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

APR 23 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Water Enforcement/Compliance Guidance Manual--
Compendium of Operative Policies

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

Jack E. Ravan
Assistant Administrator for Water

TO: Regional Counsels
Regional Water Management Division Directors
Director, Office of Water Enforcement and Permits
Associate Enforcement Counsel for Water Enforcement
Director, National Enforcement Investigation Center
Assistant Administrator for Policy, Planning
and Evaluation
General Counsel

As a part of our effort to produce guidance manuals for personnel involved in case development activities for the United States Environmental Protection Agency, we are transmitting to you the Compendium of Operative Water Enforcement Policies. The Compendium contains currently effective enforcement policies and guidance as well as procedures governing certain aspects of the day-to-day operation of legal and technical compliance and enforcement activities.

While the Compendium is up-to-date, we have noted therein that some policies are under review and have provided qualifications for other policies. As new policies are formulated and new guidance is issued, we will also inform you of any changes.

We intend to update the Compendium periodically and welcome comments on it or on policy issues which might be addressed in the future. Questions or comments on the contents of the Compendium can be addressed to Allen Danzig, of the Office of Legal and Enforcement Policy (FTS-426-7503, Mail Stop LE-130A).

Attachments

cc: Regional Administrators (w/o attachment)
Regional Enforcement Contacts (w/o attachment)
Chief, Enforcement Section, Lands and Natural Resources Division, DOJ (w/o attachment)

# TABLE OF CONTENTS

# TABLE OF CONTENTS

TABLE OF CONTENTS

This compendium contains the following Water Compliance/Enforcement related policies and guidance currently in effect.

| | |
|---|---|
| Municipal Management System, (Appendix E Only) | March, 1980 |
| Pretreatment Compliance Strategy (Short Term) | October 28, 1983 |
| National Municipal Policy | January 30, 1984 |
| FY 84 Pretreatment Enforcement Activities | April 13, 1984 |

Section 311 Enforcement

| | |
|---|---|
| Oil Spill Enforcement | January 8, 1974 |
| Civil Penalties Collected for Violations of 40 CFR Part 112-Transmittal to USCG Districts of Deposit in Revolving Fund Account | December 24, 1974 |
| Spill Prevention Control and Countermeasure (SPCC) Plan Program | April 23, 1975 |

Section 404 Enforcement

| | |
|---|---|
| Letter From Attorney General to Secretary of the Army regarding Section 404 of the Clean Water Act | September 5, 1979 |
| Solid Waste Discharges under Consolidated Permit Regulations: Procedures Pending Corps of Engineers Agreement with Changed Definition of Fill Material | August 18, 1980 |
| Enforcement of Section 404 of the Clean Water Act | November 25, 1980 |

NPDES Permitting

| | |
|---|---|
| Permits Division Policy Book - Contents | June 23, 1982 |
| NPDES Permits Authorization to Discharge | April 28, 1976 |
| State Regulation of Federal Facilities Under the Federal Water Pollution Control Act Amendments of 1977 (Clean Water Act) -- POLICY GUIDANCE MEMORANDUM | March 10, 1978 |
| Confidentiality of NPDES Permit Applications | April 6, 1978 |

| | |
|---|---|
| Certification and Permitting of Dischargers Located on Waters Forming Boundaries Between States | April 19, 1978 |
| Use of Biomonitoring in the NPDES Program | January 11, 1979 |
| Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits | January 19, 1979 |
| Incorporation of Pretreatment Program Development Compliance Schedules Into POTW NPDES Permits | January 28, 1980 |
| Policy for the Second Round Issuance of NPDES Industrial Permits | June 2, 1982 |
| Continuance of NPDES General Permits Under the APA | January 16, 1984 |
| Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants | February 3, 1984 |
| <u>NPDES Hearings</u> | |
| <u>Ex Parte</u> Contacts in NPDES Adjudicatory Hearing Decisions | June 16, 1978 |
| NPDES Evidentiary Hearing Management Program | October 3, 1980 |
| <u>Drinking Water Enforcement</u> | |
| Regional Guidance - Emergency Action on Water Supply Hazards | December 28, 1976 |
| Safe Drinking Water Act Public Water System Settlements-Interim Guidance | November 17, 1983 |
| Public Water Systems Compliance Policy | January 18, 1984 |
| Water Supply Guidance on Expired Exemptions | January 31, 1984 |
| Draft Enforcement Guidance Regarding Public Water Systems in States Which Have Primary Enforcement Responsibility | April 10, 1984 |

## General Guidance

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

April 18, 1975

OFFICE OF ENFORCEMENT

MEMORANDUM

To: Regional Enforcement Directors

From: Acting Deputy Assistant Administrator for Water Enforcement

Subject: Guidelines for the Issuing of Administrative Compliance Orders Pursuant to Title III, Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1319(a)(3) and (a)(4))

Attached are guidelines for the use of Section 309(a)(3) Administrative Orders in the enforcement process.

These requirements and recommendations are the result of a Headquarters' review of the Section 309 Findings and Orders issued by the various regions.

In line with EPA policy for even-handed national enforcement of the Federal Water Pollution Control Act, as amended, adherence with these guidelines should result in more general uniformity in the use, preparation and processing of this valuable enforcement tool.

If you have any questions or comments, please contact S. I. Olson, (202) 755-0994.

J. Brian Molloy

Attachment

## Section 309(a)(3) Administrative Orders

### VENUE, TITLE, DOCKET NUMBER AND PREAMBLE PARAGRAPH

Using legal-size paper, the following format should be followed for the venue, title, docket identification and preamble paragraph:

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION XI

| | |
|---|---|
| IN THE MATTER OF | DOCKET NO. XI-75-06 |
| DOE-ROE CHEMICAL COMPANY | |
| PROCEEDINGS UNDER SECTION 309(a)(3) and (a)(4), FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED (33 U.S.C. Sections 1319(a)(3) and (a)(4) in re NPDES PERMIT NO. _____ | FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE |

"The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency by the above referenced statute (hereinafter the Act) and by him duly delegated to the Regional Administrators of said Agency."

### Venue and Title

The Region identification is added to the venue to establish the specific venue of the issuing authority. Also, unless the full address of the Region is given under the Regional Administrator's signature to the Order or on the blueback cover (which is to be preferred), it would be helpful to add it to the venue here.

The offender is not designated in the title as "PERMITTEE" or otherwise. Although not necessarily objectionable such designation, where appropriate, is not required. However, the designation of "DEFENDANT" definitely would be inappropriate and should not be used.

Docket Number

To identify the proceeding, a docket number is required, rather than the use of the NPDES number (which if used in the format at all should more logically be referred to under the Proceedings identification in the title). The docket number above identifies the Order as being the 6th Order issued in 1975 in Region XI and should be sufficient, assuming that an Administrative Order docket is kept separate from any other docket for such matters as adjudicatory hearings. If a common docket is kept (which would appear inadvisable) then a prefix should be added to the docket number thus: "XI-AO-75-06" (Underlining supplied).

Preamble Paragraph

The preamble paragraph is important not only to establish the Administrator's authority to issue the Order but also to establish the delegation of authority to the Regional Administrator. If the Regional Administrator re-delegates his authority to the Director of the Regional Enforcement Division under EPA Order 1260.6 (Sept. 14, 1973), this re-delegation should also be alleged here or in the preamble to the Order portion of the Findings and Order. It should be noted that there is no authority to re-delegate this authority to anyone else. If the re-delegation is alleged here, the paragraph should be amended by adding:

"which authority has been duly re-delegated by the Regional Administrator of Region XI to the (undersigned) Director, Enforcement Division, Region XI".

An Administrative Order can be signed by a duly authorized Acting Regional Director. However, it should never be signed by anyone "for" the Regional Director.

FINDINGS OF VIOLATION

Most of the Findings and Orders reviewed contain adequate allegations as to specific permit (or statutory or regulation) requirements violated and the specific nature of the violations. However, in some cases it is difficult to determine from the face of a given set of Findings whether the Order was necessary, timely, and the remedy was appropriate or whether the terms of the Order appear too severe or too lenient. The Findings and Order should be able to stand by itself without reference to extraneous facts. Some of the Findings examined speak to all the pertinent facts and law much as a complaint in a civil action. In some instances, it is necessary

to know facts not alleged, although they may be inferred, by referring to background and other data not explicitly spelled out in the instrument itself. With these observations in mind the following requirements or recommendations are made with respect to the specific facts to be alleged in the Findings of Violation:

I

Allegation as to Legal Status of Permittee

It is sound legal practice as a practical matter and from a long range legal standpoint to spell out the specific legal status of the permittee (corporation, partnership, name of municipality) in the first paragraph of the Findings in order to establish of record the persons designated for service by section 309(a)(4).

While objections to personal jurisdiction may not often be raised, it would be good practice to make as positive a record as possible from the Findings and Order and the Return of Service or other file record such as a copy of a letter of transmittal, with return receipt attached, that sufficient service has been made and reasonable notice given. This practice would seem particularly advisable in view of the fact that, with few exceptions, the Regions have been making service by certified mail. (For further comment on this practice see discussion under SERVICE infra).

II

Statutory Authority

Recite statutory authority under which permit was granted, to whom (adding "hereinafter the COMPANY" or "the MUNICIPALITY"), 1/ the date issued and the permit number. In the case of such pre=permit violations as failure to apply for a permit, the pertinent authority under which the issuing of an Order is authorized should be stated.

The date the permit was issued is important in that it shows how long the violator has been on notice as to what he was required to do under the permit.

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1/ Where COMPANY is referred to hereinafter, read MUNICIPALITY, if a municipal corporation is the subject of the action.

III

Permit or Other Provisions Violated

In this paragraph detail the specific terms of the permit, regulation or statute involved.

This recital should not only spell out what was to be done but when it was to be done to avoid, if possible, the need for outside reference or for attachment of the permit on other voluminous material.

IV

Specific Violations

Allege specific violations. If more than one violation is involved, use a numbered paragraph or a lettered subparagraph for each alleged violation

V

Requests for Compliance

Recite specific requests to the COMPANY for information, reports, delayed timetables or whatever is required.

This can be done by cataloguing the letters, telephone calls, etc. made in an attempt to secure voluntary compliance or by stating that repeated attempts were made "as more fully set out in the log attached hereto as "Attachment A", and then attaching such a log and including it by reference. (See Attachment A for example of appropriate allegations and sample log.)

VI

Opportunity for Prior Consultation
(SECTION 308 VIOLATIONS ONLY)

Section 309(a)(4) requires that where a violation of section 308 is alleged, the Order shall not take effect until the person to whom it is issued has had an opportunity to confer with the "Administrator" (or his duly authorized representative) concerning the alleged violation. An allegation is essential that such person has had this reasonable opportunity to so confer, that he did not do so or, that if he did, an agreement for timely compliance could not be reached. If, because of the urgency of the time factor, or if it appears that an

attempt for such a conference would not be fruitful, then this allegation can be omitted and the Order issued forthwith with a statement that it shall not start to run until the COMPANY has been given x days to confer. (See discussion under "Effective Date of Order", infra.)

## THE ORDER FOR COMPLIANCE

The format for the Order should be as follows:

### ORDER

### Preamble Paragraph

"Based on the foregoing FINDINGS (and pursuant to the authority vested in the Administrator, Environmental Protection Agency, under section 309 (a)(3) of the Act, and by him delegated to the undersigned) or (if the Regional Administrator re-delegates his authority to the Enforcement Director, add after "of the Act" - "and by him delegated to the Regional Administrator, which authority has been duly re-delegated to the undersigned"), it is hereby ordered:".

Where the delegation and re-delegation, if any, has been recited in the preamble to the Findings (supra), only the underlined portion need be used.

### Terms of the Order

The terms of the Order need only state what the violator is specifically ordered to do, thus:

1. That the Consolidated Chemical Company shall within _____ days from the effective date of this Order furnish (or, complete and submit) to the undersigned (or, if someone else is designated, "to Mr. Edward Johnson, Enforcement Division, Environmental Protection Agency, Region XI, Room 5001, Old National Bank Building, 1414 Main Street, Brewsterville, Centralia, 11101 (555) 123-4567"), the July 197_ Report ... a revised schedule .... a certification that the alleged discharge violation has ceased .... or whatever corrective action

may be required.

2,3,4....that within ____ days from the effective date of this Order the COMPANY shall, (alleging whatever further specific actions are required).

5. That the COMPANY shall immediately (or within ___ days) notify the Agency representative designated above in writing that the actions hereinbefore required have been taken.

It is important that a time frame be specified both for the taking of the necessary action and for the reporting to the Region of its accomplishment. This additional requirement is emphasized because it has been noted that in many Orders issued, particular actions have been ordered to be taken "and the Region advised that the action has been done", but that no date is specified for the report of compliance (or non-compliance) to be in the hands of an appropriate Agency official.

Effective Date of Order

Where section 308 is not involved, the ORDER can merely recite that:

"this ORDER shall become effective upon its receipt by (service upon) said COMPANY."

Where an opportunity for conference before the ORDER can become effective is required by section 308 and this was not done prior to the issuing of the ORDER, 2/ the last paragraph should read:

"That the COMPANY shall have the opportunity, for a period of ____ ( ) days from receipt of this ORDER, to confer with the following designated Agency representative: George F. Smith, Assistant Director, Enforcement Division, Environmental Protection Agency, Room 5013, Region XI, Old National Bank Building, 1414

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2/ See discussion supra at Finding VI (Opportunity For Prior Consultation).

Main Street, Brewsterville, Centralia, 11101, (555) 123-7912;

that this ORDER shall become effective at the expiration of said period for consultation; and that the COMPANY shall have ___(_) days from and after said effective date to comply with the terms of this ORDER. To constitute compliance, material required to be submitted by the COMPANY to the Agency must be in the hands of the designated Agency representative prior to the expiration of said ____(_) day period."

Order Exceeding 30-Day Limitation

Several Regions have raised the question of whether an ORDER under Section 309 can specify a time in excess of 30 days. On this problem a memorandum issued on March 20, 1974, by the Assistant Administrator for Enforcement and General Counsel to the Region's Enforcement Division Director, states:

> "The background to Section 309 makes it clear that Congress feared "open-ended" orders would be a tool for allowing the insidious delays that often occurred in abatement schedules established under prior federal laws. Orders should, therefore, require compliance within 30 days of issuance with the terms of the permit (if one has been issued) or with other applicable requirements of the law. An order may also contain instructions as to future compliance requirements beyond 30 days which would be confirmed by additional orders issued withion 30 days prior to such future dates. For example, an order might require the submission of overdue engineering plans within 30 days and also contain a direction that the discharger adhere to an existing date for commencement of construction six months hence. If failure to comply with the construction date was considered likely, a second order could be issued 30 days prior thereto confirming the earlier directive. Obviously, "multiple" orders should not be used in every case; in some situations, however, they will prove valuable."

Signing of the Order

When the Order is dated and signed, the name of the signing official (Regional Administrator, Acting Regional Administrator, or Director, Enforcement Division) should be typed below the signature, together with the identification of the Region, thus "Region XI, Environmental Protection Agency". If the address of the Regional office is not given in the venue or on a blueback cover (preferred), it should be added here.

SERVICE

Section 309(a)(4) provides that service of any Order issued under section 309(a) shall be by personal service; that when the Order is issued to a corporation, a copy of such Order shall be served on any appropriate corporate officer and that copies shall be sent immediately to the State in which the violation occurs and to other affected States. (Emphasis added.)

In only a few of the Orders reviewed was personal service made. In most instances service was made by certified mail, return receipt requested, of a copy of the Findings and Order covered by a letter of transmittal. On the problem of whether personal service of 309(a) Orders means that an Order must actually be delivered by hand, the Assistant Administrator for Enforcement and General Counsel, in his memorandum of March 20, 1974, (supra) states:

> "The answer is that wherever possible Orders should be delivered in person. This can be done by EPA personnel, federal marshals, professional process servers, or other appropriate government representatives. Service in hand can be a useful way of getting the permittee's attention to the problem and is clearly preferable. Particularly in this day of gas shortages, however, service by hand may not always be practicable. Rather than let Orders await personal delivery for weeks, it is better to mail them registered mail, return receipt requested. "Personal service" by mail is a familiar legal principle and so long as actual delivery can be proven, this technique is probably acceptable. It should only be used, however, where delivery by hand is impracticable. Don't forget that copies of the Order should be served on appropriate corporate officials."

The important consideration is to insure that the opposite party receives due notice. In cases where service by certified mail is used there usually will be no real problem as long as the actual service on a proper party can be proved. We note that in quite a few cases of service by mail, the person addressed is not given a title or any indication of record that he is a proper person to be served. The addressee should be addressed by his title as vice-president, general manager, Plant A, or whatever, to indicate as clearly as possible his eligibility for service.

In the case of corporations, time and expense in personal service can usually be reduced sharply by making service on the corporation's registered agent. Registered agents for foreign corporations are usually located in the State Capitol city, where the U.S. Marshall or an IPA representative is available to make fast, local service at the cost of only a few dollars. In the case of local corporations the same situation often also exists. Personal service on a registered agent also has the advantage of making service on a proper party without the need for determining and reaching the proper corporate official empowered to accept service. (See Attachments C-1 and C-2 for Affidavit of Service forms*)

The use of legal rather than letter size paper and of a legal blue-back at least on the primary copy of the Findings and Order served, while not necessary, tend to impress the person served of the legal seriousness of the action being taken. (See Attachment B for proper form in filling out the back of the blue cover.)

As in court actions the original order should be retained and placed in a permanent file with the Docket Clerk, with the affidavit or certificate of service attached. If service is made by certified mail, a carbon copy of the letter of transmittal, together with the Post Office mailing receipt, and the return receipt, when returned, should be stapled to the front of the original Order, just as a return of personal service would be.

FOLLOW-UP AND FILE CLOSING

As good housekeeping practice, and more importantly, from the standpoint of possible reference for, or evidence in, future administrative or court actions, it is highly important that every file contain, at the minimum, a closing memo to the files, delineating the final disposition of the matter.

When a file is closed out, a brief memorandum or letter should be sent to Headquarters advising that the action has been completed. (Attachment D is an example of a file closing memorandum.)

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*When service is made by the U.S. Marshall, he will furnish his own Return Service form.

ALLEGATION OF ATTEMPTS TO SECURE INFORMATION (sample)

"That, pursuant to the above-referenced sections of the Act, the COMPANY was informed by letter dated December 7, 1973, of the intention of Agency representatives to visit its said plant in connection with the development of effluent limitation guidelines and standards for the iron and steel manufacturing point source category. Information was requested concerning the plant's seamless tube, 11 inch bar mill and rod mill operation in said letter and again in more detail in discussions of requirements for completing the plant Visit Log supplied by Agency representatives at the time of the visit to the plant on December 10-12, 1973. Despite repeated written and telephonic requests, as more fully set out in the Log attached hereto as Exhibit A and made a part hereof by reference, the COMPANY, in violation of section 308 of the Act, has not supplied the requested information."

LOG SAMPLE

| | | |
|---|---|---|
| 12/4/73 | Telcon: ELD - E.F. Jones | out; returned call 12/5 |
| 12/7/74 | 308 Letter AC - E.F. Jones | |
| 12/10- | Plant Visit: Have some data - hold off 10 days | |
| 4/23/74 | Telcon: ELD - T.C. | Follow-up requests for information from A & B Co. |
| 4/24/74 | Telcon: ELD - T.C. | To advise if get addn'l data by phone from A & B Co. |
| 4/26/74 | Telcon: ELD - T.C. | A & B Co. supposed to have mailed letter |
| 5/6/74 | T.C. - ELD | No letter or further telcon from A & B Co. |

ATTACHMENT A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION XI

IN THE MATTER OF

DOE-ROE CHEMICAL COMPANY,
METRO CITY, COLUMBIA
PERMITTEE*

NPDES PERMIT NO. XI-0001234*

PROCEEDINGS UNDER THE FEDERAL WATER POLLUTION CONTROL ACT AS AMENDED (33 U.S.C. 1319(a)(3)

FINDINGS OF VIOLATION
AND
ORDER FOR COMPLIANCE

Issued by

Richard Purewater, Jr.
Regional Administrator
Environmental Protection Agency
Region XI
1776 Liberty Street
Canterville, Columbia

* Where Permit has been issued.

ATTACHMENT B

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF

CONSOLIDATED STEEL CORPORATION

Affidavit of Service

Proceedings Under Section 309(a)(3) and (a)(4), Federal Water Pollution Control Act, as amended (33 U.S.C. Section 1319(a)(3) and (a)(4))

STATE OF ILLINOIS
COUNTY OF COOK SS

_____, being first duly sworn deposes and says that on _____, 197_, at 9400 West Madison Avenue, Chicago, Illinois, he served the annexed Finding of Violation and Order for Compliance, issued _____, 197_, by Allan Johnson, Assistant Administrator for Enforcement, Environmental Protection Agency, Washington, D.C., in the above entitled matter on the Consolidated Steel Corporation by handing to and leaving a true copy thereof with (Daniel H. Smith, President, Consolidated Steel Corporation) or (_____ the/a_____ of said Consolidated Steel Corporation, he/she being a person of full age representing himself/herself to be an authorized officer/employee of said Consolidated Steel Corporation to accept service of process.)*

_____

Subscribed and sworn to before me, a Notary Public and for the County of Cook, State of Illinois, this _____ day of_____, 197_ .

_____

*Serve President of Company, if possible; if not serve on best responsible person available and use alternative designation e.g. "John Doe, the General Office Manager (or Richard Roe, Vice President for Operations) he being, etc."

ATTACHMENT C-1

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF

CONSOLIDATED STEEL CORPORATION

Affidavit of Service

Proceedings Under Section 309(a)(3) and (a)(4), Federal Water Pollution Control Act, as amended (33 U.S.C. Section 1319(a)(3) and (a)(4))

STATE OF ILLINOIS
COUNTY OF COOK SS

_____, being first duly sworn deposes and says that on _____ ___, 197_, at Suite 401, 918 Sixteenth Street, N.W., Chicago, Illinois, he served the annexed Finding of Violation and Order for Compliance issued _____ __, 197_, by _____ _____, Assistant Administrator for Enforcement, Environmental Protection Agency, Washington, D.C., in the above entitled matter, personally on Consolidated Steel Corporation by handing to and leaving a true copy thereof with George C. Jones, Senior Process Officer, C D Corporation, said C D Corporation being the agent duly designated and registered by Consolidated Steel (a _____ corporation) to receive such service in the State of Illinois.

_____

Subscribed and sworn to before me, a Notary Public and for the County of Cook, State of Illinois, this _____day of _____, 197_.

_____

ATTACHMENT C-2

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

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: The Record

FROM: Director, Enforcement Division

SUBJECT: Section 309 Order Issued to Consolidated Steel Corporation to Produce Section 308 Data

On April 7, 1975, at 4:30 P.M., I received a telephone call from Mr. John Schmidt, an attorney for the Consolidated Steel Corporation. He was calling concerning the subject Order that we had served on Consolidated on Monday April 2, 1975. Mr. Schmidt indicated that he did not know what the problem was and why the Corporation had failed to provide the data before receipt of our Order, but he indicated that the data had been compiled and would be transmitted as required by the Order. He was interested in knowing if there was any further correspondence necessary or forthcoming concerning this Order. I indicated that there was no further correspondence necessary, and that production of the data by April 11, 1975, would be complete compliance with the Order.

No further action at this time.

Thomas Swift

April 14, 1975 Effluent Guidelines Division advised by telephone that required data had been received and was in order. File closed. T.S.S.

ATTACHMENT D

# COMPUTATION OF ECONOMIC BENEFIT OF DELAYED COMPLIANCE UNDER CIVIL PENALTY POLICY

Note: This policy is based on the old Civil Penalty Policy of April 11, 1978. EPA approved a new Civil Penalty Policy on February 16, 1984. However, the "Economic Benefit" Policy remains effective until EPA develops a medium specific, water penalty policy.

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

September 27, 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Regional Administrators
Regional Enforcement Directors

FROM: Assistant Administrator for Enforcement

SUBJECT: Computation of Economic Benefit of Delayed Compliance Under Civil Penalty Policy

A principal objective of the EPA Civil Penalty Policy (described in my memorandum of April 11, 1978, entitled "Civil Penalty Policy--Certain Air and Water Act Violators") is the recovery of the economic benefit that a source enjoys by postponing pollution control expenditures. The technical support document attached hereto describes the method for measuring that benefit.

The measurement of economic benefit of delayed compliance was described in a general manner in earlier guidance. It was also reviewed in greater detail in regional seminars held earlier this year. The method of measuring economic benefit described in the attached technical support document differs from that earlier guidance only in that it now recognizes that some sources may have financial structures that include preferred stock as well as common stock and long-term debt. Accordingly, for sources that have issued preferred stock, the method requires certain information regarding such stock that was not previously required.

To facilitate its use, the method described in the attachment to the memorandum has been reduced to a set of mathematical formulae; even the formulae, however, involve fairly lengthy calculations. To simplify these calculations, EPA has developed a computer program that is available to state and federal enforcement officials. Subsequent guidance will describe the computer program and its usage.

Marvin B. Durning

Marvin B. Durning

Attachment

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

OFFICE OF ENFORCEMENT

# TECHNICAL SUPPORT DOCUMENT

FOR THE

# CIVIL PENALTY POLICY

SEPTEMBER 1978

FOR DETERMINING THE ECONOMIC BENEFIT
OF DELAYED COMPLIANCE PURSUANT
TO THE EPA CIVIL PENALTY
POLICY ISSUED ON
APRIL 11, 1978

24

## ACKNOWLEDGEMENT

The material contained in this manual has been based largely upon the technical support document being prepared for regulations that will be proposed for implementation of Section 120 of the Clean Air Act.

That document is being prepared for the Economic Analysis Division of the Office of Planning and Evaluation, U.S. Environmental Protection Agency, by Putnam, Hayes and Bartlett, Inc., Newton, Massachusetts.

TABLE OF CONTENTS

COMPUTATION OF ECONOMIC BENEFIT OF DELAYED COMPLIANCE UNDER CIVIL PENALTY POLICY

TECHNICAL SUPPORT DOCUMENT

## I. Introduction

The decision to install pollution control equipment necessitates an initial capital investment as well as a long term commitment to the payment of operation and maintenance expenses. While such a decision will lead to improved environmental quality, it does not necessarily yield any direct economic benefit to the source. If financial resources were not used to implement the source's decision to install pollution control equipment, they presumably would be invested in activities which would be economically beneficial to the source. Thus, from a strictly economic point of view, it is usually in a source's best interest to delay the commitment of funds for pollution control equipment.

The EPA Civil Penalty Policy is designed to eliminate this incentive to avoid or delay compliance; and this technical support document is designed to describe in greater detail the concept of economic benefit of delayed compliance, to provide an exact method for calculating that benefit, and to provide additional information that may be helpful in making such calculations.

The method described in this document should be used in most instances to calculate the economic benefit of delayed compliance. It is recognized, however, that there may be unusual circumstances in which a different method of measuring economic benefit may be appropriate. The acceptability of any such alternative method will have to be determined on a case-by-case basis.

## II. Explanation of the Two Components of Economic Benefit of Delayed Compliance

The economic benefit of delayed compliance has two components: (1) the returns which can be earned on capital that should have been invested in the pollution control equipment whose purchase was delayed (or that was saved by not having to pay interest on capital that would have been borrowed), and (2) the operating and maintenance costs avoided as a result of not having installed the equipment. The first component arises because owners of noncomplying sources have the opportunity to either invest their funds in projects other than pollution control equipment (and

that, unlike such equipment, would yield a monetary return) or to avoid paying interest on capital that would have been borrowed.

The second component of benefit of delayed compliance is based on the operating and maintenance costs which would have been incurred if the pollution control equipment had been installed. These include the costs of labor, raw materials, energy and any other expenditures directly associated with the operation of the pollution control equipment. Delaying compliance allows these expenditures to be avoided altogether. Therefore, the noncomplying firm benefits by retaining these funds which should have been spent in order to achieve compliance (and, additionally, by investing these funds in income producing ways).

The two components of economic benefit can be quantified using generally accepted economic and financial principles and estimates of a number of parameters.

An explanation of these parameters and their relationship to the calculation of the economic benefit of delayed compliance follows.

## III. Determining the Amount of the Benefit of Delayed Compliance

The direct costs associated with installing pollution control equipment are the original purchase cost of the capital equipment, the costs associated with financing the purchase or construction of the equipment, and the annual operating and maintenance expenditures.

In addition to the direct costs, other indirect financial impacts result from the purchase of equipment. Depreciation, for example, has the effect of reducing income tax liability in years subsequent to the original investment. Similarly, the original purchase may result in an investment tax credit, which operates as if a discount were given on the purchase price. Both of these lower the net cost to the source.

To calculate the source's total economic cost of installing equipment to comply with pollution control requirements, it is necessary to determine all of the direct and indirect costs that will be incurred in the installation and operation of this equipment and to convert these costs

to a single economically equivalent value. Because these various costs do not all occur at the same time, they must first be converted into values which are comparable with respect to the time-value of money (that is, the sooner a cost must be incurred, the greater is its economic impact.) This conversion is accomplished by discounting all estimated future costs to "present value" equivalents, a technique described below.

The economic benefit of delaying compliance with pollution control requirements is the difference between the total economic cost that should have been incurred to comply with environmental requirements and that which will actually have to be incurred to come into compliance with those requirements.

A. Pollution Control Costs the Source would have Incurred had it Achieved Timely Compliance

1. Initial Capital Outlay

The direct costs and indirect financial impacts associated with the initial capital outlay to purchase and install pollution control equipment are equal to the cost of purchasing or constructing the equipment, less the amount of any applicable investment tax credit. The investment tax credit constitutes a reduction in tax liability which has the effect of a discount on the purchase price.

2. Annual Capital-Related Costs

The direct costs and indirect financial impacts associated with financing and depreciating pollution control equipment are the cash flows occurring in subsequent years as a direct result of the initial capital expenditure. Depreciation does not itself involve a cash outflow; however, its effect is to reduce pre-tax income and hence to reduce the source's income tax. If the source had installed the equipment, the tax saving in subsequent years associated with depreciation would have the effect of reducing the cost of such equipment. The other annual capital-related cash flows are those which arise from the financing of the incremental capital outlay for the pollution control equipment in question. If the equipment is partially financed

with debt, both principal and interest payments will result. The payment of interest will, of course, give rise to associated tax savings. Similarly, if preferred stock is used, its redemption and its dividends will give rise to cash outflows, although no tax savings will occur here.

3. Operation and Maintenance Costs

The final category of cash flows consists of those resulting from operating and maintenance expenditures. Since these costs are tax deductible, the relevant cash flows are simply the after-tax value of their estimated amount in each year. These cash flows are assumed to increase each year due to inflation.

B. Discounting of Cash Flows

Once all present and future direct costs and indirect financial impacts have been determined, they must be converted into a single, present-value cost of the pollution control equipment. This is done by converting each amount into values which are discounted. This is necessary because two cash flows of equal dollar value occurring many years apart do not have equal financial impacts on the source. This differential arises because the firm can invest funds at some positive rate of return. If a dollar of expenditure can be postponed for one year, that dollar can be invested in the interim. At the end of the year the dollar of expenditure can be made and the return on the investment during the intervening period accrues to the benefit of the source.

The technique used to compensate for this effect is called discounting. Discounting involves reducing the value of future cash flows to amounts which are equivalent in terms of present dollars. Suppose, for example, that a source faced with a $100 expenditure could delay that expenditure by one year (For simplicity, assume no inflation. Inflation must, of course, be, and is, taken into account in estimating future expenditure requirements.) If the firm could invest money for that year at a 10 percent return, it would not need to put aside a full $100 to make the payment one year later. In fact, if it invested only $90.91 at a 10 percent return, that amount would grow to $100 in one year. Therefore, $90.91 is the present value, at 10 percent, of a $100 cash flow one year in the future.

Similarly, $82.64 invested at 10 percent would grow to $100 in two years (it would grow to $90.91 in one year and to $100 in the second year). $82.64 is therefore the present value, at 10 percent, of a $100 cash flow two years hence. The present value of cash flows for other numbers of years in the future is found in a similar fashion. The formula for discounting is given by:

$$\text{Present Value} = \frac{\text{Future Value}}{(1+E)^{j}}$$

where E = the discount rate.
j = the number of years in the future in which the cash flow occurs.

Future Value = the cash flow expected in the future.

Applying this technique to all future pollution control cash flows converts each of them into its present value equivalent. The sum of these individual values represents the equivalent after-tax cost, in terms of a single present value, of all future cash flows arising out of the requirement to purchase and operate pollution control equipment.

C. Pollution Control Costs the Source will Experience when, After Delay, it Actually Makes the Expenditures Necessary to Achieve Compliance.

For each polluting facility there is a date by which compliance should have been achieved. Therefore, for purposes of calculating the penalty, it is assumed that all capital expenditures should have been made by that date and that operating and maintenance expenditures should begin on that date.

In computing the economic benefit of delayed compliance there are two sets of cash flows (or costs and indirect financial impacts) to be considered. The first consists of the flows that the source would have experienced had it made the expenditures necessary to come into compliance on time. These include the cash flows attributable to the purchase and operation of the original equipment as well as those associated with all future replacement cycles. The second set of cash flows consists of those which the source will experience when, following the delay, it actually makes the expenditures necessary to come into compliance. This second set of cash flows will have three properties:

1. It will be similar to the first set in that it will have the same sequence of capital expenditures, depreciation tax savings, operating and maintenance flows, etc.

2. Each cash flow will occur at some time after it would have occurred if the expenditures necessary for timely compliance had been made.

3. The magnitude of each of its individual component flows will be greater than the corresponding flow in the first set. This results from the fact that any given cost will have inflated during the period of projected delay.

D. Economic Benefit of Delayed Compliance

The present values of both sets of cash flows (those which should have been incurred to come into timely compliance and those that actually will be incurred to come into compliance) can be calculated in the manner described above. The present value of the second set will be lower, reflecting the fact that delaying compliance yields a financial benefit to the source. It is the difference between the first set of cash flows and the second set of cash flows that is the economic benefit the source gained from having delayed its compliance.

## IV. Financial Parameters to be Used in Calculating the Economic Benefit of Delayed Compliance and Sources of that Data

Calculation of the economic benefit of delayed compliance requires estimates of a large number of financial parameters, many of which are peculiar to the noncomplying source. This section defines these parameters and identifies sources from which their actual numerical values may be drawn.

The correct values for these parameters are the ones that pertain to the particular source involved, since it is the economic benefit of delay obtained by that source that is being sought through the civil penalty authority. In some instances, however, it will not be possible or, if possible, not desirable, to obtain specific information regarding the source prior to the time that civil penalty evaluations must be prepared. In those cases, reasonable estimates can be made from the data contained in the sources referenced below.

Except for the parameters concerning the capital and operation and maintenance cost of the pollution control equipment, the values for parameters must be estimated based upon likely values that will pertain in the indefinite future.

The best approximation of these parameters should be the average values which have occurred over the recent years, except when those values are clearly atypical. For example, if the recent rates of return on book equity have been very low or even negative, the average of such values should not be used. In such cases, it is obvious that the violator would expect to make a reasonable profit in future years. Otherwise it would not make economic sense for the source to remain in business. As described below, in such cases, the published industry average value may be the best available estimate of the anticipated future value.

A. Total Deferred Capital Cost of Pollution Control Equipment

This is an estimate of the capital expenditures that should have been made for purchase and installation of the required pollution control equipment. It includes not only direct purchase costs, but also such expenditures as site preparation and engineering design. It is measured in constant dollars as of the first day of noncompliance.

In the event that contracts have been signed for construction or purchase of the required equipment, they should be used as the basis for such costs. Other possible bases include engineering estimates, quotations from equipment manufacturers, and the actual cost experience of other sources which have installed similar equipment.

If a violator installed some, but not all of the equipment that was required for pollution control compliance and is in violation because the equipment constructed or installed is insufficient, then the appropriate value for total deferred capital investment expenditure is equal to the additional capital expenditure required for compliance.

If the violator installed all of the pollution control equipment required for compliance but is in violation because the equipment is inadequate or ineffective, then the amount of deferred capital expenditure depends upon the reasonableness of the source's expectation that the installed equipment would satisfy pollution control requirements. If equipment was reasonably calculated to achieve compliance, then there has been no inappropriate deferral of capital expenditure, notwithstanding the fact that additional capital expenditures are now required. In making this determination, it is important to insure that sufficient consideration was given to providing adequate capacity for continuous control and that reasonable design and construction standards were observed in installing or constructing the pollution control equipment. It is also important to insure that the inadequacy or ineffectiveness is not attributable to increased levels of production or to production process changes.

If the violator installed all of the pollution control equipment required for compliance but under conditions in which it was not reasonable to expect that pollution control requirements would be satisfied, then the total deferred capital expenditure is equal to the amount that will have to be expended to come into compliance. No reduction or credit will be allowed for the amounts actually expended.

B. Annual Operating and Maintenance Expense that Should Have Been Incurred in First Year of Operation

This parameter is an estimate of the annual cost of operating and maintaining the required pollution control equipment. It must be expressed in the same terms as capital costs. That is, the amount should represent the annual operating and maintenance expense in constant dollars as of the beginning of the first year of noncompliance. There is a provision in the formulation which automatically adjusts future years' operating and maintenance expense for anticipated inflation.

Losses in production and incremental energy costs which will be incurred as a direct result of operating the pollution control equipment should be counted as an expense in this category. On the other hand, the value of any by-product recovery resulting from such operation should be deducted.

Sources of estimates for operating and maintenance expense include equipment manufacturers and engineering consultants. These estimates should include all recommended operating and maintenance procedures, training and planning costs, cost of warranties, record-keeping and costs of monitors.

C. Investment Tax Credit

This is a reduction in Federal income taxes payable as a result of making qualified capital investments. It is equal to a specified percentage of the portion of the initial capital costs which qualify under IRS regulations. The investment tax credit is included in the formulation because it has the effect of reducing the cash outflow required to purchase the pollution control equipment.

The applicable percentage is given in the Internal Revenue Code as are the criteria for qualifying investments. If not all of the initial capital cost qualifies for the investment tax credit, an adjustment must be made as described in Appendix B.

D. Marginal Income Tax Rate

This rate is the average anticipated future value of the fraction of the last dollar of taxable income which must be paid by the source to Federal, State and local governments. It is the amount by which taxes would increase if taxable income were to increase. It is different than the average tax rate (i.e., total tax divided by taxable income).

The tax rates of the various levels of government are specified by statute and typically depend on the level of taxable income reported by the owner of the polluting facility. A formula for computing the marginal income tax rate for a firm subject to income taxation by more than one level of government is given in Appendix D.

E. Annual Inflation Rate of Pollution Control Equipment

This is the annual rate at which both capital and operating and maintenance costs are expected to grow. These cost increases are the result of inflation of various factors such as labor, capital goods and energy.

For purposes of computing the economic benefit of delayed compliance, the compounded change in the Chemical Engineering Plant Cost Inflation Index[1] may be used as an estimate of the future rate of increase in pollution control expenditures. For the years 1970-1977, this rate was 7.2 percent. The Chemical Engineering Plant Cost Index is based on a weighted average of four components. These are: fabrication and equipment, engineering and supervision, construction labor and building costs. The weights are determined by a survey made by Chemical Engineering magazine. The cost components are derived from the producer price indices compiled by the Bureau of Labor Statistics.

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[1] Chemical Engineering, McGraw-Hill, Inc., April 28, 1975, and subsequent issues.

There is no widely available index of pollution control equipment costs as such. The Chemical Engineering index is based on factors which are clearly important components of such costs. The principal alternative considered was to use some broader and more universally recognized index, such as the GNP implicit price deflator. This was considered to be a greatly inferior choice since it is based primarily on factors only loosely related to the cost of pollution control equipment.

F. Source's Rate of Return on Equity

This is the percentage used as the basis for discounting cash flows occurring in future years to equivalent present values. It is the average anticipated future value of the source's annual after-tax income divided by the total value of common shareholder interest.

Where this value cannot be estimated for any particular source (as, e.g., when recent rates of return have been unusually low or even negative) it is sufficient to use the industry average return on the book equity value. Such rates are reported by the Federal Trade Commission in its Quarterly Financial Report for Manufacturing, Mining and Trade Corporations. It is based on a large sample of sources in each industry and, subject to the limitations found in all accounting data, represents an accurate estimate of the past performance of U.S. industries.

G. Interest Rate on Source's Long-Term Debt

This is the rate of interest which would be paid by the source if additional long-term debt were to be incurred. The interest rate may be estimated as the current rate of interest on bonds of a grade equal to that of the source's bonds having the highest rating as published in Standard and Poor's The Outlook.

If a source's debt is not rated, the interest rate may be estimated as the current rate of interest on grade "A" corporate bonds, published in Standard and Poor's The Outlook or in Standard and Poor's Statistical Service, "Current Statistics".

H. Preferred Stock Dividend Rate

This is the rate paid by the source to its preferred stockholders. Like return on equity and interest rate, dividends paid on preferred stock represent a cost of long-term financing.

If a source has preferred stock outstanding which has a rating, the preferred stock dividend rate may be estimated as the current yield on stock of that rating as reported in Standard and Poor's The Outlook. If the stock is not publicly traded or has no rating, the rate may be estimated as the current preferred stock yield on grade "A" issues published in Standard and Poor's The Outlook or in Standard and Poor's Statistical Service, "Current Statistics".

I. Equity Share of Violator's Total Investment

This parameter is equal to the proportion of the source's long-term financing which is provided by common shareholders. It is a fraction, the numerator of which is the sum of all common equity accounts on the source's balance sheet including common stock, retained earnings, capital surplus and any other accounts representing common equity investments. The denominator of the fraction is given by adding to the numerator the sum of the preferred stock account plus all long-term debt incurred by the owner (excluding portions of such debt in the current account).

J. Preferred Share of Violator's Total Investment

This share is the fraction of long-term financing provided by preferred stock. The numerator is given by the preferred stock accounts in the source's balance sheet and the denominator by the source's long-term debt plus its preferred stock plus its common equity interest.

K. Income Tax Depreciation Method

Computation of the economic benefit of delayed compliance involves consideration of depreciation-related tax benefits of an investment in pollution control equipment. The source may choose the method of depreciation to be used, subject to conformity with Internal Revenue guidelines.

The computer program used by EPA to calculate the penalty automatically selects the depreciation method which results in the lowest cost of compliance (hence the least amount of economic savings due to delayed compliance). This is based on the assumption that the source would use the depreciation method which resulted in the lowest possible cost of compliance.

L. Depreciable or Tax Life of Pollution Control Equipment

The depreciation life is the minimum number of years over which a particular investment in pollution control equipment may be depreciated. A data source for this value is the lower limit on the asset depreciation range for the appropriate class of assets as given in the Internal Revenue Service publication Revenue Procedure 77-10.

M. Useful Life of Pollution Control Equipment

The useful life of the pollution control equipment is the number of years it can be expected to operate before replacement.

A source of data for the useful life of various types of pollution control equipment is the asset guideline period developed by the Internal Revenue System for certain asset classes. These are provided by the Internal Revenue Service in Revenue Procedure 77-10. They represent IRS estimates of the average lives of assets within a particular industry. They were based upon a study of actual asset lives and they are continually updated as the need arises.

N. Period of Delayed Compliance

The period of delay used to measure economic benefit should be the period of time that violations resulting from a failure to make pollution control expenditures can be proven. Typically, that period will be equal in length to the period that such expenditures were or will be unjustifiably delayed.

In actions under the Clean Water Act, the period should commence July 1, 1977, unless an earlier compliance date was required by the terms of the violator's discharge permit. In the case of violators of the Clean Air Act, the period should begin on August 7, 1977, or, if later, the earliest provable date of violation. (It should be noted that many Air Act violators had long been in violation on August 7, 1977, and had, by that time, already obtained a substantial benefit through their compliance delay.) In both Air and Water Act cases, the period of delayed compliance should extend until full compliance is or will be obtained, except in the case of major stationary source Air Act violators which will be out of compliance beyond August 7, 1979. In that case, the period of delayed compliance should only extend to August 7, 1979, or such later date as the mandatory, administratively-imposed noncompliance penalties will commence pursuant to Section 120 of the Clean Air Act.

The period of delayed compliance continues until all violations resulting from delayed expenditure are eliminated. The period does not end simply when all required expenditures have been made unless compliance is also achieved then. This is because sources should have reasonably anticipated start-up or post-construction compliance delays and have planned accordingly.

### O. Length of Time Between Beginning of Delayed Compliance Period and Time Penalty will be Imposed

The method of measuring economic benefit described above determines that value as of the beginning of the period of noncompliance. Because this amount must be adjusted to its present value as of the time of assessment, the period of time between the beginning of the noncompliance period and the time of penalty assessment must be determined.

## V. Assumptions Underlying the Calculation of Economic Benefit of Delayed Compliance

The method described herein for calculating the economic benefit of delayed compliance was based upon several important assumptions, many of which were only implicit in the discussion in the previous section. The following identifies those assumptions and explains why they were made.

A. The relative mix of debt, preferred stock and common equity associated with the acquisition of pollution control equipment is the same as that of the source's overall capital structure as shown on its balance sheet.

On the balance sheet of any source, total net assets, including net working capital, are exactly equal to total long-term financing (long-term debt, preferred stock, and equity). Any increase in net assets must be accompanied by a similar change in long-term financing. It has been assumed in developing the method set forth herein that relative proportions of the long-term financing associated with the acquisition of pollution control equipment are the same as those of the source's overall capital structure.

B. Cash flows are discounted using the equity method.

The rate used to discount future cash flows is the source's rate of return on equity. This equity discounting method is one of several different approaches to evaluating capital investments which have been developed. No single one has won universal acceptance from financial theorists. However, despite the theoretical and computational differences among the various approaches, in most practical applications they tend to give results which differ only slightly.

The equity discounting method is based on an analysis of the cash flows affecting common shareholders. All cash flows arising out of debt or preferred stock financing are netted out. The residuals, which represent amounts available for distribution to common shareholders, are then discounted at the rate of return on equity.

This method has several advantages. The most important is that it measures the benefit of noncompliance from the point of view of the true beneficiary, the common stockholder. The benefit obtained from delaying pollution control expenditures does not directly benefit the bondholders of the company. They will continue to receive the same interest payments as before. When their bonds mature they will be paid the face value of the bonds. Similarly, preferred stockholders will receive no direct benefit from delay. Therefore, any delay primarily benefits the common stockholders since they are the owners of such residual amounts.

C. The computation of economic benefit of delayed compliance assumes that the civil penalty will not be a deductible expense to the source.

In calculating the costs on which the economic benefit of delayed compliance is based, the normal tax consequences of interest, depreciation, etc., are taken into account. In addition, in setting a civil penalty amount so that it imposes the same after-tax burden as timely compliance, it is assumed that the penalty will not be allowed as an income tax deduction. If the civil penalty were allowed as a deductible expense for tax purposes, the penalty would have to be adjusted upward so that its after-tax cost to the firm would be equal to the otherwise appropriate civil penalty.

D. Cash flows take place at the end of the year.

While expenditures such as those for operating and maintaining equipment obviously are incurred throughout the course of the year, the assumption that all cash flows take place at the end of each year greatly simplifies the computation of economic benefit through delayed compliance. Its effect is to lower the penalty very slightly from the level it would have if these expenditures were assumed to be made on a continuous basis throughout the year.

E. The rate of inflation of pollution control operating and maintenance expenditures is the same as that for pollution control equipment costs.

Most of the Environmental Protection Agency's studies of pollution control costs have estimated operating and maintenance expenses as a constant fraction of capital costs. This relationship between the two, in addition to the fact that no clear reason was observed for using separate rates, led to the use of a single inflation rate.

F. A Continuous Sequence of Replacement Cycles is Required.

As the equipment approaches the end of its useful life, it is replaced at a cost which reflects the rate of inflation. This process continues for an indefinite period, implying that the underlying source of pollution is never eliminated.

This is a more prudent assumption than choosing either that the equipment is needed only for a fixed number of replacement cycles or a fixed number of years. The former assumption is unreasonable in that it implies the economic life of the underlying source of pollution somehow depends on that of the pollution control equipment. The latter is unworkable because it would require the selection of an arbitrary horizon at some distant time in the future. (It would be extremely difficult to provide a reasonable estimate of the period of need for pollution control equipment, that is, the life of the underlying source of pollution.) Fortunately, however, the effect of discounting is to reduce the importance of distant cash flows. That is, the present value of cash flows occurring twenty or thirty years in the future is very small and hence the effect of these flows on the penalty is likewise very small. This, plus the increased computational convenience and the ability to avoid having to choose a fixed horizon, led to the adoption of the continuous replacement assumption.

G. Capital and Operation and Maintenance Expenditures are Instantaneously Incurred on the Dates That Compliance was Required.

It is assumed herein that the capital expenditures associated with delayed compliance were made in a single payment on the first day that the source will or should have come into compliance, and that no operating and maintenance expenditures were required prior to that time. If these expenditures instead involve a series of payments made prior to the date the source will or should have come into compliance, then additional costs will have been avoided prior to the date compliance was required, but corresponding, compensating amounts will actually have been incurred (and not avoided) prior to the date that compliance will be scheduled. The assumption, therefore, greatly simplifies penalty calculations but does not significantly affect the accuracy of these calculations.

H. Long-term Debt Incurred to Finance Pollution Control Equipment Is Retired by End of Depreciable Life of Equipment.

As indicated above, the pollution control investment is assumed to have been financed by the same methods and in the same relative proportions as the source itself is financed (i.e., if the source's long-term financing is one-third preferred stock and one-third equity or common stock, then the pollution control equipment is assumed to have been financed by the same methods and in the same proportions).

Each year, as the book value of the pollution control equipment is reduced through depreciation, the principal balance on long-term debt and the amount of outstanding preferred stock is assumed to be correspondingly and proportionally reduced, by bond and preferred stock redemption payments, so that the relative financing proportions are preserved with respect to the outstanding book value. Accordingly, when the equipment has been fully depreciated, all outstanding bonds and preferred stock associated with financing the acquisition and installation of the pollution control equipment, will, correspondingly, be assumed to have been retired.

VI. Derivation of Formulae to Measure Economic Benefit of Delayed Compliance.

This section generally describes the procedure used to determine the economic benefit of delayed compliance. This section follows the same general outline in deriving the formulae used to calculate that benefit.

In most instances the formulae will have to be applied for each item of equipment. Where items of equipment have the same useful and depreciable tax lives and where the same period of delayed compliance and inflation rate are involved, it is possible to combine capital and operation and maintenance expenditure amounts and determine total economic benefit in a single calculation.

All symbols are defined in Appendix A to this section. A complete description of the parameters used and their sources is given in Section V.

A. Pollution Control Cash Flows.

The computation of the benefit from delaying pollution control investment requires that cash flows be estimated for a continuous series of pollution control equipment replacement cycles and that these cash flows be reduced to a single present value. The simplest approach to calculating the present value of all future flows is to calculate the present value of cash flows in the initial useful life cycle and to then use that value as a basis for all others. The derivation described below uses such an approach.

The first cash flow results from the initial investment of equity. It may be expressed as:

$$EI = II * Q \qquad (1)$$

where II = the capital cost of the pollution control equipment.

Q = the fraction of the source's capital structure made up of equity.

From this quantity must be subtracted an amount to reflect the effect of the investment tax credit. This amount may be expressed as:

$$ITC = II * t_{ITC} \qquad (2)$$

where $t_{ITC}$ = the investment tax credit rate.

The investment tax credit rate must be adjusted if not all of the investment qualifies for the credit. This adjustment is explained in Appendix B. Further, if rapid amortization is selected (see Appendix C) only one-half of the normal investment tax credit is allowed.

Additional cash flows result from capital-related expenditures which occur over the depreciable life of the equipment. These amounts account for tax depreciation effects and for the cash flows associated with financing the pollution control equipment. The effect of depreciation is to reduce the source's tax liability. The cash flow related to depreciation in year j may be expressed as:

$$DEP_j = II * d_j * t_{TR} \qquad (3)$$

where $d_j$ = the fraction of the original cost depreciated in year j (see Appendix C).

$t_{TR}$ = the source's marginal income tax rate (see Appendix D).

The other annual capital-related cash flows consist of principal repayments and financing charges (i.e., interest and dividends) on the debt and preferred stock issued to finance the equipment purchase. The fraction of the initial investment financed by debt may be expressed as:

$$DEBT\ SHARE = II * B \qquad (4)$$

where B = the fraction of the firm's capital structure made up of debt. Debt is assumed to be repaid each year in proportion to the depreciation of the asset. That is, at the end of each year the same fraction of the principal is repaid as the original book value of the investment is depreciated. Therefore, the repayment of principal in year j may be expressed as:

$$PRIN_j = d_j * II * B \qquad (5)$$

Interest is assumed to be paid at the end of each year on the principal outstanding at the beginning of that year.

$$(\text{INTEREST CHARGE})_j = R_{INT} * (\text{PRINCIPAL OUTSTANDING})_j \quad (6)$$

where $R_{INT}$ = the source's interest rate.

Since interest is tax deductible, only the after-tax effects should be considered in calculating the cash flow. Therefore, the interest payment cash flow in year j becomes:

$$INT_j = R_{INT} * (\text{PRINCIPAL OUTSTANDING})_j * (1-t_{TR}) \quad (7)$$

The principal outstanding is the original amount borrowed, II * B, less the amount which has been repaid prior to the beginning of the year. The amount repaid prior to the beginning of year j is:

$$(\text{AMOUNT REPAID}) = \sum_{k=0}^{j-1} II * d_k * B \quad (8)$$

The principal outstanding at the beginning of year j is the amount initially borrowed less the amount repaid by the end of year j-1.

$$(\text{PRINCIPAL OUTSTANDING})_j = II * B - \sum_{k=0}^{j-1} II * d_k * B \quad (9)$$

Combining equations (7) and (9) yields a formula for the interest-related cash flow in year j:

$$INT_j = R_{INT} * II * B * (1-t_{TR}) * (1 - \sum_{k=0}^{j-1} d_k) \quad (10)$$

The fraction of the initial pollution control investment that would be financed by preferred stock may be expressed as follows:

$$\text{PREFERRED SHARE} = II * F \quad (11)$$

where F is the fraction of preferred stock in the source's capital structure. Just as the additional debt is repaid over the depreciable life of the pollution control equipment, it is assumed that the preferred stock must be redeemed as the asset is depreciated. At the end of each year, the same fraction of the preferred stock is redeemed as the original book value of the investment is depreciated. Redemption in year j is given by:

$$PREF_j = d_j * II * F \tag{12}$$

Dividends on preferred stock are assumed to be paid at the end of each year on the amount of stock outstanding at the beginning of the year.

$$DIV_j = R_{DIV} * (PREFERRED\ OUTSTANDING)_j \tag{13}$$

where $R_{DIV}$ = the dividend rate on preferred stock.

These dividends are not tax-deductible. The preferred stock outstanding in any year is the original amount issued, II * F, less the amount redeemed prior to the beginning of the year. The amount redeemed prior to year j is:

$$(AMOUNT\ REDEEMED)_j = \sum_{k=0}^{j-1} II * d_k * F \tag{14}$$

The amount of preferred stock outstanding at the beginning of year j is equal to the amount originally issued less the amount redeemed.

$$(PREFERRED\ OUTSTANDING)_j = II * F \sum_{k=0}^{j-1} II * d_k * F \tag{15}$$

The dividend paid at the end of year j is found by combining equations (13) and (15).

$$DIV_j = R_{DIV} * II * F * (1 - \sum_{k=0}^{j-1} d_k) \tag{16}$$

The final category of cash flow is that associated with annual operating and maintenance expenditures. These expenses increase each year at the inflation rate. Like interest and dividend payments, they are assumed to be paid at the end of the year. They are tax deductible so their associated cash flows must reflect the effect of income taxes. If $M_j$ is the cash flow resulting from operating and maintenance expense in year j, and $M_0$ is the annual operating and maintenance expense in current dollars, the resulting cash flow may be expressed as:

$$M_1 = M_0 * (1-t_{TR}) * (1+I)$$

$$M_2 = M_1 * (1+I) = M_0 * (1-t_{TR}) * (1+I)^2$$

$$M_j = M_{j-1} * (1+I) = M_0 * (1-t_{TR}) * (1+I)^j \qquad (17)$$

B. Discounting Cash Flows

The cash flows just calculated must next be discounted to their present values. The cash flows related to the initial equity investment and the investment tax credit, take place immediately; therefore, no discounting is required to convert them to their present value. Using equations (1) and (2), that present value is given by:

$$PV_{INITIAL} = EI - ITC$$

$$= II * Q - II * t_{ITC}$$

$$= II * (Q - t_{ITC}) \qquad (18)$$

The present value of the net cash flows associated with the additional capital-related cash flows may be calculated in three steps. First, the total cash flow in year j is given by algebraically summing the individual components. The second step is to discount this sum to determine its present value. These two steps are combined in a single equation as follows:

$$PV_{\substack{\text{ANNUAL}\\\text{CAPITAL}\\\text{RELATED}_j}} = \frac{-DEP_j + PRIN_j + INT_j + PREF_j + DIV_j}{(1+E)^j} \tag{19}$$

where E = the discount rate.

The negative sign preceding the depreciation cash flow results from the fact that this component represents a reduction in cash outflow. The third step is to sum the individual present values for each year of the depreciation life of the equipment (n years).

$$PV_{\substack{\text{ANNUAL}\\\text{CAPITAL}\\\text{RELATED}}} = \sum_{j=1}^{n} PV_{\substack{\text{ANNUAL}\\\text{CAPITAL}\\\text{RELATED}_j}} \tag{20}$$

The final category, operating and maintenance cash flows, must be considered over the entire useful life of the equipment. The present value of the flow in year j is given by:

$$PV_{O\&M_j} = \frac{M_j}{(1+E)^j} \tag{21}$$

The present value over the N years of useful life is given by summing the present values for each year:

$$PV_{O\&M} = \sum_{j=1}^{N} PV_{O\&M_j} \tag{22}$$

The present value of all cash flows resulting from the purchase and operation of pollution control equipment throughout the N year life of the original equipment, $PV^1_{PCE}$, is given by summing the contributions of each of the three types of pollution control expenditures.

$$PV^1_{PCE} = PV_{INITIAL} + PV_{\substack{\text{ANNUAL}\\\text{CAPITAL}\\\text{RELATED}}} + PV_{O\&M} \tag{23}$$

The present value of all cash flows associated with the initial useful life cycle must next be expanded to include the present value of cash flows in all future replacement cycles. This can be accomplished by recognizing that any given future cycle is identical to the original one except that its costs have increased by the inflation rate. For example, the replacement made in year N, when the original equipment wears out, gives rise to cash flows whose present value in year N is equal to:

$$PV^1_{PCE} * (1+I)^N$$

where I = the annual inflation rate.

The initial present value of these flows (at time zero) is then determined by discounting:

$$\frac{PV^1_{PCE} * (1+I)^N}{(1+E)^N}$$

where E = the discount rate.

The present value of the cash flows from the original cycle and all future replacement cycles is therefore given by summing:

$$PV_{PCE} = PV^1_{PCE} + PV^1_{PCE} * \frac{(1+I)^N}{(1+E)^N} + PV^1_{PCE} * \frac{(1+I)^{2N}}{(1+E)^{2N}} + \ldots$$

$$= PV^1_{PCE} * \left[ \frac{1}{1 - \left(\frac{1+I}{1+E}\right)^N} \right], \quad E > I \qquad (24)$$

## C. The Economic Benefit of Delayed Compliance

The quantity just calculated is the present value, as of the day on which compliance should have been achieved, of all future pollution control cash flows which the source would have experienced had it not delayed. If compliance is delayed, inflation will result in the source's facing higher costs. Once it does comply, the present value of those costs, as of the day on which compliance is actually achieved, is given by:

$$PV^{1}_{DELAY} = PV_{PCE} * (1+I)^{L} \qquad (25)$$

where I = the annual inflation rate.

L = the period of delayed compliance.

The present value as of the day on which compliance should have been achieved is given by discounting:

$$PV_{DELAY} = \frac{PV^{1}_{DELAY}}{(1+E)^{L}}$$

$$= PV_{PCE} * \left(\frac{1+I}{1+E}\right)^{L} \qquad (26)$$

where E = the discount rate.

The economic benefit from delay is thus given by the differences between these two present values:

$$\text{ECONOMIC BENEFIT} = PV_{PCE} - PV_{DELAY}$$

$$= PV_{PCE} * \left[1 - \left(\frac{1+I}{1+E}\right)^{L}\right] \qquad (27)$$

## VII. Calculation of Economic Benefit of Delayed Compliance Obtained by Violators Other Than Privately Owned Sources Subject to the Federal Income Tax

The method described herein for calculation of economic benefit assumes that the source is a privately-owned entity subject to federal and perhaps state and local income taxes. There are sources other than these, however, within the scope of the EPA Civil Penalty Policy (e.g., public sector sources such as, state or municipal sources or publicly-, not investor-, owned utilities). For such sources, the economic benefit of delayed compliance can be determined by adapting the method presented here.

Public sector sources typically do not have an annual taxable "income"; accordingly, the income dependent parameters should be set equal to zero for such sources (i.e., the tax depreciation method used, the marginal income tax rate, and the investment tax credit).

One income dependent parameter, the depreciable life, should not be set equal to zero. That is because the depreciable life period is also used as the period of time over which debt incurred to finance the pollution control equipment is repaid. Accordingly, the value of that parameter should be set equal to the debt retirement period that the source uses for such equipment.

Public sector sources additionally do not finance pollution control expenditures through the issuance of anything analagous to either preferred or common stock. Their share of such expenditures is typically financed entirely through long-term debt. Accordingly, the parameters related to common or preferred stock financing should also be set equal to zero (i.e., equity share of violator's total investment and the preferred stock share of the violator's total investment).

Since public sector sources do not use anything comparable to equity financing and do not have a taxable "income", there is no quantity analagous to a rate of return on equity that can be used to discount future cash flows. Some of these sources may have established discount factors to evaluate alternative capital expenditure programs. If so, the source's own discount factor may be used. If they have not established discount factors, the rate used for inflation of pollution control equipment may be used as the discount rate (i.e., in applying the calculation method described herein, the rate of return on equity (or discount rate) should be set equal to the inflation rate of the pollution control equipment).

# APPENDIX A

## DEFINITION OF SYMBOLS

| | | |
|---|---|---|
| B | = | the fraction of debt in the owner's capital structure (book value). |
| Capital | = | the sum of the stockholders' or owners' net equity, preferred stock and long-term debt accounts at book value. |
| $DEP_j$ | = | the net after tax cash flow in year j resulting from depreciation of the initial investment. |
| $d_j$ | = | the fraction of original asset value depreciated in year j. |
| $DIV_j$ | = | the dividend payment in year j on the preferred stock used to finance the initial investment. |
| E | = | the discount rate. |
| EI | = | the amount of cash provided by equity investors to finance the initial investment. |
| F | = | the fraction of preferred stock (at book value) in the owner's capital structure. |
| I | = | the annual rate of inflation for pollution control expenditures. |
| $INT_j$ | = | the interest payment cash flow (after the effect of taxes) in year j on the debt used to finance the initial investment. |
| II | = | the initial investment in pollution control equipment; the amount which will be capitalized on the books of the firm and amortized over the life of the equipment. |
| ITC | = | the investment tax credit. |

| | | |
|---|---|---|
| $j, k$ | = | indices, usually indicating the year or quarter in which a cash flow occurs. |
| $L$ | = | the period of delayed compliance. |
| $M_j$ | = | the operating and maintenance expense in year j. |
| $N$ | = | the useful life of the pollution control equipment. |
| $n$ | = | the depreciation life of the pollution control equipment. |
| $P_k$ | = | the penalty payment to be made at the beginning of quarter k. |
| $PV$ | = | the present value of a cash flow. |
| $PREF_j$ | = | the repayment or reallocation of debt in year j. |
| $Q$ | = | the fraction of common equity (at book value) in the owner's capital structure. |
| $R_{INT}$ | = | the annual rate of interest on long-term debt. |
| $t_{ITC}$ | = | the investment tax credit rate. |
| $t_{TR}$ | = | the marginal income tax rate ($t_{FED}$ is the marginal federal rate and $t_{S\&L}$ is the marginal state and local rate). |
| $W_j$ | = | the fraction of common stock held by shareholder j. |
| $Y$ | = | the statutory investment tax credit rate. |

# APPENDIX B

## INVESTMENT TAX CREDIT QUALIFICATION

Only certain assets qualify for the investment tax credit, a notable exception being most buildings. If the installation of pollution control equipment involves expenditures which will be capitalized and amortized over the tax life of the equipment, but which do not qualify for the investment tax credit, the calculation of the credit must be adjusted.

Let $I_{qual}$ be the investment which qualifies for the investment tax credit and let $I_{non}$ be capitalized expenditures not qualifying for the credit. ($I_{qual} + I_{non} = II$, the initial investment). If the investment tax credit rate specified in the Internal Revenue Code is Y percent, the adjusted rate for use in the noncompliance penalty calculation is:

$$t_{ITC} = \frac{I_{qual}}{I_{qual} + I_{non}} * y$$

An adjustment must also be made if the pollution control equipment has a tax life of less than seven years. Values of "Y" in these cases are given by:

| Depreciable Life (years) | Y (Percent) |
|---|---|
| Less than 3 | 0 |
| At least 3 but less than 5 | 3.33 |
| At least 5 but less than 7 | 6.67 |
| 7 or more | 10.00 |

# APPENDIX C

## DEPRECIATION

The cash flow resulting from depreciation is given by:

$$DEP_j = d_j * II * t_{TR}$$

where $d_j$ is the fraction of the original cost depreciated in year j and $t_{TR}$ is the marginal income tax rate. The value of $d_j$ will depend on the method of depreciation used by the owner of the facility. Formulae for the more common methods are shown.

