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Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response



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Signature of OSWER Directives Officer		Date



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

DEC 21 1984

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Enforcement Response Policy
FROM: Lee M. Thomas, Assistant Administrator
TO: Regional Administrators - Regions I-X

I am enclosing the final Enforcement Response Policy for your implementation. The policy provides guidance on classifying violations, selecting the appropriate enforcement action in response to various categories of RCRA violators, and taking federal enforcement action in States with authorized programs.

The Enforcement Response Policy sets out an approach for strengthening the RCRA enforcement program by concentrating its efforts on the most serious violators and by ensuring that these violators receive timely and appropriate responses. Many of the concepts in this guidance were developed and agreed to in principle by the Regional Offices and many States in March 1984 as a result of a series of meetings prompted by high level concern with significant noncompliance under the RCRA program. Much of this guidance has been operational since that time and this document merely formalizes the principles that were established then.

I urge you to implement this guidance to the extent possible in FY 1985 within the constraints of your Enforcement Agreements and Grants. However, there is no need for you to reopen FY 1985 negotiations with the States. The Enforcement Response Policy should be implemented fully in FY 1986. Its principles, therefore, should be embodied in the FY 1986 Enforcement Agreements and Grants.

It is my hope that this guidance, along with the recently issued RCRA Implementation Plan, Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA, and RCRA Civil Penalty Policy will lead to significant improvements in the rate of compliance with the RCRA program.

I appreciate the assistance that your staffs have provided us in the development of this guidance.

ENFORCEMENT RESPONSE POLICY

DECEMBER, 1984

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SECTION I

INTRODUCTION

The goal of the RCRA Compliance Monitoring and Enforcement Program is to attain and maintain a high rate of compliance within the regulated community. In order to accomplish this, the Agency and the States must take frequent, visible, and effective enforcement actions against serious violators. This means that the Agency and the States must exercise penalty authorities against serious violators and act against them in an expeditious manner.

The Enforcement Response Policy thus sets forth an approach for strengthening the RCRA Enforcement Program. First, recognizing the fact that there are not sufficient resources to address all instances of noncompliance with the same level of effort, the policy calls for concentration of effort on the most serious violators, those called high priority violators. These violators represent the vast majority of violators with Class I violations. High priority violators are to receive penalties, either by issuing an order with a penalty, referring the case to a judicial authority, or utilizing the Agency's penalty authority.

Second, the policy espouses the concept of expeditiously escalating an action when compliance is not achieved. All too often in the past, the RCRA enforcement program has relied heavily on "low level" enforcement actions (e.g. warning letters and notices of violation (NOV), often issuing more than one such action over a long period of time with no success. In order to achieve compliance, stronger actions must be used in conjunction with the warning letters and NOVs. The Enforcement Response Policy thus sets forth a timeline that indicates at what point a stronger action must be taken.

Third, the policy lays out instances when the Agency will take direct action in authorized States. Finally, the policy revises the violation classification system, essentially eliminating the middle classification (previously Class II) and renumbering Class III as Class II.

The RCRA Enforcement Response Policy supersedes the guidance set out previously in the following three memoranda:

- 1) July 7, 1981 from Douglas MacMillan to Regional Administrators and Enforcement Division Directors, the subject of which was "Guidance on Developing Compliance Orders Under Section 3008 of the Resource Conservation and Recovery Act,"

- 2) January 22, 1982 from Douglas MacMillan, through Christopher Capper and William A. Sullivan, to Regional Administrators, Regional Counsels, and Air and Waste Division Directors, the subject of which was "Guidance on Developing Compliance Orders Under Section 3008 of the RCRA; Enforcement of Ground-Water Monitoring Requirements at Interim Status Facilities," and
- 3) October 6, 1982 from Robert M. Perry and Rita M. Lavelle to Regional Administrators, Regional Counsels, and Air and Hazardous Materials Division Directors, the subject of which was "Guidance on Developing Compliance Orders Under Section 3008 of the Resource Conservation and Recovery Act; Enforcement of the Financial Responsibility Requirements Under Subpart H of 40 CFR Parts 264 and 265."

