLE REGULATIONS AND REVIEWING REGULATIONS FOR ENFORCEABILITY

I. PREAMBLE

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

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

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

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

II. DEFINITIONS

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

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

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

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

III. SCOPE AND APPLICABILITY OF REGULATION

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

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

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

IV. PERFORMANCE STANDARDS

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

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

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

V. MONITORING AND INSPECTION

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

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

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

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

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

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

VI. RECORD KEEPING/REPORTING REQUIREMENTS

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

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

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

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

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

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

G. Are exceptions to the reporting requirements spelled out?

VII. DEMONSTRATING COMPLIANCE WITH PERFORMANCE STANDARDS

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

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

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

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

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

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

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

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

PURPOSE

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

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

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

APPLICABILITY

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

1. New program initiatives within the Agency;
2. New statutory responsibilities delegated to the Agency;
3. Revisions to existing regulations that a program office determines will have a significant effect on an ongoing program; and
4. Programs with existing strategies that are not producing adequate environmental results.

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

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

#59

FEB 6 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

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

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

TO: Senior Enforcement Counsel
Associate Enforcement Counsels

I. Background

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

Principal changes in the process include:

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

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

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

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

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

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

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

II. Procedures:

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

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

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

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

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

Attachments: 11

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

OCT 16 1986

THE ADMINISTRATOR

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

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

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

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

The principal changes you need to be aware of include:

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

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

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

Attachment 1

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

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

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

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

Lee M. Thomas

Attachment

cc: Steering Committee
Members

CHANGES AND ROLES IN THE REGULATORY DEVELOPMENT PROCESS

1. HOW THE PROCESS WILL WORK

(a) Make SAR process work:

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

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

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

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

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

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

- o Purpose is to:

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

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

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

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

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

o Process:

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

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

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

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

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

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

(c) Final Review

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

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

2. RESPONSIBILITIES OF WORKGROUP CHAIRS

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

- o Manage project according to agreed-upon schedule.

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

- o Assure that cross-media considerations are properly addressed.

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

3. ROLES AND RESPONSIBILITIES OF STEERING COMMITTEE MEMBERS

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

o Specific functions of Steering Committee members would include:

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

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

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

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

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

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

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

PROTOTYPE

WORKGROUP REPORTING FORMAT

1. Issue Resolution:

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

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

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

      --How was the issue resolved?

   b. List significant issues still outstanding. For each:

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

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

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

2. Status of Technical and Analytic Support Work:

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

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

3. Operation of the Workgroup:

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

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

FACT SHEET #1 -- Regulation Management Series

The Steering Committee

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

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

Membership: Chair: Mary M. Allen 382-4001

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

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

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

FACT SHEET # 2 -- Regulation Management Series

Start Action Requests

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

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

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

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

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

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

FACT SHEET #3--Regulation Management Series

The Workgroup

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

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

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

See Also: Fact Sheet , Workgroup Reports."

FACT SHEET #4 -- Regulation Management Series

Development Plans

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

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

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

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

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

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

See Also: Guidelines and prototype Development Plans available Steering Committee Representative.

FACT SHEET # 5 -- Regulation Management Series

Workgroup Reports

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

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

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

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

Workgroup Closure Meetings

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

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

Operation:

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

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

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

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

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

Information Collection Requests (ICRs)

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

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

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

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

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

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

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

See Also: PRA Guidelines

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

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

FACT SHEET #10 - Regulation Management Series

Federal Register Publication

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

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

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

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

For reprints also include EPA form 2340-1

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

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

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

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

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

#60

MAR 16 1987

SUBJECT: Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket

FROM: Richard H. Mays, Senior Enforcement Counsel,
Office of Enforcement and Compliance Monitoring (LE-133)

TO: Associate Enforcement Counsel
Regional Counsel

We have just completed compiling and reporting our 1st Quarter, FY 1987 accountability measures for civil judicial referrals. This process always requires considerable effort in reconciling and interpreting data and suggests that there may be some confusion and misunderstanding about the data required and about the procedures and responsibilities for updating and maintaining the Docket.

The responsibility for providing, maintaining, and verifying data in the Docket is shared among Headquarters and Regional staff, Headquarters and Regional data analysts. I have identified in the attached procedures some of the data problems that we observed and ask that every one participate in correcting erroneous and missing data and continue during each monthly update cycle to provide accurate and complete data. The procedures discuss the various areas of concern and the primary responsibilities. Each staff attorney should receive a copy of these procedures so that they are reminded of how the Docket is maintained and understand their responsibilities in the overall process.

Every attorney is asked to review their cases, provide correct or missing data, and to remain diligent in the monthly review and entry of Docket data. I have also asked the Headquarters and Regional data analysts to routinely run reports that will help locate incorrect or missing data. The analysts will review these reports for inconsistent or missing data and contact the Responsible attorneys for clarification.

Your persistence and continued efforts are essential to the successful operation of the Docket. If you have any questions about the procedures or wish to make suggestions to improve the procedures and usefulness of the system please get in touch with me, Sally Mansbach, or Bruce Rothrock.

cc: J. Bryan
S. Mansbach
B. Rothrock
G. Young
Computer Sciences Corporation

Procedures and Responsibilities for Updating and Maintaining the Enforcement Docket

An accurate and current Docket data base depends on the initial entry of cases and on the regular monthly review and case update by the Headquarters and Regional attorneys assigned to the case. It is particularly critical that the update and data entry schedule be adhered to at the end of each fiscal quarter. The steps in the process are:

(1) Prepare Case Data and Facility Data Forms for the initial entry of cases, either during the period when the case is under development or at the time the case is referred (Regional attorney)
(2) Enter all new cases (Regional analyst)
(3) Prepare monthly case updates (Regional & HQ attorneys)
(4) Enter monthly case updates (Regional & HQ analysts)
(5) Run reports to verify the overall accuracy of the Docket (number of new referrals, overall status of cases, major milestone dates, referral indicator, law/section) and distribute to Regional Counsel and Associate Enforcement Counsel for verification (Regional & HQ analysts)
(6) Verify accuracy of Docket and make corrections (Regional Counsel, Associate Enforcement Counsel)
(7) Enter corrections (Regional & HQ analysts)
(8) Run accountability reports and complete SPMS reporting instruction forms (HQ analysts, MOB)

Monthly updates (item 3) should be completed by the first of the month, verification (item 6) about the 9th, completion of SPMS reporting instructions (item 8) and to the Compliance Evaluation Branch on the 13th, to the Assistant Administrator on the 14th, and final SPMS reporting and to OMSE no later than the 15th of the month. This means that all corrections and data entry and updating (item 7) must be completed by the 10th to be included in the accountability report for the just concluded fiscal quarter.

The verification reports are a tool for use in determining if all cases have been accounted for and the events surrounding active or recently concluded cases have been entered in the DOCKET. Information relevant to quarterly accountability measures which is obtained after the monthly updates have been submitted to the Regional analyst can be entered on the verification reports and included in the final quarterly update (on the 10th).

1. Initial Entry of a Case: The Regional attorney assigned to develop the case is responsible for completing the Case Data Form and the Facility Data Form(s), and for providing this information to the Regional analyst for initial entry of the case. Attorneys should not expect that the analyst will complete these forms unless a procedure has been arranged with their analyst and the data is readily available in the litigation package. Such a procedure does not relieve the attorney of the responsibility for the accuracy and completeness of the data.

The attorney may enter a case in the Docket any time after the case is "opened," but no later than when the case is initiated. The "Date Opened" is an arbitrary date but is sometime in the period between when a decision is made to take judicial action (an attorney is assigned to begin case development) and when the case is "initiated." The "Date Initiated" is the date that the Regional Administrator signs and dates the referral letter. This means that the referral package is ready to be placed in the mail. To be counted as initiated in a fiscal quarter, a case must be in the mail and entered in the Docket by the Regional data analyst by the last day of the quarter.

2. Major Milestone Event Dates: Major milestone event dates are critical in tracking cases, accountability measures, and in most analyses that are performed. The timely and accurate entry of these dates is crucial for the overall integrity of the system. Significant problems have arisen due to very late or inaccurate entry of dates.

We regularly make calculations of the number of cases pending(e.g., at EPA HQ, at court) on a particular day(e.g., 10/01/86). Each time that a major milesone date is entered, the Overall Status (present/pending location) of the case changes. Inaccurate and late entries can seriously distort data used for accountability and budgeting.

Headquarters and Regional attorneys are responsible for the entry of dates as part of the monthly case update. More specifically the lead for entry of each event date is identified below:

Event/Milestone Date	Primary/Lead Responsibility
Violation Determined	Regional Attorney
Technical Documents Received by ORC	Regional Attorney
Opened	Regional Attorney
Initiated	Regional Attorney
Received at EPA HQ	HQ Attorney
Check List Completed	HQ Attorney

Referred to DOJ	HQ Attorney or Regional Attorney for Direct Referral to DOJ
Referred to US Atty	HQ Attorney & Regional Attorney
Filed	HQ Attorney & Regional Attorney
Concluded	HQ Attorney & Regional Attorney
Returned to Region	HQ Attorney
Rereferred	Regional Attorney

3. Overall Status: The Overall Status of the case coincides with the most recent major milestone and indicates the present location of the case. The HQ and Regional analysts are responsible for verifying that the overall status and latest milestone agree.

Overall Status	Milestone/Event	Meaning
O	Opened	Case opened, under development in Region
1	Initiated	Initiated, Under Review/pending at EPA HQ
2	To DOJ	Referred to DOJ; under review/pending at DOJ
3	To US Atty	Referred to US Atty for filing
4	Filed in Court	Filed; pending in court
5	Concluded	Concluded; judicial aspects completed
S	Returned to Region	Returned to Region for further development and subsequent rereferral
1	Rereferred	Rereferred by Region, pending at EPA HQ (a case that is rereferred is not counted as a new referral; the case is counted once at the time of the original referral)

4. Headquarters Review Time: The determination of the headquarters review time is applied to all cases initiated, regardless of whether the case is referred to DOJ, declined and concluded, or returned to the Region for further development. The starting point is the "Date Received at EPA HQ" which is defined as the date that the Associate Enforcement Counsel receives the litigation package. The Headquarters attorney assigned to the case is responsible for providing these dates as part of his or her monthly update. If the "Date Received at EPA HQ" is not provided, the default is "Date Initiated."

Cases can be divided into four categories and the dates used in computing the review time is defined for each.

a. Referral by Region to EPA Headquarters:

- Date Received at EPA HQ(or Date Initiated)
- Date Referred to DOJ

b. Direct Referral by Region to DOJ:

- Date Received at EPA HQ(or Date Initiated)
- Date Check List Completed

Note: Date Check List Completed will be entered in the DOCKET as a miscellaneous event and will appear on the Case Status/Update Report once entered. The event code is: CHKLST

c. Referral by Region to EPA HQ, Returned to Region for Further development:

- Date Received at EPA HQ(or Date Initiated)
- Date Returned to Region

d. Referral by Region to EPA HQ, Declined by EPA HQ or Withdrawn by Region:

- Date Received at EPA HQ(or Date Initiated)
- Date Concluded (Declined/Withdrawn)

5. Referral Indicator: The "Referral Indicator" designates the office(Region or EPA HQ) developing and originating the case and where the case is referred(EPA HQ or direct referral to DOJ).

RH - Region to EPA HQ

RD - Region direct to DOJ

A case that is referred by the Region directly to DOJ has the same date for "Initiated" and "To DOJ". Many cases that have a Referral Indicator of "RH" have the same date for "Initiated" and "To DOJ," suggesting that the case was really referred directly to DOJ and should have a "Referral Indicator" of RD.

The Regional Attorney and the Regional Data Analyst are are responsible for entering the correct Referral Indicator at the time the case is initiated. Check that all direct referrals are properly designated.

6. Concluded Cases: At the time a case is concluded the Regional and Headquarters attorneys are responsible for entering three data items as part of their monthly update:

   a. Date Concluded
   b. Result - how the case was concluded
   c. Assessed/Adjusted Penalty - for cases settled by consent decree or litigated

   This information should be provided as soon as possible after the case is concluded. In the past, delays in entering these items, for instance "Date Concluded," have altered the number of active cases on a particular date as previously reported in OECM's SPMS quarterly accountablility measures.

7. Headquarters Division: Some values for Headquarters Division do not match the Law/Section values, e.g., HQDV = PES, and LAW/SECTION = RCRA 7003, CERCLA 106. The Regional Attorney initiating the case is responsible for designating on the Case Data Form the appropriate Headquarters Division that will be reviewing the case.

8. Law/Section: The Law(s) and Section(s) are the ones violated and cited in the litigation report and complaint, the most significant entered first. Do not use the section authorizing enforcement, e.g., CAA, §113. A Section must be entered for each Law. If more than one section of a particular law is violate and cited in the litigation report, then each are entered as separate combinations.

   EXAMPLES:

CERCLA	106
CERCLA	107
RCRA	3008
RCRA	7003

   In the DOCKET we use the section designation from the published statute; do not use the one from the U.S. CODE.

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

#61

APR 8 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Enforcement Docket Maintenance

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

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

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

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

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

(3) Headquarters will not amend regional data entry;

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

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

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

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

My thanks for your cooperation.

Attachments

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

I. INTRODUCTION

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

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

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

II. DEFINITION OF A CASE

A. DOCKET Design and Assigning a Case Number.

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

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

B. Amendments to Ongoing Cases.

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

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

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

III. INITIAL CASE ENTRY

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

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

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

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

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

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

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

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

- Significant national or precedential legal or factual issues.

- Previous enforcement actions (date, type).

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

- Other significant aspects.

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

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

IV. CASE STATUS REVIEW PROCEDURES

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

The Lead EPA Attorney should pay particular attention to the

following areas:

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

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

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

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

V. QUALITY ASSURANCE

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

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

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

Headquarters staff.

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

ENFORCEMENT CASE DATA FORM

APPENDIX A

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

* CASE NAME: _____

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

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

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

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

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

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

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

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

* STATE: _____

VIOLATION TYPE: _____ POLLUTANT: _____

DATE OPENED: ___/___/___

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

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

DATE VIOLATION DETERMINED: ___/___/___

DATE DOCUMENTS RECEIVED BY ORC:____/____/____

PROPOSED PENALTY: _____

* Required fields - must be filled out for case entry

Appendix B

FACILITY DATA FORM

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

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

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

* FACILITY NAME: _____

* STREET ADDRESS: _____

* CITY: _____ * STATE_____ ZIP: _____

*TYPE OWNERSHIP: _____

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

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

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

PARENT COMPANY: _____

NPDES PERMIT NO. _____

SUPERFUND SITE: _____ (Y or N)

LATITUDE: _____ _____ _____

LONGITUDE: _____ _____ _____

APPENDIX C

CASE SUMMARY CONTENT AND FORMAT

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

- EXAMPLE -

CASE SUMMARY:

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

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

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

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

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

APPENDIX D

CASE STATUS COMMENTS

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

- EXAMPLE -

HEADQUARTERS CASE STATUS:

REGIONAL CASE STATUS:

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

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

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

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

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

CIVIL JUDICIAL ENFORCEMENT DOCKET
DATA ENTRY MAINTENANCE VERIFICATION
RESPONSIBILITIES AND PROCEDURES

APPENDIX E
03/11/88

ACTIVITY	WHO	WHAT	When	HOW
Open a Case	Regional Attorney assigned to Case development or Lead EPA Atty	Completes: Case Data Form, Facility Data Form for each violating Fac., Case Summary. Case is a matter which is filed, settled or litigated separately from any other Case.	Optional; When case is opened or any time up to but no later than when case is referred to HQ or directly to DOJ	Attorney completes forms and Case Summary. All items marked with '*' must be completed. Gives to Regional data analyst.
Initial Case Entry	Regional Data Analyst	Assign Case Number: Enter data from Case Data and Facility Data Forms, Case Summary	At time Regional Attorney Completes Forms.	On-line from Case Data and Facility Data Forms, Case Summary
Case Review and Case Update of all Active Cases	a. Lead EPA Atty	Maj. Milestones/Misc. Events, Dates, Staff, Status Comments and Signficant Case events	Monthly, Completed and given to Regional Analyst by 1st work day of each month	Review & edit as appropriate Case Update Report (using clear notations in bright colored ink)
	b HQ Attorney	HQ data fields (e.g. checklat complete, HQ Comments if appropriate)	Monthly	Case Update Report, as above, delivered by HQ data analyst
Data Entry, Data Base Update	a. Reg. Analyst	Case Update Report as reviewed and annotated by Lead Attorney	Monthly, Beginning the 1st of the month, completed by the 5th work day. Run new Update Reports and distribute by 8th work day.	On-line, directly from Case Update provided by Regional Attorney. Update all active cases even if no change made or no update received.
	b. HQ Analyst	As appropriate		
Case/Data Verification	HQ Attorney	Major milestone Dates, Overall Status (see 3b), other Case Level Data; Regular Status Comment Update [redacted] Lead Attorney	Monthly for FY'88 quarterly thereafter	Scan Case Update Report provided by HQ Analyst. Any obvious errors or omissions are brought to t[redacted]ntion attention of Ass[redacted]and then Regional Counsel for Lead EPA Atty.

CIVIL JUDICIAL ENFORCEMENT DOCKET
DATA ENTRY MAINTENANCE VERIFICATION
RESPONSIBILITIES AND PROCEDURES

ACTIVITY	WHO	WHAT	WHEN	HOW
Tracking Settlements and Litigation Events	Lead EPA Atty	Significant events related to settlement negotiation or Litigation as required by RC	Monthly	Part of monthly review of Case Update Report.
	HQ Attorney	HQ Events, as appropriate	Monthly	monthly case review.
Concluding a Case (CD/Judgement Entered	Lead EPA Atty	Enter data about settlement/Judgement Results, Date, Penalty	Monthly	Part of monthly review of Case Update Report, or as events occur.
Closing a Case Final Compliance, Case Withdrawn, Declined, Dismissed or Combined	Lead EPA Atty	Enter Data for Closed Case - when final compliance achieved or case is withdrawn, declined or dismissed	Monthly	Part of monthly review of Case Update Report, or as events occur.
Case Returned to Region	Lead EPA Atty	Enter "Date Returned"	Monthly	Part of Monthly Update, or as returns occur by proper notification of data analyst.
Case Rereferred	Lead EPA Atty	Enter "Date Re-referral"	Monthly	Part of Monthly Update
Monitor Case Returned to Region	Lead EPA Atty	Determine cases returned and pending > 60 days. Determine action to be taken: Refer or close. Update Docket	Monthly	Analyst produces report of all cases returned to Region and pending >60 days for Lead EPA Attorney review
	HQ Attorney	Assess need to discuss cases with Region	Quarterly	HQ analyst prepares quarterly report on cases rtd to Region >60 days
Amending a Case	Lead EPA Atty	Add amendments to existing case when matter is part of on-going case and will not be filed as a separate matter for litigation	When matter is referred	Monthly Case Update, or on amendment data form, to Regional Analyst, when amendment occurs
Tracking (I)		Monitor Compliance with		

VIOLATION TABLE

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

POLLUTANT TABLE

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

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

RESULT TABLE

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

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

REFERRAL INDICATOR TABLE

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

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

I. INTRODUCTION

To effect compliance with the nation's environmental laws, the United States Environmental Protection Agency (EPA) has developed and maintained a vigorous judicial and administrative enforcement program. Cases instituted under the program must be resolved, either through settlement or decision by the appropriate authority, as rapidly as possible in order to maintain the integrity and credibility of the program, and to reduce the backlog of cases.

Traditionally, the Agency's enforcement cases have been settled through negotiations solely between representatives of the Government and the alleged violator. With a 95 percent success rate, this negotiation process has proved effective, and will continue to be used in most of the Agency's cases. Nevertheless, other means of reaching resolution, known collectively as alternative dispute resolution (ADR), have evolved. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental enforcement disputes. These ADR procedures hold the promise for resolution of some of EPA's enforcement cases more efficiently than, but just as effectively as, those used in traditional enforcement. Furthermore, ADR provisions can also be incorporated into judicial consent decrees and consent agreements ordered by administrative law judges to address future disputes.

EPA does not mean to indicate that by endorsing the use of ADR in its enforcement actions, it is backing away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for achieving environmental compliance. EPA intends to use the ADR process, where appropriate, to resolve enforcement actions with outcomes similar to those the Agency reaches through litigation and negotiation. Since ADR addresses only the process (and not the substance) of case resolution, its use will not necessarily lead to more lenient results for violators; rather, ADR should take EPA to its desired ends by more efficient means.

ADR is increasingly becoming accepted by many federal agencies, private citizens, and organizations as a method of handling disputes. The Administrative Conference of the United States has repeatedly called for federal agencies to make greater

use of ADR techniques, and has sponsored numerous studies to further their use by the federal government. The Attorney General of the United States has stated that it is the policy of the United States to use ADR in appropriate cases. By memorandum, dated February 2, 1987, the Administrator of EPA endorsed the concept in enforcement disputes, and urged senior Agency officials to nominate appropriate cases.

This guidance seeks to:

(1) Establish Policy - establish that it is EPA policy to utilize ADR in the resolution of appropriate civil enforcement cases.

(2) Describe Methods - describe some of the applicable types of ADR, and the characteristics of cases which might call for the use of ADR;

(3) Formulate Case Selection Procedures - formulate procedures for determining whether to use ADR in particular cases, and for selection and procurement of a "third-party neutral" (i.e., mediators, arbitrators, or others employed in the use of ADR);

(4) Establish Qualifications - establish qualifications for third-party neutrals; and

(5) Formulate Case Management Procedures - formulate procedures for management of cases in which some or all issues are submitted for ADR.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

ADR mechanisms which are potentially useful in environmental enforcement cases will primarily be mediation and nonbinding arbitration. Fact-finding and mini-trials may also be helpful in a number of cases. A general description of these mechanisms follows. (See also Section VIII, below, which describes in greater detail how each of these techniques works.) Many other forms of ADR exist, none of which are precluded by this guidance. Regardless of the technique employed, ADR can be used to resolve any or all of the issues presented by a case.

A. Mediation[1] is the facilitation of negotiations by a person not a party to the dispute (herein "third-party neutral") who has no power to decide the issues, but whose function is to

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[1] For further information on the mediation role of Clean Sites Inc see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

TABLE OF CONTENTS

Guidance on the Use of Alternative Dispute Resolution (ADR) in EPA Enforcement Cases

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

United States Environmental Protection Agency

AUG 14 1987

MEMORANDUM

SUBJECT: Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions

TO: Assistant Administrators
Regional Administrators

I. Purpose

Attached is the final guidance on the use of alternative dispute resolution (ADR) techniques in enforcement actions. This guidance has been reviewed by EPA Headquarters and Regional offices, the Department of Justice, as well as by representatives of the regulated community. We have also sought the advice of leading ADR professionals, including many of the renowned participants at a recent Colloquium on ADR sponsored by the Administrative Conference of the United States.

The reaction to the draft guidance has been overwhelmingly favorable and helpful. In response to comments, the guidance more clearly distinguishes the uses of binding and non-binding techniques, emphasizes the need to protect the confidentiality of conversations before a neutral, and includes model agreements and procedures for the use of each ADR technique.

II. Use of ADR

As the guidance explains, ADR involves the use of third-party neutrals to aid in the resolution of disputes through arbitration, mediation, mini-trials and fact-finding. ADR is being used increasingly to resolve private commercial disputes. EPA is likewise applying forms of ADR in various contexts: negotiated rulemaking, RCRA citing, and Superfund remedial actions. ADR holds the promise of lowering the transaction costs to both the Agency and the regulated community of resolving applicable enforcement disputes.

