EPA

The Clean Water Act

Compliance/Enforcement Guidance Manual

U.S. Environmental Protection Agency
Washington, DC 20460

Prepared by

The Office of Enforcement and Compliance Monitoring

Table of Contents

Chapter One

Overview

Chapter Contents — Page

1 Purpose of the Manual

The purpose of this manual is to provide guidance to compliance/enforcement personnel on the substantive and procedural requirements necessary for ensuring compliance and preparing enforcement cases under the Clean Water Act.

The manual describes compliance monitoring, case development and judicial proceedings including:

- Conducting compliance inspections and obtaining sufficient evidence to document a suspected violation;
- Filing administrative, civil, and criminal enforcement actions; and
- Monitoring compliance with and enforcing consent decrees.

Reservation

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

2 Introduction

Purpose and Scope of the Clean Water Act

The Clean Water Act (CWA) [33 U.S.C. §1251, et seq.], as amended, was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA established a national goal to eliminate the discharge of pollutants into the navigable waters by 1985. The Act set up a National Pollutant Discharge Elimination System (NPDES) permit program. Under this program, the discharge of any pollutant into the waters of the United States is unlawful except as authorized by an NPDES permit issued pursuant to Section 402(a) of the CWA.

By 1977, all existing industrial dischargers were required to install the best practicable control technology (BPT) and all municipal dischargers were required to meet secondary sewage treatment standards. By 1984, industrial dischargers were required to meet best available technology (BAT) requirements, which are intended to limit discharges of toxic substances and can be more stringent than BPT standards. Discharges of conventional pollutants (e.g., biochemical oxygen demand and total suspended solids) were required to meet best conventional pollutant control technology (BCT) by 1984 (explained below). New sources of industrial discharges are required to meet any applicable new source performance standards that achieve the highest effluent reduction possible using the best available demonstrated control technology.

The CWA also established a pretreatment program, which regulates industrial discharges to publicly owned treatment works (POTWs); dredged and fill permit program; and prohibitions on certain spills of oil and hazardous substances.

The NPDES Permit Program

To implement the NPDES permit program, the Act set up a two-part system for determining allowable pollutant discharges. First, the Act requires increasingly stringent technology-based effluent limitations. EPA establishes these BPT and BAT limitations in national effluent guidelines (see Exhibit 1-1) or, in the absence of national regulations, on a case-by-case basis by EPA technical personnel who follow statutory guidelines. Second, after EPA determines the appropriate technology-based requirement, the

Agency is required to impose any other more stringent limitations necessary to meet state water quality standards and any other federal law to implement any applicable water quality standard. These limitations are placed in the NPDES permit.

State NPDES Programs. The CWA authorizes EPA to approve states to administer the NPDES program. In order to be approved, a state program must have adequate legal authority and programmatic capability to issue and enforce NPDES permits. Upon approving a state program, EPA must suspend issuance of permits in that state. However, EPA retains veto authority over any proposed state permits that do not meet the minimum EPA requirements, and EPA also retains concurrent enforcement authority. Under EPA policy, EPA will take enforcement action where the state fails to take "timely and appropriate" enforcement action or in cases of national significance. As of February 1985, EPA has approved 37 state NPDES programs (see Exhibit 1-2).

In those states where EPA retains the NPDES permitting authority, the CWA provides the state with the opportunity to certify that the permit meets all state water quality standards and any other state requirements.

The Pretreatment Program

The CWA also sets up a mechanism to regulate industrial discharges to publicly owned treatment works (POTW), known as the pretreatment program. Under this program, EPA has authority to develop pretreatment standards for pollutants that interfere with or pass through POTWs or contaminate sludge. These standards are promulgated as part of the national effluent guidelines. A list of these categorical standards is contained in Exhibit 1-1. The standards focus on toxic pollutants that are not adequately treated by the POTW. The program also requires certain municipalities to submit a local pretreatment program that authorizes the POTW to regulate its indirect dischargers. The pretreatment program constitutes one part of an approvable state NPDES program. The key CWA provisions on NPDES and pretreatment are discussed later in this chapter.