All three memoranda provide guidance on the classification of violations and on the enforcement response appropriate for the various classes of violations.

The Enforcement Response Policy provides guidance only on civil actions - both administrative and judicial. Further, it addresses only responses to violations, those responses authorized under §3008 of RCRA. Use of the authorities set out in §3013 and §7003 for addressing situations that may present imminent hazards to human health or the environment is set out in the policies on "Issuance of Administrative Orders under Section 3013 of the Resource Conservation and Recovery Act" and "Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act".

The policy and procedures set forth in this document and internal office procedures adopted pursuant to this document are intended solely for the guidance of employees of the Environmental Protection Agency and State Enforcement Agencies. They are not intended to nor do they constitute rulemaking by the Agency, and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. Agency officials may take any action that is at variance with the policy or procedures contained in this document or with internal office procedures that may be adopted pursuant to this document if determined to be appropriate in a specific case.

The Enforcement Response Policy is organized along the following lines:

- Relationship of the Policy to other Agency Documents
- Enforcement Responses and Definitions
- Establishment of Priorities
- EPA Action in Authorized States
- Examples of Class I and II violations.

SECTION II

RELATIONSHIP TO OTHER AGENCY POLICY AND GUIDANCE

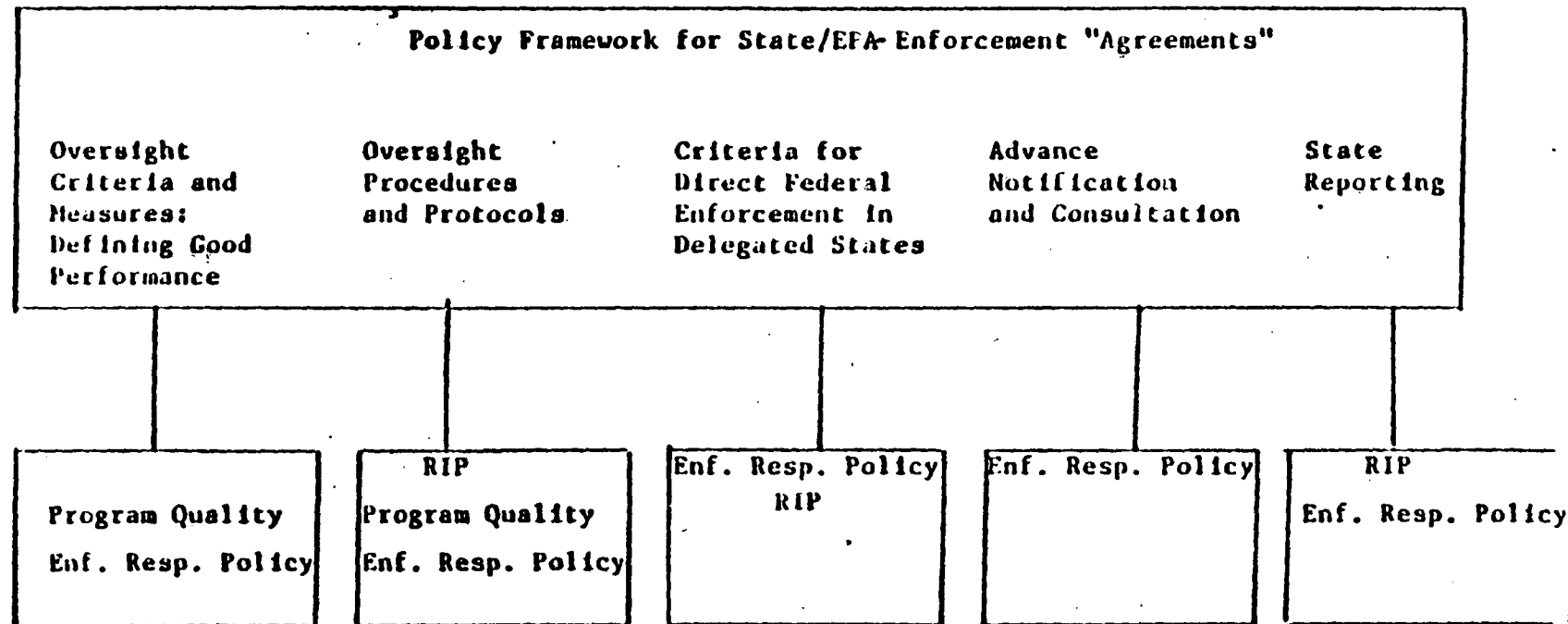
The RCRA Enforcement Response Policy does not stand alone. It should be used in conjunction with the following:

- ° Agency Operating Plan - Sets the policy and planning directions of the Agency. (Issued annually)
- ° Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements (Issued June 26, 1984, referred to as Policy Framework). Calls for enforcement agreements with the States and provides general guidance in the following areas:
 - oversight criteria and measures for assessing good compliance and enforcement program performance
 - criteria for direct federal enforcement
 - notification and consultation protocols
 - State reporting requirements.
- ° RCRA Implementation Plan (RIP) - Supplements the Agency Operating Plan by outlining RCRA directions. Sets reporting and tracking requirements for Class I violations and significant noncompliers. (Issued annually)
- ° Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA (Issued May 15, 1984) - Defines "timely enforcement action" by setting out timeframes for taking enforcement action against two types of violators -- high priority and Class I. (These timeframes are minimally acceptable times for action. The Regions and States are urged to agree upon more stringent timeframes in their grants or enforcement agreements.) Describes, in general, appropriate responses.

The latter two RCRA-specific documents, as well as this Enforcement Response Policy, provide direction for implementing the Agency Operating Plan and Policy Framework. The diagram on the following page illustrates the interaction between the various RCRA-specific guidance documents and the cross-media Policy Framework. The diagram shows, across the top of the page, each of the five areas covered by the Policy Framework. It then lists the RCRA documents that address each of the five areas.

The relationship between the Enforcement Response Policy and the RCRA Implementation Plan and Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA (Program Quality Document) is as follows. First, the Enforcement Response Policy establishes a classification system that is fundamental to both the reporting procedures and the enforcement response procedures set out in the other documents. The RIP requires that the Regional

RELATIONSHIPS AMONG RCRA ENFORCEMENT POLICY AND GUIDANCE DOCUMENTS



Offices and the States report "Class I" violations in the Hazardous Waste Data Management System (HWDMS) and the Strategic Planning and Management System (SPMS). Also, for Agency tracking purposes, the RIP defines a category of violators called "significant noncompliers." "Significant noncompliers" are facilities with Class I violations of the ground-water monitoring, closure, post-closure or financial responsibility requirements. The compliance status of these violations will be tracked throughout the year in the SPMS. The Enforcement Response Policy defines "Class I violation", but does not focus on response to "significant noncompliers."

The Program Quality Document sets out timeframes in which two categories of violators, high priority violators and Class I violators, should be addressed. It also describes the types of enforcement actions appropriate in response to such violators. However, it does not provide the Regional Offices and States with guidance on how to determine which of the several appropriate actions to choose in a specific situation. The Enforcement Response Policy addresses that issue. Further, while the Program Quality Document describes generally what type of enforcement response would be considered timely and appropriate for various situations, it does not describe how EPA would respond if an authorized State failed to take action in a timely and appropriate manner. This document sets out a presumption that EPA will immediately begin case development work when it finds that State action is not proceeding expeditiously or that the State has made a response that is not appropriate to the situation.