Straight line. Under this method, depreciation is the same during each year of the equipment's tax life (n).

$$d_j = \frac{1}{n}$$

Sum of years digits. Under this method, depreciation in year j is given by:

$$d_j = \frac{2 * (n-j+1)}{n * (n+1)}$$

Double declining balance. Under this method, depreciation in any year is the product of the remaining book value and twice the straight line rate. Switching to the straight line method is permitted after part of the asset has been depreciated. This switch, properly timed, increases the present value of the depreciation tax shield. The formula for double declining balance depreciation in year j is:

$$d_j = \max \begin{cases} \frac{2}{n} * (1 - \sum_{k=0}^{j-1} d_k) \\ \frac{1}{n-j+1} * (1 - \sum_{k=0}^{j-1} d_k) \end{cases}$$

where "max" means that the greater of the two quantities to the right of the bracket should be chosen.

Rapid Amortization. A firm generally empolys a depreciation method which minimizes the present value of its future accelerated depreciation methods, the most common of which are described above. Special rules governing the depreciation of pollution control equipment allow even faster write-offs than the accelerated methods, often resulting in still greater reductions in the present value of future tax liability. This approach, known as rapid amortization, was provided for in the Tax Reform Act of 1976.

The rules of rapid amortization are as follows:

Divide the investment into two parts:

i the amount which would be depreciated during the first 15 years under straight line depreciation, and

ii the residual.

The first part may be depreciated on a straight line basis over 5 years. Only one-half of the normal investment tax credit may be taken on this part.

The second part may be depreciated over the full tax life of the investment using whichever depreciation method the owner chooses. The full investment tax credit may be taken on this part.

The formula for the fraction depreciated in year j is most easily developed by considering the two parts separately. The fraction in year j for the first part is given by:

$$d_j^1 = \frac{1}{5} * f$$

where:

$$f = \min \frac{15}{n} \quad 1.0$$

The fraction of the second part depreciated in year j is given by the formula shown above depending on the method used. This must be multiplied by (1-f), the fraction of the initial investment in the second part.

$$d_j^2 = (1-f) * (\text{standard fraction given above})$$

The depreciation fraction for year j under rapid amortization is then given by summing the two components:

$$d_j = d_j^1 + d_j^2$$

# APPENDIX D

## TAX RATE ADJUSTMENTS

The calculation of the economic benefit of noncompliance requires use of the firm's marginal income tax rate. For most large corporations operating in states with no state income tax, this figure would be 48 percent. However, state income taxes on a non-corporate form of organization complicate the matter. This appendix discusses the adjustments necessary to deal with these two factors.

### State and Local Income Taxes

Firms in some locations are subject to income taxation by more than one level of government. If state and local income taxes are deductible on the federal return, the rate of taxation on income $t_{TR}$, must be computed according to the following procedure:

Let $t_{FED}$ be the federal marginal tax rate and $t_{S\&L}$ be the marginal rate on state and local returns. Taxes paid to state and local governments are deductible expenses on the federal return. Hence, this after-tax rate is given by:

$$t_{S\&L} * (1-t_{FED})$$

The overall tax rate is the sum of federal and state and local effects. It is given by:

$$t_{TR} = t_{FED} + t_{S\&L} * (1-t_{FED})$$

It is possible that certain local income taxes will be allowed as deductions when state income taxes are computed. In such cases, $t_{S\&L}$ is given by:

$$t_{S\&L} = t_S + t_L * (1-t_S0$$

### Multiple Ownership

The assumption used in employing the tax rate, $t_{TR}$, and its components, $t_{FED}$ and $t_{S\&L}$, was that these rates represent the marginal income tax rates applicable to the owning source. If there is more than one owner, as might be the case if the source were a partnership or a Subchapter S corporation, the rate used in calculating the economic benefit of delayed compliance should be a weighted average of the rates appropriate to each owner.

The formula for either $t_{FED}$ or $t_{S\&L}$ would then be given by:

$$t = W_1 t_1 + W_2 t_2 + \ldots + W_K t_K$$

$$= \sum_{k=1}^{K} W_k t_k$$

where:

$t$ = the weighted average marginal income tax rate.

$W_k$ = the fraction owned by the $k^{th}$ owner.

$t_k$ = the marginal income tax rate of the $k^{th}$ owner.

$K$ = the number of owners.

# APPENDIX E

## SAMPLE CALCULATION OF ECONOMIC BENEFIT

To illustrate the calculation of economic benefit of delayed compliance the following sample is provided for a hypothetical discharger in the following economic situation:

| | | |
|---|---|---|
| Delayed Capital Cost of Pollution Control Investment | = | $ 100,000 |
| Annual O&M Cost of Delayed Pollution Control Investment | = | $15,000 |
| Investment Income Tax Credit | = | 10% |
| Marginal Income Tax Rate (Combined state and federal) | = | 50% |
| Inflation Rate for Pollution Control Investment | = | 6% |
| Discharger's Interest Rate on Borrowed Capital (long-term debt) | = | 7% |
| Equity Share of Discharger's Total Investment | = | 60% |
| Preferred Stock Share of Source's Total Investment | = | 0% |
| Depreciation Method Used | = | Straight Line |
| Depreciable Life of Equipment | = | 7 years |
| Useful Life of Equipment | = | 10 years |
| Overall After-Tax Rate of Return on Discharger's Book Equity | = | 10% |
| Period of Delayed Compliance | = | 3 years |

Period of Time from Beginning of Delayed Compliance to Time Penalty is to be Determined = None, assume Penalty paid at beginning of noncompliance period

A. Cash Flows Over the Useful Life of the Pollution Control Investment that Should Have Been Made.

The first step in the calculation of the economic benefit of delayed compliance is the identification of all cash flows (including both direct costs and indirect financial impacts) that would have occurred over the useful life of the pollution control equipment that should have been constructed or installed (including the initial capital investment, those cash flows associated with financing the balance of the capital cost of the investment, and those associated with the operation and maintenance of that equipment).

The following table identifies those cash flows for the hypothetical situation described by the values assigned above to the parameters used to determine the economic benefit of delayed compliance. The footnotes that accompany the table indicate how the financing assumptions described above are used to calculate these costs.

A. CASH FLOWS OVER THE USEFUL LIFE OF THE POLLUTION CONTROL INVESTMENT THAT SHOULD HAVE BEEN MADE

| Year (End) | Annual Depre-ciation | Invest-ment Book Value | Balance on Debt 1) | Debt Pay-ment 3) | Interest on Debt Balance | Annual O&M 8) | Total Deduction Related to Investment 4) | Tax Savings 5) | Total Operating Expense 6) | Total Cash Flow 7) |
|---|---|---|---|---|---|---|---|---|---|---|
| | | 100,000 | 40,000 | | | | | | | 50,000 2) |
| 1 | 14,286 | 85,714 | 34,286 | 5,714 | 2,800 | 15,900 | 32,986 | 16,493 | 18,700 | 7,921 |
| 2 | 14,286 | 71,428 | 28,572 | 5,714 | 2,400 | 16,854 | 33,540 | 16,770 | 19,254 | 8,198 |
| 3 | 14,286 | 57,142 | 22,858 | 5,714 | 2,000 | 17,865 | 34,151 | 17,076 | 19,865 | 8,504 |
| 4 | 14,286 | 42,856 | 17,144 | 5,714 | 1,600 | 18,937 | 34,823 | 17,412 | 20,537 | 8,840 |
| 5 | 14,286 | 28,570 | 11,430 | 5,714 | 1,200 | 20,073 | 35,559 | 17,780 | 21,273 | 9,208 |
| 6 | 14,286 | 14,284 | 5,716 | 5,714 | 800 | 21,278 | 36,364 | 18,182 | 22,078 | 9,610 |
| 7 | 14,284 | - | - | 5,716 | 400 | 22,554 | 37,240 | 18,620 | 22,954 | 10,048 |
| 8 | - | - | - | - | - | 23,908 | 23,908 | 11,954 | 23,908 | 11,954 |
| 9 | - | - | - | - | - | 25,342 | 25,342 | 12,671 | 25,342 | 12,671 |
| 10 | - | - | - | - | - | 26,863 | 26,863 | 13,431 | 26,863 | 13,431 |

1) The discharger's debt/equity ratio is assumed to remain constant. Accordingly, the $100,000 investment is financed by using $60,000 of firm capital and by borrowing $40,000.
2) The initial cash flow, at the beginning of year one, is the $60,000 of the source's capital, less an investment tax credit of $10,000.
3) It is assumed that the debt is repaid over the depreciable life of the pollution control investment.
4) Total deductions related to Investment = Annual O&M + Depreciation + Interest on Debt Balance.
5) Tax Savings = Marginal Income Tax Rate X Total Deductions Related to Investment.
6) Total Operating Expense = Annual O&M + Interest on Debt Balance.
7) Net Cash Flow = Operating Expenses + Debt Repayment - Tax Savings
8) Annual O&M Cost is inflated at rate equal to overall Inflation Rate.

NOTE: Figures may be slightly off due to rounding error.

B. Present Value of Pollution Control Equipment Costs that Should Have Been Incurred

The next step in calculating the economic benefit of delayed compliance is the calculation of the present value of the annual cash flows that should have occurred over the useful life of the pollution control equipment.

| Year (End) | Net Cash Flow | Discount Factor 9) | Present Value of Net Cash Flow |
|---|---|---|---|
| | 50,000 | 1.000 | 50,000 |
| 1 | 7,921 | .909 | 7,201 |
| 2 | 8,198 | .826 | 6,775 |
| 3 | 8,504 | .751 | 6,389 |
| 4 | 8,840 | .683 | 6,038 |
| 5 | 9,208 | .621 | 5,718 |
| 6 | 9,610 | .564 | 5,425 |
| 7 | 10,048 | .513 | 5,157 |
| 8 | 11,954 | .467 | 5,577 |
| 9 | 12,671 | .424 | 5,374 |
| 10 | 13,431 | .386 | 5,178 |
| | | | 108,831 |

The total present value of the cash flows that should have occurred over the useful life of the pollution control equipment is then converted into the total present value of all cash flows that will occur during that useful life period and during all future replacement cycles. This may be done using the formula described in section VI, on page 26, above.

9) Equal to $1/(1 + \text{rate of return on equity})^{\text{Year}}$

| Year (End) | Inflation Factor 10) | Value (in year year indicated) of the next replacement cycle | Discount Factor 11) | Present Value of the next Replacement Cycle |
|---|---|---|---|---|
| 0 | 1 | 108,831 | 1 | 108,831 |
| 10 | 1.79 | 194,900 | .386 | 75,142 |
| 20 | 3.21 | 349,036 | .148 | 51,882 |
| 30 | 5.74 | 625,070 | .057 | 35,822 |
| 40 | 10.29 | 1,119,405 | .022 | 24,733 |
| 50 | 18.42 | 2,004,684 | .008 | 17,077 |
| 0 | 0 | 0 | 0 | 0 |
| 0 | 0 | 0 | 0 | 0 |
| 0 | 0 | 0 | 0 | 0 |
| | | Total Present value of all replacement cycles 12) | | $351,577 |

10) Equal to ( 1 + inflation rate) Year

11) Equal to 1/ (1 + rate of return on equity) Year

12) Given by formula described above in Section VI on page 26.

C. Present Value of Pollution Control Costs That Will Be Incurred.

The present value of the pollution control cash flows that will result from the pollution control facility that was or will actually be constructed may be determined by the formula described above in section VI and page 27.

$$PV_{DELAY} = PV_{PLE} \frac{(1 + I)^{L}}{(1 + E)}$$

$$= \$351,577 \frac{(1 + 0.06)^{3}}{(1 + 0.10)}$$

$$PV_{DELAY} = \$314,601$$

D. The Economic Benefit of Delayed Compliance

The economic benefit that the source gained through its three years of delayed compliance is the difference between the costs that it should have incurred to come into timely compliance and the lower costs that it will actually incur, i.e.,

| | |
|---|---|
| Present value of cash flows that SHOULD have been incurred | 351,577 |
| Present value of cash flows that WILL actually be incurred | 314,601 |
| Economic Benefit of Delayed Compliance | $36,976 |

# INSTRUCTIONS FOR CALCULATING CIVIL PENALTIES DUE TO DELAYED COMPLIANCE

March 1979

Environmental Protection Agency
Office of Enforcement

## INTRODUCTION

These instructions are intended to be used in conjunction with the September, 1978, Civil Penalty Policy Technical Support Document. Portions of that document have been summarized to create this calculation "cookbook" which stands on its own. However, you should still refer to the Technical Support Document for amplified explanations. Throughout these instructions, for the purpose of convenience, the economic savings of delayed compliance component of the civil penalty will be referred to as the civil penalty. Please remember, however, that these instructions relate only to that economic benefit component.

Questions and suggestions on this paper should be directed to:

Terri Bishop (EN 341)
Compliance Analysis Section
Compliance Monitoring Branch
Division of Stationary Source
Enforcement

## I. DATA NEEDED TO DETERMINE ECONOMIC SAVINGS OF PRIVATELY-OWNED TAX PAYING SOURCES

The information needed to determine the value of economic savings due to delayed compliance includes (A) information which confirms the period of time of non-compliance (in months) and the period of time between the start of non-compliance and assessment of the penalty (in months); (B) data associated with the delayed pollution control investment; and (C) financial information related to the specific source.

### A. AGENCY-RELATED INFORMATION REGARDING NON-COMPLIANCE

The period used to measure economic savings should be the period of time that required capital expenditures were or will be delayed. In actions under the Clean Water Act, the period should commence July 1, 1977, unless an earlier date was required by the terms of the violator's discharge permit. In the case of violators of the Clean Air Act, the period should begin on August 7, 1977 or the earliest provable date of violation, if that date is later. In both cases, the period of delayed compliance should extend until full compliance is or will be obtained; however, there is an exception in the case of major stationary source Air Act violators

that will be out of compliance beyond August 7, 1979. In these cases, the period of delayed compliance should only extend to August 7, 1979, when the mandatory, administratively-imposed non-compliance penalties will commence.

The method of measuring economic savings computes that value as of the beginning of the period of noncompliance. Because this amount must be adjusted to its present value as of the time of assessment, the period of time between the beginning of the noncompliance period and the time of penalty assessment must be determined.

In the sample case of Company X the non-compliance period has been determined to be from 8/77 to 6/78 (10 months). The period between noncompliance and assessment of penalty has been determined to be from 8/77 to 2/78 (6 months).

B. DATA RELATING TO THE DELAYED POLLUTION CONTROL INVESTMENT

The following information related to the delayed pollution control investment is required: (1) the deferred capital investment cost; (2) the deferred annual O&M cost; (3) the useful life of the control equipment; (4) its depreciable tax life; and (5) the annual rate of inflation

for such equipment and its operating and maintenance expenses.

1. Capital Investment Cost: This consists of all capital expenditures that should have been made for purchase and installation of the required pollution control equipment. It includes only those expenditures which are normally capitalized and depreciated over the life of the equipment.

If the violator, after having made approved investments in pollution control equipment, remains in violation due to inadequate or ineffective equipment, then there is no inappropriate deferral of capital expenditure. Where the expenditures were not made with the approval of enforcement officials or were not reasonably calculated by the source owner to achieve compliance, then the deferred capital amount should be based upon the expenditures that will be required to achieve compliance.

When several types of equipment can be used to achieve compliance, the civil penalty should be based on the cheapest, since this is the cost avoided.

The capital values used to determine the economic savings of delayed compliance should be the values that existed as of the beginning of the delayed compliance period. It is therefore important to relate any cost figures to the dollar value of the equipment at the beginning of the noncompliance period.

The equipment in the case of Company X is a wet scrubber. One million, two hundred thousand dollars ($1,200,000) is the cost of the equipment as of the installation date (6/78). Converting this cost to a value at the beginning of the noncompliance period is shown on page 2 of the Worksheet. The resulting amount is then entered on the Penalty Data Sheet.

SOURCES:

1. Quotations from various publications such as the McIlvane Manual
2. Ouotes from vendors
3. Engineering estimates
4. Headquarters (Enforcement Office)

2. Operating and Maintenance Expense. This is an estimate of the annual cost of operating and maintaining the required pollution control equipment (excluding annualized interest). It must be expressed in terms of the amount of operations and maintenance expense avoided in the first year of noncompliance. There is a provision in the formulation which automatically adjusts future years' operating and maintenance expense for anticipated inflation.

In the case of Company X, the operations and maintenance cost for the scrubber has been entered on the Penalty Data Sheet as 10% of the capital cost.

SOURCES:

Same as Capital Investment Cost

3. Useful Life. This is the expected number of years which the pollution control equipment can be operated before it must be replaced.

In determining useful life of control equipment, use the asset guideline period for the appropriate industry as given in Revenue Procedure No. 77-10.

The useful life for Company X is 18 years.

SOURCES:

1. The Company
2. I.R.S. Revenue Procedure #77-10

4. Tax Life. This is the minimum number of years over which a particular investment in pollution control equipment may be depreciated.

A short tax life has an effect similar to that of accelerated depreciation. It serves to move forward in time the benefit of depreciation, thus increasing the present value of its benefit. Reducing the tax life therefore reduces the cost of compliance and lowers the savings from noncompliance.

(NOTE: Both useful and tax life must be integers. If rounding is required, round up for useful life and down for tax life. This errs slightly in favor of the source.)

The tax life or depreciable life for Company X has been entered as 12 years. This figure represents the lower limit of the asset depreciation range for Company X's industry.

| SOURCE: |
| --- |
| 1. The Company |
| 2. I.R.S. Revenue Procedure #77-10 |

5. Inflation Rate. This is the annual rate at which both capital and operating and maintenance costs are expected to grow over the useful life of the equipment. These cost increases are the result of various factors affecting supply and demand for particular products, as well as general inflationary pressures in the economy.

The future rate of inflation shall be estimated as an average of inflationary trends in recent years. Inflation rates specific to pollution control equipment or

similar products would be appropriate. Lacking equipment-specific data, it is acceptable to use the recent 5 year average inflation rate for plant construction, as identified in Chemical Engineering magazine.

> The average annual inflation rate for Company X for 1972 through 1977 is 8.3 percent. It was calculated on Page 2 of the Worksheet and then entered on the Penalty Data Sheet.

| SOURCES: |
|---|
| 1. Chemical Engineering's Annual Index (summary attached) |
| 2. Equipment-specific annual index |

## C. FINANCIAL DATA RELATED TO THE VIOLATOR

The following information related to the violator's financial status is required: (1) stockholder's equity; (2) capitalization; (3) the violator's rate of return on book equity; (4) the violator's equity, preferred stock, and debt shares of the investment; (5) his combined marginal federal and state income tax rate; (6) his method of depreciating

pollution control equipment; (7) his federal investment tax credit for pollution control equipment; (8) the interest rate that the violator pays on his long-term debt; and (9) the dividend rate paid on preferred stock.

The specific data relating to the violator's financial condition that are needed to measure economic savings are the anticipated values of these factors over the useful life of the pollution control investment that was delayed. A good approximation of these factors is usually found by taking the average values which have occurred over the recent years, except when those values are clearly a-typical. For example, if the recent rates of return on book equity have been small or even negative, those values should not be used. In such cases, it is obvious that the violator would expect to be able to make a profit in future years or it simply would not make economic sense to remain in business. In these instances, the average rate of return for the appropriate industry should usually be used.

1. Stockholder's Equity. This is that portion of the violator's assets against which the stockholders have claim. It is the sum of the capital stock contributed by the stockholders as permanent capital, plus retained earnings

(total cumulative earnings less amounts distributed to stockholders as dividends), plus capital surplus (all other additions to common equity that do not represent earned surplus), minus treasury stock (capital stock which has been issued and paid for in full and later reacquired by the issuing corporation as a result of a purchase or donation).

The stockholder's equity for Company X has been computed from the sample data for Company X on page 1 of the Worksheet.

SOURCES:

1. Financial statement from Moody's
2. Annual Reports filed with S.E.C.
3. Violating firm

2. Capitalization. Capitalization is the sum of the violator's long-term debt (liabilities such as mortgage notes payable and bonds that will not mature for a comparatively long period of time, usually more than one year), plus its preferred stock and its stockholders' equity.

The capitalization figures for Company X were taken from its financial statements as shown on Page 1 of the Worksheet.

SOURCES:

1. Financial statement from Moody's
2. Annual reports filed with S.E.C.
3. Violating firm

3. Rate of Return on Book Equity. This is the rate (expressed as a decimal fraction) which will be used as a basis for discounting future years' cash flows. Such discounting is necessary to convert cash flows occurring in different years to present values.

The discount rate may be thought of as the return available on alternative investments which the owner may make. Viewed this way, the greater the discount rate -- the greater is the opportunity gained when investment in pollution control equipment is delayed, and hence the greater is the benefit of delayed compliance. The discount rate is normally estimated by the firm's rate of return on equity (equal to its after tax

profit, net of preferred, divided by the stockholders' equity). An alternative basis for estimating a company's available return on equity is the 2-digit SIC codes in F.T.C.'s industry related averages.

SOURCES:

1. 3 - 5 year average from Moody's
2. Annual reports
3. F.T.C.'s Quarterly Financial Report
4. Headquarters (Enforcement Office)
5. Violating firm

4. Equity Share of Investment. Preferred Stock Share of Investment. Debt Share of Investment. Equity share of investment is the portion of the long term financing (i.e., the capitalization) which is provided by common equity shareholders. It is a fraction, the numerator of which is stockholders' equity and the denominator of which is capitalization.

Similarly, the preferred stock share of investment is the portion of the violator's long term financing provided by preferred shareholders. It is equal to preferred stock divided by capitalization.

Debt share of investment is the portion of long term financing provided by other lenders. It is equal to long term debt divided by capitalization.

Equity is typically the most expensive form of long-term financing. Therefore, the greater the share of equity, the greater the total cost of financing. This leads to increased savings from delaying compliance.

Debt is typically the least expensive form of long-term financing. Therefore, an increase in the debt share leads to decreased savings from delay in compliance.

Preferred stock normally has the smallest share of long term financing. It is generally less expensive than common equity financing but more expensive than debt. If the preferred stock share increases, the effect on savings from delaying compliance depends on how the debt and common equity shares are affected.

The equity, debt, and preferred stock shares of investment for Company X were taken from the sample data, computed on the Worksheet and then entered on the Penalty Data Sheet.

SOURCES:

1. 3 - 5 year average from Moody's
2. Annual reports
3. F.T.C.'s Quarterly Financial Report
4. Headquarters (Enforcement Office)
5. Violating firm

5. Marginal Income Tax Rate. This is the fraction of the last dollar of taxable income which must be paid by the owner to federal, state and local governments. It is the amount by which taxes would increase if taxable income were to increase. It is different from the average tax rate (i.e., the total tax divided by total taxable income). For a source subject to the maximum federal tax rate of 0.48, one may determine the amount of state tax included in the combined rate by multiplying the state tax rate times (1 minus .48). The combined marginal tax would then be that portion of the state tax included, plus the .48 required by federal statute.

The marginal income tax rate is included in the formulation because it in essence represents the share of certain expenditures which are borne by the government. For example, operating and maintenance expenses are ordinarily

deductible expenses, hence they reduce the amount of the violator's income that is subject to tax. The greater the tax rate, the greater is the corresponding savings in tax liability for a given amount of operations and maintenance expense. Similarly, depreciation of capital assets reduces taxes because it reduces the amount of pre-tax income subject to taxes. As with operations and maintenance expenses, the greater the tax rate the greater the reduction in tax liability for a given size depreciation expense. Since tax savings from deductions of both operating expenses and depreciation is greater with a higher tax rate, the effect of a higher rate is to reduce the cost of compliance.

Company X is located in Alabama. Its marginal income tax rate was taken from the Marginal Federal/State Tax Rate Table (attached).

SOURCE:

1. Marginal Federal/State Tax Rate Table

6. Depreciation Methods. Depreciation is a mechanism to allow the cost of the equipment to be distributed systematically over its useful life. One effect of depreciation is to shield income from taxation by reducing pre-tax

income in the years following purchase of the equipment.

Accelerated depreciation results in a disproportionately large fraction of these tax savings occurring in the earlier years of an asset's life. It therefore increases the present value of the tax shield, in effect reducing the cost of the asset. Accelerated depreciation therefore leads to reduced cost of compliance and reduced savings from non-compliance.

For civil penalty purposes, the following depreciation methods are used:

a. The Straight-Line Method: The depreciation is computed by dividing the original cost into equal amounts over the equipment's tax life. This means that if the control equipment cost $200,000 and it has a 10 year tax life, with no salvage value, there will be a yearly depreciation of $20,000 ($200,000 divided by 10).

b. The Double-Declining Balance Method: This depreciation is computed by charging a constant percentage against the undepreciated balance each year. That fraction is equal to twice the straight line rate. In addition, at

some point the depreciation may be shifted to a straight-line basis to write off the remaining book value.

To illustrate this depreciation method, assume that the same $200,000 equipment with a 10 year tax life is depreciated using the double declining balance method.

| Year | Book Value Beginning of Period | Annual Depreciation | Book Value End of Period |
|---|---|---|---|
| 1 | $200,000 | $40,000 | $160,000 |
| 2 | $160,000 | $32,000 | $128,000 |
| 3 | $128,000 | $25,600 | $102,400 |
| 4 | $102,400 | $20,480 | $ 81,920 |
| 5 | $ 81,920 | $16,384 | $ 65,536 |
| 6 | $ 65,536 | $13,107 | $ 52,429 |
| 7 | $ 52,429 | $13,107 | $ 39,322 |
| 8 | $ 39,322 | $13,107 | $ 26,215 |
| 9 | $ 26,215 | $13,107 | $ 13,108 |
| 10 | $ 13,108 | $13,108 | -0- |

c. The Sum-of-the-Years-Digits Method: This depreciation is computed by summing the years' digits and making a fraction by using the total as the denominator and each year's digit (beginning with the last year) as the numerator to depreciate the cost of the equipment. A piece of equipment with a ten-year life would be depreciated by summing the years' digits (1+2+3+4+5+6+7+8+9+10 = 55 - the denominator).

The depreciation for the first year would then be 10/55, the next year 9/55, then 8/55....etc. of the cost of the equipment.

Where the useful life of the equipment is relatively long, the denominator may be calculated with the following formula, where N is the number of years of useful life:

$$\left(\frac{N + 1}{2}\right) \times N = \text{denominator}$$

For example, if the useful life of the equipment were 10 years:

$$\left(\frac{10 + 1}{2}\right) \times 10 = 55$$

The following illustrates the use of this method with the above example:

| Year | Fraction | Depreciation |
|---|---|---|
| 1 | 10/55 | $ 36,364 |
| 2 | 9/55 | 32,727 |
| 3 | 8/55 | 29,091 |
| 4 | 7/55 | 25,455 |
| 5 | 6/55 | 21,818 |
| 6 | 5/55 | 18,182 |
| 7 | 4/55 | 14,545 |
| 8 | 3/55 | 10,909 |
| 9 | 2/55 | 7,273 |
| 10 | 1/55 | 3,636 |

SOURCE:

1. The Violating Company

7. Investment Tax Credit. This is a reduction in federal income taxes that results from making qualified capital investments. The investment tax credit is, in effect, a tax rebate given on the purchase of qualified depreciable equipment. However, instead of giving the investor the rebate in cash, the Treasury lets the investor take the credit as a direct reduction of the tax he owes. Thus, if in 1979 the firm's qualified investments amounted to $150,000, the firm would send IRS $15,000 less in taxes than it otherwise would. The investment tax credit is set by statute at 10%.

The investment tax credit is included in the formulation because it has the effect of reducing the cash outflow required to purchase the pollution control equipment. Thus, the higher the investment tax credit rate, the lower the cost of compliance and the lower the amount saved by noncompliance.

The investment tax credit for Company X is 10%.

SOURCE:

1. I.R.S. Code, Chapter 1, Subpart B - Rules for Computing Credit for Investment in Certain Depreciable Property.

8. Interest Rate. This is the rate of interest which would be paid by the owner if additional debt were to be acquired.

Like the rate of return on common equity, the interest rate represents the cost of part of the funds used to finance the pollution control equipment. The greater the interest rate, the greater the cost of compliance and the greater the savings from noncompliance.

Lacking a specific long-term debt issue by the violator within a year of the beginning of the period of noncompliance, use an interest rate based on the bond rating assigned the company's most recently issued bonds by Moody's rating service.

The interest rate for Company X (taken from the sample data) has been entered as 8%.

SOURCES:

1. Company-specific debt obligations from Moody's or similar financial sources

2. Interest for "A" rated corporate bonds as given in Moody's.

9. Preferred dividend rate. The method used for determining the preferred dividend rate is identical to that used to select the interest rate. The quality rating of the firm's preferred shares is found in Moody's Bond Record in the Preferred Stock section. If the stock is not rated, an "a" rating is assumed.

Average yields are reported for only "aa", "a", and "baa" preferred stocks issued by utilities. However, these figures should be used for non-utilities as well. If the stock has a rating of "baa" or lower, use the "baa" average yield. Preferred rated "aa" or higher should use the "aa" yield.

Company X has no preferred stock.

SOURCE:

1. Moody's Bond Record

## II. CALCULATION OF ECONOMIC SAVINGS OF VIOLATORS OTHER THAN PRIVATELY-OWNED, TAX PAYING SOURCES

Appropriate data for calculating the economic savings of violators that are not privately owned business organizations subject to the federal income tax will have to be individually considered. Generally, economic savings for such sources can be determined by treating the pollution capital expenditures as ones that would have been paid for entirely by using long-term debt. Accordingly, the only financial data generally needed for such violators are:

1) the source's interest rate on its long-term debt;

2) the percentage rate of return on investment actually used by the source to evaluate alternative investments (i.e., the rate analogous to a private company's rate of return on book equity);

3) the capital investment cost and the annual cost of the operation and maintenance expenses that were avoided;

4) the useful life of the pollution control equipment that was deferred; and

5) the inflation rate associated with the pollution control equipment that has been delayed

6) tax credit = 0

7) tax rate = 0

WORKSHEET

| | | 1976 | 1975 | 1974 | 1973 | 1972 |
|---|---|---|---|---|---|---|
| STOCKHOLDERS' EQUITY = Capital Stock par value | | $ 19,869 | $ 19,869 | $ 19,869 | $ 19,869 | $ 19,869 |
| + Retained earnings | + | 108,401 | 95,231 | 94,469 | 82,019 | 79,511 |
| + Capital surplus | + | 66,632 | 66,632 | 66,632 | 66,632 | 66,626 |
| - Treasury stock | - | 123 | 123 | 123 | 123 | 123 |
| Stockholder's equity | = | 194,779 | 181,609 | 180,847 | 168,391 | 165,883 |

SOURCE: Sample Data for Company X

| | | | | | | |
|---|---|---|---|---|---|---|
| CAPITALIZATION = Long term debt | | $ 65,429 | $ 29,000 | $ 33,000 | $ 40,693 | $ 62,990 |
| + Preferred stock | + | 0 | 0 | 0 | 0 | 0 |
| + Stockholders' Equity | + | 194,779 | 181,609 | 180,847 | 168,391 | 165,883 |
| Capitalization | = | 260,208 | 210,609 | 213,847 | 209,084 | 228,873 |

SOURCE: Sample Data for Company X

| | | | | | |
|---|---|---|---|---|---|
| RETURN ON EQUITY = After tax profits - Pref. Stock / Stockholders' Equity = | $ 32,999 / 194,799 | $ 38,438 / 181,609 | $ 35,451 / 180,847 | $ 13,458 / 168,391 | $ 6,430 / 165,883 |
| RETURN = | = .169 | =.211 | =.196 | =.079 | =.038 |

Industry's Avg. or SIC _____ Source's Average Return = .1386

SOURCE: Sample Data for Company X

| | | | | | |
|---|---|---|---|---|---|
| EQUITY SHARE OF INVESTMENT = Stockholders' Equity / Capitalization | $194,779 / 260,208 | $181,609 / 210,609 | $180,847 / 213,847 | $168,391 / 209,084 | $165,883 / 228,873 |
| Average Equity Share = .7968 | = .748 | = .862 | = .845 | = .805 | = .724 |

SOURCE: Sample Data for Company X

| | 1976 | 1975 | 1974 | 1973 | 1972 |
|---|---|---|---|---|---|
| DEBT SHARE OF INVESTMENT = Long Term Debt / Capitalization | $ 65,429 / 260,208 | $ 29,000 / 210,609 | $ 33,000 / 213,847 | $ 40,693 / 209,084 | $ 62,99 / 228,87 |
| Average Debt Share = .2032 | =.252 | =.138 | =.155 | =.195 | =.276 |

SOURCE: Sample Data for Company X

PREFERRED SHARE OF INVESTMENT = $\frac{\text{Preferred Stock}}{\text{Capitalization}}$ (Would be computed in same manner as equity share)

Not Applicable

INFLATION FACTOR = $\frac{\text{1977 index}}{\text{1972 index}} = \frac{204.1}{137.2} = 1.4876$

Average annual inflation rate = $(\text{Inflation factor})^{1/5} = 1.083$

= 8.3 percent

Monthly inflation rate = $(1.083)^{1/12} = 1.0066$

= 0.66 percent

CONVERT CAPITAL COST TO DOLLARS AS OF FIRST DAY OF NONCOMPLIANCE

$$\text{Deflated Cost} = \frac{\text{Actual Cost}}{(1 + \text{Monthly Inflation Rate})^{\text{Months Delay}}} = \frac{1,200,000}{(1 + .0066)^{10}} =$$

$$\frac{1,200,000}{1.0684} = 1,123,138$$

# CIVIL PENALTY DATA SHEET

SOURCE NAME/LOCATION: Company X/Alabama

| | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| PROCESS: | Scrubber | | | | |
| CAPITAL COST: | $1,123,138 | | | | |
| ANNUAL O & M: | $ 112,314 | | | | |
| DEPRECIABLE LIFE (YRS): | 12 | | | | |
| USEFUL LIFE (YRS): | 18 | | | | |
| MONTHS OF VIOLATION: | 10 | | | | |
| MONTHS TO SETTLEMENT: | 6 | | | | |
| PENALTY AMT: | $ 92,480 | | | | |

## COMMON FINANCIAL PARAMETERS

| | | |
|---|---|---|
| Tax Credit Rate | = | .1 |
| Federal & State Income Tax Rate | = | .506 |
| Inflation Rate | = | .083 |
| Rate of Return on Equity | = | .14 |
| Interest Rate | = | .08 |
| Preferred Dividend Rate | = | 0 |
| Equity Share of Investment | = | .7968 |
| Preferred Stock Share | = | 0 |
| Debt Share | = | .2032 |
| Depreciation by Sum of Years Digit | | |
| Standard Amortization | | |

# MARGINAL FEDERAL/STATE INCOME TAX

1978

| STATE | STATE TAX | FEDERAL TAX | MARGINAL TAX RATE |
|---|---|---|---|
| Alabama | 5% | 48% | .506 |
| Alaska | 18 | 48 | .5736 |
| Arizona | 10.5 | 48 | .5346 |
| Arkansas | 6 | 48 | .5112 |
| California | 9 | 48 | .5268 |
| Colorado | 5 | 48 | .506 |
| Connecticut | 8 | 48 | .5216 |
| Delaware | 7.2 | 48 | .5174 |
| Dis. of Col. | 8 | 48 | .5216 |
| Florida | 5 | 48 | .506 |
| Georgia | 6 | 48 | .5112 |
| Hawaii | 6.435 | 48 | .5136 |
| Idaho | 6.5 | 48 | .5138 |
| Illinois | 4 | 48 | .5008 |
| Indiana | 3 | 48 | .4956 |
| Iowa | 10 | 48 | .532 |
| Kansas | 5 | 48 | .506 |
| Kentucky | 5.8 | 48 | .5101 |
| Louisiana | 4 | 48 | .5008 |
| Maine | 7 | 48 | .5164 |
| Maryland | 7 | 48 | .5164 |
| Massachusetts | 7.5 | 48 | .519 |
| Michigan | 7.8 | 48 | .5206 |
| Minnesota | 12 | 48 | .5424 |
| Mississippi | 4 | 48 | .5008 |
| Missouri | 5 | 48 | .506 |
| Montana | 6.25 | 48 | .5125 |
| Nebraska | 2.75 | 48 | .4943 |
| New Hampshire | 7 | 48 | .5164 |
| New Jersey | 5.50 | 48 | .5086 |
| New Mexico | 5 | 48 | .506 |
| New York | 9 | 48 | .5268 |
| North Carolina | 6 | 48 | .5112 |
| North Dakota | 6 | 48 | .5112 |
| Ohio | 8 | 48 | .5216 |
| Oklahoma | 4 | 48 | .5008 |
| Oregon | 6 | 48 | .5112 |
| Pennsylvania | 9.5 | 48 | .5294 |
| Rhode Island | 8 | 48 | .5216 |
| South Carolina | 6 | 48 | .5112 |
| South Dakota | 5.50 | 48 | .5086 |
| Tennessee | 6 | 48 | .5112 |
| Utah | 6 | 48 | .5112 |
| Vermont | 7.5 | 48 | .519 |
| Virginia | 6 | 48 | .5112 |
| West Virginia | 6 | 48 | .5112 |
| Wisconsin | 7.9 | 48 | .5211 |

INFLATION RATE INDEX
FOR
CHEMICAL ENGINEERING PLANT COST

ANNUAL INDEX

| | | |
|---|---|---|
| 1970 | - | 125.7 |
| 1971 | - | 132.2 |
| 1972 | - | 137.2 |
| 1973 | - | 144.1 |
| 1974 | - | 165.4 |
| 1975 | - | 182.4 |
| 1976 | - | 192.1 |
| 1977 | - | 204.1 |
| 1978 | - | 218.8 |

SOURCE: Chemical Engineering

## FEDERAL TRADE COMMISSION RETURN ON EQUITY STATISTICS

(Percent)

| Industry | Five-year Average (1974-78)[2] |
|---|---|
| All Manufacturing Corporations | 13.9 |
| Nondurable Manufacturing Corporations | 14.4 |
| Food and Kindred Products | 14.0 |
| Tobacco Manufactures | 16.6 |
| Textile Mill Products | 8.1 |
| Paper and Allied Products | 13.9 |
| Printing and Publishing | 15.2 |
| Chemicals and Allied Products | 15.9 |
| Industrial Chemicals and Synthetics[1] | 14.5 |
| Drugs[1] | 18.5 |
| Petroleum and Coal Products | 14.9 |
| Rubber and Miscellaneous Plastic Products | 11.2 |
| Other Nondurable Manufacturing Corporations | 13.0 |

[1]Included in major industry above.

[2]Data for 1978 includes first three quarters only. Quarterly statistics can be found in the Federal Trade Commission's Quarterly Financial Report.

| Industry | Five-year Average (1974-78)[2] |
|---|---|
| Durable Manufacturing Corporations | 13.3 |
| Stone, Clay and Glass Products | 12.1 |
| Primary Metal Industries | 9.4 |
| Iron and Steel[1] | 9.8 |
| Nonferrous Metals[1] | 8.8 |
| Fabricated Metal Products | 15.3 |
| Machinery, Except Electrical | 15.2 |
| Electrical and Electronic Equipment | 12.8 |
| Transportation Equipment | 13.0 |
| Motor Vehicles and Equipment[1] | 13.1 |
| Aircraft, Guided Missiles and Parts[1] | 13.2 |
| Instruments and Related Products | 15.8 |
| Other Durable Manufacturing Corporations | 13.5 |

[1]Included in major industry above.

[2]Data for 1978 includes first three quarters only. Quarterly statistics can be found in the Federal Trade Commission's Quarterly Financial Report.

INSTRUCTIONS FOR USING THE PROGRAMS TO CALCULATE ECONOMIC SAVINGS

There are two programs available for calculating the economic savings component of the civil penalty. The first, CIVPEN, is intended to be used largely for illustrative calculations and in response to requests for copies of the program. CIVPEN is written in the FORTRAN computer language and is designed to correspond closely to the September 1978 Technical Support Document for the Civil Penalty Policy.

The second program, CPREPEAT, performs the same calculations as CIVPEN but allows multiple calculations without having to re-enter all parameters. That is, it is possible to calculate economic savings using one set of numbers and then make new calculations by changing only as many input parameters as desired. Creating this flexibility for the user required adding substantial complexity to the program. It is therefore suggested that copies of this program not be released.

CIVPEN

1. Sign on EPA's WCC computer system.

2. Type EXEC CIVPEN:EPABOH (key return). The system will print: Job submitted, job started, and request the first data input, INITIAL CAPITAL INVESTMENT=, in the next several seconds or minutes, depending on user demand.

   Additional questions will follow each data input (and "return"). Caution: When user demand is high, response time can be very slow. Be certain the computer has given you your complete prompt before answering input questions. A prompt is generally a two digit alpha-numeric job identifier and a question mark (e.g., 2B?).

   When a percent is called for, it should be entered as a decimal. For example, an interest rate of 9 percent would be entered as .09.

3. To make a copy of the program, type LOAD CIVPEN:EPABOH (key return) and then type LIST (key return). A complete listing will take approximately 10 minutes.

Instructions (cont.)

CPREPEAT

1. Sign on EPA's WCC computer system.

2. Type EXEC CPREPEAT:EPABOH (key return). The system will print: Job submitted, job started, and request the first data input, INITIAL CAPITAL INVESTMENT=, in the next several seconds or minutes, depending on user demand.

   Additional questions will follow each data input (and "return"). Caution: When user demand is high, response time can be very slow. Be certain the computer has given you your complete prompt before answering input questions. A prompt is generally a two digit alpha-numeric job identifier and a question mark (e.g., 2B?).

3. When the calculations have been completed and the results printed, the computer will ask how many changes are to be made. Typing in a 0 (zero) causes the program to stop. Typing in a number from 1 to 12 causes a series of questions to be asked concerning the item number to be changed and its new value. Asking for more than 12 changes will cause the program to request all 17 input parameters. Typing in 999 will result in a list of all current variable values being printed.

4. Caution: Changes are cumulative. That is, if you change the value of a parameter, the old value is lost. You must therefore be careful to keep track of the current values of each of the parameters as you make changes. After you have made several changes, it is wise to have a current list printed by typing 999 as described above.

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

MAY 22 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: The Attached Memorandum Concerning Statements by Agency Personnel Purporting to Sanction Source Actions Which Are Inconsistent With Statutory Requirements

FROM: The Assistant Administrator for Enforcement

TO: The Administrator

There have been increasing pressures, in part prompted by enforcement of existing requirements, on Agency personnel to recognize de facto relaxations of discharge and emission limitations prior to formal Agency action on proposed revisions of those limitations. I have also become aware of situations where sources have been purportedly authorized by Agency personnel to proceed with construction, modification, or operation in the absence of required permits. While there may be circumstances where, in the exercise of the Agency's judgment, such actions are appropriate, I am concerned about inconsistent applications of statutory requirements among the various Agency programs and Regional offices. I feel it is essential that prior Headquarter's approval be obtained before such assurances are made. I therefore recommend that you sign the attached memorandum.

Jeffrey G. Miller

(5/28)

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

MAY 28 1980

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Statements by Agency Personnel Purporting to Sanction Source Actions Which Are Inconsistent With Statutory Requirements

TO: Regional Administrators
Regions I-X

This memorandum restates EPA policy against making any formal or informal commitment to refrain from taking enforcement action against, or otherwise to sanction activities by, sources that violate statutory or regulatory requirements administered by the Agency. Unless the procedures contained in the relevant statute, regulation or permit are followed, the policy generally forbids sanctioning the construction or operation of any source without a required permit, or the operation of any source in violation of an applicable emission or discharge limitation.

Failure to adhere to this policy may have effects that reach beyond a specific source or Region. Any commitment not to enforce a statutory requirement against a particular source may severely hamper later enforcement efforts not only against that source but also against other sources that may claim to be similarly situated.

I recognize that exceptions may arise under this policy, and that a commitment may be appropriate in a very unusual case. Because the need for national consistency in this area is essential, any written or oral commitment on the part of a Regional office not to take action under an Agency administered statute must receive advance concurrence by the Assistant Administrator for Enforcement. If a Regional Enforcement Director believes the Agency should make such a commitment, she or he should first discuss the matter with the appropriate Headquarters Deputy Assistant Administrator. This should normally be done in the context of a written memorandum to the Assistant Administrator, sent to the attention of the appropriate Headquarters Deputy Assistant Administrator, fully explaining all relevant facts.

This policy does not change the manner in which the Agency has dealt with bypass or upset situations affecting NPDES permittees, or other situations covered by specific regulations. Upset and bypass situations will continue to be handled by the Regional Enforcement Division Director, or the Director of the State agency, as set forth in 40 CFR §122.14(k)-(l). Please ensure that all appropriate members of your staff fully understand this policy.

Douglas M. Costle

cc: Deputy Assistant Administrators
for Enforcement

Enforcement Division Directors
Regions I-X

# CIVIL PENALTY POLICY

Note: This policy is dated July 8, 1980. EPA approved a new Civil Penalty Policy on February 16, 1984. However, the water-specific parts of the July 8, 1980 policy remain effective until EPA develops a medium specific, water penalty policy.

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

OFFICE OF ENFORCEMENT

# CIVIL PENALTY POLICY

JULY 8, 1980

For application of Section 309(d) of the Clean Water Act and Section 113(b) of the Clean Air Act to Certain Water Act Violators and Air Act Stationary Source Violators

TABLE OF CONTENTS

CIVIL PENALTY POLICY - CLEAN WATER ACT VIOLATORS AND STATIONARY SOURCE VIOLATORS OF THE CLEAN AIR ACT

## I. Preamble

The objective of this civil penalty policy is to assist in accomplishing the goals of environmental laws by deterring violations and encouraging voluntary compliance.

The elements of the policy reflect years of experience by federal, state and local enforcement officials, adapted to present conditions and needs. The policy has had the benefit of much informed comment in meetings of federal, state, and local officials in every region, in written comments, and in a working group of federal and state enforcement officials.

The policy is based upon the main themes of the Clean Air and Water Acts, in which Congress required all citizens, private firms and public bodies to join in a common effort to restore and maintain the quality of the nation's air and waters, and to do so consistently in all parts of the country, in accordance with statutorily mandated time schedules. The theme of national consistency has been reinforced by the Clean Air Act Amendments of 1977, which directed the Administrator of the Environmental Protection Agency to promulgate regulations designed to assure fairness and uniformity in implementing and enforcing the Act by the EPA Regional Offices and the states (Clean Air Act, Section 301).

The national response to the Air and Water Acts is encouraging. The overwhelming majority of citizens, private firms and public bodies have met the deadlines and complied with what was required of them. A minority have not. This penalty policy will keep faith with those who joined the common effort. It will help maintain the voluntary compliance on which achievement of our environmental goals depends.

The Clean Air and Water Acts authorize civil penalties up to stated maximums. This policy enunciates general principles for determining appropriate penalties that the government will seek in individual cases. It is based primarily on four considerations--the harm done to public health or the environment; the economic benefit gained by the violator; the degree of recalcitrance of the violator; and any unusual or extraordinary enforcement costs thrust upon the public. The policy recognizes appropriate mitigating circumstances or factors. Each of these penalty considerations and each of the mitigating factors is well founded in law and is consistent with statutory requirements.

While fulfilling its primary objective to deter violations and encourage compliance, this policy has very significant additional justifications and benefits as well:

A. The policy is fair:

1. in an ethical sense, because it will assure that violators of the law do not economically benefit from their violation,

2. in an economic sense, because it will assure that violators do not gain an economic advantage over others who incurred costs to obey the law, and

3. in a geographic sense, for it will assure that no area of the country can offer lenient enforcement as an advantage to its industries or a lure to the industries of other areas.

B. The policy seeks to improve the operation of the market sector of our economy by more fully imposing onto polluting firms costs otherwise thrust upon the public. By internalizing more of the social costs of producing goods or services, it makes prices of goods or services better reflect the resources used in their production, and allows the market system to better allocate resources.

C. The policy seeks to compensate the public for harm done to public health or the environment, or for unusual or extraordinary enforcement expenses.

D. The policy seeks to make efficient use of government resources by removing economic incentives to violate environmental laws, thus maintaining high voluntary compliance rates. Because there are hundreds of thousands of pollution sources, even a small decline in compliance rates brings major new requirements for enforcement resources.

Because this policy is to be used by many federal, state and local enforcement officials throughout the country, it has been drafted in general form. It is a policy for determining what civil penalties the government will seek when civil actions are taken, not a policy to determine which enforcement actions should be taken. Enforcement strategy or priorities are determined elsewhere, not by this policy.

## II. Statutory Basis for Civil Penalty under Water and Air Acts

Civil penalties are provided for in Section 309(b) of the Clean Water Act, which subjects violators to civil penalties of up to $10,000 per day of such violation. The Water Act has no further statutory criteria for determining the precise amount of the penalty, leaving that to be determined by the court. Authority for such civil penalties has been in the Act since its passage in 1972.

Since 113(b)of the Clean Air Act provides for civil penalties of up to $25,000 per day of violation and requires courts to "take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business and the seriousness of the violation." The authority for civil penalties was added by the Amendments of 1977. There was no authority for civil penalties in the Air Act prior to these amendments, at least for violations such as the ones within the scope of this policy.

In addition to adding civil penalty authority in Section 113, the Clean Air Act Amendments of 1977 also established, in Section 120, mandatory administratively imposed, noncompliance penalties.

Regulations implementing Section 120 noncompliance penalties have now been promulgated. Such noncompliance penalties are not covered by this civil penalty policy, and nothing stated in this policy should be taken to refer to them in any way, except that provision has been made in this civil penalty to avoid duplication of penalties based upon the economic benefit of delayed compliance during the same time period (see discussion in part X below.)[1]

## III. Types of Violations to Which Policy Applies

The civil penalty policy is to be used by federal, state and local officials in enforcement actions involving certain violations of the Clean Air Act, as amended, and certain violations of the Clean Water Act, as amended.

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1 The preamble to EPA's final noncompliance penalty regulations provides that no notices of noncompliance will be issued, or penalties assessed, prior to January 1, 1981. For purposes of determining an appropriate civil penalty, EPA will only calculate the economic benefit of delayed compliance prior to this date.

The policy applies to major and minor water pollution sources which violate those requirements of the Water Act made subject to civil penalties by Section 309(d),[2] and to major and minor stationary air pollution sources which violated those requirements of the Clean Air Act made subject to civil penalties by Section 113(b).[3]

The application of this civil penalty policy to situations in which full compliance is required prior to operation (as, e.g., under the New Source Performance Standards under Section 111 of the Clean Air Act) should not be interpreted as suggesting that noncompliance can be tolerated if penalties are paid.

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1 cont.

With respect to any emission limitation or other requirement approved or promulgated by the Administrator after August 7, 1977, which is either more stringent than those in effect at that time or which establishes a requirement where none existed before, Section 120(g) of the Act provides that the effective date for noncompliance penalties will be the date that full compliance is required with such limitation or requirement (though not later than three years from such approval or promulgation, nor earlier than the effective date that noncompliance penalties begin with respect to violations of existing limitations).

2 i.e., violators of effluent limitations under Section 301 of the Clean Water Act; water quality related effluent limitations under Section 302; national standards of performance under Section 306; toxic and pretreatment standards under Section 307; monitoring under Section 308; aquaculture under Section 310; disposal of sewage sludge under Section 405; violators of permit conditions or limitations under Section 402 and 404; and violators of orders issued under Section 309(a).

3 i.e., violators of an administrative order issued under Section 113(a) of the Clean Air Act; a state implementation plan requirement approved under Section 110; a New Source Performance Standard under section 111; National Emission Standards for Hazardous Air Pollutants under Section 112; a compliance date extension issued to a source converting to coal under 119(g) (as in effect prior to August 7, 1977); a delayed compliance order issued to a source converting to coal under 113(d)(5); a nonferrous smelter order under Section 119; certain requirements relating to monitoring under Section 114; a requirement imposed in a delayed compliance order under Section 113(d); and attempts to construct or modify a major stationary source in any area for which the Administrator has found, under Section 113(a)(5), that the state is not acting in compliance with applicable requirements for issuance of permits to construct or modify sources in nonattainment areas.

This policy applies to past and future violations of the above-mentioned requirements of the Clean Air and Water Acts where the violation results from the source's failure to make capital or operation and maintenance expenditures necessary to bring itself into initial compliance with the requirements (e.g., failure to install equipment, buy and use complying fuel, carry out a process change, etc.).

The policy does not apply to violations following initial compliance or to violations of an intermittent or transient kind, such as spills, violations of emission or discharge limits through accidents or when attributable solely to the failure to adequately operate or maintain pollution control equipment. Civil penalties are probably desirable in most actions against such violations, but the appropriate amount of such penalties is not set by this policy.

This policy does not apply, of course, to penalties for criminal violations, nor for violations of court decrees. In most cases that are settled, it will be desirable to include stipulated contempt penalty amounts in the consent decree. Such amounts are not subject to the civil penalty statutory limits and are not covered by this policy.

While this policy has been limited at this time to circumstances where its application is clearly appropriate, experience will undoubtedly indicate other circumstances to which it should be extended. Such situations will be considered on a case-by-case basis. Penalties appropriate for other violations under the Clean Air and Water Acts, and under other Acts, will be the subject of future guidance.

## IV. Use of the Penalty Policy in Enforcement Actions

This civil penalty policy is intended to be used by federal and state enforcement officials and, in appropriate cases, by local officials (e.g., local air pollution control agencies operating under authority of state air pollution laws). It is to be used in civil actions in state and federal courts, and in state and local administrative proceedings.

Enforcement actions must seek both expeditious compliance and adequate civil penalties. The penalties to be sought in accordance with this policy are in no way a substitute for compliance nor do they preclude injunctive relief or other non-duplicative remedies.

The goal of an enforcement action where this policy applies is both compliance (including interim controls) and appropriate penalties. Compliance and penalties should not be in any way traded off against each other. Compliance with the law is mandatory, and whereas details of technology or schedules may differ, enforcement officials should not bargain for compliance (or interim controls) by offering any reduction in penalties.

Even in the period before the statutory deadlines, the Clean Water and Air Acts required compliance immediately or as expeditiously as practicable. After the deadline has passed, it is even more urgent that violators be brought quickly into compliance.

The penalty policy, moreover, already is structured to provide a strong economic incentive for rapid compliance, for the more rapid the compliance the lower the penalties under this policy. Such an effect is automatically built into the method of calculating the economic benefit of delayed compliance, for one of the major factors of the formula is the length of the period of noncompliance. The penalty factors of harm to the environment and recalcitrance of the violator may also lead to penalty reductions as the speed of compliance increases. In the case of major source violators of the Air Act, moreover, the requirement of mandatory, administratively assessed noncompliance penalties adds additional economic incentive for rapid compliance.

Additionally, it must be kept in mind that penalties are authorized and intended to deter violations and encourage compliance. Penalties are not effluent or discharge fees. Payment of penalties does not give any right or privilege to continue operation in violation of law or to slow down compliance.

When civil enforcement actions are brought in courts, the question of penalties will arise in three contexts--filing the civil complaint, determining the minimum amount acceptable in settlement, and presenting argument to the court (and possibly affidavits or testimony, as well) for its consideration in setting penalties at trial.

The Agency is prepared to settle enforcement actions brought under this policy. Where settlement is not possible, the Agency is obviously free to claim penalty amounts up to the statutory maximum, which will generally be the amount claimed in the complaint.

The methodology of this penalty policy will be used to determine a "minimum civil penalty" which would typically be presented to the court as an appropriate penalty to be imposed.

In addition, the methodology will be used to determine a lower "minimum civil penalty acceptable for settlement" (set out in Part VI) to be used for settlement negotiations.

This policy will allow enforcement officials to arrive at fair, consistent and rationally based penalty sums while providing a lower minimum figure as an encouragement to settlement if enforcement officials believe that settlement is desirable.

By providing them with a minimum settlement figure, this policy gives the enforcement officials responsible for the action a range in which to exercise their discretion to settle or not to settle (i.e., between the statutory maximum and the minimum sum acceptable in settlement as determined by this policy).

Where the state or local administrative bodies are taking enforcement actions and have authority to administratively impose civil penalties, the minimum penalty figure determined for settlement purposes in civil actions should also serve as the minimum to be imposed in the administrative action. The administrative body, however, will want to consider its statutory maximum penalty authority and the minimum civil penalty and will probably want to impose penalties above the settlement amount. This is particularly the case since the administrative body will probably have already decided the case regarding the violation, and reductions for settlement will no longer be relevant.

## V. Determining the Amount of the Statutory Maximum Penalty and of the Minimum Civil Penalty

The minimum civil penalty should be determined by the factors and method set out below. The civil penalty so determined will, in most cases, be lower than the statutory maximum sum. Where the civil penalty sum so determined is higher, this information may be used in settlement negotiations or litigation but the statutory maximum is, of course, all that may be requested by the government or imposed by the court.

The amount of the minimum civil penalty should be determined as follows:

Step 1 - Factors Comprising Penalty

Determine and add together the appropriate sums for each of the four factors or elements of this policy, namely:

the sum appropriate to redress the harm or risk of harm to public health or the environment,

the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance,

the sum appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law, and

the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.

Step 2 - Reductions for Mitigating Factors

Determine and add together sums appropriate as reductions for mitigating factors, of which the most typical are the following:

the sum, if any, appropriate to reflect any part of the noncompliance attributable to the government itself,

the sum appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (floods, fires, etc.).

Step 3 - Summing of Penalty Factors and Mitigating Reductions

Subtract the total reductions of Step 2 from the total penalty of Step 1. The result is the minimum civil penalty. If no settlement can be reached with the defendant, this sum would typically be presented to the court as an appropriate penalty to be imposed.

In some unusual cases, the penalty amount determined in this manner may be larger than the violator can reasonably be expected to pay while bringing itself expeditiously into compliance and continuing to do business. In such cases, enforcement officials may recommend that the penalty be postponed or forgiven in part or in total.

## VI. Determining the Minimum Penalty Acceptable for Settlement

Many cases may, of course, be settled prior to trial and result in consent decrees or orders, rather than being litigated to conclusion. The objectives of the enforcement action are still the same, however -- full and expeditious compliance (including interim controls), and penalties. In cases in which enforcement officials think settlement is appropriate, they may, as an encouragement to settlement, reduce the penalty below the lesser of the statutory maximum and the sum determined to be the minimum civil penalty. This reduction, however, may not be greater than the percentage which reflects the likelihood of being unable to establish the violation or violations.

Example:

Assume statutory maximum penalty = $5,000,000

(200 days of violation @ $25,000/day)

Assume minimum civil penalty = $2,000,000

Assume estimate of government's chance of proving violation at trial = 80% (or, chance of being unable to prove violation = 20%)

The maximum reduction permitted for settlement is, therefore, $400,000 (20% X $2,000,000)

The minimum civil penalty acceptable for settlement is, therefore, $1,600,000 (80% X $2,000,000 or $2,000,000 - $400,000) (i.e., range for settlement negotiation = $5,000,000 to $1,600,000)

It is assumed that enforcement actions will not be taken unless the evidence of violation is strong; therefore, in most cases, the percentage of reduction should not be large--probably not more than 25%. Unusual circumstances may, however, exist where larger reductions are appropriate.

It is not required, of course, that enforcement officials handling an enforcement action reduce the penalty for settlement, or that they reduce it in any given amount. Defendants who settle quickly will undoubtedly stand better chances of receiving such reductions than those who do not.

It should be noted, moreover, that the reduction relates only to the degree of uncertainty of proving that the violation or violations resulted from the source's failure to make capital or operation and maintenance expenditures necessary to bring itself into initial compliance. It does not relate to uncertainty as to the court's decision on compliance schedules and penalties. Enforcement officials should carefully and thoroughly prepare the facts and reasoning supporting their penalty request, and should not be reluctant to present these arguments to the court. Judges are accustomed to deciding such matters, and will make better decisons after receiving well-reasoned recommendations based on fair principles consistently applied.

There may be extraordinary instances where the minimum settlement penalty amount is more than the violator is able to pay. In such cases, it may be appropriate to agree to a postponement of the penalty or payment over time, or, in an extreme case, to a further reduction of the penalty. Further guidance on handling these extraordinary instances is set out below.

## VII. Explanation of Factors Considered in Determining Minimum Amount of Civil Penalty

### A. Harm or Risk of Harm to Health or the Environment

The extent that the violation harms or poses risks of harm to public health or the environment must be carefully considered in setting the appropriate penalty, for violations which involve such harm or risk are certainly very serious. For example, a violation involving discharges of toxic chemicals into waters which enter or threaten to enter public drinking water supplies certainly causes or threatens serious harm to public health. It may also destroy or threaten valuable fishing or recreational resources.

Similarly, a violating air pollution source in an area which has not attained the primary (i.e., health protective) ambient air standard is contributing to a health hazard or is actually causing harm to residents of the area.

All pollutants introduced into the environment create some harm or risk, of course, and it will be difficult in many cases to precisely quantify the harm or risk caused by the violation in question. The penalty amount attributable to such public harm or risk will have to be determined on the facts of each specific case.

Estimated costs of environmental restoration may be useful in quantifying harm to the public, and traditional personal injury damage concepts may be helpful in quantifying injuries to public health. It may also be possible to use the recreational values developed by various public agencies to assist in quantifying environmental harm.

B. Economic Benefit of Delayed Compliance

Violations which are the subject of this policy usually consist of a failure to install and operate required pollution control equipment within time limits set by law, or a failure to utilize fuels or raw materials with lower pollutant content.

Delaying the purchase and operation of pollution control equipment results in economic savings or gains to the owner or operator of a facility. These savings or gains arise from two distinct sources:

> the opportunity to invest the capital funds not spent to purchase and install pollution control equipment during the period of noncompliance, and
>
> the avoidance of the operation and maintenance expenses associated with the pollution control equipment during the period of delayed compliance (labor, materials, energy, etc.). These costs avoided represent a permanent savings to the owner or operator; they may, of course, also be invested in income-producing ways.

The economic benefits attributable to delaying capital expenditures and avoiding operation and maintenance expenses have been combined in a single formula. Because these benefits occur over a period of time, both past and future in some cases, the formula reduces these benefits to a present dollar value by standard accounting methods, and also takes into account tax effects, and other appropriate economic factors. The formula is further described in a technical support document dated September 27, 1978, subject: Computation of Economic Benefit of Delayed Compliance under Civil Penalty Policy. The formula described in that memorandum should be utilized in calculating economic benefit for the purpose of arriving at appropriate penalty amounts. It is recognized, however, that there may be unusual circumstances in which a different method of measuring economic benefit may be appropriate. The acceptability of any such method will have to be determined on a case-by-case basis.

C. Violator's Recalcitrance, Defiance, or Indifference to the Requirements of the Law

Good faith efforts to obey the law are expected of all subject to its jurisdiction. Except as provided below in Sections E and F (pp. 13 and 14) assertions of "good faith" should not be considered as a basis for reducing the otherwise appropriate penalty. Courts traditionally consider the degree of the violator's recalcitrance, defiance, purposeful delay or indifference to its legal obligations in setting penalties. Enforcement officials should do so also, and should not hesitate to include a sum in the civil penalty to reflect such factors where they exist.

Care should be exercised, however, not to seek to add such an element of penalty on a person, firm, or entity for exercising, without purpose of delay, its lawful rights to challenge agency determinations in administrative or court proceedings. A violator which has complied with all requirements that were not disputed while challenging the rest has not been, on these grounds alone, recalcitrant, defiant or indifferent. Such a violator is on a different footing from one which used a challenge of one aspect of its compliance requirement to delay all compliance, or which made frivolous challenges for purposes of delay. This latter mode of behavior may indeed constitute recalcitrance, defiance, or indifference so as to justify adding an element of penalty.

If a violator, in good faith, did challenge agency determinations without purpose of delay, but did not prevail, and by virtue of the litigation has missed a deadline, or otherwise failed to comply, it is nevertheless in violation, and subject to the civil penalty factors other than the one related to the recalcitrance, defiance, or indifference of the violator -- i.e., harm or risk to public health or the environment, economic benefit of delayed compliance, and extraordinary enforcement costs. When a source decides to challenge an agency requirement, it assumes the risks of not prevailing in its challenge. Violators "litigate on their own time." U.S. Steel v. Train, 556 2d 822, (7th Cir. 1977).

D. Extraordinary Costs of Enforcement Action

Although attorney's fees and court costs cannot be recovered by the federal government in civil enforcement actions, there are situations when it is appropriate to consider unusual expenses incurred in detecting the violation, defining its extent, and in bringing the enforcement action.

Where, for example, a source has disregarded its obligation to identify its own pollutant discharges and apply for a permit, and the government, as a result, must undertake such work, the government's costs in identifying the discharges may be included in the amount sought. Or, for example, where the violator's sampling and analytical procedures are so deficient that the government must conduct significant sampling on its own to confirm discharge levels, the expense of such sampling may be added to the sum of civil penalties sought. Those costs which are routinely incurred by state and federal enforcement officials need not, however, be sought as part of a civil penalty.

E. Mitigation for Noncompliance Caused by the Government Itself

When failure to comply or compliance delay was caused by, requested by, or attributable to the government, civil penalties are not appropriate. When the failure to delay was partially caused by the government, the penalties may be reduced in proportion to the relative share of government responsibility or in proportion to the period of delay caused by the government. It is expected that mitigation on this basis will only be permitted when the government was clearly responsible for the delay, as, for example, it may have been in a small number of cases under the Water Act. In these instances, a discharger challenged conditions of an NPDES permit, requested an adjudicatory hearing, prosecuted its request expeditiously and in good faith, and may have been delayed by the Agency's lack of resources to provide prompt hearings for all those who challenged their permits.