Dredged and Fill Permit Programs

The CWA also sets up a Section 404 dredged and fill permit program. Under this program, the Army Corps of Engineers issues permits to applicants to discharge dredged and fill material to designated waters of the United States. Unlike NPDES industrial permits for existing sources, the National Environmental Policy Act (NEPA) applies to permits issued by the Corps and thus may require the Corps to prepare an environmental impact statement (EIS) prior to issuance of a permit. While the Corps issues federal dredged and fill permits and enforces the terms of the permits, EPA is charged with approving state agencies to administer a Section 404 program and with overseeing state Section 404 program implementation, including enforcement. As of May 1985, only one state has an approved program. EPA

may bring actions for discharges without a Section 404 permit and shares enforcement authority with the Corps for Section 404 permit violations.

Compliance and Enforcement

The CWA establishes several authorities for EPA compliance and enforcement activities. The Act authorizes the Administrator to require owners and operators of point sources and certain contributors to publicly owned treatment works to maintain records, and to monitor and report on water discharges. NPDES permit holders and some industrial contributors to publicly owned treatment works must submit compliance and discharge monitoring reports on a regular basis. EPA also has authority to enter and inspect water pollution sources, to sample direct and indirect discharges, and to inspect records and monitoring equipment. Entry and inspection issues are discussed in detail in Chapter Three.

The CWA provides several enforcement remedies for discharging without a permit and for violating permit effluent limitations, pretreatment requirements, monitoring provisions, and any permit conditions, which include the following:

- Issuance of a notice of violation to a state and a violator;
- Issuance of an administrative compliance order;
- Filing of a civil action for injunctive relief and penalties;
- Filing of a criminal action; and
- Filing of an emergency action.

An approved state NPDES or Section 404 program must include the authority to obtain civil and criminal remedies, including emergency injunctive relief; the state has primary responsibility for bringing enforcement action.

The CWA also contains a citizen suit provision, which authorizes persons to commence a civil action against alleged violators to enforce the Act's requirements or to require the Administrator to perform a mandatory duty. The Act provides for extensive public participation in several areas of regulatory development and the enforcement process. In addition, an opportunity for the public's input is required in developing, revising, and enforcing any effluent regulation, permit limitation, or program established by EPA or a state agency.

Program Regulations

EPA has published the NPDES program regulations in 40 C.F.R. Parts 122 through 125. Part 122 contains substantive permitting requirements, including reporting, testing, and other permit conditions (as opposed to specific permit limitations contained in effluent guidelines). Part 123 contains permitting and enforcement requirements for approval of state NPDES programs. Part 124 contains procedural requirements for issuing permits and challenging permit limitations, including evidentiary hearings. Part 125 provides criteria to be applied by EPA or an approved state in imposing effluent limitations and making specialized permit determinations under the NPDES program, such as variance requests. Key sections of the regulations are outlined in Exhibit 1-3.

3 A Short Legislative History

Pre-1972 Law

Apart from the 1899 Rivers and Harbors Act 33 U.S.C. §407 et seq. (commonly known as the "Refuse Act"), the federal water pollution control effort did not begin until the passage of the Federal Water Pollution Control Act of 1948 (FWPCA). The FWPCA relied primarily on state and local action to meet federal pollution abatement goals. The federal government's role was restricted to assisting local governments in meeting their water pollution control problems.

The 1965 amendments to the FWPCA continued to rely largely on state action. The amendments required the states to establish water quality standards that would be applicable to interstate waters. In 1966, the Federal Water Pollution Control Administration established guidelines on water quality standards. By 1972, the majority of states had obtained federal approval for their standards. The 1965 amendments also provided for federal grants for state water pollution control activities. Regarding enforcement, however, the federal law relied primarily on informal negotiations and cooperative efforts between the enforcement agency and the polluter.