III. ENFORCEMENT RESPONSES AND DEFINITIONS

The range of enforcement responses that could be considered timely and appropriate action are described in the Program Quality Document and diagrammed on the following two pages. Each Regional Office will negotiate with each State an "Agreement" that will specify, among other things, what constitutes timely and appropriate enforcement action in response to two categories of violators, high-priority violators and Class I violators (See page 11 for definitions of "high-priority violators" and "Class I violators".) Although the Regions and States are encouraged to negotiate more stringent timeframes in their Agreements, the timeframes set out in the Program Quality Document will be used for purposes of example in the remainder of this document. To emphasize that they are only examples, time limits are set in parentheses.

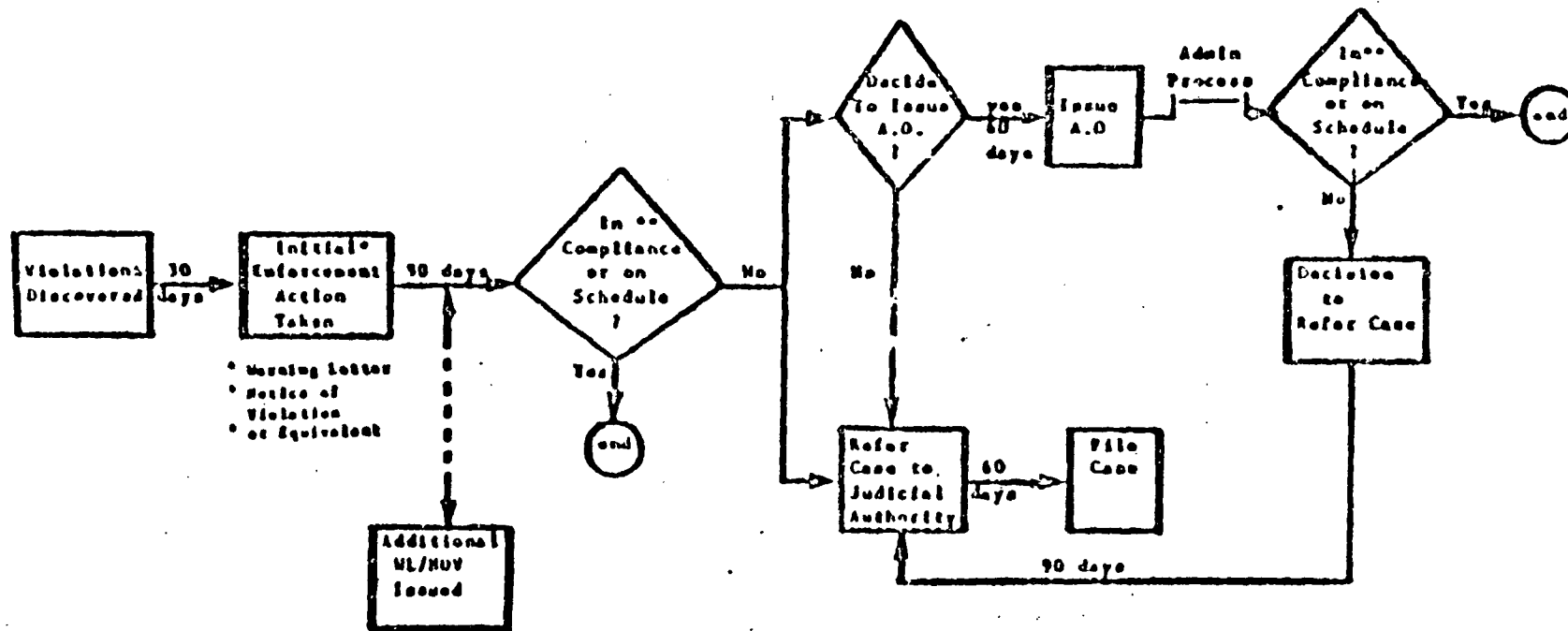
High-Priority Violators - The Regions or States should respond to "high-priority" violators by issuing Administrative Orders (Complaints) or referring judicial actions within (90) days of the discovery ^{1/} of the violations. (See page 11 for the definition of "high-priority violator".) In addition to requiring compliance on an expeditious schedule, the Regions or States should assess penalties against high-priority violators. States that do not have administrative penalty authority will need to address high-priority violators by taking judicial action or by asking EPA to issue administrative Complaints.