I view ADR as a new, innovative and potentially more effective way to accomplish the results we have sought for years using conventional enforcement techniques. We retain our strict adherence to the principle that the regulated community must comply with the environmental laws. The following tasks will be undertaken to enable the Agency to utilize ADR to more effectively and efficiently foster compliance:

Training. Some within the Agency may fear that using less adversarial techniques to resolve enforcement actions implies that the agency will be seeking less rigorous settlements. This is not the case. We must train our own people in what ADR is, what it is not, and how it can help us meet our own compliance objectives. We plan to accomplish this by making presentations at national program and regional counsel meetings, and by consulting on particular cases.

Outreach. We must also make an affirmative effort to demonstrate to the regulated community that EPA is receptive to suggestions from them about using ADR in a given case. Nominating a case for ADR need not be viewed as a sign of weakness in either party. After we have gained experience, we plan to conduct a national conference to broaden willingness to apply ADR in the enforcement context.

Pilot Cases. Ultimately, the value of ADR must be proven by its successful application in a few pilot cases. ADR is being use to resolve an important municipal water supply problem involving the city of Sheridan, Wyoming. Two recent TSCA settlements also utilized ADR to resolve disputes which may arise in conducting environmental audits required under the consent agreements. Beyond these, however, we need to explore the applicability of ADR to additional cases.

III. Action and Follow-Up

I challenge each of you to help in our efforts to apply ADR to the enforcement process. I ask the Assistant Administrators to include criteria for using ADR in future program guidance, and to include discussions of ADR at upcoming national meetings. I ask the Regional Administrators to review the enforcement actions now under development and those cases which have already been filed to find cases which could be resolved by ADR. I expect each Region to nominate at least one case for ADR this fiscal year. Cases should be identified and nominated using the procedure set forth in the guidance by September 4, 1987

Lee M. Thomas

Attachment

cc: Regional Enforcement Contacts
Regional Counsels

assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and serves as an assessor - but not a judge - of the positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem. Nevertheless, as in traditional negotiation, the parties retain the power to resolve the issues through an informal, voluntary process, in order to reach a mutually acceptable agreement. Having agreed to a mediated settlement, parties can then make the results binding.

B. Arbitration involves the use of a person -- not a party to the dispute -- to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, parties can agree to relax rules of evidence and utilize other time-saving devices. For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues.

C. Fact-finding entails the investigation of specified issues by a neutral with subject matter expertise, and selected by the parties to the dispute. The process may be binding or nonbinding, but if the parties agree, the material presented by the fact-finder may be admissible as an established fact in a subsequent judicial or administrative hearing, or determinative of the issues presented. As an essentially investigatory process, fact-finding employs informal procedures. Because this ADR mechanism seeks to narrow factual or technical issues in dispute, fact-finding usually results in a report, testimony, or established fact which may be admitted as evidence, or in a binding or advisory opinion.

D. Mini-trials permit the parties to present their case, or an agreed upon portion of it, to principals who have authority to settle the dispute (e.g., vice-president of a company and a senior EPA official) and, in some cases as agreed by the parties, to a neutral third-party advisor. Limited discovery may precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals reinstitute negotiations, possibly with the aid of the neutral as mediator. The principals are the decisionmakers while the third-party neutral, who usually has specialized subject matter expertise in trial procedures and evidence, acts as an advisor on potential rulings on issues if the dispute were to proceed to trial. This ADR mechanism is useful in narrowing factual issues

or mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their cases.

III. CHARACTERISTICS OF ENFORCEMENT CASES SUITABLE FOR ADR

This section suggests characteristics of cases which may be most suitable for use of ADR. These characteristics are necessarily broad, as ADR may theoretically be used in any type of dispute. Enforcement personnel can use these characteristics to make a preliminary assessment of whether ADR should be considered for use in a particular case, including a discrete portion or issue in a case.

ADR procedures may be introduced into a case at any point in its development or while pending in court. However, it is preferable that ADR be considered as early as possible in the progress of the case to avoid the polarizing effect which frequently results from long and intense negotiations or the filing of a lawsuit. ADR should, therefore, be considered prior to referral of a case to DOJ. Indeed, the threat of a referral may be used as an incentive to convince the other parties to utilize an appropriate ADR technique.

Notwithstanding the preference for consideration and use of ADR at an early stage in the progress of a case, there are occasions when ADR should be considered after a case has been referred and filed in court. This is particularly true when the parties have reached an apparent impasse in negotiations, or the court does not appear to be willing to expeditiously move the case to conclusion through establishing discovery deadlines, conducting motions hearings or scheduling trial dates. In such cases, introduction of a mediator into the case, or submission of some contested facts to an arbitrator may help to break the impasse. Cases which have been filed and pending in court for a number of years without significant movement toward resolution should be scrutinized for prospective use of ADR.

In addition to those circumstances, the complexity of legal and technical issues in environmental cases have resulted in a recent trend of courts to appoint special masters with increasing frequency. Those masters greatly increase the cost of the litigation and, while they may speed the progress of the case, the parties have little direct control over the selection or authority of the masters. The government should give careful consideration to anticipating a court's desire to refer complex issues to a master by proposing that the parties themselves select a mediator to assist in negotiations or an arbitrator to determine some factual issues.

The following characteristics of cases which may be candidates for use of some form of ADR are not intended to be exhaustive. Agency personnel must rely upon their own judgment and experience to evaluate their cases for potential applications of ADR. In all instances where the other parties demonstrate their willingness to use ADR, EPA should consider its use. Sample characteristics of cases for ADR[2]:

A. Impasse or Potential for Impasse

When the resolution of a case is prevented through impasse, EPA is prevented from carrying out its mission to protect and enhance the environment, and is required to continue to commit resources to the case which could otherwise be utilized to address other problems. It is highly desirable to anticipate and avoid, if possible, the occurrence of an impasse.

Impasse, or the possibility for impasse, is commonly created by the following conditions, among others:

(1) Personality conflicts or poor communication among negotiators;

(2) Multiple parties with conflicting interests;

(3) Difficult technical issues which may benefit from independent analysis;

(4) Apparent unwillingness of a court to rule on matters which would advance the case toward resolution; or

(5) High visibility concerns making it difficult for the parties to settle such as cases involving particularly sensitive environmental concerns such as national parks or wild and scenic rivers, issues of national significance, or significant adverse employment implications.

In such cases, the involvement of a neutral to structure, stimulate and focus negotiations and, if necessary, to serve as an intermediary between personally conflicting negotiators should be considered as early as possible.

B. Resource Considerations

All enforcement cases are important in that all have, or should have, some deterrent effect upon the violator and other members of the regulated community who hear of the case. It is, therefore, important that EPA's cases be supported with the

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2 ADR is not considered appropriate in cases where the Agency is contemplating criminal action.

level of resources necessary to achieve the desired result. Nevertheless, because of the size of EPA's enforcement effort, it is recognized that resource efficiencies must be achieved whenever possible to enable EPA to address as many violations as possible.

There are many cases in which utilizing some form of ADR would achieve resource efficiencies for EPA. Generally, those cases contain the following characteristics:

(1) Those brought in a program area with which EPA has had considerable experience, and in which the procedures, case law and remedies are relatively well-settled and routine; or

(2) Those having a large number of parties or issues where ADR can be a valuable case management tool.

C. Remedies Affecting Parties not Subject to an Enforcement Action

Sometimes, the resolution of an underlying environmental problem would benefit from the involvement of persons, organizations or entities not a party to an impending enforcement action. This is becoming more common as EPA and the Congress place greater emphasis on public participation in major decisions affecting remedies in enforcement actions. Such cases might include those in which:

(1) A state or local governmental unit have expressed an interest, but are not a party;

(2) A citizens group has expressed, or is likely to express an interest; or

(3) The remedy is likely to affect not only the violator, but the community in which the violator is located as well (e.g., those cases in which the contamination is wide-spread, leading to a portion of the remedy being conducted off-site).

In such cases, EPA should consider the use of a neutral very early in the enforcement process in order to establish communication with those interested persons who are not parties to the action, but whose understanding and acceptance of the remedy will be important to an expeditious resolution of the case.

IV. PROCEDURES FOR APPROVAL OF CASES FOR ADR

This section describes procedures for the nomination of cases for ADR. These procedures are designed to eliminate confusic regarding the selection of cases for ADR by: (1) integrating the

selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ to determine whether to use ADR in particular actions.

A. Decisionmakers

To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult on this decision with his/her corresponding headquarters compliance division director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be the Regional Counsel in consultation with the appropriate regional program division director. If the two Regional authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.

B. Case Selection Procedures

Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR.[3] Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. (See Section III of this document which describes the characteristics for selection of cases for ADR.) Attachments A and B are sample case nomination communications. Attachment A pertains to nonbinding ADR, and Attachment B pertains to binding ADR.

Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or other defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use

[3] Nomination papers should always be deemed attorney work product so that they are discovery free.

ADR, and the potential benefits to all parties from its use. The PRP(s) or other defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter. Further, for cases which are referrable, the defendant(s) should be advised that EPA will not hesitate to refer the matter to DOJ for prosecution.

1. Nonbinding ADR

For mediation, mini-trials, nonbinding arbitration, and other ADR mechanisms involving use of a third-party neutral as a nonbinding decisionmaker, regions should notify the appropriate AEC and, if the case is referred, DOJ of: (1) its intent to use ADR in a particular case, and (2) the opportunity to consult with the Region on its decision. Such notification should be in writing and by telephone call. The AEC will consult with the appropriate headquarters program division director. The Region may presume that the AEC and DOJ agree with the selection of the case for ADR unless the AEC or DOJ object within fifteen (15) calendar days of receipt of the nomination of the case. If either the AEC or DOJ object, however, the Region should not proceed to use ADR in the case until consensus is reached.

2. Binding ADR

For binding arbitration and fact-finding, and other ADR mechanisms involving the use of third-party neutrals as binding decisionmakers, the appropriate AEC must concur in the nomination of the case by the Region. In addition, DOJ must also concur in the use of binding ADR in referred cases. Finally, in non-CERCLA cases which may involve compromise of claims in excess of $20,000 or where the neutral's decision will be embodied in a court order, DOJ must also concur. Without the concurrence of headquarters and DOJ under these circumstances, the Region may not proceed with ADR. OECM and DOJ should attempt to concur in the nomination within fifteen (15) days of receipt of the nomination.

Under the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, §122(h)(2)(1986), EPA may enter into binding arbitration for cost recovery claims under Section 107 of CERCLA, provided the claims are not in excess of $500,000, exclusive of interest. Until regulations are promulgated under this section, EPA is precluded from entering into binding arbitration in cost recovery actions. Accordingly, Attachment C is not yet appropriate for use in cases brought under this section. It is, however, available for use in nonbinding arbitration.

V. SELECTION OF A THIRD-PARTY NEUTRAL

A. Procedures for Selection

Both the Government and all defendants must agree on the need

for a neutral in order to proceed with ADR. In some situations (e.g., in a Superfund case), however, the parties may proceed with ADR with consensus of only some of the parties depending on the issue and the parties. Once agreed, the method for selecting the neutral and the actual selection in both Superfund and other cases will be determined by all parties involved with the exception of cases governed by §107 of CERCLA. To help narrow the search for a third-party neutral, it is useful, although not required, for the parties to agree preliminarily on one or more ADR mechanisms. OECM is available to help at this point in the process, including the procurement of in-house or outside persons to aid the parties in selecting an appropriate ADR mechanism.

In Section VIII below, we have indicated some of the situations where each ADR mechanism may be most appropriate. Of course, the parties are free to employ whichever technique they deem appropriate for the case. Because the ADR mechanisms are flexible, they are adaptable to meet the needs and desires of the parties.

The parties can select a third-party neutral in many ways. Each party may offer names of proposed neutrals until all parties agree on one person or organization. Alternatively, each party may propose a list of candidates, and allow the other parties to strike unacceptable names from the list until agreement is reached. For additional methods, see Attachments C, D, and E. Regardless of how the parties decide to proceed, the Government may obtain names of qualified neutrals from the Chief, Legal Enforcement Policy Branch (LEPB) (FTS 475-8777, LE-130A, E-Mail box EPA 2261), by written or telephone request. With the help of the Administrative Conference of the U.S. and the Federal Mediation and Conciliation Service, OECM is working to establish a national list of candidates from which the case team may select neutrals. In selecting neutrals, however, the case team is not limited to such a list.

It is important to apply the qualifications enumerated below in section V.B. in evaluating the appropriateness of a proposed third-party neutral for each case. Only the case team can decide whether a particular neutral is acceptable in its case. The qualifications described below provide guidance in this area.

At any point in the process of selecting an ADR mechanism or third-party neutral, the case team may consult with the Chief, LEPB, for guidance.

B. Qualifications for Third-Party Neutrals

The following qualifications are to be applied in the selection of all third-party neutrals who may be considered for service in ADR procedures to which EPA is a party. While a

third-party neutral should meet as many of the qualifications as possible, it may be difficult to identify candidates who possess all the qualifications for selection of a third-party neutral. Failure to meet one or more of these qualifications should not necessarily preclude a neutral who all the parties agree would be satisfactory to serve in a particular case. The qualifications are, therefore, intended only as guidance rather than as prerequisites to the use of ADR. Further, one should apply a greater degree of flexibility regarding the qualifications of neutrals involved in nonbinding activities such as mediation, and a stricter adherence to the qualifications for neutrals making binding decisions such as arbitrators.

1. Qualifications for Individuals

a. Demonstrated Experience. The candidate should have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, judicial officer or judge, or formal training as a neutral may be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable.

b. Independence. The candidate must disclose any interest or relationship which may give rise to bias or the appearance of bias toward or against any party. These interests or relationships include:

(a) past, present or prospective positions with or financial interests in any of the parties;

(b) any existing or past financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;

(c) previous or current involvement in the specific dispute;

(d) past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(e) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the candidate from serving as a neutral, particularly if the candidate has demonstrated sufficient independence by reputation and performance. The neutrals with

the most experience are most likely to have past or current relationships with some parties to the dispute, including the Government. Nevertheless, the candidate must disclose all interests, and the parties should then determine whether the interests create actual or apparent bias.

c. Subject Matter Expertise. The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner as a third-party neutral. Depending on the case, it may also be helpful if the candidate has specific expertise in the issues under consideration.

d. Single Role. The candidate should not be serving in any other capacity in the enforcement process for that particular case that would create actual or apparent bias. The case team should consider any prior involvement in the dispute which may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed on behalf of certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between EPA and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the candidate in that case. The candidate may continue to serve in other capacities by, for example, relaying information among parties and presenting offers on behalf of particular parties.

2. Qualifications for Corporations and Other Organizations.[4] Corporations or other entities or organizations which propose to act as third-party neutrals, through their officers, employees or other agents, in disputes involving EPA, must:

(a) like unaffiliated individuals, make the disclosures listed above; and

(b) submit to the parties a list of all persons who, on behalf of the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

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[4] For further guidance regarding Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

In selecting a third-party neutral to resolve or aid in the resolution of a dispute to which EPA is a party, Agency personnel should remain at all times aware that the Agency must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that the Agency is performing its mission. Care should be taken in the application of these qualifications to avoid the selection of third-party neutrals whose involvement in the resolution of the case might undermine the integrity of that resolution and the enforcement efforts of the Agency.

VII. OTHER ISSUES:

A. Memorialization of Agreements

Just as it would in cases where ADR has not been used, the case team should memorialize agreements reached through ADR in orders and settlement documents and obtain DOJ and headquarters approval (as appropriate) of the terms of any agreement reached through ADR.

B. Fees For Third-Party Neutrals

The Government's share of ADR costs will be paid by Headquarters. Contact LEPB to initiate payment mechanisms. Because such mechanisms require lead time, contact with LEPB should be made as early as possible after approval of a case for ADR.

It is EPA policy that PRPs and defendants bear a share of these costs equal to EPA except in unusual circumstances. This policy ensures that these parties "buy in" to the process. It is important that the exact financial terms with these parties be settled and set forth in writing before the initiation of ADR in the case.

C. Confidentiality

Unless otherwise discoverable, records and communications arising from ADR shall be confidential and cannot be used in litigation or disclosed to the opposing party without permission. This policy does not include issues where the Agency is required to make decisions on the basis of an administrative record such as the selection of a remedy in CERCLA cases. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.

Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which

renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability. Noting the underlying policy behind the rule, courts have construed the rule to preclude admission of evidence regarding the defendant's settlement of similar cases.[5]

Exemption protection under the Freedom of Information Act (FOIA), 15 U.S.C. §552, could also accommodate the interest in confidentiality. While some courts have failed to recognize the "settlement negotiations privilege,"[6] other courts have recognized the privilege.[7]

In addition to these legal authorities and policy arguments, confidentiality can be ensured by professional ethical codes. Recognizing that promoting candor on the parties' part and impartiality on the neutral's part is critical to the success of ADR, confidentiality provisions are incorporated into codes of conduct as well as written ADR agreements (See Attachment D). The attachment provides liquidated damages where a neutral reveals confidential information except under court order.

Furthermore, confidentiality can be effected by court order, if ADR is court supervised. Finally, as many states have done

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5 See Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727 (N.D. Ill. 1980), and to bar discovery, see Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981). Courts have also construed labor laws to favor mediation or arbitration and have therefore prevented third-party neutrals from being compelled to testify. See, e.g., N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (upholding N.L.R.B.'s revocation of subpoena issued to mediator to avoid breach of impartiality).

6 See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

7 See Bottaro v. Hatton Associates, 96 F.R.D. 158-60 (E.D.N.Y 1982) (noting "strong public policy of favoring settlements" and public interest in "insulating the bargaining table from unnecessary intrusions"). In interpreting Exemption 5 of the FOIA, the Supreme Court asserted that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. ...We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." United States v. Weber Aircraft, 104 S.Ct. 1488, 1494 (1984).

statutorily, EPA is considering the promulgation of regulations which further ensure the confidentiality of ADR proceedings.

D. Relationship of ADR to Timely and Appropriate and Significant Noncompliance Requirements

The decision to use ADR would have no particular impact under the "timely and appropriate" (T&A) criteria in a case where there is already an administrative order or a civil referral since the "timely and appropriate" criteria would have been met by the initiation of the formal enforcement action. In the case of a civil referral, the 60-day period by which DOJ is to review and file an action may be extended if ADR is used during this time.

The decision to use ADR to resolve a violation prior to the initiation of a formal enforcement action, however, would be affected by applicable "timely and appropriate" criteria (e.g., if the violation fell under a program's Significant Noncompliance (SNC) definition, the specific timeframes in which compliance must be achieved or a formal enforcement action taken would apply). The use of ADR would not exempt applicable "T&A" requirements and the ADR process would normally have to proceed to resolve the case or "escalate" the enforcement response. However, since, "T&A" is not an immutable deadline, that ADR is being used for a particular violation would be of central significance to any program management review of that case (e.g., the Deputy Administrator's discussion of "timely and appropriate" enforcement during a regional review would identify the cases in which ADR is being used.)

VIII. PROCEDURES FOR MANAGEMENT OF ADR CASES

This section elaborates on the various ADR techniques: How they work, some problems that may be encountered in their use, and their relationship to negotiation and litigation. For each ADR technique, we have provided, as an attachment to this guidance, an example of procedures reflecting its use. These attachments are for illustrative purposes only, and do not represent required procedures. The specific provisions of the attachments should be adapted to the circumstances of the case or eliminated if not applicable.

A. Arbitration

1. Scope and Nature

As stated in Section II, above, arbitration involves the selection by the parties of a neutral decisionmaker to hear selected issues and render an opinion. Depending on the parties' agreement, the arbitrator's decision may or may not be binding.

For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues. Included as Attachment C are draft generic arbitration procedures for formal arbitration. To conduct less formal proceedings, the parties may modify the procedures.

2. Use

Arbitration is most appropriate in resolving routine cases that do not merit the resources required to generate and process a civil judicial referral. It may aid in resolving technical disputes that are usually submitted to the courts or administrative law judges (ALJs), which disputes require subject-matter expertise which federal district court judges and ALJs may lack.[8]

B. Mediation

1. Scope and Nature

Mediation, an informal process, is entered into voluntarily by the parties to a dispute and in no way binds them beyond their own agreement. More than the other ADR processes, mediation is best viewed as an extension of the direct negotiation process begun by the parties. As in direct negotiation, the parties continue to control the substance of discussions and any agreement reached. In mediation, however, the mediator directs and structures the course of discussions.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Included as Attachment D are generic mediation protocols for use and adaptation in all EPA mediations. Most of the items covered in the attachment would be useful as ground rules for most EPA enforcement negotiations. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role; they may even suggest possible settlement alternatives to resolve deadlocks between the parties. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

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[8] Arbitration is specifically authorized under Section 107 of CERCLA for cost recovery claims not in excess of $500,000, exclusive of interest.

There are no external time limits on mediation other than those imposed by the parties or by external pressures from the courts, the community or public interest groups. In all cases, the Government should insist on a time limit for the mediation to ensure that the defendants do not use mediation as a stalling device. The Government should also insist on establishing points in the process to evaluate progress of the mediation. As the parties approach settlement terms through mediation, final authority for decisionmaking remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers are applicable.

2. Use of Mediation

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court (e.g., a state which can help with the funding for a municipality's violation). Mediation is the most flexible ADR mechanism, and should be the most widely used in Agency disputes.

3. Withdrawal from Mediation

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

4. Relation to Litigation

In the ordinary case, prior to referral or the filing of an administrative complaint, the time limits for mediation could be the same as those for negotiation. In contrast to normal negotiations, however, the parties may agree that during the time period specified for mediation, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended. In filed civil judicial cases, where the court imposes deadlines, it will be necessary to apprise the

court of the parties' activities and to build ADR into the court's timetable. For agreements relating ADR activities to ongoing litigation, see paragraph 17 of Attachment E.

C. Mini-Trial

1. Scope and Nature

Like other ADR techniques, the mini-trial is also voluntary and nonbinding on the parties. In the mini-trial, authority for resolution of one or more issues rests with senior managers who, representing each party in the dispute, act as decisionmakers. In some cases a neutral referee is appointed to supervise the proceedings and assist the decisionmakers in resolving an issue by providing the parties with a more realistic view of their case. In addition, the neutral's presence can enhance public acceptability of a resolution by effectively balancing the interests of the Government and the defendant.

The scope and format of the mini-trial are determined solely by the parties to the dispute and are outlined in an initiating agreement. Because the agreement will govern the proceedings, the parties should carefully consider and define issues in advance of the mini-trial. Points that could be covered include the option of and role for a neutral, issues to be considered, and procedural matters such as order and schedule of proceedings and time limits. Attachment E is a sample mini-trial agreement.

The mini-trial proceeds before a panel of decisionmakers representing the parties and, in some cases, a neutral referee. Preferably, the decisionmakers will not have participated directly in the case prior to the mini-trial. The defendant's representative should be a principal or executive of the entity with decisionmaking authority. EPA's representative should be a senior Agency official comparable in authority to the defendant's representative. In some cases, each side may want to use a panel consisting of several decisionmakers as its representatives. The neutral referee is selected by both parties and should have expertise in the issues under consideration.