In contrast to the water quality-based approach of the FWPCA, the Refuse Act prohibited the discharge from a ship or shore installation into navigable waters of the United States of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state without a permit." Originally intended to protect navigation, the Refuse Act was rejuvenated as a water pollution control measure. In United States v. Republic Steel Corp. [362 U.S. 482 (1960)], the Supreme Court interpreted an "obstruction to navigable capacity" to include the discharge of industrial wastes into a navigable river. In 1971, the Army Corps of Engineers adopted guidelines to implement an Executive Order of December 1970, which created a Refuse Act permit program.

The 1972 Amendments

The FWPCA amendments of 1972 set up a comprehensive regulatory scheme for controlling water pollution discharges and resolved the differing water quality standards approach of the 1965 FWPCA and the effluent standards approach of the Refuse Act. The 1972 amendments to the FWPCA set as a national goal the elimination of the discharge of pollutants into the navigable waters by 1985. The amendments also abandoned water quality standards as the primary regulatory approach in favor of EPA-promulgated; industry-by-industry, technology-based effluent limitations and extended federal jurisdiction to all waters of the United States.

The amendments established the NPDES permit program to implement these "technology-forcing" standards, superseding the Refuse Act permitting program. Under this scheme, a permit is required for any discharge into the waters of the United States and cannot be issued unless the effluent discharges meet federal effluent guidelines or, when no guidelines exist, the issuing Agency's best professional judgment on how to meet statutory requirements. The Act further required more stringent permit limitations based on state water quality standards and other state water quality requirements. The amendments also authorized EPA to establish effluent standards for new sources and toxic pollutants and to set pretreatment standards for industrial contributors or indirect discharges to publicly owned treatment works.

Finally, the amendments provided extensive enforcement authority, including issuance of administrative orders, and established civil penalties of up to $10,000 per day of violation and criminal penalties of up to $25,000 per day of violation and one year in prison.

EPA promulgated the initial regulations for state NPDES programs on December 22, 1972 (37 Fed. Reg. 28391) and promulgated substantive NPDES permitting requirements on May 22, 1973 (38 Fed. Reg. 13528). In the initial, or "first-round," permitting effort, EPA and states with NPDES program authority issued over 65,000 NPDES permits. EPA issued the vast majority of these permits prior to promulgation of best practicable control technology (BPT) effluent guidelines by relying on its authority under Section 402(a)(1) of the Act to issue permits with "such conditions as the Administrator determines to be necessary to carry out the provisions of this Act."

The NRDC Consent Decree and the 1977 Amendments

EPA's development of BPT national effluent guidelines focused largely on conventional pollutants such as biochemical oxygen demand, suspended solids, and acidity and alkalinity. In addition, EPA regulated some toxic pollutants on a substance-by-substance basis under Section 307 rather than on an industry-by-industry basis through the effluent guidelines. In 1975,

the Natural Resources Defense Council (NRDC) and several other environmental groups filed suit against EPA challenging (1) EPA's criteria for identifying toxic pollutants under Section 307(a) of the CWA, and EPA's failure to promulgate effluent standards under this section and (2) EPA's failure to promulgate pretreatment standards under Section 307(b) for numerous industrial categories and pollutants. In settling this litigation, NRDC v. Train, 8 ERC 2120 (D. D.C. 1976), EPA and NRDC agreed on a policy to regulate toxic pollutants through EPA effluent guidelines and standards.

The consent agreement required EPA to regulate the discharge of 65 categories of priority pollutants (which included 129 chemical substances) from 34 industrial categories unless specific findings could be made to exclude industrial categories or pollutants from regulation. EPA subsequently removed 3 of the 129 substances from regulation. The decree required adoption of best available technology (BAT) effluent limitation guidelines in each category by June 30, 1983, and set similar requirements for new sources and indirect dischargers. NPDES permits issued or renewed after January 1, 1976, had to be modified to reflect these new effluent standards.

The 1977 Federal Water Pollution Control Act amendments largely incorporate the NRDC Consent Decree by:

- Adopting the list of priority pollutants as the list of toxic pollutants to be regulated by EPA;
- Requiring establishment of BAT effluent limitation guidelines by July 1, 1980;
- Requiring compliance with BAT effluent limitations by July 1, 1984; and
- Allowing EPA to add to or delete from the list of toxic pollutants.