States and the federal government are not bound by the acts of the other, but they will, of course, want to be informed of and consider carefully the acts of the other in connection with penalty decisions.

F. Mitigation for Impossibility

Where delayed compliance was, in fact, attributable to causes absolutely beyond the control of the violator (such as floods, fires, and other acts of nature) and was not due to fault or negligence, a civil penalty is not required--even in instances where as a result of the impossibility the violator has enjoyed an economic benefit. If only a portion of the period of delayed compliance is attributable to such factors beyond the violator's control, a civil penalty should be sought only for that period of noncompliance that was not attributable to such factors.

G. Other Bases for Mitigation

There may also be other unforeseeable mitigation circumstances because of which all or a part of the otherwise appropriate civil penalty should not be sought, as, for example, when it was not technically possible to comply. Acceptability of such a situation as a mitigating circumstance will have to be considered on a case-by-case basis, keeping in mind also the "technology forcing" aspects of the laws. Another instance in which all or part of an otherwise appropriate civil penalty might not be sought would be where emergency needs require that sources be operated even though they fail to comply with discharge or emission limitations. Obviously, situations involving unusual mitigating circumstances must be looked at individually since the full range of such circumstances cannot be predicted.

Since the Water Act and the Air Act impose absolute duties of compliance, requiring sources to take whatever measures are possible to come into compliance by the legally established dates, the burden is clearly upon the violator to establish a compelling reason why a civil penalty should be mitigated. This burden should only be considered satisfied where urgent efforts are made to comply but actual impossibility or government conduct alone precluded compliance, or where a similar mitigating circumstance caused the delay. Only in these instances have violators really made what should be considered a "good faith" effort that excuses noncompliance. All dischargers must be held to a standard that requires careful and diligent planning and an urgent, serious effort to come into compliance in a timely manner.

H. Specified Clean Air Act Factors

The civil penalty policy factors described above include consideration of the three factors specified in Section 113 of the Clean Air Act. The "size of the business" is reflected in the economic benefit of delayed compliance since less expensive control equipment is typically required for smaller businesses and the benefit of delaying installation of such equipment is correspondingly less. The "economic impact of the penalty on the business" is considered by the penalty deferral or reduction that is allowable where violators lack the ability to immediately pay the full amount of the penalty (see section IX below). The third factor, the "seriousness of the violation," is taken into account by looking at the harm done to public health and the environment (violations may, though, be considered as serious, even though they do no measurable or quantifiable harm to the environment) and the violator's recalcitrance, defiance or indifference to the requirments of the law.

## VIII. Approved Environmentally Beneficial Expenditures In Lieu of Payment of Penalty Sum to State or Federal Treasury (i.e., "Credits Against Penalty")

### A. Use of Credit to Satisfy or Offset Penalty

Occasions have arisen in enforcement actions where violators have offered to make expenditures for environmentally beneficial purposes above and beyond expenditures made to comply with all existing legal requirements, in lieu of paying penalties to the treasury of the enforcing government. Courts have sometimes accepted such payments, and in some circumstances such arrangements are acceptable under this penalty policy. For ease of reference (but without characterizing them for any other legal purposes--e.g., tax deductibility) such alternative ways for a violator to satisfy the penalty instead of paying the penalty sum to the federal, state, or local treasury are referred to herein as "credits" against the penalty.

Examples of possible credits against a penalty might be:

(1) construction and operation of approved pollution control equipment in addition to that required for compliance with existing requirements which will achieve a significant further increment of environmental benefit above all present requirements of federal, state or local law.

(2) financial contributions to a private or governmental body or agency for environmentally approved uses--e.g., restoring fish and wildlife resources, carrying out environmental studies or research of a high priority need, improving the ability of citizen or public interest groups to monitor and assist in enforcing the law. Credits, however, will not be given for expenditures that would properly be required as part of equitable relief being sought for the violations, such as cleaning up the pollution, restoring the areas affected, or reimbursing the government's costs of doing so, unless these costs have been included in the penalty sum. In all events, the financial contributions must be acceptable to the enforcing agency. Credits for high priority research are desirable, but the research must be closely scrutinized to insure it is beneficial from the point of view of the enforcing agency, not merely from the point of view of the violator.

B. Criteria for Acceptable Credits

In determining whether a proposed expenditure is creditable against the penalty, the following criteria must be satisfied:

(1) The penalty sum itself will generally be stated in the order, decree or judgment as determined, before any credits are allowed, and this amount should be clearly identified as a penalty.

(2) The expenditure proposed for credit must be approved by enforcement officials in advance of the entry of the decree, order, or judgment in the case, must be clearly delineated therein, and must be enforceable along with other elements of the decree, e.g., subject to stipulated contempt penalties or to the court's continued contempt authority for the full length of time over which expenditures are to be made.

(3) The item to be acquired by additional expenditure for which credit is given must be described with sufficient precision to bind the violator to the agreed expenditure level. Where the credit is for the construction and operation of additional pollution control equipment that will bring about a greater degree of control than that required by law (and a considerably reduced discharge or emission level) an agreement should be obtained from the violator that it will treat the reduced discharge or emission, in all respects, as a requirement of law for the period that it has agreed to operate such equipment.

(4) The proposed expenditure must be clearly for environmental benefits above and beyond the requirements of law. Interim controls and expeditious compliance are required by law (not just waiting for the last day before the statutory deadline) and are not appropriate for credit.

(5) Environmental laws require compliance at all times. Good engineering practice, therefore, includes design of pollution control systems with sufficient capacity and reliability to provide a margin of safety to ensure such continuous compliance. Expenditures for this margin of safety are to assure compliance with the requirements of law and are not eligible for credits.

(6) If in accomplishing the required level of pollution control, the violator necessarily will accomplish a higher level of control, there can be no credit for such incidental benefit. (e.g., to accomplish 80% removal of a pollutant, the violator must necessarily purchase and operate equipment which removes 85% of the pollutant.)

(7) Studies or research and development which are necessary parts of compliance with legal requirements are not eligible for credits (e.g., studies assessing the feasibility and costs of alternative methods of compliance or prototype research and development). Research and development work eligible for credit should be work from which the public in general can benefit. To insure this, the following measures should be required:

(a) the enforcing agency should insure that adequate reporting procedures are required. These procedures should include an initial research and development plan, periodic progress reports, and a comprehensive final report that documents startup and the first year of operations if a facility was involved;

(b) the enforcement agency or its contractors should be given the right to obtain first hand information about the work by inspecting all documents associated with it and by making on-site inspections; and

(c) the source should agree that all domestic patents, design rights and trade secrets that result from the work will be placed in the public domain.

In most instances the research and development should be related to the violation, but other instances can be considered on a case-by-case basis. As stated above, credits for research or studies will be closely scrutinized.

(9) Expenditures accepted for credit may only be expenditures that the violator agrees it may not later use (or sell to anyone else to be used) as a credit against any other existing provisions of environmental law (such as emission offset to allow the construction or modification of a major stationary source in an area where national air quality standards are not being satisfied) and the decree must so provide.

C. Constraints on Federal Enforcement Officials With Respect to Payment of Penalties and Use of Credits In Lieu of Penalties

The Air and Water Acts both authorize civil penalties which are payable only to the United States Treasury. State statutes may differ, but most provide for payment of the penalties to the State Treasury.

Civil enforcement actions to enforce the Air or Water Acts whether settled or litigated to conclusion will end in orders, decrees, or judgments of a court. In such actions there are limitations governing the positions to be taken by federal enforcement officials. In settling cases, federal enforcement officials may accept proposals for expenditures as credits against penalties and recite them, as well as the penalty sum, in the proposed consent decree, but it must be kept in mind that such provisions as well as the entire decree are subject to approval by the court.

With respect to credit for proposed contributions to third parties, federal enforcement officials may not agree with defendants as to such payments in lieu of paying the penalty to the United States Treasury, for that prefers a third party as recipient of the payment over the United States, and prefers one third party potential recipient over another.

State and local enforcement officials may or may not be as constrained with respect to proposing contributions to third parties. Accordingly, the appropriateness of state or local government officials proposing credits for contributions to third parties must be governed by their own policies.

D. Discretionary Nature of Credit

Acceptance of a proposed credit is purely discretionary with federal, state, and local enforcement officials. Enforcement officials may, of course, insist on payment of the penalty into the treasury. The statutes provide for penalties. Violators have no "rights" to credits against these penalties.

E. Consideration of After-Tax Effects of Credit Expenditures

The amount of the credit to be given for proposed expenditures is governed by the rule that it must have the same after-tax effect on the violator as payment of the penalty sum would have. Since the penalty sum is immediately payable upon entry of the order, decree or judgment, any proposed credit which includes other than immediate payment of the full sum must be

reduced to an equivalent present value by standard accounting methods. Where the expenditure proposed for credit is construction and operation of additional pollution control equipment, the formula for computing economic benefit of delayed compliance (see paragraph VII.B. above) should be used to compute the present value of the credit. It should be noted that this formula assumes that the expenditures will receive normal tax treatment (deductibility or credit against tax) and accounts for that. The present value resulting from use of this formula may, therefore, be used dollar-for-dollar as credit against the penalty.

## IX. Penalty Postponement or Forgiveness Based Upon Inability To Pay

In some instances, the indicated appropriate civil penalty may be so severely disproportionate to the resources of the owner or operator of the violating facility that its imposition would cause the owner or operator very serious economic hardship. In such unusual cases, enforcement officials may recommend to the court that it postpone or forgive the otherwise appropriate penalty, in part or in total as circumstances may indicate.

While the appropriate civil penalty amount may be postponed or reduced in such circumstances, no such concession may be made with respect to the cost of coming into compliance. Except as the Air and Water Acts may themselves provide, compliance is required in every case, regardless of cost and regardless of the violator's financial situation.

Clearly the burden is on the violator to establish its inability to pay. This burden can only be satisfied when the violator has produced adequate evidence to establish its financial condition and when the enforcement officials involved have obtained a competent review of the violator's financial condition. Mere statements of inability to pay are not enough, and a violator making such a claim must be willing to make full disclosure of its financial affairs to enforcement officials and the court under circumstances that assure such disclosure is accurate and complete.

If review by persons competent to assess the violator's financial condition and prospects indicates that the violator's resources would not permit it to finance its compliance, and also pay the penalty, then, if adequate interest can be arranged, the penalty may be paid over time.

If even payment over time is not possible, then the penalty may be reduced to an amount commensurate with the resources of the violator (taking into account the cost of compliance).

In making a determination of the violator's ability to pay, it is important to insure that the economic condition of the violator has not been distorted by transactions with parent companies or shareholders or by unusual or unconventional accounting practices. Where such distortion has taken place, parent company and shareholder or other owners' resources should be considered in determining whether or not the violator is able to pay the civil penalty. In all cases, review of financial information by persons competent in financial affairs should be obtained.

## X. Time Period for Application of Civil Penalty Policy

In general, this civil penalty policy would appropriately apply to violations of the kinds covered which have occurred since enactment of the Air Act in 1970 and the Water Act in 1972. In determining the penalty sum, both with respect to the statutory maximum and the minimum civil penalty, the period of violation should begin with the earliest provable date of violation and continue until the violator has installed and operated the required equipment, made the required process change, or converted to the complying fuel and thus brought itself into compliance.

Under the Water Act, this general rule will be applied in this civil penalty policy, since authority for civil penalties has existed since 1972. Consequently, the period covered and the noncompliance period commence on the date when the schedule requirements of a National Pollutant Discharge Elimination System (NPDES) permit were violated or on July 1, 1977, (the statutory deadline for best practicable control technology or secondary treatment), whichever is earlier. The period of noncompliance ends when the violator has brought itself into full compliance with statutory (including permit) requirements.

Under the Air Act, there are other considerations which, as a matter of policy, lead to application of a different rule regarding the time period for application of this civil penalty policy. The Air Act has had authority for criminal or civil injunctive relief since 1970, but general authority for civil penalties was not added until the amendments of 1977, which took effect August 7, 1977. Whether, as a matter of law, civil

penalties are authorized in civil enforcement actions commenced or amended after August 7, 1977, for violations occurring before August 7, 1977, may be debated, but regardless of that, and without conceding any issue of law, as a decision of policy, this civil penalty policy will be applied by federal enforcement officials only to those violations of the Air Act occurring after August 7, 1977.

Accordingly, under the Air Act, for purposes of computing the statutory maximum penalty, the period of noncompliance will commence with August 7, 1977, or the date of earliest provable violation, whichever is later. For purposes of computing the minimum civil penalty, the period of noncompliance used will also be as stated in the previous sentence, except that when considering the sum to be included for the violator's recalcitrance, defiance, or indifference to its legal obligations, the entire record of the violator should be considered.

When determining a civil penalty under the Air Act a special consideration also applies concerning the end date of the period of noncompliance, but only with respect to the element of the penalty based on removing the economic benefit of delayed compliance.

As indicated earlier, Section 120 of the Air Act requires EPA to assess and collect noncompliance penalties against certain categories of stationary sources. The purpose of these administratively imposed penalties is to recapture the economic value which a delay in compliance may have to the source owner or operator. EPA will not issue any notices of noncompliance or assess and collect any noncompliance penalties prior to January 1, 1981. While the authority to collect noncompliance penalties (Section 120) is independent of and additional to the authority to seek civil penalties (Section 113), federal enforcement officials will not seek double recovery of any portion of the economic value attributable to delayed compliance. Accordingly, when the period of noncompliance will extend beyond January 1, 1981, the economic benefit element of the civil penalty should be based only upon the noncompliance that will have occurred prior to that date.

Sources subject to judicial orders or that have negotiated consent decrees with EPA, will not have their civil penalties recalculated. Additionally, even if a consent decree has not been approved by the court, the amount of the penalty need not be recomputed if it is clear that agreement has been reached on all material terms, including the penalty amount, and among all parties, including EPA where it is a party. In all other settlements, the economic benefit components of the civil penalty will be based

upon noncompliance which will occur up to January 1, 1981, or the date for final compliance specified in the consent decree, whichever is earlier. In this way the policy will provide an incentive for expeditious and fair settlements, while honoring the Agency's commitment not to seek double recovery of any portion of the economic benefit element attributable to delayed compliance.

In all other respects, however, in Air Act cases, both when computing the statutory maximum penalty and when determining the minimum civil penalty (or the minimum acceptable for settlement), the period of noncompliance continues until the violator has brought itself into full compliance with the requirements of the law.

Where state or local government civil penalty authority existed prior to August 7, 1977, then that additional authority might, of course, be used by the state to extend the period of noncompliance.

## XI. Application of Civil Penalty Policy to Different Types of Sources - Private, Public, Regulated Utilities, etc.

Congress, in enacting the civil penalty provisions of the Air and Water Acts, and in the Air Act's (Section 120) administratively imposed noncompliance penalties, made no exemptions or distinctions for classes or types of violators on the basis of ownership or form of organization. This civil penalty policy seeks to carry out Congress' fair, evenhanded, consistent approach, but recognizes obstacles in a few situations.

### A. Privately-Owned or Operated Sources (other than Regulated Utilities)

This penalty policy, as described above, applies in full in civil enforcement actions against privately-owned and operated sources other than regulated utilities. Extraordinary situations, if any, can be handled on a case-by-case basis.

### B. Publicly-Owned Utilities and Investor-Owned, Regulated Utilities

Publicly-owned utilities and investor-owned, regulated utilities are to be treated equally.

Penalties will be sought from utilities whose violations come within the scope of this policy. The focus of these penalties will be on deterrence. That is, penalties should be in sufficient amounts to deter future violations. Penalties should include appropriate amounts for environmental harm or risk of harm caused by the source's violations and recalcitrance or indifference of the source to its legal obligations as well as any extraordinary enforcement costs which the government has been forced to pay.

C. State and Municipal Facilities

In enforcement actions against state or municipal facilities, including publicly-owned treatment works, this civil penalty policy applies, except with respect to the penalty element for economic benefit of delayed compliance.

Because state and municipal budgeting and financial decisions are generally concerned with the allocation of tax derived public funds to provision of public services, rather than the sale of goods or services for profit, recovering the economic benefit of delayed compliance is somewhat less applicable. In all such cases, the economic benefit of delayed compliance should be calculated and considered as a guide, but in determining the minimum civil penalty and the minimum civil penalty acceptable for settlement, enforcement officials may recommend that this factor be discounted or eliminated in cases where they think it is appropriate. Because the other elements (harm or risk; recalcitrance; extraordinary enforcement expense) are not always susceptible to precise quantification, the appropriate minimum civil penalty or the minimum civil penalty acceptable in settlement for such facilities can only be determined on a case-by-case basis.

The only further guidance with respect to penalties in such cases is as follows:

1. Enforcement officials should not excuse all civil penalties except in extraordinary situations, for that would create a double standard of more lenient treatment for public agencies than private individuals or firms.

2. Civil penalties for violations by state or municipal facilities should be in sufficient amounts to deter future violations, considering the elements of this penalty policy, size of the facility, and the duration of the violation, and in a municipal case, the size and the resources of the municipality. To achieve a deterrent effect, civil penalties for violations by state or municipal facilities should bear some relationship to the population served by the violating facility and upon which the burden of the penalty will fall.

D. Federal Facilities (Other than Utilities)

Because of recent amendments to the Air Act and the Water Act and the federal mechanism that exists for the payment of penalties, federal facilities present a significantly different problem from other violating sources. Accordingly, guidance as to them will be provided elsewhere.

## XII. Federal-State Cooperation in Implementing this Policy

As part of their efforts to enforce air and water pollution laws, many federal, state, and local enforcement officials will be using this penalty policy. To assist in achieving consistency in its application, a method of consultation among federal, state and/or local enforcement officials has been devised to insure that appropriate penalties will be sought in specific cases.

## XIII. Effective Date of this Civil Penalty Policy

Many of the factors comprising this penalty policy have been used by federal and state enforcement officials for years. EPA's civil penalty policy has been more fully articulated over the last year.

On June 3, 1977, guidance was provided to EPA regional offices by the Office of Enforcement regarding criteria for settlement of civil penalty aspects of enforcement cases under the Water Act. This guidance included most of the factors now more fully explained in this document, including, for example, recovery of the economic benefit of delayed compliance, harm to the public, and recalcitrance of the violator. EPA's intention to take enforcement action against major source violators of the Water Act and to seek civil penalties, including sums to take away the economic benefit of delayed compliance, was announced at a press conference on June 21, 1977, by Assistant Administrator Thomas C. Jorling.

Further elaboration of this Water Act civil penalty policy was provided by an Office of Enforcement memorandum to EPA regional offices dated June 28, 1977.

The Air Act Amendments became effective on August 7, 1977, including authority for civil penalties, and regions were advised on September 2, 1977 that civil penalties should only be sought for violations occurring or continuing after August 7, 1977.

The first comprehensive version of this consolidated Air and Water Act civil penalty policy was distributed to federal and state enforcement officials on November 23, 1977, and took effect on that date.

In addition to these general communications, this civil penalty policy was explained at meetings and workshops of federal, state, and local officials, at press conferences and other gatherings at Washington, D.C., and in all regions of the country in the last half of 1977 and early 1978. This policy has had the benefit of comments, discussion and analysis over many months.

The civil penalty policy (including its predecessors as explained above) covers all Air and Water Act cases within its scope, as follows:

> all Water Act cases not concluded prior to June 3, 1977, and
>
> all Air Act cases not concluded prior to August 7, 1977.

The application to Water Act cases concluded after June 3, 1977 and Air Act cases concluded after August 7, 1977, but prior to the date of this memorandum, is governed by the guidance extant and in effect at the time the case was concluded, including any case-by-case guidance given.

For purposes of this policy, a case was concluded if it is clear that agreement had been reached on all material terms, including penalties, and among all the parties, including EPA where it was a party. Where the agreement had been reduced to writing so as to memorialize its terms, it was clearly concluded. Other situations will have to be individually considered.

Enforcement officials aware of civil enforcement actions which they believe should not be included within the coverage of this policy or its predecessors should present the facts or circumstances for consideration.

## XIV. Previous Civil Penalty Policy Superseded

This civil penalty policy supersedes all previous Air Act stationary source and Water Act civil penalty policy, including the following, but only to the extent that such previous policy was inconsistent herewith:

> (1) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Settlement of Section 309(d) Enforcement Cases for Monetary Amounts" dated June 3, 1977, signed by Stanley W. Legro, Assistant Administrator for Enforcement.
>
> (2) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Settlement of Section 309(d) Enforcement Cases for Monetary Amounts--Policy Background" dated June 28, 1977 signed by Stanley W. Legro, Assistant Administrator for Enforcement.

(3) U.S. Environmental Protection Agency, Office of Enforcement guidance letter entitled "Civil Penalties under Section 113(b) of the Clean Air Act Amendments of 1977," dated September 2, 1977, signed by Richard D. Wilson, Acting Assistant Administrator for Enforcement.

Jeffrey G. Miller
Acting Assistant Administrator for Enforcement
U.S. Environmental Protection Agency

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

FEB 17 1981

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Neutral Inspection Plan for the NPDES Program

FROM: Edward A. Kurent
Director, Enforcement Division (EN-338)

TO: Regional Enforcement Division Directors
Regional S&A Division Directors
Director, NEIC

Attached is the final Neutral Inspection Plan which was developed for the NPDES Compliance Inspection Program. This plan fulfills the requirements for performing neutral compliance inspections based on the Marshall v Barlow's, Inc. ruling. The Neutral Inspection Plan must be used to target all inspections which are not based on some type of probable cause. Copies of this plan were distributed to each Region last year for comments.

The selection of candidates for neutral inspections each year will be based on only two factors; the length of time since the last inspection and geographic grouping (to minimize the use of resources). The initial selection process will be done by computer using the Permit Compliance System (PCS). Selecting specific permittees for inspections will then be based on common geographic areas. For example, a permittee with a low priority for inspection may be chosen if it is in close physical proximity to a permittee with a very high priority for inspection.

This plan will not be used to target all NPDES compliance inspections, only those based on administrative factors. We expect that the portion of inspections which are not based on some form of civil probable cause (DMR data, citizen complaints) will be very small. Indeed, some Regions plan all their inspections based on probable cause for violations. In these cases, no Neutral Inspection Plan would be needed. Similarly, some Regions (along with the States) are able to inspect each major permittee once a year. Since this Neutral Inspection Plan is based on annual planning, it would not be needed in these cases.

Several Regions commented that the significance of the discharger should be a factor. Since this plan will be applied only to major permittees, we believe this issue is basically addressed. In addition, when the new major/minor designation system is complete, PCS will be able to use potential for a permittee to discharge toxics as a factor in the neutral inspection process. Without this information in PCS, it would be necessary to perform a review of every major permittee to determine the toxics discharge potential. This would place an unreasonable burden on Regional enforcement programs.

If you have any questions or comments on this plan, please contact me or Brian Maas of the Enforcement Division staff at 755-0994.

Attachment

# CRITERIA FOR NEUTRAL SELECTION OF NPDES COMPLIANCE INSPECTION CANDIDATES

## A. BACKGROUND

In response to the recent Supreme Court decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), the Agency is developing neutral inspection criteria to be used when targeting compliance inspections. The purpose of using the neutral inspection plan is to eliminate any bias in choosing candidates for compliance inspections.

Under the National Pollutant Discharge Elimination System (NPDES) authorized by Section 402(a)(1) of the Clean Water Act, over 50,000 permits have been issued for the discharge of pollutants. Of these issued permits, about 8,000 have been classified by EPA or states with NPDES authority as major permittees. The designation of a permittee as "major" is based on quantity and potential environmental impact of the wastewater source.

EPA's program to monitor compliance with the terms and conditions of issued NPDES permits is primarily designed to ensure the compliance of the major permittees. EPA has not been provided with sufficient resources to routinely monitor the compliance of the remaining minor permittees.

Compliance inspections performed under the NPDES program can be divided into two general categories: 1) those

inspections based on administrative factors; and 2) those inspections based on specific evidence of an existing violation, e.g. civil probable cause.

Inspections based on the second category are not neutral since they are based on prior knowledge of apparent or probable permit violations. Factors which constitute specific evidence include: 1) violations reported on recent DMR's; 2) citizen complaints; 3) response to emergency situations, such as threats to public health or safety; 4) follow-up to previous inspections which indicated violations; and 5) specific enforcement case support.

For targeting inspections which rely strictly on administrative factors, the Agency has developed the following neutral inspection plan.

B. UNIVERSE OF NPDES INSPECTION CANDIDATES

The EPA, upon the presentation of credentials, has the authority to enter and inspect all NPDES permitted facilities at any time regardless of other factors such as "major" or "minor" designations. Because of limited resources, not all facilities are targeted for inspections each year. The frequency with which compliance inspections are performed is based on the discharger's environmental significance, available resources, the types and mix of inspections being employed, climatic and geographical influences on inspection logistics, and other factors influencing compliance monitoring such as the ability to follow up on inspection findings.

C. BASIC SELECTION CRITERIA

When targeting permittees of neutral compliance inspections, the time that has passed since the last inspection and the geographical grouping of the permittees are the only factors which may be considered. Other information, such as data from DMR's which indicated apparent violations, would not be used since this would constitute probable cause under the civil standard. However, the existence of such data would not preclude the facility from being considered for a neutral inspection if this neutral plan is followed during the selection process.

The only permittees who would not be considered when targeting neutral compliance inspections are permittees who are in current litigation with EPA. This does not apply to state litigation.

D. NEUTRAL COMPLIANCE INSPECTIONS

To target inspections based on a neutral inspection plan, Regions will first determine the length of time that has passed since the last EPA or state inspection for all major permittees. This can be done easily using the capabilities of the Permit Compliance System (PCS) available in each EPA Regional Office. A PCS report can be generated which will print out each major permittee in order by the date of the last inspection. Appendix A contains a sample list which the PCS System can generate. A separate report should be

generated for each state in the Region. In some cases, it may be appropriate to use subdistricts (by county) of a state depending on the organizational structure in a specific state or Region. The permittees which are highest on the list (greatest time since last inspection) will have the highest priority for neutral inspections.

In order to minimize use of Agency resources, inspection targeting should be based on both the priority list and geographical grouping. For example, any permittee on the list may be targeted for an inspection if it is in close physical proximity to a facility which is very high on the list. This is extremely important as it allows the most efficient use of the limited inspection resources. The PCS System can give the names and most recent inspection dates for all permittees which are in the same county as a permittee which is selected for an inspection.

The priority list will identify only those facilities which are possible targets for compliance inspections during the current fiscal year. The exact timing of these inspections during the fiscal year will be at the discretion of the Regional Office, based on logistics and specific Regional needs.

The list of permittees targeted for inspections may be amended at any time during the fiscal year. Similarly, before the start of a new fiscal year, Regional Offices should

reassess all permittees regardless of whether all previously targeted inspections have been completed for the current fiscal year.

E. INSTRUCTIONS FOR TARGETING INSPECTIONS BASED ON THE POINT ASSESSMENT SYSTEM

To use the neutral inspection plan, Regional Offices will first determine the percentage of inspection resources that will be devoted to neutral administrative inspections. This will depend, to a large extent, on the ongoing enforcement case load and the percentage of major permittees which have probable violations of effluent limitations and compliance schedules. For example, a Region may allocate the following resources for neutral inspection activities:

a) 10% of the Compliance Sampling Inspection resources;

b) 25% of the Performance Audit Inspection resources; and

c) 50% of the Compliance Evaluation Inspection resources.

The remaining Regional inspection resources would be reserved for inspections based on probable cause and specific enforcement case support.

The Region should next determine the approximate number of neutral inspections that can be completed using the resources allocated for each inspection type (CSI, CEI, PAI). This number will be flexible depending on the type and/or the number of outfalls and size of the permitted facility.

For each state, starting with the permittees highest on the list, proceed down the priority list until about one third of the neutral inspection resources for that state have been allocated. For example, if the allocated inspection resources for neutral inspections in a particular state are enough for 30 inspections, approximately the first 10 permittees on the priority list would be targeted. The Region should then use the remaining 20 inspections for permittees which are grouped with the already targeted candidates based on common geographical and/or special technical considerations. For example, a Region may target a sampling inspection at a facility with a high point rating, and then target several more sampling inspections, CEI's or PAI's in the same geographic area. This would allow all these inspections to be done on one inspection trip.

Regions may target inspections to single facilites at times, such as when the facility is in close proximity to Regional Offices or Field Offices.

A specific percentage of inspection resources are set aside each fiscal year for enforcement case support activities and emergency response. By the last quarter of the fiscal year, Regions should know to what extent these set-aside resources will be available for routine inspections. To the extent that these resources become available, they should be utilized to inspect the remaining permittees on the priority list.

## Appendix A

The following two pages are sample printouts from the Permit Compliance System (PCS) for the State of New Jersey. Printout 1 gives a partial listing of major NPDES facilities in order by the date of the last inspection. Permittees with no date listed for inspections have not had an inspection which was noted in PCS. These permittees will have the highest priority for neutral inspections.

Printout 2 is a list of permittees and inspection dates by county (for New Jersey). This Printout is used to identify permittees which may be in close physical proximity to facilities which were chosen for inspections from Printout 1.

ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

REGION=02 STATE=NJ

| NAME | IDATE | ITYPE | INSP | NPDES | CITY | CNTY |
|---|---|---|---|---|---|---|
| ATLANTIC COUNTY S.A. | | | | NJ0024473 | ATLANTIC CITY | ATLANTIC |
| HAMILTON TWP MUA | 780215 | C | R | NJ0021393 | MAYS LANDING | ATLANTIC |
| CITY OF EGG HARBOR | 790215 | C | S | NJ0024589 | EGG HARBOR CITY /C/ | ATLANTIC |
| TOWN OF HAMMONTON | 790611 | C | S | NJ0025160 | HAMMONTON | ATLANTIC |
| BUENA BOROUGH MUA | 791003 | C | S | NJ0021717 | BUENA BORO | ATLANTIC |
| SCIENTIFIC CHEMICAL PROCESSING | | | | NJ0003212 | CARLSTADT BORO | BERGEN |
| JOINT MTG RUTH-E.RUTH-CARL. | 751125 | C | R | NJ0022756 | RUTHERFORD | BERGEN |
| DIAMOND SHAMROCK CORP | 770328 | C | R | NJ0002798 | CARLSTADT BORO | BERGEN |
| TECHNICAL OIL PRODUCTS INC | 780626 | C | R | NJ0005754 | CARLSTADT BORO | BERGEN |
| MATHESON GAS PROD. CO. | 780629 | C | R | NJ0002721 | EAST RUTHERFORD | BERGEN |
| ROYCE CHEMICAL CO | 780911 | C | R | NJ0003502 | EAST RUTHERFORD | BERGEN |
| MARCAL PAPER MILLS INC | 780914 | C | R | NJ0002674 | EAST PATERSON | BERGEN |
| BENDIX CORP. | 781025 | S | R | NJ0002697 | TETERBORO | BERGEN |
| ABEX CORPORATION. | 790301 | C | S | NJ0000190 | MAHWAH TWP | BERGEN |
| INTERMEDIATES DIV-TENN. CHEM. | 790328 | C | R | NJ0000124 | GARFIELD | BERGEN |
| HACKENSACK WATER COMPANY | 790329 | C | R | NJ0003310 | ORADELL | BERGEN |
| BOROUGH OF EDGEWATER | 790329 | C | S | NJ0020591 | EDGEWATER BORO | BERGEN |
| FORD MOTOR CO MAHWAH | 790419 | C | S | NJ0002704 | MAHWAH TWP | BERGEN |
| LEVER BROTHERS CO. | 790516 | C | S | NJ0002143 | EDGEWATER BORO | BERGEN |
| TRANSCONTINENTAL GAS PIPE LINE | 790606 | C | S | NJ0002101 | CARLSTADT BORO | BERGEN |
| BERGEN COUNTY UTILITIES AUTH. | 790620 | C | R | NJ0020028 | LITTLE FERRY /BORO/ | BERGEN |
| UNIVERISAL OIL PROD. | 790702 | C | S | NJ0001252 | EAST RUTHERFORD | BERGEN |
| NORTHWEST BERGEN COUNTY S.A. | 790802 | C | S | NJ0024813 | WALDWICK | BERGEN |
| HAWARD CORPORATION | 790912 | C | S | NJ0023868 | NORTH ARLINGTON | BERGEN |
| NO.ARLINGTON LYNDHURST JNT MTG | 791019 | C | R | NJ0025291 | NORTH ARLINGTON | BERGEN |
| PUBLIC SERVICE ELEC & GAS | 791128 | C | S | NJ0000621 | RIDGEFIELD BORO | BERGEN |
| BOROUGH OF FAIR LAWN NJ | 800108 | C | S | NJ0025571 | FAIRLAWN | BERGEN |
| VILLAGE OF RIDGEWOOD | 800305 | C | S | NJ0024791 | RIDGEWOOD /V/ | BERGEN |
| CITY OF BORDENTOWN DPW | 741211 | C | R | NJ0024678 | BORDENTOWN /C/ | BURLINGTON |
| BEVERLY SEWERAGE AUTHORITY | 770203 | C | S | NJ0027481 | BEVERLY /CITY/ | BURLINGTON |
| STEPAN CHEM CO IND CHEM DIV | 770210 | C | R | NJ0005410 | FIELDSBORO | BURLINGTON |
| MOORESTOWN TWP STP | 771205 | C | R | NJ0024996 | MOORESTOWN TWP | BURLINGTON |
| MILLINGBORO MUA STP | 771206 | C | R | NJ0023361 | MILLINGBORO TWP | BURLINGTON |
| BURLINGTON TWP MAIN STP | 771212 | C | R | NJ0021709 | BURLINGTON /TWP/ | BURLINGTON |
| CITY OF BURLINGTON | 771212 | C | R | NJ0024660 | BURLINGTON /C/ | BURLINGTON |
| IONAC CHEM CO DIV OF SYBRON | 780830 | C | R | NJ0005509 | BIRMINGHAM | BURLINGTON |
| TENNECO CHEMICALS INC | 781004 | S | R | NJ0004391 | BURLINGTON /TWP/ | BURLINGTON |
| GRIFFIN PIPE PRODUCTS | 781212 | S | R | NJ0005096 | FLORENCE TWP | BURLINGTON |
| MOUNT LAUREL MUA | 790103 | S | R | NJ0025178 | MOUNT LAUREL TWP | BURLINGTON |
| EVESHAM MUA | 790215 | C | S | NJ0024040 | EVESHAM TWP | BURLINGTON |
| MEDFORD TOWNSHIP | 790215 | C | S | NJ0026932 | MEDFORD | BURLINGTON |
| BURLINGTON TWP LA GORCE SQUARE | 790307 | C | S | NJ0021695 | BURLINGTON /TWP/ | BURLINGTON |
| DELRAN SEWERAGE AUTHORITY | 790314 | C | S | NJ0023507 | DELRAN TWP | BURLINGTON |
| MOUNT HOLLY SEWERAGE AUTHORITY | 790314 | C | S | NJ0024015 | MOUNT HOLLY | BURLINGTON |
| MOUNT LAUREL MUA | 790417 | C | S | NJ0023981 | MOUNT LAUREL TWP | BURLINGTON |
| MAC-MCGUIRE AFB | 790425 | C | S | NJ0022578 | BURLINGTON /C/ | BURLINGTON |
| HOOKER CHEMICAL CORP | 790427 | C | R | NJ0004235 | BURLINGTON /TWP/ | BURLINGTON |
| HERCULES INC | 790502 | C | S | NJ0005142 | BURLINGTON /TWP/ | BURLINGTON |
| FORT DIX | 790517 | C | S | NJ0004855 | FORT DIX | BURLINGTON |
| ARMAK COMPANY | 790530 | C | S | NJ0004500 | MAPLE SHADE | BURLINGTON |
| P.S.G.&E. | 790619 | C | S | NJ0005002 | BURLINGTON /C/ | BURLINGTON |
| P.S.E. & G. | 790619 | C | S | NJ0005690 | BURLINGTON COUNTY B | BURLINGTON |

Printout 1

THE PERMIT COMPLIANCE SYSTEM

9:25 MONDAY, JUNE 16, 1980

ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

REGION=02 STATE=NJ

| NAME | IDATE | ITYPE | INSP | NPDES | CITY | CNTY |
|---|---|---|---|---|---|---|
| PSE&G CO HARRISON GAS PLANT | | | | NJ0000566 | HARRISON | HUDSON |
| PUBLIC SERVICE ELEC & GAS | | | | NJ0000582 | EDISON /TWP/ | MIDDLESEX |
| PUBLIC SERVICE ELEC & GAS | | | | NJ0000639 | NEWARK | ESSEX |
| PUBLIC SERVICE ELEC & GAS | | | | NJ0000671 | JERSEY CITY /C/ | HUDSON |
| NL INDUSTRIES | | | | NJ0000931 | SAYREVILLE | MIDDLESEX |
| WHIFFANY PAPERBOARD CO. | | | | NJ0001457 | CLIFTON | PASSAIC |
| SCHERING CORP. | | | | NJ0002305 | KENILWORTH | UNION |
| E.I. DU PONT DE NEMOUR CORP. | | | | NJ0002640 | LINDEN | UNION |
| SCIENTIFIC CHEMICAL PROCESSING | | | | NJ0003212 | CARLSTADT BORO | BERGEN |
| PFIZER INC. | | | | NJ0003450 | PARSIPPANY | MORRIS |
| PORT AUTHORITY OF N Y AND N J | | | | NJ0003824 | NEWARK | ESSEX |
| BORDEN INC-SHOW FOOD PROD. | | | | NJ0004961 | CAPE MAY | CAPE MAY |
| P.S.E.& G MERCER GENER STA | | | | NJ0004995 | HAMILTON /TWP/ | MERCER |
| ATLANTIC CITY ELEC. | | | | NJ0005363 | PENNS GROVE | SALEM |
| JERSEY CENTRAL POWER & LIGHT | | | | NJ0005517 | MILFORD | HUNTERDON |
| JERSEY CENTRAL POWER & LIGHT | | | | NJ0005550 | LACEY TWP | OCEAN |
| P.S.E. & G. | | | | NJ0005622 | HANCOCKS BRIDGE | SALEM |
| CITY OF ELIZABETH | | | | NJ0020648 | ELIZABETH /C/ | UNION |
| PASSAIC VALLEY SEWERAGE COMM | | | | NJ0021016 | NEWARK | ESSEX |
| MOBIL CHEMICAL DIST. SER. | | | | NJ0024392 | CARTERET | MIDDLESEX |
| ATLANTIC COUNTY S.A. | | | | NJ0024473 | ATLANTIC CITY | ATLANTIC |
| CUMBERLAND COUNTY UTILITIES AU | | | | NJ0024651 | BRIDGETON /C/ | CUMBERLAND |
| MONMOUTH CO. BAYSHORE OUTFALL | | | | NJ0024694 | MIDDLETOWN | MONMOUTH |
| CITY OF NEWARK DPW | | | | NJ0024724 | NEWARK | ESSEX |
| P.S.E.& G HOPE CREEK | | | | NJ0025411 | LOWER ALLOWAYS CREEK | SALEM |
| CITY OF ORANGE DPW | | | | NJ0025925 | ORANGE /C/ | ESSEX |
| PEQUANNOCK LIN.PK.& FAIRFILD S | | | | NJ0029306 | LINCOLN PARK | MORRIS |
| OCEAN COUNTY SEWERAGE AUTH. | | | | NJ0029408 | BERKELEY TWP | OCEAN |
| CITY OF BORDENTOWN DPW | 741211 | C | R | NJ0024670 | BORDENTOWN /C/ | BURLINGTON |
| OLIN CORPORATION | 750305 | S | R | NJ0005088 | PAULSBORO | GLOUCESTER |
| FOSTER GLASS WORKS | 750904 | S | R | NJ0004715 | SALEM | SALEM |
| JOINT MTG RUTH-E,RUTH-CARL, | 751125 | C | R | NJ0022756 | RUTHERFORD | BERGEN |
| PUBLIC SERVICE ELECTRIC & GAS | 760305 | C | S | NJ0000663 | LINDEN | UNION |
| PUBLIC SERVICE ELEC & GAS | 760326 | C | S | NJ0000680 | WOODBRIDGE | MIDDLESEX |
| PICATINNY ARSENAL | 761107 | C | R | NJ0002500 | DOVER | MORRIS |
| CAMDEN COUNTY MUA | 761110 | C | S | NJ0026182 | CAMDEN | CAMDEN |
| BEVERLY SEWERAGE AUTHORITY | 770203 | C | S | NJ0027481 | BEVERLY /CITY/ | BURLINGTON |
| STEPAN CHEM CO IND CHEM DIV | 770210 | C | R | NJ0005410 | FIELDSBORO | BURLINGTON |
| DIAMOND SHAMROCK CORP | 770328 | C | R | NJ0002798 | CARLSTADT BORO | BERGEN |
| CHEVRON OIL CO | 770627 | C | R | NJ0000264 | ELIZABETH /C/ | UNION |
| CHEMICAL CONTROL CORPORATION | 770805 | C | R | NJ0024201 | ELIZABETH /C/ | UNION |
| WARNER-CHILCOTT LABORATORIES | 770811 | C | S | NJ0002342 | MORRIS PLAINS | MORRIS |
| HEINZ USA SALEM | 770831 | C | R | NJ0004693 | SALEM | SALEM |
| FLORHAM PARK SEW. AUTH. | 770907 | S | R | NJ0025518 | FLORHAM PARK | MORRIS |
| TOWN OF WEST NEW YORK | 771130 | C | R | NJ0025321 | WEST NEW YORK | HUDSON |
| MOORESTOWN TWP STP | 771205 | C | R | NJ0024995 | MOORESTOWN TWP | BURLINGTON |
| MILLINGBORO MUA STP | 771206 | C | R | NJ0023361 | MILLINGBORO TWP | BURLINGTON |
| BURLINGTON TWP MAIN STP | 771212 | C | R | NJ0021709 | BURLINGTON /TWP/ | BURLINGTON |
| CITY OF BURLINGTON | 771212 | C | R | NJ0024660 | BURLINGTON /C/ | BURLINGTON |
| HA[illegible]ON TWP MUA | 780215 | C | R | NJ0021393 | HAYS LANDING | ATLANTIC |
| C[illegible]ILL TOWNSHIP | 780223 | C | S | NJ0025101 | CHERRY HILL /TWP/ | CAMDEN |
| [illegible]OSELLE S.A. | 780220 | C | R | [illegible]024953 | LINDEN | UNION |

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

OCT 17 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Direct Referral

FROM: Richard H. Mays
Senior Enforcement Counsel

TO: Associate Enforcement Counsels

Attached is a letter of agreement between the Deputy Administrator, on behalf of EPA, and the Acting Assistant Attorney General for Land and Natural Resources, on behalf of the Department of Justice, regarding the referral of certain types of cases from the Regional Offices directly to the Department of Justice for a period of one year on an experimental basis.

You will note that this agreement does not go into effect until December 1, 1983, and that Courtney Price will distribute a memorandum within EPA explaining this agreement and how it will be implemented within the Agency. Courtney would like to have the assistance of each of you and your staffs in developing the guidance memorandum which will implement this agreement. Please review the agreement in your respective offices and submit any suggestions you may have for its implementation.

This office needs to closely monitor both the efficiency and the effectiveness of this method of handling referrals. Therefore, it is an important responsibility to assure that this guidance memorandum receives careful and thoughtful consideration. Please have your respective comments submitted to me by Wednesday, October 26, 1983 to enable us to prepare and distribute a guidance memorandum to the Regions well in advance of December 1, 1983.

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 monifor or report by industrial dischargers;

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

(v) referrals to collect administrative spill penalties under Section 311(j) of the CWA;

(c) All cases under the Clean Air Act except the following:

(i) cases involving the steel industry;

(ii) cases involving non-ferrous smelters;

(iii) cases involving National Emissions Standards for Hazardous Air Pollutants;

(iv) cases involving the post-1982 enforcement policy.

2. Cases described in Section 1, above, shall be referred directly from the Regional Administrator to the Land and Natural Resources Division of DOJ in the following manner:

(a) The referral package shall be forwarded to the Assistant Attorney General for Land and Natural Resources, U.S. Department of Justice (DOJ), with copies of the package being simultaneously forwarded to the U.S. Attorney (USA) for the appropriate judicial district in which the proposed case is to be filed (marked "advance copy-no action required at this time"), and the Assistant Administrator for Enforcement and Compliance Monitoring (OECM) at EPA Headquarters. OECM shall have the following functions with regard to said referral package:

(i) OECM shall have no responsibility for review of such referral packages, and the referral shall be effective as of the date of receipt of the package by DOJ; however, OECM shall comment to the Region upon any apparent shortcomings or defects which it may observe in the package. DOJ may, of course, continue to consult with OECM on such referrals. Otherwise, OECM shall be responsible only for routine oversight of the progress and management of the case consistent with applicable present and future guidance. OECM shall, however, retain final authority to approve settlements on behalf of EPA for these cases, as in other cases.

(ii) The referral package shall be in the format and contain information provided by guidance memoranda as may be promulgated from time to time by OECM in consultation with DOJ and Regional representatives.

(iii) DOJ shall, within 30 days from receipt of the referral package, determine (1) whether the Lands Division of DOJ will have lead responsibility for the case; or (2) whether the USA will have lead responsibility for the case.

While it is agreed that to the extent feasible, cases in which the USA will have the lead will be transmitted to the USA for filing and handling within this 30-day period, if DOJ determines that the case requires additional legal or factual development at DOJ prior to referring the matter to the USA, the case may be returned to the Regional Office, or may be retained at the Lands Division of DOJ for further development, including requesting additional information from the Regional Office. In any event, DOJ will notify the Regional Office, OECM and the USA of its determination of the lead role within the above-mentioned 30-day period.

(iv) Regardless of whether DOJ or the USA is determined to have lead responsibility for management of the case, the procedures and time limitations set forth in the MOU and 28 CFR §0.65 et seq., shall remain in effect and shall run concurrently with the management determinations made pursuant to this agreement.

3. (a) All other cases not specifically described in paragraph 1, above, which the Regional Offices propose for judicial enforcement shall first be forwarded to OECM and the appropriate Headquarters program office for review. A copy of the referral package shall be forwarded simultaneously by the Regional Office to the Lands Division of DOJ and to the USA for the appropriate judicial district, the USA's copy being marked "advance copy-no action require 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 lette 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
Deputy Administrator

Approved:

F. Henry Habicht, II
Acting Assistant Attorney General
Land and Natural Resources Division

# Municipal and Pretreatment Enforcement

# Municipal and Pretreatment Enforcement

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

JAN 5 1977

OEC/MON

OFFICE OF THE
ADMINISTRATOR

MEMORANDUM

TO: Regional Administrators

FROM: Deputy Administrator /S/ John Quarles

SUBJECT: POTW Compliance with NPDES Permit Effluent Limitations

Poor performance by Publicly Owned Treatment Works (POTWs) is of major concern to the Agency. Each successive review of POTWs' operations indicates that their overall performance level is unsatisfactory. Over a third of the POTWs are failing to produce the effluent quality for which they were designed. Nearly half of the POTWs originally designed for secondary treatment fail to comply with present secondary treatment standards. These conclusions have been confirmed both by EPA's annual Section 210 Reports to Congress and by the recently completed municipal compliance audit report. This memorandum briefly describes the EPA's policy for dealing with the problem.

The Federal Water Pollution Control Act clearly establishes EPA's primary role in assuring adequate POTW performance as being regulatory. This role requires us to insist that municipalities accept full responsibility for achieving effluent limits required by their NPDES permits. To accomplish this, we must assume an aggressive enforcement posture with respect to municipal noncompliance. Aggressive enforcement of municipal permit requirements can and will yield significant results. Region II, for example, recently initiated and won a major precedent-setting civil action against the City of Camden, New Jersey, forcing it to restore and properly operate and maintain its treatment facilities. Other significant enforcement actions are also being developed against POTWs. The amount of POTW enforcement activity, however, must be drastically increased in all Regions in order to demonstrate our insistence upon municipal accountability for POTW performance.

Municipalities are responsible and accountable for achieving the effluent limitations required in their NPDES permits whether or not they have the in-house capability to deal with the problem underlying the violation. It is the municipality's responsibility to seek and secure whatever technical assistance or training is necessary to solve that problem. EPA must insist that municipalities accept and carry out that responsibility and must take enforcement action against those that are unwilling to do so.

Although it is recognized that EPA and the States are currently providing limited technical and training assistance, most of such assistance and training must be provided by the private sector. While the private sector can undoubtedly develop the capability to provide such services when a sufficient demand is made on it for those services, to date that demand has not been strongly made. Consequently, many consultants, equipment manufacturers and systems vendors have not yet developed a significant capability to render technical assistance or training. EPA and the States must expand their present efforts to encourage and stimulate development of private sector capability and expertise to meet these needs. Aggressive enforcement of municipal permits and an insistence that municipalities seek needed technical and training services should provide an incentive for the private sector to develop the needed capability.

In those few cases where a municipality has recognized the need of outside assistance to meet permit effluent limitations and has unsuccessfully sought that assistance, formal enforcement might be a futile response. EPA or State assistance might be appropriate in such a situation. Since it is the municipality's responsibility to seek that assistance, it should be given normally at the municipality's request rather than on the initiative of EPA or the State. And since a demand must be placed on the private sector if it is to develop the capability of providing such assistance, EPA should not normally provide the assistance unless the municipality has unsuccessfully sought it elsewhere. Consequently, EPA and State technical and training capabilities will be helpful in the short term to fill gaps in local and private sector capabilities to resolve POTW compliance problems. To the extent that EPA capabilities in this regard exist at the present time, however, they should not be expanded, but should be reduced as private sector capabilities mature.

Any technical or training assistance provided by EPA <u>must</u> be provided in a manner compatible with our primary role as regulators. It should be regarded as but one option available to the regulator in a particular case and not as the sole option or the option of choice in all cases. The inability to provide technical assistance in a given case or the failure to achieve the required effluent limitations after the provision of such

assistance should never preclude the use of more demanding regulatory options. Where technical assistance is provided, it must be done in a manner that will not prejudice the Agency's case in a subsequent enforcement action if the effluent limitations are not achieved after assistance has been provided.

I recognize that many people, both within and outside the Agency, believe that EPA should conduct a strong program of technical assistance to individual communities in addition to its enforcement role. In the abstract, this proposition may appear attractive. As a practical matter, however, an active assistance role confuses and undercuts the predominantly regulatory role that the FWPCA has fashioned for the Agency. Moreover, limitations on existing and foreseeable resources make it wholly unrealistic to think that we have or could develop the capacity to provide technical assistance in any significant number of cases as part of our national program. Thus we have no choice but to accept our role as being predominantly regulatory. Within this context, we can and should conduct an active role in manpower training, technology transfer and the dissemination of technical assistance on a general basis rather than an individual case basis.

I also specifically do not intend to restrict by this means any activities we may be able to undertake in the neglected field of manpower training.

In summary, let me make clear that our philosophy toward operating POTWs is regulatory and that the responsibility for meeting applicable permit requirements rests squarely on the POTWs. To date the compliance assurance program has been successful in securing compliance from industry. It is our responsibility to make sure that it is equally effective in securing compliance from municipalities.

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

NOV 29 1978

MEMORANDUM

TO: Regional Administrators w/o attachments
Regional Water Division Directors
Regional Enforcement Division Directors

FROM: Deputy Assistant Administrator for Water Programs Operations (WH-546)

Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Coordination Between Regional Enforcement and Water Programs Personnel in Implementing the National Pretreatment Program

The general pretreatment regulation (40 CFR Part 403) promulgated on June 26, 1978, requires that certain publicly owned treatment works (POTWs) develop pretreatment programs to control the introduction of industrial wastes into POTWs. The successful implementation of these pretreatment programs requires a careful integration of Regional Enforcement Division efforts in overviewing the creation of such programs and Construction Grants efforts in providing funding for the development of these programs. The purpose of this memorandum is to outline the respective roles of these two groups with regard to the initial stages of POTW pretreatment program development. The recommendations in this memorandum reflect the proposals for coordinating Enforcement and Construction Grants activities found in the Interim National Municipal Policy and Strategy, October, 1978, and the latter document should be read in concert with this memorandum.

Identification of POTWs Required to Develop a Program

The pretreatment regulation specifies that two groups of POTWs should be required to develop a pretreatment program (see section 403.8). First, all POTWs with an average design flow greater than 5 million gallons per day (mgd) and receiving industrial wastes which 1) pass through the POTW untreated, 2) interfere with the operation of the POTW or, 3) are otherwise subject to pretreatment standards developed under section 307 of the Clean Water Act are required to develop a program. In addition, the Regional Administrator or Director of the State NPDES program may require that POTWs with an average design flow of 5 mgd or less develop a pretreatment program if their industrial influent meets any of the three criteria listed above.

A computer print-out of all POTWs in each Region broken down by majors and minors is attached to this memorandum. The Regional Enforcement Division should take the lead in developing from the attached computer print-out: 1) a list of those POTWs (both above and below 5 mgd) in non-NPDES States which should develop a pretreatment program and, 2) a list of those POTWs above 5 mgd in NPDES States which must be required to develop a program. The Regional Water Division must assist in this effort and provide such necessary information as is available in the Water Division files. Attachment A suggests means by which the Regional office can identify these POTWs.

In compiling the non-NPDES State list, the Regional office should check the appropriate boxes next to the POTW name on the computer print-out. Copies of this print-out should then be forwarded to the Permits and Municipal Construction Divisions at Headquarters. A copy of this print-out should also be maintained by both the Enforcement and Water Divisions in the Regional office and both Divisions should be consulted on any changes to the list.

The NPDES State list should be sent to NPDES States to assist them in identifying appropriate POTWs. NPDES States will be responsible for adding to the Regional list those POTWs with flows of 5 mgd and less which will be subject to the program development requirement. Once the NPDES State has developed a list of all POTWs within its jurisdiction which will be required to implement pretreatment programs, it should forward this list to the Grants and Enforcement personnel in the Regional office who will, in turn, send this information on to Headquarters.

Lists of those POTWs in both NPDES and non-NPDES States which will be required to develop a program should be sent to the Headquarters Permits and Municipal Construction Divisions no later than January 15, 1979. The cover memorandum transmitting the completed lists should be signed jointly by the Directors of the Regional Water and Enforcement Divisions. These lists will eventually be incorporated into the Permit Compliance System (PCS) which will provide a convenient mechanism for tracking and updating progress in developing POTW pretreatment programs.

Application for Construction Grants Amendment

Once the lists of POTWs required to develop a pretreatment program have been compiled, the Construction Grants staff should notify the appropriate POTWs in NPDES and non-NPDES States of the need to apply for an amendment to their existing Step 1, 2 or 3 grant in order to acquire funding for the development of a pretreatment program (see Construction Grants regulation 40 CFR 35.907). Concurrent notice of POTWs which should apply for grant amendments should be sent to Grant personnel in NPDES and non-NPDES States so that the States may plan future funding requirements. Existing construction grants should be amended no later than June 30, 1979, to provide pretreatment program funding.

As individual POTWs apply for and are awarded an amendment to their construction grant for pretreatment program implementation, this information should be conveyed to Regional Enforcement personnel. As will be seen in the subsequent discussion, timing of the construction grants award can have an impact on the development of the pretreatment compliance schedule incorporated into the POTW's NPDES permit.

Reissuance of Permits to Include Pretreatment Requirements

The pretreatment regulation requires that NPDES permits for POTWs which are required to develop a POTW pretreatment program incorporate a compliance schedule for the development of such a program [see 40 CFR 403.8(d)]. This compliance schedule should be incorporated into the POTW's permit upon reissuance at the end of the existing permit term or at the time the permit is modified or reissued to grant a section 301(i)(1) time extension or a section 301(h) modification of secondary treatment requirements. In addition, a POTW's NPDES permit may be modified in mid-term to incorporate a schedule for the development of a POTW pretreatment program where the operation of a POTW without a pretreatment program poses significant public health, environmental or related concerns, or where a pretreatment program compliance schedule must be developed to coordinate with construction grant awards. A detailed explanation of the development and application of pretreatment compliance schedules will be found in Attachment B along with a model compliance schedule.

The pretreatment strategy envisions the type of close coordination between Enforcement and Construction Grants staffs outlined in the Interim National Municipal Policy and Strategy for developing these compliance schedules. Both the Construction Grants regulation (40 CFR 35.907, 35.920-3) and the pretreatment regulation (40 CFR 403.8) impose time limitations on the various activities to be undertaken in the pretreatment compliance schedule. The pretreatment compliance schedule incorporated into a POTW's NPDES permit should contain milestones derived from the grants process. As the discussion in Attachment B indicates, in order to develop a compliance schedule which meets both the pretreatment and Construction Grants regulatory requirements, the Enforcement staff must coordinate with Construction Grants staff in determining the current grant status of the permittee and the schedule for receipt of future grant funding.

Enforcement of POTW Pretreatment Programs

The preceding discussion of coordination between Construction Grants and Enforcement in developing POTW pretreatment programs should not be understood to imply that availablity of funding is a prerequisite to the development of a pretreatment program. The requirement to develop a pretreatment program should be enforced and not dependent on

Federal funds. The development of pretreatment programs is critical; it is the main tool to address toxic discharges from POTW's. The costs of developing such programs are not capital costs and they can be recovered from users of the municipal system in most cases. In balancing these considerations, the Agency's policy is to enforce requirements for municipalities to develop pretreatment programs without dependence on Federal funding.

This policy applies equally to funding the operation of municipal pretreatment programs once they are developed and running. They are expected to be self-supporting. A user charge system may be used for this purpose.

If you have any questions on the implementation of this coordination effort or its relation to the Interim National Municipal Policy and Strategy, please feel free to contact Nancy Hutzel or Shanna Halpern (8-755-0750) in the Permits Division or Ron DeCesare (8-426-8945) in the Municipal Construction Division.

John T. Rhett

Jeffrey G. Miller

Attachments

cc: Regional S&A Division Directors
NEIC

ATTACHMENT A

## Procedures to Identify POTWs Which Will be Required to Develop POTW Pretreatment Programs

The permit-issuance authority (Regional office or NPDES State) must have the ability to determine which of its municipal permittees will be required to develop a POTW pretreatment program. As section 403.8(a) of the pretreatment regulation explains, POTWs required to develop a program will include those POTWs with a design flow over 5 mgd receiving from industrial users wastes which:

- pass through the POTW untreated
- interfere with the operation of the treatment works
- are subject to pretreatment standards developed under the authority of section 307(b) or (c) of the CWA.

In determining which POTWs are above 5 mgd, the permit-issuance authority should look at average design flow. In addition, if one permittee controls several treatment works, the cumulative flow of the treatment works should be considered in calculating average design flow. For example, one Regional Authority controlling 3 treatment works with average design flows of 3, 2 and 1.5 mgd respectively would be viewed, for the purposes of the pretreatment regulation, as a single operation with an average design flow greater than 5 mgd.

A recommended first step in determining which POTWs over 5 mgd fall within the 3 categories listed above would be to determine which POTWs receive wastes from one or more industries within the 21 industrial categories listed in the NRDC Consent Decree (for reprinting of Consent Decree see The Environmental Reporter-Cases, 8 ERC 2120). EPA anticipates that categorical pretreatment standards under section 307(b) and (c) will be developed for almost all industrial subcategories within the 21 industrial categories listed in the NRDC Consent Decree. A possible approach to detecting these sources would be to examine industrial inventories such as the Dun and Bradstreet Market Identifiers, the Directory of Chemical Producers, published by the Stanford Research Institute, and the State industrial directories to determine which of the listed sources are within the State or Region and discharging into POTWs.

A second step in identifying POTWs required to develop a POTW pretreatment program might be to look at those POTWs which are not meeting their NPDES permit conditions. Such permittees would be likely candidates for a pretreatment program aimed at controlling pollutants which interfere with the operation of or pass-through the POTW.

Section 403.8(a) of the pretreatment regulation also gives the permit-issuance authority the ability to require the development of a pretreatment program by POTWs with average design flows of 5 mgd or less. It is recommended that the permit-issuance authority require the development of a program wherever the POTW meets one of the 3 criteria outlined earlier. The permit-issuance authority is strongly urged to exercise its option to extend the requirement to develop a pretreatment program as broadly as possible.

The burden of proof for demonstrating that a program is not needed should rest on the POTW. Where there is some doubt that a certain POTW has industrial influent subject to pretreatment requirements, the POTW can be allowed to show that it need not develop a program. In such cases, a clause should be inserted in the municipal permit along with the compliance schedule for the development of a pretreatment program. This clause would state that if the industrial waste inventory required by the compliance schedule demonstrates that the POTW has no contribution of industrial wastes which would be subject to pretreatment requirements, the POTW would not be required to continue development of the program.

# ATTACHMENT B

## GUIDANCE ON PREPARING COMPLIANCE SCHEDULES FOR DEVELOPING POTW PRETREATMENT PROGRAMS

GENERAL COMMENTS:

Section 403.8(d) of the general pretreatment regulation (40 CFR part 403) requires that NPDES permits for POTWs which are required to develop a POTW pretreatment program incorporate a compliance schedule for the development of such a program. In some cases, this compliance schedule will be incorporated into affected POTW permit upon reissuance at the end of its existing term.

In many cases, however, the compliance schedule will be incorporated into the POTW permit in mid-term through a permit modification. It is anticipated that in many instances this pretreatment compliance schedule will be inserted into the NPDES permit for applicable POTWs when the permit is modified or reissued in mid-term in connection with a 301(i)(1) determination (i.e., the determination as to whether or not the schedule for development of secondary treatment should be extended under the provisions of section 301(i)(1) of the Act, see 40 CFR 124.104). Similarly, a POTW which is required to develop a pretreatment program will have a pretreatment compliance schedule inserted in its NPDES permit if that permit is modified or reissued in order to grant a waiver of secondary treatment requirements under the provisions of section 301(h) of the Act. (See proposed 40 CFR Part 233.) In addition, a POTW permit will be modified in mid-term to incorporate a schedule for the development of a POTW pretreatment program, where the operation of a POTW without a pretreatment program poses significant public health, environmental or related concerns, or where a pretreatment program compliance schedule must be developed to coordinate with construction grant awards.

The compliance schedule will require that the permittee develop the authorities, procedures and resources, as defined by 40 CFR 403.8 and 403.12, which comprise an approvable POTW pretreatment program. The activities listed in the attached model compliance schedule summarize the more detailed requirements found in sections 403.8 and 403.12 of the pretreatment regulation. It is recommended that the permit-issuance authority review the more detailed requirements set forth in the regulation before developing the pretreatment compliance schedule, and insert additional schedule activities where appropriate.

There are several time limitations imposed by the pretreatment regulation and the construction grant regulation (40 CFR part 35) which should be considered in establishing compliance schedule dates. The pretreatment regulation provides that the compliance schedule will require the development and approval of a POTW pretreatment program as soon as reasonable and within 3 years after the schedule is incorporated

into a POTW's permit but in no case later than July 1, 1983 (see §403.8). Since up to 6 months must be allowed for the program approval process according to section 403.11 of the pretreatment regulation, the compliance schedule date for submission of a pretreatment program for approval (activity 8 of the compliance schedule) should be 2-1/2 years from the incorporation of a compliance schedule or January 1, 1983, whichever is sooner.

Provisions of the construction grants regulations impose what may be in some cases stricter time constraints on the development of an approvable program. For example, section 35.920-3 of the construction grants regulation provides that no grantee may receive a Step 3 grant after December 31, 1980, until it has developed an approvable pretreatment program. Thus, a permittee which is scheduled to receive a Step 3 construction grant in January 1981 will be required to develop an approvable program at the outside by January 1981. However, if that same permittee received a compliance schedule for the development of a pretreatment program in December 1978 it would be allowed, by the pretreatment regulation, an outside date of June 1981 (i.e., 2-1/2 years from the incorporation of the compliance schedule) to develop an approvable program. In this case, the more stringent time limitation, i.e., that posed by the construction grant regulation, would apply.

As the example above indicates, in developing the schedule date for the submission of an approvable pretreatment program, the permit-issuance authority must use that date prescribed by either the pretreatment regulation or the construction grants regulation which provides the shortest time for the development of the program. In addition, the permit-issuance authority may impose reasonable time limitations which are more restrictive.

## DEVELOPMENT OF THE PRETREATMENT COMPLIANCE SCHEDULE

It is apparent from the general discussion above that several different regulatory provisions influence the development of the schedule date for submitting a POTW pretreatment program for approval (compliance schedule activity 8). Regulatory limitations on the time frame for developing a program can be summarized as follows:

- approval within 3 years from the incorporation of a pretreatment compliance schedule in the municipal permit (application for approval within 2-1/2 years). See 40 CFR 403.8.

- approval by July 1, 1983 (application for approval by January 1, 1983). See 40 CFR 403.8.

- o approval prior to payment of grants beyond 90% of the Step 3 funding (application for approval 6 months before this date). See 40 CFR 35.935-19.

- o development of an approvable pretreatment program by the end of the Step 2 grant for certain permittees. See 40 CFR 35.920-3.

- o approval by whatever more stringent time limit is imposed by the permit-issuance authority.

In addition, the construction grant regulation imposes an interim time limitation on the development of compliance schedule activities 1-3. According to this regulation, grantees with amended Step 1 grants must have completed activities 1-3 by the time of application for the Step 2 grant if the Step 2 is to be awarded after June 30, 1980.