At the mini-trial, counsel for each side presents his or her strongest and most persuasive case to the decisionmakers in an informal, trial-like proceeding. In light of this structure, strict rules of evidence do not apply, and the format for the presentation is unrestricted. Each decisionmaker is then afforded the unique opportunity to proceed, as agreed, with open and direct questioning of the other side. This information exchange allows the decisionmakers to adjust their perspectives and positions in light of a preview of the case. Following this phase of the mini-trial, the decisionmakers meet, with or without counsel or the neutral referee, to resolve the issue(s) or case presented, through negotiation.

2. Role of the Neutral

The neutral referee may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decision-makers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

3. Use

As with mediation, prior to referral or the filing of an administrative complaint, the time limits for a mini-trial would be the same as those for negotiation. The parties usually agree, however, that during the time period specified for a mini-trial, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended except as otherwise agreed. In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four kinds of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;

2. Where significant policy issues exist which would benefit from a face-to-face presentation to decisionmakers (without use of a neutral);

3. Where the issues are technical, and the decisionmakers and neutral referee have subject-matter expertise; or

4. Where the imprimatur of a neutral's expertise would aid in the resolution of the case.

D. Fact-finding

1. Scope and Nature

Binding or nonbinding fact-finding may be adopted voluntarily by parties to a dispute, or imposed by a court. It is most appropriate for issues involving technical or factual disputes. The primary purpose of this process is to reduce or eliminate conflict over facts at issue in a case. The fact-finder's role is to act as an independent investigator, within the scope of the authority delegated by the parties. The findings may be used in reaching settlement, as "facts" by a judge or ALJ in litigation,

or as binding determinations. Like other ADR processes involving a neutral, a resolution based on a fact-finder's report will have greater credibility with the public.

The neutral's role in fact-finding is clearly defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report. Attachment F is a sample fact-finding agreement.

The fact-finder issues a formal report of findings, and recommendations, if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

2. Relation to Litigation

Decisions regarding pursuit of litigation when fact-finding is instituted are contingent upon the circumstances of the case and the issues to be referred to the fact-finder. If fact-finding is undertaken in connection with an ongoing settlement negotiation, in most cases it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. If fact-finding is part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or to suspend litigation while awaiting the fact-finder's report.

ATTACHMENT A

MEMORANDUM

SUBJECT: Nomination of U.S. v. XYZ Co. for Non-binding Alternative for Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel
for Hazardous Waste Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum is to nominate U.S. v. XYZ Co. for alternative dispute resolution (ADR). The case is a CERCLA enforcement action involving multiple PRPs as well as a number of complex technical and legal issues. The RI/FS and the record of decision have both been completed. We anticipate that the PRPs are interested in settling this matter and, we believe, a trained mediator will greatly aid negotiations. The members of the litigation team concur in this judgment.

We understand that if you object within 15 days of the receipt of this letter, we will not proceed with ADR in this case without your approval. We do believe, however, that ADR is appropriate in this action. We look forward to working with your offices in this matter.

ATTACHMENT B

MEMORANDUM

SUBJECT: Nomination of United States v. ABC Co. for Binding Alternative Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Water Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum requests concurrence in the use of a binding fact-finding procedure in United States v. ABC Co. The case involves the following facts:

ABC Co. owns and operates a specialty chemical production and formulation facility. Wastewater streams come from a variety of production areas which change with product demand. Because of these diverse processes, the company's permit to discharge wastewater must be based on the best professional judgment of the permit writer as to the level of pollution control achievable.

The company was issued an NPDES permit in 1986. The permit authorizes four (4) outfalls and contains limits for both conventional and toxic organic pollutants. The effluent limitations of the permit incorporate the Best Available Technology requirements of the Clean Water Act (CWA).

EPA filed a civil lawsuit against the company for violating effluent limits of the 1986 permit. As part of the settlement of the action, the company was required to submit a compliance plan which would provide for modification of its existing equipment, including institution of efficient operation and maintenance procedures to obtain compliance with the new permit. The settlement agreement provides for Agency concurrence in the company's compliance plan.

The company submitted a compliance plan, designed by in-house engineers, which proposed to slightly upgrade their existing activated sludge treatment system. The company has claimed that this upgraded system provides for treatment adequate to meet the permit limits. EPA has refused to concur in the plan because EPA experts believe that additional treatment modifications to enhance pollutant removals are required to meet permit limits on a continuous basis. This enhancement, EPA believes, is possible with moderate additional capital expenditures.

A fact-finding panel, consisting of experts in utility, sanitation and chemical engineering, is needed to assess the adequacy of the treatment system improvements in the compliance plan in satisfying permit requirements. Resolution of this issue by binding, neutral fact-finding will obviate the expenditure of resources needed to litigate the issue.

We request your concurrence in the nomination of this case for fact-finding within fifteen (15) days. We look forward to hearing from you.

ATTACHMENT C

ARBITRATION PROCEDURES*

SUBPART A - GENERAL

1. Purpose

This document establishes and governs procedures for the arbitration of EPA disputes arising under [insert applicable statutory citations].

2. Scope and Applicability

The procedures enunciated in this document may be used to arbitrate claims or disputes of the EPA regarding [insert applicable statutory citations and limitations on scope, if any.]

SUBPART B - JURISDICTION OF ARBITRATOR, REFERRAL OF CLAIMS, AND ARBITRATOR SELECTION

1. Jurisdiction of Arbitrator

(a) In accordance with the procedures set forth in this document, the Arbitrator is authorized to arbitrate [insert applicable categories of claims or disputes.]

(b) The Arbitrator is authorized to resolve disputes and award claims within the scope of the issues presented in the joint request for arbitration.

2. Referral of Disputes

(a) EPA [insert reference to mechanism by which EPA has entered into dispute, e.g., after EPA has issued demand letters or an administrative order], and one or more parties to the case may submit a joint request for arbitration of [EPA's claim, or one or more issues in dispute among the parties] _____ [a group authorized to arbitrate such matters, e.g., the National Arbitration Association (NAA)] if [restate any general limitations on scope]. The joint request shall include: A statement of the matter in dispute; a statement of the issues to be submitted for resolution; a statement that the signatories consent to arbitration of the dispute in accordance with the procedures established by this document; and the appropriate filing fee.

(b) Within thirty days after submission of the joint request for arbitration, each signatory to the joint request shall individually submit to the National Arbitration Association

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* Regulations applicable to section 112 of SARA are currently being prepared.

two copies of a written statement which shall include:

(1) An assertion of the parties' positions in the matter in dispute;

(2) The amount of money in dispute, if appropriate;

(3) The remedy sought;

(4) Any documentation which the party deems necessary to support its position;

[(5) A statement of the legal standard applicable to the claim and any other applicable principles of law relating to the claim;]

(6) The identity of any known parties who are not signatories to the joint request for arbitration; and

(7) A recommendation for the locale for the arbitral hearing.

A copy of the statement shall be sent to all parties.

3. **Selection of Arbitrator**

(a) The NAA has established and maintains a National Panel of Environmental Arbitrators.

(b) After the filing of the joint request for arbitration, the NAA shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual preference, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.

(c) The dispute shall be heard and determined by one Arbitrator, unless the NAA decides that three Arbitrators should be approved based on the complexity of the issues or the number of parties.

(d) The NAA shall notify the parties of the appointment of the Arbitrator and send a copy of these rules to each party. A signed acceptance of the case by the Arbitrator shall be filed with the NAA prior to the opening of the hearing. After the Arbitrator is appointed, all communications from the parties shall be directed to the Arbitrator.

(e) If any Arbitrator should resign, die, withdraw, or be disqualified, unable or refuse to perform the duties of the office, the NAA may declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this Section, and unless the parties agree otherwise, the matter shall be reheard.

4. Disclosure

(a) A person appointed as an Arbitrator under the above section shall, within five days of receipt of his or her notice of appointment disclose to the NAA any circumstances likely to affect impartiality, including [those factors listed in section V.B. of the accompanying guidance]

(b) Upon receipt of such information from an appointed Arbitrator or other source, the NAA shall on the same day communicate such information to the parties and, if it deems it appropriate, to the Arbitrator and others.

(c) The parties may request within seven days of receipt of such information from the NAA that an Arbitrator be disqualified.

(d) The NAA shall make a determination on any request for disqualification of an Arbitrator within seven days after the NAA receives any such request. This determination shall be within the sole discretion of the NAA, and its decision shall be final.

5. Intervention and Withdrawal

(a) Subject to the approval of the parties and the Arbitrator, any person [insert applicable limitations, if any, e.g. any person with a substantial interest in the subject of the referred dispute] may move to intervene in the arbitral proceeding. Intervening parties shall be bound by rules that the Arbitrator may establish.

(b) Any party may for good cause shown move to withdraw from the arbitral proceeding. The Arbitrator may approve such withdrawal, with or without prejudice to the moving party, and may assess administrative fees or expenses against the withdrawing party as the Arbitrator deems appropriate.

SUBPART C - HEARINGS BEFORE THE ARBITRATOR

1. Filing of Pleadings

(a) Any party may file an answering statement with the NAA no later than seven days from the date of receipt of an opposing party's written statement. A copy of any answering statement shall be served upon all parties.

(b) Any party may file an amended written statement with the NAA prior to the appointment of the Arbitrator. A copy of the amended written statement shall be served upon all parties. After the Arbitrator is appointed, however, no amended written statement may be submitted except with the Arbitrator's consent.

[(c) Any party may file an answering statement to the amended written statement with the NAA no later than seven days from the date of receipt of an opposing party's amended written statement. A copy of any answering statement shall be served upon all parties.]

2. Pre-hearing Conference

At the request of one or more of the parties or at the discretion of the Arbitrator, a pre-hearing conference with the Arbitrator and the parties and their counsel will be scheduled in appropriate cases to arrange for an exchange of information, including witness statements, documents, and the stipulation of uncontested facts to expedite the arbitration proceedings. The Arbitrator may encourage further settlement discussions during the pre-hearing conference to expedite the arbitration proceedings. Any pre-hearing conference must be held within sixty days of the appointment of the Arbitrator.

3. Arbitral Hearing

(a) The Arbitrator shall select the locale for the arbitral hearing, giving due consideration to any recommendations by the parties.

(b) The Arbitrator shall fix the time and place for the hearing.

(c) The hearing shall commence within thirty days of the pre-hearing conference, if such conference is held, or

within sixty [thirty] days of the appointment of the Arbitrator, if no pre-hearing conference is held. The Arbitrator shall notify each party by mail of the hearing at least thirty days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

(d) Any party may be represented by counsel. A party who intends to be represented shall notify the other parties and the Arbitrator of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other parties, such notice is deemed to have been given.

(e) The Arbitrator shall make the necessary arrangements for making a record of the arbitral hearing.

(f) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, and the requesting parties shall assume the cost of such service.

(g) The Arbitrator may halt the proceedings upon the request of any party or upon the Arbitrator's own initiative.

(h) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(i) (1) A hearing shall be opened by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the written statements, amended written statements, if any, and answering statements, if any. The Arbitrator may, at the beginning of the hearing, ask for oral statements clarifying the issues involved.

(2) The EPA shall then present its case, information and witnesses, if any, who shall answer questions posed by both parties. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant information.

(3) Exhibits, when offered by any party, may be received by the Arbitrator. The names and addresses of all witnesses, and exhibits in the order received, shall be part of the record.

(j) The arbitration may proceed in the absence of any party which, after notification, fails to be present or fails to obtain a stay of proceedings. If a party, after notification, fails to be present, fails to obtain a stay, or fails to present information, the party will be in default and will have waived the right to be present at the arbitration. A decision shall not be made solely on the default of a party. The Arbitrator shall require the parties who are present to submit such information as the Arbitrator may require for the making of a decision.

(k) Information and Evidence

(1) The parties may offer information as they desire, subject to reasonable limitations as the Arbitrator deems appropriate, and shall produce additional information as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the information offered, and conformity to legal rules of evidence shall not be necessary.

(2) All information shall be introduced in the presence of the Arbitrator and all parties, except where any of the parties has waived the right to be present pursuant to paragraph (j) of this section. All information pertinent to the issues presented to the Arbitrator for decision, whether in oral or written form, shall be made a part of the record.

(l) The Arbitrator may receive and consider the evidence of witnesses by affidavit, interrogatory or deposition, but shall give the information only such weight as the Arbitrator deems appropriate after consideration of any objections made to its admission.

(m) After the presentation of all information, the Arbitrator shall specifically inquire of all parties whether they have any further information to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearing closed and minutes thereof shall be recorded.

(n) The parties may provide, by written agreement, for the waiver of the oral hearing.

(o) All documents not submitted to the Arbitrator at the hearing, but arranged for at the hearing or by subsequent agreement of the parties, shall be filed with the Arbitrator

AUG 14 1987

MEMORANDUM

SUBJECT: Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions

TO: Assistant Administrators
Regional Administrators

I. Purpose

Attached is the final guidance on the use of alternative dispute resolution (ADR) techniques in enforcement actions. This guidance has been reviewed by EPA Headquarters and Regional offices, the Department of Justice, as well as by representatives of the regulated community. We have also sought the advice of leading ADR professionals, including many of the renowned participants at a recent Colloquium on ADR sponsored by the Administrative Conference of the United States.

The reaction to the draft guidance has been overwhelmingly favorable and helpful. In response to comments, the guidance more clearly distinguishes the uses of binding and non-binding techniques, emphasizes the need to protect the confidentiality of conversations before a neutral, and includes model agreements and procedures for the use of each ADR technique.

II. Use of ADR

As the guidance explains, ADR involves the use of third-party neutrals to aid in the resolution of disputes through arbitration, mediation, mini-trials and fact-finding. ADR is being used increasingly to resolve private commercial disputes. EPA is likewise applying forms of ADR in various contexts: negotiated rulemaking, RCRA citing, and Superfund remedial actions. ADR holds the promise of lowering the transaction costs to both the Agency and the regulated community of resolving applicable enforcement disputes.

I view ADR as a new, innovative and potentially more effective way to accomplish the results we have sought for years using conventional enforcement techniques. We retain our strict adherence to the principle that the regulated community must comply with the environmental laws. The following tasks will be undertaken to enable the Agency to utilize ADR to more effectively and efficiently foster compliance:

Training. Some within the Agency may fear that using less adversarial techniques to resolve enforcement actions implies that the agency will be seeking less rigorous settlements. This is not the case. We must train our own people in what ADR is, what it is not, and how it can help us meet our own compliance objectives. We plan to accomplish this by making presentations at national program and regional counsel meetings, and by consulting on particular cases.

Outreach. We must also make an affirmative effort to demonstrate to the regulated community that EPA is receptive to suggestions from them about using ADR in a given case. Nominating a case for ADR need not be viewed as a sign of weakness in either party. After we have gained experience, we plan to conduct a national conference to broaden willingness to apply ADR in the enforcement context.

Pilot Cases. Ultimately, the value of ADR must be proven by its successful application in a few pilot cases. ADR is being use to resolve an important municipal water supply problem involving the city of Sheridan, Wyoming. Two recent TSCA settlements also utilized ADR to resolve disputes which may arise in conducting environmental audits required under the consent agreements. Beyond these, however, we need to explore the applicability of ADR to additional cases.

III. Action and Follow-Up

I challenge each of you to help in our efforts to apply ADR to the enforcement process. I ask the Assistant Administrators to include criteria for using ADR in future program guidance, and to include discussions of ADR at upcoming national meetings. I ask the Regional Administrators to review the enforcement actions now under development and those cases which have already been filed to find cases which could be resolved by ADR. I expect each Region to nominate at least one case for ADR this fiscal year. Cases should be identified and nominated using the procedure set forth in the guidance by September 4, 1987

Lee M. Thomas

Attachment

cc: Regional Enforcement Contacts
Regional Counsels

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

United States Environmental Protection Agency

TABLE OF CONTENTS

Guidance on the Use of Alternative Dispute Resolution (ADR) in EPA Enforcement Cases

GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

I. INTRODUCTION

To effect compliance with the nation's environmental laws, the United States Environmental Protection Agency (EPA) has developed and maintained a vigorous judicial and administrative enforcement program. Cases instituted under the program must be resolved, either through settlement or decision by the appropriate authority, as rapidly as possible in order to maintain the integrity and credibility of the program, and to reduce the backlog of cases.

Traditionally, the Agency's enforcement cases have been settled through negotiations solely between representatives of the Government and the alleged violator. With a 95 percent success rate, this negotiation process has proved effective, and will continue to be used in most of the Agency's cases. Nevertheless, other means of reaching resolution, known collectively as alternative dispute resolution (ADR), have evolved. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental enforcement disputes. These ADR procedures hold the promise for resolution of some of EPA's enforcement cases more efficiently than, but just as effectively as, those used in traditional enforcement. Furthermore, ADR provisions can also be incorporated into judicial consent decrees and consent agreements ordered by administrative law judges to address future disputes.

EPA does not mean to indicate that by endorsing the use of ADR in its enforcement actions, it is backing away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for achieving environmental compliance. EPA intends to use the ADR process, where appropriate, to resolve enforcement actions with outcomes similar to those the Agency reaches through litigation and negotiation. Since ADR addresses only the process (and not the substance) of case resolution, its use will not necessarily lead to more lenient results for violators; rather, ADR should take EPA to its desired ends by more efficient means.

ADR is increasingly becoming accepted by many federal agencies, private citizens, and organizations as a method of handling disputes. The Administrative Conference of the United States has repeatedly called for federal agencies to make greater

use of ADR techniques, and has sponsored numerous studies to further their use by the federal government. The Attorney General of the United States has stated that it is the policy of the United States to use ADR in appropriate cases. By memorandum, dated February 2, 1987, the Administrator of EPA endorsed the concept in enforcement disputes, and urged senior Agency officials to nominate appropriate cases.

This guidance seeks to:

(1) Establish Policy - establish that it is EPA policy to utilize ADR in the resolution of appropriate civil enforcement cases.

(2) Describe Methods - describe some of the applicable types of ADR, and the characteristics of cases which might call for the use of ADR;

(3) Formulate Case Selection Procedures - formulate procedures for determining whether to use ADR in particular cases, and for selection and procurement of a "third-party neutral" (i.e., mediators, arbitrators, or others employed in the use of ADR);

(4) Establish Qualifications - establish qualifications for third-party neutrals; and

(5) Formulate Case Management Procedures - formulate procedures for management of cases in which some or all issues are submitted for ADR.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

ADR mechanisms which are potentially useful in environmental enforcement cases will primarily be mediation and nonbinding arbitration. Fact-finding and mini-trials may also be helpful in a number of cases. A general description of these mechanisms follows. (See also Section VIII, below, which describes in greater detail how each of these techniques works.) Many other forms of ADR exist, none of which are precluded by this guidance. Regardless of the technique employed, ADR can be used to resolve any or all of the issues presented by a case.

A. Mediation[1] is the facilitation of negotiations by a person not a party to the dispute (herein "third-party neutral") who has no power to decide the issues, but whose function is to

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[1] For further information on the mediation role of Clean Sites Inc. see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and serves as an assessor - but not a judge - of the positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem. Nevertheless, as in traditional negotiation, the parties retain the power to resolve the issues through an informal, voluntary process, in order to reach a mutually acceptable agreement. Having agreed to a mediated settlement, parties can then make the results binding.

B. Arbitration involves the use of a person -- not a party to the dispute -- to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, parties can agree to relax rules of evidence and utilize other time-saving devices. For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues.

C. Fact-finding entails the investigation of specified issues by a neutral with subject matter expertise, and selected by the parties to the dispute. The process may be binding or nonbinding, but if the parties agree, the material presented by the fact-finder may be admissible as an established fact in a subsequent judicial or administrative hearing, or determinative of the issues presented. As an essentially investigatory process, fact-finding employs informal procedures. Because this ADR mechanism seeks to narrow factual or technical issues in dispute, fact-finding usually results in a report, testimony, or established fact which may be admitted as evidence, or in a binding or advisory opinion.

D. Mini-trials permit the parties to present their case, or an agreed upon portion of it, to principals who have authority to settle the dispute (e.g., vice-president of a company and a senior EPA official) and, in some cases as agreed by the parties, to a neutral third-party advisor. Limited discovery may precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals reinstitute negotiations, possibly with the aid of the neutral as mediator. The principals are the decisionmakers while the third-party neutral, who usually has specialized subject matter expertise in trial procedures and evidence, acts as an advisor on potential rulings on issues if the dispute were to proceed to trial. This ADR mechanism is useful in narrowing factual issues

or mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their cases.

III. CHARACTERISTICS OF ENFORCEMENT CASES SUITABLE FOR ADR

This section suggests characteristics of cases which may be most suitable for use of ADR. These characteristics are necessarily broad, as ADR may theoretically be used in any type of dispute. Enforcement personnel can use these characteristics to make a preliminary assessment of whether ADR should be considered for use in a particular case, including a discrete portion or issue in a case.

ADR procedures may be introduced into a case at any point in its development or while pending in court. However, it is preferable that ADR be considered as early as possible in the progress of the case to avoid the polarizing effect which frequently results from long and intense negotiations or the filing of a lawsuit. ADR should, therefore, be considered prior to referral of a case to DOJ. Indeed, the threat of a referral may be used as an incentive to convince the other parties to utilize an appropriate ADR technique.

Notwithstanding the preference for consideration and use of ADR at an early stage in the progress of a case, there are occasions when ADR should be considered after a case has been referred and filed in court. This is particularly true when the parties have reached an apparent impasse in negotiations, or the court does not appear to be willing to expeditiously move the case to conclusion through establishing discovery deadlines, conducting motions hearings or scheduling trial dates. In such cases, introduction of a mediator into the case, or submission of some contested facts to an arbitrator may help to break the impasse. Cases which have been filed and pending in court for a number of years without significant movement toward resolution should be scrutinized for prospective use of ADR.

In addition to those circumstances, the complexity of legal and technical issues in environmental cases have resulted in a recent trend of courts to appoint special masters with increasing frequency. Those masters greatly increase the cost of the litigation and, while they may speed the progress of the case, the parties have little direct control over the selection or authority of the masters. The government should give careful consideration to anticipating a court's desire to refer complex issues to a master by proposing that the parties themselves select a mediator to assist in negotiations or an arbitrator to determine some factual issues.

The following characteristics of cases which may be candidates for use of some form of ADR are not intended to be exhaustive. Agency personnel must rely upon their own judgment and experience to evaluate their cases for potential applications of ADR. In all instances where the other parties demonstrate their willingness to use ADR, EPA should consider its use. Sample characteristics of cases for ADR[2]:

A. Impasse or Potential for Impasse

When the resolution of a case is prevented through impasse, EPA is prevented from carrying out its mission to protect and enhance the environment, and is required to continue to commit resources to the case which could otherwise be utilized to address other problems. It is highly desirable to anticipate and avoid, if possible, the occurrence of an impasse.

Impasse, or the possibility for impasse, is commonly created by the following conditions, among others:

(1) Personality conflicts or poor communication among negotiators;

(2) Multiple parties with conflicting interests;

(3) Difficult technical issues which may benefit from independent analysis;

(4) Apparent unwillingness of a court to rule on matters which would advance the case toward resolution; or

(5) High visibility concerns making it difficult for the parties to settle such as cases involving particularly sensitive environmental concerns such as national parks or wild and scenic rivers, issues of national significance, or significant adverse employment implications.

In such cases, the involvement of a neutral to structure, stimulate and focus negotiations and, if necessary, to serve as an intermediary between personally conflicting negotiators should be considered as early as possible.