On March 9, 1979, the Consent Decree was modified (12 ERC 1833) to adopt the 1977 amendments' BAT compliance deadline of June 30, 1984, and to extend the deadline for developing technology-based effluent limitations for toxics in the 34 industrial categories.

The 1977 amendments made other significant changes as well. First, under the revised Section 402(d), EPA is authorized to issue an NPDES permit in those instances in which the state-proposed NPDES permit is inconsistent with the federal requirements.

Second, Section 313 was amended to authorize states to issue NPDES permits to federal facilities (see Executive Order 12088). EPA has interpreted Section 313 to require state programs to include federal facilities permitting in its NPDES program. (See "State Regulation of Federal Facilities Under the Federal Water Pollution Control Act Amendments of the 1977 Clean Water Act POLICY GUIDANCE MEMORANDUM," March 10, 1978, contained in the Permits Division (Office of Water) Policy Book.)

Third, the amendments add significant pretreatment provisions. Under Section 402(h), EPA has authority to take enforcement action in an approved NPDES state to prevent the introduction of pollutants into a POTW that is discharging pollutants in violation of its permit. EPA previously had this authority only in unapproved states. Section 309(f) authorizes EPA to take a civil action against an indirect discharger for violating any pretreatment standard and against the receiving POTW in which the POTW does not begin enforcement action within 30 days following notice from the Administrator; it also authorizes EPA to require POTWs to submit pretreatment programs for Agency approval. Section 402(b)(8) requires states to include conditions in POTW NPDES permits that ensure the identification of sources introducing pollutants to POTWs and to implement a program to ensure compliance with pretreatment standards by each such source.

Finally, Congress ratified the judicial and regulatory interpretations of the Section 404 program as one with broad jurisdictional scope, including wetlands. The amendments also established EPA's authority to approve state Section 404 programs in certain waters of the United States.

Recent Regulatory Developments

Following the passage of the 1977 amendments, EPA substantially revised the NPDES permitting regulations to include best available technology (BAT), or "second-round," permitting conditions (i.e., testing and monitoring requirements; 44 Fed. Reg. 32854, June 7, 1979). EPA revised these regulations and consolidated them with other EPA permit program regulations (45 Fed. Reg. 33290; May 19, 1980). Shortly thereafter, several industry groups and NRDC challenged numerous sections of the EPA permitting regulations. The litigation focused largely on challenges to permittee reporting and testing requirements. EPA settled most of the NPDES-specific issues by agreeing to propose regulatory revisions (47 Fed. Reg. 25546, June 14, 1982; and 47 Fed. Reg. 52072, November 18, 1982). The Agency also promulgated a final regulation on common issues (i.e., provisions applicable to NPDES as well as other EPA permitting programs) on September 1, 1983 (48 Fed. Reg. 39611). EPA adopted the final regulation on NPDES-specific issues on September 26, 1984 (49 Fed. Reg. 37997).

4 Overview of the Clean Water Act

The following are the central components of the CWA's regulatory scheme:

- Section 301 -- Prohibition against discharges to waters of the United States except in compliance with an NPDES or Section 404 permit and compliance deadlines for technology-based effluent limitations and water quality-based effluent limitations;
- Section 303 -- State development of water quality standards and EPA review of such standards;
- Section 304 -- Criteria for development of national effluent guidelines for industry categories;
- Section 306 -- EPA development of standards of performance for new sources of pollutant discharges;
- Section 307 -- EPA development of pretreatment categorical standards for industrial contributors to POTWs and development of toxic pollutant standards;
- Section 308 -- EPA authority to require discharger reporting and monitoring and to enter, inspect, and sample water pollutant discharges;
- Section 309 -- Administrative orders and civil and criminal enforcement of the NPDES program and Section 404 violations;
- Section 311 -- Control of discharges of oil or hazardous substances;
- Section 313 -- State and EPA NPDES permitting of federal facilities;
- Section 401 -- State certification of EPA-issued permits;
- Section 402 -- EPA issuance of NPDES discharge permits and EPA approval of states to administer an NPDES program;