Facilities required to develop a POTW pretreatment program can generally be divided into 4 groups depending upon the applicablity of the time limitations discussed above. See attached Chart A.

GROUP 1 Facilities which will have received Step 1 and 2 construction grants or amendments before June 30, 1980, and a Step 3 construction grant before December 31, 1980.

If a grantee is scheduled to receive its Step 2 and 3 construction grants before June 30, 1980 and December 31, 1980, respectively, the construction grant regulation (40 CFR 35.935-19) requires that, in most cases, the grantee have an approved POTW pretreatment program before it receives the last 10% of its Step 3 grant funding. This means that the grantee would be required to apply for POTW pretreatment program approval at least 6 months before it is scheduled to receive payment beyond 90% of its Step 3 funding.*

The pretreatment regulation (40 CFR 403.8(d)) provides that such a grantee should request approval of the POTW pretreatment program within 2-1/2 years from the incorporation of a pretreatment compliance schedule into its NPDES permit or by January 1, 1983, whichever is sooner.

In developing the compliance schedule for permittees in this group, the permit-issuance authority should determine which of the above dates provides for the earliest development of a POTW pretreatment program. This date should then be used as the pretreatment compliance schedule deadline for activity 8.

*As a 6 months period is needed to approve a POTW pretreatment program, in order to receive approval of a program by the date upon which the grantee is scheduled to receive payment beyond 90% of its Step 3 funding, the application for approval must be submitted 6 months earlier.

Dates for the remaining compliance schedule activities are negotiable with the permittee. Generally, however, the deadlines for completing activities 1-3 should not exceed 15 months from the initiation of the compliance schedule.

Facilities receiving their Step 3 grant before June 30, 1980, shall be subject to the same time limitations described above.

GROUP 2 Facilities which will have received Step 1 and 2 construction grants before June 30, 1980, and a Step 3 construction grant after December 31, 1980.

The construction grant regulation provides that a grantee which is scheduled to receive a Step 3 grant after December 31, 1980, must have completed compliance schedule activities 1-7 before it can receive its Step 3 funding. Therefore, in developing the compliance schedule, the permit-issuance authority should use as an outside compliance date for activities 1-7 the date for completion of the Step 2 grant as determined by the construction grants compliance schedule as long as this date would not be later than 2-1/2 years from the initiation of the pretreatment compliance schedule or Janurary 1, 1983, whichever is sooner.

The compliance date for pretreatment compliance schedule activity 8 (request for program approval) should not exceed 2-1/2 years from the initiation of the compliance schedule, January 1, 1983, or 6 months before the permittee is scheduled to receive payment beyond 90% of its Step 3 funding, whichever is sooner.

Again, the interim pretreatment compliance schedule dates are negotiable. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

GROUP 3 Facilities which will receive a Step 2 construction grant after June 30, 1980, and a Step 3 construction grant before December 31, 1980.

Under to the construction grant regulation, in order to receive a Step 2 grant after June 30, 1980, a grantee must first have completed activities 1-3 of the pretreatment compliance schedule. The permit-issuance authority should therefore ensure that the compliance schedule dates for the completion of activities 1-3 do not exceed the scheduled date for the completion of the Step 1 grant activities. The permit-issuance authority may at its discretion impose a more stringent time limitation for the completion of these activities. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

The construction grant regulation provides that grantees which will receive a Step 3 grant before December 31, 1980, must have an approved pretreatment program in order to receive the final 10% of the Step 3 grant funds. The final compliance date for activity 8 of the pretreatment compliance schedule therefore should be no later than 6 months* before the date upon which the grantee is scheduled to receive payment beyond 90% of the Step 3 grant funding unless this date exceeds 2-1/2 years from the initiation of the compliance schedule, or January 1, 1983, in which case the final date for activity 8 should be no later than January 1, 1983, or 2-1/2 years from the initiation of the compliance schedule, whichever is sooner.

The interim dates for activities 4-7 are negotiable with the permittee.

GROUP 4 Facilities which will receive a Step 2 construction grant after June 30, 1980, and a Step 3 construction grant after December 31, 1980.

The construction grant regulation provides that in order to receive a Step 2 grant after June 30, 1980, a grantee must first have completed activities 1-3 of the pretreatment compliance schedule. The permit issuance authority should therefore ensure that the compliance schedule dates for the completion of activities 1-3 do not exceed the schedule date for the Step 2 grant application. The permit-issuance authority may impose a more stringent time limitation for the completion of these activities. It is recommended that the completion date for activities 1-3 not exceed 15 months from the initiation of the compliance schedule.

In order to receive a Step 3 grant after December 31, 1980, a facility in this category must also have completed compliance schedule activities 4-7. The final compliance dates for activities 4-7 should therefore be no later than the completion date for the facilities Step 2 grant as determined by the construction grants schedule. If the scheduled completion date for the Step 2 construction grant activities is later than 2-1/2 years from the initation of the compliance schedule or January 1, 1983, then the final compliance date for activities 4-7 should not exceed January 1, 1983, or 2-1/2 years from the initiation of the compliance schedule, whichever is sooner.

In establishing the pretreatment compliance schedule dates for activities 4-7, sufficient time must be allowed for the grantee to accomplish activity 8 (application for program approval) by January 1, 1983, 2-1/2 years from the initiation of the pretreatment compliance schedule, or 6 months before the permittee is scheduled to receive payment beyond 90% of its Step 3 funding*, whichever is sooner.

* See footnote, page 3

MODEL PRETREATMENT COMPLIANCE SCHEDULE LANGUAGE

Under the authority of section 307(b) and 402(b)(8) of the Clean Water Act, and implementing regulations (40 CFR 403), the permittee is required to develop a pretreatment program. This program shall enable the permittee to detect and enforce against violations of categorical pretreatment standards promulgated under section 307(b) and (c) of the Clean Water Act and prohibitive discharge standards as set forth in 40 CFR 403.5.

The schedule of compliance for the development of this pretreatment program is as follows. The permittee shall:

| ACTIVITY NO. | ACTIVITY | DATE |
|---|---|---|
| 1 | Submit the results of an industrial user survey as required by 40 CFR 403.8(f)(2)(i-iii), including identification of industrial users and the character and volume of pollutants contributed to the POTW by the industrial users. | _____ |
| 2 | Submit an evaluation of the legal authorities to be used by the permittee to apply and enforce the requirements of sections 307(b) and (c) and 402(b)(8) of the Clean Water Act, including those requirements outlined in 40 CFR 403.8(f)(1). | _____ |
| 3 | Submit a determination of technical information (including specific requirements to specify violations of the discharge prohibitions in 403.5) necessary to develop an industrial waste ordinance or other means of enforcing pretreatment standards. | _____ |
| 4 | Submit an evaluation of the financial programs and revenue sources, as required by 40 CFR 403.8(f)(3), which will be employed to implement the pretreatment program. | _____ |
| 5 | Submit design of a monitoring program which will implement the requirements of 40 CFR 403.8 and 403.12, and in particular those requirements referenced in 40 CFR 403.8(f)(1)(iv-v), 403.8(f)(2)(iv-vi) and 403.12(h-j),(l-n). | _____ |

CHART

OUTSIDE PRETREATMENT COMPLIANCE DATES BASED ON CONSTRUCTION GRANT AWARDS AND PRETREATMENT REQUIREMENTS*

| Group | | | JUNE 30, 1980 | DECEMBER 31, 1980 | 2-1/2 YEARS FROM INITIATION OF COMPLIANCE SCHEDULE, JANUARY 31, 1983, OR 6 MONTHS BEFORE THE FINAL 10% OF STEP 3 GRANT WHICHEVER IS SOONER |
|---|---|---|---|---|---|
| 1 | Step 1 Awarded | Step 2 Awarded | Step 3 Awarded | | Activities 1-8 Due |
| 2 | Step 1 Awarded | Step 2 Awarded | | Step 3 Awarded (Activities 1-7 due by application for Step 3) | Activity 8 Due |
| 3 | Step 1 Awarded | | Step 2 Awarded (Activities 1-3 due by application for Step 2) | Step 3 Awarded | Activities 4-8 Due |
| 4 | Step 1 Awarded | | Step 2 Awarded (Activities 1-3 due by application for Step 2) | Step 3 Awarded (Activities 4-7 due by application for Step 3) | Activity 8 Due |

*Interim dates are negotiable and are established by the permit-issuance authority

6 Submit list of monitoring equipment required by the POTW to implement the pretreatment program and a description of municipal facilities to be constructed for monitoring or analysis of industrial wastes. _____

7 Submit specific POTW effluent limitations for prohibited pollutants (as defined by 40 CFR 403.5) contributed to the POTW by industrial users. _____

8 Submit a request for pretreatment program approval (and removal credit approval, if desired) as required by 40 CFR 403.9. _____

The terms and conditions of the POTW pretreatment program, when approved, shall be enforceable automatically through the permittee's NPDES permit.

Quarterly Reporting

The permittee shall report to the permit-issuance authority on a quarterly basis the status of work completed on the POTW pretreatment program. Reporting periods shall end on the last day of the months of March, June, September and December. The report shall be submitted to the permit-issuance authority no later than the 28th day of the month following each reporting period.

Removal Allowances

Any application for authority to revise categorical pretreatment standards to reflect POTW removal of pollutants in accordance with the requirements of 40 CFR 403.7 must be submitted to the permit-issuance authority at the time of application for POTW pretreatment program approval or at the time of permit expiration and reissuance thereafter.

DOCUMENT C

Explanation of Procedural/Funding Requirements
for State Pretreatment Programs

Procedures/Funding to Identify POTWs Which Will be Required to Develop POTW Pretreatment Programs

The State must have the ability to determine which of its municipal permittees will be required to develop a POTW pretreatment program. As section 403.8(a) of the pretreatment regulation explains, POTWs required to develop a program will include those POTWs with a design flow over 5 mgd receiving from industrial users wastes which:

- o pass through the POTW untreated
- o interfere with the operation of the treatment works
- o are subject to pretreatment standards developed under the authority of section 307(b) or (c) of the CWA.

In determining which POTWs are above 5 mgd, the State should look at average design flow. In addition, if one permittee controls several treatment works, the cumulative flow of the treatment works should be considered in calculating average design flow. For example, one Regional Authority controlling 3 treatment works with average design flows of 3, 2 and 2 mgd respectively would be viewed, for the purposes of the pretreatment regulation, as a single operation with an average design flow greater than 5 mgd.

A recommended first step in determining which POTWs over 5 mgd should be required to develop a pretreatment program would be to determine which POTWs receive wastes from one or more industries within the 21 industrial categories listed in the NRDC Consent Decree (for reprinting of Consent Decree see The Environmental Reporter-Cases, 8 ERC 2120). EPA anticipates that categorical pretreatment standards under section 307(b) and (c) will be developed for almost all industrial subcategories within the 21 industrial categories listed in the NRDC Consent Decree. A possible approach to detecting these sources would be to examine industrial inventories such as the Dunn and Bradstreet Market Indicator and the Directory of Chemical Producers, published by the Stanford Research Institute, to determine which of the listed sources are within the State and discharging into POTWs.

A second step in identifying POTWs required to develop a POTW pretreatment program might be to look at those POTWs which are not meeting their permit conditions. Such permittees would be likely candidates for a pretreatment program aimed at controlling pollutants which interfere with the operation of the POTW.

Section 403.8(a) of the pretreatment regulations also gives the State authority to require the development of a pretreatment program by POTWs with average design flows of 5 mgd or less. It is recommended that the State require the development of a program wherever the POTW receives industrial wastes from sources in one or more of the 21 industrial categories listed in the NRDC Consent Decree, is not meeting its permit conditions or where municipal sludge is not meeting applicable requirements. The State is strongly urged to exercise its option to extend the requirement to develop pretreatment program as broadly as possible. The burden of proof for demonstrating that a program is not needed should rest on the POTW. Where there is some doubt that a certain POTW has industrial influent subject to pretreatment requirements, the POTW can be allowed to show that it need not develop a program. In such cases, a clause can be inserted in the municipal permit along with the compliance schedule for the development of a pretreatment program. This clause would state that if the industrial waste inventory required by the compliance schedule demonstrates that the POTW has no significant contribution of industrial wastes which would be subject to pretreatment requirements, the POTW would not be required to continue development of the program.

In brief narrative form, the State should explain those procedures it has currently developed for identifying POTWs above and below 5 mgd required to develop a pretreatment program. The narrative should be accompanied by a statement of the resources currently devoted to this undertaking. If a program to identify appropriate POTWs is planned for the future, the State should indicate what approaches to identifying POTWS will be used and what criteria will be applied in identifying the pollutants and industries subject to pretreatment requirements. The State should also describe briefly its planned procedures for providing technical and legal assistance to POTWs where help is needed in developing a POTW pretreatment program.

2. <u>Procedures/Funding to Notify POTWs of Pretreatment Requirements</u>

The State should indicate those procedures it has developed to notify POTWs of applicable pretreatment requirements as set forth in 40 CFR 403.8(2)(iii). This may consist of a mailing system for distributing information such as copies of the pretreatment regulation and any guidance on developing a POTW pretreatment program prepared by the State or EPA. Any such distribution system should be coordinated with similar information networks employed by State personnel in charge of EPA construction grants.

3. Procedures/Funding to Incorporate Pretreatment Requirements in Municipal Permits

Where States currently have the authority to revoke and reissue or modify municipal permits to incorporate an approved pretreatment program or a compliance schedule for developing such a program, (see Attorney General's Pretreatment statement section 2) they will be required to exercise this authority. Otherwise, a State must include a modification clause in appropriate POTW permits which calls for the incorporation of pretreatment requirements at a later date. The State should indicate to EPA the priorities it will use for incorporating pretreatment requirements into POTW permits and an estimate of the additional resources, if any, which will be required to carry out this task. For example, the State should indicate to the best of its ability:

- the number of municipal permits which will incorporate pretreatment requirements at the same time as they are revoked and reissued or modified for the purpose of meeting the provisions of 301(i) or 301(h) of the Clean Water Act;

- the number of expiring municipal permits not receiving 301(i) or 301(h) modifications which will incorporate pretreatment conditions upon reissuance

- the number of municipal permits to be revoked and reissued or modified to include an approved pretreatment program or a compliance schedule for developing such a program

Procedures/Funding to Make Determinations on Requests for POTW Pretreatment Program Approval and Removal Allowances

The State must have the procedures and funding to receive and make determinations on requests for POTW pretreatment program and removal allowance approval. In general this responsibility will require that the State have procedures and funding to:

- comply with the public notice provisions of section 403.11(b)(1) of the regulation which requires the State to:

  1. mail notices of the request for approval to adjoining States whose waters may be affected;

  2. mail notices of the request to appropriate area-wide planning agencies (Section 208 of the CWA) and other persons or organizations with an interest in the request for program approval or removal allowance;

3. publish a notice of the request in the largest daily newspapers of the municipality in which the POTW requesting program or removal allowance approval is located. These notices shall indicate that a comment period will be provided for interested parties to express their views on the request for program approval or removal allowance.

- Provide a public hearing if requested by any affected or interested party as provided for in section 403.11(b)(2). Notice of such a hearing will be published in the same newspapers where the original notice of request for program or removal credit approval appeared.

- Make a final determination on the request if EPA has not objected in writing to the approval of the request during the comment period. In making the final determination, the State should take into consideration views expressed by interested parties during the comment period and hearing, if held.

- Issue a public notice of the final determination on the request. This notice shall be sent to all persons who submitted comments and/or participated in the public hearing. In addition, the notice will be published in the same newspapers as the original notice of request for approval was published.

The State should indicate to EPA by October 10, its current ability to carry out these responsibilities, focusing primarily on staffing and funding availability. This assessment should be based on an estimate of the number of POTWs which will be scheduled to receive POTW pretreatment program and removal allowance approval during the remainder of the State's budget year. The State should then indicate the projected resource levels for POTW pretreatment program and removal allowance approval in each of the budget years 1979-1983 based on the estimated number of POTWs requesting program and removal allowance approval during each of these years. Finally, the State should explain how it can insure, to the best of its ability, that the funding required to carry out this activity will be available each year.

5. <u>Procedures/Funding for Identifying and Notifying Industrial Users Subject to Pretreatment Requirements</u>

The pretreatment regulations provide that where a POTW is not required to develop a POTW pretreatment program, the State will assume responsibility for identifying industrial users of the POTW which might be subject to pretreatment standards. The State may

devise its own methods for obtaining this information, including requiring the POTW to identify the industrial users in question. Reference to the Dunn and Bradstreet and Directory of Chemical Producers listings, as mentioned earlier, may provide a convenient first step. In many cases this information may already have been provided by the POTW through part 4 of the municipal permit application form. Through whatever means it chooses, the State should insure that all industrial users which fall within one or more of the 21 industrial categories listed in the NRDC Consent Decree are identified. In addition, the State should identify as subject to pretreatment standards all industrial users which contribute pollutants which interfere with the operation of the treatment works or pass through the POTW untreated.

Once the appropriate industrial users have been identified, the State must ensure that they are notified of all applicable existing pretreatment standards and of applicable pretreatment standards which might be forthcoming. Acceptable procedures would include a mailing list for industrial users or an arrangement with the POTW requiring it to provide the requisite notice.

The State should indicate by October 10, whether it has presently in operation effective procedures for identifying and notifying industrial users currently or potentially subject to pretreatment standards. If such procedures are not currently on line, if for example, information supplied by part 4 of the municipal application form is not sufficiently detailed to provide the required information, the State should indicate how it plans to develop the ability to identify and notify appropriate industrial users. The description of these procedures should be accompanied by an assessment of resources needed to implement them, the current availability of resources to meet this need and plans for obtaining additional resources if required.

6. Procedures/Funding for Identifying the Character and Volume of Pollutants Contributed by Industrial Users to POTWs

Section 403.10(f)(2)(i) of the pretreatment regulation provides that where a POTW is not required to develop a POTW pretreatment program, the State will be required to carry out those procedures which would otherwise have been the responsiblity of the POTW. One of these responsiblities is the identification of the character and volume of pollutants being contributed to the POTW by sources subject to pretreatment requirements (see 403.8(f)(2)(ii)). Industrial users subject to pretreatment requirements include those which are subject to pretreatment standards promulgated under section 307(b) and (c) and/or, contribute pollutants which interfere with the operation of the POTW or which pass through the POTW untreated. This responsibility is complicated by the fact that

analytical and monitoring techniques are not yet available to provide a quantitative analysis of the presence of many of the pollutants in question. In recognition of this problem, EPA recommends that States follow the procedures outlined below in developing their inventory of industrial waste contribution.

- The first step in the waste inventory should be a qualitative analysis of pollutants being contributed by all industrial sources within the system. The individual industrial users should be asked to provide information on the type and approximate quantity of pollutants discharged by the facility. This information should be derived entirely from knowledge of the facility's process and should not require any sampling at the source.

- Second, the State should review this qualitative information on the pollutants being discharged into the system and remove from further consideration those pollutants which are not within the 129 pollutants to be regulated with national pretreatment standards and/or which are known not to interfere with the operation of the POTW or pass through the POTW untreated.

- Third, the State (or POTW if the State so directs) will then sample the influent to the POTW to determine which of the pollutants remaining after step two appear in significant concentrations in the influent to the POTW. In carrying out this sampling, the State should use those sampling and analytical techniques set forth in 40 CFR part 136. If a pollutant appears at such a low concentration that it is highly unlikely that it would have an adverse effect on the operation of the POTW, pass through untreated, or if the pollutant does not appear at all in the influent to the POTW, it should be excluded from further consideration.

- Fourth, the analysis in preceeding steps has resulted in a list of those pollutants contributed to the system which may affect the operation of the POTW or pass through the POTW untreated. The next step is to determine which industrial users have such pollutants in their effluent.

- Fifth, those industrial users identified in step four will be required to do sampling and analysis to quantify the amounts of those pollutants being discharged by that source into the POTW. If necessary, the State may then impose upon that industrial user an effluent limitation which will ensure that such pollutants are discharged at levels which will not interfere with the operation of the treatment works or pass through in unacceptable amounts.

- Finally, as Federal pretreatment standards for industrial subcategories are promulgated, the State will require that industrial users belonging to those subcategories sample and analyze their effluent to quantify the amount of pollutants regulated by the standard being discharged by that industrial user.

The above procedures can be characterized as a 2-part program. Initially, prior to the development of sampling and analytical techniques for many of the complex pollutants regulated within the 21 industrial categories (and approximately 400 industrial subcategories) set forth in the NRDC Consent Decree, the State will focus on identifying and quantifying only those pollutants which interfere with the operation of the treatment works. Then, as Federal pretreatment standards for the 129 pollutants in the 21 industrial categories emerge, along with recommended sampling and analytical techniques for such pollutants, the State will be required to elicit specific quantitative information on the character and volume of pollutants discharged by indstrial users regulated by Federal standards.

POTWs which are required to develop a POTW pretreatment program are responsible for carrying out the industrial waste inventory in lieu of the State (see 403.8(f)(ii) and step 2 of the municipal pretreatment compliance schedule). The State should recommend that this 2-step program be used by such POTWs.

The State should indicate to EPA by October 10 its current ability to carry out the industrial waste characterization program described above. Particular attention should be paid to the availability of resources to implement this survey, the technical ability of the State to sample influent to POTWs as required by step 3 above, and the State's technical ability to develop effluent limitations for industrial users where necessary to control the introduction of pollutants which interfere with the operation of the POTW. The State should discuss those resources and technical abilities which it will need to acquire to fully implement the components of the industrial waste inventory described above.

7. Procedures/Funding to Make Determinations on Requests for Fundamentally Different Factor Variances

Section 403.13 of the pretreatment regulation provides that States will be responsible for considering requests for fundamentally different factors variances. Any interested person believing that factors relating to an industrial user are fundamentally different from the factors considered during the development of a categorial pretreatment standard applicable to that user may apply for a fundamentally different factors variance allowing a modification of the discharge limit specified in that standard.

The State must have procedures to review such requests, and make a determination to deny the request or recommend to EPA that the request be approved. In making this determination, the State must consider the factors outlined in 403.13(c) and (d). The State should submit to EPA by October 10, 1978, a discussion of its current ability to consider requests for fundamentally different factor variances. Emphasis should be placed on current funding availability and projected funding needs. In addition, the State should identify the existing or required technical expertise it will need to evaluate the various factors listed in 403.13(c) and (d).

8. Procedures/Funding to Ensure Compliance with Pretreatment Standards and Permit Conditions

Where a POTW is not required to develop a POTW pretreatment program, the State will be required to ensure that industrial users of that POTW subject to pretreatment standards comply with those standards. In order to do so, the State must develop procedures which include the following:

- Where State law provides adequate authority, the State should have the technical ability to review the technology which the industry proposes to install in order to meet State or Federally imposed pretreatment standards.

- Once the compliance date for a pretreatment standard has passed, the State must have procedures to receive and analyze the report submitted by the industry, in compliance with the requirements of 403.12(d), indicating whether or not the industry has complied with applicable effluent limitations.

- The State must develop the administrative and technical ability to receive and analyze the periodic reports submitted by industrial users indicating continued compliance with pretreatment standards (see 403.12(e)).

- The State must ensure that it has adequate resources and technical expertise to determine, independent of reports submitted by the industrial user, that the user is in compliance with applicable pretreatment standards. For example, the State should have procedures for scheduling periodic checks on industrial users to spot-check compliance, sampling the effluent at the industrial sources and analyzing this effluent to ensure compliance with applicable limitations.

Where a POTW pretreatment program has been developed and the POTW has been granted a removal allowance for certain pollutants, the State must have procedures to:

- receive and analyze periodic reports from the POTW indicating continued removal at the rate allowed by the POTW's permit and continued compliance with sludge requirements;

- sample and analyze the influent to and effluent from the POTW to determine, independent of reports submitted by the POTW, that the POTW is maintaining the approved level of removal and is in compliance with all applicable sludge requirements.

It is recognized that the sampling and analytical requirements explained in this section may impose a substantial resource burden on the State. While it is preferred that the State develop its own technical expertise, an acceptable alternative would be for the State to contract with private consultants, universities or other groups with sufficient technical expertise to carry out the sampling and analytical requirements described in this section.

# PRETREATMENT COMPLIANCE STRATEGY

Note: This policy contains the "Short Term Pretreatment Compliance Strategy." The long term policy is under development and will be subsequently added to the Compendium.

182

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

OCT 28 1983

OFFICE OF
WATER

MEMORANDUM

SUBJECT: Pretreatment Compliance Strategy

FROM: Bruce R. Barrett, Director
Office of Water Enforcement and Permits (EN-335)

TO: Water Management Division Directors
Regions I-X

Attached is the Pretreatment Compliance Strategy developed by the Pretreatment Compliance Strategy Task Force which I established in May, 1983. The task force is comprised of representatives from all ten Regions, OWPO, OWRS and the States of North Carolina and Illinois. The Office of Enforcement and Compliance Monitoring has also provided comments throughout the development of the strategy.

The strategy, as attached, includes both a short term (FY 1984-1985) and a proposed long term (FY 1985 and beyond) phase. The short term strategy, being final, should be implemented as soon as possible. The short term strategy describes EPA's compliance response to those POTWs which did not complete approvable pretreatment program development by September 30, 1983 and those industries which violate schedules or effluent limits associated with specific categorical standards. Of specific concern will be those categorical standards, electroplating and metal finishing, which have compliance deadlines in FY 84. Regions should be prepared to address any compliance problems associated with these industries in FY 84. An estimated 720 POTWs located in non-approved States are in non-compliance with the pretreatment program development requirements as of October 1, 1983.

The long term strategy describes the pretreatment compliance goals for FY 1985 and beyond. This is the implementation phase of the pretreatment compliance program. This phase deals with compliance monitoring of POTWs and categorical industries, response to non-compliance by these entities and EPA's overview of States that are approval authorities.

# PRETREATMENT COMPLIANCE STRATEGY

## I. INTRODUCTION

The U.S. Environmental Protection Agency's (EPA) pretreatment program, established pursuant to Clean Water Act sections 307, 308, and 402 as implemented by regulations set forth at 40 C.F.R. §403, is designed to protect receiving waters and Publicly Owned Treatment Works (POTWs) from industrial pollutants discharged into POTW collection systems. These pollutants may interfere with treatment processes, contaminate sludges so as to inhibit effective sludge management, or pass through treatment processes and pollute receiving waters.

EPA's pretreatment regulations establish three major elements of the pretreatment program:

- General discharge prohibitions that apply to all contributing industries;
- Administrative mechanisms to ensure that general discharge prohibitions, categorical standards, and local limitations are applied and enforced; and
- Reporting requirements for contributing industries and POTWs.

POTWs that receive substantial quantities of industrial waste flows are required by the regulation to develop pretreatment programs to ensure that their contributing industries comply with general prohibitions, categorical standards, and other requirements. These POTW pretreatment programs will control the introduction of industrial pollutants through the establishment of limitations on industrial facilities contributing pollutants to POTWs. EPA envisions that POTWs will act as the primary controlling authority

over industrial dischargers to POTW collection systems. However, EPA and many States have concurrent authority to enforce pretreatment requirements and will do so, if necessary.

The pretreatment program uses the terms "control authority" and "approval authority". "Control authority" is that entity (POTW, State or EPA) responsible for achieving and maintaining compliance with the pretreatment program requirements. If a POTW has an approved pretreatment program, it is the "control authority"; if not, either the State or EPA is the control authority depending on whether EPA has approved State administration of the pretreatment program.

The "approval authority" is that entity (State or EPA) responsible for overviewing the control authority's implementation of an approved pretreatment program.

## II. SHORT TERM STRATEGY - FY 84 and 85

### A. Objective

The objective of the short term strategy is to see that all POTWs required to develop and implement pretreatment programs do so in the shortest possible time. This is necessary to (1) ensure that POTWs have maximum control over, and responsibility for the integrity of their treatment systems and (2) facilitate compliance with categorical standards by indirect dischargers.

### B. Compliance Follow-Up

Pretreatment regulations (40 C.F.R. §403.8(b)), established July 1, 1983, as the deadline for approval of POTW pretreatment programs. Adequate notice and time for development of pretreatment programs has been provided for POTWs which are required, by their permits, to develop pretreatment programs.

A substantial number of POTW pretreatment programs, as of July 1, 1983, were not approved and, therefore, the POTWs are in violation of their NPDES permits. EPA intends to address these violations in the following manner:

1. For POTWs who were unable or unwilling to submit an approvable program,[1] on or before September 30, 1983, compliance schedules will be established through administrative orders, judicial orders or other appropriate mechanisms for establishing enforceable schedules.
2. Compliance schedules in enforcement actions will require that all submissions of prepared POTW pretreatment programs be received as soon as possible, but no later than September 30, 1984.[2] It is expected that approval of all required POTW programs will be completed no later than March 31, 1985.

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[1]An approvable POTW pretreatment program contains: legal authority to apply and to enforce the requirements of Sections 307(b) and (c), and 402(b)(8) of the CWA and any regulations implementing those sections (403(f)(1)); procedures to ensure compliance with the requirements of the POTW pretreatment program (403(f)(2)); and sufficient funding and qualified personnel to carry out the program authorities and procedures (403(f)(3)).

[2]It is anticipated that most compliance schedules will require the POTW to submit a pretreatment program prior to September 30, 1984 and in only rare instances will this deadline be extended.

Judicial enforcement should be initiated in appropriate cases against POTWs that violate pretreatment administrative orders, exhibit continued recalcitrance, or substantially violate other pretreatment requirements.

EPA will also enforce categorical standards. In non-approved cities in non-approved States, EPA will enforce standards directly against indirect dischargers. This may include conducting compliance inspections at indirect dischargers when needed. In approved cities that are not enforcing categorical standards, EPA will use appropriate enforcement mechanisms against both the POTW and the indirect dischargers. EPA's enforcement response in these situations will be consistent with the enforcement responses set forth in the policies governing the enforcement of the NPDES program.

[The following long term strategy is still in the developmental stage and is being circulated for review and comment. When finalized, the long term strategy will be the second phase of the Pretreatment Compliance Strategy.]

## III. LONG TERM PROGRAM STRATEGY (DRAFT)

## ENVIRONMENTAL PROTECTION AGENCY

[WH-FRL 2515-6]

## Notice of National Municipal Policy on Publicly-Owned Treatment Works.

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of National Municipal Policy.

**SUMMARY:** This notice sets forth the Environmental Protection Agency's policy on ensuring that all publicly-owned treatment works (POTW) comply with the statutory requirements and compliance dead-lines in the Clean Water Act (CWA). The policy describes the Agency's intention to focus its efforts on POTWs that previously received Federal funding assistance and are not in compliance, on all other major POTWs, and on minor POTWs that are contributing significantly to an impairment of water quality. It also describes how the Agency expects EPA Regions and States to carry out the intent of the policy. The purposes of the policy are to achieve maximum improvement in water quality in accordance with the goals of the CWA, and to protect the public's investment in wastewater treatment facilities.

The Agency has recently proposed a regulation that redefines secondary treatment pursuant to the 1981 amendments to section 304(d) of the CWA, 48 FR 52258, November 16, 1983. This related action will help provide reasonable certainty regarding POTWs applicable effluent limits and will facilitate implementation of this policy.

**EFFECTIVE DATE:** This policy will be effective January 30, 1984.

**FOR FURTHER INFORMATION CONTACT:** Robert W. Zeller, Ph. D., U.S. Environmental Protection Agency, EN-338, 401 M Street, SW., Washington, D.C., 20460 (202) 475-8304.

Dated: January 23, 1984.

**William D. Ruckelshaus,**

*Administrator.*

### Statement of Policy

When the Clean Water Act (CWA) was passed in 1972, Congress gave municipalities until 1977 to comply with its requirements. Congress authorized the Environmental Protection Agency (EPA) to extend the deadline to 1983 and then again to July 1, 1988, for some municipalities. In addition, Congress amended the Act in 1981 to modify the basic treatment requirements. Therfore, Congress has authorized EPA to give some municipalities several additional years to achieve compliance and has also provided more reasonable treatment requirements for certain types of facilities.

The CWA requires all publicly-owned treatment works (POTWs) to meet the statutory compliance deadlines and to achieve the water quality objectives of the Act, whether or not they receive Federal funds. The EPA will focus on POTWs that previously received Federal funding assistance and are not currently in compliance with their applicable effluent limits, on all other major POTWs, and on minor POTWs that are contributing significantly to an impairment of water quality. EPA's goal will be to obtain compliance by POTWs as soon as possible, and no later than July 1, 1988. Where there are extraordinary circumstances that preclude compliance of such facilities by July 1, 1988, EPA will work with States and the affected municipal authorities to ensure that these POTWs are on enforceable schedules for achieving compliance as soon as possible thereafter, and are doing all they can in the meantime to abate pollution to the Nation's waters.

### Implementation Strategy

The Agency is committed to pursuing a clear course of action that fulfills the intent of Congress and results in the maximum improvement in water quality. The Agency is also committed to protecting the public's financial investment in wastewater treatment facilities. To meet these objectives, the Agency expects EPA Regions and States to adhere to the National policy stated above and to use the following mechanisms to carry out the intent of this policy.

EPA Regions will cooperate with their respective States to develop strategies that describe how they plan to bring noncomplying facilities into compliance. These strategies should include a complete inventory of all noncomplying facilities, should identify the affected municipalities consistent with the National policy, and should describe a plan to bring these POTWs into compliance as soon as possible. Regions and States will then use the annual State program grant negotiation process to reach agreement on the specific activities they will undertake to carry out the plan.

Based on the information in the final strategies, the permitting authority (Region or approved NPDES State) will require affected municipal authorities to develop one of the following as necessary:

*Composite Correction Plan:* An affected municipality that has a constructed POTW that is not in compliance with its NPDES permit effluent limits will be required to develop a Composite Correction Plan (CCP). The CCP should describe the cause(s) of noncompliance, should outline the corrective actions necessary to achieve compliance, and should provide a schedule for completing the required work and for achieving compliance.

*Municipal Compliance Plan:* An affected municipality that needs to construct a wastewater treatment facility in order to achieve compliance will be required to develop a Municipal Compliance Plan (MCP). The MCP should describe the necessary treatment technology and estimated cost, should outline the proposed sources and methods of financing the proposed facility (both construction and O&M), and should provide a schedule for achieving compliance as soon as possible.

The permitting authority will use the information in these plans and will work with the affected municipality to develop a reasonable schedule for achieving compliance. In any case where the affected municipal authority is unable to achieve compliance promptly, the permitting authority will, in addition to setting a schedule for achieving full compliance, ensure that the POTW undertakes appropriate interim steps that lead to full compliance as soon as possible. Where there are extraordinary circumstances that make it impossible for an affected municipal authority to meet a July 1, 1988 compliance date, the permitting authority will work with the affected municipality to establish a fixed date schedule to achieve compliance in the shortest, reasonable period of time thereafter, including interim abatement measures as appropriate. The general goal is to establish enforceable compliance schedules for all affected municipalities by the end of FY 1985. Once schedules for affected municipalities are in place, the permitting authority will monitor progress towards compliance and will take follow-up action as appropriate. Nothing in this policy is intended to

impede or delay any ongoing or future enforcement actions.

Overview

EPA Headquarters will overview the implementation of this policy to ensure that actions taken by Regions and States are consistent with National policy and that the Agency as a whole is making progress towards meeting the statutory deadlines and achieving the water quality objectives of the Act.

Dated: January 23, 1984.

William D. Ruckelshaus,

*Administrator.*

[FR Doc. 84-2433 Filed 1-27-84; 8:45 am]

BILLING CODE 6560-50-M

# MUNICIPAL MANAGEMENT SYSTEM

Note: The Municipal Management System was based on the National Municipal Policy of October, 1979, which was superseded by the new National Municipal Policy of January 30, 1984. Appendix E of the Municipal Management System remains the only effective section of the document.

United States
Environmental Protection
Agency

Office of
Water Program Operations
Washington DC 20460

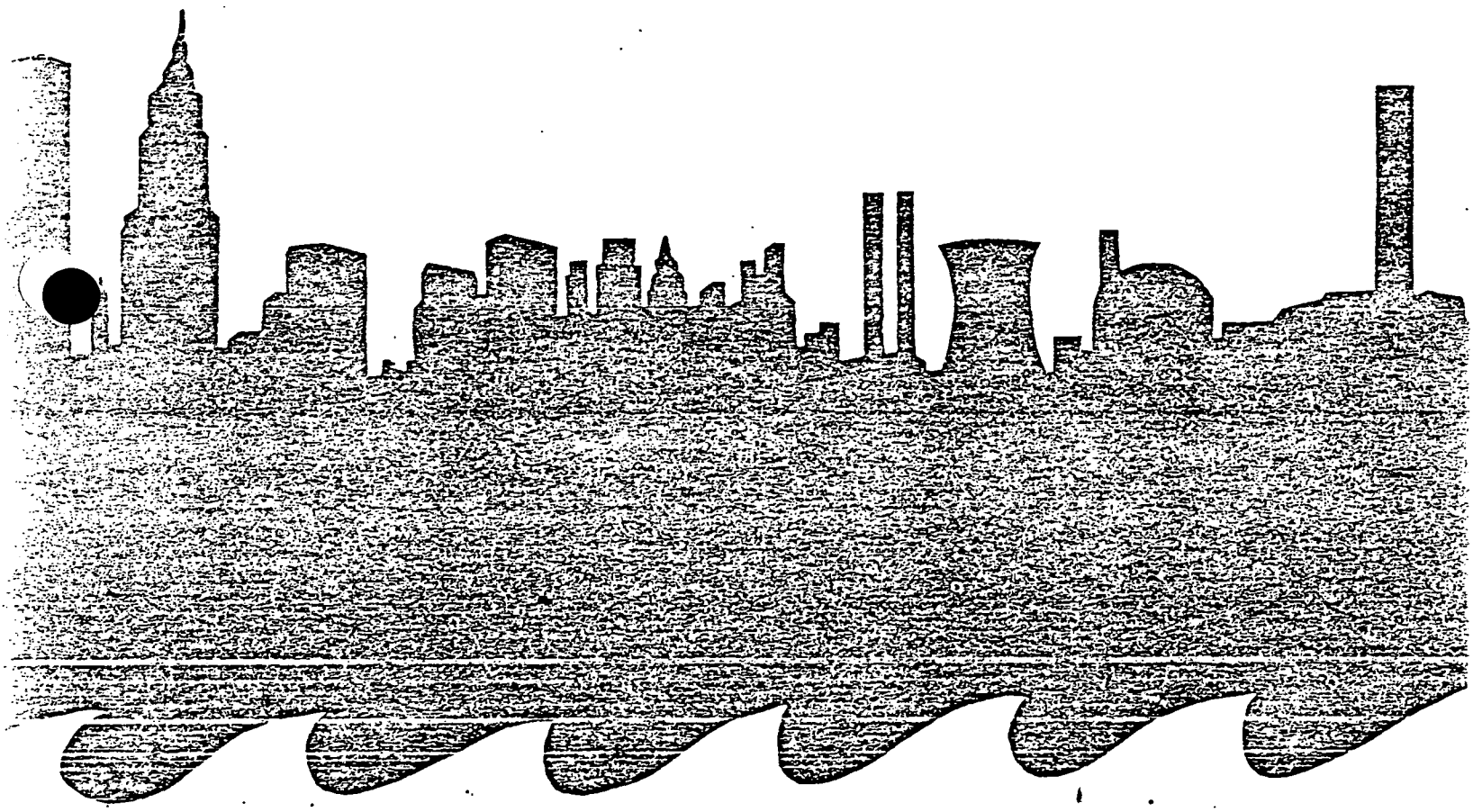
Office of Water Enforcement

190

Water

EPA

# Municipal Management System



## Appendix E

## NONCOMPLIANCE RESPONSE GUIDE

This is a guide for Construction Grant and Enforcement officials in the exercise of their enforcement discretion. It serves three main purposes. First, it establishes enforcement responses that are appropriate, both in terms of their severity and the availability of Agency resources for different types of permit or grant violations. Secondly, given the resource constraints in the various Grants and Enforcement units, it assures a relatively uniform application of enforcement responses to comparable levels and types of violations around the country. Finally, it acts as a standard against which any MMS program can be evaluated.

It should be emphasized that this guide is to be used when considering the most appropriate response to a permit or grant violation. Thus, the suggested responses or alternatives may not be the only ones appropriate in achieving compliance. The guide should not be woodenly applied in any particular case. Each violation of an NPDES permit or grant schedule is a violation of the Federal Water Pollution Control Act for which the full array of enforcement responses provided in the Act is available. Determining the most appropriate response (or set of responses) requires consideration of 1) the severity of violation in terms of the degree of variance from the permit/grant condition, 2) the impact on the environment and the integrity of the NPDES program, 3) the enforcement history of the permittee in terms of past violations and good faith, 4) the impact on other dischargers, 5) the availability of enforcement resources within the enforcement unit, the prosecutorial branch of government, and the judiciary, 6) the importance of the violation in comparison with other violations that must be dealt with by limited resources, and 7) considerations of fairness and equity.

In any particular case these factors may lead to an enforcement response different from that suggested in the guide. In most cases, it is anticipated that responses to violations will be made within the framework of responses outlined in the guide.

The following table displays most of the standard responses which may be made to noncompliance with construction grant and/or NPDES permit requirements. Some of the responses have very broad applications. The table gives users an idea of the scope or range of options which may be considered when responding to permit or grant violations. Since there is to be no unilateral response (on the part of only one program) to a grant-related permit violation, the following examples serve to indicate the flexibility that may

be desirable in bringing a permittee back into compliance. Any sequence of grant responses or enforcement actions should not deviate from the levels outlined in Table 2 such that the response is not appropriate to the severity of the violation. For example, "documented phone calls" or "letters" (B1, 2) may be used to gather information or to alert a permittee in the early stages of almost any type of violation or apparent violation. Other responses have a much more limited application. For example, to "withhold up to 10% of grant payment" (A4) would be effective only near the completion of a grant project in Step 1, 2, or 3, and would be most effective at the time of close-out of a Step 3 grant. Similarly, "sewer bans/restrictions" (B5(b), C10) would be most effective where a community is undergoing significant growth and where the violation is so clear and serious as to offset the political outcry certain to be triggered by imposition of a ban or restriction.

In general, the responses escalate in impact as one moves down the list within each category, i.e. A7 ("stop payment") is much more serious a grant management action than A2 ("impose grant conditions"). Likewise, B4 ("Show Cause hearing") is much more serious an enforcement action than B1 ("documented phone call").

However, responses ranked close to one another within a given category may in some cases differ more with respect to the circumstances in which they are usable than with respect to the overall impact. For example, A3 ("withdraw authorization to advertise for bids") would be effective where a grantee was delaying initiation of facility construction to press ahead with sewer construction to accommodate new development, while A4 ("withhold up to 10%) would be most effective near closeout of a Step 3 grant. Neither is more serious than the other in terms of impact.

# SAMPLE RESPONSES TO MUNICIPAL NONCOMPLIANCE

A. Grant Management Actions (EPA/State)

1. Deny/defer award
2. Improve grant conditions (to assure "catch-up")
3. Withdraw authority to advertise for bids
4. Withhold up to 10% of grant payment
5. Disallow costs related to noncompliance
6. Suspend work (conditional, unconditional)
7. Stop payment
8. Terminate grant
9. Recover funds
10. Annul grant (partial, total)
11. Suspend grant eligibility

B. Enforcement Actions (EPA/State)

1. Make documented phone call
2. Send letter:
   a. informal inquiry
   b. instructional
   c. Section 308
   d. warning, "no action"
   e. warning, time-controlled
   f. "Show Cause"
3. Issue NOV to State or 309 Administrative Order
4. Hold "Show Cause" hearing
5. Refer to Justice, possibly request:
   a. court-appointed master
   b. 402(h) connection ban/restriction
   c. adjustment of grantee on project priority list

C. State Actions

1. Decertify plant operator (temporarily/permanently)
2. File a complaint vs. engineer's license
3. Establish prequalification procedures for consulting engineers
4. Publish list of "eligible" consulting engineers, contractors
5. Publish list of plants with design problems and the responsible consulting engineers
6. Withhold approval of trust report required for funding of local share
7. Hold "Show Cause" hearings
8. Impose administrative fines
9. Take over operation of plant and bill the community
10. Sewer bans/restrictions
11. Issue State order
12. Refer to State Attorney General

D. General Sanctions (EPA)

1. Withhold approval of Corps of Engineers Section 404 (dredging) permits
2. Deny certificate of adequacy for actions by other Federal agencies

NATIONAL ENFORCEMENT RESPONSE GUIDANCE - ALL MAJOR PERMITTEES

REPORTING VIOLATIONS

| TYPE VIOLATION | CIRCUMSTANCES | BASIC APPROACH |
|---|---|---|
| 1. Failure to report. | Routine permit requirement. Isolated instance. Also, any special, one-time report. | Industrial: Phone call follow-up. Request immediate submittal by specified date. Municipal: Contact Grants. Initiate phone follow-up. |
| 2. Failure to report. | Failure to respond to initial call by submitting report or refusing to acknowledge requirement. | Industrial: Issue notice (letter) of noncompliance (NNC).[1] Municipal: Contact Grants. If no legitimate delays, issue NNC. Otherwise, set new deadline. |
| 3. Failure to report. | Failure to respond to NNC or repeated attempts to contact by phone. Documented lack of cooperation. | Industrial: Proceed with AO.[2] Continue to document case. Municipal: Contact Grants. Take Grant Management actions as appropriate. Document case. |
| 4. Failure to report. | Long-term disregard of requirements, violation of AO, documented lack of cooperation, and coincident effluent or schedule violations. | Industrial: Proceed with referral. Continue to contact and document case. Municipal: Coordinate with Grants. Take Grant Management actions. If ineffective, escalate and/or initiate referral. |
| 5. Failure to report. | Failed to report effluent violation(s) within 5 days of occurence. Not fully aware of problems. | Industrial: Phone follow-up to request immediate submittal. Issue NNC. Municipal: Contact Grants. Initiate phone follow-up. Issue NNC. |
| 6. Failure to report. | Knowingly failed to submit report within 5 days of effluent violation(s). | Industrial: Issue NNC. Cite legal liability for continued reporting violations. If violation continues, proceed as in 3 above. Municipal: Contact Grants. Same as industrial. |
| 7. Failure to report. | Failure to report effluent violation(s) within 5 days of occurence <u>and</u> serious environmental damage takes place or public health endangered. | Industrial: Proceed with AO or referral depending on impact of violation and 'intent' to avoid responsibility. Municipal: Contact Grants. Take Grant Management actions. If ineffective, escalate as in industrial. |
| 8. Reporting False information. | Permittee satisfactorily explains how error made. | Industrial: Issue NNC. Cite severe legal liability for false reporting. Municipal: Contact Grants. Issue NNC citing severity of violation. |
| 9. Reporting false information. | Permittee's culpability unmistakable. 'Intent' can be established. | Industrial: Proceed with criminal referral. Municipal: Proceed with criminal referral. |

1 A NNC should cite the facts about the violation (including dates), identify the permit requirement(s) violated, refer to the legal liability which may be incurred, and require an explanation (by date certain), not only of the incident, but also of the steps taken to return to compliance.

2 This guidance does not attempt to draw the line between 'minor' or 'insignificant' unreported data and that information which is critical in making a compliance determination or enforcement decision. All responses should encourage a change in reporting behavior.

GRANT/COMPLIANCE SCHEDULE EVENTS

| VIOLATION | CIRCUMSTANCES | BASIC APPROACH |
|---|---|---|
| 1. Failure to meet interim requirement. | Will not result in violation of final requirement or other interim dates. | Industrial: Phone follow-up. Secure date by which event should occur. If appropriate, issue NNC.<br>Municipal: Same as above. Identify Grant management actions which may be taken. |
| 2. Failure to meet interim requirement. | Will result in violation of other interim or final dates. Legitimate delays. Acting in good faith. | Industrial: Issue NNC. Follow-up to secure commitment to compliance. Set new deadlines. Track closely.<br>Municipal: Same as industrial; identify Grant management actions which may be taken. |
| 3. Failure to meet interim requirement. | Will result in violation of other interim or final dates. No legitimate delays. Not acknowledging permit responsibilities. | Industrial: Proceed with AO. Issue NNC. Document case.<br>Municipal: Issue NNC. Disallow costs associated with noncompliance. |
| 4. Failure to meet final requirement. | Compliance likely within 90 days. Demonstrated commitment to permit responsibilities. | Industrial: Issue NNC. Monitor closely to verify status.<br>Municipal: Same as industrial. |
| 5. Failure to meet final requirement. | Delay for legitimate reason: strike, act of God, economy. | Industrial: Issue NNC. Secure commitment to complete requirement.<br>Municipal: Same as industrial. |
| 6. Failure to meet final requirement. | 90 days or more overdue. No legitimate delays. Not acknowledging permit responsibilities. Failure to respond to Agency communications. | Industrial: Issue NNC. Proceed with AO. Document case.<br>Municipal: Issue NNC. Withhold up to 10% of grant; recover funds; suspend eligibility for other projects; terminate or annul grant. |
| 7. Failure to meet final requirement. | Same as above and failure to respond to NNC or violation of AO. Requirement is a major step, resulting in a serious environmental or public health situation. | Industrial: Proceed with referral. Document case.<br>Municipal: Proceed with AO or take Grants Management actions as in 6 above. If actions ineffective, proceed with referral. |
| 8. Failure to install monitoring equipment. | No legitimate delays. | Industrial: If NNC ineffective, proceed with AO to begin monitoring (with contractor support if necessary) immediately. Set new deadline.<br>Municipal: Issue NNC. Take grant Management actions. If ineffective, proceed with AO. |

EFFLUENT VIOLATIONS

| | VIOLATION | CIRCUMSTANCES | BASIC APPROACH |
|---|---|---|---|
| 1. | Exceeding interim limits | Isolated discharge under permittee's control. No harmful effects. | Industrial: Telephone follow-up. If response unsatisfactory, issue NNC.<br>Municipal: Same as Industrial. |
| 2. | Exceeding interim limits | Isolated discharge under permittee's control. Jeopardizes water quality. | Industrial: Issue NNC. If response inadequate, proceed with AO.<br>Municipal: Contact Grants. Proceed as with Industrial. |
| 3. | Exceeding interim limits | Isolated discharge under permittee's control. Results in serious environmental damage or public health concerns. | Industrial: Issue NNC. If immediate steps not taken, proceed with AO or referral.<br>Municipal: Contact Grants. Consider Grant Management actions and proceed as with Industrial. |
| 4. | Exceeding interim limits | Isolated discharge under permittee's control. Relatively minor infraction occurring routinely (more than once in four quarters). | Industrial: If second NNC ineffective, proceed with AO.<br>Municipal: Contact Grants. Proceed as with Industrial. |
| 5. | Exceeding interim limits | Isolated discharge not under permittee control. No harmful effects. | Industrial: Issue NNC.<br>Municipal: Same as Industrial. |
| 6. | Exceeding interim limits | Isolated discharge not under permittee control. Serious environmental damage or public health concerns. | Industrial: Same as 3 above.<br>Municipal: Same as Industrial. |
| 7. | Exceeding final limits | Isolated instance. Compliance record generally good. No harmful effects. | Industrial: Telephone follow-up. If corrective steps taken, monitor closely. If not, issue NNC. Document instance.<br>Municipal: Same as Industrial. |
| 8. | Exceeding interim or final limits. | Notification to Agency not made within five days as required by permit. | Industrial: Issue NNC. If repeated proceed with AO.<br>Municipal: Contact Grants. Proceed as with Industrial. |
| 9. | Exceeding interim or final limits | Excursion within Technical Review Criteria but constitutes routine violation. | Industrial: Telephone follow-up. If response unsatisfactory, issue NNC.<br>Municipal: Same as industrial. |
| 10. | Exceeding final limits | Violation continues after issuance of NNC. Demonstrated lack of commitment to permit responsibilities. | Industrial: Proceed with AO. If AO violated, initiate referral.<br>Municipal: Contact Grants. Consider Grant Management actions and proceed with AO or referral. |

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

APR 13 1984

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: FY 1984 Pretreatment Enforcement Activities

FROM: Alvin L. Alm
Deputy Administrator

TO: Regional Administrators

As stated in the Operating Year Guidance for FY 1985-86, EPA's principal emphasis will be to deal effectively with control of toxic and hazardous substances. One of the important programs necessary for accomplishing this objective is the pretreatment program. I think the approval of State and local pretreatment programs and ensuring compliance with categorical standards are critical to the success of controls on discharges containing toxic pollutants.

The Operating Year Guidance discusses a strategy for implementing the pretreatment program during FY 1985-86, but I believe we cannot wait until then to initiate a strong enforcement effort in this area. To date, compliance by POTWs with pretreatment requirements has lagged and we anticipate widespread noncompliance by the electroplaters with the upcoming April and June 1984 deadlines for compliance with categorical standards. Therefore, we must start immediately to improve on POTW program approval rates and begin to ensure compliance with the categorical standards.

The short-term Pretreatment Compliance Strategy, issued on October 28, 1983, by the Office of Water Enforcement and Permits, provides that:

1. Administrative orders, judicial orders or other appropriate mechanisms be used for establishing enforceable schedules requiring submittal of all POTW pretreatment programs by no later than the end of FY 1984; and

2. EPA will enforce categorical standards in both non-approved cities in non-approved States and in approved cities that are not enforcing categorical standards.

Action Required

It is absolutely essential that the Regions exert every effort to get approvable local POTW pretreatment programs, and implement the short-term strategy cited above. In the Strategic Planning and Management System, you have committed to a target of 114 Administrative Orders for this purpose. I expect all Regions to comply with the strategy by issuing as many orders as necessary to POTWs which have failed to submit approvable pretreatment programs, to achieve the September 30 goal, and to do this as quickly as possible.

Each Region should also immediately begin to examine priority cases for referrals based on the attached targeting factors. I would expect that each Region has at least one POTW and one industrial user that are priority candidates for referrals. Those Regions with more pretreatment activity should have a larger number of candidates.

The Regions should submit no later than April 30, to the Associate Enforcement Counsel for Water, Office of Enforcement and Compliance Monitoring (OECM), a one page description for each potential referral candidate which includes the following information:

- Name of candidate and basic information (location, size, control authority status and NPDES permit status, if appropriate);
- Summary of enforcement actions to date;
- Assessment of appropriate targeting factors; and
- Identification of any problems or unresolved issues such as those listed in the targeting factors.

The Office of Water and OECM will consult with the Regions on each of these candidate referrals before a decision is made to proceed. The Regions will manage the cases in coordination with Headquarters. Regions should submit their case referrals to Headquarters for concurrence by July 1, 1984, for POTWs and non-integrated electroplating facilities and by August 1, 1984, for integrated electroplating facilites. OECM will immediately canvass the Regions to ascertain the need for model pleadings. If requested, OECM will develop the model pleadings by June 1 with input from OW and the Regions.

In addition to the above actions, Regions should begin to issue Administrative Orders to industrial users violating categorical standards this fiscal year. Regions should be able to

issue at least 20 Administrative Orders nationwide to noncomplying industrial users during the last two quarters of FY 1984.

During FY 1984, EPA enforcement actions should be focused in areas where EPA is the control authority in order to establish an immediate, visible enforcement presence and to compel selected members of the regulated community to achieve compliance. Obviously, to have a fully credible enforcement program, EPA must ensure these efforts are expanded in FY 1985 and beyond to cover all unapproved local and State programs, a larger number of categorical standard noncompliers, and oversight of approved POTW and State programs. OW and OECM are currently developing a long-term strategy to address these and other issues.

I look forward to seeing the results of your immediate enforcement efforts.

Attachment

ATTACHMENT 1

## FACTORS FOR IDENTIFYING POTW AND INDUSTRIAL USER PRETREATMENT REFERRALS

The following factors should be used in identifying potential referrals of POTW and industrial users (IUs) violating pretreatment program requirements. These factors are intended to establish broad categories from which initial cases should be selected. There may be some cases appropriate for referral that may not fit these factors. Such cases, of course, should be considered but final determination should be coordinated as discussed in the memorandum.

It should be noted that in developing enforcement cases, violations by POTWs for failure to submit required pretreatment programs will be relatively easy to document. This may not be the case for documentation of IU categorical standard violations. In many cases, the standards are complex and determinations of noncompliance may be difficult and resource intensive. However, since a limited number of IU referrals are envisioned in the short term, extensive sampling inspections should not be necessary. Regions already have adequate information on some noncompliers. Such information can be obtained from POTWs, BMRs where available, citizen complaints, contractors assisting in pretreatment program implementation, and past inspections.

Where possible, pretreatment enforcement actions should be coordinated with ongoing NPDES permit enforcement actions. Where a Region is referring a case for NPDES permit violations under the National Municipal Policy, a pretreatment count should be added where appropriate. In the case of an IU, a categorical standard violation which causes or contributes to a NPDES permit violation by a POTW would make, all other things being equal, a particularly telling case. Since the latter situation will be rare and may be very difficult to identify, the merging of enforcement actions is not essential. It is only suggested as a way to make stronger enforcement cases and/or to reduce resource burden.

### POTW Referral Factors

1. POTW should be in violation of an AO requiring program submittal or have demonstrated a recalcitrant attitude in failing to develop the required pretreatment program. In the latter case, referrals may be warranted even if an AO has not been issued. Violations of AOs should be priority candidates for referrals.

2. POTW should be in States where EPA has program responsibility. In order to maximize the deterrent effect of enforcement actions, the POTW should be relatively large and should have a significant number of industrial users subject to categorical standards.

Industrial User Referral Factors

1. IU violating categorical standards should be in a State that does not have pretreatment program authority, should be a facility that is significant in terms of size and/or wasteflow, and that has demonstrated a recalcitrant attitude. Priority for an IU case should be based on the extent of noncompliance with the categorical standards. It is preferable that the IU be in an area where the POTW does not have an approved pretreatment program, is not likely to obtain approval in the near future, and/or is taking little or no action on its own to enforce the categorical standards or comparable State or local standards. It is not necessary for an AO to be issued before a referral.

2. Potential cases raising unresolved issues such as removal credits or unresolved category determination requests should be assessed on a case-by-case basis in close consultation with Headquarters. In addition, it is highly desirable that there be some documentation of how the categorical standard applies to a given IU prior to the initiation of enforcement action.

3. Referrals should not be initiated solely because the IU did not submit required baseline monitoring reports (unless such failure is a violation of a previously issued AO). However, non-submittal of these reports may be one of several reasons for initiating a referral. BMRs that have been submitted should be reviewed in preparing a referral that is initiated for noncompliance with categorical standards. Additionally, referrals involving nonsubmittal of BMRs should be considered so that noncompliance with reporting requirements does not exclude the IU from enforcement.

4. Candidates for AOs are IUs that did not submit baseline monitoring reports or are out of compliance with the categorical standards. Good faith/bad faith and time needed for compliance should be taken into account when deciding whether or not to issue an AO or initiate a referral.

# Section 311
# Enforcement

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

JAN 8 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

TO: Regional Enforcement Directors
Surveillance and Analysis Directors
Regional Oil and Hazardous Materials Coordinators

FROM: Assistant Administrator for Enforcement and General Counsel

SUBJECT: Oil Spill Enforcement

Attached is a status report on EPA Oil and Hazardous Materials spill enforcement actions covering the period January 1 to October 1, 1973. It shows a great improvement over last year's record, although some Regions should apparently be more active. Some Regions with few actions reported may be relying on strong Coast Guard enforcement programs. All Regions should send me the Coast Guard records that would indicate the number of enforcement actions taken and the results to date. This may present a more complete picture of the status of spill enforcement activities.

I realize that lack of manpower and resources may result in the inability to follow up oil spill referrals, particularly in light of the present priority being rightly accorded to permit issuance and follow-up. What is needed, I believe, is a more efficient use of those Enforcement and Surveillance and Analysis personnel already working on oil spill problems. It is particularly important that Surveillance and Analysis personnel work closely with Enforcement staffs to maximize the number of investigations that can be completed and cases that can be prepared, in addition to the vital job of oil spill clean-up. Wherever reported spills cannot be investigated by the Environmental Protection Agency or the U. S. Coast Guard, a Section 308 information request should be sent to the discharger. Regional Administrators were delegated the authority to administer Section 308 in the Part 125--NPDES regulations, promulgated May 22, 1973 (38 Federal Register 13531). You should also encourage State agencies to provide EPA with evidence obtained from State investigations.

Some Regions have already been successfully using Section 308 letters in their oil enforcement programs. For those who have not, a suggested format is attached which should be helpful, which was prepared by Henry Stetina. Regional comments on this format should be forwarded to Rick Johnson, with a copy to Henry Stetina.

The following guidelines should apply when a Section 308 letter is sent to a discharger:

1. Section 308 letters should be used when a violator reports a spill which EPA is unable to investigate on scene.

2. Section 308 letters may also be used occasionally to supplement EPA or State investigations.

3. Section 308 information requests should not be utilized to investigate situations which may culminate in criminal prosecution.

4. Section 308 letters must be posted by "Registered Mail -- Return Receipt Requested."

5. Each Region must carefully maintain a log indicating for each letter the date mailed, the date received and the date a response is due.

6. When a Section 308 letter is used, the Enforcement Division should plan to exercise Section 309 sanctions if the violator fails to respond or if the response contains false statements -- the falsity of which can be established.

7. If the complete information submitted in response to the letter indicates that a violation did occur, that evidence should be referred to the Coast Guard as basis for a Section 311(b)(6) civil penalty.

A copy of the discharger's response should be automatically sent to the Emergency Response Branch in your Region.

To improve oil spill enforcement procedures within Regions, and to share successful Regional techniques among Regional staffs, we are planning a meeting for a representative of each Oil Enforcement staff and their counterpart in the Emergency Response Branch on February 20 and 21, 1973, in Atlanta, to be conducted in cooperation with the Oil and Hazardous Materials Division. Any suggestions for possible topics

to be included in the agenda should be sent to Patricia O'Connell, Headquarters. This will be a working level meeting which will focus on legal and investigative problems. Coast Guard and Justice Department participation is planned. We also plan to discuss the new EPA spill prevention regulations, and their implementation.

Alan G. Kirk II

Enclosures

cc: OGC Chron
Reading

Rick Johnson
Henry Stetina
Patricia O'Connell
Assistant Administrator for Air & Water Programs

RWJohnson:dwk:12/28/73

CONCURRENCES

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
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OFFICIAL FILE C

| Region | No. of Oil Spills Reported to Emergency Branch | No. of Oil Spills EEB Reported to Enforcement | No. of Spills Enforcement Referred to Coast Guard | No. of Spills Enforcement Referred to U. S. Attorney (FWPCA) | No. of Spills Enforcement Referred to U. S. Attorney (Refuse Act) | Total Enforcement Actions |
|---|---|---|---|---|---|---|
| I | 800 | 175 | 17 | 3 | 9 | 29 |
| II | 217 | 15 | 7 | - - | 1 | 8 |
| III | 603 | 100 | 51 | 3 | 1 | 55 |
| IV | 192 | 61 | 52 | 19 | - - | 71 |
| V | 210 | 310 | 16 | 4 | 30 | 50 |
| VI | 499 | 17 | 8 | 1 | 3 | 12 |
| VII | 151 | 151 | 49 | 16 | 4 | 69 |
| VIII | 477 | 42 | 22 | 1 | - - | 23 |
| IX | - - | 24 | 9 | 1 | - - | 10 |
| X | 10 | 10 | 9 | 1 | - - | 10 |
| Total. | 3314 | 905 | 240 | 49 | 48 | 337 |

OIL AND HAZARDOUS MATERIALS SPILL ENFORCEMENT

JANUARY 1 - DEC 1, 1973

Draft letter for Regional Administrators' signature

Gentlemen:

The Environmental Protection Agency has received a report that your company was involved in the discharge of a harmful quantity of oil, estimated to be gallons into waters of the United States, to-wit: (name of waterway) near (city), (state) on or about (time, date) from a (truck, pipeline or facility) which you own (or operate).

The 1972 Amendments to the Federal Water Pollution Control Act (hereinafter, the "Act") prohibits the discharge of oil or a hazardous substance into or upon the waters of the United States in harmful quantities [33 U.S.C. 1321(b)(3)]. Any owner or operator of a vessel or facility from which oil or a hazardous substance is discharged shall be assessed a civil penalty by the Coast Guard of not more than $5,000 [33 U.S.C. 1321(b)(6)]. The definition of harmful quantities of oil appears in Title 40, Code of Federal Regulations, Section 110.3.

In order for this Agency to carry out its responsibilities under the Act, you are required under authority of Section 308 of the Act (33 U.S.C. §1318) to submit a letter of explanation including the specific information listed in Attachment A.

The letter of explanation must be submitted to: (Enforcement Director, Region address) within fourteen (14) days of receipt of this letter. It must be signed by a duly authorized official of the corporation or company. The information submitted will be considered in evaluating whether the oil spill violated Section 311. (Please note that your reply in no way constitutes immediate notification of a spill to the appropriate federal agency, as required by Section 311(b)(5).) Section 309 of the Act (33 U.S.C. §1319) provides civil and criminal penalties for failure to submit information required under Section 308 and criminal penalties for knowingly making a false statement in any submission under Section 308.

If you have any questions please contact (name), Attorney Legal Branch, Enforcement Division, at (phone number).

Sincerely yours,

Attachment A

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Report of Oil or Hazardous Material Discharge

The following information is submitted concerning a discharge of oil or hazardous material:

1. Time and date of discharge.

2. Location of discharge, including:

   a. name of municipality and state;

   b. name and address of industry or commercial establishment at which the discharge occurred, if applicable;

   c. distance from receiving waterway.