B. Resource Considerations

All enforcement cases are important in that all have, or should have, some deterrent effect upon the violator and other members of the regulated community who hear of the case. It is, therefore, important that EPA's cases be supported with the

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2 ADR is not considered appropriate in cases where the Agency is contemplating criminal action.

level of resources necessary to achieve the desired result. Nevertheless, because of the size of EPA's enforcement effort, it is recognized that resource efficiencies must be achieved whenever possible to enable EPA to address as many violations as possible.

There are many cases in which utilizing some form of ADR would achieve resource efficiencies for EPA. Generally, those cases contain the following characteristics:

(1) Those brought in a program area with which EPA has had considerable experience, and in which the procedures, case law and remedies are relatively well-settled and routine; or

(2) Those having a large number of parties or issues where ADR can be a valuable case management tool.

C. Remedies Affecting Parties not Subject to an Enforcement Action

Sometimes, the resolution of an underlying environmental problem would benefit from the involvement of persons, organizations or entities not a party to an impending enforcement action. This is becoming more common as EPA and the Congress place greater emphasis on public participation in major decisions affecting remedies in enforcement actions. Such cases might include those in which:

(1) A state or local governmental unit have expressed an interest, but are not a party;

(2) A citizens group has expressed, or is likely to express an interest; or

(3) The remedy is likely to affect not only the violator, but the community in which the violator is located as well (e.g., those cases in which the contamination is wide-spread, leading to a portion of the remedy being conducted off-site).

In such cases, EPA should consider the use of a neutral very early in the enforcement process in order to establish communication with those interested persons who are not parties to the action, but whose understanding and acceptance of the remedy will be important to an expeditious resolution of the case.

IV. PROCEDURES FOR APPROVAL OF CASES FOR ADR

This section describes procedures for the nomination of cases for ADR. These procedures are designed to eliminate confusic regarding the selection of cases for ADR by: (1) integrating the

selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ to determine whether to use ADR in particular actions.

A. Decisionmakers

To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult on this decision with his/her corresponding headquarters compliance division director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be the Regional Counsel in consultation with the appropriate regional program division director. If the two Regional authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.

B. Case Selection Procedures

Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR.[3] Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. (See Section III of this document which describes the characteristics for selection of cases for ADR.) Attachments A and B are sample case nomination communications. Attachment A pertains to nonbinding ADR, and Attachment B pertains to binding ADR.

Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or other defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use

[3] Nomination papers should always be deemed attorney work product so that they are discovery free.

ADR, and the potential benefits to all parties from its use. The PRP(s) or other defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter. Further, for cases which are referrable, the defendant(s) should be advised that EPA will not hesitate to refer the matter to DOJ for prosecution.

1. Nonbinding ADR

For mediation, mini-trials, nonbinding arbitration, and other ADR mechanisms involving use of a third-party neutral as a nonbinding decisionmaker, regions should notify the appropriate AEC and, if the case is referred, DOJ of: (1) its intent to use ADR in a particular case, and (2) the opportunity to consult with the Region on its decision. Such notification should be in writing and by telephone call. The AEC will consult with the appropriate headquarters program division director. The Region may presume that the AEC and DOJ agree with the selection of the case for ADR unless the AEC or DOJ object within fifteen (15) calendar days of receipt of the nomination of the case. If either the AEC or DOJ object, however, the Region should not proceed to use ADR in the case until consensus is reached.

2. Binding ADR

For binding arbitration and fact-finding, and other ADR mechanisms involving the use of third-party neutrals as binding decisionmakers, the appropriate AEC must concur in the nomination of the case by the Region. In addition, DOJ must also concur in the use of binding ADR in referred cases. Finally, in non-CERCLA cases which may involve compromise of claims in excess of $20,000 or where the neutral's decision will be embodied in a court order, DOJ must also concur. Without the concurrence of headquarters and DOJ under these circumstances, the Region may not proceed with ADR. OECM and DOJ should attempt to concur in the nomination within fifteen (15) days of receipt of the nomination.

Under the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, §122(h)(2)(1986), EPA may enter into binding arbitration for cost recovery claims under Section 107 of CERCLA, provided the claims are not in excess of $500,000, exclusive of interest. Until regulations are promulgated under this section, EPA is precluded from entering into binding arbitration in cost recovery actions. Accordingly, Attachment C is not yet appropriate for use in cases brought under this section. It is, however, available for use in nonbinding arbitration.

V. SELECTION OF A THIRD-PARTY NEUTRAL

A. Procedures for Selection

Both the Government and all defendants must agree on the need

for a neutral in order to proceed with ADR. In some situations (e.g., in a Superfund case), however, the parties may proceed with ADR with consensus of only some of the parties depending on the issue and the parties. Once agreed, the method for selecting the neutral and the actual selection in both Superfund and other cases will be determined by all parties involved with the exception of cases governed by §107 of CERCLA. To help narrow the search for a third-party neutral, it is useful, although not required, for the parties to agree preliminarily on one or more ADR mechanisms. OECM is available to help at this point in the process, including the procurement of in-house or outside persons to aid the parties in selecting an appropriate ADR mechanism.

In Section VIII below, we have indicated some of the situations where each ADR mechanism may be most appropriate. Of course, the parties are free to employ whichever technique they deem appropriate for the case. Because the ADR mechanisms are flexible, they are adaptable to meet the needs and desires of the parties.

The parties can select a third-party neutral in many ways. Each party may offer names of proposed neutrals until all parties agree on one person or organization. Alternatively, each party may propose a list of candidates, and allow the other parties to strike unacceptable names from the list until agreement is reached. For additional methods, see Attachments C, D, and E. Regardless of how the parties decide to proceed, the Government may obtain names of qualified neutrals from the Chief, Legal Enforcement Policy Branch (LEPB) (FTS 475-8777, LE-130A, E-Mail box EPA 2261), by written or telephone request. With the help of the Administrative Conference of the U.S. and the Federal Mediation and Conciliation Service, OECM is working to establish a national list of candidates from which the case team may select neutrals. In selecting neutrals, however, the case team is not limited to such a list.

It is important to apply the qualifications enumerated below in section V.B. in evaluating the appropriateness of a proposed third-party neutral for each case. Only the case team can decide whether a particular neutral is acceptable in its case. The qualifications described below provide guidance in this area.

At any point in the process of selecting an ADR mechanism or third-party neutral, the case team may consult with the Chief, LEPB, for guidance.

B. Qualifications for Third-Party Neutrals

The following qualifications are to be applied in the selection of all third-party neutrals who may be considered for service in ADR procedures to which EPA is a party. While a

third-party neutral should meet as many of the qualifications as possible, it may be difficult to identify candidates who possess all the qualifications for selection of a third-party neutral. Failure to meet one or more of these qualifications should not necessarily preclude a neutral who all the parties agree would be satisfactory to serve in a particular case. The qualifications are, therefore, intended only as guidance rather than as pre-requisites to the use of ADR. Further, one should apply a greater degree of flexibility regarding the qualifications of neutrals involved in nonbinding activities such as mediation, and a stricter adherence to the qualifications for neutrals making binding decisions such as arbitrators.

1. Qualifications for Individuals

a. Demonstrated Experience. The candidate should have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, judicial officer or judge, or formal training as a neutral may be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable.

b. Independence. The candidate must disclose any interest or relationship which may give rise to bias or the appearance of bias toward or against any party. These interests or relationships include:

(a) past, present or prospective positions with or financial interests in any of the parties;

(b) any existing or past financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;

(c) previous or current involvement in the specific dispute;

(d) past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(e) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the candidate from serving as a neutral, particularly if the candidate has demonstrated sufficient independence by reputation and performance. The neutrals with

the most experience are most likely to have past or current relationships with some parties to the dispute, including the Government. Nevertheless, the candidate must disclose all interests, and the parties should then determine whether the interests create actual or apparent bias.

c. Subject Matter Expertise. The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner as a third-party neutral. Depending on the case, it may also be helpful if the candidate has specific expertise in the issues under consideration.

d. Single Role. The candidate should not be serving in any other capacity in the enforcement process for that particular case that would create actual or apparent bias. The case team should consider any prior involvement in the dispute which may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed on behalf of certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between EPA and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the candidate in that case. The candidate may continue to serve in other capacities by, for example, relaying information among parties and presenting offers on behalf of particular parties.

2. Qualifications for Corporations and Other Organizations.[4] Corporations or other entities or organizations which propose to act as third-party neutrals, through their officers, employees or other agents, in disputes involving EPA, must:

(a) like unaffiliated individuals, make the disclosures listed above; and

(b) submit to the parties a list of all persons who, on behalf of the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

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[4] For further guidance regarding Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

In selecting a third-party neutral to resolve or aid in the resolution of a dispute to which EPA is a party, Agency personnel should remain at all times aware that the Agency must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that the Agency is performing its mission. Care should be taken in the application of these qualifications to avoid the selection of third-party neutrals whose involvement in the resolution of the case might undermine the integrity of that resolution and the enforcement efforts of the Agency.

VII. OTHER ISSUES:

A. Memorialization of Agreements

Just as it would in cases where ADR has not been used, the case team should memorialize agreements reached through ADR in orders and settlement documents and obtain DOJ and headquarters approval (as appropriate) of the terms of any agreement reached through ADR.

B. Fees For Third-Party Neutrals

The Government's share of ADR costs will be paid by Headquarters. Contact LEPB to initiate payment mechanisms. Because such mechanisms require lead time, contact with LEPB should be made as early as possible after approval of a case for ADR.

It is EPA policy that PRPs and defendants bear a share of these costs equal to EPA except in unusual circumstances. This policy ensures that these parties "buy in" to the process. It is important that the exact financial terms with these parties be settled and set forth in writing before the initiation of ADR in the case.

C. Confidentiality

Unless otherwise discoverable, records and communications arising from ADR shall be confidential and cannot be used in litigation or disclosed to the opposing party without permission. This policy does not include issues where the Agency is required to make decisions on the basis of an administrative record such as the selection of a remedy in CERCLA cases. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.

Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which

renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability. Noting the underlying policy behind the rule, courts have construed the rule to preclude admission of evidence regarding the defendant's settlement of similar cases.[5]

Exemption protection under the Freedom of Information Act (FOIA), 15 U.S.C. §552, could also accommodate the interest in confidentiality. While some courts have failed to recognize the "settlement negotiations privilege,"[6] other courts have recognized the privilege.[7]

In addition to these legal authorities and policy arguments, confidentiality can be ensured by professional ethical codes. Recognizing that promoting candor on the parties' part and impartiality on the neutral's part is critical to the success of ADR, confidentiality provisions are incorporated into codes of conduct as well as written ADR agreements (See Attachment D). The attachment provides liquidated damages where a neutral reveals confidential information except under court order.

Furthermore, confidentiality can be effected by court order, if ADR is court supervised. Finally, as many states have done

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5 See Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727 (N.D. Ill. 1980), and to bar discovery, see Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981). Courts have also construed labor laws to favor mediation or arbitration and have therefore prevented third-party neutrals from being compelled to testify. See, e.g., N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (upholding N.L.R.B.'s revocation of subpoena issued to mediator to avoid breach of impartiality).

6 See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

7 See Bottaro v. Hatton Associates, 96 F.R.D. 158-60 (E.D.N.Y 1982) (noting "strong public policy of favoring settlements" and public interest in "insulating the bargaining table from unnecessary intrusions"). In interpreting Exemption 5 of the FOIA, the Supreme Court asserted that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. ...We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." United States v. Weber Aircraft, 104 S.Ct. 1488, 1494 (1984).

statutorily, EPA is considering the promulgation of regulations which further ensure the confidentiality of ADR proceedings.

D. Relationship of ADR to Timely and Appropriate and Significant Noncompliance Requirements

The decision to use ADR would have no particular impact under the "timely and appropriate" (T&A) criteria in a case where there is already an administrative order or a civil referral since the "timely and appropriate" criteria would have been met by the initiation of the formal enforcement action. In the case of a civil referral, the 60-day period by which DOJ is to review and file an action may be extended if ADR is used during this time.

The decision to use ADR to resolve a violation prior to the initiation of a formal enforcement action, however, would be affected by applicable "timely and appropriate" criteria (e.g., if the violation fell under a program's Significant Noncompliance (SNC) definition, the specific timeframes in which compliance must be achieved or a formal enforcement action taken would apply). The use of ADR would not exempt applicable "T&A" requirements and the ADR process would normally have to proceed to resolve the case or "escalate" the enforcement response. However, since, "T&A" is not an immutable deadline, that ADR is being used for a particular violation would be of central significance to any program management review of that case (e.g., the Deputy Administrator's discussion of "timely and appropriate" enforcement during a regional review would identify the cases in which ADR is being used.)

VIII. PROCEDURES FOR MANAGEMENT OF ADR CASES

This section elaborates on the various ADR techniques: How they work, some problems that may be encountered in their use, and their relationship to negotiation and litigation. For each ADR technique, we have provided, as an attachment to this guidance, an example of procedures reflecting its use. These attachments are for illustrative purposes only, and do not represent required procedures. The specific provisions of the attachments should be adapted to the circumstances of the case or eliminated if not applicable.

A. Arbitration

1. Scope and Nature

As stated in Section II, above, arbitration involves the selection by the parties of a neutral decisionmaker to hear selected issues and render an opinion. Depending on the parties' agreement, the arbitrator's decision may or may not be binding.

For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues. Included as Attachment C are draft generic arbitration procedures for formal arbitration. To conduct less formal proceedings, the parties may modify the procedures.

2. Use

Arbitration is most appropriate in resolving routine cases that do not merit the resources required to generate and process a civil judicial referral. It may aid in resolving technical disputes that are usually submitted to the courts or administrative law judges (ALJs), which disputes require subject-matter expertise which federal district court judges and ALJs may lack.[8]

B. Mediation

1. Scope and Nature

Mediation, an informal process, is entered into voluntarily by the parties to a dispute and in no way binds them beyond their own agreement. More than the other ADR processes, mediation is best viewed as an extension of the direct negotiation process begun by the parties. As in direct negotiation, the parties continue to control the substance of discussions and any agreement reached. In mediation, however, the mediator directs and structures the course of discussions.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Included as Attachment D are generic mediation protocols for use and adaptation in all EPA mediations. Most of the items covered in the attachment would be useful as ground rules for most EPA enforcement negotiations. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role; they may even suggest possible settlement alternatives to resolve deadlocks between the parties. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

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[8] Arbitration is specifically authorized under Section 107 of CERCLA for cost recovery claims not in excess of $500,000, exclusive of interest.

There are no external time limits on mediation other than those imposed by the parties or by external pressures from the courts, the community or public interest groups. In all cases, the Government should insist on a time limit for the mediation to ensure that the defendants do not use mediation as a stalling device. The Government should also insist on establishing points in the process to evaluate progress of the mediation. As the parties approach settlement terms through mediation, final authority for decisionmaking remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers are applicable.

2. Use of Mediation

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court (e.g., a state which can help with the funding for a municipality's violation). Mediation is the most flexible ADR mechanism, and should be the most widely used in Agency disputes.

3. Withdrawal from Mediation

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

4. Relation to Litigation

In the ordinary case, prior to referral or the filing of an administrative complaint, the time limits for mediation could be the same as those for negotiation. In contrast to normal negotiations, however, the parties may agree that during the time period specified for mediation, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended. In filed civil judicial cases, where the court imposes deadlines, it will be necessary to apprise the

court of the parties' activities and to build ADR into the court's timetable. For agreements relating ADR activities to ongoing litigation, see paragraph 17 of Attachment E.

C. Mini-Trial

1. Scope and Nature

Like other ADR techniques, the mini-trial is also voluntary and nonbinding on the parties. In the mini-trial, authority for resolution of one or more issues rests with senior managers who, representing each party in the dispute, act as decisionmakers. In some cases a neutral referee is appointed to supervise the proceedings and assist the decisionmakers in resolving an issue by providing the parties with a more realistic view of their case. In addition, the neutral's presence can enhance public acceptability of a resolution by effectively balancing the interests of the Government and the defendant.

The scope and format of the mini-trial are determined solely by the parties to the dispute and are outlined in an initiating agreement. Because the agreement will govern the proceedings, the parties should carefully consider and define issues in advance of the mini-trial. Points that could be covered include the option of and role for a neutral, issues to be considered, and procedural matters such as order and schedule of proceedings and time limits. Attachment E is a sample mini-trial agreement.

The mini-trial proceeds before a panel of decisionmakers representing the parties and, in some cases, a neutral referee. Preferably, the decisionmakers will not have participated directly in the case prior to the mini-trial. The defendant's representative should be a principal or executive of the entity with decisionmaking authority. EPA's representative should be a senior Agency official comparable in authority to the defendant's representative. In some cases, each side may want to use a panel consisting of several decisionmakers as its representatives. The neutral referee is selected by both parties and should have expertise in the issues under consideration.

At the mini-trial, counsel for each side presents his or her strongest and most persuasive case to the decisionmakers in an informal, trial-like proceeding. In light of this structure, strict rules of evidence do not apply, and the format for the presentation is unrestricted. Each decisionmaker is then afforded the unique opportunity to proceed, as agreed, with open and direct questioning of the other side. This information exchange allows the decisionmakers to adjust their perspectives and positions in light of a preview of the case. Following this phase of the mini-trial, the decisionmakers meet, with or without counsel or the neutral referee, to resolve the issue(s) or case presented, through negotiation.

2. Role of the Neutral

The neutral referee may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decision-makers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

3. Use

As with mediation, prior to referral or the filing of an administrative complaint, the time limits for a mini-trial would be the same as those for negotiation. The parties usually agree, however, that during the time period specified for a mini-trial, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended except as otherwise agreed. In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four kinds of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;

2. Where significant policy issues exist which would benefit from a face-to-face presentation to decisionmakers (without use of a neutral);

3. Where the issues are technical, and the decisionmakers and neutral referee have subject-matter expertise; or

4. Where the imprimatur of a neutral's expertise would aid in the resolution of the case.

D. Fact-finding

1. Scope and Nature

Binding or nonbinding fact-finding may be adopted voluntarily by parties to a dispute, or imposed by a court. It is most appropriate for issues involving technical or factual disputes. The primary purpose of this process is to reduce or eliminate conflict over facts at issue in a case. The fact-finder's role is to act as an independent investigator, within the scope of the authority delegated by the parties. The findings may be used in reaching settlement, as "facts" by a judge or ALJ in litigation,

or as binding determinations. Like other ADR processes involving a neutral, a resolution based on a fact-finder's report will have greater credibility with the public.

The neutral's role in fact-finding is clearly defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report. Attachment F is a sample fact-finding agreement.

The fact-finder issues a formal report of findings, and recommendations, if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

2. Relation to Litigation

Decisions regarding pursuit of litigation when fact-finding is instituted are contingent upon the circumstances of the case and the issues to be referred to the fact-finder. If fact-finding is undertaken in connection with an ongoing settlement negotiation, in most cases it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. If fact-finding is part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or to suspend litigation while awaiting the fact-finder's report.

ATTACHMENT A

MEMORANDUM

SUBJECT: Nomination of U.S. v. XYZ Co. for Non-binding Alternative for Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel
for Hazardous Waste Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum is to nominate U.S. v. XYZ Co. for alternative dispute resolution (ADR). The case is a CERCLA enforcement action involving multiple PRPs as well as a number of complex technical and legal issues. The RI/FS and the record of decision have both been completed. We anticipate that the PRPs are interested in settling this matter and, we believe, a trained mediator will greatly aid negotiations. The members of the litigation team concur in this judgment.

We understand that if you object within 15 days of the receipt of this letter, we will not proceed with ADR in this case without your approval. We do believe, however, that ADR is appropriate in this action. We look forward to working with your offices in this matter.

ATTACHMENT B

MEMORANDUM

SUBJECT: Nomination of United States v. ABC Co. for Binding Alternative Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Water Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum requests concurrence in the use of a binding fact-finding procedure in United States v. ABC Co. The case involves the following facts:

ABC Co. owns and operates a specialty chemical production and formulation facility. Wastewater streams come from a variety of production areas which change with product demand. Because of these diverse processes, the company's permit to discharge wastewater must be based on the best professional judgment of the permit writer as to the level of pollution control achievable.

The company was issued an NPDES permit in 1986. The permit authorizes four (4) outfalls and contains limits for both conventional and toxic organic pollutants. The effluent limitations of the permit incorporate the Best Available Technology requirements of the Clean Water Act (CWA).

EPA filed a civil lawsuit against the company for violating effluent limits of the 1986 permit. As part of the settlement of the action, the company was required to submit a compliance plan which would provide for modification of its existing equipment, including institution of efficient operation and maintenance procedures to obtain compliance with the new permit. The settlement agreement provides for Agency concurrence in the company's compliance plan.

The company submitted a compliance plan, designed by in-house engineers, which proposed to slightly upgrade their existing activated sludge treatment system. The company has claimed that this upgraded system provides for treatment adequate to meet the permit limits. EPA has refused to concur in the plan because EPA experts believe that additional treatment modifications to enhance pollutant removals are required to meet permit limits on a continuous basis. This enhancement, EPA believes, is possible with moderate additional capital expenditures.

A fact-finding panel, consisting of experts in utility, sanitation and chemical engineering, is needed to assess the adequacy of the treatment system improvements in the compliance plan in satisfying permit requirements. Resolution of this issue by binding, neutral fact-finding will obviate the expenditure of resources needed to litigate the issue.

We request your concurrence in the nomination of this case for fact-finding within fifteen (15) days. We look forward to hearing from you.

ATTACHMENT C

ARBITRATION PROCEDURES*

SUBPART A - GENERAL

1. Purpose

This document establishes and governs procedures for the arbitration of EPA disputes arising under [insert applicable statutory citations].

2. Scope and Applicability

The procedures enunciated in this document may be used to arbitrate claims or disputes of the EPA regarding [insert applicable statutory citations and limitations on scope, if any.]

SUBPART B - JURISDICTION OF ARBITRATOR, REFERRAL OF CLAIMS, AND ARBITRATOR SELECTION

1. Jurisdiction of Arbitrator

(a) In accordance with the procedures set forth in this document, the Arbitrator is authorized to arbitrate [insert applicable categories of claims or disputes.]

(b) The Arbitrator is authorized to resolve disputes and award claims within the scope of the issues presented in the joint request for arbitration.

2. Referral of Disputes

(a) EPA [insert reference to mechanism by which EPA has entered into dispute, e.g., after EPA has issued demand letters or an administrative order], and one or more parties to the case may submit a joint request for arbitration of [EPA's claim, or one or more issues in dispute among the parties] _____ [a group authorized to arbitrate such matters, e.g., the National Arbitration Association (NAA)] if [restate any general limitations on scope]. The joint request shall include: A statement of the matter in dispute; a statement of the issues to be submitted for resolution; a statement that the signatories consent to arbitration of the dispute in accordance with the procedures established by this document; and the appropriate filing fee.

(b) Within thirty days after submission of the joint request for arbitration, each signatory to the joint request shall individually submit to the National Arbitration Association

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* Regulations applicable to section 112 of SARA are currently being prepared.

two copies of a written statement which shall include:

(1) An assertion of the parties' positions in the matter in dispute;

(2) The amount of money in dispute, if appropriate;

(3) The remedy sought;

(4) Any documentation which the party deems necessary to support its position;

[(5) A statement of the legal standard applicable to the claim and any other applicable principles of law relating to the claim;]

(6) The identity of any known parties who are not signatories to the joint request for arbitration; and

(7) A recommendation for the locale for the arbitral hearing.

A copy of the statement shall be sent to all parties.