- Section 404 -- Army Corps of Engineers' issuance and enforcement of dredged and fill permits and EPA approval of state Section 404 programs;
- Section 504 -- Emergency enforcement;
- Section 505 -- Citizen suits against CWA violators or against the Administrator for failure to perform a nondiscretionary act or duty;
- Section 508 -- Prohibitions on award of federal contracts, grants, or loans for CWA violations;
- Section 509 -- Judicial review of EPA effluent standards and Agency permitting decisions; and
- Section 510 -- State authority to set more stringent effluent limitations than those required by federal law.

NPDES Permits and Effluent Standards

Section 402 of the CWA establishes the NPDES permit program. Under Section 301 of the Act, the discharge of pollutants into the waters of the United States is prohibited except when the discharge occurs under the limitations and conditions of an NPDES (or Section 404) permit. The permit incorporates the minimum, nationally required effluent limitations and any more stringent water quality-based limitations, as well as other compliance measures, schedules, and monitoring and reporting requirements. These limitations are legally binding on the industrial or municipal permittee.

Permit Limitations and Compliance Deadlines

Section 301 also provides compliance deadlines for industrial and municipal dischargers to achieve minimum levels of water pollution control. By July 1, 1977, industrial permittees were required to achieve BPT; and, by July 1, 1984, industrial permittees were required to achieve BAT for toxic pollutants. Under Sections 301, 306, and 307, EPA has established BPT, BAT, and new source effluent limitations and standards by promulgating industry-by-industry effluent guidelines.

Section 304 provides the criteria for adopting limitations through effluent guidelines. For setting both BPT and BAT, Sections 304(b)(1)(A) and 304(b)(2)(B) direct the Administrator to "identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of [BPT or BAT] for classes and categories of point sources...."

Both BPT and BAT require a consideration of costs (although for BPT, Section 304(b)(1)(B) specifically requires the Agency to compare the total

cost of the pollution control technology with the effluent reduction benefits that the Agency expects to achieve). In adopting standards, Section 304(b)(1)(B) directs EPA to consider the age of the equipment and facilities involved, the effluent reduction process employed, engineering aspects, process changes, nonwater quality environmental impact (including energy requirements), and any other appropriate factors, as determined by the Administrator.

Section 304(b)(4)(B) provides that in setting BCT limitations, EPA must consider the same factors in setting BAT and must do an additional cost test. BCT cannot be less stringent than BPT nor more stringent than BAT.

The effluent guidelines are contained in 40 C.F.R. Parts 400 to 464. Effluent limitations become enforceable against an individual point source discharger through its NPDES permit. Toxics standards and new source performance standards (NSPS) are enforceable whether or not a permit has been issued, and pretreatment standards are enforceable directly or as part of a POTW pretreatment program. The nationally promulgated effluent guideline regulations may not be challenged in an NPDES permit proceeding; under Section 509(b)(1), a challenge must be made within 90 days of promulgation of such final regulations.

Where effluent guidelines have not been established for a particular industrial category, EPA has authority under Section 402(a)(1) of the Act to issue enforceable NPDES permits "upon such conditions as the Administrator determines to be necessary to carry out the provisions of the Act" [United States v. Cutter Laboratories, Inc., 413 F. Supp. 1295 (E.D. Tenn 1976)]. EPA refers to these permits as "best professional judgment" (BPJ) permits. Where an effluent guideline does apply to a particular discharger, EPA or an authorized NPDES state can use its Section 402(a)(1) or equivalent state authority to establish additional permit limitations for pollutants that were not addressed by the national guideline.

New Source Performance Standards

Section 306 directs the Administrator to adopt new source performance standards (NSPS) for new sources of water pollutants. A new source is defined as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source...." Construction is defined as "any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment)...." EPA publishes NSPS regulations along with industry-by-industry effluent guidelines for existing sources.