Class I Violators - The appropriate response to a "Class I violator" is the issuance of a Notice of Violation (NOV), warning letter, or other similar notification within (30) days of violation discovery, or the issuance of an Administrative Order or referral of a judicial complaint within (90) days. (See page 11 for definition of "Class I violator".) If the initial action is an NOV, warning letter, or other similar notification and it does not result in either final compliance or in an enforceable compliance schedule within (90) days, a decision should be made to issue an Order or refer a judicial complaint. The Region or State would have an additional (60) days to issue the Order or (90) days to **refer** the judicial complaint. These procedures and the procedures described for addressing high-priority violators are diagrammed on timelines on the following two pages.

1/ A violation is discovered as of the date when the case development staff determines through review of the inspection report and/or data (e.g., laboratory reports), that a violation has occurred. For purposes of tracking national progress against the timeline, the violation discovery date mentioned in the Program Quality Criteria was 45 days after the inspection. However, the Program Quality Criteria did not officially designate a time from date of inspection to discovery of violation. The Agency will designate a violation discovery date in the next revision of the Criteria scheduled for late FY 1985. It is expected to be much less than 45 days. Forty-five days between an inspection and violation discovery date should only be used in extreme circumstances, usually when sampling and analysis is involved.

TIMELINE FOR ENFORCEMENT ACTIONS

CLASS I VIOLATORS



- If the Region or State chooses to issue an Administrative Order (AO) or refer the case immediately instead of taking less formal action, then the timeline for High Priority Violator should be followed.
- Handlers on a compliance schedule will be monitored to ensure conformance with the schedule. Escalated enforcement actions will be taken if a handler is not in compliance within 90 days of the compliance schedule date.

Time required for administrative processing is in addition to the days indicated on the timeline. Pro-bating negotiations should not generally continue beyond 90 days from issuance of an initial Administrative Order.

----- before to an optional action.

Class II Violators - While EPA and most authorized States have the authority to respond to any Subtitle C violation with an order or referral, a violator with only Class II violations will normally receive a warning letter as the initial response. If the warning letter does not result in expeditious compliance, normally within 30-60 days of issuance, the Regional Office or authorized State should consider whether the violation warrants issuing an order. In cases involving large numbers of Class II violations, repeated Class II violations, or any other case the enforcement authority considers serious, it may be preferable to issue an order directly, without a preceding warning letter.

Flexibility - Within the framework set out above, the Region or State: 1) must determine what type of action is appropriate as the initial response to a Class I violator, and 2) must decide between administrative and judicial action in response to a high-priority violator or to a Class I violator if an NOV or warning letter is either not issued or is not successful. In deciding which enforcement tools to use, a number of factors must be considered.

With regard to initial response to Class I violators, as indicated by the timeline in Table II (page 9), it is acceptable for a State to initially address a Class I violator with an NOV or similar response or to attempt to negotiate an enforceable agreement with the violator. In fact, it is expected that such action will frequently result in compliance or in the negotiation of an enforceable agreement that incorporates a compliance schedule. If, however, such an action does not result in compliance or in the negotiation of an enforceable compliance schedule within (90) days following its issuance, an administrative order or judicial referral must be initiated. The timeline allows an additional (60) days for the development and issuance of an Administrative Order. It unintentionally fails to allow additional time for the development and referral of a judicial complaint, however it is recognized that additional time must be allowed for such activities. It is expected that Administrative Orders, rather than judicial referrals, will be the usual response to non high-priority Class I violators.