3. **Selection of Arbitrator**

(a) **The NAA has established and maintains a National Panel of Environmental Arbitrators.**

(b) After the filing of the joint request for arbitration, the **NAA shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual preference, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.**

(c) The dispute shall be heard and determined by one Arbitrator, unless the NAA decides that three Arbitrators should be approved based on the complexity of the issues or the number of parties.

(d) The NAA shall notify the parties of the appointment of the Arbitrator and send a copy of these rules to each party. A signed acceptance of the case by the Arbitrator shall be filed with the NAA prior to the opening of the hearing. After the Arbitrator is appointed, all communications from the parties shall be directed to the Arbitrator.

(e) If any Arbitrator should resign, die, withdraw, or be disqualified, unable or refuse to perform the duties of the office, the NAA may declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this Section, and unless the parties agree otherwise, the matter shall be reheard.

4. Disclosure

(a) A person appointed as an Arbitrator under the above section shall, within five days of receipt of his or her notice of appointment disclose to the NAA any circumstances likely to affect impartiality, including [those factors listed in section V.B. of the accompanying guidance]

(b) Upon receipt of such information from an appointed Arbitrator or other source, the NAA shall on the same day communicate such information to the parties and, if it deems it appropriate, to the Arbitrator and others.

(c) The parties may request within seven days of receipt of such information from the NAA that an Arbitrator be disqualified.

(d) The NAA shall make a determination on any request for disqualification of an Arbitrator within seven days after the NAA receives any such request. This determination shall be within the sole discretion of the NAA, and its decision shall be final.

5. Intervention and Withdrawal

(a) Subject to the approval of the parties and the Arbitrator, any person [insert applicable limitations, if any, e.g. any person with a substantial interest in the subject of the referred dispute] may move to intervene in the arbitral proceeding. Intervening parties shall be bound by rules that the Arbitrator may establish.

(b) Any party may for good cause shown move to withdraw from the arbitral proceeding. The Arbitrator may approve such withdrawal, with or without prejudice to the moving party, and may assess administrative fees or expenses against the withdrawing party as the Arbitrator deems appropriate.

SUBPART C - HEARINGS BEFORE THE ARBITRATOR

1. Filing of Pleadings

(a) Any party may file an answering statement with the NAA no later than seven days from the date of receipt of an opposing party's written statement. A copy of any answering statement shall be served upon all parties.

(b) Any party may file an amended written statement with the NAA prior to the appointment of the Arbitrator. A copy of the amended written statement shall be served upon all parties. After the Arbitrator is appointed, however, no amended written statement may be submitted except with the Arbitrator's consent.

[(c) Any party may file an answering statement to the amended written statement with the NAA no later than seven days from the date of receipt of an opposing party's amended written statement. A copy of any answering statement shall be served upon all parties.]

2. Pre-hearing Conference

At the request of one or more of the parties or at the discretion of the Arbitrator, a pre-hearing conference with the Arbitrator and the parties and their counsel will be scheduled in appropriate cases to arrange for an exchange of information, including witness statements, documents, and the stipulation of uncontested facts to expedite the arbitration proceedings. The Arbitrator may encourage further settlement discussions during the pre-hearing conference to expedite the arbitration proceedings. Any pre-hearing conference must be held within sixty days of the appointment of the Arbitrator.

3. Arbitral Hearing

(a) The Arbitrator shall select the locale for the arbitral hearing, giving due consideration to any recommendations by the parties.

(b) The Arbitrator shall fix the time and place for the hearing.

(c) The hearing shall commence within thirty days of the pre-hearing conference, if such conference is held, or

within sixty [thirty] days of the appointment of the Arbitrator, if no pre-hearing conference is held. The Arbitrator shall notify each party by mail of the hearing at least thirty days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

(d) Any party may be represented by counsel. A party who intends to be represented shall notify the other parties and the Arbitrator of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other parties, such notice is deemed to have been given.

(e) The Arbitrator shall make the necessary arrangements for making a record of the arbitral hearing.

(f) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, and the requesting parties shall assume the cost of such service.

(g) The Arbitrator may halt the proceedings upon the request of any party or upon the Arbitrator's own initiative.

(h) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(i) (1) A hearing shall be opened by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the written statements, amended written statements, if any, and answering statements, if any. The Arbitrator may, at the beginning of the hearing, ask for oral statements clarifying the issues involved.

(2) The EPA shall then present its case, information and witnesses, if any, who shall answer questions posed by both parties. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant information.

(3) Exhibits, when offered by any party, may be received by the Arbitrator. The names and addresses of all witnesses, and exhibits in the order received, shall be part of the record.

(j) The arbitration may proceed in the absence of any party which, after notification, fails to be present or fails to obtain a stay of proceedings. If a party, after notification, fails to be present, fails to obtain a stay, or fails to present information, the party will be in default and will have waived the right to be present at the arbitration. A decision shall not be made solely on the default of a party. The Arbitrator shall require the parties who are present to submit such information as the Arbitrator may require for the making of a decision.

(k) Information and Evidence

(1) The parties may offer information as they desire, subject to reasonable limitations as the Arbitrator deems appropriate, and shall produce additional information as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the information offered, and conformity to legal rules of evidence shall not be necessary.

(2) All information shall be introduced in the presence of the Arbitrator and all parties, except where any of the parties has waived the right to be present pursuant to paragraph (j) of this section. All information pertinent to the issues presented to the Arbitrator for decision, whether in oral or written form, shall be made a part of the record.

(l) The Arbitrator may receive and consider the evidence of witnesses by affidavit, interrogatory or deposition, but shall give the information only such weight as the Arbitrator deems appropriate after consideration of any objections made to its admission.

(m) After the presentation of all information, the Arbitrator shall specifically inquire of all parties whether they have any further information to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearing closed and minutes thereof shall be recorded.

(n) The parties may provide, by written agreement, for the waiver of the oral hearing.

(o) All documents not submitted to the Arbitrator at the hearing, but arranged for at the hearing or by subsequent agreement of the parties, shall be filed with the Arbitrator

ATTACHMENT D

MEDIATION PROTOCOLS

I. PARTICIPANTS

A. Interests Represented. Any interest that would be substantially affected by EPA's action in _____ [specify case] may be represented. Parties may group together into caucuses to represent allied interests.

B. Additional Parties. After negotiations have begun, additional parties may join the negotiations only with the concurrence of all parties already represented.

C. Representatives. A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

II. DECISIONMAKING

A. Agendas. Meeting agendas will be developed by consensus. Agendas will be provided before every negotiating session.

B. Caucus. A caucus can be declared by any participant at any time. The participant calling the caucus will inform the others of the expected length of the caucus.

III. SAFEGUARDS FOR THE PARTIES

A. Good Faith. All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.

B. Right to Withdraw. Parties may withdraw from the negotiations at any time without prejudice. Withdrawing parties remain bound by protocol provisions on public comment and confidentiality.

C. Minutes. Sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

D. Confidentiality and the Use of Information

(1) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.]

(2) [Parties will provide information called for by this paragraph as much in advance of the meetings as possible.]

(3) The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree. The process shall be treated as compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of these protocols is a basis for exclusion from the negotiations.

(4) The mediator agrees that if he/she discloses information regarding the process, including settlement terms, to third parties without the participants' agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

(a) Removal from the case;

(b) Removal from any EPA list of approved neutrals; and

(c) Payment of an amount equal to _____ [at a minimum, the amount of the mediator's fee].

IV. SCHEDULE

A. Time and location. Negotiating sessions will initially be held _____ [insert how often]. The first negotiating session is scheduled for _____. Unless otherwise agreed upon, a deadline of _____ months for the negotiations will be established. The location of the meetings will be decided by the participants.

B. Discontinue if unproductive. The participants may discontinue negotiations at any time if they do not appear productive.

V. Press

A. [Joint Statements. A joint press statement shall be agreed to by the participants at the conclusion of each session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the process. Participants and the mediator shall respond to press inquires within the spirit of the press statement agreed to at the conclusion of each session.]

B. [Meetings with the Press. Participants and the mediator will strictly observe the protocols regarding confidentiality in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No party will hold discussions with the press concerning specific offers, positions, or statements made during the negotiations by any other party.]

VI. MEDIATOR

A neutral mediator will work with all the parties to ensure that the process runs smoothly.

VII. APPROVAL OF PROPOSALS

A. Partial Approval. It is recognized that unqualified acceptance of individual provisions is not possible out of context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing of the agreed upon items by the representatives of all interests represented. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Final Approval. Upon final agreement, all representatives shall sign and date the appropriate document. It is explicitly recognized that the representatives of the U.S. EPA do not have the final authority to agree to any terms in this case. Final approval must be obtained from _____ [insert names of proper officials].

VIII. EFFECTIVE DATE

These protocols shall be effective upon the signature of the representatives.

For the U.S. Environmental Protection Agency

_____ _____
Signature Date

For _____ [Name of violator]

_____ _____
Signature Date

Attachment E

AGREEMENT TO INSTITUTE MINI-TRIAL PROCEEDINGS

The United States Environmental Protection Agency (EPA) and XYZ Corporation, complainant and respondent, respectively, in the matter of XYZ Corp., Docket No. _____, agree to the alternative dispute resolution procedure set forth in this document for the purpose of fostering the potential settlement of this case. This agreement, and all of the actions that are taken pursuant to this agreement, are confidential. They are considered to be part of the settlement process and subject to the same privileges that apply to settlement negotiations.

1. The parties agree to hold a mini-trial to inform their management representatives of the theories, strengths, and weaknesses of the parties' respective positions. At the mini-trial, each side will have the opportunity and responsibility to present its "best case" on all of the issues involved in this proceeding.

2. Management Representatives of both parties, including an EPA official and an XYZ official at the Division Vice President level or higher, will attend the mini-trial. The representatives have authority to settle the dispute.

3. A mutually selected "Neutral Advisor" will attend the mini-trial. The Neutral Advisor will be chosen in the following manner. By _____, [insert date] the parties shall exchange a list of five potential Neutral Advisors selected from the list of candidates offered by _____ [insert neutral organization]. The potential candidates shall be numbered in order of preference. The candidate who appears on both lists and who has the lowest total score shall be selected as the Neutral Advisor. If no candidate appears on both lists, the parties shall negotiate and shall select and agree upon a Neutral Advisor by _____ [insert date].

4. The fees and expenses of the Neutral Advisor will be borne equally by both parties. [However, if the Neutral Advisor provides an opinion as to how the case should be resolved, and a party does not follow the recommended disposition of the Neutral Advisor, that party shall bear the Advisor's entire fees and expenses.]

5. Neither party, nor anyone on behalf of either party, shall unilaterally approach, contact or communicate with the Advisor. The parties and their attorneys represent and warrant that they will make a diligent effort to ascertain all prior contact between themselves and the Neutral Advisor, and that all such contacts will be disclosed to counsel for the opposing party.

6. Within 10 days after the appointment of the Neutral Advisor, mutually agreed upon basic source material will be jointly sent to the Neutral Advisor to assist him or her in familiarizing himself or herself with the basic issues of the case. This material will consist of neutral matter including this agreement, the complaint and answer, the statute, any relevant Agency guidance, a statement of interpretation and enforcement policy, the applicable civil penalty policy, and any correspondence between the parties prior to the filing of the complaint.

7. All discovery will be completed in the _____ [insert number] working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before [a federal judge or administrative law judge] in the event this mini-trial does not result in a resolution of this dispute. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual regarding the same or additional subject matter for a later hearing.

8. By _____, [insert date] the parties shall exchange all exhibits they plan to use at the mini-trial, and send copies at the same time to the Neutral Advisor. On the same date the parties also shall exchange and submit to the Neutral Advisor and to the designated trial attorney for the opposing side: (a) introductory statements no longer than 25 double-spaced pages (not including exhibits), (b) the names of witnesses planned for the mini-trial, and (c) all documentary evidence proposed for utilization at the mini-tial.

9. Two weeks before the mini-trial, if he or she so desires and if the parties agree, the Neutral Advisor may confer jointly with counsel for both parties to resolve any outstanding procedural questions.

10. The mini-trial proceeding shall be held on _____, and shall take ____ day(s). The morning proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until _____ p.m. A sample two day schedule follows:

Day 1

8:30 a.m.	12:00 Noon	EPA's position and case presentation
12:00 Noon	1:00 p.m.	Lunch*
1:00 p.m.	2:30 p.m.	XYZ's cross-examination
2:30 p.m.	4:00 p.m.	EPA's re-examination
4:00 p.m.	5:00 p.m.	Open question and answer period

Day 2

8:30 a.m	12:00 Noon	XYZ's position and case presentation
12:00 Noon	1:00 p.m.	Lunch*
1:00 p.m.	2:30 p.m.	EPA's cross-examination
2:30 p.m.	3:00 p.m.	XYZ's re-examination
3:00 p.m.	4:30 p.m.	Open question and answer period
4:30 p.m.	4:45 p.m.	EPA's closing argument
4:45 p.m.	5:00 p.m.	XYZ's closing argument

*Flexible time period for lunch of a stated duration.

11. The presentations at the mini-trial will be informal. Formal rules of evidence will not apply, and witnesses may provide testimony in the narrative. The management representatives may question a witness at the conclusion of the witness' testimony for a period not exceeding ten minutes per witness. In addition, at the conclusion of each day's presentation, the management repesentatives may ask any further questions that they deem appropriate, subject to the time limitations specified in paragraph 10. Cross-examination will occur at the conclusion of each party's direct case presentation.

12. At the mini-trial proceeding, the trial attorneys will have complete discretion to structure their presentations as desired. Forms of presentation include, but are not limited to, expert witnesses, lay witnesses, audio visual aids, demonstrative evidence, and oral argument. The parties agree that there will be no objection by either party to the form or content of the other party's presentation.

13. In addition to asking clarifying questions, the Neutral Advisor may act as a moderator. However, the Neutral Advisor will not preside like a judge or arbitrator, nor have the power to limit, modify or enlarge the scope or substance of the parties' presentations. The presentations will not be recorded, but either party may take notes of the proceedings.

14. In addition to counsel, each management representative may have advisors in attendance at the mini-trial, provided that all parties and the Neutral Advisor shall have been notified of the identity of such advisors at least ten days before commencement of the mini-trial.

15. At the conclusion of the mini-trial, the management representatives shall meet, by themselves, and shall attempt to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

16. At the request of any management representative, the Neutral Advisor will render an oral opinion as to the likely outcome at trial of each issue raised during the mini-trial. Following that opinion, the management representatives will again attempt to resolve the dispute. If all management representatives agree to request a written opinion on such matters, the Neutral Advisor shall render a written opinion within 14 days. Following issuance of any such written opinion, the management representatives will again attempt to resolve the dispute.

17. If the parties agree, the [adminstrative law judge or federal district court judge] may be informed in a confidential communication that an alternative dispute resolution procedure

is being employed, but neither party shall inform the [administrative law judge or federal district court judge] at any time as to any aspect of the mini-trial or of the Advisor. Furthermore, the parties may file a joint motion to suspend proceedings in the _____ [appropriate court] in this case. The motion shall advise the court that the suspension is for the purpose of conducting a mini-trial. The court will be advised as to the time schedule established for completing the mini-trial proceedings. Written and oral statements made by one party in the course of the mini-trial proceedings cannot be utilized by the other party and shall be inadmissible at the hearing of this matter before the [administrative law judge or federal district court judge] for any purpose, including impeachment. However, documentary evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

18. Any violation of these rules by either party will seriously prejudice the opposing party and be prima facie grounds for a motion for a new hearing; and to the extent that the violation results in the communication of information to the [administrative law judge or federal district court judge] contrary to the terms of this agreement, it shall be prima facie grounds for recusal of the [administrative law judge or federal district court judge]. Moreover, notwithstanding the provisions of Paragraph 4 above, any violation of these rules by either party will entitle the opposing party to full compensation for its share of the Neutral Advisor's fees and expenses, irrespective of the outcome of any administrative or court proceeding.

19. The Neutral Advisor will be disqualified as a hearing witness, consultant, or expert for either party, and his or her advisory response will be inadmissible for all purposes in this or any other dispute involving the parties. The Neutral Advisor will treat the subject matter of the presentations as confidential and will refrain from disclosing any trade secret information disclosed by the parties. After the Advisor renders his or her opinion to the parties, he or she shall return all materials provided by the parties (including any copies) and destroy all notes concerning this matter.

Dated: _____ Dated: _____

By: _____
Attorney for United States Environmental Protection Agency

By: _____
Attorney for XYZ Corporation

Affirmation of Neutral Advisor:

I agree to the foregoing provisions of this Alternative Dispute Resolution Agreement.

Dated: _____

Signed: _____
Neutral Advisor

All parties shall be given an opportunity to examine documents.

4. Arbitral Decision

(a) The Arbitrator shall render a decision within thirty [five] days after the hearing is declared closed except if:

(1) All parties agree in writing to an extension; or

(2) The Arbitrator determines that an extension of the time limit is necessary.

(b) The decision of the Arbitrator shall be signed and in writing. It shall contain a brief statement of the basis and rationale for the Arbitrator's determination. At the close of the hearing, the Arbitrator may issue an oral opinion which shall be incorporated into a subsequent written opinion.

(c) The Arbitrator may grant any remedy or relief within the scope of the issues presented in the joint request for arbitration.

(d) The Arbitrator shall assess arbitration fees and expenses in favor of any party, and, in the event any administrative fees or expenses are due the NAA, in favor of the NAA.

(e) If the dispute has been heard by three Arbitrators, all decisions and awards must be made by at least a majority, unless the parties agree in writing otherwise.

(f) If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon the parties' request, may set forth the terms of the agreed settlement.

(g) The Arbitrator shall mail to or serve the decision on the parties.

(h) The Arbitrator shall, upon written request of any party, furnish certified facsimiles of any papers in the Arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

SUBPART D - APPEALS, FEES AND OTHER PROVISIONS

1. Appeals Procedures

(a) Any party may appeal the award or decision within thirty days of notification of the decision. Any such appeal

shall be made to the [insert "Federal district court for the district in which the arbitral hearing took place" or "Chief Judicial Officer, U.S. Environmental Protection Agency"].

(b) The award or decision of the Arbitrator shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, abuse of discretion, other misconduct by any of the parties, or mutual mistake of fact. [Insert "No court shall" or "The Chief Judicial Officer shall not"] have jurisdiction to review the award or decision unless there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, abuse of discretion, other misconduct, or mutual mistake of fact.

(c) Judgment upon the arbitration award may be entered in any Federal district court having jurisdiction. The award may be enforced in any Federal district court having jurisdiction.

(d) Except as provided in paragraph (c), no award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of [insert applicable statutory acronyms] or any other provision of law, nor shall any prearbitral settlement be admissible as evidence in any such proceeding. Arbitration decisions shall have no precedential value for future arbitration, administratiave or judicial proceedings.

2. Administrative Fees, Expenses, and Arbitrator's Fee

(a) The NAA shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of filing or the time of refund shall be applicable. The filing fee shall be advanced by the parties to the NAA as part of the joint request for arbitration, subject to apportionment of the total administrative fees by the Arbitrator in the award. If a matter is withdrawn or settled, a refund shall be made in accordance with the Refund Schedule.

(b) Expenses of witnesses shall be borne by the party presenting such witnesses. The expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies, unless otherwise agreed by the parties, or unless the Arbitrator assesses such expenses or any part thereof against any specified party in the award.

(c) The per diem fee for the Arbitrator shall be agreed upon by the parties and the NAA prior to the commencement of any activities by the Arbitrator. Arrangements for compensation of the Arbitrator shall be made by the NAA.

(d) The NAA may require an advance deposit from the parties to defray the Arbitrator's Fee and the Administrative Fee, but shall render an accounting to the parties and return any balance of such deposit in accordance with the Arbitrator's award.

3. Miscellaneous Provisions

(a) Any party who proceeds with the arbitration after knowledge that any provision or requirement of this Part has not been complied with, and who fails to object either orally or in writing, shall be deemed to have waived the right to object. An objection, whether oral or written, must be made at the earliest possible opportunity.

(b) Before the selection of the Arbitrator, all oral or written communications from the parties for the Arbitrator's consideration shall be directed to the NAA for eventual transmittal to the Arbitrator.

(c) Neither a party nor any other interested person shall engage in ex parte communication with the Arbitrator.

(d) All papers connected with the arbitration shall be served on an opposing party either by personal service or United States mail, First Class, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

ATTACHMENT F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	
XYZ Corporation,	)	Docket No.
	)	
Respondent	)	

AGREEMENT TO INSTITUTE FACT-FINDING PROCEDURES

A. General Provisions

1. Purpose

2. Definitions

B. Guidelines for Conduct of Neutral Fact-finding

1. Scope and Applicability

2. Jurisdiction of Neutral Fact-finder

3. Selection of Neutral Fact-finder

4. Information Regarding Dispute

5. Determination of Neutral Fact-finder

6. Confidentiality

7. Appeals Procedures

8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee

9. Miscellaneous Provisions

A. GENERAL PROVISIONS

1. Purpose

This agreement contains the procedures to be followed for disputes which arise over _____ [state issue(s)].

2. Definitions

Terms not defined in this section have the meaning given by _____ [state applicable statute(s) and section(s)]. All time deadlines in these alternative dispute resolution (ADR) procedures are specified in calendar days. Except when otherwise specified:

(a) "Act" means [state applicable statute(s) and citation in U.S. Code].

(b) "NAO" means any neutral administrative organization selected by the parties to administer the requirements of the ADR procedures.

(c) "Neutral Fact-finder" means any person selected in accordance with and governed by the provisions of these ADR procedures.

(d) "Party" means EPA and the XYZ Corporation.

B. GUIDELINES FOR CONDUCT OF NEUTRAL FACT-FINDING

1. Scope and Applicability

The ADR procedures established by this document are for disputes arising over _____ [state issue(s)].

2. Jurisdiction of Neutral Fact-finder

In accordance with the ADR procedures set forth in this document, the Neutral Fact-finder is authorized to issue determinations of fact regarding disputes over [state _____ issue(s)], and any other issues authorized by the parties.

3. Selection of Neutral Fact-finder

The Neutral Fact-finder will be chosen by the parties in the following manner.

(a) The parties shall agree upon a neutral administrative organization (NAO) to provide services to the parties as specified in these ADR procedures.

The parties shall jointly request the NAO to provide them with a list of three to five (3-5) potential Neutral Fact-finders. Either party may make recommendations to the NAO of qualified individuals. Within ten (10) days after the receipt of the list of potential Neutral Fact-finders, the parties shall numerically rank the listed individuals in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with and interview the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the Neutral Fact-finder.

(b) The NAO shall give notice of the appointment of the Neutral Fact-finder to each of the parties. A signed acceptance by the Neutral Fact-finder shall be filed with the NAO prior to the initiation of fact-finding proceedings.

(c) If the Neutral Fact-finder should resign, die, withdraw, or be disqualified, unable, or refuse to perform the duties of the office, the NAO may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be reinitiated, unless the parties agree otherwise.

4. Information Regarding Dispute

(a) Within ten (10) days after the selection of the Neutral Fact-finder, basic source material shall be jointly submitted to the Neutral Fact-finder by the parties. Such basic source material shall consist of:

1) an agreed upon statement of the precise nature of the dispute,

2) the position of each party and the rationale for it,

3) all information and documents which support each party's position, and

4) _____ [describe additional material].