The NPDES regulations provide criteria for determining whether a source is an existing source (or a modification thereof) or a new source. This determination is important for three reasons:

- First, NSPS can be more strict than effluent guidelines for existing sources;

- Second, EPA-issued new source permits, unlike existing permits, are subject to the environmental review requirements of the National Environmental Policy Act (NEPA), and thus the facility may be required to prepare an environmental impact statement (EIS) [Note that state-issued new source permits are not subject to NEPA. See District of Columbia v. Schramm, 631 F. 2d 854 (D.C. Cir. 1980), 40 C.F.R. §122.29(c)(1)(ii)]; and

- Third, under Section 306(e), the new source discharges must immediately comply with the NSPS and do not receive the statutory compliance deadline of June 30, 1984, as do existing sources, which must attain BAT.

The permit regulations at 40 C.F.R. §122.29(d)(4) require dischargers to "start up" all pollution control equipment so that their permit conditions are met prior to any actual discharge and to meet all permit conditions no later than 90 days following issuance of the permit. Where there is a new discharge of pollutants, but no applicable proposed NSPS, the source is considered to be a new discharger under the NPDES regulations (40 C.F.R. §122.2). New dischargers, like new sources, must have all start-up equipment in place to meet permit conditions before beginning to discharge.

In addition, Section 306 provides new sources with a ten-year period of protection from more stringent technology-based standards, and new dischargers receive a similar protection period from more stringent technology-based standards. However, for both new sources and new dischargers, the protection period does not extend to additional or more stringent permit conditions based on water quality standards, toxic effluent standards under Section 307(a) of the CWA, or additional permit conditions controlling toxic pollutants or hazardous substances that are not controlled by NSPS.

Water Quality-Based Limitations

Section 301(b)(1)(C) requires POTWs to achieve "any more stringent limitation, including those necessary to meet water quality standards...established pursuant to any State law or regulations...." As noted in United States Steel Corp. v. Train [556 F. 2d 822, 838 (7th Cir. 1977)], technology-based limitations represent the minimum level of pollution control required by the Act. Any more stringent water quality-based limitations apply to both industrial and municipal dischargers and must be placed in the NPDES permit.

Publicly Owned Treatment Works

Section 301(b)(1)(B) requires POTWs, as defined in Section 201, to achieve effluent limitations based upon secondary treatment guidelines. Section 304(d)(1) directs EPA to adopt secondary treatment guidelines. The Agency has defined secondary treatment in 40 C.F.R. Part 133. In the 1981 amendments to the Act, Congress added Section 304(d)(4), which provided that "such biological treatment facilities as oxidation ponds, lagoons, and ditches and trickling filters shall be deemed the equivalent of secondary

treatment." In amending this section, Congress approved the use of certain biological treatment techniques that can significantly reduce biological oxygen demand (BOD) and total suspended solids (TSS) levels, although these treatment techniques are not capable of achieving the regulatory standard of 30 mg/L of BOD and TSS over a 30-day period. EPA issued rules to implement Section 304(d)(4) on September 20, 1984 (49 Fed. Reg. 36986).

General NPDES Permits

EPA or a state approved to issue general permits may issue a general NPDES permit covering a category of discharges under the CWA within a geographical area. General NPDES permits set permit limitations and conditions, including monitoring and reporting requirements on an area-wide and industry basis and authorize discharges from a large number of facilities with a single permit action. EPA began to implement the general permit program in 1979. Exhibit 1-4 contains a list of proposed and issued general permits. The permitting approach has its greatest impact where an industry is concentrated in a particular geographical area. For example, a general permit for coal mining activities in Kentucky covers about 2,500 facilities.

EPA uses general permits for major as well as minor dischargers. Major dischargers are defined in Section 122.2 as "any NPDES 'facility or activity' classified as such by the Regional Administrator or, in the case of 'approved state programs,' the Regional Administrator in conjunction with the state director." Under 40 C.F.R. §122.28, the NPDES director may issue a general permit covering either separate storm sewers or a category of sources that:

- Involve the same or substantially similar types of operations;
- Discharge the same types of wastes;
- Require the same effluent limitations or operating conditions;
- Require the same or similar monitoring; and
- In the opinion of the NPDES director, are more appropriately controlled under a general permit than under individual permits.