3. Type of material discharged.

4. Quantity discharged.

5. Quantity of material which eventually reached the receiving waterway, and date and time it was discovered.

6. Type of vessel or facility (ship, barge, storage tank, tank truck, etc.) in which the oil was originally contained.

7. Describe in detail what actually caused the discharge.

8. Name and address of owner of facility causing the discharge.

9. Name and address of operator of facility causing the discharge.

10. Describe damage to the environment.

11. Describe steps the above named owner or operator took to clean up the spilled oil and dates and times steps were taken.

12. Actions by company to mitigate damage to the environment.

13. Measures taken by your company to prevent future spills.

14. List the federal and state agencies. if any, to which the owner or operator named in 8 and 9 above reported this discharge. Show the agency, its location, the date and time of the notification, and the official contacted.

15. List the names and addresses of persons you believe have knowledge of the facts surrounding this incident.

16. Name and address of person completing this report.

17. Your relationship, if any, to owner or operator.

18. List other information which you wish to bring to the attention of EPA. For example, number employed by the firm.

The above answers are true to the best of my knowledge and belief.

_____
Signature of person completing this report.

Date of Signature:_____

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

DEC 24 1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

MEMORANDUM

To: Regional Enforcement Directors

From: Director, Enforcement Division

Subject: Civil Penalties Collected for Violations of 40 CFR Part 112 - Transmittal to USCG Districts for Deposit in Revolving Fund Account

Civil penalties collected for violations of the subsections of section 311 and regulations issued pursuant to section 311 of the FWPCA are being deposited in the revolving fund established by section 311(k) of the FWPCA which reads as follows:

> "(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury not to exceed $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

In compliance with the foregoing, civil penalties collected for violations of EPA's Oil Pollution Prevention Regulations, 40 CFR Part 112, are to be forwarded, by the EPA regional offices, to the main office of the U.S. Coast Guard District within which the violation occurred, for inclusion in the Coast Guard's revolving fund account established pursuant to section 311(k) of the FWPCA. The following procedures should be followed:

(1) Checks in payment of the civil penalty should be made payable to the "United States of America." Checks made payable to "EPA," "Treasurer of the U.S.," etc. are acceptable so long as the amount of the check is the same as the civil penalty. Do <u>not</u> endorse any such checks.

(2) The checks should be forwarded to the U.S. Coast Guard District with a cover letter setting out the following:

(a) Legal name and address of owner/operator charged with the violation.

(b) Date and nature of violation, including a citation of the relevant statutory and regulatory provisions. (i.e., failure to have SPCC Plan in violation of 40 CFR Part 112.3).

(c) EPA Regional Office Enforcement file number.

(d) Date of check, name of bank, amount of check.

(e) A statement that the check is being forwarded for deposit in the U.S. Coast Guard's revolving fund, and

(3) At times the EPA Part 112 violation will have as its genesis facts establishing other law violations. Where the Part 112 violation resulted from facts establishing another Federal law violation, including but not limited to the FWPCA's section 311 provisions relating to oil spills or failure to notify, identification data on the other Federal law violation, for the purpose of avoiding possible conflicts, should be included in the transmittal to the USCG.

(4) Where the violation, for which the check was submitted, is also the basis for a referral to a U.S. Attorney, the U.S. Attorney should be informed of the disposition of the EPA civil penalty proceeding.

J. Brian Holloy

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

APR 20 1975

MEMORANDUM

To: All Regional Administrators

From: Acting Deputy Assistant Administrator for Water Enforcemen
Director for Oil and Hazardous Materials Control Division

Subject: Spill Prevention Control and Countermeasure (SPCC) Plan Program

This memorandum covers a number of SPCC program issues raised at the March 27-28 joint meeting of Environmental Emergency Branch and Enforcement Division representatives in San Francisco.

Warning Letters to Violators

Several Regions are considering the transmission of warning letters as a means of giving notice to violations of SPCC requirements and obtaining compliance without going through the civil penalty assessment procedures. The warning letter device was discussed vigorously at the San Francisco meeting with strong arguments made both for and against warning letters. After careful consideration we have decided that warning letters are unnecessary and should not be used. The preferred procedure, upon detection of a violation, is to issue a notice of violation with a proposed civil penalty. The notice of violation will get the attention and compliance response from the owner or operator faster than a warning letter. As appropriate, the penalty can be compromised down to a much smaller figure or waived altogether. The notice of violation, when used in this manner, has the advantages of a warning letter but provides more clout with no loss of time.

Nature and Conduct of Civil Penalty Hearings

It is important that everyone connected with the civil penalty hearings provided for in 40 C.F.R. Part 114 understand that these hearings are to be informal. They can be held in an office or conference room with the casualness of a routine meeting. No formal record is necessary. No undue attention need be given to the materiality or relevance of statements or evidence offered by participants. The rules of evidence employed in courtrooms and formal hearings are not appropriate for Part 114 civil penalty hearings. No cross examination is required. The time and resources of Regional attorneys involved with these hearings should be kept to a minimum.

It should be noted that the Presiding Officer at a civil penalty hearing can raise as well as lower a proposed civil penalty.

Selection of Hearing Officers

Section 114.6 of the civil penalty regulations provides that the Presiding Officer may be any attorney in EPA who has no prior connection with the case. To maintain an atmosphere of fairness and impartiality, Regional Administrators should not appoint Enforcement Division Directors or other Enforcement Division supervisory personnel. Similarly, it is desirable to avoid appointing water enforcement attorneys. Because of the informality of the hearing and the relatively simple responsibilities of the Presiding Officer, Agency Administrative Law Judges should not be asked to conduct these hearings. The most desirable candidates for Presiding Officers are attorney's in the Regional Counsel's Office. Also acceptable, although with some loss of the appearance of impartiality, are Enforcement Division attorneys working in non-water programs such as air and pesticides.

Criteria for Civil Penalty Levels

The desirability of establishing national criteria for uniform assessment of civil penalties was discussed at the San Francisco meeting, but no conclusion was reached. We have decided to form a Headquarters-Regional work group to determine whether such criteria would be desirable and, if so, to set up a matrix or some other system for uniform civil penalty assessment.

Jurisdiction Over Local, State, and Federal Facilities

Doubt as to whether federal, state, or local facilities are subject to SPCC requirements has been raised because the definition of "person" in section 311 does not explicitly include federal, state, and local entities. Our interpretation of section 311 and the SPCC regulations is that local, state, and federal entities are subject to SPCC plan preparation and implementation requirements. A General Counsel's legal memorandum to this effect will be distributed shortly.

Inclusion of Animal and Vegetable Oils in Section 311 Definition of "Oil"

Attached are four letters discussing the inclusion of animal and vegetable oils in the section 311 definition of "oil." EPA and the U.S. Coast Guard have always treated spills of non-petroleum based oils as subject to the civil penalty and cleanup provisions of section 311. However, the National Broiler Council and similar organizations have questioned this interpretation, and, as a result, many users of animal and vegetable oils are not in compliance with the SPCC regulations and have not submitted requests for extensions of time for compliance. In his January 9, 1975, letter Alan Kirk made clear EPA's position that non-petroleum oils are included in the section 311 definition of "oil" and that animal and vegetable oil users are subject to the SPCC plan preparation and implementation requirements of Part 112.

You will note in Mr. Kirk's January 9 letter and Rick Johnson's February 3 letter that, in view of the good faith efforts of the animal and vegetable oil users to determine whether their facilities are subject to the SPCC regulations, we will consider requests for extensions of time for compliance received from users of non-petroleum based oils. Such requests should be approved in cases where the requestor can demonstrate his reasonable belief that he was not subject to the SPCC program and his firm commitment to comply fully with SPCC requirements. Civil penalties for failure to request extensions of time, in accordance with the timetable set out in Part 112, should not be imposed in these situations. Part 112 will be amended to clarify that the Regional Administrators have the authority to grant such extensions for appropriate reasons in addition to those listed in §112.3(f). Any grant of additional time should provide for

8 1975

MEMORANDUM

To: Regional Enforcement Directors

From: Acting Deputy Assistant Administrator for Water Enforcement

Subject: Section 311 Jurisdiction over Local, State, and Federal Entities

In Ken Biglane's and my joint April 23, 1975, memorandum entitled "Spill Prevention Control and Countermeasure (SPCC) Plan Program," I promised to distribute the General Counsel's opinion as to whether the definition of "person" in section 311 includes federal, state, and local entities. Attached is such an opinion, dated April 25, 1975, from Ray McDevitt, Associate General Counsel, Water.

The General Counsel's opinion concludes that all onshore and offshore facilities, including those owned or operated by local, state, and federal entities are subject to section 311 and the SPCC Plan regulations, 40 CFR Part 112. Those Regions which are not already doing so should ensure that all local, state, and federal facilities are in compliance with SPCC Plan preparation and implementation requirements.

/s/

J. Brian Molloy

Enclosure

Prepared by: RADennett/dmk/EG-338/5-7
bcc: J. Brian Molloy, EG-335
EG-338 Reading (D.Lyons)
R.Fennett, EG-338

bcc: Ken Biglane
Ray McDevitt

5 SEP 1979

Honorable Clifford L. Alexander, Jr.
Secretary of the Army
Washington, D.C. 20310

My dear Mr. Secretary:

I am responding to your letter of March 29, 1979, requesting my opinion on two questions arising under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344. You asked whether the Act gives the ultimate administrative authority to determine the reach of the term "navigable waters" for purposes of § 404 to you, acting through the Chief of Engineers, or to the Administrator of the Environmental Protection Agency; and similarly you ask whether the Act gives the ultimate administrative authority to determine the meaning of § 404(f) to you or to the Administrator. Although no specific provision in the Federal Water Pollution Control Act or specific statement in its legislative history speaks directly to your questions, I am convinced after careful consideration of the Act as a whole that the Congress intended to confer upon the Administrator of the Environmental Protection Agency the final administrative authority to make those determinations. Before turning to the specific reasons for my conclusions, I believe that some background description is in order.

The basic objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As one means of achieving that objective, the Act makes the discharge of any pollutant unlawful except in accordance with standards promulgated or permits issued under the Act. 33 U.S.C. § 1311(a). Permits for the discharge of pollutants may be obtained under §§ 402 and 404 of the Act, 33 U.S.C. §§ 1342, 1344, if certain requirements are met. The Administrator of the Environmental Protection Agency and the Secretary of the Army, acting through the Chief of Engineers, share responsibility for issuance of those permits and enforcement of their terms. The Administrator issues permits for point source discharges under the National Pollutant Discharge

Elimination System (NPDES) program established by § 402; the Secretary of the Army issues permits for the discharge of dredged or fill material under § 404. 1/

During consideration of the legislative proposals that resulted in the Federal Water Pollution Control Act Amendments of 1972, the question whether the Secretary should play any role, through the Chief of Engineers, in issuing permits was hotly debated. The bill introduced in the Senate, S. 2770, gave the Administrator the authority to issue permits and treated discharges of dredged or fill material no differently from discharges of any other pollutant. During consideration of the bill both by the Senate Public Works Committee 2/ and on the Senate floor, 3/ amendments were proposed to give the authority to issue permits for discharges of dredged or fill material to the Secretary of the Army. These amendments were offered in recognition of the Secretary's traditional responsibility under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 401 et seq., to protect navigation, including the responsibility to regulate discharges into the navigable waters of the United States. Concerned that the

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1/ A point source is defined in the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . ." 33 U.S.C. § 1362(14).

Dredged and fill material are not defined in the Act, but are defined in regulations promulgated by the Corps of Engineers: Dredged material is "material that is excavated or dredged from waters of the United States," while fill material is "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body." 33 C.F.R. § 323.2(k), (m).

2/ Senate Comm. on Public Works, 93rd Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973), at 1509 (hereafter "Legislative History").

3/ Id. at 1386.

Secretary would have insufficient expertise to evaluate the environmental impact of a proposed dredge or fill operation, Senator Muskie, the author of S. 2770, opposed those amendments. 4/ He proposed instead that the Secretary certify the need for any permit for discharge of dredged material to the Administrator, who would retain permit issuing authority. The Senate adopted Senator Muskie's proposal. 5/

The House of Representatives bill, H.R. 11896, on the other hand, gave the Secretary complete responsibility over issuing permits for the discharge of dredged or fill material. Although the House bill required the Secretary to consult with the EPA on the environmental aspects of permit applications, the Secretary had the authority to make the final decision on permit issuance. 6/

The Conference Committee substitute, passed by the Congress as § 404 of the Federal Water Pollution Control Act Amendments of 1972, represented a compromise between the Senate and House positions. It established a separate permit procedure for discharges of dredged or fill material to be administered by the Secretary, acting through the Chief of Engineers. The Administrator, however, retained substantial responsibility over administration and enforcement of § 404. The EPA responsibilities were perhaps best summarized by Senator Muskie during the Senate's consideration of the Conference Report:

> First, the Administrator has both responsibility and authority for failure to obtain a Section 404 permit or comply with the condition thereon. Section 309 authority is available because discharge of the "pollutant" dredge spoil without a permit or in violation of a permit would violate Section 301(a).
>
> Second, the Environmental Protection Agency must determine whether or not a site to be used for the disposal of dredged spoil

4/ Id. at 1387-88.

5/ Id. at 1393.

6/ Id. at 816.

> is acceptable when judged against the criteria established for fresh and ocean waters similar to that which is required under Section 403.
>
> Third, prior to the issuance of any permit to dispose of spoil, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue. 7/

Subsequent amendment of § 404 by the Clean Water Act of 1977, 91 Stat. 1566, altered the relationship between the Secretary and the Administrator in only limited fashion. The amendments gave the Administrator authority comparable to the authority conferred on him by the § 402 NPDES program to approve and to monitor State programs for the discharge of dredged or fill material. 33 U.S.C. § 1344(g)-(l). New subsection (s) gave the Secretary of the Army explicit authority under the Act to take action to enforce those § 404 permits which he had issued. New subsection (n) cautioned that the amendments should not be considered to detract from the Administrator's enforcement authority under § 309 of the Act, 33 U.S.C. § 1319. 8/

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7/ Id. at 177. This statement, which is often quoted in explanation of the relative responsibilities of the Corps and EPA under § 404, is included in the Congressional Record as a supplement to Senator Muskie's oral remarks.

8/ Section 309 empowers the Administrator to order compliance with the conditions or limitations of permits issued under § 402 and State permits issued under § 404, and to seek civil and criminal penalties with respect to such permits. Importantly, as the above-quoted history of § 404 indicates, the section also gives the Administrator the authority to bring enforcement actions to stop discharges without a required permit, since such discharges violate the basic prohibition set out in § 301 of the Act. 33 U.S.C. § 1319.

With that background, I turn to your specific questions. First, you asked whether the Secretary or the Administrator has the authority under § 404 to resolve administrative disputes over interpretation of the jurisdictional term "navigable waters." That question is an important one, since the authority to construe that term amounts to the authority to determine the scope of the § 404 permit program.

The term "navigable waters," moreover, is a linchpin of the Act in other respects. It is critical not only to the coverage of § 404, but also to the coverage of the other pollution control mechanisms established under the Act, including the § 402 permit program for point source discharges, 9/ the regulation of discharges of oil and hazardous substances in § 311, 33 U.S.C. § 1321, and the regulation of discharges of vessel sewage in § 312, 33 U.S.C. § 1322. Its definition is not specific to § 404, but is included among the Act's general provisions. 10/ It is, therefore, logical to conclude that Congress intended that there be only a single judgment as to whether--and to what extent--any particular water body comes within the jurisdictional reach of the federal government's pollution control authority. We find no support either in the statute or its legislative history for a conclusion that a water body would have one set of boundaries for purposes of dredged and fill permits under § 404 and a different set for purposes of the other pollution control measures in the Act. On this point I believe there can be no serious disagreement. Rather, understanding that "navigable waters" can have only one interpretation under the Act, the question is whether Congress intended ultimately for the Administrator or the Secretary to describe its parameters.

The question is explicitly resolved neither in § 404 itself nor in its legislative history. My conclusion that the

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9/ The Act, as stated above, contains a general prohibition against the "discharge of any pollutant" except in compliance with particular standards and permit procedures. § 301(a), 33 U.S.C. § 1311(a). The definition of the phrase "discharge of pollutants" includes a discharge from a point source into "navigable waters." § 502(12), 33 U.S.C. § 1362(12).

10/ "Navigable waters" is defined under the Act as meaning "the waters of the United States, including the territorial seas." § 502(7), 33 U.S.C. § 1362(7).

Act leaves this authority in the hands of the Administrator thus necessarily draws upon the structure of the Act as a whole. First, it is the Administrator who has the overall responsibility for administering the Act's provisions, except as otherwise expressly provided. § 101(d), 33 U.S.C. § 1251(d). It is the Administrator as well who interprets the term "navigable waters" in carrying out pollution control responsibilities under sections of the Act apart from § 404.

Additionally, while the Act charges the Secretary with the duty of issuing and assuring compliance with the terms of § 404 permits, it does not expressly charge him with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play. Enforcement authority over permitless discharges of dredged and fill material is charged, moreover, to the Administrator. 11/

Finally, any argument in favor of the Secretary's authority to interpret the reach of the term "navigable waters" for purposes of § 404 is substantially undercut by the fact that he shares his duties under the section with the Administrator. As outlined above, § 404 authorizes the Administrator to develop guidelines with respect to selection of disposal sites, to approve and oversee State programs for the discharge of dredged or fill material, and to veto on environmental grounds any permit the Secretary proposes to issue.

I therefore conclude that the structure and intent of the Act support an interpretation of § 404 that gives the Administrator the final administrative responsibility for construing the term "navigable waters."

Your second question is whether the Secretary or the Administrator has the final authority to construe § 404(f) of the Act. 33 U.S.C. § 1344(f). That subsection exempts

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11/ 33 U.S.C §§ 1311, 1344(n). The Secretary does have enforcement authority with respect to permitless discharges into navigable waters under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 407, 413. Navigable waters for purposes of that Act have a more restrictive meaning, however, than navigable waters under the Federal Water Pollution Control Act. E.g., National Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

certain activities from regulation under §§ 404, 301(a), and 402. The Corps of Engineers has argued that the responsibility for interpretation of the subsection insofar as it relates to the issuance of the Corps' § 404 permits is vested in the Secretary. For reasons similar to those discussed in connection with your first question, I disagree. It is the Administrator who has general administrative responsibility under the Act, 33 U.S.C. § 1251(d), and who has general authority to prescribe regulations, 33 U.S.C. § 1361(a). In reviewing the statute and its legislative history, I find no indication that Congress intended that the Secretary have final authority to construe that subsection for purposes of his § 404 program. Absent such an indication, I believe that the Act would be strained by a construction allowing the Secretary to give a different content to § 404(f) than the Administrator gives that subsection as it relates to pollution control provisions apart from § 404. I therefore conclude that final authority under the Act to construe § 404(f) is also vested in the Administrator.

Yours sincerely,

Benjamin R. Civiletti
Attorney General

Honorable Clifford L. Alexander, Jr.
Secretary of the Army
Washington, D.C. 20310

My dear Mr. Secretary:

If you approve, I should like to have published, in accordance with 28 U.S.C. 511, my opinion to you regarding questions arising under § 404 of the Federal Water Pollution Control Act.

Please let me know whether you have any objections to the publication.

Yours sincerely,

Benjamin R. Civiletti
Attorney General

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

OFFICE OF ENFORCEMENT

MEMORANDUM

AUG 18 1980

SUBJECT: Solid Waste Discharges under Consolidated Permit Regulations: Procedures Pending Corps of Engineers Agreement with Changed Definition of Fill Material

FROM: Director, Enforcement Division (EN-338)

TO: Regional Enforcement Division Directors

Background

On May 19, 1980, EPA issued its Consolidated Permit Regulations, 40 CFR Parts 122, 123, 124 and 125; 45 F.R. 33287, which incorporated a change in the definition of fill material which affects sections 402 and 404 of the Clean Water Act. The new regulations specify,

> Fill material (404) means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose. 40 CFR §122.3; 45 F.R. 33419.

As the preamble to the new regulations notes,

> The [earlier definition] defined fill material as material discharged for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body, reserving to the NPDES program discharges with the same effect which are primarily for the purpose of disposing of waste. 45 F.R. 33299.

All discharges of pollutants which meet the new definition of fill material, including solid waste discharges, require a section 404 permit issued by the Corps of Engineers. The Corps, however, has not changed its own regulations to coincide with the change adopted by EPA. 1/ Resolution of this inconsistency is currently the subject of discussions between EPA and the Corps. Until this issue is resolved, the following procedures should be observed.

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1/ The Corps' regulations define fill material as any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. 33 CFR § 323.2(m).

Inquiries and Permit Applications

If Regional offices receive inquiries concerning permit requirements for discharges of solid wastes, they should advise the inquirer that unpermitted discharges into waters of the United States are prohibited by section 301(a) of the Clean Water Act, 33 U.S.C. §1311. In addition, Regions should inform inquirers that they should apply to the Corps of Engineers for a section 404 permit pursuant to EPA's Consolidated Permit Regulations.

In the unlikely event that a Regional office receives an NPDES application for solid waste discharge, the Region should accept the application and notify Joan Ferretti of my staff at FTS 755-2870. The application should be held pending specific guidance from this office regarding the status of our ongoing discussions with the Corps.

If you have further questions, please contact Joan Ferretti of my staff.

J. Brian Molloy

J. Brian Molloy

cc: Regional Section 404 Coordinators

alternative need not be considered to have "less adverse" impact.

Several commenters questioned the legal basis for requiring the permitting authority to select the least damaging alternative. (The use of the term "select" may have been misleading. Strictly speaking, the permitting authority does not select anything; he denies the permit if the guidelines requirements have not been complied with.) As mentioned above, the statute leaves to EPA's discretion the exact implementation of the alternative requirement in section 403 of the Act. In large part, the approach taken by these regulations is very similar to that taken by the recent section 403(c) regulations (45 FR 65942, October 3, 1980). There is one difference: the Guidelines always prohibit discharges where there is a practicable, less damaging alternative, while the section 403(c) regulations only apply this prohibition in some cases. This difference reflects the wide range of water systems subject to 404 and the extreme sensitivity of many of them to physical destruction. These waters form a priceless mosaic. Thus, if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided. Of course, where a category of 404 discharges is so minimal in its effects that it has been placed under a general permit, there is no need to perform a case-by-case alternatives analysis. This feature corresponds, in a sense, to the category of discharges under section 403 for which no alternatives analysis is required.

Third, some commenters were concerned that the alternative consideration was unduly focused on water quality, and that a better alternative from a water quality standpoint might be less desirable from, say, an air quality point of view. This concern overlooks the explicit provision that the existence of an alternative which is less damaging to the aquatic ecosystem does not disqualify a discharge if that alternative has other significant adverse environmental consequences. This last provision gives the permitting authority an opportunity to take into account evidence of damage to other ecosystems in deciding whether there is a "better" alternative.

Fourth, a number of commenters were concerned that the Guidelines ensure coordination with planning processes under the Coastal Zone Management Act, § 208 of the CWA, and other programs. We agree that where an adequate alternatives analysis has already been developed, it would be wasteful not to incorporate it into the 404 process. New § 230.10(a)(5) makes it clear that where alternatives have been reviewed under another process, the permitting authority shall consider such analysis. However, if the prior analysis is not as complete as the alternatives analysis required under the Guidelines, he must supplement it as needed to determine whether the proposed discharge complies with the Guidelines. Section 230.10(a)(4) recognizes that the range of alternatives considered in NEPA documents will be sufficient for section 404 purposes, where the Corps is the permitting authority. (However, a greater level of detail may be needed in particular cases to be adequate for the 404(b)(1) Guidelines analysis.) This distinction between the Corps and State permitting authorities is based on the fact that it is the Corps' policy, in carrying out its own NEPA responsibilities, to supplement (or require a supplement to) a lead agency's environmental assessment or impact statement where such document does not contain sufficient information. State permitting agencies, on the other hand, are not subject to NEPA in this manner.

We have moved proposed § 230.10(a)(1) (iii), concerning "other particular volumes and concentrations of pollutants at other specific rates", from the list of alternatives in § 230.10 to Subpart H, Minimizing Adverse Effects, because it more properly belongs there.

Definitions (§ 230.3)

A number of the terms defined in § 230.3 are also defined in the Corps' regulations at 33 CFR 323.2, applicable to the Corps' regulatory program. The Corps has recently proposed some revisions to those regulations and expects to receive comments on the definitions. To ensure coordination of these two sets of regulations, we have decided to reserve the definitions of "discharge of dredged material," "discharge of fill material," "dredged material," and "fill material," which otherwise would have appeared at § 230.3 (f), (g), (j), and (l).

Although the term "waters of the United States" also appears in the Corps' regulations, we have retained a definition here, in view of the importance of this key jurisdictional term and the numerous comments received. The definition and the comments are explained below.

Until new definitions are published, directly or by reference to the Corps' revised regulations, users of these Guidelines should refer to the definitions in 33 CFR 323.2 (except in the case of state 404 programs, to which the definitions in 40 CFR § 122.3 apply.)

Waters of the United States: A number of commenters objected to the definition of "waters of the United States" because it was allegedly outside the scope of the Clean Water Act or of the Constitution or because it was not identical to the Corps' definition. We have retained the proposed definition with a few minor changes for clarity for several reasons. First, a number of courts have held that this basic definition of waters of the United States reasonably implements section 502(7) of the Clean Water Act, and that it is constitutional (e.g., *United States v. Byrd, 609 F.2d 1204, 7th Cir. 1979; Leslie Salt Company v. Froehlke*, 578 F.2d 742, 9th Cir. 1978). Second, we agree that it is preferable to have a uniform definition for waters of the United States, and for all regulations and programs under the CWA. We have decided to use the wording in the recent Consolidated Permit Regulations, 45 Fed. Reg. 33290, May 19, 1980, as the standard.*

Some commenters suggested that the reference in the definition to waters from which fish are taken to be sold in interstate commerce be expanded to include areas where such fish spawn. While we have not made this change because we wish to maintain consistency with the wording of the Consolidated Permit regulations, we do not intend to suggest that a spawning area may not have significance for commerce. The portion of the definition at issue lists major examples, not *all* the ways which commerce may be involved.

Some reviewers questioned the statement in proposed § 230.72(c) (now § 230.11(h)) that activities on fast land created by a discharge of dredged or fill material are considered to be in waters of the United States for purposes of these Guidelines. The proposed language was misleading and we have changed it to more accurately reflect our intent. When a portion of the Waters of the United States has been legally converted to fast land by a discharge of dredged or fill material, it does not remain waters of the United States subject to section 301(a). The discharge may be legal because it was authorized by a permit or because it was made before there was a permit requirement. In the case of an illegal discharge, the fast land may remain subject to the jurisdiction of the Act until the government determines not to seek restoration. However, in authorizing a

* The Consolidated Permit Regulations exclude certain waste treatment systems from waters of the United States. The exact terms of this exclusion are undergoing technical revisions and are expected to change shortly. For this reason, these Guidelines as published do not contain the exclusion as originally worded in the Consolidated Permit Regulations. When published, the corrected exclusion will apply to the Guidelines as well as the Consolidated Permit Regulations.

discharge which will create fast lands, the permitting authority should consider, in addition to the direct effects of the fill inself, the effects on the aquatic environment of any reasonably foreseeable activities to be conducted on that fast land.

Section 230.54 (proposed 230.41) deals with impacts on parks, national and historical monuments, national sea shores, wilderness areas, research sites, and similar preserves. Some readers were concerned that we intended the Guidelines to apply to activities in such preserves whether or not the activities took place in waters of the United States. We intended, and we think the context makes it clear, that the Guidelines apply only to the specification of discharge sites in the waters of the United States, as defined in § 230.3. We have included this section because the fact that a water of the United States may be located in one of these preserves is significant in evaluating the impacts of a discharge into that water.

Wetlands: Many wetlands are waters of the United States under the Clean Water Act. Wetlands are also the subject of Federal Executive Order No. 11990, and various Federal and State laws and regulations. A number of these other programs and laws have developed slightly different wetlands definitions, in part to accommodate or emphasize specialized needs. Some of these definitions include, not only wetlands as these Guidelines define them, but also mud flats and vegetated and unvegetated shallows. Under the Guidelines some of these other areas are grouped with wetlands as "Special Aquatic Sites" (Subpart E) and as such their values are given special recognition. (See discussion of Water Dependency above.) We agree with the comment that the National Inventory of Wetlands prepared by the U.S. Fish and Wildlife Service, while not necessarily exactly coinciding with the scope of waters of the United States under the Clean Water Act or wetlands under these regulations, may help avoid construction in wetlands, and be a useful long-term planning tool.

Various commenters objected to the definition of wetlands in the Guidelines as too broad or too vague. This proposed definition has been upheld by the courts as reasonable and consistent with the Clean Water Act, and is being retained in the final regulation. However, we do agree that vegetative guides and other background material may be helpful in applying the definition in the field. EPA and the Corps are pledged to work on joint research to aid in jurisdictional determinations. As we develop such materials, we will make them available to the public.

Other commenters suggested that we expand the list of examples in the second sentence of the wetland definition. While their suggested additions could legally be added, we have not done so. The list is one of examples only, and does not serve as a limitation on the basic definition. We are reluctant to start expanding the list, since there are many kinds of wetlands which could be included, and the list could become very unwieldy.

In addition, we wish to avoid the confusion which could result from listing as examples, not only areas which generally fit the wetland definitions, but also areas which may or not meet the definition depending on the particular circumstances of a given site. In sum, if an area meets the definition, it is a wetland for purposes of the Clean Water Act, whether or not it falls into one of the listed examples. Of course, more often than not, it will be one of the listed examples.

A few commenters cited alleged inconsistencies between the definition of wetlands in § 230.3 and § 230.42. While we see no inconsistency, we have shortened the latter section as part of our effort to eliminate unnecessary comments.

Unvegetated Shallows: One of the special aquatic areas listed in the proposal was "unvegetated shallows" (§ 230.44). Since special aquatic areas are subject to the presumptions in § 230.10(a)(3), it is important that they be clearly defined so that the permitting authority may readily know when to apply the presumptions. We were unable to develop, at this time, a definition for unvegetated shallows which was both easy to apply and not too inclusive or exclusive. Therefore, we have decided the wiser course is to delete unvegetated shallows from the special aquatic area classification. Of course, as waters of the United States, they are still subject to the rest of the Guidelines.

"Fill Material": We are temporarily reserving § 230.3(1). Both the proposed Guidelines and the proposed Consolidated Permit Regulations defined fill material as material discharged for the primary purpose of replacing an aquatic area with dryland or of changing the bottom elevation of a water body, reserving to the NPDES program discharges with the same effect which are primarily for the purpose of disposing of waste. Both proposals solicited comments on this distinction, referred to as the primary purpose test. On May 19, 1980, acting under a court-imposed deadline, EPA issued final Consolidated Permit Regulations while the 404(b)(1) Guidelines rulemaking was still pending. These Consolidated Permit Regulations contained a new definition of fill material which eliminated the primary purpose test and included as fill material all pollutants which have the effect of fill, that is, which replace part of the waters of the United States with dryland or which change the bottom elevation of a water body for any purpose. This new definition is similar to the one used before 1977.

During the section 404(b)(1) rulemaking, the Corps has raised certain questions about the implementation of such a definition. Because of the importance of making the Final Guidelines available without further delay, and because of our desire to cooperate with the Corps in resolving their concerns about fill material, we have decided to temporarily reserve § 230.3(1) pending further discussion. This action does not affect the effectiveness of the Consolidated Permit Regulations. Consequently, there is a discrepency between those regulations and the Corps' regulations, which still contain the old definition.

Therefore, to avoid any uncertainty from this situation, EPA wishes to make clear its enforcement policy for unpermitted discharges of solid waste. EPA has authority under section 309 of the CWA to issue administrative orders against violations of section 301. Unpermitted discharges of solid waste into waters of the United States violate section 301.

Under the present circumstances, EPA plans to issue solid waste administrative orders with two basic elements. First, the orders will require the violator to apply to the Corps of Engineers for a section 404 permit within a specified period of time. (The Corps has agreed to accept these applications and to hold them until it resolves its position on the definition of fill material.)

Second, the order will constrain further discharges by the violator. In extreme cases, an order may require that discharges cease immediately. However, because we recognize that there will be a lapse of time before decisions are made on this kind of permit application, these orders may expressly allow unpermitted discharges to continue subject to specific conditions set forth by EPA in the order. These conditions will be designed to avoid further environmental damage.

Of course, these orders will not influence the ultimate issuance or non-issuance of a permit or determine the conditions that may be specified in such a permit. Nor will such orders limit the

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

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Enforcement of Section 404 of the Clean Water Act

FROM: Acting Director, Enforcement Division (EN-338)

TO: Regional Enforcement Division Directors

## Background

As you may recall, in March 1980, the Enforcement Division initiated discussion with the Corps of Engineers for the purpose of updating and revising the existing June 1, 1976 Enforcement Agreement which had been signed by EPA, the Corps, and the Department of Justice. The proposed new agreement was circulated to all regions for review, and comments were received. Although initial discussions were held with the Corps and DOJ, no progress was made on resolving this matter. However, in October 1980, the Corps approached EPA with the proposition that it lacked authority to enforce against persons discharging dredged or fill materials into waters of the United States without section 404 permits. Although EPA has not drawn any conclusions regarding the Corps' authority or lack of it, the Enforcement Division has agreed to endorse the attached document, dated 7 November 1980, as an interim approach to enforcement of section 404.

## EPA's Role in Enforcement of Section 404

Pursuant to sections 301, 309 and 404(n), EPA has authority and responsibility for enforcement of violations of section 301(a) which occur by virtue of discharges of dredged or fill materials into waters of the United States without a permit, or in violation of the terms and conditions of section 404 permits. Pursuant to section 404(s), the Corps of Engineers enforces discharges which violate the terms and conditions of permits it has issued. Therefore, it is reasonable that as a matter of practice, EPA's enforcement effort for violations of section 404 has focused largely on unpermitted discharges. Even in this capacity, however, a number of Regions have persisted in viewing EPA's enforcement role as simply one of support for the Corps' efforts, rather than as a complementary one with independent authority flowing from section 309.

Certain recent developments have underscored the need for EPA to take a more positive approach to enforcement of section 404. The need has arisen most particularly in cases of solid waste discharges requiring section 404 permits pursuant to the Consolidated Permit Regulations, 40 CFR §§122.3 and 122.51(c)(2)(ii), 1/ and in cases where EPA asserts jurisdiction over waters of the United States, but the Corps disagrees. In such cases, the Corps has been and will continue to be reluctant or unwilling to take enforcement action. Therefore, it is incumbent on EPA to exercise its authority under section 309.

Procedures for Enforcing Dredge or Fill Violations

Section 309 authority may take the form of administrative orders or judicial actions, civil or criminal. The procedures for enforcing section 404 requirements are the same as those for any other violation of section 301(a). Administrative orders may be issued by the Regional Administrator's delegatee, with courtesy copies sent to the Office of Water Enforcement, Attention: Drinking Water and Special Enforcement Branch. Civil actions should be prepared in standard civil litigation report format, and forwarded to the Office of Water Enforcement (Attention: Drinking Water and Special Enforcement Branch) for review and referral to the Department of Justice. Criminal referrals may be made directly to the appropriate United States Attorney's office. Courtesy copies should be sent simultaneously to the Office of Water Enforcement, Attention: Drinking Water and Special Enforcement Branch.

In all cases, EPA should notify the appropriate Corps district of a planned or proposed enforcement action. This notification is designed to achieve two results. First, it will insure that the Corps does not take an inconsistent action which would jeopardize the efficacy of EPA's enforcement action. Second, it will afford the Corps an opportunity to join with EPA in the action.

If you have any questions, please contact Joan Ferretti or Betty Cox of my staff at FTS 755-2870.

David Lyons, P.E.

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1/ For a fuller discussion of the appropriate enforcement action for such discharges, see Memorandum from R. Sarah Compton, Deputy Assistant Administrator for Water Enforcement, to Enforcement Division Directors and Section 404 Coordinators, September 11, 1980.

Attachment

cc: General E. R. Heiberg, III
Regional §404 Coordinators
George Ciampa, Region I
Richard Weinstein, Region II
Elo-Kai Ojama, Region III
Susan Schub, Region IV
Jerry Frumm, Region V
Tony Anthony, Region VI
Bill Ward, Region VII
Lee Marabel, Region VIII
Ann Nutt, Region IX
John Hammill, Region X

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

REPLY TO ATTENTION OF:

7 NOV 1980

DAEN-CWO-N

SUBJECT: Enforcement Authority for Violations of Section 404 of Clean Water Act

Division Engineer, Lower Mississippi Valley

1. Reference:

a. Letter, DAEN-CWZ-B, 26 May 1980, to Division Engineers, subject: Legal Authority Under Section 404 of the Clean Water Act of 1977 to Enter Private Property.

b. Letter, LMVOC, 25 September 1980, to DAEN-CWZ-B, citing agreement to elevate Section 404 permitless enforcement authority problem to EPA/COE Headquarters for resolution.

2. This letter provides clarification to the guidance set forth in the reference 1a above. It shall be implemented on an interim basis pending revision or change of the June 1976 EPA/Corps/Justice enforcement memorandum currently being discussed between OCE and EPA.

3. The Corps should continue to carry out a strong enforcement program including the issuance of cease and desist orders against unauthorized activities. In the past there was clear justification for this position based on the inherent authorities vested in the Chief of Engineers. This residual power was considered to be associated with the implied authority as permitting agent to manage the Section 404 permit program. However, the Civiletti Attorney General Opinion of September 5, 1979, undercut that rationale. Nonetheless, in order to serve the public interest and prevent confusion, we should continue our enforcement program as in the past unless precluded by future judicial decisions. Accordingly, the district engineers shall proceed in the following manner:

a. If the site of the discharge is a "water of the United States," as interpreted by the district engineer, the procedures set forth at 33 CFR 326 shall be followed and, as appropriate, a permit shall be required and an application accepted (no change to present practice).

b. If the site is in a previously designated "special case" pursuant to the Corps/EPA jurisdiction, MOU (Federal Register, Volume 45, No. 129, July 2, 1980, p. 45018), EPA will be responsible for the enforcement action.

DAEN-CWO-N
SUBJECT: Enforcement Authority for Violations of Section 404 of Clean Water Act

If the Corps learns of discharge activities in such special cases it will notify EPA immediately. If a permit is subsequently required, an application will be accepted and processed by the district engineer consistent with current regulations.

c. If lands under a and b above are involved in the same case, EPA will normally be responsible for enforcement actions; however, by mutual agreement, the district engineer may assume the responsibility.

4. Paragraph 6 of the Corps/EPA Jurisdiction MOU states that any jurisdictional determination made by EPA as a result of an enforcement action will be used by the district engineer as the basis for all subsequent 404 actions of that case. Therefore, if EPA (or the Department of Justice on its behalf) brings an enforcement action against the discharger, the district engineer shall, consistent with 33 CFR 326, accept an application for an after-the-fact or subsequent permit application consistent with the assertions made by the EPA in that action. If it is at all unclear from EPA's enforcement action whether all phases of the discharger's activities are taking place in "waters of the United States," the district engineer shall forward the case to EPA for a formal jurisdictional delineation before processing any permit. Informal verbal or written communications (actions other than enforcement actions signed by the regional administrator or his designee) will not in themselves establish jurisdiction. In such case where EPA brings an enforcement action and in cases 3b and 3c above, any public notice will clearly state that the jurisdictional determination has been made by EPA.

5. Pursuant to Section 404(s) of the Clean Water Act, each district engineer shall conscientiously implement enforcement actions against permit condition violations. This applies regardless of the location of the discharge.

6. This letter does not alter our full authority and responsibility to take enforcement action against all violations of the River and Harbor Act of 1899 in traditionally navigable waters of the United States.

FOR THE CHIEF OF ENGINEERS:

E. R. HEIBERG III
Major General, USA
Director of Civil Works

# PERMITS DIVISION POLICY BOOK

Note: The Contents of the Permits Division Policy Book is included for the reader's reference and may be obtained in the Permits Division (EN-336, 755-2545).

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

JUN 23 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT: Permits Division Policy Book Update

FROM: Martha G. Prothro, Director
Permits Division (EN-336)

TO: Regional Water Management Division Directors
Regional Permit Branch Chiefs
NPDES State Directors

In 1981 we distributed a Permits Division Policy Book which provided a compilation of current policies and guidance material for your reference. We have reviewed and updated the contents of the Policy Book. Several outdated NPDES items should be deleted and nine more recent issuances should be included. Also, we are no longer including RCRA materials in this compilation.

Attachments 1 and 2 show additions and deletions by their subject headings. We will maintain a historical file of the deleted policy guidance materials. For your convenience I am also providing copies of the nine additions and new chronological and subject indices.

We will continue to provide periodic updates to the Permits Division Policy Book. Your comments and suggestions for improving the usefulness of this book are welcome.

Attachments

## Additions

Administrative Guidance

A. Forms

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|---|---|---|
| Application Forms 1 and 2 c | 12/10/80 | n-80-18 |

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IV. Legal Interpretation and Information Memos

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| | | |
|---|---|---|
| NPDES Permit Issuance for Iron and Steel Industry | 5/15/81 | n-81-3 |
| Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phosphate Manufacturing Point Source Category" (October 1977) in Writing NPDES Permits | 1/18/82 | n-82-1 |
| BCT Permitting | 11/2/81 | n-81-4 |
| NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities | 5/15/81 | n-81-5 |
| Status of the Major NPDES Industrial Permits List | 12/10/81 | n-81-6 |

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V. Second Round Permits:

| | | |
|---|---|---|
| Policy for the Second Round Issuance of NPDES Industrial Permits | 6/02/82 | n-82-2 |

VI. Technical Guidance:

| | | |
|---|---|---|
| Outer Continental Shelf Coordination Committee | 6/6/80 | n-80-19 |
| Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities | 7/30/81 | n-81-7 |

## Deletions

| Title | Date | Permit Program Code |
|---|---|---|
| Regulation Procedures | | |
| A. ECSLs: | | |
| Procedures for Issuance of ECSLs | 6/03/76 | n-76-2 |
| Enforcement Actions Against Funded Municipal Dischargers | 6/03/76 | n-76-3 |
| Enforcement Actions where an Industrial Discharger Fails to Meet 7/1/77 Deadline | 6/03/76 | n-76-4 |
| Questions re: ECSLs | 12/10/76 | n-76-13 |
| Additional Questions re: ECSLs | 4/01/77 | n-77-3 |
| Use of ECSLs Past 7/1/77 | 5/11/77 | n-77-9 |
| Enforcement Policy and Use of ECSLs for POTWs | 6/22/77 | n-77-11 |
| * * * | | |
| Clean Water Act Extensions and Modifications: | | |
| Municipal Permit Extensions under Section 301(i) | 4/19/78 | n-78-3 |
| * * * * * | | |
| III. Federal/State Relationships | | |
| * * * | | |
| D. Resource Conservation and Recovery Act: | | |
| Establishment of RCRA "Program Implementation Guidance System (PIGs)" | 10/03/80 | PIG-80-1 |
| Interim Authorization of Programs Based on Emergency State Regulations | 10/03/80 | PIG-80-2 |
| Requirement that State-Permitted Hazardous Waste Facilities have "Interim Status" | 10/03/80 | PIG-80-3 |
| Short-Term Financial Assistance for State Expected to Receive Authorization before 1/1/81 | 10/03/80 | PIG-80-4 |
| The Use of State Permitting Systems During Phase I Interim Authorization which are not Based on Explicit Regulatory Standards | 10/17/80 | PIG-81-1 |

| Title | Date | Permit Program Code |
|---|---|---|
| Federal Register Notice of Public Hearing and Comment Period on State Applications for Interim Authorization | 10/30/80 | PIG-81-2 |
| Effect of RCRA Regulations Changes on Phase I Interim Authorization Approval | 10/30/80 | PIG-81-3 |
| Delisting of Wastes by Authorized States | 10/31/80 | PIG-81-4 |
| Used Oil Recycling Act of 1980 | 11/14/80 | PIG-81-5 |
| State Regulation of Federal Agencies For purposes of Interim Authorization | 11/14/80 | PIG-81-6 |
| Final Determinations on State Applications for Interim Authorization: Action Memorandum & Federal Register Notice | 12/1/80 | PIG-81-7 |
| Program Implementation Guidance on Issuance of Provisional EPA Identification Numbers | 11/26/80 | PIG-81-8 |
| Effect of EPA's Memorandum of Understanding With the Dept. of Transportation on Activities in States with Cooperative Arrangements | 12/10/80 | PIG-8[illegible] |
| Transfer of Modification and Permit Application Information to States | 3/24/81 | PIG-81-10 |
| Involvement of States without Phase II Interim Authorization in RCRA Permitting | 2/12/81 | PIG-81-11 |

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V. Second Round Permits:

| | | |
|---|---|---|
| Reissuing NPDES Permits to Sources Affected by the NRDC Consent Decree | 5/16/78 | n-78-5 |
| Policies for Reissuing Industrial NPDES Permits | 7/12/78 | n-78-9* |
| Writing NPDES BAT Permits in the Absence of Promulgated Effluent Guidelines | 6/25/80 | n-80-7 |
| Revised NPDES Second Round Permits Policy | 8/29/80 | n-80-10 |

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XI. RCRA:

| | | |
|---|---|---|
| RCRA Permit Priorities Guidance | 10/03/80 | r-80-1 |
| RCRA Emergency Permit Guidance | 10/20/80 | r-80-2* |

| | | |
|---|---|---|
| Establishment of RCRA "Program Implementation Guidance System (PIGs)" | 10/03/80 | r-80-1 |
| Interim Authorization of Programs Based on Emergency State Regulations | 10/03/80 | PIG-80-2 |
| Requirement that State Permitted Hazardous Waste Facilities have "Interim Status" | 10/03/80 | PIG-80-3 |
| Short-Term Financial Assistance for States Expected to Receive Authorization Before 1/1/81 | 10/03/80 | PIG-80-4 |
| The Use of State Permitting Systems During Phase I Interim Authorization Which are not Based on Explicit Permit Guidance | 10/17/80 | PIG-81-1 |
| RCRA Emergency Permit Guidance | 10/20/80 | r-80-2* |
| Federal Register Notice of Public Hearing and Comment Period on State Applications for Interim Authorization | 10/23/80 | PIG-81-2 |
| Effect of RCRA Regulations Changes on Phase I Interim Authorization Approval | 10/30/80 | PIG-81-3 |
| Delisting" of Wastes by Authorized States | 10/31/80 | PIG-81-4 |

# Permits Division Policy Book

This book contains policies and guidance under the NPDES Permit Program. The materials are arranged and numbered in chronological sequence. NPDES policies are prefixed by an "n". Following the prefix, the first number is the year of issuance and the second is the chronological sequence for that year. In addition to the chronologcial listing a subject index is provided to assist in locating policies.

Documents which are too lengthy to be included are indicated by an asterisk. Copies of these documents may be obtained by contacting:

Mr. Timothy Dwyer
Permits Division (EN-336)
U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460
(202) 426-4793

Please use the policy number when requesting a document.

| Title | Date | Permit Program Code |
|---|---|---|
| **1973** | | |
| . Policy on Storage & Releases for Water Quality Control in Reservoirs Planned by Federal Agencies | 1/16/73 | n-73-1 |
| . Permit Form | 9/18/73 | n-73-2 |
| . Intermittent Streams | 9/28/73 | n-73-3 |
| . Alternative in Permit Language | 12/27/73 | n-73-4 |
| **1974** | | |
| . Additional Guidance for Petroleum Marketing Terminals & Oil Production Facilities | 7/18/74 | n-74-1 |
| . Feedlot Permit Format | 7/29/74 | n-74-2 |
| . Application of Electroplating Guidelines | 8/28/74 | n-74-3 |
| . Disposal of Supply Water Treatment Sludges | 9/13/74 | n-74-4 |
| **1975** | | |
| . Use of Closed Cycle Cooling Systems to Meet the Requirements of Section 316(b) | 2/26/75 | n-75-1 |
| **1976** | | |
| . NPDES Permit Authorization to Discharge | 4/28/76 | n-76-1 |
| . (Deleted) | | n-76-2 |
| . (Deleted) | | n-76-3 |
| . (Deleted) | | n-76-4 |
| . Coordination Between NPDES Program and Water Quality Management | 7/07/76 and | n-76-5 |
| Attachment - Coordination | 4/02/76 | n-76-5 |
| . Municipal Wastewater Treatment Ponds | 8/12/76 | n-76-6 |
| . American Petroleum Institute v. EPA - Information Memo | 8/24/76 | n-76-7 |
| . Binding Effect of 303(e) Basin Plans | 8/24/76 | n-76-8 |
| . Impact of Phase I Basin Plans | 9/01/76 | n-76-9 |
| . Phase II Iron and Steel Guidelines - Mahoning River Valley | 10/04/76 | n-76-10 |
| . Asbestos Limits | 10/15/76 | n-76-11 |
| . Use of Low Flow Augmentation to Meet Water Quality Standards | 11/08/76 | n-76-12 |
| . (Deleted) | | n-76-13 |
| . Comments on Region VIII's Approach to Writing Effluent Limits for Confined Animal Feeding Operations | 12/15/76 | n-76-14 |
| **1977** | | |
| . Clarification of OGC Opinion No. 40 (State Review Authority) | 2/04/77 | n-77-1 |
| . Fecal Coliform Bacteria Limits | 2/14/77 | n-77-2 |
| . (Deleted) | | n-77-3 |
| . Water Treatment Plant Limitations | 4/13/77 | n-77-4 |

| Title | Date | Permit Program Code |
|---|---|---|
| . Request for Policy Regarding Possible Use of NPDES Permits to Promote Better Sludge Management | 4/13/77 | n-77-5 |
| . 316(a) & (b) Technical Guidance Documents | 5/01/77 | n-77-6* |
| . Use of In-Stream Mechanical Aerators to Meet Water Quality Standards | 5/02/77 | n-77-7 |
| . NPDES Permits and Requirements of State Law | 5/04/77 | n-77-8 |
| . (Deleted) | | n-77-9 |
| . Implementation of Promulgated Section 307(a) Toxic Standards | 6/01/77 | n-77-10 |
| . (Deleted) | | n-77-11 |
| . NPDES Permits in Wetlands Areas | 7/12/77 | n-77-12 |
| . Implementation of Section 403 | 7/20/77 | n-77-13 |
| . Policy Regarding Procedures for Fundamentally Different Factors BPT Variances | 8/18/77 | n-77-14 |
| . Policy Regarding the Inclusion in Permits of More Stringent Effluent Parameters | 10/13/77 | n-77-15 |
| **1978** | | |
| . State Regulation of Federal Facilities | 3/10/78 | n-78-1 |
| . Confidentiality of NPDES Permit Applications | 4/06/78 | n-78-2 |
| . (Deleted) | | n-78-3 |
| . Certification and Permitting of Dischargers in Boundary Waters | 4/19/78 | n-78-4 |
| . (Deleted) | | n-78-5 |
| . Coal Mining Under the Surface Mining Control and Reclamation Act of 1977. | 5/25/78 | n-78-6 |
| . Opinions on Variances in Second Round and Other Issues | 6/13/78 | n-78-7 |
| . Ex Parte Contacts in Adjudicatory Hearings | 6/16/78 | n-78-8 |
| . (Deleted) | | n-78-9* |
| . Ex Parte Contacts in EPA Rulemaking | 8/04/77 | n-78-10 |
| . Suspended Solids Limits for POTW Ponds | 9/01/78 | n-78-11 |
| . Innovative Technology Extensions | 9/06/78 | n-78-12 |
| . Guidance to States re Pretreatment Program | 9/08/78 | n-78-13* |
| . Variance Applications | 9/12/78 | n-78-14 |
| . Applicability of 301(h) & (i) to Federal Facilities | 9/12/78 | n-78-15 |
| . Transfer of Authority over Federal Facilities to NPDES States | 11/28/78 | n-78-16 |
| . Coordination between Regional Enforcement and Water Programs re Pretreatment Program | 11/29/78 | n-78-17 |
| . Request for Legal Opinion - Inclusion of Compliance Schedules in Second Round and New Permits | 12/26/78 | n-78-18 |
| **1979** | | |
| . Use of Biomonitoring in the NPDES Permits Program | 1/11/79 | n-79-1 |
| State Pretreatment Programs | 4/12/79 | n-79-2 |

| Title | Date | Program Code |
|---|---|---|
| . EPA Procedures for Review & Approval of State Pretreatment Program Submissions | 4/30/79 | n-79-3 |
| . Separate Storm Sewers | 9/11/79 | n-79-4 |
| . National Municipal Policy & Strategy | 10/79 | n-79-5* |
| . Guidance on Setting BCT Permit Limits for Breweries under Section 402(a)(1) of CWA | 10/18/79 | n-79-6 |
| **1980** | | |
| . Regional Review of State-Issued NPDES Permits | 1/18/80 | n-80-1 |
| . Applicability of Revised NPDES Regulations to Permits Currently Being Processed | 1/18/80 | n-80-2 |
| . Incorporation of Pretreatment Program Development Compliance Schedules into POTW NPDES Permits | 1/28/80 | n-80-3 |
| . OGC Memo-Use of BOD5 Carbonaceous Test Results | 4/18/80 | n-80-4 |
| . Pretreatment Compliance Schedule | | n-80-5 |
| . Statement By Agency Personnel Purporting To Sanction Source Actions Which Are Inconsistent With Statutory Requirements | 5/28/80 | n-80-6 |
| . (Deleted) | | n-80-7 |
| . Major Municipal Permitting in FY 81 | 7/10/80 | n-80-8 |
| . Suspension of Portion of Definition of "Waters of the US" in Consolidated Permit Regulations | 7/15/80 | n-80-9 |
| . (Deleted) | | n-80-10 |
| . NPDES Permit Issuance for Iron & Steel Facilities | 9/15/80 | n-80-11 |
| . Suspension of Provisions in Consolidated Permit Regulations Establishing Criteria for NPDES New Source Determinations and Proposed Revision of the Regulations | 9/25/80 | n-80-12 |
| . Treatability Manual | 9/25/80 | n-80-13* |
| . BCT Cost Test Guidance | 9/30/80 | n-80-14* |
| . NPDES Evidentiary Hearing Management Program | 10/3/80 | n-80-15 |
| . Review of State NPDES Permits Written Prior to State Program Revision | 12/24/80 | n-80-16 |
| . Procedures for Processing Plans of Approved NPDES States to Implement NPDES General Permit Programs | 12/31/80 | n-80-17 |
| . Application Forms 1 and 2c | 12/10/80 | n-80-18 |
| . Outer Continental Shelf Coordination Committee | 6/06/80 | n-80-19 |
| **1981** | | |
| (number not used) | | n-81-1 |
| . Determining Whether Revisions to State NPDES Programs Made to Authorize the Issuance of General Permits are Substantial | 2/12/81 | n-81-2 |
| . NPDES Permit Issuance for Iron and Steel Industry | 5/15/81 | n-81-3 |

| Title | Date | Permit Program Code |
|---|---|---|
| • BCT Permitting | 11/2/81 | n-81-4 |
| • NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities | 5/15/81 | n-81-5 |
| • Status of the Major NPDES Industrial Permits LIst | 12/10/81 | n-81-6 |
| • Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities | 7/30/81 | n-81-7 |
| **1982** | | |
| • Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phosphate Manufacturing Point Source Category" (October 1977) in Writing NPDES Permits | 1/18/82 | n-82-1 |
| Policy for the Second Round Issuance of NPDES Industrial Permits | 6/02/82 | n-82-2 |

# LIST OF CURRENT POLICIES BY SUBJECT

| Title | Date | Permit Program Code |
|---|---|---|
| I. Administrative Guidance | | |
| A. Forms: | | |
| Permit Form | 9/18/73 | n-73-2 |
| Alternative in Permit Language | 12/27/73 | n-73-4 |
| Feedlot Permit Format | 7/29/74 | n-74-2 |
| Application Forms 1 and 2c | 12/10/80 | n-80-18 |
| B. Procedures: | | |
| Applicability of Revised NPDES Regs. to Permits Currently Being Processed | 1/18/80 | n-80-2 |
| II. Regulatory Procedures | | |
| B. Industrial: | | |
| C. Municipal: | | |
| D. Tie-in: | | |
| F. Consolidated: | | |
| Suspension of Portion of Definition of "Waters of the US" in Consolidated Permit Regulations | 7/15/80 | n-80-9 |
| Suspension of Provisions in Consolidated Permit Regulations Establishing Criteria for NPDES New Source Determinations & Proposed Revision of the Regulations | 9/25/80 | n-80-12 |
| III. Federal/State Relationships | | |
| A. NPDES States: | | |
| Clarification of OGC Opinion No. 40 (State Review Authority) | 2/04/77 | n-77-1 |
| State Regulation of Federal Facilities | 3/10/78 | n-78-1 |

| Title | Date | Permit Program Code |
|---|---|---|
| Transfer of Authority over Federal Facilities to NPDES States | 11/28/78 | n-78-16 |
| Review of State NPDES Permits Written Prior to State Program Revision | 12/24/80 | n-80-16 |
| Procedures for Processing Plans of Approved NPDES States To Implement NPDES General Permit Programs | 12/31/80 | n-80-17 |
| Determining Whether Revisions to State NPDES Programs Made to Authorize the Issuance of General Permits are Substantial | 2/12/81 | n-81-2 |
| B. Non-NPDES States: | | |
| C. Water Quality Management Plans: | | |
| Coordination Between NPDES Program and Water Quality Management | 7/07/76 and | n-76-5 |
| Attachment - Coordination | 4/02/76 | n-76-5 |
| Binding Effect of 303(e) Basin Plans | 8/24/76 | n-76-8 |
| Impact of Phase I Basin Plans | 9/01/76 | n-76-9 |
| NPDES Permit and Requirements of State Law | 5/04/77 | n-77-8 |
| E. Safe Drinking Water Act: | | |
| Legal Interpretations and Information Memos: | | |
| Intermittent Streams | 9/28/73 | n-73-3 |
| Disposal of Supply Water Treatment Sludges | 9/13/74 | n-74-3 |
| NPDES Permit Authorization to Discharge | 4/28/76 | n-76-1 |
| American Petroleum Institute v. EPA - Information Memo | 8/24/76 | n-76-7 |
| Phase II Iron & Steel Guidelines - Mahoning River Valley | 10/4/76 | n-76-10 |
| Request for Policy re Possible Use of NPDES Permits to Promote Better Sludge Management | 4/13/77 | n-77-5 |
| NPDES Permit in Wetlands Areas | 7/12/77 | n-77-12 |
| Implementation of Section 403 | 7/20/77 | n-77-13 |
| Policy Regarding the Inclusion in Permits of More Stringent Effluent Parameters | 10/13/77 | n-77-15 |
| Confidentiality of NPDES Permit Applications | 4/06/78 | n-78-2 |
| Coal Mining Under the Surface Mining Control and Reclamation Act of 1977 | 5/25/78 | n-78-6 |
| Certification and Permitting of Dischargers in Boundary Waters | 4/19/78 | n-78-4 |
| Opinions on Variances in Second Round and Other Issues | 6/13/78 | n-78-7 |

| Title | Date | Permit Program Code |
|---|---|---|
| Ex Parte Contacts in Adjudicatory Hearings | 6/16/78 | n-78-8 |
| Ex Parte Contacts in EPA Rulemaking | 8/04/77 | n-78-10 |
| Innovative Technology Extensions | 9/06/78 | n-78-12 |
| Applicability of 301(h) and (i) to Federal Facilities | 9/12/78 | n-78-15 |
| Request for Legal Opinion - Inclusion of Compliance Schedules in Second Round and New Permits | 12/26/78 | n-78-18 |
| Separate Storm Sewers | 9/11/79 | n-79-4 |
| Regional Review of State-Issued NPDES Permits | 1/18/80 | n-80-1 |
| OGC Memo-Use of Carbonaceous Test Results | 4/18/80 | n-80-4 |
| Statement By Agency Personnel Purporting to Sanctional Actions Which are Inconsistent w/ Statutory Requirements | 5/28/80 | n-80-6 |
| NPDES Permit Issuance for Iron & Steel Facilities | 9/15/80 | n-80-11 |
| BCT Cost Test Guidance | 9/30/80 | n-80-14* |
| NPDES Evidentiary Hearing Management Programs | 10/03/80 | n-80-15 |
| NPDES Permit Issuance for Iron and Steel Industry | 5/15/81 | n-81-3 |
| BCT Permitting | 11/02/81 | n-81-4 |
| NPDES Permit Issuance for Pulp and Paper Facilities with BCT Limitations to Other Facilities | 5/15/81 | n-81-5 |
| Status of the Major NPDES Industrial Permits List | 12/10/81 | n-81-6 |
| Use of "Draft Supplement to Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Phosphorous Derived Chemicals Segment of the Phosphate Manufacturing Point Source Category" (October 1977) in writing NPDES Permits | 1/18/82 | n-82-1 |
| Second Round Permits: | | |
| Policy for the Second Round Issuance of NPDES Industrial Permits | 6/02/82 | n-82-2 |
| Technical Guidance: | | |
| Policy on Storage & Release for Water Quality Control in Reservoirs Planned by Federal Agencies | 1/16/73 | n-73-1 |
| Additional Guidance for Petroleum Marketing Terminals & Oil Production Facilities | 7/18/74 | n-74-1 |
| Application of Electroplating Guidelines | 8/28/74 | n-74-3 |
| Use of Closed Cycle Cooling Systems to Meet the Requirements of Section 316(b). | 2/26/75 | n-75-1 |
| Municipal Wastewater Treatment Ponds | 8/12/76 | n-76-6 |
| Asbestos Limits | 10/15/76 | n-76-11 |

| Title | Date | Permit Program Code |
|---|---|---|
| Use of Low Flow Augmentation to Meet Water Quality Standards | 11/08/76 | n-76-12 |
| Comments on Region VIII's Approach to Writing Effluent Limits for Confined Animal Feeding Operations | 12/15/76 | n-76-14 |
| Fecal Coliform Bacteria Limits | 2/14/77 | n-77-2 |
| Water Treatment Plant Limitations | 4/13/77 | n-77-4 |
| Use of In-Stream Mechanical Aerators to Meet Water Quality Standards | 5/02/77 | n-77-7 |
| Implementation of Promulgated Section 307(a) Toxic Standards | 6/01/77 | n-77-10 |
| Suspended Solids Effluent Limitations for Publicly Owned Wastewater Treatment Ponds | 9/01/78 | n-78-11 |
| Guidance on Setting BCT Permit Limits for Breweries under Section 402(a)(1) of the CWA | 10/18/79 | n-79-6 |
| Treatability Manual | 9/25/80 | n-80-13* |
| Outer Continental Shelf Coordination Committee | 6/06/80 | n-80-19 |
| Application of the NPDES General Permit Program to Offshore Oil and Gas Facilities | 7/30/81 | n-81-7 |
| Variances: | | |
| Policy re Procedures for Fundamentally Different Factors BPT Variances | 8/18/77 | n-77-14 |
| Variance Applications | 9/12/78 | n-78-14 |
| 316(a) & (b) Technical Guidance Documents | 5/01/77 | n-77-6* |
| Coordinated Municipal Strategy | | |
| National Municipal Policy & Strategy | 10/79 | n-79-5* |
| Coordination between Regional Enforcement and Water Programs re Pretreatment Program | 11/29/78 | n-78-17 |
| Major Municipal Permitting in FY 81 | 7/10/80 | n-80-8 |
| Pretreatment: | | |
| Guidance to States re Pretreatment Program (see also Feb. 1979 publication- Guidance for NPDES States on Implementaion of the General Pretreatment Regulations - 40 CFR Part 403) | 9/8/78 | n-78-13* |
| State Pretreatment Programs | 4/12/79 | n-79-2 |
| EPA Procedures for Review and Approval of State Pretreatment Program Submissions | 4/30/79 | n-79-3 |

| Title | Date | Permit Program Code |
|---|---|---|
| Incorporation of Pretreatment Program Development Compliance Schedules into POTW NPDES Permits | 1/28/80 | n-80-3 |
| Pretreatment Compliance Schedule | | n-80-5 |
| Biomonitoring: | | |
| OGC Memo "Use of Biomonitoring in the NPDES Permit Program" | 1/11/79 | n-79-1 |

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

APR 28 1976

OFFICE OF ENFORCEMENT
n-76-1

MEMORANDUM

Subject: NPDES Permit Authorization to Discharge

From: Deputy Assistant Administrator for Water Enforcement

To: Regional Enforcement Director, Region V

This is in response to your March 17 memorandum requesting Headquarters' policy on the following issue:

"[W]hether an NPDES permit constitutes an authorization to discharge only specific parameters limited or monitored in the permit or a general authorization to discharge all parameters subject only to the limitations contained in the permit."

Answer

Headquarters policy, as well as the clear language contained in the standard permit form [EPA Form 3320-4 (10-73)], provides for a general authorization to discharge subject only to the conditions and limitations contained in the permit.

Discussion

Every standard permit issued by EPA provides that the named discharger is "authorized to discharge from a [named] facility . . . to [named] receiving waters . . . in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, III hereof." In addition to effluent limitations specified in Part I and any special requirements set forth in Part III each general authorization to discharge is subject to the general conditions set forth in Part II. Those general conditions which tend to restrict the general authorization to discarge are the following:

A.1. Change in Discharge - requires notice of facility expansions, production increases or process modifications resulting in any different or increased discharges of pollutants even if such changes do not violate the permit effluent limitations.