Many States have the authority to issue NOV's and warning letters but are not required to do so before issuing an order. Those States must decide in each case of a Class I violator whether to begin with an Order or with an NOV or similar notice. In general, the use of NOV's and warning letters by such States is recommended only in cases where the State believes that the NOV or warning letter will itself lead to compliance within the required timeframe. If a warning letter or NOV is not expected to result in compliance and is not required, the State should go directly to an administrative order. Other States are required to precede orders and referrals with NOV's, warning letters, or some other type of notification.

It should be noted that the Regions and States should seek compliance on as expeditious a schedule as possible. If the full time period allowed by the timelines is not necessary in a particular case, a more timely action should be taken.

In deciding whether to respond with an Administrative Order or with a judicial referral, the first consideration is whether the State has administrative penalty authority. States that do not have administrative penalty authority will need to refer high-priority violators to their Attorneys General for action or request that EPA issue an Administrative Order with penalties. In making this decision, the Region or State should consider the handler's compliance history and culpability. While administrative actions generally proceed more quickly than judicial actions, there are many instances in which judicial action is more appropriate. If the handler is a chronic violator and administrative action has not been successful in deterring repeated violations or if there are other reasons to believe that compliance with an administrative order is unlikely, the Region or State may choose to seek relief in the courts. Similarly, court action may be appropriate in the case of a handler that is in violation of a compliance schedule in an order, agreement or decree. Judicial referrals may also be appropriate when a handler is believed to have intentionally committed violations and a civil, rather than criminal, action is planned. Judicial action in such cases is likely to serve as a more effective deterrent to other would-be violators than an administratively issued Order.

For a Class I violator that is not in the high-priority category, an Administrative Order is generally the most effective response. Where EPA is the primary enforcement agency, the initial enforcement response to a Class I violator should generally be an order with penalties. At their discretion, this response is also recommended for authorized States that have the statutory authority to assess administrative penalties and to issue Administrative Orders directly, without any prior NOV or warning letter. However, many authorized States are without authority to assess administrative penalties and many are required to precede Orders and referrals with NOV's, warning letters, or some other type of notification.

Priority Classification Scheme: Key Definitions

The RCRA program employs several terms for defining priorities for enforcement response, used within this document as well as the Program Quality Document and the RCRA Implementation Plan.

First, the program classifies individual violations into one of two Classes:

Class I Violation - a violation that results in a release or serious threat of release of hazardous waste to the environment, or involves the failure to assure that groundwater will be protected, that proper closure and post-closure activities will be undertaken, or that hazardous wastes will be destined for and delivered to permitted or interim status facilities.

Class II Violation - any violation of RCRA requirements that does not meet the criteria listed above for Class I violations.

The distinction between Class I and Class II violations should be clearly understood; examples of Class I and II violations are provided in the Appendix. Note that the two-Class system replaces the previous three-Class system.

Further, a RCRA handler is classified based upon the nature of its collection of violations and various additional factors such as compliance history. The designations of handlers are as follows:

High-Priority Violator - a handler who

- has one or more Class I violations of the groundwater, closure/post closure, and financial responsibility requirements, or
- poses a substantial likelihood of exposure to hazardous waste or has caused actual exposure, or
- has realized a substantial economic benefit as a result of noncompliance, or
- is a recalcitrant or chronic violator (including a handler who is violating schedules in an Order or decree).

Class I Violator - a handler with one or more Class I violations who is not a "high-priority violator".

Class II Violator - a handler who has only Class II violations.

High Priority

The identification of high-priority violators is somewhat subjective and will require judgment on the part of the Regions or States. The high-priority criteria do not place any burden of proof on the Regions or States. The criteria are set out only to assist the Agencies in setting priorities for enforcement response and determining when penalty assessments are essential.

The likelihood of exposure in a situation created by a violator should be evaluated on the basis of the case-specific information and might consider the following, among other, questions^{2/}:

- What is the quantity of waste?
- Is human life or health potentially threatened by the situation?
- Are animals potentially threatened by the situation?
- Are any environmental media potentially threatened by the situation?

In examining whether there is a substantial likelihood of exposure posed by a violator, the focus should be on the potential for harm, rather than whether harm actually occurred.