EPA issues general permits based on BPJ determinations under authority of Section 402(a)(1) of the CWA in any case where effluent guidelines do not address the discharges regulated by general permits.

The NPDES director may require any person authorized by a general permit to apply for an individual permit for several reasons, including "[t]he discharger is not in compliance with the conditions of the general NPDES permit" [Section 122.28(b)(2)]. In addition, any general permittee may request to be excluded from the coverage of the general permit by applying for an individual permit.

State NPDES Programs

Section 402(b) of the CWA authorizes EPA to approve states to administer the NPDES program. The Administrator must approve a proposed state permit program unless he or she determines that the state does not have adequate legal authority or programmatic capability. This includes permitting and enforcement authority, and adequate resources and staffing. The approved program must cover all categories of direct discharges to state waters (including federal facilities), as well as regulate indirect dischargers through a pretreatment program. The permitting requirements that all NPDES states must meet are contained in 40 C.F.R. §123.25. Upon approval, EPA must suspend further issuance of federal NPDES permits in the state under Section 402(c). The state also becomes the primary enforcement authority of the NPDES program. [See Aminoil U.S.A. Inc. v. California State Water Resources Control Board, 674 F. 2d 227 (9th Cir. 1982).] However, Section 309 does not preclude federal enforcement following state NPDES program approval. EPA also retains extensive statutory oversight authority under Section 402(d) to review proposed state permits and to withdraw a program that does not comply with federal requirements.

Compliance with Permit Limitations

Permit limitations generally serve as a shield for enforcement. Section 402(k) provides that "[c]ompliance with a permit issued pursuant to this section shall be deemed compliance [for the purpose of federal enforcement and citizen suits] with Section 301, 302, 306, 307, and 403, except any standard imposed under Section 307 for a toxic pollutant injurious to human health." In duPont v. Train [430 U.S. 112, 138, n. 28 (1976)], the Supreme Court noted that "[t]he purpose of §402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question of whether their permits are sufficiently strict. In short, §402(k) serves the purposes of giving permits finality." (Chapter Eleven discusses this concept in greater detail.)

Permit Modifications

While it is important to set effluent limitations for all pollutants during the initial permit issuance, EPA or an approved state may reopen and modify a permit under 40 C.F.R. §122.62. The following are examples of good cause for permit modification:

- Material and substantial alterations to the permitted facility;
- New information received by the NPDES director that was not available at the time of permit issuance;
- Regulations on which the permit was based have been changed by EPA or judicial decisions (permittee must request this modification);

- Incorporation of a Section 307(a) toxic effluent standard; and
- Modification of a compliance schedule.

Note that administrative orders issued under Section 309 that contain compliance schedules do not modify permit requirements.

State Certification

Where EPA is the permit-issuing authority, Section 401 of the Act requires a state to certify that the NPDES permit meets requirements of federal and state law, including application of state water quality standards. (EPA has adopted regulations for certification in 40 C.F.R. Part 121. The regulations actually refer to the Refuse Act predecessor to Section 401.) EPA cannot issue the permit until the state so certifies or waives certification. Section 303 establishes procedures for establishing state water quality standards, subject to approval by the EPA Administrator, and Section 303(c)(1) requires a state to review its water quality standards at least once every three years and to receive EPA approval of these revisions.

The Pretreatment Program

The pretreatment program is designed to protect municipal wastewater treatment plants and the environment from damage that may occur when pollutants are discharged into a sewage system. Section 307 of the Act establishes regulation of industries that discharge waste to a POTW and authorizes EPA to set pretreatment standards for those pollutants discharged to POTWs that would interfere with, pass through, or otherwise be incompatible with the treatment works. The general pretreatment program regulations are contained in 40 C.F.R. Part 403.