(b) Thereafter, for a period of _____ days, the Neutral Fact-finder shall conduct an investigation of the issues in dispute. As part of such investigation, the Neutral Fact-finder may interview witnesses, request additional

documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The Neutral Fact-finder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be necessary.

5. Determination of Neutral Factfinder

(a) The Neutral Fact-finder shall render a determination within _____ days of the time limitation specified in Section B. 4(b) above, unless:

(1) Both parties agree in writing to an extension; [or

(2) The Neutral Fact-finder determines that an extension of the time limit is necessary.]

(b) The determination of the Neutral Fact-finder shall be signed and in writing. It shall contain a full statement of the basis and rationale for the Neutral Fact-finder's determination.

(c) If the parties settle their dispute prior to the determination of the Neutral Fact-finder, the Neutral Fact-finder shall cease all further activities in regard to the dispute upon receipt of joint notice of such settlement from the parties.

(d) The parties shall accept as legal delivery of the determination the placing of a true copy of the decision in the mail by the Neutral Fact-finder, addressed to the parties' last known addresses or their attorneys, or by personal service.

(e) After the Neutral Fact-finder forwards his or her determination to the parties, he or she shall return all dispute-specific information provided by the parties (including any copies) and destroy notes concerning this matter.

6. Confidentiality

(a) The determination of the Neutral Fact-finder, and all of the actions taken pursuant to these ADR procedures, shall be confidential and shall be entitled to the same privileges that apply generally to settlement negotiations.

(b) The Neutral Fact-finder shall treat the subject matter of all submitted information as confidential, and shall refrain from disclosing any trade secret or confidential business information disclosed as such by the parties. [If XYZ has previously formally claimed information as confidential business information (CBI), XYZ shall specifically exclude the information from such CBI classification for the limited purpose of review by the Neutral Fact-finder.]

(c) No determination of the Neutral Fact-finder shall be admissible as evidence of any issue of fact or law in any proceeding brought under any provision of [state statute] or any other provision of law.

7. Appeals Procedures

(a) Any party may appeal the determination of the Neutral Fact-finder within thirty days of notification of such determination. Any such appeal shall be made to the [Chief Judicial Officer, U.S. Environmental Protection Agency, or district court judge].

(b) The determination of the Neutral Fact-finder shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, other misconduct by the Neutral Fact-finder or by any of the parties, or mutual mistake of fact. The [administrative law judge or federal district court judge] shall not have jurisdiction to review the determination unless there is a verified complaint with supporting affidavits filed by one of the parties attesting to specific instances of such fraud, misrepresentation, other misconduct, or mutual mistake of fact.

8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee

(a) The fees and expenses of the Neutral Fact-finder, and of the NAO, shall be borne equally by the parties. The parties may employ additional neutral organizations to administer these ADR procedures as mutually deemed necessary, with the fees and expenses of such organizations borne equally by the parties.

(b) The NAO shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of the joint request for fact-finding shall be applicable. The filing fee, if required, shall be advanced by the parties to the NAO as part of the joint request for fact-finding. If a matter is settled, a refund shall be made in accordance with the Refund Schedule.

(c) Expenses of providing information to the Neutral Fact-finder shall be borne by the party producing such information.

(d) The per diem fee for the Neutral Fact-finder shall be agreed upon by the parties and the NAO prior to the commencement of any activities by the Neutral Fact-finder. Arrangements for compensation of the Neutral Fact-finder shall be made by the NAO.

9. Miscellaneous Provisions

(a) Before the selection of the Neutral Fact-finder, all oral or written communications from the parties for the Neutral Fact-finder's consideration shall be directed to the NAO for eventual transmittal to the Neutral Fact-finder.

(b) All papers connected with the fact-finding shall be served on the opposing party either by personal service or United States mail, First Class.

(c) The Neutral Fact-finder shall be disqualified from acting on behalf of either party, and his or her determination pursuant to these ADR procedures shall be inadmissible for all purposes, in any other dispute involving the parties.

(d) Any notification or communication between the parties, or with and by the Neutral Fact-finder shall be confidential and entitled to the same privileges that apply generally to settlement negotiations.

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

#63

AUG 20 1987

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

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

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Regional Administrators
Regions I-X

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

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

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

Attachment

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

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

Background

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

Primary Responsibilities Under the MOU

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

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

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

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

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

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

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

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

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

Current Experience

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

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

Consideration Affecting Invoking Section 9

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

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

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

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

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

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

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

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

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

Procedures for Invoking Section 9

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

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

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

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

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

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

Support of Cases Where Agency Invokes Section 9

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

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

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

SEP 14 1987

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Processing of Consent Decrees

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: OECM Attorneys

The August 10-12 meeting on Enhancing and Streamlining the Enforcement Process produced several promising proposals for long-term improvements in the way our Agency conducts enforcement. In addition to following up on these proposals, I am currently looking for ways to streamline our own internal operations and thereby shorten the time for Headquarters review of documents submitted by the Regions.

One suggestion which I plan to implement immediately is designed to speed up Headquarters processing of consent decrees. Consent decrees are normally sent to Headquarters with a cover memorandum which explains the nature of the case, the contents of the settlement, and other important issues. The staff attorney prepares a memorandum to me recommending that the decree be forwarded to the Department of Justice. This memorandum, in part, summarizes or restates the facts and issues discussed in the Regional cover memorandum.

Rather than reiterating the information contained in the Region's cover memorandum, I would prefer that you refer to and attach that memorandum where appropriate. Of course, any items requiring further discussion should also be addressed in the cover memorandum you prepare.

In any case, the package sent to me for signature should contain, in the cover memorandum you prepare or in the attached Regional submission, the following information:

1) identification of the cause of action (including statutory and regulatory provisions at issue) and the basic facts of the case;

2) summary of the terms of the settlement, including anticipated environmental results and an explanation of any significant variance from established guidance on drafting consent decrees;

3) discussion of precedential issues and issues of national importance;

4) discussion of whether the penalty comports with the applicable penalty policy (there should be a full explanation of any penalty figure below that which is recommended by the applicable policy);

5) discussion of any unusual injunctive relief obtained (e.g., environmental auditing or credit projects);

6) if the consent decree allows the defendant to come into compliance after the statutory deadline, discussion of the reason for doing so; and

7) if the settlement is not complete, discussion of the elements and issues of the remaining case.

Thank you for your cooperation in implementing this new procedure. I would enjoy hearing any additional ideas you may have for avoiding duplication of effort or otherwise streamlining the enforcement process.

cc: Regional Counsels, Regions I - X

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

#65

SEP 29 '87

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Processing of Indirect Referrals

FROM: Thomas L. Adams, Jr. Thomas L. Adams
Assistant Administrator

TO: OECM Attorneys

Under current practices for handling indirect referrals in OECM, the staff attorney generally prepares a memorandum which summarizes the case, discusses significant issues, and then recommends that I refer the case to the Department of Justice for filing. The litigation report sent to headquarters by the Region often contains a cover memorandum from the Regional Administrator that also summarizes the case being referred.

In continuing our efforts to streamline the enforcement process, I want to encourage OECM staff attorneys to refer to and attach the Regional Administrator's cover memorandum to the package that is sent to me for signature as appropriate. Points that are adequately covered in the Regional memorandum need not be addressed in the OECM staff attorney's memorandum.

In any case, the package sent to me for signature should contain, in the memorandum you prepare or in the attached Regional memorandum, the following information:

1) a brief summary of the case, including the basic facts and an identification of the cause(s) of action(s);

2) a summary of the injunctive relief requested and a discussion of whether the proposed bottom-line penalty is consistent with the applicable penalty policy;

3) a discussion of any precedential issues, any issues of national importance and any significant weak-

nesses that may prevent the United States from obtaining the relief sought; and

4) identification of any government personnel who must be recused from participation in, or review of, the case (please keep in mind that Jonathan Cannon is recused from all cases handled by the law firm of Beveridge and Diamond, and I am recused from all Republic steel cases).

I anticipate that, for most cases, this information can be provided in a two to three page memorandum prepared by you that either discusses each of the four items itself, or, as appropriate, refers to an attached Regional memorandum.

cc: Regional Counsels, I - X

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

#66

OCT 3 1984

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Guidance for Assertion of Deliberative Process Privilege

TO: Assistant Administrators
General Counsel
Inspector General
Associate Administrators
Regional Administrators

The following guidance covers the assertion of the deliberative process privilege in response to depositions, motions to compel discovery and questions posed at a trial or hearing.1/

By separate action today, I have approved a delegation of authority authorizing you to assert this privilege on behalf of EPA. The guidance should be consulted and applied when exercising the authority to assert this privilege. (See delegation entitled "Assertion of Deliberative Process Privilege.) The guidance covers three areas:

- When should EPA assert the privilege?
- Who should assert the privilege?
- How should one assert the privilege?

The purpose of this privilege is to prevent disclosure of certain documents or other materials containing personal advice, recommendations or opinions relating to the development of

1/ This guidance does not cover assertion of this privilege in Freedom of Information Act matters. Nor does it cover other discovery privileges such as attorney work product, attorney client, etc. Finally, proper objections may lie to discovery that are not based on any privilege such as objections to discovery of legally irrelevant evidence.

Agency policy, rulemaking, use of enforcement discretion, the settlement of cases, etc. Public disclosure of such material would be likely either to inhibit the honest exchange of views or inaccurately reflect or prematurely disclose the views of the Agency.

I. Background

The deliberative process privilege applies to information which is generated as part of the process leading to a final Agency decision or action on a matter. The function of the privilege is to encourage the honest and free expression of opinion, suggestions and ideas among those formulating policy for government agencies. United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973).

Inherent in this rationale is the assumption that, absent the privilege, the range of fresh ideas will be limited by fear of later public scrutiny of internal statements and suggestions. Thus, effective and innovative government will suffer. This purpose has been recognized in deciding that the privilege applies to documents "so candid or personal in nature that public disclosure is likely in the future to stifle the honest and frank communication within the agency." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The privilege likewise "covers recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinion of the writer rather than the policy of the agency." Id. Perhaps the most encompassing definition holds that "it is well established that the privilege obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd 384 F.2d 979, cert. denied 389 U.S. 952 (1967).

There are several limitations upon the otherwise broad reach of the privilege. First, the document or other written material must be predecisional, meaning generated before the policy to which it pertains was adopted by the Agency. In the case of mental impressions or opinions, predecisional means that the information sought in discovery consists of thoughts that were never communicated in writing as part of the policy setting or rulemaking process. Any document written to explain or support an established policy is not privileged. NLRB v. Sears, Roebuck and Co., 421 U.S. 132 (1975). Furthermore even

if a document was predecisional when prepared, it can lose that status "if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d at 866. The privilege also does not apply to matters which are purely factual in nature unless such factual material is inextricably bound within truly deliberative or opinion matters. Smith v. FTC, 403 F. Supp. 1000 (D. Del. 1975).

II. When to Assert the Privilege

Although the law allows the Agency to assert this privilege in a wide variety of situations, it does not require the Agency to exercise that right. Indeed, it is EPA policy that the Agency will not assert the privilege in every case where it applies. The Agency has a responsibility to the public to provide the relevant facts which underlie a particular policy. This responsibility suggests that we disclose data and the reasons supporting a policy on occasion which might otherwise fall within the scope of the privilege.

The Agency should release documents or other materials otherwise subject to the deliberative process privilege except where:

- release of the documents or other matters may cause harm to the public interest (See Section IV (5) for definition of harm),
- the documents or other matters are subject to another privilege which would justify nondisclosure, or
- release of the material would be unlawful.[2]/

Documents or other materials should not be withheld solely because they would reveal flaws in the case or information embarrassing to the government.

III. Who Should Assert the Privilege

In general, the head of the office responsible for developing the document or material in question should assert the

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2/ It is the responsibility of counsel to decide whether the materials are subject to some other privilege or their release is unlawful.

privilege on EPA's behalf where appropriate. Thus, if a litigant makes a discovery request at a regional office seeking production of matters which originated with a Headquarters program office, the decision to assert the privilege should probably be made by the head of that Headquarters program office. Of course, if the document was produced in a regional office, the Regional Administrator would assert the privilege, if appropriate.

IV. How to Assert the Privilege

The guidance contained in this section should be followed in asserting the deliberative process privilege. The deliberative process privilege may be claimed only for documents or other materials which are truly deliberative or recommendatory in nature and consist of advisory matter or personal opinion rather than factual matter or Agency policy. Material or documents which are essentially factual in nature or which embody policies upon which the Agency has relied may not be withheld under the claim of deliberative process privilege. Furthermore, material which is clearly factual and which can be excised from deliberative material must be extracted and disclosed.

At a deposition, trial, or hearing, or similar circumstances where it is impracticable for the Agency to have a high official on call to claim the privilege, the privilege may initially be asserted by the attorney representing the Agency. He or she will raise and protect any potential claim of privilege by objecting to a question posed and directing the witness not to answer. If necessary - for example, in order to respond to a motion to compel - the attorney must furnish an affidavit from the appropriate Agency official which formalizes and supports the assertion of the privilege. The affidavit would be furnished to opposing counsel and, when appropriate, to the hearing officer or trial judge.

In formally asserting the privilege, the delegatee should comply with the following:

1) All delegatees must obtain the advance concurrence of the Office of General Counsel before asserting the privilege.

2) The privilege shall be claimed by executing an affidavit to be furnished to opposing counsel and, when appropriate, to the hearing officer or trial judge.

3) Where appropriate, the affidavit shall identify each document, portion of the document or other matter for which the privilege is claimed.

4) The affidavit shall specify that the delegatee has personally reviewed each document or other matter for which the privilege is being claimed.

In cases involving an extraordinarily large amount of material, the delegatee need only review a representative sample. It is understood that these will be extreme cases. In addition, the process of selecting the representative sample will be under close scrutiny. Alternatively, the delegatee may rely upon a personal briefing of a responsible Agency employee with personal knowledge of the matters for which the claim of privilege is sought or upon a comprehensive affidavit of such a responsible Agency employee in lieu of a briefing. The affidavit of the delegatee shall state the extent of the review and whether he or she is relying upon the briefing or affidavit of another.

5) The affidavit shall contain a statement that in the judgment of the affiant (delegatee), disclosure of the documents or other matters may cause an identifiable harm to the public interest. For these purposes, "harm" may be found where public disclosure is likely in the future to inhibit honest and frank communication necessary to effective policy making or might inaccurately reflect or prematurely reveal the views of the Agency. Documents or other materials should not be withheld solely because they would reveal flaws in the case or information embarrassing to the government.

6) Any agency official wishing to assert this privilege must be prepared to provide the material in question to the court for an in camera review.

William D. Ruckelshaus

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Revision:2/27/84:3/1/83:3/6/84:3/30/84:4/5/84:4/9/84:4/12/84
5/7/84:5/10/84:7/27/84

GENERAL, ADMINISTRATIVE, AND MISCELLANEOUS

1-49. Assertion of the Deliberative Process Privilege

1. AUTHORITY. To assert the deliberative process privilege in judicial and administrative litigation with respect to documents, portions of documents, or other materials within the control of the Agency.

2. TO WHOM DELEGATED. Deputy Administrator, Assistant Administrators, General Counsel, Inspector General, Associate Administrators, and Regional Administrators.

3. LIMITATIONS. All delegatees must obtain the concurrence of the General Counsel before asserting the deliberative process privilege.

4. REDELEGATION AUTHORITY. This authority may not be redelegated.

5. ADDITIONAL REFERENCES.

a. Rule 501, Federal Rules of Evidence;

b. Rule 26, Federal Rules of Civil Procedure; and

c. See the Memorandum of October 3, 1984, from William D. Ruckelshaus, Administrator, to Assistant Administrators, General Counsel, Inspector General, Associate Administrators, and Regional Administrators entitled "Guidance for Assertion of Deliberative Process Privilege."

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

APR 22 1985

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Deputy Administrator
Assistant Administrators
Inspector General
Associate Administrators
Regional Administrators

FROM: Gerald H. Yamada
Acting General Counsel

SUBJECT: Assertion of the Deliberative Process Privilege

On October 3, 1984, the Administrator delegated to you the authority to assert the deliberative process privilege in litigation on the condition that you obtain the General Counsel's concurrence before asserting the privilege (see attached). This memorandum sets forth the procedures for obtaining that concurrence.

In general, the head of the office responsible for developing the document or material in question should assert the privilege. In all cases, the official asserting the privilege should prepare a memorandum requesting the General Counsel's concurrence. If the litigating attorney needs to file an affidavit to support the privilege, a draft affidavit should also be forwarded for review. The Associate General Counsels, Associate Enforcement Counsels, and Regional Counsels will be available to take the lead in preparing these documents. The official must explain both the basis for the conclusion that the materials fall within the deliberative process privilege and the reasons why release of the documents may cause harm to the public interest. Depending on the stage of the litigation, the explanation should be either in the affidavit or in the memorandum. A representative sample of the documents should be provided to the General Counsel along with the affidavit or memorandum. The extent to which the asserting official must review and describe the documents is addressed in the Administrator's memorandum.

Attachment

cc: Regional Counsels
Associate General Counsels
Associate Enforcement Counsels

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

SEP 30 1987

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Change in Review Process for Concurrence in Assertions of Deliberative Process Privilege in Litigation

FROM: Francis S. Blake
General Counsel

TO: Associate General Counsels

As you know, in accordance with the directive of the former Administrator, my concurrence is required in any assertion of the deliberative process privilege by the Agency in response to depositions, motions to compel discovery or questions posed at trial or hearings. The attached memoranda set out the procedures which already are in place and which remain in effect for obtaining my concurrence.

Until now, the Grants, Contracts and General Law Division has been responsible for reviewing requests for my concurrence. Effective immediately, requests for concurrence will be reviewed by the OGC division with programmatic responsibility for the documents or testimony in question, rather than only the Grants, Contracts and General Law Division. For example, requests to assert the deliberative process privilege in Superfund cost recovery cases will be brought to the attention of the Solid Waste and Emergency Response Division, and requests in Clean Air Act administrative hearings will be directed to the Air and Radiation Division.

The request for concurrence in asserting the privilege should be sent to me, along with the division's recommendation.

The Contracts and Information Law Branch of the Grants, Contracts and General Law Division will be available to discuss the standards to be applied and procedures to be followed in this review process. Contact Tom Darner at 382-5460 to request assistance.

cc: Assistant Administrators
Regional Counsels
Regional Administrators

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

January 11, 1988

#67

MEMORANDUM

SUBJECT: Procedures for Assessing Stipulated Penalties

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

TO: Regional Administrators
Regional Enforcement Contacts
Regional Counsels
Regional Program Division Directors
Program Office Enforcement Directors

The purpose of this memorandum is to clarify procedures for assessing stipulated penalties for consent decree violations.

As discussed in my August 28, 1986 memo on Expanded Civil Judicial Referral Procedures, the direct referral process will be followed to enforce the terms of a judicial decree for payment of penalties agreed to as part of the settlement on the original violation. Stipulated penalties (i.e. penalties due and owing because of a violation of the consent decree terms) are not covered under the above direct referral procedures. The procedure described below will be used for enforcing the payment of stipulated penalties.

Unless the consent decree specifies otherwise, letters to defendants demanding payment of stipulated penalties should be sent by DOJ. The following procedures apply for enlisting DOJ's assistance:

- The Region sends a letter to DOJ (copy to OECM) requesting DOJ to issue a demand letter. The letter to DOJ should contain summary information sufficient to apprise DOJ of relevant facts, issues and proposed solutions.

- DOJ copies the Region and OECM with any response to the demand letter.

- o If the response is unsatisfactory, the Region will send a direct referral package to DOJ (copy to OECM). The referral package should request that DOJ enforce against the unresolved consent decree violations, include any relevant new information arising since the demand letter request, and specify the extent of the relief which EPA wishes to pursue.

- o DOJ takes appropriate action to enforce the original consent decree with full participation by the Region.

- o When the defendant pays stipulated penalties to the Federal government without receiving a demand letter (e.g. if the consent decree establishes stipulated penalties which are automatically due when certain events happen and the defendant pays such sums to EPA or the U.S. Attorneys Office), the Region should notify the appropriate Associate Enforcement Counsel of that fact in writing or by telephone. OECM is currently developing procedures for tracking and collecting civil penalties which may change the notification requirement in the future.

SPMS CONSENT DECREE TRACKING MEASURE

Under the SPMS consent decree measure, a demand letter is not considered a "formal enforcement response." A penalty payment must be received or a direct referral package sent to DOJ (copy to OECM) before the violation is considered addressed. Where a demand letter has been sent, the Region should report the decree in the "in violation with action planned" category. When a direct referral is sent to DOJ to address the non-payment of a stipulated penalty, the Region should report the decree in the "in violation with action commenced" category.

If you have any questions regarding these procedures, please contact Lisa Oyler, Compliance Evaluation Branch, OECM, at 475-6113.

cc: Roger J. Marzulla, DOJ
David Buente, DOJ
Gerald A. Bryan, OCAPO
Thomas Gallagher, NEIC
Deputy Assistant Administrators, OECM
Associate Enforcement Counsels, OECM

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

#68

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

January 11, 1988

MEMORANDUM

SUBJECT: Procedures for Modifying Judicial Decrees

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

TO: Regional Administrators
Regional Enforcement Contacts
Regional Counsels
Regional Program Division Directors
Program Office Enforcement Directors

The purpose of this memorandum is to clarify procedures for modifying consent decrees and other judicial orders entered in EPA enforcement cases.

Consent decree "modifications" are changes to a consent decree proposed jointly to the court by the Federal government and a defendant, largely to address circumstances which have arisen since the entry of the consent decree (such as force majeure events or other unanticipated circumstances). Thus, these "modifications" are distinct from Federal government unilateral enforcement actions requiring the violator to comply with the terms of the decree and imposing sanctions. Consent decree modifications should be addressed as follows:

- As soon as the need to modify a consent decree is discovered, the Region should send a letter to the appropriate OECM-AEC and DOJ-Environmental Enforcement Section Chief notifying them of the intent to open negotiations with the defendant. The letter should contain summary information sufficient to apprise OECM and DOJ of relevant facts, issues, and proposed solutions.

- Consistent with appropriate consultation procedures with OECM or DOJ, the Region (along with OECM or DOJ, as appropriate) may proceed to negotiate a modification of the consent decree in the manner described in the letter.

- o OECM retains authority for approving any modifications on behalf of EPA. DOJ retains authority for approving any modifications on behalf of the United States.

- o After OECM and DOJ officials have approved the modifications, the DOJ attorney will present the proposed consent decree modification to the appropriate court for approval.

SPMS CONSENT DECREE TRACKING MEASURE

A consent decree violation handled through modification will be considered addressed under the SPMS consent decree tracking measure when a modified consent decree is signed by the AA-OECM and DOJ representative. Until these officials approve the modification, the Region will report the consent decree in the "in violation with action planned" category.

If you have any questions regarding these procedures, please contact Lisa Oyler, Compliance Evaluation Branch, OECM, at 475-6118.

cc: Roger J. Marzulla, DOJ
David Buente, DOJ
Gerald A. Bryan, OCAPO
Thomas Gallagher, NEIC
Deputy Assistant Administrators, OECM
Associate Enforcement Counsels, OECM

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

JAN 14 1988

#69

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

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

FROM: Thomas L. Adams, Jr.
Assistant Administrator

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

I. BACKGROUND

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

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

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

II. SUMMARY

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

Attached is a copy of the agreement between EPA and DOJ, which is incorporated into this guidance. Many of the procedures for direct referral of cases are adequately explained in the agreement. However, there are some points I would like to emphasize.