One example of a violator that could be considered as posing a substantial likelihood of exposure is an owner/operator who installed an inadequate ground-water monitoring system at a facility that overlies a nearby town's drinking water supply. Another example is an owner/operator who failed to prevent the entry of people onto the active portion of a surface impoundment facility.

While there is no firm threshold for determining whether a violator has triggered the second high-priority criterion, the substantial economic benefit of noncompliance, it is suggested that \$5,000 be used as a guideline.^{3/} While it is difficult to identify

^{2/} The Penalty Policy requires that the likelihood of exposure for each individual regulatory violation be evaluated separately. However, for the purposes of identifying high-priority violators, this policy recommends that in evaluating the likelihood for exposure, the Region or State look at the handler's collection of violations as a whole.

^{3/} The Penalty Policy defines a substantial economic benefit as a benefit > \$2,500. It is appropriate to set a higher dollar value as the threshold in this policy because the purpose is to set out a category of violators that demand response on an expedited schedule and a penalty assessment regardless of whether the enforcement authority has administrative penalty authority. The Penalty Policy, on the other hand, establishes a threshold to ensure that if a penalty is assessed it at least offsets any economic benefit that may have accrued, but not to determine whether action should be taken or which violators should be addressed first. Again, the Penalty Policy considers each regulatory violation separately whereas this policy looks collectively at all of a handler's violations.

specific sections of the regulations whose violation would reap substantial economic benefit, the following general areas are likely candidates for consideration:

- ° failure to properly install ground-water monitoring wells
- ° failure to initiate assessment monitoring
- ° failure of a land treatment facility owner/operator to monitor the unsaturated zone
- ° failure of an owner/operator to close a facility properly or to develop closure or post-closure plans
- ° failure of an owner/operator to establish and maintain a financial assurance instrument
- ° failure of an owner/operator to submit a timely and complete Part B permit application
- ° failure of a storage facility to install a secondary containment system
- ° failure of a facility to begin ground-water corrective action
- ° disposal at an unpermitted facility
- ° shipment of hazardous waste, by a generator, to an unpermitted facility

SECTION IV

ESTABLISHING PRIORITIES

The Regions' and States' priority targets should be, first, high-priority violators, then Class I violators, and then Class II violators. Enforcement actions need not be taken for all high-priority violators before any action is initiated against Class I violators. Because the different categories of violators merit different levels of response with varying resource requirements, most Regions and States will want to respond to a mix of the various categories of violators. This is an acceptable approach although the Regions and States should keep in mind that oversight activities will focus first on high-priority violators. Therefore, the emphasis must be on those handlers.

SECTION V

EPA ACTION IN AUTHORIZED STATES

States with authorized programs have the primary responsibility for ensuring compliance with the RCRA program requirements. Nevertheless, Section 3008 of RCRA specifically provides EPA with the authority to take enforcement action in authorized States.

As discussed in a November 28, 1983 memo from Lee Thomas and Courtney Price to the Regional Administrators, it is EPA's policy to take enforcement actions in authorized States when:

- ° the State asks EPA to do so, or
- ° the State fails to take timely and appropriate action^{4/}

The previous section described what is considered timely and appropriate action in response to various categories of violators. The timelines set out in that chapter establish trigger points at which EPA should initiate action if an authorized State has failed to do so or has initiated an action that is not considered appropriate for the situation involved. If the State has failed to issue an order or complete a referral within (90) days after discovery of a high-priority violator (or (60) days after deciding to issue an Order to a Class I violator), the Regional Office should notify the State that EPA will take action. The Regional Office may also choose to assess a penalty against a high-priority violator if the State's action failed to include one. ^{5/} The Memorandum of Agreement (MOA) or Grant Agreement between EPA and each State should set out the mechanism by which notice will be provided. Either written or telephone notice could be considered acceptable. The Regional Office may need to conduct its own case development inspection, and prepare additional documentation before proceeding to initiate an action. Only if the State has made reasonable progress in returning the facility to compliance or in processing an enforcement action should the Region hold off federal response when the timeline is not met by an authorized State.