A.3. Facility Operation - requires the permittee to maintain his treatment facilities or systems in good working order and operate them as efficiently as possible.

A.5. Bypassing all bypassing is prohibited except under certain circumstances.

It is believed that the above general conditions, along with the installation and proper operation of treatment systems designed to achieve compliance with effluent limitations based upon BPT and water quality standards requirements should adequately limit the general authorization to discharge. Should information which suggests otherwise subsequently become available (e.g., discovery of the presence of toxic substances such as PCBs in the discharge), the permit may be modified for cause in accordance with general condition B.4. ("Permit Modification").

The few permits issued under the NPDES's predecessor permit program, the Refuse Act Permit Program, authorized only those parameters identified in the permit. This approach was rejected by EPA during the early development phases of the NPDES because it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants. Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit. The permittee then would be in technical violation of his permit.

Because we believe the approach adopted in the NPDES Permit Form 3320 is valid we recommend against inserting in permits the language identified by Walter A. Romanek in his January 22, 1976, memorandum (attached). Although it may be appropriate in special cases to employ narrative language in addition to the Part II general conditions in order to further restrict the general authorization to discharge, as a routine matter such practices should be avoided.

I believe the above statement of policy is consistent with that provided to your staff by Dick Browne and Barry Shanoff. If you have any further questions please contact Dick Browne, Bob Bennett, Brian Molloy, or me.

Jeffrey G. Miller

Enclosure

cc: Roy Harsch, Enforcement Division, Region V

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

TAB A

10 MAR 1978

OFFICE OF ENFORCEMENT

n-78-1

MEMORANDUM

TO: Regional Administrators
Directors of the Approved NPDES Programs

FROM: Assistant Administrator for Enforcement (EN-329)

General Counsel (A-130)

SUBJECT: State Regulation of Federal Facilities Under the Federal Water Pollution Control Act Amendments of 1977 (Clean Water Act) -- POLICY GUIDANCE MEMORANDUM

Introduction

The recent amendments to the FWPCA have significantly changed the regulatory relationship of States to Federal facilities under the FWPCA. First, section 313 of the FWPCA was substantially amended to provide that Federal facilities must comply with substantive and procedural requirements of State law regarding the control of water pollution including State permits. Second, Federal permits to Federal agencies now require State certification under section 401.

State Issuance of Permits to Federal Facilities

Under the 1977 amendments, States are authorized to issue water pollution control permits to Federal facilities. Prior to these amendments, the Supreme Court had held that States could not require federally owned or operated facilities to obtain State discharge permits.1/

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1/ EPA v. California Regional Water Resources Control Board 426 U.S. 200 (1976).

Section 313 was amended to require that Federal facilities:

> . . . shall be subject to and comply with all . . . State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity . . .. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, <u>any requirement respecting permits</u> and any other requirement, whatsoever), (B) to the exercise of any . . . State or local administrative authority . . .. (Emphasis added.)

<u>State and NPDES Permits</u>

States are authorized to issue water pollution control permits to Federal facilities. The section 313 amendments do not restrict this authority to State or NPDES permits, therefore States may issue both. Obviously, only approved NPDES States can issue section 402 permits. Where a non-approved State issues a State permit to a Federal facility, the Regions should continue to issue an EPA permit in the same manner as any other NPDES permit. To the extent possible, issuance by a Region of an NPDES permit in these circumstances should be coordinated with the State to avoid inconsistencies and procedural delays.

The effect that the 1977 Amendments will have on the NPDES permit program as it relates to State regulation of Federal facilities is discussed below. The issuance of State permits to Federal dredge and fill activities, and State administration of the section 404 program is not covered by this memorandum. These issues will be discussed later.

<u>State NPDES Programs</u>

Section 402(c)(1) of the Clean Water Act provides that upon approving a State program, "the Administrator shall

suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program . . .." Except for Federal facilities, it has always been EPA's position that section 402(c)(1) requires States to have authority to issue permits to all point sources. Prior to the enactment of the Clean Water Act of 1977, EPA withheld approval of State NPDES authority over Federal facilities because Federal law precluded States from issuing permits to Federal agencies. The Supreme Court adopted EPA's position in EPA v. California Regional Water Resources Control Board, supra n. 1.

However, in its decision, the Court made it clear that Congress intended "that the States be given maximum responsibility for the permit system . . .." Id. at n. 39. Moreover, the Court approved withholding EPA approval of State programs to the extent that they applied to Federal facilities only because EPA "may not . . . approve a state plan which the State has no authority to issue because it conflicts with federal law." Id. at 226. Now that Congress has amended the Clean Water Act specifically to include Federal facilities within the class of dischargers subject to State permits, it seems clear that States may no longer exclude Federal facilities from regulation, just as they may not exclude steel mills or power plants, or other sources over which they may assert jurisdiction.

Accordingly, all NPDES programs approved before the 1977 Amendments should be modified, including the Memoranda of Agreement, to reflect the States' new authority to issue Federal facilities permits.2/ As part of this modification,

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2/ Modification is required because many States are prevented by State law from issuing permits to Federal facilities. Moreover, all States which administer the NPDES program have entered into a Memorandum of Agreement which includes a provision that prevents the State from issuing permits to Federal facilities. For example, the State of Missouri Agreement provides that:

> This agreement does not cover the issuance of NPDES permits to Federal facilities within the State of Missouri. It is understood by both parties that it is the intent of EPA to expressly retain the permit issuance authority for Federal facilities . . ..

the State shall submit a statement from its attorney general that the laws of the State provide adequate authority for issuance of permits to Federal facilities and to carry out the reporting, monitoring, inspection and entry authorities set out below. The Office of Enforcement will develop regulations to require these programs to be modified within one year of promulgation unless a State must amend or enact a law in order to make the necessary modification. In that case the modification must be made within two years of the date of regulation promulgation. Programs may be modified before these regulations are issued. Program modifications should be subject to public notice and opportunity for comment. Modifications to the Memorandum of Agreement must be approved by the Administrator.

It is possible that for some programs only the Memorandum of Agreement need be modified to authorize State takeover of Federal facility permits. In such cases the Regions may relinquish their permit issuing authority to the State solely by modifying the Memorandum of Agreement. Following whatever program modification is necessary, the States become the permit issuing authority for Federal facilities.

Permits issued or in the process of issuance by EPA to Federal facilities located in approved NPDES States should be transferred to the State in the same way other permits were transferred following initial State takeover of the program. In certain cases, however, the Regions may, as an interim measure, issue a Federal facility permit in an approved State before completion of the necessary program modifications if it is apparent that awaiting such modifications will cause an inordinate delay in permit issuance.

Finally, all State programs approved after enactment of the 1977 Amendments (December 27, 1977) must provide for State issuance of permits to Federal facilities. Existing regulations are being changed to reflect this requirement.

Reporting, Monitoring, Inspection and Entry Requirements

The section 313 amendments also explicitly require that Federal facilities comply with any State "recordkeeping or reporting requirement." The Senate Report indicates that this includes any reporting or monitoring requirements. Senate Report at 67.

States must have the right to enter and inspect Federal facilities if their reporting and monitoring authorities are to be meaningful. Moreover, it is clear from the language of section 313 that Congress intended States to have such a right of entry. The President is authorized to grant a "paramount interest" exemption covering "any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property . . .." [section 313(a)] (emphasis added). Clearly, unless the President exempts a Federal facility, a State must be allowed "access" to the facility.3/

Initial State contact with a Federal facility for the purpose of entry and inspection should be closely coordinated with the facility and the Region particularly where access to the facility is restricted.

State Certification Under Section 401

The new amendments eliminated section 401 (a) (6), which provided an exception for Federal agencies from State certification. Accordingly, NPDES permits issued by EPA to Federal facilities require certification by the State that the discharge is in compliance with all of the applicable provisions of sections 301, 302, 303, 306 and 307 of the FWPCA.

Please refer any further questions to Jeffrey G. Miller, Deputy Assistant Administrator for Water Enforcement (8/755-0440).

Marvin B. Durning

Marvin B. Durning

Joan Z. Bernstein

Joan Z. Bernstein

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3/ Section 308(c) authorizes States to exercise entry authority under programs approved by EPA, but such entry authority does not extend to Federal facilities. This section, which was not revised by the 1977 Clean Water Act, cannot be read to weaken or render ineffective the clear authority provided States by the amendments to section 313.

MODIFICATION TO NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM MEMORANDUM OF AGREEMENT BETWEEN THE INDIANA STREAM POLLUTION CONTROL BOARD AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION V

The Memorandum of Agreement approved July 22, 1977, by the Administrator of the United States Environmental Protection Agency between the Indiana Stream Pollution Control Board (hereinafter, the "State") and the United States Environmental Protection Agency (hereinafter, "USEPA") Region V is hereby modified as follows:

The State will administer the NPDES permit program with respect to Federal facilities and has shown that it has the authority to enter and inspect Federal facilities. The State is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits in Indiana, including permits applicable to Federal facilities.

All references in the Memorandum of Agreement which have the effect of retaining responsibility to USEPA Region V over Federal facilities have no force or effect after the effective date of this Modification. Nothing in this Modification shall be construed to limit the authority of USEPA to take action pursuant to Sections 308, 309, 311, 402, 504, or other Sections of the Act.

INDIANA STREAM POLLUTION CONTROL BOARD

By _____

Date: _____

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION V

By _____

Date: _____

Approved:

_____
Assistant Administrator for Enforcement
United States Environmental Protection Agency

Date:

Region V

DATE: OCT 27 1978

TAB C

SUBJECT: Transfer of NPDES Federal Facilities Program Authority Under Section 313 of the Clean Water Act to the State of Michigan - Action Memorandum

FROM: John McGuire
Regional Administrator

TO: Marvin B. Durning, Assistant Administrator for Enforcement (EN-329)

Issue

Shall National Pollutant Discharge Elimination System (NPDES) program authority for Federal facilities be transferred to the State of Michigan?

Discussion

The 1977 Amendments to the Clean Water Act authorize states to assume NPDES authority over Federal facilities. On June 21, 1978, Michigan requested this authority and provided an Attorney General's opinion that the Michigan Department of Natural Resources has all of the necessary authority to administer the NPDES permit program for Federal facilities (See Tab A). Our Regional Counsel has reviewed the Attorney General Statement and concurs (See Tab B).

Assumption of NPDES authority, except for agencies and instrumentalities of the Federal Government, was transferred by the Administrator to Michigan on October 17, 1973 (See Tab C). The Memorandum of Agreement (MOA), which was signed as part of the approval of Michigan's NPDES program (See Tab D), contains no disallowance of Michigan's jurisdiction over Federal facilities. Therefore, the MOA does not need to be modified to allow Michigan to take NPDES jurisdiction over Federal facilities.

Recommendation

The request from Michigan to assume NPDES authority over Federal facilities, pursuant to Section 313 of the Clean Water Act, has been reviewed and is consistent with the March 10, 1978, Policy Guidance Memorandum from the Assistant Administrator for Enforcement and General Counsel covering transfer of authority. Therefore, I recommend that the request from the State of Michigan to assume NPDES authority over Federal facilities be approved. A suggested letter to the Governor of Michigan approving Michigan's assumption of authority is enclosed (See Tab E).

OCT 27 1978



Decision of Regional Administrator

That the request from the State of Michigan to assume NPDES authority over Federal facilities, pursuant to Section 313 of the Clean Water Act, be approved.

Approve: _____

Disapprove: _____

Date: _____

Disposition

A letter to the Governor of Michigan with a copy to the Executive Secretary, Michigan Water Resources Commission has been prepared for signature of the Administrator (See Tab E).

Concurrence

Deputy Assistant Administrator
for Enforcement

Concur: _____

Nonconcur: _____

Date: _____

Enclosures: Tabs A - E

Decision of Assistant Administrator for Enforcement

Approve: _____

Disapprove: _____

Date: _____

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

OFFICE OF ENFORCEMENT

Honorable Otis R. Bowen, M.D.
Governor of Indiana
Indianapolis, Indiana 46204

Dear Governor Bowen:

On January 1, 1975, Indiana received authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders. EPA's approval letter indicated that we would retain authority to issue permits for Federal facilities within the State. The reservation of authority over Federal facilities was necessary because the Federal Water Pollution Control Act (FWPCA) precluded State regulation of these facilities.

The 1977 amendments to the FWPCA specifically authorize the States to administer the NPDES permit program for Federal facilities. Accordingly, I have today approved the State of Indiana's request to assume this responsibility. I have today also approved a modification to the Memorandum of Agreement between EPA and the State allowing this transfer (copy enclosed). This approval overrides any contrary language in EPA's January 1, 1975, letter approving the State's NPDES program.

We are glad to transfer the administration of the NPDES permit program for Federal facilities to the State of Indiana. Region V will be working with the Indiana Stream Pollution Control Board to facilitate this transfer in a timely manner.

Sincerely yours,

Marvin B. Durning
Assistant Administrator
for Enforcement

Enclosure

cc: Mr. Oral H. Hert
Technical Secretary
Indiana Stream Pollution Control Board

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
215 Fremont Street
San Francisco, Ca. 94105

# PUBLIC NOTICE OF PROPOSED ACTION

by the

U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, Ca. 94105

(415) 556-3450
June 23, 1978

On September 19, 1975, the Administrator of the Environmental Protection Agency gave approval to a request from the State of Nevada for authorization to administer the National Pollutant Discharge Elimination System (NPDES) permit program for discharges within the jurisdiction of the State. This authorization was made pursuant to Section 402(b) of the Federal Water Pollution Control Act Amendments of 1972. The authorization excluded discharges from facilities which are agencies or instrumentalities of the Federal government.

The 1977 Amendments to the Federal Water Pollution Control Act (33 U.S.C. 1251,et seq. ) provide, in Section 313, authority for states to regulate discharges from agencies or instrumentalities of the Federal government. The Administrator of the Environmental Protection Agency proposes to expand the State of Nevada's NPDES authorization to include Federal facilities.

All comments or objections received within 30 days of the date of this notice will be considered by EPA before taking final action. If sufficient public interest is expressed a public hearing may be held.

6 APR 1978

n-78-2

MEMORANDUM

TO: Regional Administrators
State NPDES Directors

FROM: Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Confidentiality of NPDES Permit Applications

Attached is a copy of a recent decision issued by the Office of General Counsel which requires that all information in NPDES permit applications and permits be made public. Please advise your staff of this change so that implementation can be uniform.

Jeffrey G. Miller

Attachment

cc: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

JShaffer:mHite:PD:EN-336:3109 WSM:5-0750

WASHINGTON, D.C. 20460

261

MAR 22 1978

OFFICE OF GENERAL COUNSEL

MEMORANDUM

SUBJECT: Confidentiality of NPDES Permit Applications

FROM: Joan Z. Bernstein
General Counsel (A-130)

TO: Thomas C. Jorling
Assistant Administrator for
Water and Hazardous Materials (WH-556)

Marvin Durning
Assistant Administrator
for Enforcement (EN-329)

Attached is a Class Determination I have issued concerning the status of potentially confidential business information contained in NPDES permits and NPDES permit applications. I have concluded that section 402(j) of the FWPCA requires that NPDES permits and permit applications be made public notwithstanding the fact that some of the information contained in them would otherwise be treated as confidential.

The Class Determination will be used by this office and the Regional Counsels in making final confidentiality determinations under the regulations in 40 CFR Part 2, Subpart B. Any request for confidentiality of information in a permit application or permit would be denied citing the Class Determination. The applicant would be given 10 days notice prior to disclosure in which to seek a judicial remedy. At the end of the 10-day notice period the information would be made available to the public.

An important part of implementing this Class Determination is to inform the various EPA regions and State agencies of the decision. I have informed the Regional Counsels of the Class Determination and of the way in which it is to be implemented. You will need to inform your counterpart offices in the Regions and the States.

I think it is also important that this be reflected in the NPDES regulations, in the application forms, and in any informational materials used by EPA to explain the NPDES program.

From what I have been able to determine, this decision may be a change from past practice in the treatment of information in NPDES permit applications. I believe that in the past section 402(j) was overlooked, and most offices treated information in NPDES permit applications the same as section 308 information. Accordingly, it will take time to bring everybody up to speed on this change.

If you have questions about how your offices should implement the Class Determination or other related matters, contact James Nelson at 755-0794.

Attachment

CLASS DETERMINATION 1-78

CONFIDENTIALITY OF INFORMATION IN NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMITS AND PERMIT APPLICATIONS UNDER SECTION 402(j) OF THE FEDERAL WATER POLLUTION CONTROL ACT

Under the Federal Water Pollution Control Act (FWPCA), as amended (33 U.S.C. 466 et seq.), the Environmental Protection Agency (EPA) or counterpart State agencies issue National Pollution Discharge Elimination System (NPDES) permits to individual sources of water pollution. This program is administered primarily in EPA's Regional offices. Those offices have asked for a Class Determination concerning the confidentiality of information contained in NPDES permits and permit applications in light of section 402(j) of the FWPCA. Under 40 CFR 2.207, I have authority to issue Class Determinations concerning the confidentiality of classes of information obtained by EPA.

In the case of information contained in NPDES permit applications and NPDES permits, I have found:

1. EPA possesses and will continue to acquire information in NPDES permits and permit applications.

2. The information contained in NPDES permits and permit applications is of the same character. It is proper to treat all of the information as in the same class.

3. A Class Determination would serve a useful purpose in clarifying the status of potentially confidential information contained in NPDES permits and permit applications as restricted by section 402(j) of FWPCA

I have determined that information contained in NPDES permits and NPDES permit applications is not entitled to confidential treatment because section 402(j) of the FWPCA mandates disclosure of this information to the public notwithstanding the fact that it might be trade secrets or commercial or financial information.

Section 402(j) of FWPCA states "[a] copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available upon request for the purpose of reproduction." This language is different from that in section 308 of the FWPCA. Section 308 is the basic information gathering authority of the FWPCA. Paragraph (b) of section 308 states "[a]ny records, reports, or information obtained under this section...shall be available to the public, except upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code...."

The inconsistency between the language of section 402(j) and that of section 308 was brought to the attention of the House Committee on Public Works in a letter dated December 13, 1971, from William Ruckelshaus Administrator of EPA. Congress chose to treat the information covered

by section 402(j) differently from the information obtained under section 308. In all versions of the bill that became the 1972 amendments to FWPCA, the same basic approach of requiring public disclosure of NPDES permits and permit applications was followed. The only amendments to section 402(j) were to eliminate a specific enumeration of the offices in which copies would have to be kept. In Senate Report 92-414, October 28, 1971, at page 72, the Senate Committee on Public Works made the following comments:

> An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. The Committee has therefore established requirements to provide opportunity for public hearing by the Federal Government, or if State participation is approved by the Administrator, the State, and other provisions to make available to the public all relevant information surrounding a discharge source and the control requirements placed on it. This includes the deposit of any permit, and the conditions thereto, in a place of ready public access. The scrutiny of the public and the exercise of authority under this section is extremely important to insuring expeditious implementation of the authority and a high level of performance by all levels of government and discharge sources.

It is clear from the language of section 402(j) and the legislative history of that provision that Congress intended section 402(j) to be a disclosure mandate in contrast to the basic approach of section 308 which provides protection for trade secret information. Accordingly, EPA is required to make public NPDES permits and NPDES permit applications.

The NPDES permit application is a standard form specified by EPA. It asks the applicant to supply certain specific information. In some cases, there is insufficient space for the applicant to supply all of the requested information. In those cases the applicant attaches additional sheets with the further information. For purposes of section 402(j), the NPDES permit application required to be made public is the application form itself and any attachments that are used to supply information requested by the application form. Any information obtained by EPA that goes beyond that asked for in the application, whether submitted by the applicant or obtained by EPA under authority such as 40 CFR 125.13, is not considered part of the permit application as contemplated by section 402(j). This additional information will be treated in accordance with the procedures of 40 CFR 2.302.

If an applicant has claimed as confidential any information contained in the NPDES permit application or the NPDES permit, confidential treatment will be denied in accordance with this Determination and notice given to the applicant in accordance with 40 CFR 2.205(f).

Joan Z. Bernstein
General Counsel (A-130)

3/22/78
Date

26

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

APR 19 1978

OFFICE OF
GENERAL COUNSEL
n-78-4

MEMORANDUM

TO: Assistant Administrator for Enforcement

Regional Enforcement Directors

NPDES State Directors

FROM: Joan Z. Bernstein Joan Z. Bernstein
General Counsel (A-130)

SUBJECT: Certification and Permitting of Dischargers Located on Waters Forming Boundries Between States

QUESTIONS PRESENTED

When a facility is located within one State, but the end of the discharge pipe is located within the waters of another State, which State has certification rights pursuant to Section 401 of the Clean Water Act ("The Act")? If the Section 402 NPDES permitting authority has been transferred by the Administrator to the States, which State has the 402 permitting authority?

FACTS

On February 16, 1978, the Atomic Safety and Licensing Appeal Board of the Nuclear Regulatory Commission issued a decision which interpreted Section 401 of the Act. The Board determined that the proper State to issue a certification is the State which has jurisdiction over the navigable waters in which the discharge originates rather than the State in which the facility is located. The Board noted that:

> "we are prepared to give substantial weight to the interpretation given a statute by the agency Congress entrusted with its administration. In this case, we acknowledge that EPA is that Agency with respect to the Water Act. But EPA has not specified how Section 401 controls the outcome of the issue

> before us. We are, therefore, left to do so ourselves." (PUBLIC SERVICE COMPANY OF INDIANA, INC., Docket Nos. STN 50546, STN 50-547, slip op. at 20-21, footnotes omitted).

On February 28, we received a letter from the attorneys for the Public Service Company of Indiana requesting that we address the legal issue which is before the NRC. In addition, we had informal communications with representatives from the NRC staff and the Commonwealth of Kentucky similarly requesting that we address the issue. On March 20, we wrote the Secretary of the NRC and notified him that we would prepare a legal opinion on the 401 certification question.

The proposed Marble Hill Nuclear Generating Station will be located in Indiana. Its discharge will enter the Ohio River, which forms the border between Kentucky and Indiana. Apparently, the precise border is located at the low water mark on the Indiana side of the river.1/

The legal question raised is of significance to this Agency because there are 29 rivers in the United States that are boundaries between two States. While the boundary line between the States is usually the midline or thread of the channel of the stream, this is not always the case. For some rivers the boundary line is the high-water mark or low-water mark on one side of the river.

The boundary line creates questions not only in regard to certification under Section 401 of the Act but also in regard to the question of which State has the permitting authority under Section 402 of the Act. In this opinion we shall address both issues.

ANSWER

The State in whose waters the discharge originates is the certifying authority pursuant to Section 401 of the Act. Section 401(a)(1) provides that whenever the construction or operation of a facility "may result in any discharge into the navigable waters", the certifying State shall be the one

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1/ There is a factual question as to whether the discharge originates in Kentucky or Indiana waters. As noted in our March 20 letter, we shall not address this factual question.

"in which the discharge originates or will originate." While it might be argued that a discharge of pollutants actually "originates" where the manufacturing or industrial facility is located, rather than at the end of the discharge pipe, the entire structure of the Clean Water Act, its legislative history, and intent clearly establish that the State whose waters are affected by the discharge is the proper certifying State.

Similarly, the State in whose waters the discharge originates is the Section 402 permitting authority. Section 402(b) provides that a permitting State shall "administer its own permit program for discharges into navigable waters within its jurisdiction."

The State in which the facility is located has rights pursuant to Section 401(a)(2) and Section 402(b)(5) only to the extent that the quality of its waters is affected by the discharge.

DISCUSSION

The Clean Water Act is a comprehensive statute designed to reduce and ultimately to eliminate the discharge of pollutants into the nation's waters. The Act provides for a delicate partnership between the Federal government and the States in achieving this result. A major responsibility of the Federal government under the Act is the development and promulgation of uniform national technology-based standards for categories and classes of industrial dischargers. At the same time, the States are granted the authority (with Federal support and in some cases oversight) to institute a range of more stringent, more comprehensive requirements to assure protection of the navigable waters within each State.

Pursuant to Section 510 of the Act, the States are empowered to develop more stringent water pollution control requirements than those developed by EPA. Section 510(2) also explicitly retains the authority of each State to control the waters within its jurisdiction.

In addition to these general powers, the Act provides that States shall have a series of rights and responsibilities based upon the State's jurisdiction and control over waters

of the United States. Section 208(a)(2) of the Act requires a State or its designated areawide agency to develop comprehensive pollution control plans for areas of the State which have "substantial water quality control problems." Clearly the State whose waters are affected must take the lead role in devising a plan to protect its waters.

Under Section 303 of the Act each State is required to develop water quality standards for all waters within its jurisdiction. Such standards consist of a designated use/uses of the stream (e.g. "protection and propagation of fish and wildlife") and criteria necessary to support the use, (e.g. "not less than 5 mg/l of dissolved oxygen"). Prior to the passage of the 1972 Amendments, such water quality standards were the major water pollution control mechanism under the Federal law. See State Water Control Board v. EPA, 426 U.S. 200, (1976). While the role of water quality standards was somewhat diminished by the 1972 Amendments, the standards form a major basis for numerous State and Federal programs. The difference between the designated standards and the actual ambient water quality may provide the basis for Section 208 planning. Under Section 303(d) of the Act, States must identify those streams where the federal technology-based standards are insufficient to meet the designated water quality standards. The States are required to develop maximum daily loads for such streams and to develop more stringent effluent limitations which will achieve the standards as part of the continuing planning process under Section 303(e).2/

These State plans, laws, regulations, and other requirements are translated into limitations applicable to individual point source dischargers through the NPDES permit program pursuant to Section 402 of the Act. And under Section 208(e) of the Act, no permit can be issued which is in conflict with an approved 208 plan. Under Section 301(b)(1)(C), a discharger must achieve by July 1, 1977, any more stringent limitation necessary to meet the requirements of State law,

2/ In addition, Section 305(b) requires each State to submit biannually a report describing the water quality of all navigable waters within the State and the steps which will be taken to improve water quality.

including water quality standards. The 402 permitting authority is required to assure that permits are consistent with Sections 208(e) and 301(b)(1)(C), and thus consistent with the requirements of State law including State water quality standards and limitations developed pursuant to such standards.

Section 401 of the Act provides another mechanism to insure that NPDES permits (as well as other Federal licenses and permits) meet the requirements of state law, particularly State water quality standards. Section 401 has its origins in Section 21(b) of the Water Quality Improvement Act of 1970, April 3, 1970, P.L. 91-224, 84 Stat. 91. This provision required that any applicant for a federal license or permit which might result in a discharge into navigable waters must provide the permitting authority with a certificate from the State in which the discharge originates or will originate that:

> "There is reasonable assurance, as determined by the State or interstate agency that such activity will be conducted in a manner which will not violate applicable water quality standards."

Section 21(b)(1) also provided that if the standards had been promulgated by the Secretary of the Interior, the certification should be from the Secretary. Section 21(b(9) further provided that if there were no applicable water quality standards, no certification should be required. Section 21(b) therefore recognized that the appropriate certifying authority is that which has developed and implemented water quality standards for the water body into which the discharge originates, since only the authority that develops and implements the standards could provide the "reasonable assurance" that the standards won't be violated.

The substance of Section 21(b) became Section 401 of the 1972 Federal Water Pollution Control Act Amendments. The State was no longer required to directly certify that its water quality standards would be met by the permit, but was instead required to certify that the discharge would comply with "the applicable provisions of Sections 301,

302, 306 and 307 of this Act."3/ It is clear from the legislative history of the 1972 Amendments that the major purpose of Section 401 was to allow a State to assure that its water quality standards would be met.

As noted in the Senate Report:

> "The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements."

A Legislative History of the Water Pollution Control Act Amendments of 1972, Senate Committee on Public Works, Committee Print, 93rd Cong. 1st. Sess., 1973 ("Leg. Hist.") at 1487.

In his statement on the Conference Bill, Senator Muskie further explicated this concern:

> "If a State establishes more stringent limitations and/or time schedules pursuant to Section 303, they should be set forth in a certification under Section 401." Leg. Hist. at 171.

3/ Section 401 was amended by the Clean Water Act of 1977 to include Section 303 in the list of enumerated sections. As stated in the Conference Report:

> The inserting of Section 303 into the series of sections listed in Section 401 is intended to mean that a federally licensed or permitted activity, including discharge permits under Section 402, must be certified to comply with State water quality standards adopted under Section 303. The inclusion of Section 303 is intended to clarify the requirements of Section 401. It is understood that Section 303 is required by the provisions of Section 301 . . . Section 303 is always included by reference where Section 301 is listed. (House of Representatives, Report No. 95-830, 95th Cong. 1st Sess. December, 1977 at 96)

> "Secondly, the Conferees agreed that a State may attach to any Federally issued license or permit such conditions as may be necessary to assure compliance with water quality standards in that State." Leg. Hist. at 176.

The legislative history of Section 401 thus shows that Congress intended that the certifying State be the State with jurisdiction over the navigable waters at the point of discharge.

The language of Section 401 itself further supports the same conclusion. First, Section 401(a)(1) grants certification to the State "in which the discharge originates or will originate." Under Section 502(12) the discharge of the pollutant is defined as "any addition of any pollutant to navigable waters from any point source." Thus, there is no discharge until the pollutants enter navigable waters. For the purposes of Section 401, at least, the discharge thus originates at the point at which it enters the navigable waters.4/

Secondly, when an interstate water pollution control agency "has jurisdiction over the navigable waters at the point where the discharge originates or will originate" it, rather than any State has the certifying authority. This is further indication that the certifying authority derives from jurisdiction over the navigable waters, not over the land where the facility is located.

Section 401(a)(3) provides further support for this conclusion. Pursuant to Section 401(a)(3), a certification with respect to the construction of any facility also is binding upon any subsequent operating licenses for such a facility, except that the certification may be withdrawn because of changes in four circumstances:

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4/ In his discussion of Section 401, Senator Muskie says that the certification should come "from the State in which the discharge occurs." (Leg. Hist. at 1388, emphasis added) While there may be some question as to where a discharge originates, there can be no question that the discharge occurs in navigable waters.

It may be that the Congress used the word originates to distinguish between the State in whose waters the discharge initially enters from a downstream State whose waters are also affected by the discharge. See footnote 5, infra.

> (A) The construction or operation of the facility, (B) the characteristics of the receiving waters into which such discharge is made, (C) the water quality standards applicable to such waters, or (D) applicable effluent limitations or other requirements."

A concern for the receiving waters and the criteria applicable to such waters is primarily a concern of the State which has jurisdiction over the receiving waters. A State in which the facility is located may have a variety of concerns about the facility but does not have any direct concern or jurisdiction over the waters affected by the discharge.5/

Our interpretation of Section 401 is further buttressed by a reading of Section 402 of the Act. Under this section, permits are issued to point source dischargers. Although permits are initially issued by EPA, the Act provides that the permitting authority may be transferred to a State which has an adequate program. Section 402(a)(5) provides for a temporary transfer, while Section 402(b) provides for a more permanent transfer. Both sections provide that the State has the power to issue permits for all discharges into its navigable waters:

> "The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for <u>discharges into navigable waters within the jurisdiction of such State.</u>" Section 402(a)(5) (emphasis added).

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5/ Section 401 does provide protection for any other State whose <u>water quality</u> may be affected by the discharge. Section 401(a)(2). Such State may object to the issuance of a permit and request a public hearing. The permitting agency is then required to hold a public hearing and to "condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements."

States whose waters may be affected by the issuance of an NPDES permit by another State also have rights to assure protection of their water quality. <u>See</u> Sections 402(b)(5) and 402(d)(2)(A).

> "At any time after the promulgation of the guidelines required by subsection (h)(2) of Section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." Section 402(b) (emphasis added).

Thus, the explicit statutory language of Section 402 authorizes a State to issue permits for all discharges into navigable waters within its jurisdiction.6/

In its letter requesting our opinion on this issue, the Public Service Company of Indiana suggested that the opposite answer would be preferable administratively since it would avoid the necessity of making a factual/legal determination in each case as to who owned the waters at the point of discharge. We recognize that in some circumstances such a determination may demand the resources of the permitting agency, but we believe that these considerations are insufficient to override the clear language of the Act, its legislative history, and its goals.

It has also been suggested that in issuing permits to facilities located in another State, the permit granting State may encounter difficulties in providing for inspection and monitoring of the facility, and in the enforcement of the permit. We do not regard these difficulties as insuperable, since we assume that all permits would include provisions allowing the issuing State to monitor and inspect the facility. In enforcing these provisions, or other provisions of a

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6/ The House Report clearly states that a permitting State does not have jurisdiction to issue permits for discharges into navigable waters outside of State's jurisdiction:

> Subsection (a)(5) further provides that the Administrator may authorize a State, which he determines has the capability of administering a permit program, to issue permits for the discharges into the navigable waters within the jurisdiction of such State (but not in the contiguous zone or the ocean). Leg. Hist. at 813. (emphasis added).

permit, the issuing State could bring an action in its State courts and should be able to establish that the defendant had sufficient contacts necessary to support the State's long-arm jurisdiction.

The questions answered in this opinion have not previously been formally addressed by this Agency. It is our understanding that this opinion is consistent with the actual "real world" permitting and certifying activities in most regions. A number of regions, however, have evidently allowed States to certify and to issue permits to facilities located in such States which discharge into the navigable waters of another State.

A permit issued by a State which does not have the authority under the Clean Water Act to issue such a permit is jurisdictionally defective, and would not therefore provide a discharger with the protection provided by Section 402(k) of the Act. I urge the Assistant Administrator for Enforcement to take whatever steps are necessary to expedite the re-issuing of such permits.

On the other hand, a Federal permit issued despite the lack of certification from the proper State remains valid. The Federal agency which issued such permit had the jurisdiction to take such action. To the extent that the permit is incomplete or illegal because of lack of proper certification, any injured party could seek judicial review of such permit under the appropriate provisions of Federal law. Any State which failed to assert its certification rights within the prescribed statutory and regulatory time period may be deemed to have waived such rights pursuant to Section 401(a)(1) of the Act.

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

n-79-1

JAN 11 1979

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO : Deputy Assistant Administrator
for Water Enforcement (EN-335)

FROM : Associate General Counsel
Water and Solid Waste Division (A-131)

SUBJECT: Use of Biomonitoring in the NPDES Permit Program

Your memorandum of August 31, 1978, requests the Office of General Counsel to address two questions as to the legal authority of EPA to impose toxicity test requirements in second round permits. Our conclusions are discussed below.*

Question 1

Does EPA have the authority to require permittees whose effluent fails a toxicity test or whose waste contains known carcinogens, mutagens, or teratogens, etc. to prepare treatability studies and toxicity reduction plans?

Answer

Yes.

Discussion

EPA's authority to require submission of information in a permit under Section 402 of the Clean Water Act, as amended, is at least as broad as the authority conferred by Section 308 of the Act. Section 402(b)(2), see Decision of the General Counsel No. 39, Issue I(b). Section 308 calls for point sources to conduct certain types of information gathering activities as necessary for specified purposes.

* This memorandum supersedes an OGC memorandum of November 3, 1978, on this subject

Thus, if necessary, the Administrator must require the owner or operator of a point source to "install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods)," Section 308 (a)(A)(iii), and "provide such other information as he may reasonably require." Section 308(a)(A)(v). This authority must be exercised "whenever required to carry out the objective of this Act," including (1) "developing or assisting in the development of any effluent limitation . . . , (2) determining whether any person is in violation of any such effluent limitation . . . , or (3) carrying out sections . . . 402 . . . and 504." Section 308(a). The General Counsel has stated that under Section 308(a) it is only necessary, to support a permit data-gathering requirement, to find that the information is reasonably required to carry out the objective of the Act and is not unreasonable. Decision of the General Counsel No. 27, Issue V.

Reasonable biological monitoring requirements are clearly an appropriate permit condition. Biological monitoring is specifically authorized by Section 308. In addition, such monitoring is consistent with the section's criteria in that the requirement can provide information related to the restoration and maintenance of the biological integrity of the nation's waters; can be useful in the development of effluent limitations for the same or a subsequent NPDES permit, or may possibly be necessary to carry out the Section 504 emergency provisions.

Treatability studies and pollutant reduction plan requirements are also within the scope of Sections 308 and 402. Where a discharge is found to be toxic, it is not inherently unreasonable to require the discharger to develop additional information showing whether and how the toxicity can be controlled. The added information may be necessary in order to restore and maintain the waters involved, Section 308(a), Section 101(a), to develop effluent limitations for the source, Section 308(a)(1), and to carry out Section 402. Section 308(a)(4).

Such studies are further supported by Section 101(a)(3). That section establishes a policy, in order to achieve the Act's objective, that "the discharge of toxic pollutants in toxic amounts be prohibited." Toxicity reduction plans would be squarely in accord with that policy. Their development would assist the Administrator to implement the policy through the available statutory procedures.

This question is similar to the question addressed by Decision of the General Counsel No. 39, Issue I(b). There, the permittee was required to conduct treatment and control studies, including economic analyses of various alternatives, to determine the technical and economic feasibility of attaining BATEA as then estimated by EPA. No guidelines had been promulgated for the category of point sources in question. The General Counsel's decision upheld the permit terms under Sections 402 and 308, stating, "it just cannot be seriously contended that information directly relevant to establishment of effluent limitations reflecting BATEA for the very permittee from whom the information is obtained is not information 'required to carry out the objective of the Act' and neither to be used for developing effluent limitations or relevant to carrying out Section 402."

Here, it is not clear that the treatability studies and toxicity reduction plans to be supplied would be employed to promulgate industry-wide BAT. The information could nonetheless be "required to carry out the objective of the Act," to set Section 402(a)(1) effluent limitations for the individual permittee or to implement water quality standards. See discussion of question II, below.

It is therefore concluded that biomonitoring, treatability studies, and toxicity reduction plans may be included as terms of a NPDES permit. The specific requirements must of course be reasonable. The reasonableness of any requirement would have to be determined in each case.

Question II

Do EPA and NPDES States have the authority to require non-guidelines based toxicity limits in NPDES permits, and if so, what is the basis for that authority?

Answer

EPA and NPDES States have the authority to require non-guideline-based toxicity limits in NPDES permits pursuant to Section 402(a)(1) or water quality standards, provided that the applicable requirements of Section 402(a)(1) are met or that the water quality standards supply a basis for the limits.

Discussion

Section 402(a)(1)

Section 402(a)(1) authorizes the Administrator to include in permits, prior to the implementing actions relating to Sections 301, 302, 306, 307, 308, and 403, such conditions as he determines are necessary to carry out the provisions of the Act. Where applicable effluent limitation guidelines and standards have not been promulgated, Section 402(a) authorizes the Administrator to include in permits effluent limitations based on best engineering judgment. Decision of the General Counsel No. 1, Issue I. The States' authority is comparable. 40 CFR §124.42(6).

Promulgation of effluent limitations and guidelines for a category of sources does not prevent the Administrator from using Section 402(a)(1) to impose limitations on parameters not included in those guidelines. Decision of the General Counsel No. 54, Issue I. The omitted parameters are considered to be outside the scope of the regulation. In addition, in the case of a pollutant listed as a toxic pollutant under Section 307(a), the 402(a)(1) action could be justified as being action prior to implementing actions under Section 307(a). Id.; see also Decision of the General Counsel No. 2, Issue 3.

A determination under Section 402(a)(1) is an individual-case determination of "a uniform national standard for the class or category of plants of which the plant in question is a member." U.S. Steel Corp. v. EPA, ___ F.2d ___, 10 ERC 1001, 1016 (7th Cir. 1977). Toxicity limitations presumably would constitute individual-source BAT or 307(a) limitations and should be justifiable within the terms of Section 304(b)(2) or 307(a).

It has been proposed that toxicity limitations derived from biomonitoring could be stated in either of two ways. (1) Limitations could be established on specific waste parameters reflecting the levels of pollution achievable after completion of the toxicity reduction plan or (2) an LC50 limitation could be imposed on the total waste stream after a toxicity reduction plan.

The first approach would impose numerical limitations on specific effluent characteristics. This is the usual practice in writing NPDES permits and is clearly acceptable

as long as the numbers are justified by technical, water-quality or 307(a) factors. Where the limitations are based on the discharger's own treatability studies and pollutant reduction plan, EPA may, after review of the studies and plan, be able to find that the results constitute an individually determined BAT for the source. The permit should then be able to withstand challenge and thus effectively limit the parameters covered.

Of course, the specific constituent approach has the practical drawback of requiring identification and limitation of each constituent to be regulated. It fails to take advantage of the capability of biological monitoring and general limitations to control unidentified pollutants. This purpose could be accomplished by the use of an LC50 permit limitation, if authorized by law.

Two possible approaches to a general toxicity condition have been identified. A straight LC50 limitation could be established. Alternatively, the permit might regulate the "lethal units" per gallon of discharge, using the "lethal unit" concept being developed in draft biomonitoring protocol guidance.

An initial question in determining whether such conditions could be upheld under Section 402(a)(1) is whether a lethal unit or LC50 limitation is an effluent limitation within the meaning of Section 502(11). That section defines the term "effluent limitation" as ". . . any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged . . . ." There is no indication in Section 502(11) that the restrictions contemplated must be numerical or that the constituents must be individually identified. A permit restriction phrased in terms of the biological results of the discharge of any constituents is comparable to a BOD limitation, which also indicates the effect of the overall discharge rather than the specific constituents. Such an effluent limitation should not be inherently improper.

An effluent limitation could be couched in terms of the effluent's LC50 or "lethal units." However, any permit condition must be sufficiently clear that the discharger can understand what the permit requires and what would constitute a violation. The problem of vagueness or uncertainty may be of more concern in setting general toxic limitations than

would be true in the case, for example, of BOD. BOD is a widely accepted measure of the oxygen required by living organisms (bacteria) to decompose organic material under aerobic conditions. A standard method for its analysis exists. See 40 C.F.R. §136.3. The methodology recognizes that BOD varies depending on a number of factors, and it specifies constant temperature and other conditions to assure a controlled environment.

At this time, EPA has not published toxicity test procedures under 40 C.F.R. §136. However, the Agency has published three methods manuals which are widely used by industry and regulatory agencies in testing for acute toxicity. 1/ Acute toxicity methods also are included in Standard Methods, 2/ which is recognized as an authoritative reference for chemical and biological methodology. 3/

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1/ (a) IERL - RTP Procedures Manual, Level I Environmental Assessment: Biological Tests/or Pilot Studies.

(b) EPA-660/3-75-009, Methods for Acute Toxicity Tests with Fish, Macroinvertebrates, and Amphibians.

(c) EPA-600/4-78-92, Methods for Measuring the Acute Toxicity of Effluent to Aquatic Organisms.

2/ APHA-1975. Standard Methods, 14th edition.

3/ Many NPDES states and regions, referencing the EPA and standard methods, are including acute and in some cases chronic toxicity test requirements in permits for industries suspected of discharging toxic substances. These requirements are generally used only for monitoring, but California and Washington also use acute toxicity tests to establish permit effluent limitations. California uses the Toxicity Emission Rate (TER) as an effluent limitation. The TER is the product of the effluent toxicity (acute) concentration and the waste flow expressed as Mgd. The State of Washington limits acute toxicity in permits as a function of percent survival of test organisms in a percent concentration of effluent, i.e. 80 percent survival in 65 percent treated effluent.

While test procedures for acute toxicity may have reached a level of confidence adequate to support specific effluent limitations, it appears that testing methods to determine chronic toxicity are not so well established. Where procedures have not been refined to the point that results are fairly predictable and consistent, effluent requirements based on the results of the procedures might be challenged as uncertain or vague.

Where the testing method is generally recognized, lethal unit or LC50 effluent limitations based on a source's treatability studies and pollutant reduction plan may be upheld as a 402(a)(1) best engineering judgment as to BAT. The source's studies, if properly designed and conducted, could be considered as supplying the necessary engineering and other information for the Administrator to consider in keeping with Section 304(b)(2).

It must be emphasized that any 402(a)(1) best engineering judgment limitation must in fact be based on an evaluation of the technology available to achieve that limitation. If a discharger's study is to be employed to provide the engineering data, the permit writer cannot depart from the results of the study to impose requirements more stringent than those indicated by the study unless other defensible technical studies support the alternative requirements. This is true irrespective of the permit writer's views of the discharger's studies. Whether a given discharger's studies correctly identify the best available technology for reducing its toxic effluents may be a practical issue, but inadequacies of the study, whether done in good faith or otherwise, will not justify writing a 402(a)(1) permit that goes beyond the available engineering data.

Section 307(a) focusses on individual pollutants. It would be inappropriate to base a 402(a)(1) lethal unit or LC50 condition on a 307(a) rationale. If the conditions can be justified as individual-source BAT, no 307(a) justification would be necessary.

Water Quality Standards

State water quality standards have for years included general narrative criteria to limit certain water quality

characteristics resulting from other than natural causes. These criteria include variously phrased criteria prohibiting the discharge of toxic substances in toxic amounts. 4/

Previous decisions of the General Counsel have established that narrative criteria in State water quality standards may be used in imposing conditions in NPDES permits. Thus, Decision of the General Counsel No. 13, Issue 1, upholds imposition of numerical limits on the total residual chlorine discharged based on State toxic water quality standards consisting of a general narrative and a median tolerance limit numerical standard. The decision indicates that the appropriate numerical chlorine limitation would be a question of fact.

Further, the permit's effluent limitations derived from the State's narrative criteria do not have to be expressed in quantitative terms. See Decision of the General Counsel No. 65, upholding a limitation that "there shall be no discharge of visible foam or floating solids in other than trace amounts," based on the State's narrative standard to that effect.

It follows from these decisions that the Act would not bar the Administrator from issuing permits that include LC50 or "lethal unit" effluent limitations based on a narrative criterion included in a duty adopted State water quality standard. Indeed, where a water quality standard for toxicity exists and a source's biomonitoring indicates that its discharge is toxic, the Administrator would have a duty to establish effluent limitations to assure compliance with the State's established criteria. See Decision of the General

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4/ Many State standards were modeled on the Water Quality Criteria (1968) ("Green Book") recommendations. The Green Book recommended, p. 3, that standards should provide that all waters should be free from "materials, including radionuclides, in concentrations or combinations which are toxic or which produce undesirable physiological responses in human, fish, and other animal life and plants." Similarly, Quality Criteria for Water (1976), p. 6, recommends that waters should be free from substances attributable to discharges that "injure or are toxic or produce adverse physiological responses in humans, animals, or plants."

Counsel No. 13, Issue I; Decision of the General Counsel No. 54, Issue IV, and Decision of the General Counsel No. 58, Issue I. 5/ In that case, the Administrator's choices would be to compel analysis and identification of the individual constituents accounting for the toxicity or to impose a general toxic limitation. Particularly since technical feasibility of complicance is not an issue in the case of water quality standards compliance, the latter response is reasonable.

It might be argued that imposition of a general control on the effluent in order to implement a water quality criterion which is non-numerical, with compliance measured through relatively new and uncertain techniques, contains too many uncertainties to form a part of a regulatory program -- the same vagueness/uncertainty concerns raised in connection with the Section 402(a)(1) discussion. However, the translation of effluent characteristics to receiving water quality and determination of appropriate effluent limitations to assure compliance with water quality standards is generally imprecise. Where the toxicity criterion is a State water quality standard, Section 301(b)(1)(C) requires that it be met. Although the standard is phrased in narrative terms, its intent is clear, and there is an obvious close relationship between the water quality criterion and the effluent limitation. The permit process may provide a forum for translating the imprecise standard into more precise effluent limitations. It is concluded that effluent limitations reasonably designed to result in achievement of the duly-adopted narrative water quality standard should be defensible.

Where the water quality standard is completely narrative, the measure of compliance becomes judgmental. (Compare, e.g., the Illinois standard considered in Decision of the General Counsel No. 13, Issue I, which defined toxicity as 1/10 of the 48-hour TLM for native fish or essential fish food organisms, with the more general prohibitions modelled after the recommendations quoted in footnote 4, above.

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5/ A State's 401 certification, failure to certify, or certification of a less stringent limitation would not alter the Administrator's independent responsibility. Decision of the General Counsel No. 13, Issue I, and Decision of the General Counsel No. 58, Issue I.

It is cautioned that where EPA is operating the permit program and the State standards are silent as to the measure of toxicity, the Administrator may be forced to determine acceptable concentrations, thus issuing "interpretations" of State law and regulations in an important area of emerging policies. 6/

Conclusion

There are over 12,000 suspected toxic chemical compounds in commercial use. It is, if not impossible, at least enormously expensive to identify and establish appropriate prohibitions or limitations on every substance which, if discharged to the navigable waters, may in some concentration, singly or in combination with other substances, injure or be toxic to humans or aquatic biota. Creative and at times technology-forcing solutions are needed. It is believed that the efforts discussed in this memorandum can be supported under the Clean Water Act.

At the same time, the imperfections of these approaches are clear. Continuing work on identification and more precise definition of the acute and long-term lethal and sublethal effects of toxic constituents will be an important complement to the biomonitoring and general toxicity limitation approach.

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6/ Of course, the State may participate in the permit determinations, and if the State objects to an EPA interpretation of its narrative toxicity standard, the State may suggest an effluent limitation or adopt a standard reflecting the State's preferences.

287

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

JAN 19 1979

OFFICE OF ENFORCEMENT
n-78-18

MEMORANDUM

TO: Regional Enforcement Division Directors
Director, NEIC
NPDES State Directors

FROM: Deputy Assistant Administrator for Water Enforcement (EN-335)

SUBJECT: Office of General Counsel (OGC) Memorandum

Attached is a copy of a legal opinion prepared by OGC in response to questions concerning the inclusion of compliance schedules in Second Round and new permits. The Permits Division is including this document in its Policy Book as 78-21-IV. If you have any questions or comments about this opinion please contact Scott Slesinger (EN-336), 202-755-0750.

Jeffrey G. Miller

Attachment

cc: Regional Permits Branch Chiefs

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

72-21-IV

DEC 0 0 1978

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

TO : Deputy Assistant Administrator for Water Enforcement (EN-335)

FROM : Associate General Counsel
Water and Solid Waste Division (A-131)

SUBJECT: Request for a Legal Opinion -- Inclusion of Compliance Schedules in Second Round Permits and Newly Issued Permits -- Your Memo of November 2, 1978

QUESTION

You have asked a series of questions regarding the requirements of best practicable control technology currently available ("BPT") and water quality standards ("WQS") in permits issued after July 1, 1977. Your first questions concern reissuance of a permit to a source which had already been subject to BPT requirements in an expiring permit. If BPT or WQS have become more stringent since issuance of the first permit and additional construction would be necessary for the source to meet the changed requirements, you ask whether the permit must require the source to meet the new BPT or WQS requirements and, if so, whether the permit may include a schedule for achieving the new requirements. In addition you ask, in the case of a new permit, whether the permit may ignore BPT and WQS requirements and place the source on a direct schedule to BAT/BCT. In both cases, you ask whether a schedule of compliance, if allowable, may provide a time period during which no construction is required, to allow the permit writer and the discharger to determine what construction will be required by BAT/BCT where those requirements cannot be clearly determined when the permit is issued.

ANSWER

If a source, other than a publicly-owned treatment works, has never received an NPDES permit setting forth any applicable BPT and WQS based effluent limitations, a permit issued to such source must require immediate compliance with the applicable requirements of BPT or WQS as those requirements are in effect at the time the permit is issued. If a non-POTW source has achieved its first-round effluent control requirements, a new or reissued permit to that source should assure that the source will continue to achieve those effluent reductions. In addition, revised BPT and WQS must be applied to the source. Since the Act provides no fixed schedule for compliance with these requirements, EPA should adopt a reasonable scheme for attaining compliance expeditiously, consistent with orderly application of the Act's 1984 requirements.

DISCUSSION

Section 301(b)(1)(A) of the Clean Water Act requires all sources of pollutants, other than publicly-owned treatment works, to achieve BPT by July 1, 1977, and Section 301(b)(1)(C) requires all sources to comply with WQS by that date. Section 301(b)(2) establishes a second set of more stringent technological requirements to be achieved by non-POTW's by 1984 (or three years after the date the requirements are established, up to 1987). Thus, the Act establishes a two-phase structure for achieving specified effluent limitations.

The questions raised by your memorandum arise because (1) some sources did not achieve compliance with the Phase I requirements by July 1, 1977, and (2) in some instances the definitions of BPT, or the requirements of WQS, have been revised, and current levels of treatment, previously in compliance with BPT or WQS, as defined in an NPDES permit, are not adequate to meet the revised BPT or WQS. The Act addresses the first situation, but it is silent as to the second.

I

Congress made it clear, in Section 301(b)(1), that initial compliance with BPT and WQS was to be achieved by July 1, 1977. In the 1977 amendments to the Act Congress recognized that some sources had not met those requirements, sometimes for justifiable reasons. Nonetheless, it refused to waive or extend the deadline for such sources. See H.R. 3199, 95th Cong. 1st Sess., Section 13, eliminated in conference; see also, Cong. Rec. S 13538, Aug. 4, 1977, explaining that the 1977 amendments do not extend the deadlines of Section 301 but allow the Administrator certain Section 309 enforcement options.

Since Congress expressly determined not to waive Phase I compliance requirements or allow permits to extend the compliance deadlines of Section 301(b)(1), EPA cannot claim implied authority to do so. Instead, if a permit must be issued or reissued to a source which has never achieved compliance with applicable BPT or WQS requirements, the permit must require immediate compliance with those requirements as they are currently in effect when the permit is issued, and if relief is to be provided, Section 309(a)(5) orders must be employed.

II

A source which had complied with BPT before the determination of BPT changed is in a different position from the source which never complied. This source has already achieved the Act's Phase I requirement as administratively interpreted and applied to it and is in a position to proceed with the second phase. Therefore, it would be inappropriate to impose an immediate requirement that revised BPT be achieved.

The requirement that BPT be achieved remains in the Act even after the 1977 deadline has passed. However, the Act does not set a specific deadline for attaining revised BPT requirements, and some reasonable scheme should be adopted to ensure that such requirements be achieved as expeditiously as practicable, consistent with orderly imposition of Phase II (BAT and BCT) requirements. Thus, for example, if compliance with revised BPT is a logical step towards attainment of BAT or BCT limitations, such compliance could be included as a reasonable interim element of the source's permit responsibilities. Certainly any applicable BPT requirements would have to

be met not later than the date on which compliance with BCT and BAT is required. However, where a compliance date prior to that time would require construction or modification in addition to previously defined BPT, and where that construction would not constitute a logical step toward BAT, imposing the interim BPT requirement might well undermine the Act's orderly progression from the 1977 to the 1984 requirements.

III

The issue of compliance dates for ongoing WQS compliance is less clear. The Act establishes the end date for the first stage of WQS compliance, but for subsequent levels of possibly more stringent WQS, the Act defers to State planning determinations. See Section 303(e)(3)(A), Section 303(e)(3)(F), Section 208(b)(2)(B), Section 208(e), and Section 303(e)(3)(B). If a state has revised its WQS and established a schedule of compliance at least as stringent as any federal requirement, the NPDES permit would have to impose the state-established limitation. However, if the State plans do not contain specific compliance schedules, the EPA permit writer must establish the source's Phase II WQS compliance schedule.

The Act supplies no express guidance as to what the EPA-determined, post-1977 WQS compliance schedule should be. In general, Congress intended compliance with the Act's requirements to occur at the earliest practicable time.* One option, therefore, might be for EPA simply to establish the policy that post-1977 compliance must be achieved by the earliest practicable time.

Alternatively, the Section 301(b)(2) pattern is to require second round municipal compliance in 1983 and second round industrial compliance in 1984. It is reasonable to

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* The Section 301 requirements are all to be met "no later than" the statutory deadlines. See, e.g., Leg. Hist. 163. In the 1977 amendments, Congress confirmed its interest in securing the earliest possible compliance. See Sections 309(a)(5) and 309(a)(6), added by the amendments.

establish WQS compliance schedules in harmony with the Act's general regulatory structure. Thus, EPA may infer that the Section 301(b)(2) dates should be applied to WQS, in the absence of any more stringent state schedules.

Which of these approaches (or what combination of them) is to be selected is a policy judgment. Since the Act does not express compliance schedule requirements for post-1977 WQS compliance, EPA may wish to supply guidance by regulation. This would provide a reasonable, permanent method for establishing WQS compliance schedules where none are available from the states.

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

JAN 28 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

n-80-3

TO: Regional Enforcement Division Directors
Regional Permits Branch Chiefs

FROM: Acting Deputy Assistant Administrator
for Water Enforcement (EN-335)

SUBJECT: Incorporation of Pretreatment Program Development Compliance Schedules Into POTW NPDES Permits

The General Pretreatment Regulation (40 CFR Part 403) requires that certain publicly owned treatment works (POTWs) develop programs to ensure compliance with pretreatment discharge standards by nondomestic sources discharging into the POTW. A necessary first step in developing these programs is the insertion of a compliance schedule for program development in the POTW's NPDES permit. The purpose of this memorandum is to re-emphasize the importance of incorporating pretreatment compliance schedules into all appropriate permits at the earliest possible time.

BACKGROUND

It is the intention of the Clean Water Act and the National Pretreatment Strategy that the primary responsibility for enforcing pretreatment standards be delegated to local POTWs. This is to be accomplished by EPA and NPDES States overseeing the development of POTW pretreatment programs meeting the requirements of the General Pretreatment Regulation. Section 403.8(d) of that regulation requires that,

> If the POTW* does not have an approved Pretreatment Program at the time the POTWs' existing Permit is reissued or modified, the reissued or modified Permit will contain the shortest reasonable compliance schedule, not to exceed three years or July 1, 1983, whichever is sooner, for the development of the legal authority, procedures and funding required by paragraph (f) of this section. Where the POTW is located in an NPDES State currently without authority to require a POTW Pretreatment Program, the Permit shall incorporate a modification or termination clause as provided for in section 403.10(d) and the compliance schedule shall be incorporated when the Permit is modified or reissued pursuant to such clause.

As defined by section 403.8(a)

The insertion of these compliance schedules is a critical element in launching the development of many POTW pretreatment programs. Compliance schedules also serve as a means for EPA and NPDES States to track program development.

Those POTWs required to develop a pretreatment program have been identified by States and Regional offices. Preliminary information on these POTWs was forwarded to Headquarters at the start of 1979. Since that time, the Regions and States should have developed a firmer list of exactly which POTWs will need pretreatment programs. For those POTWs so identified, the task of incorporating compliance schedules should be well underway.

CURRENT STATUS AND NECESSARY ACTIONS

Despite the importance of compliance schedules to program development and the need for their swift incorporation if regulatory deadlines are to be met, there have been indications that schedules have not been inserted in all appropriate permits. While some Regions and States have moved forward strongly in this area, others have not. If the pretreatment program is to be successful and the momentum for local program development that has been generated is to be maintained, it is essential that this activity is given appropriate priority.

In order to meet both the July 1, 1983 program approval deadline and allow POTWs adequate time for program development, compliance schedules should be established as soon as possible. By inserting schedules in permits as they expire or are modified, the disruption and waste of resources created by reopening permits solely to incorporate pretreatment compliance schedules will be avoided. Although it is desirable to avoid opening permits just to insert pretreatment schedules, this step may become necessary as the 1983 deadline approaches. As first round permits expire in FY 80, the insertion of compliance schedules will be a priority activity in this fiscal year. Less than complete attention to this activity will create a backlog with potentially disastrous program consequences.

I understand that the timely insertion of compliance schedules has been made more difficult by the delay in approval of State pretreatment programs. However, in many cases, this delay need not affect the development of POTW compliance schedules. The General Pretreatment Regulation and the National Pretreatment Strategy make it clear that those States which currently have the authority to reissue, modify or reopen POTW permits to incorporate pretreatment requirements should exercise that authority and put compliance schedules into expiring permits or those being modified for some other reason. This should be the case with the majority of NPDES States. Those few States which at this time lack the necessary authority to incorporate compliance schedules

should continue to put modification clauses in permits. These modification clauses should require that such permits be promptly reissued or modified after State pretreatment program approval to incorporate an approved POTW program or a compliance schedule for the development of a pretreatment program. To alleviate future delays, all States should move quickly to receive State program approval.

The incorporation of compliance schedules into permits should not be a major resource burden on either Regional offices or States. Individual schedules should not vary a great deal from the model provided in guidance material. A model compliance schedule accompanied by a detailed explanation of how to develop such a schedule was included in the November 29, 1978 memorandum from the Deputy Assistant Administrator for Water Enforcement and the Deputy Assistant Administrator for Water Programs Operations which is attached for your assistance. This information was expanded upon in the Pretreatment Guidance Document for NPDES States that was distributed in February, 1979. Additional copies of this Document are available from Headquarters Permits Division. If these models are followed, it should require a minimal amount of resources to carry out this critical function. The investment of resources in this effort now will yield a long term resource saving for EPA and States. Pretreatment programs developed as a result of these compliance schedules will shift most program responsibilities to POTWs.

CONCLUSION

To allow us to evaluate the progress of this program, and to help us plan where we can best utilize our contract dollars, we ask that you provide us with the following information on compliance schedule activities:

- Your current count of the number of POTWs or POTW Authorities which are required to develop pretreatment programs.

- Of those POTWs or POTW Authorities required to develop programs, how many have pretreatment compliance schedules? How many have modification clauses?

- How many POTWs or POTW Authorities, required to develop pretreatment programs, do not yet have either a compliance schedule or a modification clause?

- How do you plan to deal with those POTWs or POTW Authorities with neither a compliance schedule nor a modification clause, in a manner that will allow them sufficient time to develop a program prior to the July 1, 1983 deadline?

For purposes of answering the first three questions, we have attached a form that can be filled in for each State in your Region. Because of the need to finalize our contract planning process, we need this information as soon as possible and would like to have it within four weeks of your receipt of this memorandum. Please send the completed forms to Michael Kerner, Permits Division, (EN-336), US EPA, 401 M Street SW, Washington, D.C. 20460. If you have any questions on this or any other aspect of the National Pretreatment Program you can call Michael Kerner at (202) 755-0750 (FTS).

By diligently pursuing this compliance schedule activity, we should be able to prevent any further program slippage and encourage the rapid and successful development of this important pollution control program.

Leonard A. Miller

Leonard A. Miller

Attachments

ATTACHMENT 2

STATE OF _____

Number of POTWs or POTW Authorities requiring Pretreatment Programs* _____

Number of POTWs or POTW Authorities with Pretreatment compliance schedules. _____

Number of POTWs or POTW Authorities with modification clauses _____

Number of POTWs without compliance schedules or modification clauses. _____

POTW Authorities responsible for more than one POTW will be required to develop only one pretreatment program applicable to all their facilities. Therefore, in those situations the individual POTWs should <u>not</u> be counted separately.

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

JUN 2 1982

OFFICE OF WATER

MEMORANDUM

SUBJECT: Policy for the Second Round Issuance of NPDES Industrial Permits

TO: Regional Administrators

FROM: Frederic A. Eidsness, Jr.
Assistant Administrator for Water (WH-556)

The final "second round" policy for re-issuing NPDES industrial permits is attached. The policy reflects Regional comments in response to previous drafts sent to you and discussions with the Water Management Division Directors. This policy applies only to EPA-issued permits, although States may choose to adopt the principles outlined. I am sending the policy to both the NPDES and non-NPDES States under separate cover to solicit their comments and advice on the applicability of the policy to their programs. In addition to the priorities set here for reissuance of NPDES industrial permits, the issuance of new source or new discharge permits remains the highest priority to assure no undue delay in the construction or modification of such sources.

This policy reflects the Administrator's conviction that, to the extent possible, permit requirements should be based either on promulgated national wastewater treatment standards or requirements necessary to achieve the designated water uses specified in water quality standards. It also reflects the principles that permit effluent limitations should be developed using good scientific information and that, to the extent practicable, permits of a lasting value should be developed. Such permits assure protection of the environment while establishing wastewater treatment requirements that will not be subject to frequent change.

The policy establishes five priorities for permit issuance and describes the basis for assigning permit priorities and developing limitations. Based on this policy, Regions are to develop and submit by June 30, 1982, a list of priority permits which the Region expects to issue before the end of FY 1983. The initial list is to be submitted to Headquarters and should

contain key information such as the facility name, owner/operator, location, receiving water (STORET Reach Number), the issuance priority category (see attachment to the policy), pollutants of concern, and the anticipated schedule of issuance. Headquarters will use this information to report to the Congress and others on EPA's plans for and status of the permit program -- what our priorities are and where our resources are going. Regional performance against established plans will be assessed as part of the Office of Water's guidance/evaluation process.

Regions should also work cooperatively with the NPDES States to develop similar priority permit information on permits to be issued by the States. This is important to assuring a truly national effort and can be done as a part of routine cooperative program planning processes, such as the development of 106 plans. In this way we can determine how EPA can most usefully assist the States in their permitting efforts. Establishing State priority permit lists will also serve to assist in determining the most appropriate State-issued permits to be reviewed by the Region.

EPA headquarters will be providing guidance and assistance to help carry out this policy. Questions concerning the policy should be directed to Bruce Barrett, Director, Office of Water Enforcement and Permits (FTS/Area Code 202-755-0440).