III. PROCEDURES

A. CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which must continue to be referred through the Office of Enforcement and Compliance Monitoring (OECM). All other cases should be referred directly by the Regional Office to DOJ Headquarters, with the following two exceptions:

(1) cases which contain counts which could be directly referred and counts which require prior EPA Headquarters review should be referred through EPA Headquarters, and

(2) any referral which transmits a consent decree should be referred through EPA Headquarters, except where existing delegations provide otherwise.

If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

B. **PREPARATION AND DISTRIBUTION OF REFERRAL PACKAGES**

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

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

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

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

(c) the essential facts upon which the proposed action is based, including identification of any significant factual issues;

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

(e) significant or precedential legal or policy issues;

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

(g) lead Regional legal and technical personnel;

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

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

Referral packages should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington D.C. 20530. Attention:

Chief, Environmental Enforcement Section. Copies of all referral packages should also be sent to the Assistant Administrator for OECM and the appropriate Headquarters program office.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

C. IDENTIFICATION AND RESOLUTION OF SIGNIFICANT LEGAL AND POLICY ISSUES

A major element in assuring the success of the expanded direct referral program is an efficient process to identify and resolve significant legal and policy issues. This should be done as early as possible to assure that unresolved issues not delay a referral. Early identification and resolution will also help the Agency to avoid devoting significant Regional resources to preparing a litigation report for a case which will ultimately be considered inappropriate for referral.

The procedures make clear that the Regional office has the initial responsibility for identification of significant legal and policy issues. Such issues should be identified to OECM and the appropriate Headquarters program office as soon as a decision is made to proceed with litigation. All parties should then work to address the issues as quickly as possible, preferably before the referral package is sent to Headquarters.

The agreement with DOJ also outlines procedures for Headquarters review of referral packages to determine whether any significant legal or policy issues exist which would impact filing, and the process for resolution of such issues. If an issue surfaces during the 35-day Headquarters review period, OECM will work for quick resolution of the issue, with escalation as necessary to top Agency management. This should serve primarily as a "safety valve" for those few issues not previously identified, rather than as the point at which issues are first raised.

Finally, if DOJ raises a significant legal or policy issue during its review, OECM will work with the Region and the Headquarters program office to expedite resolution of the issue. If DOJ makes a tentative determination to return a

referral, DOJ will consult with OECM and the Regional Office in advance of returning the referral.

D. **CASE QUALITY/STRATEGIC VALUE**

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral based on concerns about quality or strategic value, it will consider these factors during the annual audits of the Offices of Regional Counsel and the annual Regional program office reviews. Concerns relative to issues of quality or strategic value will also be raised informally as soon as they are identified.

E. **WITHDRAWAL OF CASES PRIOR TO FILING**

Cases should be fully developed and ready for filing at the time they are referred to DOJ Headquarters. Thus, case withdrawal should be necessary only under the most unusual circumstances. If, after consultation with OECM, withdrawal is determined to be appropriate, the Regions may request that DOJ withdraw any directly referred case prior to filing. Copies of the Region's request should be sent to the Assistant Administrator for OECM and the appropriate program office.

F. **MAINTENANCE OF AGENCY-WIDE CASE TRACKING SYSTEM**

In order to assure effective management of the Agency's enforcement program, it is important to maintain an accurate, up-to-date docket and case tracking system. Regional attorneys must continue to report the status of all cases, including directly referred cases, on a regular basis through use of the national Enforcement Docket System. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

If you have any questions concerning the procedures set forth in this memorandum, please contact Jonathan Cannon, Deputy Assistant Administrator for Civil Enforcement, at FTS 382-4137.

Attachment

cc: Hon. Roger J. Marzulla
David Buente
Nancy Firestone
Assistant Section Chiefs

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

... 24

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
Washington, D.C. 20530

Dear Roger:

As you know, the Agency has been considering changes in existing procedures to increase the effectiveness of its enforcement program. One change, which we discussed at our recent meeting with you, is a major expansion of the direct referral program for civil judicial enforcement actions, whereby such cases are referred directly from the Regional Administrators to your office.

We believe the past successes of this program and the increased maturity of Regional staff warrant adopting direct referrals as the basic mode of operation. Thus, with your acceptance, we intend to utilize direct referrals to your office for virtually all civil cases other than those relating to certain new statutory authorities or emerging programs where judicial enforcement experience is limited. As such programs mature, we will expand the scope of direct referrals to cover them. In addition, as new programs are implemented under new statutory or regulatory requirements, we contemplate an initial period of referrals through Headquarters for these cases prior to their incorporation into the direct referral process.

Based on discussions within the Agency and with your staff, we would propose that direct referrals cover all civil cases but those listed in Attachment A. This list includes cases in new and emerging programs and a few, highly-selected additional categories of cases where continued referral through Headquarters has been determined to be appropriate. This would allow direct referral of the vast majority of civil cases, including those which would still require significant national coordination to assure a consistent approach (such as auto coating VOC air cases). For this reason, the procedures applicable to this small subset of cases as outlined in the memorandum entitled "Implementing Nationally Managed or Coordinated Enforcement Actions: Addendum to Policy Framework for State/EPA Enforcement Agreements" dated January 4, 1985 will remain in effect.

For all but CERCLA cases, this expansion would be effective on January 1, 1988. For CERCLA cases, direct referrals would take effect on April 1, 1988. We anticipate joint issuance by our offices of the model CERCLA litigation report prior to that date.

Also attached (Attachment B) is the outline of the direct civil referral process as the Agency intends to implement it. This outline refines current direct referral procedures by more clearly focusing authority and accountability within the Agency.

Under these modified procedures, the Regional Office has the lead on direct referrals. The Region will be solely responsible for the quality of the referral. In this context, quality encompasses both the completeness and accuracy of the litigation report and the strategic value of the case. Any problems involving case quality should be raised directly with the Region.

OECM will evaluate Regional performance as to the quality and strategic value of cases on a generic basis. While OECM will not request withdrawal of an individual referral on the basis of concerns about quality or strategic value, we are committed to working with the Regional Offices to assure that current standards are maintained or even exceeded in future referrals. We welcome your input on Agency performance to assist us in this regard.

As the procedures detail, OECM (as well as the appropriate Headquarters office) will continue to be actively involved in identification and resolution of significant legal and policy issues. Such issues normally should be raised and resolved prior to the actual referral. If such an issue surfaces during the 35-day Headquarters review period, we will work for quick resolution of the issue, with escalation as necessary to top Agency management. During the period required for resolution, DOJ will treat the referral as "on hold". In the unusual circumstance where an issue is still unresolved after 60 days from the date of referral, we would contemplate withdrawal of the referral by the Agency pending resolution unless a formal "hold" letter has been submitted in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986.

If a significant policy or legal issue is raised by DOJ during its review, OECM remains committed to work with the Regional and program offices to assure expedited resolution of the issue. Obviously, these procedures are not intended to inhibit discussions between our offices to facilitate a resolution. In addition, if DOJ makes a tentative determination to return a referral, we understand that you will consult with OECM and the Regional Office in advance of returning the referral.

We believe this expansion in use of direct referrals represent a major advance in streamlining the Agency's enforcement process and appreciate your support in its implementation. This letter, upon your acceptance, will supersede the letters of September 29, 1983, October 28, 1985, and August 28, 1986 on this subject and constitute an amendment to the June 15, 1977 Memorandum of Understanding between our respective agencies.

I appreciate your continuing cooperation and support in our mutual efforts to make our enforcement process more effective. I hope this letter meets with your approval. If so, please sign in the space provided below and return a copy of the letter to me for distribution throughout the Agency.

Sincerely,

Thomas L. Adams, Jr.
Assistant Administrator

Attachments

Approved:

JAN 05 1988

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

Date

RESPONSIBILITIES AND PROCEDURES FOR DIRECT REFERRALS OF CIVIL JUDICIAL ENFORCEMENT ACTIONS TO THE DEPARTMENT OF JUSTICE

(1) Regional Offices have the lead on direct referrals to the Assistant Attorney General, Land and Natural Resources Division, Department of Justice (DOJ); Regions will be responsible for the quality of referrals.

(2) Regions will identify any significant legal/policy issues as soon as the decision is made to proceed with litigation. Such issues will be raised in writing for consideration by OECM and the appropriate Headquarters program office. All parties will attempt to resolve such issues as early as possible, preferably before the referral package is sent to Headquarters. Regions will also flag such issues in the cover memo transmitting the referral.

(3) At the same time the referral is sent to DOJ, it will be sent to OECM and the appropriate Headquarters program office for a simultaneous and independent review to determine whether any other significant policy/legal issues exist which would impact filing.

(4) Headquarters offices will complete their reviews within 35 days of receipt of the referral. Each Headquarters office will notify the Region in writing of any significant issues identified or that no such issues have been identified. A copy of this memorandum will be sent to DOJ. The Headquarters offices will coordinate their reviews and, to the extent possible, provide a consolidated response.

(5) If significant issues are identified and not readily resolved, Headquarters (the Assistant Administrator for OECM), after consultation with the program office Assistant Administrator, may request the Regional Administrator to withdraw the case. If the Regional Administrator and the Assistant Administrator for OECM (and, as applicable, the program office Assistant Administrator) are unable to agree on the appropriate resolution of the issue, the issue would be escalated to the Deputy Administrator.

(6) If a significant issue is not resolved within 60 days of the date of referral, the case will normally be withdrawn pending resolution unless an appropriate "hold" letter is sent to DOJ in accordance with the procedures contained in the memorandum entitled "Expanded Civil Judicial Referral Procedures" dated August 28, 1986 (document GM-50 in the General Enforcement Policy Compendium.)

(7) Headquarters will NOT request withdrawal of a referral package for any of the following reasons:

-- overall quality of referral package
-- strategic value of case
-- adequacy of documentation

(8) If DOJ makes a tentative decision to return a referral to EPA, it will consult with the Regional Office and OECM prior to making a final decision to return the case.

(9) Headquarters will evaluate on a generic basis (e.g., trends or repeated concerns) the quality/strategic value of a Region's referrals. Concerns relative to issues of quality or strategic value will be raised informally as soon as they are identified.

(10) Headquarters oversight will be accomplished primarily through annual program and OGC/OECM reviews, or ad hoc reviews as problems are identified in a given Region.

Note: Where a referral also transmits a signed consent decree for Headquarters approval, the procedures applicable to processing settlements shall apply in lieu of these procedures.

CASES WHICH WILL CONTINUE TO BE REFERRED THROUGH HEADQUARTERS

ALL MEDIA:

Parallel Proceedings -- Federal civil enforcement matters where a criminal investigation of the same violations is pending

RCRA/CERCLA:

UST enforcement

Enforcement of RCRA land ban and minimum technology regulations

Enforcement of administrative orders for access and penalty cases for failure to comply with requests for access (Section 104)

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

TSCA/FIFRA:

Referrals to compel compliance with or restrain violations of suspension orders under FIFRA Section 6(c)

FIFRA actions for stop sales, use, removal, and seizure under Section 13

Referrals to enforce Title III of SARA, the Community Right-to-Know provisions

Injunctive actions under Section 7 of TSCA (actions for injunctive relief to enforce the regulations promulgated under Section 17 or Section 6 could be directly referred)

WATER:

Clean Water Act pretreatment violations --failure of a POTW to implement an approved local pretreatment program

Clean Water Act permit violations relating to or determined by biological methods or techniques measuring whole effluent toxicity

PWSS cases to enforce against violations of administrative orders which were not issued using an adjudicatory hearing process

WATER (contd.)	Cases brought under the Marine Protection, Research and Sanctuaries Act (MPRSA)
	UIC cases[1]
AIR:	Smelter cases

[1] The ten cases referred to date indicate that the regulations raise interpretive issues of continuing national significance. There also appears to be a need for greater experience at gathering the facts necessary to prove violations and support appropriate relief. For this reason, the first 3 UIC cases from each Region shall be referred through Headquarters. Once the Associate Enforcement Counsel for OECM determines that the Region has completed three successful referrals, the Region may proceed to refer these cases directly to DOJ.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

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 / consultation with DOJ and Regional representativ

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

Alvin L. Alm

Alvin L. Alm
Deputy Administrator

Approved:

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

JAN 14 1988

#70

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Delegation of Concurrence and Signature Authority

FROM: Thomas L. Adams, Jr.
Assistant Administrator

TO: Associate Enforcement Counsels
Regional Counsels

As part of our continuing effort to streamline the enforcement process, OECM has been seeking ways to move cases quickly through our office while maintaining the ability to identify and participate in decisions involving significant legal and policy issues. In order to streamline our internal review process, I hereby redelegate the following concurrence and signature authorities to the appropriate Associate Enforcement Counsels:

Redelegated Authorities

1) Concurrence authority for all categories of CERCLA referrals except:

   a) actions to enforce administrative orders for access under CERCLA Section 104

   b) actions for failure to comply with requests for access under CERCLA Section 104

   c) actions to enforce Title III of SARA, the Community Right-to-Know provisions

2) Direct Referrals

a) Concurrence authority for all direct referrals shall be redelegated to the appropriate Associate Enforcement Counsels.

b) The authority to recommend withdrawal of a direct referral shall reside with the Assistant Administrator for OECM, after consultation with the appropriate Headquarters program office.

3) Signature of Consent Decrees

a) Signature authority for consent decrees shall be redelegated to the Associate Enforcement Counsels, with concurrence by the appropriate Headquarters program office as required by current delegations, for the following categories of cases:

(1) actions seeking only the collection of penalties based on previously assessed administrative orders;

(2) actions for access to property;

(3) information collection actions;

(4) proofs of claim in bankruptcy actions.

b) Signature authority for all other consent decrees shall continue to reside with the Assistant Administrator for OECM, with concurrence by the appropriate Headquarters program office as required by current delegations.

Procedures

Although the AEC's will have primary responsibility for these redelegated items, it is important that the Assistant Administrator and Deputy Assistant Administrators be kept informed of all major legal or policy issues and important trends in Regional enforcement efforts. Thus, in connection with these redelegations, the following procedures should be followed:

1) Each Division's weekly highlights will include a brief summary of each direct referral received during the pre s week.

2) For each direct referral with which the AEC concurs, copies of the concurrence memorandum, checklist, and any other document sent to the Region in connection with the direct referral will be circulated to the Assistant Administrator for OECM. A copy of the concurrence memorandum should also be sent to the Assistant Attorney General for Land and Natural Resources.

3) Where a recommendation to withdraw the referral is deemed appropriate, the AEC will prepare the following materials:

   a) a memorandum from the AEC to the Assistant Administrator for OECM containing a detailed discussion of the reason for requesting that the case be withdrawn; and

   b) a memorandum from the Assistant Administrator for OECM to the Regional Administrator which outlines the basis for requesting that the case be withdrawn. After signature by the Assistant Administrator, a copy of this memorandum should be sent to the Assistant Attorney General for Land and Natural Resources.

These redelegations shall become effective immediately.

cc: Deputy Administrator
Deputy Regional Administrators
Deputy Assistant Administrators for OECM
Headquarters Program Office Enforcement Directors
OECM Attorneys and Supervisors

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

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MAR 11 1988

#72

MEMORANDUM

SUBJECT: Case Management Plans

FROM: Thomas L. Adams, Jr.
Assistant Administrator for Enforcement and Compliance Monitoring (OECM)
U.S. Environmental Protection Agency (EPA)

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice (DOJ)

TO: EPA Regional and OECM Attorneys

EPA Regional Program Office Personnel

Environmental Enforcement Section Attorneys
DOJ Division of Land and Natural Resources

The environmental enforcement cases initiated by the United States Environmental Protection Agency (EPA) and the United States Department of Justice (DOJ) are characterized by their complexity, their significant demand on resources, and the participation of numerous legal and technical people from many offices. Nearly all cases present major challenges to EPA and DOJ, and in some instances can take several years to bring to conclusion. In order to achieve the best possible results in the shortest time, with the most efficient use of resources, both EPA and DOJ will be implementing a number of measures to promote the effective handling of cases.

Case management plans represent a mechanism to enhance the effectiveness of the environmental enforcement program. Case management plans are plans for the conduct of environmental enforcement cases which provide a road map for bringing a case

from its initiation to a successful conclusion. The primary elements of the plans include the tasks to be performed, the people assigned to perform the tasks, and the dates by which the tasks are to be completed. Case management plans include both the litigation and negotiation elements of the case, and the legal and technical tasks to be performed.

With the number of people involved in cases, it is essential to establish as early as possible which litigation team members will be responsible for what tasks and when these tasks will be completed. Because DOJ is primarily responsible for management and control of the case, it will have the lead role in establishing the case management plan. Attorneys in the regional offices, the Office of Enforcement and Compliance Monitoring, and in some cases U.S. Attorney's Offices, also play significant roles in the cases, as do EPA technical staff; therefore, they will participate in the development of the plan. The case management plan will, to the maximum extent practicable, reflect the agreement among members of the litigation team as to how they will bring the case from its initiation to a successful conclusion.

DOJ has developed the attached form covering the legal assignments for the litigation elements of case management plans. This form is comprehensive and will be used for all cases beginning April 1, 1988. The form will be used as follows.

Regional attorneys and regional program staff who are preparing litigation reports should indicate their availability for case work assignments in a draft case management plan when the case is referred. The attorney should use the standard DOJ form, and should propose assignments for the regional attorney and regional technical staff which include only those tasks which regional supervisors and managers consider appropriate for the individuals assigned to perform them. The form, as submitted by the region, will not address assignments for DOJ attorneys or Assistant U.S. Attorneys. The draft case management plan should also reflect the regional attorney's initial thinking concerning the strategy and timetable for litigating and negotiating the case, although at this point in the development of the case, the draft plan may not contain much detail.

During the period assigned for its review of the referral, OECM will propose to DOJ, after discussion with the region, any assignments which management considers appropriate for the OECM attorney assigned to the case. The DOJ attorney should then, in consultation with EPA, complete the case plan for litigation and negotiation. It is important for the DOJ attorney to initiate

development of a strategy and timetable for the case, in concert with the other members of the litigation team. The team's members should assure support for the plan by their respective supervisors. The plan should reflect a realistic assessment of the resources (including technical and contract dollar resources) available to support the case, and team members should be assigned responsibility for actually obtaining the resources contemplated by the plan. The DOJ attorney should have a case plan in place by the date of filing of the complaint, addressing the roles of DOJ, the Assistant U.S. Attorney, and regional and headquarters legal and technical staff.

Because litigation and negotiation of environmental cases is a dynamic process, initial projections of tasks in a case plan will need to be revised on a periodic basis. In order to keep the case plan up to date, but, at the same time, avoid undue consumption of the litigation team's time, the case plans will be updated on a quarterly basis. The case plans will serve as the primary discussion documents for the legal and technical staff and their first-line supervisors in periodic case reviews. The plans also will be used as a guide to managers interested in the general progress of a case. In order to facilitate the best use of the case management plans, DOJ will work towards developing a means of incorporating the plans in its case docket system.

If prepared and used properly, case management plans can help assure effective and efficient management of complex cases and available resources.

Date

PRELIMINARY CASE PLAN

Case Name: U.S. v. _____ DJ #90-_____

Statutes: _____ EPA Region: _____

Nature of Violation/Claims: _____ District: _____

Litigation Team:

DOJ/LNRD: _____ EPA/Reg. Program _____

DOJ/AUSA: _____ EPA/HQ Program _____

EPA/RC: _____ State Rep. _____

EPA/OECM: _____

A. General Breakdown of Case Responsibilities Assignment — Name

1. General Oversight and Case Management -- Review of all briefs and other filings; consultation on litigation and negotiations strategy — _____ DOJ Attorney (or AUSA)

2. Principal Contact with Defendant(s) on Litigation Matters — _____

3. Principal Contact with Defendant(s) Regarding Settlement — _____

4. Development of Technical Proof [List needs for liability and remedy case; assign by need] — _____

5. Selection and Development of Expert(s) [List needs] — _____

6. Development of Liability Case */ [List elements; assign by element] — _____

7. Development of Remedy Case [Break down; assign by element where possible] — _____

B. Preliminary Discovery Plan Task	Name	Date
1. Offensive Discovery		
a. First Set of Interrogatories	_____	_____
b. First Set of Production Requests	_____	_____
c. First Set of Requests for Admissions	_____	_____
d. Forseeable Offensive Depositions [List each deponent and assign by deponent]	_____	_____
2. Defensive Discovery		
a. Responses to Written Discovery	_____	_____
b. Depositions	To be assigned as they are noticed	
C. Preliminary Motions Plan		
1. U.S. Motion to Strike Jury Trial Demand	_____	_____
2. U.S. Motion to Strike Defenses */	_____	_____
3. U.S Motion for Partial Summary Judgment */	_____	_____
4. U.S. Motion for Case Management Order (if appropriate)	_____	_____
5. Analyze Answer/Motion to Dismiss */	_____	_____
6. Response to Motion to Dismiss */	_____	_____
D. Preliminary Settlement Plan [List near-term events and tasks relating to settlement; assign as appropriate]	_____ _____	_____ _____
E. Deadline for First Revision and Expansion		

*/ In multiple defendant cases, list each defendant and assign by defendar in single defendant cases, assign by liability element.

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

APR 8 1988

#72

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Assuring Timely Filing and Prosecution of Civil Judicial Actions

FROM: Thomas L. Adams, Jr.
Assistant Administrator

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

This memorandum continues the efforts we have been making to clarify the responsibilities of Headquarters and Regional Offices in assuring an effective civil judicial enforcement program. It was developed in cooperation with the Enforcement Management Council.

Consistent with the approach taken in my memorandum of February 8, 1988, entitled "Responsibilities for Assuring Effective Civil Judicial Enforcement", the Regional Offices have primary responsibility in the vast majority of cases for taking whatever actions are necessary to secure timely filing and prosecution of civil judicial enforcement actions. This is part of the responsibility of the lead Agency attorney, typically a Regional attorney, and his or her supervisors. This responsibility includes working with the Department of Justice attorney assigned to the case (and, as necessary, the Assistant U.S. Attorney), monitoring the status of cases at DOJ to assure that they are filed in a timely manner, following up directly with DOJ management to resolve problems or expedite action where a case is not moving along in a manner consistent with a 60-day filing target, alerting OECM whenever problems exist which threaten to delay significantly a filing or when OECM (or program office) assistance is required, monitoring the progress of filed cases (through active participation and use of the case management plan) to assure that negotiations and litigation are proceeding acceptably, and maintaining current, complete and accurate information about the case in the Agency's enforcement docket system.

OECM, working with the Headquarters program offices, is charged with the responsibility for assuring the overall effectiveness of the Agency's judicial enforcement program. To carry out this responsibility, OECM plans to monitor the status of both unfiled and filed civil cases, primarily through the enforcement docket system. To help monitor progress and assure timely filing of civil cases, each Associate Enforcement Counsel will discuss with the Regional Counsel or Deputy Regional Counsel the status of any case which had been pending unfiled at the Department of Justice for at least 120 days as of the end of the preceding month. This will allow for a full discussion of any problems with the case, actions taken by the Region to get the case filed or to otherwise resolve the problems, and any further actions which the Region or OECM can take. (If problems exist, the Region is encouraged to contact OECM or the program office earlier than the 120-day point if Headquarters can be of assistance in expediting filing of the referral). These discussions should be useful not only in expediting the particular case but also in determining whether any broader problems exist which need to be addressed. Cases presenting particular difficulties may also be put on the agenda for a subsequent monthly enforcement conference call conducted by the Deputy Assistant Administrator for Civil Enforcement.