^{4/} The Policy Framework identifies an additional circumstance under which EPA will take action in an authorized State - a case that would establish a legal precedent - although such cases are expected to arise infrequently.

^{5/} EPA may also consider assessing a penalty if it feels that the penalty assessed by the State was egregiously small, as judged according to the State's penalty policy or procedures established by the State for determining penalty amounts. Before initiating any penalty-only action, EPA must weigh the benefit of that action with the need to take action against handlers that are out of compliance with applicable requirements.

To track State progress against the "timely" and "appropriate" criteria, the Regional Offices should depend on the Compliance and Enforcement Logs that are submitted monthly and on conversations with appropriate State personnel. The Regional Offices should review the Logs each month and determine not only which cases have failed to meet the (30), (60), and (90) day triggers but also which cases that are in earlier stages are not proceeding expeditiously.

EXAMPLES OF VIOLATION CLASSIFICATION

<u>Violation</u>	<u>Classification</u>
Failure of a handler to meet a compliance schedule in an Order, decree, agreement or permit	I
Construction of a new facility without a permit	I
Failure of the generator to comply with requirements relating to the manifest system.	I
Failure of a generator to meet the packaging, labeling, marking or placarding requirements	I
Failure to comply with the "small quantity generator requirements"	I
Failure of a transporter to comply with the requirements for immediate action and clean up of discharges	I
Failure of the transporter to comply with requirements relating to the manifest system	I
Failure of a facility owner/operator to comply with manifest requirements	
Failure of an owner/operator to conduct required waste analyses	I
Failure of an owner/operator to properly handle ignitable, reactive or incompatible wastes	I
Failure to install operate and maintain an adequate ground-water monitoring system, including failure to begin assessment monitoring when required under the interim status regulations	I
Self-granting, by an owner or operator, of an unjustifiable waiver from ground-water monitoring requirements.	I

<u>Violation</u>	<u>Classification</u>
Failure to meet the closure performance standard	I
Failure to develop a complete and adequate closure plan.	I
Failure to meet specified standards for post-closure care	I
Failure to develop a complete and adequate post-closure plan	I
Failure to develop an adequate estimate of closure and post-closure costs	I
Failure to establish and maintain a financial assurance mechanism for closure and post-closure costs.	I
Discrepancies in wording such that the financial instrument is ineffective	I
Improper cancellation of a bond by the surety.	I
Cancellation or reduction of value, without R.A.'s consent, of surety bond or insurance policy	I
Failure to include information regarding all facilities that are covered by the same instrument	I
Failure to obtain or maintain coverage for sudden accidental occurrences	I
Failure to obtain or maintain coverage for nonsudden accidental occurrences.	I
Failure of owner/operator to submit a timely and complete Part B application	I
Storage of wastes in containers that are not in good condition or have begun to leak	I

Violation	Classification
Failure of an owner/operator to meet the requirements regarding storage of ignitable, reactive or incompatible wastes.	I
Failure to provide for proper containment of leachate or runoff from a waste pile	I
Failure of an owner/operator to meet applicable general operating requirements.	I
Failure of a land treatment owner/operator to meet the requirements regarding food chain crops.	I
Failure of a land treatment owner/operator to prepare and plan for monitoring of the unsaturated zone or to monitor the unsaturated zone.	I
Failure of landfill owner/ operator to properly dispose of containers.	I
Failure of a thermal treatment facility to meet the requirements regarding open burning and waste explosives.	I
Failure to submit the biennial report	II
Failure of an owner/operator to provide notice regarding international shipments of hazardous wastes	II
Failure to provide required notices regarding transfers of ownership or foreign shipments of waste	II
Failure to make emergency arrangements with local authorities	II
Failure to maintain copy of closure plan at the facility	II
Failure to meet the timeframes set out for facility closure	II