Attachment

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

OFFICE OF
WATER

# Policy for the Second Round Issuance of National Pollutant Discharge Elimination System (NPDES) Permits for Industrial Sources

## STATEMENT OF POLICY

EPA-issued industrial NPDES permits will be issued according to the following priorities. (A detailed explanation of the policy is contained in the attachment to the "Implementation" section of this policy.) First priority shall be given to facilities discharging to waters where use impairment problems have been identified and where there is adequate information to develop either a water quality-based permit or, in the exceptional case detailed in the attachment, a BAT/BCT permit relying on best professional judgment. The second priority is to permit facilities for which applicable BAT effluent limitations guidelines have been promulgated. The third priority covers facilities suspected of contributing to the impairment of a designated water use but where insufficient information exists to confirm the extent of the use impairment. The fourth priority addresses facilities for which effluent limitations guidelines are not scheduled for promulgation and the existing permit limitations do not reflect sufficient treatment. The lowest priority is extension or reissuance of permits to facilities for which effluent limitations guidelines are not scheduled and the existing permit requires sufficient treatment. In all permitting actions, EPA will work cooperatively with States and permittees and adhere to procedures established by applicable statutes and regulations. This policy also establishes a mechanism for developing priority permit lists with the first list due by June 30, 1982 (see "Other Considerations" in the Attachment).

## EXPIRATION DATE

This policy will remain in effect until September 30, 1983.

June 2, 1982

BACKGROUND

EPA and authorized States issue NPDES permits for periods not to exceed five years. Permit limits are based either on the application of available technology or on the protection of water quality, whichever is more stringent. The Clean Water Act (CWA) establishes two levels of technology standards and deadlines for industrial compliance: best practicable control technology currently available (BPT) by July 1, 1977 and best available technology economically achievable/best conventional technology (BAT/BCT) by July 1, 1984.

The majority of the "first round" permits, reflecting BPT or more stringent water quality-based limitations, were issued between 1974 and 1976. Most of these were based on technology using "best professional judgment" (BPJ) because effluent guidelines were unavailable (relying on section 402(a)(1) of the CWA). In 1978, as these permits began to expire, EPA instituted a policy of reissuing short-term (2 to 3 year) permits in order to await promulgation of BAT/BCT effluent guidelines. Most of these short-term permits have now expired. Thus there are now more than 35,000 expired permits. For the most part, these expired permits continue in effect under the federal Administrative Procedure Act or similar State statutes.

In the past, EPA and many States focused almost exclusively on the technology-based effluent limitations approach. While EPA will continue this technology-based approach using BAT/BCT effluent limitations guidelines, EPA will also look beyond technology-based requirements and issue permits based on scientifically determined requirements for assuring environmental protection. The development of requirements based on protection of water quality has often been hampered by lack of data. This policy makes clear that the burden of data collection is shared by EPA, the State, and the discharger. Further, the implementation of this policy should assure the most effective use of resources by carefully scheduling permit activities, waiting for national treatment standards where practicable, making better use of existing data, and initiating cooperative efforts with States and permittees.

This approach is supported by initiatives that will strengthen both technology-based and water quality-based effluent limitations. It will produce permits of lasting value that are not subject to frequent change. EPA is moving ahead to promulgate national effluent limitations guidelines on a schedule which will provide guidelines for 24 primary industry categories before the end of FY 1983. Promulgated effluent limitations guidelines, in conjunction with their development documents, expert assistance, and permit writer training, will assure the application of good science and produce well founded permit limitations. Individual permit limitations developed in this way will significantly reduce conflicts and avoid protracted appeals.

A sound technical and legal basis for permit limits is also provided by State water quality standards. All States have standards for each designated water use which include both numeric criteria for specific pollutants and general conditions. Expanding the scope of these standards and improving their scientific basis is a continuing process which is now being given additional attention by EPA, the States, and throughout the scientific community. EPA is encouraging States to review and revise their standards to reflect site-specific factors. The technological basis for implementing these standards using Total Maximum Daily Load/Wasteload Allocations is being significantly advanced. These factors and site-specific biological and chemical analysis will provide the needed scientific basis for water quality-based effluent limitations in permits.

APPLICATION

This policy applies only to EPA-issued industrial NPDES permits although States may choose to adopt the principles outlined.

IMPLEMENTATION

This policy is implemented by establishing permit issuance priorities and developing priority permit lists and schedules. This approach is designed to assure the best use of available resources and produce results where they are most needed. The details of this approach are explained in the attachment.

6/2/82
Date

Frederic A. Eidsness, Jr.
Assistant Administrator
for Water

Second Round Industrial [illegible]itting Policy
(EPA-Issued P[illegible] Only)

Attachment [illegible]

| Permitting Priorities | Discussion/Implementation |
|---|---|
| **First Priority**<br>Issue permits to facilities where water use impairment problems have been identified | o States, with EPA assistance, identify water bodies where it is known that the water use is impaired or other major water quality problems exist. This may be based on factors such as drinking water supply contamination, exceedences of applicable water quality standards, and bioaccumulation of toxic pollutants. In coordination with the State, the available scientific information should be reviewed to identify significant contributors and determine whether there is adequate scientific information to develop water quality-based limits for those dischargers.<br><br>o For those dischargers identified as contributing to a use impairment or other major water quality problem, and for which there are sufficient information and data, permit limits should be developed based on section 303(d) total maximum daily load/wasteload allocations (TMDL/WLA's) and relevant portions of section 208 plans. Where sufficient data exist, EPA may develop water quality-based limits in the absence of 303(d) TMDL/WLA's, using scientifically acceptable methods, including the use of bioassays. However, such effluent limits are subject to public, administrative, and judicial review as part of the permit process and any other permittees contributing to the water quality problem will have an opportunity to participate after notice of proposed effluent limits. All water quality-based permits with expiration dates beyond July 1, 1984, also must meet the statutory definition of BAT and BCT.<br><br>o In those exceptional cases where major water quality problems are identified but there is insufficient information to develop limitations based on water quality, and effluent guidelines will not be available in the near term, the permit should be based on good scientific information with the limits reflecting BAT/BCT. In making determinations of BAT/BCT, the permit writer will rely on best professional judgment. Such permits will be issued with five year terms. More stringent limits required by national technology-based guidelines issued during the term of the permit will be included in subsequent permits. In addition, the organic chemicals and plastics/synthetics industry categories will likely present a number of cases which, because of the identified use impairment or other major water quality problems, justify the use of this approach. EPA headquarters will provide assistance to permit writers through teams of industry experts for these industrial categories. |
| **Second Priority**<br>Issue permits based on promulgated BAT guidelines where BAT guidelines are scheduled | o Where BAT effluent guidelines have been promulgated, permits will be issued reflecting guidelines and any other necessary BAT/BCT or water-quality based limits. If BAT guidelines are scheduled but have not been promulgated and no major water quality problems are involved, the first round BPT permit should be extended under the Administrative Procedure Act (APA) while waiting for BAT guidelines. |

June 2, 1982

| Permitting Priorities | Discussion/Implementation |
|---|---|
| **Third Priority**<br>Issue permits to facilities where water use impairment problems are suspected | o For those dischargers suspected of contributing to major water use impairment or other major water quality problems, but where insufficient confirming data exist, a specific short-term program of data collection should be initiated. The data collection program should include requirements for biomonitoring, chemical analysis, or field surveys necessary to obtain information to determine the magnitude and extent of the water use impairment. In setting up the data collection program, particular attention should be paid to potential contamination of public drinking water supplies. EPA Headquarters will provide further guidance on both the procedural mechanisms for implementing this data collection program as well as substantive guidance on the type of biomonitoring or chemical analysis requirements that could be used to collect data.<br><br>o If sufficient information is obtained that shows the discharger is contributing to water use impairment problems, a new five year permit or modification of existing permit limits should be developed as appropriate. |
| **Fourth Priority**<br>Issue permits where upgrading is needed and BAT guidelines are not scheduled | o Where no further BAT guidelines development is planned and the first round permit does not reflect sufficient treatment to comply with BAT/BCT, subsequently promulgated BPT guidelines or water quality standards, upgrade the permits limits and/or other necessary conditions and issue a five-year permit. Limits on conventional pollutants reflecting BCT may be developed using the BCT methodology when it becomes available, and limits on priority pollutants reflecting BAT should be developed using BPJ. Normally, significant discharges of priority pollutants are not expected where BAT guidelines are not scheduled for development. |
| **Fifth Priority**<br>Issue permits for all others as the last priority | o Where no further guidelines development is planned but the first round permit requires sufficient treatment (i.e., would meet what are likely to be considered BAT/BCT limits and no water quality problems are suspected), the existing permit may be extended under APA provisions or reissued only as the last priority. |

## Other Considerations

| | |
|---|---|
| 1. Priority Permits | EPA Regional Offices will identify facilities which are probable contributors to water use impairment or other major water quality problems. The 305(b) reports and 303(d) priority segments will be considered in identifying these priority facilities. Using this and other information, the Regional Offices will develop a listing of permits which are expected to be issued before October 1, 1983 consistent with the priorities established by this policy. The listing will include permit issuance schedules which will provide a reasonable estimate of expected issuance. The initial list of priority permits and schedules are to be transmitted to Headquarters by June 30, 1982. This list should be updated periodically to reflect current plans and priorities. Encouraging States to establish similar priority lists is also essential to the national program. |
| 2. General Permits | In addition to the points described above, we are encouraging the use of general permits to cover many facilities with the same or substantially similar types of operations and the same types of wastestream discharges. This should help significantly in reducing the backlog of expired NPDES permits. The Office of Water will analyze the opportunities for general permits for industry categories, including some primary industry categories, where the facilities' operations and discharges are very similar. Multi-State coverage will also be considered. We will keep you informed of progress in this area. In the meantime, permitting authorities should consider issuing general permits in their own jurisdictions where appropriate. |
| 3. Compliance Deadline | All permits extending past July 1, 1984 must contain final limitations that are deemed equivalent to BAT/BCT regardless of whether the limits are based on water quality, effluent guidelines, or BPJ. |

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

OFFICE OF
WATER

JAN 16 1984

MEMORANDUM

SUBJECT: Continuance of NPDES General Permits Under the APA

FROM: Bruce R. Barrett, Director
Office of Water Enforcement and Permits (EN-335)

TO: Regional Water Management Division Directors
Regional Counsels

We have received a number of inquiries as to whether continuation of expired general permits is allowed under the Administrative Procedure Act (APA) and the NPDES regulations. A recent Office of General Counsel (OGC) opinion (attached) indicates that such continuance is legally permissible. However, there are important reasons for EPA not to rely on APA continuance except in extreme cases where permit reissuance is delayed for unexpected or unavoidable reasons. This memorandum addresses the general permit reissuance process in light of OGC's recent review of the continuance issue.

SUMMARY

NPDES general permits may be continued under the APA where the Agency has failed to reissue the permit prior to expiration. Although continuance is legally permissible, permits should be continued only as a last resort and continuance should be avoided by timely reissuance of general permits wherever possible.

Because of the geographic scope of general permits and the number of facilities covered, continuance could raise questions as to whether EPA has adequately considered long-term cumulative environmental impacts, exacerbate the permit issuance backlog, and create new issues or workload problems associated with new facility permits since new facilities cannot be covered by a continued permit. Continuance is generally avoidable given adequate planning. Where continuance is unavoidable, it should be for the shortest possible time. Upon determining that a general permit will not be reissued prior to expiration, the

Regional Water Management Division Director should inform the Permits Division Director and provide a specific schedule for completing reissuance.

IMPLEMENTATION

The following requirements govern the continuance of general permits:

- Only those facilities authorized to discharge under the expiring general permit are covered by the continued permit.

- Where the notification requirements of a general permit provide permit coverage prior to the actual commencement of operations at a site (e.g., mobile seafood processors and oil and gas drilling vessels) facilities providing such notice prior to expiration are covered by the continued permit.

- At least six months prior to the expiration date of a general permit, the Regional Water Management Division Director should submit a draft general permit and a schedule for permit issuance or reissuance to the Permits Division Director. If a draft general permit is not ready at that time, an explanation of the reasons for delay and a schedule for permit development and reissuance, should be submitted instead. The Permits Division Director will expedite permit issuance and reissuance processes at headquarters as much as possible and will inform upper management in the Office of Water of any significant delays.

DISCUSSION

As with individual NPDES permits, it may become necessary to administratively continue a general NPDES permit when reissuance of the permit or issuance of a new permit is impossible before permit expiration. The APA allows for continuance of a Federal license or permit when a permittee has made a timely and complete application for a new permit. Until OGC's recent review of the issue, OWEP had advised the Regional Offices that general permits could not be continued under the APA because the NPDES regulations do not require applications for general permits. OWEP requested that OGC review and provide a written opinion on this issue since a number of parties had questioned our legal position. On November 17, 1983, OGC informed OWEP that general permits can legally be continued under the APA.

There are a number of strong policy and program reasons to assure timely reissuance rather than relying on APA continuance. Many general permits cover several dozens or even hundreds of individual facilities. The large number of facilities covered and the broad geographic coverage tend to focus industry and public attention on Agency inaction when the permit is allowed to expire, especially in the early stages of implementation of the general permit program.

Many general permits are controversial at the time of initial permit issuance. Similar controversies can be anticipated during reissuance. EPA cannot allow the public to perceive that we are avoiding these issues through administrative continuance of expired permits. For example, cumulative environmental impact assessments hinge on the number and volume of discharges. Information gathered during the term of the original permit may justify new permit limitations, terms and conditions at the time of reissuance. For marine dischargers, determinations pursuant to §403(c) of the Clean Water Act are usually dependent on the estimates of the number of facilities that will discharge during the term of the permit. Delay in updating these determinations raises questions about potential environmental impacts and the efficacy of permit conditions. Similar issues arise where there have been new standards or effluent limitation guidelines promulgated during the course of the permit or changes in the CWA or applicable requirements under other applicable statutes (e.g., Coastal Zone Management Act, Endangered Species Act).

Finally, a major goal of the general permit program is to reduce the Agency's NPDES permit issuance backlog. Allowing general permits to expire aggravates the backlog problems. In addition, new dischargers would not be covered until EPA reissued the general permit. Since these facilities would be liable for discharge without a permit, they would likely request an individual permit and be required to submit a full application and do appropriate testing. This creates a permit issuance workload demand that would be avoided by timely reissuance of the general permit, as well as putting burdens on permit applicants that would be removed by reissuance of the general permit.

Given the drawbacks and problems, administrative continuance of general permits should be the exception rather than the rule. Adequate planning and timely permit preparation will allow us to avoid the necessity to use administrative continuance except as a stop gap, short term measure. The Office of Water Enforcement and Permits will work with the Regions to avoid continuance wherever possible.

cc: Colburn T. Cherney, OGC

Attachment

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

JUN 16 1978

THE ADMINISTRATOR

n-78-8

MEMORANDUM

TO : Assistant Administrator for Enforcement (EN-329)
Deputy Assistant Administrator for Water Enforcement (EN-335)
Regional Administrators
Regional Counsels
Regional Enforcement Directors

SUBJECT: Ex Parte Contacts in NPDES Adjudicatory Hearing Decisions

This memorandum sets forth limitations on contacts among those EPA employees who are involved in preparing and issuing initial and final NPDES decisions of the Regional Administrator or the Administrator, and other Agency staff and persons outside EPA. Effective immediately, these requirements apply to all EPA employees involved in NPDES proceedings.

Several courts have now held that the hearing required by Section 402(a) of the Clean Water Act must be "on the record," triggering the formal adjudication requirements of the Administrative Procedure Act. Seacoast Anti-Pollution League v. Costle, No. 77-1284 (1st Cir. Feb. 15, 1978); United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir. 1977). Among these requirements is that embodied in the Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (Sept. 13, 1976), prohibiting EPA decision-makers in formal APA hearings from engaging in ex parte discussions of the merits with "interested persons outside the agency." 5 U.S.C. §557(d). The APA also requires that no one involved in "investigative or prosecuting functions" may "participate or advise in the decision, recommended decision, or agency review . . . ." 5 U.S.C. §554(d).

It is not clear that Agency enforcement staff involved in NPDES adjudicatory hearings are performing "investigative or prosecuting functions." However, EPA should adopt a policy that not only complies with the law, but avoids even the appearance of unfairness. Accordingly, I am setting out the following requirements.

When these Requirements Apply

Consistent with the Sunshine Act, all the requirements in this memorandum are applicable from the date public notice of an evidentiary hearing is published under 40 C.F.R. §125.36(c)(4), until the date of final Agency action on the permit application.

Requirements Applicable to Regional Administrators and their Assistants

Regional Administrators and staff members selected to assist them in writing an NPDES decision will refrain from *ex parte* discussions of the merits of the proceeding with any interested person outside the Agency. They should also refrain from any such discussions with the Assistant Administrator for Enforcement or his staff, and the Regional Enforcement Director and his staff.

The term "interested person outside the agency" appears in the Sunshine Act, and refers generally to anyone who has a stake in the outcome of the proceedings greater than a member of the general public. The term includes, for instance, all parties to the hearing and their competitors, public officials (including elected representatives such as mayors, Senators, and Congressmen), environmental and other interest groups, and companies, organizations or associations with some special interest in the issues (for example, the Chamber of Commerce or industry trade associations).

The Water Quality Division of the Office of General Counsel has been assigned to be available to assist me, the Deputy Administrator, or any judicial officer in preparing final decisions in NPDES proceedings. Accordingly, the Regional Administrator and his staff, and Regional enforcement staff, may not discuss the merits of the case with an attorney in that Division.

However, to avoid total isolation of the Regional Administrator and his staff from assistance, one or two attorneys in the Water Quality Division will be designated by the Associate General Counsel for Water to serve as Special Counsel to advise them in preparing decisions. Such attorneys may not advise me or my staff in NPDES decisions. Currently, Barry Malter (FTS 755-0760) and Nancy Othmer (FTS 755-0433) are serving in that capacity.

Administrator and his Staff

The Administrator (and the Deputy Administrator, when she is Acting Administrator for the purpose of making a final decision on an NPDES appeal), and any judicial officer assigned to assist us in preparing an NPDES decision, will, like Regional Administrators, refrain from *ex parte* discussions of the merits of the proceeding with all "interested persons outside the Agency," and Enforcement staff. We will, where necessary, call upon other Agency personnel, including the General Counsel and her staff, excluding any attorneys designated as Special Counsel to assist Regional Administrators.

Procedures in case of Departure from these Requirements

Occasionally these requirements may be abrogated through inadvertence. Or, if a Congressman or Senator requests a briefing on a pending matter (*see* 5 U.S.C. §557(d)(2)), discussions otherwise proscribed by this memorandum may be unavoidable. In any case where such a discussion occurs, the substance of the discussion must be promptly reduced to writing, and a copy served upon all parties to the proceeding.

I have asked the Assistant Administrator for Enforcement and the General Counsel to review applicable NPDES regulations to see to what extent incorporation of these procedures would be appropriate.

for Douglas M. Costle

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

OCT 03 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: NPDES Evidentiary Hearing Management Program

TO: Regional Enforcement Division Directors

FROM: R. Sarah Compton
Deputy Assistant Administrator
for Water Enforcement (EN-335)

On March 7, 1979, responsibility for managing the NPDES evidentiary (formerly adjudicatory) hearing program was transferred from the Enforcement Division to the Permits Division. With the evidentiary hearing program the Permits Division gained responsibility for:

- o developing a strategy for resolving evidentiary hearings
- o providing guidance on granting and denying evidentiary hearings
- o providing specific case support */
- o maintaining an evidentiary hearing tracking system
- o processing proposed stipulations settling evidentiary hearings

Until now, no written procedures for carrying out these activities have been directed to the Regions. Discussion of these procedures is outlined in the following paragraphs.

However, before discussing hearing program policy, I wish to emphasize the importance of processing pending cases as expeditiously as possible. It is essential that you

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*/ Legal case support was reestablished on September 10, 1980, as an Enforcement Division responsibility.

aggressively resolve the existing backlog of cases so that permittees will complete, at the earliest possible date, all measures necessary to achieve BPT. The backlog must be eliminated in anticipation of another series of hearing requests which we expect as second round permits are issued. Pending hearings, and the issues which they have raised, will not necessarily become moot upon the filing of a hearing request for review of second round BCT or BAT permits. We should push for attaining BPT and then be prepared to handle the second round of hearing requests as they are filed.

Strategy for Resolving Evidentiary Hearings

Several attempts have been made to develop a strategy for resolving pending evidentiary hearings. However, with permits expiring and emphasis being placed on enforcement case resolution, developing this strategy for resolution of evidentiary hearings was never completed. However, we are still considering the following actions for resolving the large number of upcoming hearing requests:

1. Narrow the scope of, or deny as many unfounded requests as can be justified. Guidance for granting and denying evidentiary hearings is now being prepared by Robin Conrad in the Permits Division. The initial draft guidance document is expected shortly.

2. Categorize the issues raised, code these issues and incorporate these codes into the Evidentiary Hearing Tracking System. Automation of these issues (through use of codes) could allow us to keep a running tally of issues and allow categorizing such issues and ultimately aid in providing uniform response to requests and uniform resolution to issues adjudicated.

3. After categorizing and summarizing the issues, a centralized evidentiary hearing team, made up of technical and legal staff (and economists), could be established to address these common issues.

Specific Case Support

Even though management of the evidentiary hearing program was transferred to the Permits Division, specific legal case support has been reestablished as a responsibility of the Legal Branch, Water Enforcement Division.

Evidentiary Hearing System Report (formerly "Adjudicatory" Hearing System Report)

Recently we have discussed improvements to the computerized Evidentiary Hearing System Report (EHSR), which has not been updated since June 1978; and we are considering three approaches to providing a current hearing status:

- Use the present system and format and periodically update the report.
- Eliminate data elements of little benefit and replace them with more useful ones before updating the report.
- Develop a completely new tracking system that is more efficient and flexible.

Several aspects of the Headquarters NPDES evidentiary hearing program, as well as regional hearing programs, will have to be considered before a decision is made on which route to follow. In the meantime, we still would like to track evidentiary hearings. In the summer of 1978, Bridget Crawford of the Industrial Permits Branch requested (by phone) the number of pending hearings in each region, their SIC codes, and related issues. From this information, she developed a status report on all pending NPDES evidentiary hearings. Once again we want to request this type of information to enable the "Crawford" report to be updated. For your convenience, attached is a questionnaire that, when completed by your office, covers all areas necessary for updating the report.

Stipulations Review Procedures

Even though the final Consolidated Regulations are silent on Deputy Assistant Administrator (DAA) approval of stipulations settling NPDES evidentiary hearings, the review and approval of stipulations for major dischargers only will continue at Headquarters. This review procedure is a continuation of existing policy except that stipulations for minor dischargers no longer require Headquarters' approval. Stipulations will continue to be signed by the Chief, Industrial Permits Branch (until we reorganize). Since settling evidentiary hearings for majors is of primary concern, it is important that the review and approval of stipulations to such hearings be well managed. Also, we anticipate an increasing flow of stipulations for Headquarters approval because of the many new hearing requests that are expected in the coming months. We do not anticipate any delays in Headquarters.

Stipulations submitted for Headquarters approval will still be examined for their legal and technical accuracy and ability to meet certain compliance standards. This review process has proven to be an effective method of screening stipulations for possible errors due to oversights, lack of coordination, and misjudgment. Generally, once Headquarters has received a stipulation package, the proposed stipulation can be reviewed and returned to the Region within fifteen working days. However, in certain cases additional time is needed.

So that stipulations can be reviewed and returned to the Regions with minimal delay, these procedures should be followed:

1. Forward the proposed stipulation package to:

   Bridget C. Crawford (EN-336)
   Evidentiary Hearing Clerk
   Permits Division, Industrial Permits Branch
   Environmental Protection Agency
   401 M Street, S.W.
   Washington, D. C. 20460

2. The stipulation package should contain:

   a. A cover memorandum to the Chief, Industrial Permits Branch that explains the proposed changes to the permit, reasons for those changes, and includes the name and phone number of the regional contact who is familiar with the stipulation.

   b. A copy of the permit (and the revised permit if part of the stipulation).

   c. The original copy of the proposed stipulation signed by appropriate regional officials.

   d. A copy of the evidentiary hearing request.

   e. Any background data that would have bearing on the review and approval of the stipulation.

If all reviewers concur with the proposed stipulation, it is returned to the Chief, Industrial Permits Branch, for final review and signature and then returned to the Region for further processing. In cases where an issue is raised with regard to provisions of a stipulation, the Headquarter's staff member raising the issue will telephone the appropriate regional contact and attempt a verbal resolution. If agreement cannot be reached, the Industrial Permits Branch Chief will review the issues in question and determine whether the stipulation should be returned to the Region for revision. If this determination is made, the Regional Enforcement Division Director will be requested to resubmit the stipulation to Headquarters with suggested changes. However, if the stipulation is resubmitted to Headquarters without suggested changes, and still does not meet with the approval of the Industrial Permits Branch Chief, a review by the Deputy Assistant Administrator for Water Enforcement will be requested. If the DAA for Water Enforcement concurs with the decision of the Industrial Permits Branch Chief, the stipulation will be returned to the Region unsigned and accompanied by a formal nonapproval memorandum.

I hope that this memorandum will provide sufficient guidance for getting stipulations processed in an organized and timely manner. As the program moves ahead, you will receive further guidance or information on managing the evidentiary hearing process, revising the Evidentiary Hearing Tracking System, how specific case support will be provided, the grounds for granting and denying evidentiary hearing requests, the development of policy for resolving hearings, and training with regard to evidentiary and non-adversary panal hearing procedures.

Please provide us with your comments. Call me (FTS 755-0440) or Bill Jordan, Chief Industrial Permits Branch (FTS 426-7010) if there are any questions.

Attachment

# Drinking Water Enforcement

# Drinking Water Enforcement

WSG-29

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

OFFICE OF ENFORCEMENT
DEC 28 1976

MEMORANDUM

Subject: Regional Guidance
Emergency Action on Water Supply Hazards

From: Deputy Assistant Administrator for Water Enforcement (EN-335)
Deputy Assistant Administrator for Water Supply (WH-550)

To: See Below

A draft guidance memorandum on the above subject was sent to you on May 17, 1976, for your review and comments. All the comments that you submitted have been reviewed and evaluated in the preparation of the attached final version of the Guidance Memorandum. You may now use this guidance in exercising the authority granted by section 1431 of the Public Health Service Act, as amended by the Safe Drinking Water Act.

At this time, we wish to emphasize that these Emergency Powers should be used "to deal promptly and effectively with emergency situations which jeopardize the health of persons" and only as a last resort when all other remedies available to EPA have been exhausted.

This memorandum should be filed as Water Supply Guidance No. 29 under the heading "Emergency Powers."

Jeffrey G. Miller  Victor J. Kimm

Addressees:
Regional Administrators
Regional Counsel
Regional Enforcement Directors
Regional Water Program Directors
Regional Surveillance & Analysis Directors
Regional Water Supply Chiefs

Attachment

The whole point of water vending machines is to sell water so that condition (c) is not met. Most machines treat the water in some way so condition (a) is not met.

If any one of (a) (b) or (c) is not met the public water system is covered by the regulations.

Conclusion

Water vending machines which either treat water in some way or sell water are covered by the NIPDWR as a non-community, public water supply.

# REGIONAL GUIDANCE

## EMERGENCY ACTION ON WATER SUPPLY HAZARDS

Section 1431 of the Public Health Service Act, as amended by the Safe Drinking Water Act, provides that the Administrator may take emergency action to protect public health when he receives information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to health. The text of section 1431 and the accompanying explanation in the House Report (H.R. No. 93-1185) are attached as Tab A.

Evaluation of a given situation to which section 1431 might apply must include the following considerations:

A. Who may take emergency action. A decision to act under section 1431 must be made by the Administrator. To date there has been no delegation of this authority.

B. Discretionary nature of section 1431. Action under section 1431 is discretionary. The statute provides that the Administrator "may" take action. Upon evaluation of the available information, the Administrator may determine that the evidence of an imminent hazard is inadequate or that the problem should be dealt with by State or local government or under EPA authority provided elsewhere in the Act. Emergency authority under this section is not to be used in cases where the risk is speculative in nature, or trifling in degree.

C. Purpose of 1431 action. Any section 1431 action should be directed toward:

1. Preventing an impending hazardous condition from materializing,

2. Reducing or eliminating a hazardous situation once it has arisen, and

3. Providing an alternate safe water supply source.

D. Effect of State and local action. Action can be taken under section 1431 only if the Administrator has information indicating that appropriate State and local authorities have not acted to protect the public health. Moreover, to the extent considered practical in light of the urgency of the situation, the Administrator must consult with State and local authorities to confirm the information indicating that there is an imminent hazard and to determine what action the State and local governments are taking or will take. This requirement implements legislative intent expressed in House Report 93-1185 to "direct the Administrator to refrain from precipitous preemption of effective State or local emergency abatement efforts." Section 1431 is not meant to be a vehicle for dealing with problems which can be handled effectively by State and local governments in a timely fashion.

E. Other SDWA requirements do not limit 1431 action. Action under section 1431 can be taken without regard to requirements of the primary drinking water regulations or State underground injection control programs. Thus, action can be taken to deal with a contaminant not covered by the primary drinking water regulations or to act against an underground injection control program. Orders may be issued and enforced and suits may be brought notwithstanding the existence of any exemption, variance, permit, license, regulation, order or other requirement. During the initial stages of implementation of the emergency powers authorized under section 1431, appropriate actions will have to be taken on a case-by-case basis. However, as experience is accumulated and certain problems are found to recur in a geographical area or on a nationwide basis, it would be best to deal with such similar cases on a Regional or national basis by modifying the national requirements (such as revision of MCLs) instead of the repeated use of emergency powers under section 1431.

F. Standard of imminent endangerment to health. The Administrator has been given broad discretion to determine whether a hazard is "imminent." Because of the paramount importance given to the objective of protecton of the public health, implementation of this authority must occur early enough to prevent the potential hazard from materializing or becoming worse. "Imminence" thus means that the Administrator is required to have proof of a substantial danger to health, but he is not required to have uncontroverted proof that injury will in fact occur. The risk of harm must be "imminent," not the harm itself. Thus, for example, the Administrator may invoke this section to prevent an imminent introduction of contaminants into drinking water even though the adverse health effects will be experienced by the users of the system only after a long period of latency. The Administrator may consider the time it may take to prepare orders, to commence and complete litigation, and to implement and enforce administrative or judicial orders to protect the public health. Thus, the hazard may also be "imminent" even if the contaminants will not enter the water supply for several days, if time is needed to implement corrective action under section 1431.

G. Standard of substantial endangerment to health. The Administrator also has been given broad discretion to determine whether a hazard is "substantial." Certainly, the presence or potential presence of any life threatening substances is a "substantial" hazard, but a "substantial" hazard may also include the presence or potential presence of any substances capable of causing adverse health effects, such as carcinogens, as well as a substantial statistical probability that disease will result from the presence of contaminants in drinking waters. Additionally, a "substantial" endangerment may also exist when the danger is one of a lesser degree of risk but a substantial number of people are involved.

H. Degree of proof required. As noted above, the Administrator does not have to have uncontroverted "proof" that persons will in fact be injured before taking action under section 1431. Undue efforts to document the available information or proof should be avoided, particularly where the delay in obtaining such information or proof could impair attempts to prevent or reduce the hazardous situation.

I. Scope of remedial action. Once the Administrator determines that action under section 1431 is needed, a broad range of options is available. The statute provides that he may take such actions as may be necessary to protect the health of persons who are or may be users of the public water system involved, and that he may issue an order or bring a suit for appropriate relief, including a restraining order or a temporary or permanent injunction. An order or a suit can be directed against an owner or operator of a public water system, a Federal Government agency, a State or local government unit, State or local officials, owners or operators of underground injection wells, area or point source polluters, or any other person whose action or inaction requires prompt regulation to protect the public health.

J. No citizen suits under section 1431. Section 1431 does not authorize suits by anyone other than EPA. Citizens' civil actions are authorized by section 1449 of the Public Health Service Act to force compliance with drinking water requirements, but section 1449 does not grant general authority for suits in emergency situations.

K. Orientation towards sources of contaminants. Any action under section 1431 should be oriented toward the abatement of the source of contamination. Such action may include amendment of the terms of an NPDES permit. Public water systems, where they are not the source of contamination, should not be forced to bear the burden of ameliorating an emergency situation unless the danger is such that exposure must be minimized immediately and it is not feasible to abate the source of pollution within the available time period.

L. Procedures for implementation of section 1431. Implementation of section 1431 shall generally proceed in the sequence outlined below:

1. The Regional Office documents the problem. The degree of documentation necessary will depend on the difficulty and urgency of the problem. Section 1431 authorizes the Administrator to obtain from any person relevant information necessary to evaluate the source and the danger of a potentially hazardous contaminant. If possible, the Region should cooperate with State and local officials in this effort. Pending the acquisition and evaluation of such information, the Regional Office should promptly notify one person in Headquarters using the following order of priority:

a. DAA for Water Supply.

b. Associate DAA.

c. Director, State Programs Division.

d. Chief, Drinking Water Regulations Implementations Branch.

The Office of Water Supply will promptly notify the DAA for Water Enforcement.

2. The Regional Office transmits the information to the DAAs for Water Supply and Water Enforcement for coordination of the risk assessment and identification of possible remedial measures.

3. The Regional Office shall consult with the State and local officials to confirm the correctness of the information developed in Step 1.

4. The Regional Office determines whether State and local officials are or are not taking appropriate action to protect the health of persons.

5. If it is determined that State and local officials are not (or cannot) taking appropriate action, the Regional Office and the Offices of Water Supply and Enforcement shall prepare an action package in accordance with EPA Order 1320.2 for the Administrator. The degree of detail and amount of backup for the Action Memorandum will vary with the degree of urgency involved. When the hazard is due to area or point source pollution, proposed actions should include identification of the pollution sources and plans for their abatement.

6. The Administrator determines the action(s) to be taken and transmits his decision to the Regional Administrator by telephone or mail, as appropriate.

7. The Regional Office implements the action(s) of the Administrator. These guidelines should be followed until sufficient case-by-case experience is accumulated to allow their revision.

TAB A

"Part D - Emergency Powers

. 42 USC 300i.

"Sec. 1431. (a) Notwithstanding any other provision of this title, the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

"(b) Any person who willfully violates or fails or refuses to comply with any order issued by the Administrator under subsection (a) (1) may, in an action brought in the appropriate United States district court to enforce such order be fined not more than $5,000 for each day in which such violation occurs or failure to comply continues."

House Report No. 93-1185, pages 35 and 36 :

"Part D - General Provisions

Section 1431. Emergency Powers

Section 1431 reflects the Committee's determination to confer completely adequate authority to deal promptly and effectively with emergency situations which jeopardize the health of persons.

The authority conferred by this section is intended to override any limitations upon the Administrator's authority found elsewhere in the bill. Thus, the section authorizes the Administrator to issue such orders as may be necessary (including reporting, monitoring, entry and inspection orders) to protect the health of persons, as well as to commence civil actions for injunctive relief for the same purpose.

The authority to take emergency action is intended to be applicable not only to potential hazards presented by contaminants which are subject to primary drinking water regulations, but also to those presented by unregulated contaminants.

The authority conferred hereby is intended to be broad enough to permit the Administrator to issue orders to owners or operators of public water systems, to State or local governmental units, to State or local officials, owners or operators of underground injection wells, to area or point source polluters, and to any other person whose action or inaction requires prompt regulation to protect the public health. Such orders may be issued and enforced notwithstanding the existence of any exemption, variance, permit, license, regulation, order or other requirement. Such orders may be issued to obtain relevant information about impending or actual emergencies, to require the issuance of notice so as to alert the public to a hazard, to prevent a hazardous condition from materializing, to treat or reduce hazardous situations once they have arisen, or to provide alternative safe water supply sources in the event any drinking water source which is relied upon becomes hazardous or unuseable.

Willful violation of the Administrator's order is made punishable by a fine of up to $5,000 per day of violation.

In using the words "that appropriate State or local authorities have not acted to protect the health of persons," the Committee intends to direct the Administrator to refrain from precipitous preemption of effective State or local emergency abatement efforts. However, if State or local efforts are not forthcoming in timely fashion or are not effective to prevent or treat the hazardous condition, this provision should

not bar prompt enforcement by the Administrator.

In using the words "imminent and substantial endangerment to th health of persons," the Committee intends that this broad administrative authority not be used when the system of regulatory authorities provided elsewhere in the bill could be used adequately to protect the public health. Nor is the emergency authority to be used in cases wher the risk of harm is remote in time, completely speculative in nature, o de minimis in degree. However, as in the case of U.S.v. United States Steel, Civ. Act. No. 71-1041 (N. D. Ala. 1971), under the Clean Air A the Committee intends that this language be construed by the courts and the Administrator so as to give paramount importance to the objective of protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prever the potential hazard from materializing. This means that "imminence" must be considered in light of the time it may take to prepare administrative orders or moving papers, to commence and complete litigation, and to permit issuance, notification, implementation, and enforcement of administrative or court orders to protect the public health.

Furthermore, while the risk of harm must be "imminent" for the Administrator to act, the harm itself need not be. Thus, for example, the Administrator may invoke this section when there is an imminent likelihood of the introduction into drinking water of contaminants that may cause health damage after a period of latency.

Among those situations in which the endangerment may be regarde as "substantial" are the following: (1) a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventive action is not taken; (2) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants)."

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

NOV 17 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Safe Drinking Water Act Public Water System Settlements - Interim Guidance

FROM: Courtney M. Price
Assistant Administrator, Office of Enforcement and Compliance Monitoring

TO: All Regional Administrators
All Regional Counsels

## Introduction

Since 1979 EPA has referred 30 Safe Drinking Water Act (SDWA) cases against public water suppliers to the Department of Justice. Sixteen of these cases have been filed by Justice during 1983 alone. With this increase in litigation, three different settlement patterns have developed among the three Regions referring SDWA cases (see attached charts). This document establishes criteria that will promote a coherent national enforcement policy governing SDWA settlements in cases against public water suppliers. Proposed Regional settlements not consistent with these criteria will not be concurred in by this office and will not be recommended to the Department of Justice.

Due to negotiations currently underway in a number of SDWA cases, this guidance is being issued for immediate use in interim form at this time. This guidance shall remain in effect until further notice. Comments are invited on the policies set forth herein.

The Office of Drinking Water has been consulted on this policy.

## Injunctive or Administrative Relief

Except for extraordinary cases in which it is physically impossible for a public water supplier to comply with a maximum contaminant level (MCL) or other appropriate health standard, all settlements must remove all health hazards or risks associated with the public water supplier's SDWA violations. Violations of MCLs shall be abated as soon as possible, whether through the

provision of alternate water supplies, installation of treatment equipment, or other means. If settlement in such circumstances is not immediately available, Regional Administrators should issue an administrative order under §1431 of the SDWA where warranted, or seek a preliminary injunction ordering appropriate relief.

Monitoring, Reporting, and Notification Duties

Because public exposure to health risks is also increased by a public water supplier's failure to comply with the SDWA regulations governing monitoring, reporting, and public notification duties, all settlements must require full compliance with SDWA regulations governing monitoring, reporting, and public notification duties. In cases in which the defendant has failed to monitor for any contaminant during the most recent monitoring period, all settlements should require appropriate monitoring to be conducted within 30 days of the entry of the settlement with the court.

Civil Penalties

Civil penalties have two components: the recovery of economic benefits accruing from noncompliance, and the imposition of a penalty to deter further violations. All settlements should recover the economic benefits that have accrued to the defendant through his noncompliance. Proposed settlements which do not recover economic benefits should explain why they do not. A deterrence component must also be included in each settlement, although its amount may vary according to the factors discussed below.

Calculations of benefits should include applicable amounts saved through the avoidance of sampling, mailing, public notice, laboratory, and capital equipment costs.[1] Labor costs to conduct sampling and other tests may be included at Regional discretion. As a rule, inferred costs for volunteer labor for small public water suppliers need not be included in the government's final settlement offer, although costs for paid employees of larger systems should be included in settlement. This distinction is based on financial differences among defendants and their effect on achieving settlements.

The deterrence component presents a more complex calculation. The primary factors to consider in determining the Agency's final

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[1] Economic savings of capital costs may be calculated by the imputation of finance costs. (The 1980 Civil Penalty Policy provides an example of a detailed method to estimate economic savings enjoyed by deferral of capital expenditures.) In all SDWA cases brought to date, economic savings to the violator for failures to monitor, report, or notify have been slight. Very few cases have required construction or equipment installation costs.

settlement offer are those enumerated in the Safe Drinking Water Act itself - "the seriousness of the violation, the population at risk, and other appropriate factors." SDWA §1414(b), 42 U.S.C. §300g-3. All settlements reached should specifically attempt to deter the violator from further noncompliance. Deterrent penalty amounts should reflect the severity of the defendant's violations. Most serious are MCL violations associated with outbreaks of waterborne illness among the defendant's consumers, followed in order by MCL violations of bacteriological, nitrate, or turbidity limits, other MCL violations, failures to notify the public or EPA of violations, monitoring violations, and reporting violations. The Region should also consider the willfulness or recalcitrance of the defendant, its financial resources, the length of time over which the violations have occurred, and the general deterrent effect of the settlement on similarly situated violators in the same area.

Unless there are extraordinary circumstances, no settlement may include a deterrent component of less than $1,000. All settlements shall include a deterrent component.

If a settlement that includes an appropriate civil penalty cannot be achieved, the case should be litigated through trial.[2]

Conclusion

Adherence to this settlement policy will affect certain pending cases. Cases which a Region determines are significant enough to refer merit application of the minimal settlement requirements set forth above to promote effective enforcement responses. The potential for adverse affects on human health by violation of the SDWA compels rigorous enforcement of the Act to achieve remedies for existing violations and to deter future violations.

Attachment

cc: Rebecca Hanmer
F. Henry Habicht

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[2] See Memorandum dated September 7, 1982, titled "Case Referrals for Civil Litigation" from Acting Enforcement Counsel to Regional Counsels: "[R]eferrals to Headquarters and DOJ for the purpose of applying pressure on a party to settle should not be made unless the Regional office is willing to carry the case through a suit."

SAFE DRINKING WATER ACT CASES
CIVIL ENFORCEMENT DIVISION
REGION III

| Name of Defendant/ Facility Location | Date Filed | Status | Penalty/ Special Relief |
|---|---|---|---|
| | | | |
| Cherry Tree Bor Muni, Cherry Tree, Pa. | 4/7/83 | active | - |
| Monument Water Assn., Centre County, Pa. | 2/3/83 | active | - |
| Orviston Water Assn., Orviston, Pa. | 2/21/83 | active | - |
| Oval-Oriole Water, Lycoming County, Pa. | 4/25/83 | CD | $500 |
| Perkiomen Valley Preservation Society, Green Lane, Pa. | 9/30/83 | CD lodged | $8,000 & broad injunctive relief |
| Salemville Water Assn., Bedford County, Pa. | 9/29/80 | CD | $100 & required to discontinue use of surface water source |
| Tenney, Wm. B., et al. Hamden Twp., Pa. | 6/23/80 | Trial concluded | $25,000 |
| West Carroll, Twp. of West Carroll Tw., Pa. | 4/7/83 | active | - |
| Whiskey Run Water, Farrandsville, Pa. | 8/16/83 | active | - |
| | | | |
| | | | |

SAFE DRINKING WATER ACT CASES
CIVIL ENFORCEMENT DIVISION
REGION VIII

| Name of Defendant/ Facility Location | Date Filed | Status | Penalty/ Special Relief |
|---|---|---|---|
| Avelino Gutierrez,d/b/a A & K Trailer Court, Rock Springs, Wy. | 3/22/83 | CD lodged | $1,000 |
| Alcova Acres Invest, Alcova, Wy. | 8/13/82 | CD | $1,000 & required to provide bottled water until PWS complies |
| Alpine Water and Sewer District, Alpine, Wy. | 9/6/83 | active | - |
| Alta Commun Pipeline, Alta, Wy. | 3/22/83 | CD lodged | $1,000 |
| Grover Domestic Water Works, Grover, Wy. | 8/15/83 | active | - |
| Happy Valley Pipel., Afton, Wy. | 8/13/82 | CD | $0 - required to install $2,000 chlorinator |
| McGuire Trailer Ct., Rock Springs, Wy. | 3/22/83 | active | - |
| North Alton Pipeline, Afton, Wy. | 8/13/82 | Default J'ment | Penalty question still open |
| Osmond Pipeline Co., Afton, Wy. | 3/22/83 | active | - |
| Rainbow Pipeline Co., Afton, Wy. | 10/14/80 | CD | $0 - Judge rejected penalty in CD |
| Rio Vista Homesites, Green River, Wy. | 10/14/80 | Default J'ment | $0 - system turned over to new supplier |

SAFE DRINKING WATER ACT CASES
CIVIL ENFORCEMENT DIVISION
REGION X

| Name of Defendant/ Facility Location | Date Filed | Status | Penalty/ Special Relief |
|---|---|---|---|
| | | | |
| Alder Creek Water Co., Portland, Or. | 9/19/79 | active | Court placed company in receivership for 2 1/2 yrs |
| Glen Villa Trl. Park, Glendale, Or. | 11/12/82 | CD | $2,500 |
| London Water Coop, Cottage Grove, Or. | 1/25/83 | active | - |
| Midland Water Assn., Clatskanie, Or. | 1/7/83 | active | - |
| Mitchell Water Assn., Bend, Or. | 11/12/82 | active | - |
| Mt. View Motel & Trail, Chemult, Or. | 11/12/82 | Default J'ment ($50/day) | $6,800 |
| Neskowin Enterprises, Neskowin, Or. | 4/4/79 | Summ. J'ment | $26,400 |
| Partney Mobile Home Park Pilot Rock, Or. | To DOJ: 10/21/83 | active | - |
| Tivoli Mobile H. Park, Junction City, Or. | 11/12/82 | CD | $2,000 |
| Westgate Mobile Home Park, Ontario, Or. | 5/9/83 | Default J'ment ($50/day) | $35,400 |
| | | | |

# PUBLIC WATER SYSTEMS

# COMPLIANCE POLICY

Office of Water

U.S. Environmental Protection Agency

November 18, 1983

## Preface

The Safe Drinking Water Act of 1974 established a national goal of safe drinking water for all Americans. To carry out this mandate, the Environmental Protection Agency (EPA) promulgated National Interim Primary Drinking Water Regulations (NIPDWR) which establish permissible concentration levels for contaminants commonly found in drinking water and require water systems to monitor for and report on the presence of these contaminants.

A great deal has been accomplished since 1977, the date the NIPDWR went into effect. Available data indicate a steady improvement in compliance with the regulations over the years. More, however, remains to be done. In 1982, water provided by 1.3% of the monitored systems persistently exceeded the allowable level of microorganisms. Also in 1982, there were 40 documented outbreaks of waterborne disease causing 3,456 cases of illness. The problem is greatest among small systems which tend to have a higher violation rate than large systems.

The purpose of this Policy is to foster compliance with the NIPDWR. It provides guidance to the States and Regions responsible for implementing Public Water System Supervision programs by suggesting priorities for selecting compliance problems to address and outlining the available actions for bringing water systems into compliance.

Some of the material incorporated here, for example, strategies for improving compliance by noncommunity and small

systems, has been published previously. The issuance of this overall Public Water System Compliance Policy is intended to signal the Agency's goal of achieving full compliance with the NIPDWR by 1988.

# Table of Contents

PUBLIC WATER SYSTEMS
COMPLIANCE POLICY

## I. STATEMENT OF POLICY

The Environmental Protection Agency (EPA) and states which have assumed primary enforcement responsibilities (primacy states) will protect public health by ensuring that all public water systems (PWS) are in compliance with the National Interim Primary Drinking Water Regulations (NIPDWR). While the Safe Drinking Water Act requires that all systems be in compliance by January 1, 1984 (1986 for regionalized systems), the Agency realizes some systems will not be in compliance by this date. Therefore, EPA's interim goal is to eliminate all persistent violations[1] by 1986, to reduce to a minimum all violations of the microbiological and turbidity maximum contaminant levels and monitoring and reporting requirements by PWS's and to put all noncomplying systems on a formal compliance schedule. To achieve this goal, compliance must improve substantially between now and 1986. By 1988, all PWS's should be in full compliance with the NIPDWR.

Each state[2] is asked to undertake appropriate measures including the development and implementation of a PWS compliance strategy to ensure annual compliance improvements that will meet the 1986 interim goal and the 1988 goal of full compliance.

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[1] In a fiscal year, 4 or more months in violation or more than one quarter in violation.

[2] Agent which assumes primary enforcement responsibility

While EPA acknowledges that a few PWS's will always drop out of compliance temporarily because of such factors as operator turnover, variability of analytical results, equipment failures, and human error, the Agency believes that a goal of full compliance is valid given a small turnover of temporarily noncompliant systems.

While implementing this Policy the following principles will guide the Agency's efforts:

1. Improved compliance with the NIPDWR will increase public health protection.

   The measurement of compliance with the NIPDWR, is the best indicator the Agency has concerning how well the public is protected from the traditional contaminants in drinking water. Since the standards established by the NIPDWR are based on protection of public health to the maximum extent feasible, compliance improvements will result in improved protection of public health. This Policy will focus EPA and state resources on those violations which represent the greatest threats to health.

2. States have a primary responsibility for compliance.

   When states assume responsibility to enforce the NIPDWR, they also assume a primary role in achieving national compliance improvements. Though EPA has established national compliance goals, the Agency recognizes that there are differences among the states in implementing the PWS program, establishing priorities, and creating

enforcement strategies. However EPA believes that although states may legitimately differ in their management styles or in their perceptions concerning the degree of threat to public health that a given violation represents, state enforcement priorities should first address those violations which present the greatest public health threats. EPA also expects each state to negotiate yearly compliance targets with EPA and to develop a strategy to achieve agreed upon compliance improvements. EPA will provide states programmatic and funding assistance to ensure state enforcement efforts result in the agreed upon compliance improvements.

3. EPA and states will cooperate to set reasonable compliance targets.

EPA will assist state efforts to bring systems into compliance. Each year, EPA will set national compliance targets based upon the compliance rates in the Federal Reporting Data System (FRDS). EPA regions will negotiate individual state compliance targets with each State. EPA recognizes that because states and EPA Regions begin with varying compliance levels, compliance targets may differ. However, EPA expects annual compliance improvements in each state will serve to meet the annual compliance targets.

4. States will develop strategies to bring noncomplying systems into compliance.

   EPA will encourage each State to develop a strategy to identify high priority violating systems and to systematically bring each into compliance voluntarily through corrective action, a negotiated compliance schedule or through a formal enforcement action. States should consider the following factors in establishing compliance priorities: the type of violation, e.g., a maximum contaminant level or monitoring/reporting failure; the degree of hazard, e.g., deviation from the standard or whether the violation represents an acute or chronic health risk; the size of the population affected; the degree of system recalcitrance; and the deterrent effect which enforcement actions will have on other potential violators. Each strategy should ensure that all persistent violators are in compliance or on a compliance schedule by 1986.

5. EPA and states will enforce against all noncomplying systems.

   EPA and the states will take appropriate enforcement action against all noncomplying systems giving first priority to systems whose violations threaten public health, recalcitrant systems, and persistent violators. EPA will cooperate with states when enforcing against noncomplying systems to ensure that the objectives of this policy are successfully achieved.

6. Each year EPA will review progress toward targets and goals.

Each year Headquarters will review with each region the progress toward the achievement of the compliance goal and the development of state compliance strategies. EPA will review each state strategy and compliance record to determine the need for further guidance, assistance, and mid-course corrections to report progress to the Administrator and to Congress, to revise State targets for the next year, and to take corrective action where State primacy requirements are not met.

## II. BACKGROUND

The Safe Drinking Water Act (P.L. 93-523) enacted on December 16, 1974 gives EPA the responsibility to establish standards ensuring the safety of drinking water while encouraging the states to accept primary enforcement responsibility for implementing these programs. If a state does not elect to assume primacy, EPA must implement a program in that state. Presently 51 states and territories have assumed primary enforcement responsibility for the drinking water program. The water supply programs in Pennsylvania, Indiana, Wyoming, South Dakota, Oregon, District of Columbia, and on Indian lands are implemented by EPA regional offices.

The states (and the EPA regions for non-primacy states) have the primary responsibility for ensuring compliance by public water systems. EPA regions provide overview and

technical assistance to primacy states. EPA Headquarters has national oversight responsibility for all programs under the SDWA.

In 1975 EPA promulgated regulations (effective June 24, 1977) for five classes of contaminants including microbiological, turbidity, organic, inorganic, and radionuclides. These regulations established maximum contaminant levels, monitoring and reporting requirements, and administratve procedures each public water system must follow. In 1979 additional standards were promulgated for total trihalomethanes (TTHMs) and applied to systems which disinfect and serve 10,000 or more people

Each year States report compliance information to EPA. EPA analyzes that data, reports national compliance trends, and provides the Administration and Congress reports on progress under the SDWA.

As EPA began analyzing the compliance rates of various segments of the public water systems, it found that rates of compliance varied depending upon system size, and type of system (community vs. non-community). To address these specific problems, EPA in 1979 issued a non-community strategy which suggested that regions and states establish followup and enforcement priorities using such factors as the population at risk, the type of contaminant level exceeded, the source of the water supply, the degree of treatment, and the type of non-community facility served (hospital, food establishment, rest area, etc.).

Continuing analysis of community compliance data revealed that noncompliance was disproportinately concentrated in the small and very small water systems (systems serving less than 3,300 persons). In response to this data, the Office of Drinking Water proposed a small systems strategy in June 1980 which suggested an approach through which states could rank enforcement actions. In fiscal years 1982 and 1983, the Office of Water through national program guidance, encouraged states to use the state compliance strategy technique to rank followup and enforcement actions when addressing instances of noncompliance.

Current compliance rates based upon an analysis of FRDS data indicates that though compliance with the microbiological and turbidity MCL and M/R requirements has improved each year, 30.1% and 16.3% of the PWS's were not in compliance with the microbiological and turbidity standards respectively. This includes 9.8% and 11.6% of the PWS's respectively classified as persistent microbiological and turbidity violators.

The Public Water System Program is a mature program with many of the initial tasks such as developing an inventory, informing PWS of NIPDWR requirements, and delegation of primary enforcement authority now completed. As such, EPA recognizes that many of the systems which remain out of compliance are either recalcitrant or clearly lack the ability to comply. To ensure that these systems are targeted for compliance requires a systematic approach combining programmatic,

financial, and enforcement actions. This Policy is designed to further this systematic approach and ensure that the cooperation which exists between states and EPA results in compliance improvements.

## III. IMPLEMENTATION

In order to ensure the success of this Policy, EPA suggests that the States at a minimum address the following implementation activities:

1. Monitor Compliance Data

   Monitoring of compliance data is essential to determine the progress of each state in improving compliance. Each state should compile its compliance data and analyze it to determine which classes of PWS's need improvement. EPA will compile national compliance data for use in determining future national compliance goals. Those goals will be established based upon discussions between EPA and the states as part of the annual program planning cycle. Once national goals are set, EPA will negotiate annual compliance targets with each state.

2. On an annual basis, commit to compliance targets.

   National compliance objectives will be established annually. Yearly objectives will be contained in the Office of Water's Accountability System. Regions will negotiate with each of the primacy states appropriate state specific objectives. (Headquarters will negotiate with Regions that operate the PWS program within the non-primacy states). Depending

on state compliance levels, some states will be above the national objectives and others will be below. Though variability in individual state targets and goals is expected, all agreements which are negotiated, should incorporate compliance improvements, to the extent feasible, over the previous year.

3. Develop state strategies.

One of the goals of this Policy is to encourage each State to develop a compliance strategy which ranks compliance violations and develop appropriate enforcement responses to noncomplying systems. The initial step for a primacy agency to take in developing a compliance plan is to list and rank, on a priority basis, noncomplying systems. Developing a priority list requires consideration of several factors including: the type of violation; the degree of hazard; size of the affected population; degree of recalcitrance; and the the deterrent effect. (Attachment B gives guidance concerning the establishment of priorities and developing a decision making model.)

4. Take appropriate compliance enforcement actions.

After establishing a priority ranking, primacy agents should consider a number of possible enforcement responses including taking emergency action; requiring public notification; providing informal notification (phone call, warning letter, site visit); granting a variance or exemption and place on a compliance schedule; issuing a notice of violation or

administrative order; or initiating civil suit or criminal action. EPA will cooperate with the states to ensure coordinated financial and enforcement assistance. For example, systems may be referred to FmHA or other agencies for loans or grants when financing is needed for system improvements. EPA will also cooperate with the states to ensure that EPA programmatic resources are used to improve PWS compliance.

5. Conduct Data Verification

Because the development of compliance objectives depends upon the accurate measurement of compliance, EPA and the states will institute a quality control program to ensure that the compliance data reflects the actual water quality. On a regular basis, the states and EPA will ensure the integrity of compliance data through data audits. To support this effort, EPA will provide training and guidance concerning data verification and audit techniques.

## IV. EFFECTIVE DATE

This policy is effective immediately. It will be reviewed annually. The review will evaluate compliance objectives and will incorporate any policy changes into the Office of Water's Accountability System.

Attachment A

## NATIONAL COMPLIANCE TRENDS

NUMBER OF COMMUNITY WATER SYSTEMS IN
VIOLATION AND TOTAL NUMBER OF VIOLATIONS
(FY82)

| Requirement | Number of Systems with Violations Persistent[2] | Intermittent | Total Number of Violations |
|---|---|---|---|
| Microbiological | | | |
| MCL | 764 | 5,050 | 11,500 |
| Monitoring | 4,463 | 9,878 | 67,000 |
| Turbidity | | | |
| MCL | 153 | 249 | 1,000 |
| Monitoring | 1,137 | 390 | 7,500 |
| Fluorides[1] | | | |
| MCL | 1,350 | - | 1,350 |
| All Others | | | |
| MCL | 950 | - | 950 |
| | 8,817 | 15,567 | 89,300 |

[1]Monitoring is nearly 100 percent for inorganic, organic and radionuclide contaminants.

[2]Persistant violations reflect systems in violation more than three months or more than one quarter. Any inorganic, organic or radionuclide contamination is considered persistent.

PERCENTAGE OF COMMUNITY WATER SYSTEMS IN VIOLATION

WITH THE MICROBIOLOGICAL AND TURBIDITY STANDARDS

FY's 1980-1982

| Requirement | National Total | | | Persistent Violators[1] | | | Intermittent Violator[2] | | |
|---|---|---|---|---|---|---|---|---|---|
| | FY 80 | FY 81 | FY 82 | FY 80 | FY 81 | FY 82 | FY 80 | FY 81 | FY 82 |
| Microbiological | | | | | | | | | |
| MCL | 11.0 | 8.5 | 9.9 | 1.0 | .9 | 1.3 | 10.0 | 7.6 | 8.6 |
| M/R | 30.1 | 24.6 | 24.4 | 12.4 | 8.3 | 7.6 | 17.7 | 16.3 | 16.8 |
| TOTAL | 36.7 | 29.8 | 30.1 | 14.3 | 10.0 | 9.8 | 22.4 | 19.8 | 20.3 |
| Turbidity | | | | | | | | | |
| MCL | 6.6 | 4.9 | 3.6 | 2.8 | 1.8 | 1.4 | 3.8 | 3.1 | 2.2 |
| M/R | 11.8 | 10.2 | 13.7 | 6.8 | 5.3 | 10.2 | 5.0 | 4.9 | 3.5 |
| TOTAL | 16.8 | 13.9 | 16.3 | 9.5 | 7.0 | 11.6 | 7.3 | 6.9 | 4.7 |

[1]Persistent: In a fiscal year--more than 3 months or 1 quarter in violation

[2]Intermittent: In a fiscal year--less than or equal to 3 months or 1 quarter in violation

Attachment B

# Guide to the Development of State Strategies

## INTRODUCTION

State compliance strategies should ensure that all systems which provide water comply with the National Interim Primary Drinking Water Regulations (NIPDWR) as mandated by the Safe Drinking Water Act (SDWA). The approach outlined here should result in an orderly process that improves compliance. This document establishes both a procedure to develop enforcement priorities and a strategy to achieve compliance by all public water systems within each EPA Region and primacy State.

Strategy implementation will require close cooperation between Federal, State and local governments, reflecting a common commitment to improving drinking water quality.

### Priorities

Listing and ranking noncompliant systems is central to systematic decision-making. This process should be continuous. As systems come into compliance and removed from the priority listing of violators, new ones may be added due to changes in source water, deterioration of equipment, or the quality of operation. This ranking process will aid the ability of the primacy agency in deciding when to act and what action to take.

## DEVELOPING A STRATEGY

Each state will undoubtedly have a different approach to the development of a Drinking Water Compliance Strategy. There will be a number of common elements, principal among them the development of criteria which can be used to rank non-complying systems on a priority basis. Such a listing and ranking of noncomplying systems is central to systematic decision-making and should be continuously updated with systems which some into compliance being dropped and systems going out of compliance being added. This ranking will provide the primacy agency a priority list of systems with those which are the most important to address listed first and those with marginal problems last.

### Criteria for Action

Developing a priority list of violators is a complex determination requiring consideration of several factors, including:

Type of violation - The primacy agent should clarify the type of violation, for example, microbiological MCL vs. inorganic chemical MCL or monitoring frequency vs. reporting.

- Degree of hazard - Both the extent of the contamination and the potential harm resulting from the non-compliance should be considered, (e.g., immediate illness vs. long term health effects; and the amount by which an MCL is exceeded). Violations posing minimal public health hazard could receive a lower priority.

- Size of population affected - Greatest emphasis should be placed on ensuring that medium and large systems achieve compliance as they serve a larger segment of the population and any health threat, therefore affects a greater number of people.

- Degree of recalcitrance of the water supplier - This is difficult to determine and will require some subjective judgment on the part of the primacy agency. Factors to consider include:

  - falsification of data, e.g., willful incomplete reporting or fabrication of data;

  - attitude of the water supplier, e.g., generalized opposition to compliance with or indifference to the law;

  - type, frequency and magnitude of violations (persistent violations should receive higher priority);

  - efforts, if any, by the water supplier to come into compliance;

  - response of the water supplier to informal compliance actions by the primacy agency; and/or

- The deterrent effect that action to gain compliance from a system, including enforcement action, may have on other potential violators.

The most critical factor in the above list is the degree of hazard. The primacy agency should develop a ranking of violations taking into account the extent of contamination and potential harm resulting from the noncompliance.

Table A is an example of how these criteria can be factored into a single list against which each violator may be rated. Though Table A shows State regulation violations at the bottom of the table they can be inserted elsewhere in the priority listing. Many of these violations, such as noncompliance with a State disinfection requirement have legitimate public health implications and could be assigned a higher priority.

Table A

## PRIORITY LISTING OF VIOLATIONS

EMERGENCY ACTIONS**

SERIOUS VIOLATIONS

ACUTE RISKS

Microbiological MCL/Microbiological Public Notification Failure

Nitrate MCL/Nitrate Public Notification Failure

Turbidity MCL/Turbidity Public Notification Failure

Microbiological Monitoring/Reporting

Nitrate Monitoring/Reporting

Turbidity Monitoring/Reporting

Radiological MCL*

Inorganic Chemical MCL*

Organic Chemical MCL*

Radiological Public Notification Failure*

Inorganic Chemical Public Notification Failure*

CHRONIC RISKS

Organic Chemical Public Notification Failure*

Radiological Monitoring/Reporting

Inorganic Chemical Monitoring/Reporting

Organic Chemical Monitoring/Reporting

Radiological MCL #

Inorganic Chemical MCL #+

Organic Chemical MCL #

Radiological Public Notification Failure #

Inorganic Chemical Public Notification Failure #

Organic Chemical Public Notification Failure #

Public Notification for Failure to Monitor/Report

Variance or Exemption Public Notification Failure

LESS SERIOUS VIOLATIONS

Failure to Negotiate a Compliance Schedule

Failure to Complete an Engineering/Economic Evaluation as Part of an Exemption Schedule

Fluoride MCL #

Failure to Meet Deadline Set as Part of an Exemption Schedule +

Fluoride Exemption Schedule

Incorrect Analytical Methods

Laboratory Certification Violations

STATE REGULATION VIOLATIONS

Disinfection Requirement

No Certified Operator

Facility/Operation Violations

Inadequate Chlorinator Redundancy

Others

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* MCL LEVELS GREATER THAN THE EXEMPTION GUIDELINES
\+ EXCLUDES FLUORIDES
\# LEVELS GREATER THAN MCL BUT LESS THAN EXEMPTION GUIDELINES
** It should be noted that there is EPA and State jurisdiction over emergencies where a significant health risk is posed even though no MCL violation has occurred.

It is important to note that in the list, the priority given an MCL violation must take into account the amount by which the MCL is exceeded. Minimal violations which present no immediate adverse public health hazard would receive a lower priority than greater, more hazardous violations. [See Guidance for the Issuance of Variances and Exemptions, Section III, (1979).] Section III of this Guidance sets forth levels of various contaminants which will not result in an unreasonable risk to the public's health. A consistent enforcement scheme would not allow MCL violations in excess of these levels.

Further, a repeated violation may receive higher priority than a violation which just occurs once or twice. For example, on-going failure or refusal to monitor/report would usually be assigned higher priority than a single such violation. However, this does not mean that a single violation should be a low priority. A single microbiological MCL violation, for example, could have very serious consequences and might therefore have a high priority.

Emergency Actions

A second important part of each compliance strategy should be an action plan for addressing emergencies. These situations are generated when there is an imminent and substantial risk to the public health. These actions may involve industries or individuals that are contaminating the water source to the point that the supplier cannot provide water that meets the standards, and therefore, the remedies set up in the Act for suppliers may be totally inappropriate. Each compliance strategy should set out clearly what will be done when emergency actions are required or anticipated.