For filed cases, I have asked each of the Associate Enforcement Counsel in OECM to develop an appropriate periodic audit mechanism, working with their Regional and program counterparts and the Department of Justice. Further guidance on this subject will be provided later.

I look forward to working with you on our continued efforts to assure an effective judicial enforcement program. If you have any questions about this memorandum, please contact Ed Reich at FTS 382-4137.

cc: Deputy Regional Administrators, Regions I-X

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

APR 13 [illegible]

#73

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Process for Conducting Pre-Referral Settlement Negotiations on Civil Judicial Enforcement Cases

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

TO: Regional Administrators
Deputy Regional Administrators
Regional Counsels
Associate Enforcement Counsels
HQ Compliance Office Directors

This memorandum transmits to you an agreement between EPA and the Department of Justice on an authoritative process for conducting pre-referral settlement negotiations of non-Superfund civil judicial enforcement cases. A separate process, reflecting the same basic concepts but recognizing the unique features of Superfund, is being developed jointly by OECM, OWPE and the Department of Justice.

This agreement addressess one of the judicial enforcement streamlining initiatives identified by EPA's newly-formed Enforcement Management Council at recent meetings in Easton, MD. The major objective of this initiative is to promote efficient and expeditious resolution of civil enforcement cases on appropriate terms. The mechanism developed for doing this is the attached set of protocols, which establish a process for providing a Regional office with pre-authorization to negotiate settlement with a potential defendant on behalf of the United States before resorting to the full-scale referral/litigation process. Typically, a Region will have the option of deciding whether to invoke this procedure for a given case or to proceed immediately to the referral process.

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

MAR - 9 1988

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Honorable Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Dear Roger:

This letter requests your concurrence in the enclosed "Process for Conducting Pre-Referral Settlement Negotiations" which EPA and the Department of Justice will employ as part of our joint efforts to streamline the United States' civil judicial environmental enforcement program.

This initiative is intended to build on successes we have seen in pilot projects using pre-referral settlement negotiations. More specifically, the primary intent of establishing in a formal manner these joint procedures is:

1. to expedite the resolution of civil enforcement cases on satisfactory terms which support the public interest, and

2. to allow the United States to accomplish this objective in a resource-efficient manner.

To these ends, the procedures established here identify appropriate milestones and timetables for conducting pre-referral settlement negotiations which are reasonable management targets in straightforward environmental enforcement cases.*/ The more routine the case (i.e., no complicated factual issues or unusual terms of settlement), the more likely the government will be able to apply this framework for expeditious, efficient case resolution.

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*/ This process does not apply to Superfund cases. Pre-referral negotiations procedures, taking into account specific statutory requirements, will be developed separately. EPA and the Department have agreed to evaluate the potential for adapting these procedures to the Superfund context.

Please note that Regional Counsels will receive workload credit for a case which a Region has opened for negotiation with a mini-lit report under these protocols, even if EPA has not formally referred the case with a full-scale lit report to DOJ for filing. Regional Counsels, however, are responsible for having their docket clerks make appropriate case entries on EPA's Enforcement DOCKET system in the "Cases Opened" category. These cases would move to the "Cases Initiated" category once the Region forwards to DOJ a full lit report or settlement document for filing.

Naturally, as an Agency we will have to pay close attention to implementation of this process to ensure that it is successful in achieving settlements on appropriate terms more expeditiously. Thanks in advance for your cooperation as we move forward to implement these procedures.

Attachment

cc: Jim Barnes, EPA HQ
Roger Marzulla, DOJ
David Buente, DOJ
Jerry Bryan, EPA HQ
Tom Gallagher, EPA-NEIC
Sally Mansbach, EPA HQ

The guidance identifies the areas which a Region must address in a mini-lit report to initiate the pre-referral negotiation process. All participating offices will need to work together to strike an appropriate balance in deciding how much detail this information should cover to facilitate informed review or quick filing if negotiations break down, yet still allow for productive negotiations to commence quickly. In most cases, Regional submission of a draft consent decree based upon available program-specific models is likely to produce easier, quicker approval of proposed settlement terms and final consent decrees.

It will remain important for representatives of all participating offices to maintain continuous, open lines of communication to permit these procedures to attain their objectives. Offices still will work out their respective roles on a case-by-case basis, although this guidance sets out norms to help make these determinations. Furthermore, the appropriate Assistant Section Chief at DOJ will be responsible for working out the extent of U.S. Attorney involvement in pre-referral negotiation activities consistent with these procedures and time lines. In any event, it remains crucial for EPA and the Department to monitor the use of these procedures diligently to affirm that they indeed result in a more effective, efficient enforcement effort. We nevertheless understand that because we have pressed to institute these new procedures quickly, both EPA and the Department will need additional time to modify computer systems to track adequately adherence to these protocols.

Thank you for the Department's support of our mutual work in this area. Please indicate your approval of this process in the signature blank below and return a copy of your signed approval to me, or give me a call if you have any questions.

Sincerely,

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

Enclosure

I concur in the enclosed "Process for Conducting Pre-Referral Negotiations."

Roger J. Marzulla
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

1988
(Date)

PROCESS FOR CONDUCTING PRE-REFERRAL
SETTLEMENT NEGOTIATION

I. Should a Region wish to use this process, the RA or his/her delegate will initiate the process as is done presently for referrals by sending simultaneously to OECM, the HQ Program Compliance Office and DOJ a mini-lit report/case summary (typically 5-10 pages) which summarizes:

a. defendant and its enforcement history
b. summary of violation(s) at issue or cause of action (including known environmental impact)
c. summary of available evidence
d. noteworthy legal and equitable defenses
e. significant contacts with defendant (by EPA and/or the State)
f. any legal or other significant action by the State, local agencies, or citizen groups
g. proposed terms of settlement--present view of bottom line, (including up-front and stipulated penalties, scope of relief, compliance schedule and any releases of liability) supporting rationale, and penalty calculation in accordance with the penalty policies
h. legal, policy or other issues/strategic considerations of primary significance to the government or bearing on appropriate terms of settlement or the conduct of litigation
i. milestones for negotiation and filing, covering all parties to the lawsuit
j. potential for criminal prosecution or investigation
k. what participation the Region requests from HQ and DOJ in negotiations beyond what these procedures call for.

A proposed draft consent decree to use to open negotiations must accompany the mini-lit report. EPA's computer DOCKET system will begin tracking these cases once the Region sends its mini-lit report to HQ and DOJ.1/

1/ As an alternative to filing a mini-lit report at the start of this process and a full lit report later on if negotiations do not reach a timely settlement, a Region may choose instead to file a full lit report at the start of the process, and follow that with a simple update if pre-referral negotiations do not produce a settlement.

II. DOJ, OECM and the Program Office will provide comments on the proposed case, their interest in participating because of national issues, terms of settlement, further contact point, and negotiation/litigation strategy to the Region within 21 days[2/] of receipt. Participating offices should initially convey or subsequently confirm their comments in writing. If necessary, comments will also address whether unique circumstances in a case indicate that the proposed pre-referral settlement negotiation process is not appropriate for the case. HQ Offices will coordinate during their review and wherever possible, OECM will consolidate the comments into a coordinated response. A simultaneous discussion among all litigation team members may be particularly helpful to identify and resolve outstanding issues. Upon response, the Region will have authority to negotiate a settlement consistent with pre-approved terms.

a. The region will keep HQ and DOJ apprised of changes in the course of negotiations to the extent there is a desire to deviate from key pre-approved terms (e.g. bottom-line penalty, scope of relief, compliance schedule and requirements, releases of liability) and will circulate to the HQ and DOJ contacts for clearance successive re-drafts of the decree before forwarding these redrafts to opposing counsel, consistent with present practice for post-filing negotiations. HQ and DOJ contacts will have a seven-day target, but sooner if possible, for responding to re-drafts in which the Region has clearly identified changes from prior versions. Regions should also keep HQ and DOJ generally informed of the status of ongoing negotiations.

b. If settlement in principle is not reached within 90 days of the latter of DOJ/HQ responses to the mini-lit report, the Region will, within 30 days, submit a full lit report to DOJ (copy to OECM and HQ program office), unless otherwise agreed. The Regional Counsel, in consultation with the appropriate Regional Division Director, may invoke a 30-day extension to the 90-day period in exceptional cases upon consultation with the appropriate OECM Associate Enforcement Counsel. Moreover, at any point in this 90-day period, the Regional Counsel, in consultation with the appropriate Regional Division Director, may "remove" a case from this process for the purpose of placing it on a filing track. In such a situation, the case will be handled as a normal referral and the Region will submit the full litigation report.

2/ All time periods are in calendar days.

c. DOJ will have a management target of filing the case within 45 days of receipt of a complete lit report unless new issues emerge based upon more complete case development or unless the case is settled in principle before that deadline.

d. If settlement in principle is reached, the Region will within 20 days submit a final draft consent decree to HQ and DOJ for review. HQ/DOJ will review and comment to the Region within 15 days of receipt. Within 45 days of HQ/DOJ response (unless otherwise agreed), the Region will submit a signed consent decree with cover letter explaining the rationale supporting the settlement to HQ (copy to DOJ) for approval.

III. EPA HQ will, within 21 days from receipt of a signed consent decree with supporting documentation/rationale, act on (approve or disapprove) civil settlements which are within preapproved terms as initially set forth or as modified over the course of negotiations.

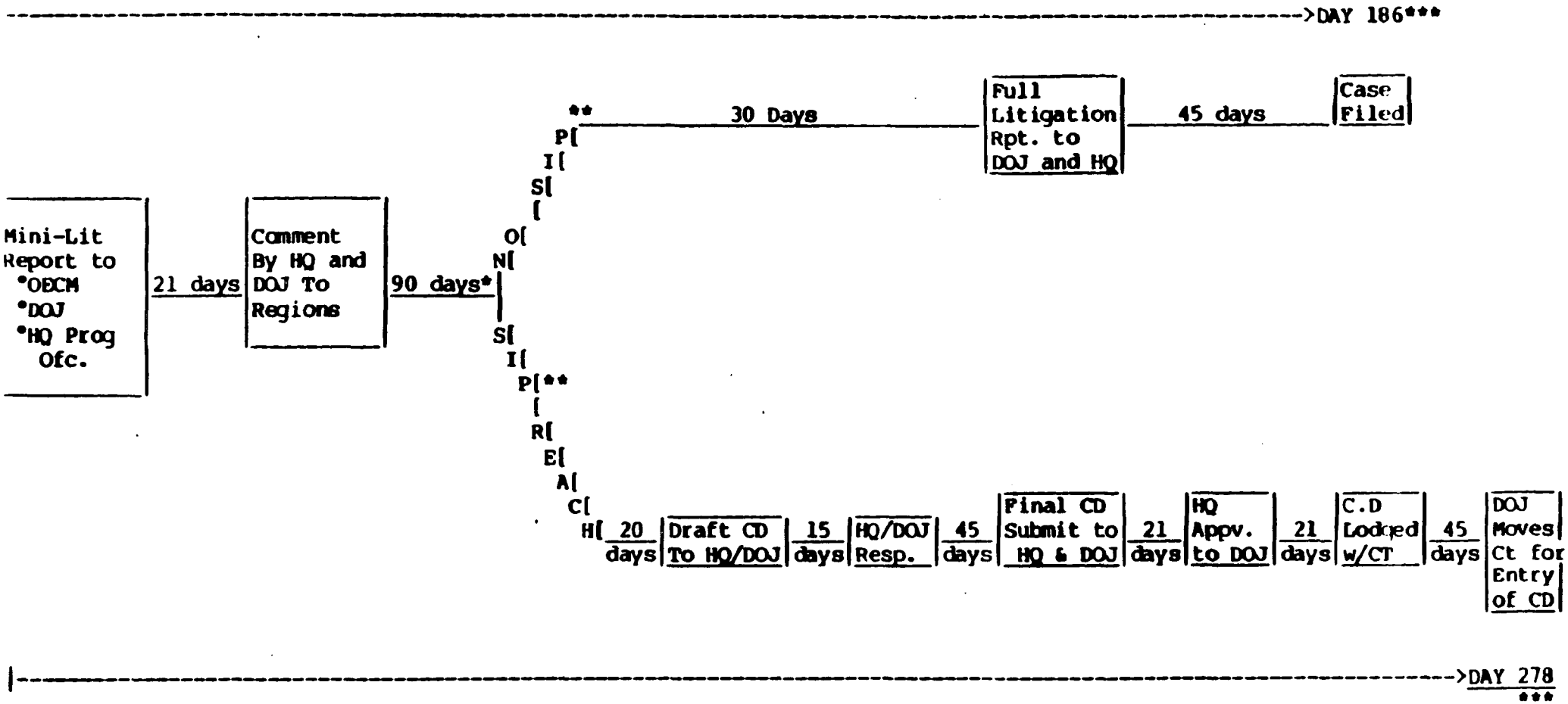
IV. Simultaneous with submission to EPA HQ, Regions will send a copy of the consent decree to DOJ to initiate a simultaneous review. DOJ will have a management target of 21 days from receipt of a signed consent decree from EPA HQ to act on (lodge or disapprove) civil settlements which are within pre-approved terms as initially set forth or modified over the course of negotiations.

V. DOJ will have a management target of 45 days from the date of lodging to move a court for entry of a consent decree, assuming no significant public comment. If 45 days cannot be met because of significant public comment, DOJ and EPA will agree on a process and timetable for response.

A flow chart of the proposed time lines is attached to assist the reader. The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and may not be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The United States reserves the right to act at variance with these procedures and to change them at any time without public notice.

Attachment

PRE-REFERRAL SETTLEMENT NEGOTIATIONS TIME LINE



*The Regional Counsel, in consultation with the appropriate Regional Division Director, may invoke a 30-day extension to this 90-day period in exceptional cases upon consultation with the appropriate Associate Enforcement Counsel

**SIP = Settlement in principle

***These total times do not account for the time it takes to transmit reports or final settlement documents between offices. The total times also may be extended by 30 days where an extension to the negotiating period is invoked.

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

#74

JUL 25 1988

MEMORANDUM

SUBJECT: Guidance on Certification of Compliance with Enforcement Agreements

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

TO: Assistant Administrators
Regional Administrators
Regional Counsels

I. BACKGROUND

Over the past several years, EPA has initiated record numbers of civil judicial and administrative enforcement actions. The vast majority of such actions have been resolved by judicial consent decree or administrative consent order.

The terms of many of these settlements require the violator to perform specific tasks necessary to return to or demonstrate compliance, to accomplish specific environmental cleanup or other remedial steps, and to take prescribed environmentally beneficial action.

Settlement agreements typically specify that the violator perform certain required activities and thereafter report their accomplishment to EPA. Verification that the required activities have actually been accomplished is an essential element in the overall success of the Agency's enforcement program.

II. PURPOSE

The focus of this advisory guidance is on verification of compliance with settlement agreements which require specific performance to achieve or maintain compliance with a regulatory standard. EPA has ongoing responsibility for ensuring that settling parties are in compliance with the terms of their negotiated agreements. To this end, the Agency may require that a responsible official (as that term is defined herein) personally attest to the accuracy of information contained in compliance documents made available to EPA pursuant to the terms of a settlement agreement.

The inspection programs of EPA and other federal regulatory agencies are based of necessity on the concept that a limited number of regulated facilities will be inspected each year. Conversely, this means that a large number of regulated parties can operate for extended periods of time without being the subject of an on-site inspection by EPA staff. Hence, it is crucial to ensure that all required compliance reports are received from the regulated facility in a timely manner. In addition--and equally as important--timely review of such reports must be undertaken by EPA to ensure that the reports are adequate under the terms of the settlement agreement.

EPA experience shows that the majority of regulated parties make good faith efforts to comply with their responsibilities under the environmental laws and regulations. Nevertheless, the Agency must have effective monitoring procedures to detect instances of noncompliance with a settlement agreement. A vital component of these procedures will be to ensure that the environmental results obtained in the enforcement action are indeed achieved and that criminal sanctions, where appropriate, are available to respond to instances of intentional misrepresentation or fraud committed by such violators.

EPA will ensure that all responsible officials entering into settlement agreements with the Agency are held accountable for their subsequent actions and the actions of any subordinates responsible for the information contained in compliance reports submitted to the Agency.

III. GUIDANCE

A. Certification by Responsible Corporate Official

The terms of settlement agreements, as well as any certification language in subsequent reports to the Agency, should be drafted in a manner to trigger the sanctions of 18 U.S.C. §1001, [1/] in the event that false information is knowingly and willfully submitted to EPA. Submission of such false information

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1/ United States Code, Title 18, Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be

may also expose the defendant(s) in judicial consent decree falsification incidents to both civil and criminal contempt proceedings.

This provision of law is a key sanction within the federal criminal code for discouraging any person from intentionally deceiving or misleading the United States government.

1. Signatories to Reports

Settlement agreements should specify that all future reports by the settling party to the Agency, which purport to document compliance with the terms of any agreement, shall be signed by a responsible official. The term "responsible official" means as follows:[2/]

a. For a corporation: a responsible corporate officer. A responsible corporate officer means: (a) A president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or (b) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $35 million (in 1987 dollars when the Consumer Price Index was 345.3), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship: a general partner or the proprietor, respectively.

2. When to Require a Certification Statement

The requirement for an attestation by a responsible official is always useful as a matter of sound regulatory management practice. Such a requirement is more urgent,

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(Note 1, cont'd)

fined not more than $10,000 or imprisoned not more than five years, or both."

There are four basic elements to a Section 1001 offense: (1) a statement; (2) falsity; (3) the false statement be made "knowingly and willfully"; and (4) the false statement be made in a "matter within the jurisdiction of any department or agency of the United States". United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965).

2/ For NPDES matters, the definitions of "responsible official" and "certification", as set forth in 40 CFR §122.22, may be used as alternative language to this guidance.

however, where a regulated party has a history of noncompliance or where prior violations place one's veracity into question. 3/

3. Terms of a Certification Statement

An example of an appropriate certification statement for inclusion in reports submitted to the Agency by regulated parties who are signatory to a settlement agreement is as follows:

> "I certify that the information contained in or accompanying this (submission) (document) is true, accurate, and complete.
>
> "As to (the) (those) identified portion(s) of this (submission) (document) for which I cannot personally verify (its) (their) truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting under my direct instructions, made the verification, that this information is true, accurate, and complete." 4/

B. Documentation to Verify Compliance

Typical settlement agreements require specific steps to be undertaken by the violator. As EPA staff members engage in settlement negotiations and the drafting of settlement documents, they should identify that documentation which constitutes the

3/ While personal liability is desirable to promote compliance, it should be noted that corporations may be convicted under 18 U.S.C. §1001 as well. A corporation may be held criminally responsible for the criminal acts of its employees, even if the actions of the employees were against corporate policy or express instructions. See U.S. v. Automated Medical Laboratories, 770 F.2d 339 (4th Cir. 1985); U.S. v. Richmond, 700 F.2d 1183 (8th Cir. 1983). Moreover, both a corporation and its agents may be convicted for the same offense. See U.S. v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983).

4/ It is inevitable that in negotiating consent agreements, counsel for respondents will seek to insert language in the certification statement as to the truth of the submissions to be to the "best information" or to the "fullest understanding" or "belief" of the certifier. Such qualifiers should not be incorporated, since the provisions of 18 U.S.C. §1001 provide for prosecution for making false statements knowingly and willfully--not for forming erroneous beliefs, etc.

most useful evidence that the action required has actually been undertaken. The most useful evidence would be that information or documentation that best and most easily allows the Agency to verify compliance with the terms (including milestones) of a settlement agreement. Examples of documentation to substantiate compliance include, but are not limited to, invoices, work orders, disposal records, and receipts or manifests.

Attachment A is a suggested type of checklist that can be developed for use within each program area. 5/ The checklist includes examples of specific documentary evidence which can be required to substantiate that prescribed actions have, in fact, been undertaken.

IV. SUMMARY

This guidance is to provide assistance to EPA employees who negotiate and draft settlement documents. It is appropriate when circumstances so dictate that such documents contain sufficient certification language for ensuring, to the maximum extent possible, that all reports made to EPA, pursuant to the terms of any settlement agreement, are true, accurate, and complete, and that such reports are attested to by a responsible official.

The Agency must incorporate within its overall regulatory framework all reasonable means for assuring compliance by the regulated community. The inclusion of compliance certification language, supported by precise documentation requirements, in negotiated settlement agreements may, in appropriate instances, mean the difference between full compliance with both the letter and the spirit of the law, and something less than full compliance. In the case of the latter, the violating party is then subject to the sanctions of the federal criminal code.

Attachment A

5/ EPA or a State may be unable to confirm the accuracy of certifications for an extended period of time. Therefore, it is suggested that, whenever certification by a respondent/defendant is required, the order/decree provide that "back-up" documentation--such as laboratory notes and materials of the types listed in the examples in the text above--be retained for an appropriate period of time, such as three years. See, for example, the 3 year retention time in 40 CFR §122.41(j)(2).

MEANS OF CERTIFYING COMPLIANCE
WITH CONSENT AGREEMENTS
(Examples)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Purchase pollution control equipment.	*Equipment purchased	*Invoice
*Installation	*Equipment installed and tested	*Invoice for work with photograph
*Ongoing operation and maintenance	*Operating as required	*Continuous monitoring tape *Periodic sample results *Maintenance of records
*Meet discharge levels	*Discharge levels have been met	*Continuous monitoring tapes *Periodic sample results
*Labeled transformers	*Transformers have been labeled	*Photographs
*Do risk study	*Study has been completed	*Study report and recommendations
*Hire employees	*Employees have been hired	*Personnel records *Position descriptions *Entry on duty dates *Salary data
*Use complying coatings	*Verifying complying coatings are used	*Documents to verify VOC content
*Train employees (e.g., work practices)	*Employee training has been completed	*Educational materials and record of employee attendance at training session
*Set up environmental auditing unit	*Unit has been established *Orientation and instruction completed	*Same as above re: personnel *Charter of audit group

(co on next page)

MEANS OF CERTIFYING COMPLIANCE WITH CONSENT AGREEMENTS (Examples)

(continued from previous page)

Action Required By Consent Agreement	Violator's Official Certifies That:	Documents Accompanying Certification:
*Dispose of PCBs	*PCBs disposed of in lawful manner	*Copies of manifests
*Replace PCB transformers	*New transformers installed	*Copies of purchase and installation receipts
*Register pesticide certification of applicator	*Applicator certification has been accomplished	*Copies of certificates
*Remove cancelled product from the market	*Removal has been accomplished	*Copies of correspondance with customers and documentation of removal *Copies of customer lists for independent verification by EPA and states
*Comply with asbestos removal and disposal regulations	*Compliance with asbestos removal and disposal regulations on a job-by-job basis	*List of locations of all jobs
*Monitor waste stream	*Waste stream has been properly monitored	*Discharge Monitoring Report
*Sludge removal	*Sludge removed by milestone deadline	*Copies of invoices on sludge removal
*Conduct groundwater monitoring	*Groundwater monitoring accomplished in appropriate manner	*2/A (quality analysis) tests; certification by laboratory
*Collect and analyze soil samples	*Soil samples collected and analyzed in specified manner	*Same as above
*Remove contaminated soils and dispose of in compliance with RCRA	*Contaminated soils removed and disposed of in compliance with RCRA	*Copies of contract documents and manifests