Federal responses to emergencies which threaten drinking water are governed by Section 1431 of the SDWA. This Section provides that the Administrator may take whatever action is necessary to protect the public health when information is received that a contaminant which is present in or likely to enter a public water system may present an imminent and substantial endangerment to the health of the public. State or local inaction is a prerequisite to EPA emergency action. "Inaction" is interpeted to mean either that State or local authorities have taken no action or that the Federal action seeks additional relief. For an in-depth analysis of what constitutes an emergency action and when such an action should be brought by EPA, see attachment C.

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Note: Under the emergency action section of the SDWA, Federal action may be taken in a primacy State either where State or local authorities have taken no action or where the Federal action seeks additional relief. Among the situations which may require Federal intervention are where an emergency involves more than one State, at the request of the State, or where the emergency involves more than one State, at the request of the State, or where the emergency is beyond the resources of the State, e.g., Three Mile Island.

Types of Federal action which may be taken under Section 1431 include, but are not limited to, issuance of administrative orders, civil suits, and actions for injunctive relief. Willful violations of, or failures to comply with, administrative orders are subject to a fine of up to $5,000 per day.

In order to determine whether Federal emergency action is appropriate:

1. First, determine whether an emergency exists. This requires examination of the type and degree of harm posed to the public's health. In essence, there must be an "imminent and substantial endangerment" to the health of the public. See attachment C for an in-depth analysis of this requirement.

2. Next, examine any State or local action which has been taken to mitigate the situation. Where an emergency exists and no State/local action has been taken, use of §1431 would be appropriate. Where State/local action has been taken, §1431 may also be used after their action has been carefully analyzed by EPA. There is to be no "precipitous preemption of effective state or local emergency abatement efforts". House Committee or Interstate and Foreign Commerce, H.R. Rep. No 93-1185, 93d Cong., 2d Sess. 35 (1974). Section 1431 is interpreted to mean not that State/local action is inadequate, but that additional avenues of public health protection need to be pursued. Under this interpretation, Federal and State/local action are supplemental. Thus, duplication of effort is eliminated, maximum allocation of resources is achieved, and the health of the public is protected to the maximum extent possible.

3. Finally, determinations should be made as to the method of regaining compliance from the pollution source or the offending system. EPA may take any appropriate action to remedy the emergency.

Emergency actions should always be handled as expeditiously as possible to mitigate/eliminate the public health risk. In the event of a Federal emergency action EPA, as appropriate, should work with the State to coordinate an appropriate response. Acute serious violations should be handled either to bring the system into compliance and/or minimize the public health risk so that the violation can be handled as a chronic serious violation (where time is available to explore the possible remedies). This latter category is extremely important in that many of these violations may not be subject to rapid correction. Accordingly, these violations will probably generate a work-load associated with exemptions, variances, technical assistance, technical

information hearings, and legal action and may be the pool from which the recalcitrant systems can be identified.

It is also crucial that the serious chronic violations be given ample timely attention. A check-off system may be developed so that this category of systems can be systematically moved up the scale of compliance/enforcement actions. A specific time frame that fits the local situation and available resources should be developed and adhered to.

Routine Compliance Actions

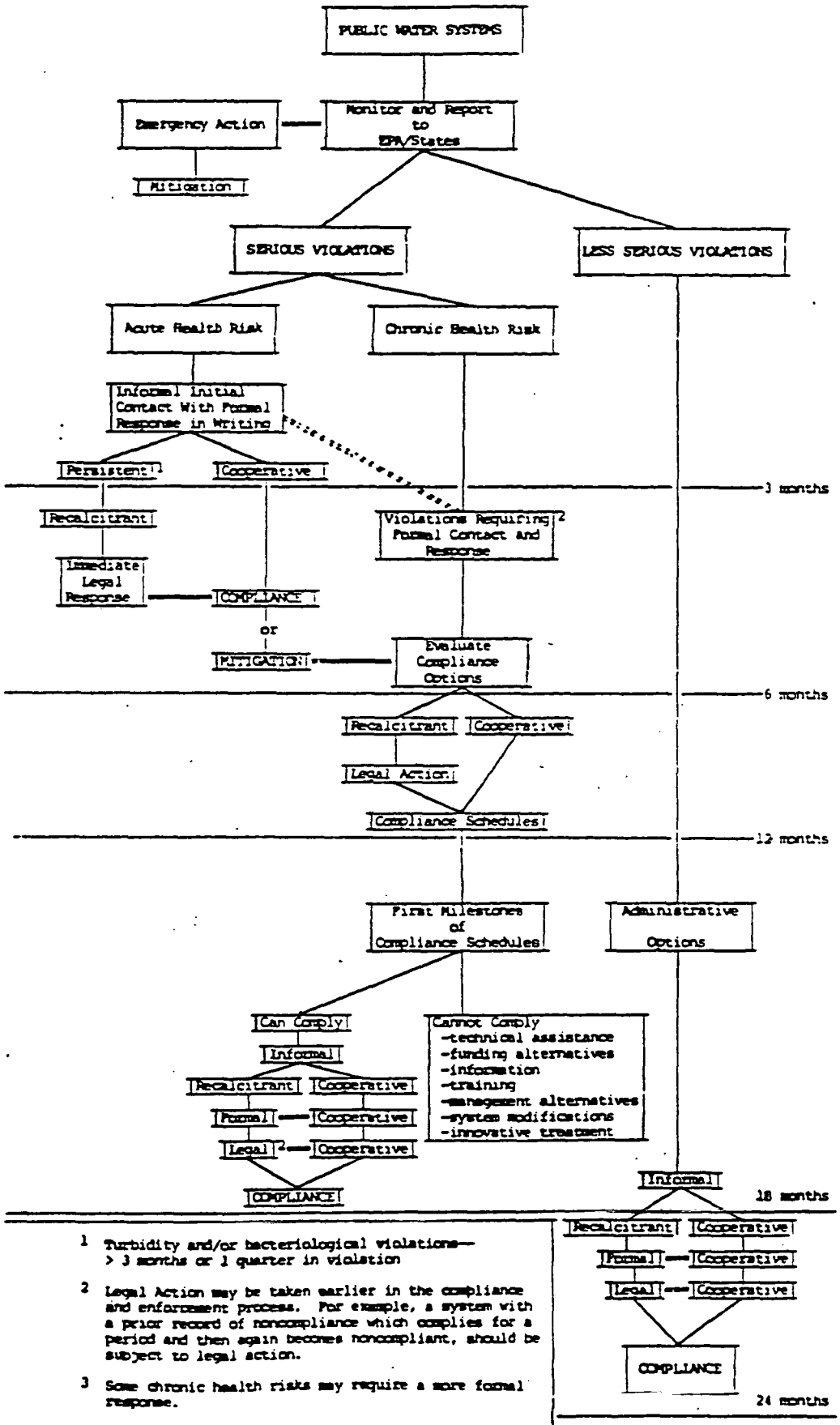
The last category of violations that are essentially administrative in nature, should be addressed only after the other violations have been addressed, except where resources allow for simultaneous actions on all violations. Additionally, legal and/or judicial action should be reserved for this category of system as a last alternative except where there is the possibility that the administrative violation may mask a more serious violation.

Charting a Systematic Strategy

The flow chart (Table B) that follows outlines a systematic and consistent process for using the priority ranking of violations to evaluate noncompliance and to bring a system into compliance. It serves as a decision tree to aid the primacy agency manager to determine where in the ranking each violator should fall. For example, if a community public water system monitors and reports a nitrate MCL violation, the primacy agency will determine, based on the priority ranking of violations, that such a violation is serious and presents a potential acute health risk, the primacy agency should then act to mitigate the health risk. Such mitigation could take the form of requiring public notification by the supplier and recommending that the system supply bottled water meeting the drinking water standards to all families with infants. The next step is to evaluate what action is necessary to bring the system into compliance. Where the system is cooperative and can adequately demonstrate that immediate compliance is not possible, the primacy agency should develop a long term solution. The system should enter into a compliance schedule with milestones for compliance.

# PWS VIOLATION RESPONSE

TABLE B




1 Turbidity and/or bacteriological violations— > 3 months or 1 quarter in violation

2 Legal Action may be taken earlier in the compliance and enforcement process. For example, a system with a prior record of noncompliance which complies for a period and then again becomes noncompliant, should be subject to legal action.

3 Some chronic health risks may require a more formal response.

Note: Where there is final judgement in a legal action, generally the system will remain subject to the court's jurisdiction

ENFORCEMENT ACTION

Once a priority listing of violators and violations has been created, the primacy agency should use the flow chart to aid in deciding upon appropriate action. Responses may be selected from a wide range of compliance and enforcement choices. Enforcement under the SDWA is not restricted to legal action. In the exercise of enforcement discretion, choices range from a phone call to criminal prosecution. Several courses of action can be pursued simultaneously. In some situations, particularly with recalcitrant systems, it may be appropriate to pursue legal action immediately. In others, a progression of responses from informal notification through legal action may be necessary. In still other circumstances, effective allocation of resources and lack of seriousness of a violation may permit enforcement action to be deferred.

Choosing among the various enforcement responses does not require starting with the least formal action, for example, informal notification, then proceeding through the other options. Depending upon the facts and individual State or Regional authorities, the initial enforcement response can be chosen at any appropriate level. However, in general, it is appropriate that water suppliers be given an opportunity to comply before taking more stringent action.

Options for Compliance and Enforcement

° Require Public Notification

As early as possible in dealing with a noncompliant public water system, a primacy agency should require public notification The SDWA requires public notification for all violations of an MCL, failure to comply with an applicable testing procedure, and when a variance or exemption is granted. Where EPA has primary enforcement responsibility, public notice is also required for failure to comply with applicable testing procedures and monitoring requirements.

In analyzing the public notification provision of the SDWA, the Congressional intent is very clear. Congress intended that the primary vehicle for compliance would be the pressure brought to bear by an informed citizenry.

The primacy agency should document when a water supplier is advised of the need for public notification. This is necessary for future case support. Where a supplier is verbally notified of a violation, documentation of the request for public notification can be by a file memorandum. The primacy agency may devise a standard method to record the giving of oral advice. Such a system would be helpful to the office giving the advice and would ensure a consistent record of when a supplier is informed of the need for public notification. Where written notice of the need for public notification is sent to a supplier, a copy should be kept for the file.

When public notification is required of a system, the supplier should submit to the primacy agency proof that public notification was done. Finally, where a system fails or refuses to provide public notification, the primacy agency may give notice to the public on behalf of the system.[1] Agency experience is that Regions and States have developed novel and inventive ways of accomplishing this responsibility. Nothing in this document should be interpreted to limit or prohibit such innovation, consistent with the requirements of the SDWA.

° Informal Notification

Informal notification can take a number of forms. Methods for notification include: a phone call, an on-site visit/survey, a note attached to sample bottles; and/or a warning letters/form letters.

One of the simplist methods of informal notification is a phone call reminding the purveyor that a violation has occurred and that action is required on his part. Another method is to schedule an on-site visit or a sanitary survey from a representative of the primacy agency to inform the operator of the problem and to ascertain whether the situation requires more formal action. The advantage of this method is that it is often quick and very effective, thereby eliminating the resource commitment required for a more formal response. Another method, attaching a note to sample bottles which are sent to system operators with sampling requirements and instructions, has also proven to be useful. Several States have institutionalized this process by a system of postcards that are computer generated and automatically sent to purveyors when monitoring and/or reporting is required. Other innovative techniques and methods are encouraged.

Warning letters can take a variety of forms and may be used for all types of violations.[2] Initially, in these letters, the opportunity to meet with the primacy agency and discuss compliance may be available to the supplier. If the supplier fails or refuses to take advantage of this opportunity within a reasonable period of time, for example thirty days, other steps should be considered. However, even after litigation commences, settlement negotiations may continue.

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[1] The reader is referred to the EPA publication, "Handbook on Public Notification - June 1977" (U.S. GPO: 1977-241-037/38) for specific guidance on details of public notification.

[2] For a more detailed discussion, see EPA document, "Regulatory Aspects of the Safe Drinking Water Act - Workgroup Report" - dated November 1977. This document can be obtained from EPA Regional and Headquarters offices.

These letters should also advise suppliers of the potential penalties which could be imposed under the Act. Compliance may be more easily obtained if attention is drawn to the potential costs of continued noncompliance. Finally, these letters should require a response from the water supplier detailing any corrective action he has taken to achieve compliance. Several types of letters may be sent:

- advising the water supplier of the violation and the need for compliance;
- advising the water supplier to apply for a variance or exemption, if eligible;
- ordering the water supplier to show cause why he should not be subject to prosecution and penalties for violation of the SDWA (these orders may be issued by primacy States having the legal authority to issue such orders); or,
- threatening legal action if efforts to comply are not immediately made.

The particular type of informal notification the primacy agent uses should consider cost and effectiveness. For example, a phone call can be very expensive when dealing with a small water system which only has one operator who usually is not at the facility. On-site visits could take the better part of a day and may be resource intensive. Perhaps the quickest and easiest method of informal notification is the warning/form letter.

- Variance and Exemption Activities

Primacy agents should evaluate systems which cannot comply due to compelling factors or to the nature of the raw water source and advised of their eligibility for a variance or exemption. Variances and exemptions were included in the Act to lessen the immediate impact of the regulations by giving certain public water systems an opportunity to extend the date for compliance with MCL and treatment technique requirements.

A public water system can request one or more variances when the characteristics of the reasonably available raw water are such that the system cannot meet the maximum contaminant levels of the regulations despite the application of the best technology treatment techniques or other means found by the Administrator of EPA to be generally available (taking cost into consideration). Granting of a variance must not result

in an unreasonable risk to health. Within one year of granting a variance, the primacy agency must prescribe a compliance schedule which will bring the systems into compliance as expeditiously as practicable.

The primacy agent may grant an exemption if a public water system cannot meet an MCL or specified treatment technique requirement of the regulations due to compelling factors. These factors include, but are not limited to: the high cost of purchasing and constructing necessary equipment or facilities or a service community of a small number of consumers with low per capita income. Where the cost of treatment or other factors is excessive, an exemption from the MCL's may be granted until January 1, 1984, or January 1, 1986 (if a systems has entered into an agreement to become a part of a regional public water system). However, any public water system requesting an exemption must have been in operation on the effective date of the particular MCL or treatment technique requirement. A system which was not in operation by the date may be eligible for an exemption only if no reasonable alternative source of drinking water is available to the new system.

A request for a variance or exemption can be made upon determining that one or more MCL's are exceeded. The request for an exemption must be fully supported and documented in order to demonstrate the compelling reasons for granting the exemption. Application for either a variance or an exemption must demonstrate that there will be no unreasonable risk to health if the variance or exemption is issued.

Detailed information regarding the above provisions of the Act is contained in the National Interim Primary Drinking Water Regulations, the National Interim Primary Drinking Water Regulations, Implementation Regulations and the document entitled, "Guidance for the Issuance of Variances and Exemptions" - U.S. GPO: 1979.

- Hearings

In most cases, hearings are part of another enforcement/compliance action, i.e., they are required as part of the administrative prerequisites to the granting of a variance or exemption. However, hearings should not be limited to these special cases. Often, when a violation occurs and the supplier is reluctant to give public notice and/or the public notice is inadequate, a public hearing intended to gather technical information can be useful in informing the affected customers of the potential risks and appropriate costs. The hearing brings together the primacy agency, the water supplier and any interested users and allows technical discussions on

possible corrective actions which would achieve compliance. Likewise, this extra step can be important in the preparation of litigation if legal action ultimately becomes necessary. It is critical that such hearings be held so that the primacy agency develops appropriate case support.

- Notice of Violation by EPA

EPA normally issues a formal notice of violation to a state after the appropriate state official is informally advised of the program deficiencies and has not taken timely action to correct the noted deficiencies. EPA may issue a notice of violation to a primacy State in two alternative instances.

First, EPA may issue a notice of violation where a primacy State has committed an abuse of discretion in a substantial number of cases by granting variances or exemptions or by failing to prescribe a variance or exemption compliance schedule. This notice identifies the problem system, gives reasons for the abuse of discretion finding and, as appropriate, proposes revocation of the variance or exemption or revision of the compliance schedule. Additionally, the State should be kept informed of the pending public administrative hearing on the notice of violation. Within 180 days of notice to the State, the Administrator must either rescind the notice or issue modifications to the variances or exemptions. These modifications are to become effective 90 days after notice thereof to the State, unless the State takes adequate corrective action within that time.

Secondly, primacy States and noncompliant public water systems are subject to notices of violation for failure to comply with any NIPDWR or with any compliance schedule issued as a condition of a variance or exemption. EPA is to offer the State and system advice and technical assistance, as appropriate. If, within 30 days of notice of violation to the State of the non-compliance, the system fails to comply or to initiate adequate corrective action, public notice of the noncompliance should be made by EPA. Within 15 days of this public notice, the State must submit a report of the action taken to bring the system into compliance and any reasons for the State's failure to gain the system's compliance. Based on this report, the Administrator is to determine whether the State action is adequate or whether the State has abused its discretion. It

is an abuse of discretion where the State fails by the sixtieth day from notice by EPA to implement procedures to bring the system into compliance and to assure an alternative safe drinking water source.

- Administrative Orders

A primacy State, with appropriate State authority, may issue administrative orders mandating that an offending system cease violation. Alternatively, the states may, if State law allows issue binding compliance orders and assess civil penalties.

- Civil Suit

The Administrator may bring a civil action against a supplier who is in violation of the NIPDWR or of a variance or exemption. Civil suit may be brought against a system in four alternate instances. First, in a non-primacy State, a civil suit by EPA would be appropriate where a system had violated the NIPDWR, a variance or exemption. Second, in either a primacy or a non-primacy State, suit may be instituted upon the request of either the chief executive officer of the State or the appropriate State agency. Third, in a primacy State, a civil action would be appropriate where a system is still in violation sixty days after notice to the State by EPA and the State has failed to submit to EPA a timely report of the steps being taken to bring the system into compliance. Finally, civil action may be brought against a system in a primacy State where the State has committed an abuse of discretion in carrying out its primary enforcement responsibility. There will be a per se abuse of discretion where there has been "any failure by a State to implement by the sixtieth day [from notification by EPA] adequate procedures to bring a system into compliance by the earliest feasible time . . . " House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 93-1185, 93d Cong. 2d Sess. 22 (1974). (H.R. Rep.). "Such a failure would constitute an abuse of discretion whether it results from negligence, inattention, lack of adequate technical and enforcement personnel, or from any other cause." H.R. Rep. at 23. A State's failure to carry out properly any follow-up or enforcement procedures necessary to achieve timely compliance would also be an abuse of discretion.

Civil actions seeking penalties pursuant to §1414(b) SDWA may be brought by EPA where there has been willful violation of a variance or exemption, or a NIPDWR by a system.

The degree of seriousness of the violation of the NIPDWR should be taken into account in making the decision whether or not to bring a civil suit.

° Criminal Action

A criminal action may be brought where a system has willfully failed to satisfy the public notification requirements. Criminal actions may also be brought against a system for failure or refusal to comply with the recordkeeping, monitoring, or reporting requirements of the SDWA.

° Defer Enforcement Action

Effective allocation of enforcement resources and lack of seriousness of a violation may dictate that the primacy agency exercise its enforcement discretion in deciding to defer action.

REMEDIES AND PENALTIES

This section of the guidance presents the judicially imposed remedies which may be sought and the types of remedies which may be required in negotiating settlements. It is important that enforcement actions seek both expeditious compliance and adequate penalties. The penalties and remedies sought under this guidance neither substitute for injuctive relief or other non-duplicative remedies.

The current financial ability of the water supplier to achieve immediate compliance or, within a reasonable time, to progress toward compliance as expeditiously as practicable should be determined. This is a practical concern to be taken into account along with the other health risk factors--provided the existing noncompliance does not pose a significant threat to consumers. Factors to consider in analyzing a system's financial situation include:

- type and cost of treatment presently used, e.g., addition of a chemical to the water vs. devising of a construction or funding schedule;
- cost of relief sought;
- the community's ability to pay increased utility bills;
- possibility of regionalization or centralized management and associated costs; and/or
- possibility of use of other water sources.

While State law may authorize penalties other than those discussed in this document, this policy provides guidelines for the selection and application of both SDWA penalties and any additional primacy States penalties. The penalty policy is intended to provide a strong economic incentive for rapid compliance. In essence, the purpose of penalties is to deter violations and encourage compliance. Violators must recognize that penalties are not violation fees. Payment of penalties by a system does not give any right or privilege to continue to operate in violation of the law or to slow down compliance.

The statutory bases for penalties under the SDWA include:

- §1414(b) which imposes a $5,000 per day civil penalty for willful violation of a national primary drinking water regulation, a variance or exemption;
- §1414(c) which imposes up to a $5,000 criminal fine for willful violation of the public notification provisions; and
- §1445(c) which prohibits any violations of the inspection-reporting requirements and imposes up to a $5,000 per day criminal fine.

The minimum penalty may be determined on the basis of the factors set forth below. The penalty so determined may be lower than the statutory maximum. Where the penalty sum is higher, this figure may be used in settlement negotiations or in litigation, but the statutory maximum is all that may be requested by the State/EPA or imposed by the court.

Penalty factors:

- the sum appropriate to redress the harm or risk of harm to public health;
- the sum appropriate to remove the economic benefit gained or to be gained from delayed compliance;
- the sum appropriate as a penalty for the violator's recalcitrance, defiance of or indifference to requirements of the law; and
- the sum appropriate to recover unusual or extraordinary enforcement costs thrust upon the public.

In calculating these factors it should be kept in mind that civil penalties under §1414(b) of the SDWA and criminal fines under §1445(c) of the SDWA are assessed on a daily basis. We recognize that State penalty amounts may differ from these penalties. Therefore, the sum arrived at as an appropriate penalty under these two Sections must be keyed to this per day assessment. Section 1414(c) of the SDWA does not require consideration of daily penalty amounts.

- Harm or Risk of Harm:

The extent to which a violation harms or poses a risk of harm to the public health the primacy agent should be carefully considered by the primacy agency in setting the appropriate penalty, e.g., a serious microbiological MCL violation vs. a minimal turbidity violation. Of course, all violations create some risk of harm and it may be difficult in some cases to precisely quantify this risk or harm. The penalty amount attributable to such harm or risk will have to be determined on the facts and circumstances of each case.

- Economic Benefit from Delayed Compliance:

Delaying the implementation of treatment techniques or installation of treatment equipment can result in economic savings or gains for a water supplier. These savings or gains usually arise from:

  - The opportunity to otherwise invest capital not spent on treatment (the monetary amount of this element may be calculated on the same basis as is done under the Clean Water Act - P.L. 92-500) and/or

  - the avoidance of operation and maintenance expenses (figures for calculating benefit from delayed use of treatment techniques or installation of equipment are readily available in the literature).

This factor should be used as a guide to determine the appropriate penalty. In some instances, often with very small systems, there will have been no economic benefit to noncompliance. Thus, although this factor should always be analyzed to determine its applicability, it is not a required element of a penalty.

- Recalcitrance, Defiance of, or Indifference to the Law

Good faith efforts to obey the law are expected of all subject to the Act and regulations. Except as provided below under "Mitigation", assertions of good faith should not be considered

as a basis for reducing a penalty. Courts traditionally consider the degree of the violators recalcitrance, defiance, purposeful delay or indifference to legal obligations in setting penalties. It is important that, where appropriate, these factors be considered in calculating penalties.

- Extraordinary Costs

Unusual or extraordinary enforcement costs may be taken into account in calculating a penalty, where appropriate. Where, for example, a water supplier fails to notify the public and, as a result, the primacy agency must undertake such notification to protect the public's health, then the costs for this notification should be considered. Extraordinary costs may be sought pursuant to both the penalty provisions of the SDWA and the general equity powers of a court.

- Mitigation

This factor involves consideration of whether the system is demonstrating good faith by entering into and following a compliance schedule designed to obtain compliance as expeditiously as practicable.

The appropriate sum for each of the four penalty factors should be determined and added together. Thereafter, the appropriate sums reflecting the mitigation factor should be subtracted. The balance reflects the penalty amount which should be sought, assuming the total is less than or equal to the statutory maximum.

One additional consideration is the collection of penalties where a system may be unable to pay. In such a case, the reasons for inability to pay must be carefully scrutinized. Depending on the facts and circumstances of each case, the following alternatives may be considered:

- seek the full penalty; (a lien on the supplier's property may also be sought so that a recorded judgment will be had and recovery assured); and/or

- recommend that a time payment arrangement be made (a lien may also be sought here); or

- recommend that the penalty be postponed or forgiven in part or <u>in toto</u>.

This is particularly important with respect to small systems where the calculated penalty may be disproportionate to the resources of the system.

Attachment C

# Guide to Bringing Formal Enforcement Action Under the Safe Drinking Water Act (Legal Interpretation of Section 1431)

Emergency actions under Section 1431 of the SDWA (Section 1431) are an important enforcement tool. One of the primary goals of the SDWA is prevention of contamination of drinking water supplies. Another objective is elimination of contamination to the extent possible once it has occurred. Where there is an emergency or potential emergency, this Section provides guidance on the quickest, most effective method of achieving these goals. This guidance is primarily a legal interpretation of Section 1431, its legislative history and recent case law designed as a resource document for legal personnel. It describes the circumstances under which it is appropriate to commence an emergency action and how to assemble the necessary elements of proof.

When there is an identifiable source of contamination near a water supply, e.g. a hazardous waste site or an industrial plant, EPA has the responsibility and the means of preventing the contamination. Because of the importance of protecting the public health, and given the high costs of removing contaminants, the most economic method of handling these problems, both in terms of monetary cost to society and the limited Agency resources, is to stop the contamination at its source before it enters the water supply.

In the past, lack of information and apparent institutional obstacles (e.g. the assumed need to allege lack of protection of the public health by the State) have resulted in the under utilization of this provision. The preparation by the Agency and the States of hazardous waste site inventories and compilation of other useful facts has greatly reduced the information problems. As will be described below, the SDWA has never required that EPA allege that the State is failing to do its duty before EPA can use the emergency provision. In fact, a greater use of this power should lead to greater cooperation between the States and EPA. Neither the States nor EPA alone necessarily have sufficient resources to handle emergency situations. Section 1431 provides a mechanism whereby resources can be applied jointly to the most serious and immediate public health problems.

In order to initiate a §1431 action (either a civil action or an administrative order), six major elements must be present:

1. The appropriate State and local authorities must not have already successfully obtained the same remedy EPA is seeking, and that remedy is necessary to prevent an endangerment to the public health;

2. there must be a contaminant;

3. that contaminant must be present in or likely to enter a public water system;

4. that contaminant must be a substance that may present an "imminent and substantial endangerment to the health of persons";

5. there must be something that can be done to remedy or ameliorate the situation, (i.e. appropriate relief); and,

6. there must be an appropriate defendant.

1. State and Local Authorities Have not Acted

This element is one of the most misunderstood requirements of the SDWA. First, there has been an overly literal interpretation of the meaning of the words used in the statute ("that the appropriate State and local authorities have not acted to protect the health of such persons. . . ." §1431(a) SDWA, 42 U.S.C. §300(a). Second, the requirements must be understood within the intricate State/Federal relationship established by the Act. A study of the statute, its legislative history, and the statutory enforcement framework leads to a reasonable interpretation that the Federal emergency action simply must not be completely duplicative of a local or State action.

The plain meaning of the language is that there must be no actions already taken by the State or local authorities, or if an action has been taken, the Federal action must be seeking additional relief which will protect the public from the contamination in question. Shaff, The Emergency Powers In The Environmental Protection Statutes: A Suggestion For A Unified Emergency Provision, 3 Harv. Env. L. Rev. 298, 304 (1979). (Emergency Powers). Under this interpretation EPA need not allege or prove that the State is failing to do its duty, i.e., protecting the public health (although clearly if that is the case EPA may act). Quite the contrary, the legislative

history unequivocally indicates that the provision was intended only to prevent EPA from "precipitous[ly] preempt[ing] . . . effective State or local emergency abatement efforts." House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 93-1185, 93d Cong., 2d Sess. 35 (1974). (1974 House Report). Where a State is not seeking the remedy sought by the United States, no such preemption of an abatement effort is possible.

However, when the State or local authority does not take action "in a timely fashion or [even if actions are taken but they] are not effective to prevent or treat the hazardous condition, this provision should not bar enforcement by the Administrator." id. at 35 (emphasis added). The Congressional Reports and floor debates support the view that Congress included this language in §1431 (and added certain procedural prerequisites before allowing Federal enforcement in a primacy State) simply to avoid duplication between Federal and State enforcement and to preserve the primary responsibility for protecting the public at the State and local level. id. at 22-23,35, Senate Committee on Commerce, S. Rep. No 93-231, 93d Cong., 1st Sess. 9, 10 (1973) (1973 Senate Report); 120 Cong. Rec. H 10789, H 10793-94; (daily ed. Nov. 19, 1974); 120 Cong. Rec. S20241-42 (daily ed. Nov. 26, 1974).

Not only does the Act not require an adversarial relationship between the State and EPA for EPA to bring an emergency action, but §1431 mandates cooperation and consultation to the extent feasible. Emergency Powers, supra, at 305. Section 1431(a) explicitly states that:

> [t]o the extent [the Administrator] determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking." (emphasis added).

Additionally, the SDWA establishes a "joint Federal/State system . . . protecting underground sources of drinking water." 1974 House Report, supra, at 1, 8; 120 Cong. Rec. H10794 (daily ed. Nov. 19, 1974). The House Committee expressed the "hop[e] that State and Federal cooperation will be the rule." 1974 House Report, supra, at 21. In reviewing the Act in 1979, the Senate Committee described it as requiring the "development of an effective enforcement program in cooperation with State governments." Senate Committee on Environment and Public Works, S. Rep. No. 96-161, 96th Cong., 1st Sess. 3 (1979) (1979 Senate Report).

The Act's joint Federal/State enforcement scheme is also expressed in §1414(a) which permits EPA to enforce drinking water regulations, variances, and exemptions even in primacy States. Also, §1414(b) specifically authorizes EPA to bring an enforcement action when requested to do so by the Governor of a State or the State Agency which regulates drinking water. The legislative history of that section states that a lack of adequate technical and enforcement resources is sufficient to justify Federal action. 1974 House Report, supra at 22-23. The legislative history of §1431 contains no similar statement, but clearly where there is an emergency situation and the State's resources are overburdened, it would be foolish to withhold from EPA the power to remedy the problem.

This is particularly true when the emergency action is directed against the source of the contamination rather than against a water supplier, since the other enforcement provision (§1414(b)) does not cover sources of pollution and does not provide authority for States to bring an emergency action. The House Committee inferentially supported this interpretation by stating that it was "confer[ing] completely adequate authority to deal promptly and effectively with emergency situations which jeopardize the health of persons." id. at 35.

In sum, the emergency action Section provides another mechanism for cooperative Federal/State enforcement. It allows the Federal government to assume some of the burden of bringing an enforcement action.

2. Contaminant

The term contaminant is broadly defined in Section 1401(6), 42 U.S.C. §300f(b) as:

> any physical, chemical, biologial or radiological substance or matter in water.

The breadth of this definition is even greater because the protection of the public health is a "fundamental personal interest in life, health and liberty . . . [which has] a special claim to judicial protection in comparison with the economic interests . . . ." EDF v. Ruckelshaus, 439 F.2d 585, 598 (D.C. Cir. 1971) (in reviewing an administrative order concerning a pesticide); EDF v. EPA, 465 F.2d 528, 538 (D.C. Cir., 1972) (particularly when carcinogens are involved); Certified Color Mfgs. v. Matthews, 593 F.2d 284, 297-298 (D.C. Cir., 1976) (in upholding FDA's termination of a provisional listing of certain food colorings). See generally, Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); U.S. v. Nutrition Service, Inc., 234 F.Supp. 578, 579 (W.D. Penn., 1964). Since the emergency provision is intended to cover "potential hazards presented by . . . unregulated contaminants" the term "contaminant" must be defined broadly. 1974 House Report supra, at 35.

Congress enacted the SDWA in direct response to the discovery of organic compounds in drinking water. Baum, Drinking Water Chlorination and the Regulation of Organics, 3 Harv. Env. L.Rev. 399, 400, 403 (1979). Among situations considered by Congress, a substantial endangerment was the exposure to a carcingenic agent. id. at 36. This view is underscored by the many references in the legislative history to the discovery of carcinogens and potential carcinogens in an ever-increasing number of water supplies. 1974 House Rep., supra, daily 6, 10-11, 35; 120 Cong. Rec. H 10789, H 10793-94, H10798-99, H 10801-02 (daily ed. Nov. 19, 1974); 120 Cong. Rec. S20240 (daily ed. Nov. 26, 1974). This concern was reiterated and strengthened in subsequent Congressional reviews of the SDWA program. House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 96-186 at 4-6, (1979) (1979 House Report); 1979 Senate Rep., supra, at 3.

Congress has thereby provided a clear mandate to the Agency to use this Act in dealing with a wide range of contaminants including hazardous wastes.

3. Contaminant In or Likely to Enter a Public Water Supply

The language of the Act is plain on its face, a contaminant does not have to be present in a drinking water supply but only be "likely to enter a public water system . . . ." This language has been interpreted as covering threatened discharges. Emergency Powers, supra, at 302, n.26 and n.27. The legislative history strongly emphasizes the point by stating that:

1. the emergency administative "orders may be issued to obtain relevant information about impending . . . emergencies." (emphasis added);

2. such orders may be issued "to prevent a hazardous condition from materializing . . . ." (emphasis added);

3. the section should be used "early enough to prevent the potential hazard from materializing . . . ." (emphasis added);

4. EPA may use the section when "there is an imminent likelihood of the introduction into drinking water of contaminants." (emphasis added). (All of the above quotes are from 1974 House Report, supra, at 35-36);

5. "the Act requires that EPA adopt a preventive health posture in regulating contaminants. With chemicals whose side effects may not become manifest for a generation after exposure, this means regulations cannot be withheld until danger is conclusively proven . . . [particularly for organic chemicals] . . . ." 1979 Senate Rep., supra, at 3.

The above interpretation is also dictated by the practical necessities of the hydrology of groundwater, e.g.:

> In as much as 40 percent of the population derives drinking water from groundwater sources, pollution is of significant concern, not only from a public health standpoint but also from an economic standpoint . . . . Once an aquifer becomes polluted, recovery from that pollution is usually slow, because of the generally slow rate of groundwater movement through the aquifer. Hence, groundwater pollution may be considered a semi permanent condition, perhaps lasting for years after the source has been located and the pollution stopped. United States Water Resources Council. The Nation's Water Resources - 1975 - 2000 at 64 (emphasis added.); cited in 1979 House Rep., supra, at 5-6, see also, Tripp and Jaffe, Preventing Groundwater Pollution; Towards a Coordinated Strategy to Protect Critical Discharge Zones, 3 Harv. Env. L.Rev. 1, 3-9 (1979).

The House Committee, citing this report, the growing hazardous waste problems, and the established principles of hydrology directed the Agency to protect underground sources of drinking water, particularly from organic chemical contamination. 1979 House Report, supra, at 5-6; see also 1979 Senate Report, supra, at 3. Specifically, the Committee called for "full and vigorous implementation of its authorities under its hazardous waste program of . . . the Safe Drinking Water Act . . . ." 1979 House Report, supra at 6; see also 1979 Senate Report supra at 3.

In sum, the uncontradicted purpose of the Act in general and the emergency provision in particular is to avoid allowing water supplies to become contaminated.

4. May Present an Imminent and Substantial Endangerment

This element of an emergency action has several discrete subparts:

a. a contaminant "may", not will, endanger;

b. the endangerment must be imminent; and,

c. the endangerment must be substantial.

The meaning of the phrase, therefore can best be understood by analyzing its component parts. Emergency Powers supra at 312. These terms must also be interpreted with the preventive nature of the statutory scheme (see discussion above) and the strong emphasis on the control of organic chemicals, especially carcinogens, in mind. (see, Contaminants, above). As Justice Frankfurter directed, "[s]tatutes . . . are instruments of government, and in constructing them, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down . . . . This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words." United States v. Shirey, 359 U.S. 255, 260-61 (1958) (emphasis added.). Also, the courts must understand that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices." Marshall v. United States, 414 U.S. 917, 727 (1974) (emphasis added).

Even more than recent environmental and public health statutes, Congress intended this Act to be "construed broadly by the courts so as to give paramount importance to the objective of protection of the public health." 1974 House Report, supra, at 35 (citing United States v. United States Steel, Civ. Act. No. 71-1040 (N.D. Ala. 1971) at 32; at 23 (in discussing §1414 (b)); at 120 Cong. Rec. H10794 (daily ed. Nov. 26, 1974). Congress specifically rejected the limited interpretation of when injunctive relief was available that the Eighth Circuit took in the Reserve Mining Co. v. U.S., 514 F.2d 518. 120 Cong. Rec. H 10793 (daily ed. section on Appropriate Remedies). see page 10 this memorandum

A. Contaminant May Endanger

The original Senate version of the emergency provision used the phrase "a constituent . . . will result in a serious risk to health . . . ." § 6 (a) of S. 433 as reported in 1974 Senate Report, supra, at 24. In the final version, Congress chose the probabilistic word "may" rather than the deterministic term "will." The plain meaning of the language change is that EPA need only prove that the contaminant may be an endangerment, not that it will be an endangerment. In interpreting why the word "may" instead of "will" was chosen the House Report states:

> The words used by the Committee were carefully chosen. Because of the essential preventive purpose of the legislation, the vast number of contaminants which may need to be regulated, and the limited amount of knowledge presently

> available on the health effects of various contaminants in drinking water, the committee did not intend to require conclusive proof that any contaminant will cause adverse health effects as a condition for regulation of a suspected contaminant. Rather, all that is required is that the Administrator make a reasoned and plausible judgment that a contaminant may have such an effect. 1974 House Report supra, at 10. (emphasis added).

Although the House Report was discussing the definition of an MCL, since Congress used the identical word in a similar context, under general statutory interpretation rules, it is presumed that the same meaning was intended. Certainly, such an interpretation is consistent with the purpose of the provision.*/ The House Report also specifically stated that in determining whether there may be an adverse health effect, EPA could use epidemiological, toxicological, physiological, biochemical or statistical studies or research (including studies on the effects on animals). id. at 10. Even extrapolations of such research and studies or a professional judgment based on the known behavior of analogous contaminants or the same contaminant in other media could be used. id. at 10.

Given this history and the explicit rejection of the holding in the Reserve Mining case, it is clear that Congress intended that the traditional (and, in modern scientific analysis, outmoded) concept of causation be rejected. See Kraus, Environmental Carcinogenesis: Regulation on the Frontiers of Science, 7 Env. L. 83, 104-11 (1976) (Kraus); Ethyl Corp. v. EPA, 541 F.2d 1, 28 (D.C. Cir.) en banc, cert. denied 426 U.S. 941 (1976); Emergency Powers, supra, at 315; 1979 House Rep., supra at 4.

"Endangerment" is composed of reciprocal elements of risk and harm, or probability and severity. See Ethyl Corp. v. EPA, 541 F.2d., at 18 (in interpreting the language "will endanger" in the Clean Air Act); Carolina Environmental Study Group v. United States, 510 F. 2d 796, 799 (D.C. Cir. 1975); Reserve Mining Co. v. EPA, 514 F.2d at 519-529 (8th Cir., 1975); Emergency Powers, supra, at 313. Public health may properly be considered endangered both by a lesser risk of a greater harm and by a greater risk of lesser harm. What constitutes an endangerment will ultimately depend on the facts of each case. Ethyl Corp. v. EPA, 510 F.2d, at 18; Emergency Powers, supra, at 315.

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*/The legislative history of the Act uses the term regulation and regulatory authority broadly. See 1974 House Report, supra, at 35-36 which states that an emergency action is used to regulate a source of contamination.

In Reserve Mining, the Eighth Circuit interpreted "endanger" in the Clean Water Act's emergency provision as not requiring a showing of actual harm. A showing of evidence of potential harm was held to be sufficient.*/ See also, United States v. United States Steel Corp., Civ. Act. No. 77-1041 (S.D. Ala. Nov. 18, 1971) (discussed in Emergency Powers, supra, at 313 n. 99); and Kraus, supra, at 100-111.) As the Court stated in Reserve Mining:

> Congress used the term "endangering" in a precautionary or preventive sense, and, therefore, evidence of potential harm as well as actual harm comes within the purview of that term. We are fortified in this view by the flexible provisions for injunctive relief which permit a court to enter such judgment and orders enforcing such judgment as the public interest and the equities of the case may require. Reserve Mining Co. v. U.S., 514 F.2d at 528 (emphasis added).

The court in the Ethyl case felt that requiring actual harm to meet a standard of "endangerment" to persons would frustrate the preventive purposes of environmental legislation. 510 F.2d at 28. Clearly, "(w)ith chemicals whose side effects may not become manifest for a generation after exposure, this means regulations cannot be withheld until danger is conclusively proven." 1979 Senate Report, supra, at 3. Therefore, the endangerment element only requires proof of the risk of harm, not actual harm. Emergency Powers, supra, at 315.

B. Imminent

The risk of harm must be imminent not the harm itself for the Agency to act. 1974 House Report, supra, at 36. Thus, §1431 may be used if there is an "imminent" likelihood that contaminants which may cause health damage even after a period of latency are

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*/In dicta without any discussion or analysis the Court also stated that "the term endangering. . . connotes a lesser risk of harm . . . than the phrase imminent and substantial endangerment to the health of persons as used by Congress in the 1972 amendments to the FWPCA. 33 U.S.C. §1364." 514 F.2d at 528 (emphasis added). This judicial opinion was decided after the SDWA was passed. Therefore, Congress could not have incorporated this interpretation into the SDWA. In fact, Congress rejected the Eighth Circuit's earlier opinions in this case. 120 Cong. Rec. H10793 (daily ed. Nov. 19, 1974). See discussion of Reserve Mining, infra, under Appropriate Relief.

introduced into drinking water. id. at 36. This is a change from the common law approach and is necessary to enable action before people actually get sick or are otherwise harmed.

In construing the term "imminent" the Agency may also consider the time it may take to prepare orders, commence and complete litigation, and to implement and enforce administrative or court orders. id. A hazard, therefore, may be "imminent" even if the contaminant will not enter the water supply for many years, if time is needed to implement corrective action under §1431. id. at 35-36. See also, EDF v. Ruckelshaus, 439 F.2d 584, 597 (D.C. Cir. 1971) (accepting a similar definition in a statute regulating pesticides).

The term "imminent" is related to the probability that harm will be set into motion (as opposed to already being manifest) within a certain time frame. The recognition by Congress that a risk of harm may be considered "imminent", even though the harm itself may be latent, is a necessary element for enforcement under the Safe Drinking Water Act, otherwise the Agency could never prevent carcinogens from contaminating water supplies.

C. Substantial Endangerment

"Substantial," for purposes of the SDWA, includes risks of harm which are greater than de minimis. 1974 House Report supra, at 35; Emergency Powers, supra, at 315. What Congress meant to exclude by the term "substantial" are insignificant, negligible or speculative risks of injury or illness. This interpretation is supported elsewhere in legislative history of this and other statutes. Administrative and judicial implementation of emergency authority must occur sufficiently early to prevent the potential hazard from materializing, or the Agency's regulatory tasks becomes meaningless. 1974 House Rep. at 35, 36.

"Substantial endangerment" specifically includes: a) a substantial likelihood that hazardous contaminants will be ingested by consumers if preventive action is not taken; b) a substantial statistical probability that disease will result from the presence of contaminants in drinking water; or, c) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants). 1974 House Report, supra at 36.

5. Appropriate Relief

There are two mechanisms for obtaining relief under the emergency provision: an administrative order issued by the Agency or a judicial order issued by a court in a civil action.*/ These

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*/ Under §1431, the Administrator may take such actions as he may deem necessary . . ." and he is "not limited to . . ." administrative orders and civil actions. Exactly what actions this additional authority encompasses will not be discussed here.

> The court's decision in Reserve Mining has prompted a third question, whether it is proper to resolve all uncertanties in favor of public health where substantial economic costs would be imposed to meet standards of questionable necessity . . . the court did not say that resolving uncertainties in favor of health protection is impermissible. Rather it said:
>
> ". . . the district court's determination to resolve all doubts in favor of health safety represents a legislative policy judgment, not a judicial one." [498 F. 2d at 1084]
>
> Whatever Congress' intent was in passing the Refuse Act I have no doubt that subcommittee and the committee have made just such a legislative policy judgment in the Safe Drinking Water Act. . . . Cost is not to be considered. . . in enforcing the [Act's] requirement. . . . We must recognize that there now exists very little evidence on the health effects of contaminants in drinking water. What there is is often inconclusive and inconsistent. But in my view, we cannot afford to wait 20 years for health effects research to be completed . . . . If there are uncertainties, they must be resolved on the side of protection of health. 120 Cong. Rec. H10793 (daily ed. Nov. 19, 1974). (emphasis added). (Mr. Rogers, Chairman of the Subcommittee reporting the bill and floor leader)

Congress also specifically expressed its desire that a different result occur in SDWA cases by using different, less restrictive language than is used in the Clean Water Act's emergency provision. 120 Cong. Rec. H 10794 (daily ed. Nov. 19, 1974). The Administrator was directed to seek such injunctive relief as may be necessary to protect the health of persons. 1974 House Rep., supra, at 35. Congress underscored this position by clearly stating that uncertainies should be resolved in the favor of the protection of the public health.

To argue that a court should wait until a contaminant is actually detected in the water supply before issuing a mandatory order to the source of contamination is not only contrary to the plain language of the statute and the legislative history, but implies that the only effective remedy is precluded. In general,

orders may be issued sequentially or independently. If an administrative order is issued and willfully violated or there is a willful refusal to comply, EPA may initiate a civil action to enforce the order or it may seek criminal penalties of up to $5,000 per day. Section 1431(b), 42 U.S.C. §300i(b).

Such orders can require any "actions as [EPA]. . . may deem necessary in order to protect the health of such persons." Section 1431(a), 42 U.S.C. 300i(a). The legislative history specifically states that these orders may be issued:

> to obtain relevant information about <u>impending</u> or actual emergencies, to require the issuance of notice so as to alert the public to a hazard, to <u>prevent</u> a hazardous condition from materializing, <u>to treat</u> or reduce a hazardous situation <u>once they have arisen</u>, or to provide alternative notice safe water supply sources in the event any drinking water source which is relied upon becomes hazardous or unuseable." 1974 House Report, <u>supra</u>. at 35; <u>Emergency Powers</u>, <u>supra</u> at 320 n. 137 (emphasis added).

The remedies available under this section are, therefore, extremely broad. They fall into two basic categories: those directed at water suppliers and those directed at the source of contamination. Those actions directed at the contamination source are particularly important, since the purpose of the Act is to prevent health problems.

Generally, and particularly with regard to actions against the sources of contamination, vigorous and preventive remedies should always be sought. It should be noted that despite the precautionary and preventive definition of endangerment adopted by the Eighth Circuit in the <u>Reserve Mining</u> case the Court in that case refused to uphold the district court's order to shut down Reserve Mining's plant because the economic consequences of such a shut down (a loss of 31,000 jobs and millions of dollars to the local economy) outweighed the risk of harm from asbestos fibers in the water. <u>Reserve Mining Co. v. EPA</u>, 514 F. 2d at 536-537. The Court used the traditional balancing test, i.e. weighing the unpredictable health effects versus the social and economic consequences of closing a plant. <u>id</u>. at 536. Nevertheless, Congress, in passing the SDWA, specifically discussed the holding in <u>Reserve Mining</u> and dictated that courts should not follow that case, e.g.:

courts should not impute to Congress a futility inconsistent with the great design of this legislation. United States v. Republic Steel, 362 U.S. 482, 492 (1960) (in inferring that the Rivers and Harbors Act provided a civil remedy); Wyandotte Transportation Co. v. United States, 389 U.S. 191, 203 (1974) (in interpreting Rivers and Harbors Act as allowing recovery of removal costs). In many SDWA emergency actions, particularly hazardous waste site cases, the major concerns of the Eighth Circuit in Reserve Mining, i.e. the loss of jobs from a plant closing, will not arise since either a plant shutdown will not be necessary or a waste site is involved, not an industrial facility.

For the above mentioned reasons, a preliminary injunction should be more easily obtainable under the SDWA. The legislative history behind the Act specifically rejects the traditional balancing tests that the courts have adopted in preliminary injunction cases. Congress has determined that the balance must be struck in favor of minimizing the risk of harm to the user of the water supply. Courts are directed to give "utmost

of the public health." 1974 House Report, supra, at 23.

6. Potential Defendants

Obviously, §1431 covers the owners and operators of water supplies. However, §1431 by its language can be used against any person who is or potentially may contaminate a drinking water supply. The legislative history explicitly includes within the reach of this section, State or local governments, State or local officials, owners or operators of underground injection well, area or point source pollutants, and "any other person whose action or inaction requires prompt regulation to protect the public health." 1974 House Report, supra, at 35. The floor debate in the House discussed extensively the Reserve Mining case where a point source discharge contaminated a water supply with asbestos fibers and concluded that the SDWA would apply in such a case. 120 Cong. Rec. H 10793 (daily ed. Nov. 19, 1974). When recently reviewing the SDWA both the Senate and House Committee specifically directed EPA to use all its authorities under the SDWA to address the problems of hazardous waste sites. 1979 House Report, supra, at 6, and 1979 Senate Report, supra, at 3.

In summary, this section of the Act may and should be used against any existing or potential source of contamination.

7. Elements of Proof

The mainstay of legal proof in a §1431 preliminary injunction action is the affidavit. An affidavit is a declaration in writing, under oath, sworn to or affirmed by the person making it before some person who has authority to administer an oath,

e.g., a notary. Affidavits are to be made by persons who know the facts from first hand experience and have the legal ability to make an oath, i.e., they are over the legal age and are not mentally disabled. The affidavit presents to the court prima facie evidence of an emergency condition that requires emergency action under §1431. The language of each affidavit must be tightly written. Within ten (10) days of filing its pleadings and moving for a temporary restraining order (TRO), EPA must be prepared to present witnesses in support of each element of each affidavit filed. The affidavits can be from non-governmental persons.

Ordinarily, the person with overall responsibility in the case will present affidavits describing the facts of a violation presenting an emergency. Those subordinates with direct responsibility for fact gathering and field analysis must be prepared to testify as witnesses in support of the affidavits at any hearings which will ensue. Care must be taken to safeguard that evidence is admissible at any hearings. Affidavits should contain the following elements:

1. Identify the person giving the affidavit; name, position, experience, credentials, etc.;

2. Enumerate all facts, scientific, technical, and the source of these facts, e.g., "I observed that no chlorinator was installed by the plant, or "[t]he owner (or employee) of the water supply stated that there never has been a chlorinator installed", etc.

3. Enumerate all professional opinions and conclusions pertinent to the emergency condition and within the expertise of that person. The affidavit should relate the opinions to the facts, (e.g., Since the benzene waste I observed was at the site for several years according to the workmen at the site and, given the hydrology of the area, I conclude that benzene has probably migrated within 400 feet of the well (aquifer or reservoir). From my knowledge of the geology and hydrology of this area and, given the normal migration process, I am of the opinion that the benzene will reach and contaminate the water supply within one year if nothing is done). Care should be taken that experts give opinions only on matters within their expertise.

## 8. Conclusion

The purpose and legislative history of the SDWA, the prior case law, and practical considerations support a strong preventive interpretation of Section 1431. This interpretation emphasizes the paramount importance of protection of the public health. Health studies that raise a reasonable medical concern about a chemical or are indicative that a chemical is a carcinogen may

be used to determine whether there is an "imminent and substantial endangerment." All that is necessary as discussed above is the risk of harm rather than actual medically proven harm (in the traditional sense). Of course, a detailed description of the outer contours of what constitutes an "imminent and substantial endangerment" must await the development of an extensive case law.

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

JAN 31 1984

OFFICE OF WATER

MEMORANDUM

SUBJECT: Water Supply Guidance on Expired Exemptions

FROM: Victor J. Kimm, Director
Office of Drinking Water

TO: Regional Drinking Water Branch Chiefs
Regions I - X

This document should be filed in Chapter VI - Variance and Exemption Guidance, Compendium of Water Supply Guidance for the Public Water System Supervision Program. It addresses the expiration of exemptions under Section 1416 of the Safe Drinking Water Act, as amended (42 U.S.C. §300f et seq.) and explains how to work with systems whose exemptions expired on January 1, 1984. This guidance is offered to states with primary enforcement responsibility and EPA Regional Offices that have issued exemptions where states do not have primacy. For the purpose of this document, Regional Offices and states with primacy will be collectively referred to as the "primacy agent."

Section 1416 authorizes exemptions for public water systems that are unable to comply with a maximum contaminant level (MCL) or treatment technique requirement due to compelling factors such as economic constraints. Economic constraints may include the cost of purchasing and constructing necessary equipment and facilities and/or the low per capita income and small number of residents in a community served by the system. An exemption may be granted only if it will not result in an unreasonable risk to health.

According to the Act, a compliance schedule must be prescribed with every exemption to the National Primary Drinking Water Regulations (NPDWR's). Exemptions to the Interim NPDWR'S must require compliance with MCL's or treatment techniques no later than January 1, 1984. If a system has entered into an enforceable agreement to become part of a regional public water system, the schedule must require compliance no later than January 1, 1986. In addition, exemptions may not be issued after January 1, 1984, unless the system has entered into an enforceable agreement to join a regional system.

Congress is now considering legislation (H.R. 3200, the Eckart Bill) to grant a reprieve to those systems whose exemptions have expired but it is unclear when or if relief will be granted. Systems that are not in compliance with the MCL's or treatment techniques and whose exemptions have expired are in violation of the Act. Our latest report (see attached) indicates that 393 exemptions to the Interim NPDWR's remain outstanding as of January 1, 1984. Primacy agents should take the following actions as soon as possible:

(1) If necessary to determine the compliance status, survey the systems that have been granted exemptions to determine their compliance status (e.g., whether the systems are becoming part of a regional system). Report to the US EPA Regional Office on the compliance status of systems that had been given exemptions and update that report with quarterly reports on changes in compliance status. Regional reports on the compliance status should be forwarded to USEPA Office of Drinking Water by February 15, 1984, with updates submitted quarterly after the initial report.

(2) Inform the systems that their exemptions have expired, that they are in violation of the Act and that they may be subject to enforcement action;

(3) In addition, under section 1414(c) of the Act, notify the systems that they must notify the persons they serve of any violation of an MCL;

(4) Encourage systems to enter into regional tie-in agreements where feasible;

(5) Develop a compliance plan as soon as possible for each system which is not in compliance, and consider judicial or administrative actions as appropriate.

Primacy agents should follow their respective compliance strategies to bring their systems into compliance. The fact that the systems may be out of compliance due in part to the expiration of an exemption allows the exercise of discretion and case-by-case evaluation of any non-compliance. Compliance strategies may dictate a variety of responses including enforcement action in some cases. An effective compliance strategy should place great importance on the magnitude of the health risk arising from each violation and the ability of the system to come into compliance. Enforcement action against these systems should be carefully weighed against

other enforcement priorities. We expect you to work with each system to bring it into compliance as soon as possible.

We recognize that expiration of exemptions has generated uncertainty for some public water systems and their customers. By developing compliance plans for each system, both the systems and their users should understand how compliance can be achieved in a realistic manner. We will keep you informed of Congressional developments.

## Summary of Exemptions

| Contaminant | Number of Exemptions |
|---|---|
| Turbidity | 34 |
| Arsenic | 17 |
| Barium | 4 |
| Chromium | 1 |
| Fluoride | 284 |
| Nitrate | 38 |
| Selenium | 11 |
| Gross Alpha | 2 |
| Combined Radium | 2 |
| TOTAL | 393 |

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

APR 10 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Draft Enforcement Guidance Regarding Public Water Systems in States Which Have Primary Enforcement Responsibility

FROM: Victor Kimm, Director
Office of Drinking Water

Louise D. Jacobs
Associate Enforcement Counsel
for Water

TO: Regional Water Management Division Directors
Regional Counsels
Regions I - X

Background

Since September 1979, 30 Federal enforcement actions have been filed against public water systems under the Safe Drinking Water Act. They have all been filed in States which have not received primary enforcement responsibility, (Pennsylvania (9), Wyoming (11) and Oregon (10)), where the Agency is not required to provide any notice to the State prior to filing the action. All of these actions have been brought under the authority of §§1414(b)(1) and 1414(a)(2) and other sections.

Also, during this period, the Administrator has issued two administrative orders under the "imminent and substantial endangerment" provision of the SDWA (§1431): Perkiomen Valley, Greenhouse, Pennsylvania (1983) and Grindstone Indian Rancheria, Orland, California (1984). These actions were brought in areas where EPA has primary enforcement responsibility.

However, we are receiving data which reflect significant levels of non-compliance in a few States which do have primary enforcement responsibility, which, for the purpose of this draft guidance, we will call "primacy States." In an effort to reduce existing levels of non-compliance, and consistent with guidelines for improved Federal-State relations, we believe it is important for the Agency to more closely examine PWS non-compliance in primacy States and to more closely consider

appropriate Federal enforcement actions. This guidance is intended to clarify the Agency's enforcement alternatives in primacy States and to respond directly to Regional inquiries following the recent national meeting on enforcement.

There are two principal sections of the SDWA which authorize the Agency to bring a civil action against a public water system in a primacy State: (1) §1414(a)(1), which is distinguished by a somewhat cumbersome procedure, including the prerequisites of a finding by the Administrator of non-compliance, notice to the State, and notice to the public; and (2) §1414(b)(2), which is distinguished by the prerequisite of a request by the State that the Administrator bring a civil action. (The full texts of these provisions are attached as an Appendix.)

§ 1414(b)(2) -- "Request by State"

There are two prerequisites to the Agency initiating a civil referral under this section: (1) a request by a specified State official; and (2) a belief by the Agency (supported by evidence) that the PWS is not in compliance. We should consider the following factors in connection with such a referral:

(1) The source of the request: (a) "the chief executive officer of the State in which is located the [PWS]...", e.g., the Governor; or, (b) "the agency of such State which has jurisdiction over compliance", i.e. the State agency for which enforcement responsiblity has been approved, e.g. the Director of the State Department of Health or the Director of the PWS compliance division or office;

(2) The addressee of the request: the Regional Administrator or the Water Management Division Director;

(3) The form of the request: in writing;

(4) The content of the request: a request that the Administrator bring a civil action against one or more specifically identified PWSs to require compliance with a national primary drinking water regulation or with any schedule or other requirement imposed pursuant to a variance or exemption granted under section 1415 or 1416;

(5) The Agency response to the request: the Agency should respond to every request; however, litigation is discretionary ("The Administrator may bring a civil action..."). The Regional Office should carefully consider each request. At a minimum, the Region should review and evaluate the supporting data supplied by the State and should also consider conducting an inspection, after appropriate notice to the PWS, to independently verify the State's information. The Region should then evaluate a potential civil action in light of the "Public Water Systems

Compliance Policy," January 18, 1984. While the State request does not require the Agency to respond by initiating a civil referral, the mere fact of a State request should carry considerable additional weight in assigning the enforcement priority which would otherwise have been determined based solely upon the PWS Compliance Policy. While there is no statutory timetable, we recommend that, within 60 days from the date of the receipt of the request from the State, the Regional Water Management Division Director make the decision as to whether to initiate the development of a civil referral. The Region should also provide the State with a final, written response to each request.

In addition, we request that the first two primacy referrals from each Region be submitted for Headquarters concurrence, to help insure national consistency.

§ 1414(a)(1) -- EPA-Initiated Referrals

The Agency may also initiate a civil referral under §1414 (a)(1), even if a State has not requested such action. The summary prerequisites of (a)(1) are that the Administrator: (1) "finds" that a PWS is in noncompliance; (2) provides notice to the State; (3) provides "appropriate" advice and technical assistance to the State and the PWS; (4) provides public notice and requests a State report; (if noncompliance continues for more than 30 days after the initial notice to the State); and (5) determines, after 60 days after the initial State notice, that (a) the noncompliance continues, and (b) the State has (i) failed to report within 15 days of the public notice or (ii) the State has abused its discretion. (Actions under § 1414 (a)(1) have been delegated to the Regional Administrators.)

We should consider the following factors in connection with such a referral:

(1) The notice to the State: must be in writing, signed by the Administrator or his delegatee; must state the finding of noncompliance; should cite the authority for the finding [§1414(a)(1)(A)], the specific PWS in noncompliance, the specific regulations or requirements which were violated, the duration of the violation, and the potential significance of the noncompliance;

(2) The type of advice and technical assistance: is required to be "as may be appropriate to bring the system into compliance...by the earliest feasible time;" however, this does not require the Agency to bring the system into compliance, otherwise the section would end here; the statute describes the provision of general guidance regarding feasible, appropriate alternative short and long-term methods of assuring compliance or providing safe drinking water;

(3) The timing of advice and technical assistance: the Agency should provide this assistance at the same time as, or shortly after, the initial notice to the State so that (a) the State can use the assistance to help bring the system into compliance, and (b) the second finding of noncompliance, if any, may include mention of this assistance.

(4) The second finding and public notice: if, after 30 days after the initial State notice, the Administrator finds continuing noncompliance (with one or more of the regulations or requirements cited in the original finding), the Administrator should make such a finding and must give public notice of the finding; the second finding and public notice should be made as soon as possible after the first 30 days after the State notice and no later than 45 days after the State notice.

The Senate Report on the proposed Senate version of the SDWA noted that: "Any notification required by EPA under this section for violations of national primary drinking water standards should be given through local newspapers or by any other means which will alert users of the public water system of the standard being violated and the extent of the dangers posed." Legislative History of the SDWA, at 804 (1982).

(5) The request for the State report: at the same time as, or shortly after, the public notice, the Administrator must request that the State report, to EPA, within 15 days from the date of the public notice as to the steps being taken to bring the PWS into compliance: this request need not be in writing initially but should be confirmed in writing.

(6) The evaluation of the State report: after receipt of the State report, if received within (or close to) 15 days from the public notice, the Region should evaluate the report to determine whether or not the State has abused its discretion, [see §1414(a) (1)(B)(ii)(beta)];

The House Report on the proposed House version of the SDWA clarified the suggested content of the State report, as follows: "The Committee intends that such reply [report] be as specific as possible. It should specify a timetable by which compliance will be achieved and include interim steps that will be taken. It should also include a statement of the legal authority which the State intends to rely upon and any remaining legal steps that will be taken by the State to assure that the timetable is followed. Mere declarations of intent to commence legal proceedings or other similar vague declarations of intent would not be sufficient to constitute the required reply under this section." Legislative History of the SDWA, at 554 (1982).

(7) The final assessment of compliance: the Agency may initiate a civil referral if the Agency concludes that (1) the noncompliance extends beyond 60 days after the initial State notice; and (2) (a) the State fails to submit, in a timely manner, the report required in §1414(a)(1)(B), or (b) the Agency concludes that the State abused its discretion, (see §1414(a)(1)(B)(ii)).

The determination that a system is in serious enough noncompliance to warrant EPA-initiated civil suit should be made using the EPA PWS Compliance Policy. Sources of information on noncompliance include the State submissions on violations by public water systems and the Region's mid-year evaluations of the State programs.

As you determine that a system is a candidate for a §1414 action, or as you are contacted by States for assistance in bringing a system into compliance, please work with the appropriate Regional personnel to assure that proper legal and technical procedures are followed. The Office of Enforcement and Compliance Monitoring has prepared additional information on formats for motions, orders, etc., which has been distributed to you. The Office of Drinking Water's technical advice is, of course, available to you, as is their knowledge of overall compliance rates and activities in other Regions. If you have questions or comments on any of this, please direct them to us personally, or to Jack Winder, OECM (382-2879) or John Trax, ODW (382-5526).

Attachment: Appendix

# Appendix

Sec. 1414. (a)(1)(A) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for public water systems (within the meaning of section 1413(a)) that any public water system -

(i) for which a variance under section 1415 or an exemption under section 1416 is not in effect, does not comply with any national primary drinking water regulation in effect under section 1412, or

(ii) for which a variance under section 1415 or an exemption under section 1416 is in effect, does not comply with any schedule or other requirement imposed pursuant thereto,

he shall so notify the State and and provide such advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance with such regulation or requirement by the earliest feasible time.

(B) If the Administrator finds such failure to comply extends beyond the thirtieth day after the date of the notice given pursuant to subparagraph (A), he shall give public notice of such finding and request the State to report within fifteen days from the date of such public notice as to the steps being taken to bring the system into compliance (including reasons for anticipated steps to be taken to bring the system into compliance and for any failure to take steps to bring the system into compliance). If -

(i) such failure to comply extends beyond the sixtieth day after the date of the notice given pursuant to subparagraph (A); and

(ii)(alpha) the State fails to submit the report requested by the Administrator within the time period prescribed by the preceeding sentence; or

(beta) the State submits such report within such period but the Administrator, after considering the report, determines that the State abused its discretion in carrying out primary enforcement responsibility for public water systems by both -

(I) failing to implement by such sixtieth day adequate procedures to bring the system into compliance by the earliest feasible time, and

(II) failing to assure by such day the provision through alternative means of safe drinking water by the earliest feasible time:

the Administrator may commence a civil action under subsection (b).

Section 1414(b) The Administrator may bring a civil action in the appropriate United States district court to require compliance with a national primary drinking water regulation or with any schedule or other requirement imposed pursuant to a variance or exemption granted under section 1415 or 1416 if -

(1) authorized under paragraph (1) or (2) of subsection (a), or

(2) if requested by (A) the chief executive officer of the State in which is located the public water system which is not in compliance with such regulation or requirement, or (B) the agency of such State which has jurisdiction over compliance by public water systems in the State with national primary drinking water regulations or State drinking water regulations.