Because municipal wastewater treatment systems are designed primarily to treat domestic wastes, the introduction of nondomestic wastes may affect these systems. For example, the bacteria needed in activated sludge treatment systems can be inhibited by toxic pollutants. The result is interference with the treatment process, which means that domestic and industrial wastes may be improperly treated by the POTW before being discharged into the receiving water. Even if pollutants do not interfere with the treatment systems, they may pass through POTWs without being adequately treated because the systems are not designed to remove them. EPA has prohibited "interference" and "pass through" in 40 C.F.R. §403. While these definitions were remanded in National Association of Metal Finishers, et al. (NAMF) v. EPA [719 F. 2d 624, 641 (3d Cir. 1983)], rev'd in part on other grounds, 53 U.S.L.W. 4193 (Sup. Ct. 1985), the generic prohibition in Part 403 remains.

EPA regulates indirect discharges in two ways. First, under the NRDC consent decree (cited above) and Section 307(b)(1), EPA must adopt 34

industrial pretreatment or categorical standards, which are analogous to BAT standards for direct dischargers unless EPA can support a decision to exclude them from national regulation. Categorical standards apply to those users in these categories that the Agency has determined are the most significant sources of toxic pollutants. In developing these categorical standards, EPA compares the percent removal of pollutants achieved for BAT at a direct-discharging industry to the percent removal of indirectly discharged pollutants at the POTW to determine whether there is "pass through" of pollutants. If there is "pass through," EPA establishes categorical pretreatment standards based on BAT.

As of May 1985, EPA has adopted 24 final pretreatment categorical standards covering 21 industrial categories. Industries in those categories must come into compliance with the standards no later than three years from the effective date of the standard. Section 307 also authorizes EPA to approve POTW applications for removal credits for an industrial user (i.e., a treatment allowance for the POTW's treatment of some of the industrial user's discharge). In addition, POTWs are required to establish more stringent local limits for industrial users where necessary to protect the environment or the municipal sewage system (40 C.F.R. §403.5). Section 403.5 also states that limits are considered pretreatment standards and are enforceable as such under Section 307(d) of the Act.

Second, the general pretreatment regulations prohibit the discharge of pollutants that:

- Create a fire or explosion hazard in the sewers or treatment works;
- Are corrosive (i.e., pH lower than 5.0);
- Obstruct flow in the sewer system or interfere with operation of the sewer system;
- Upset the treatment processes or cause a violation of the POTW's permit; and
- Increase the temperature of wastewater entering the treatment plant to above 104 °F (40 °C).

These prohibited discharge standards apply to all industrial and commercial establishments connected to POTWs.

In NAMF, cited above, the court addressed several issues in the pretreatment program. The court upheld the BPT-level electroplating pretreatment standards (40 C.F.R. Part 413; see Exhibit 1-1). (Electroplaters constitute approximately 11,000 of the 14,000 indirect dischargers.) The court also upheld the combined waste stream formula (i.e., the formula for deriving categorical standards where more than one waste stream are combined) and the removal credits provision. The court remanded the definitions of "interference" and "pass through."

Approval of Local Programs

Those POTWs with a total design flow greater than 5 million gallons per day that receive industrial discharges that either pass through, interfere with, or are covered by a categorical standard must submit a local pretreatment program to EPA or an approved state (40 C.F.R. §403.8). An approved local program must develop and enforce local limits to implement the prohibitions on pass through and interference, as well as the specific prohibitions of 40 C.F.R. §403.5(b) (see NAMF, above).

The POTW must have authority to obtain remedies for violations of categorical standards, local limits, or other pretreatment requirements such as monitoring [40 C.F.R. §403.8(f)(1)(vi)(A)]. The state may approve the local program if the state has an approved pretreatment program; otherwise, EPA approves the program. The state and EPA may take enforcement action when the POTW either has not taken timely and appropriate enforcement action or has sought an insufficient remedy.

Where the POTW does not have an approved local program at the time the POTW's existing permit is reissued or modified, the reissued or modified permit must contain a compliance schedule to develop such a program [40 C.F.R. §403.8(d)]. The approval authority should also incorporate an approved POTW pretreatment program into the POTW permit [40 C.F.R. §403.8(e)(4)].

Reporting Requirements

Industrial dischargers covered by categorical standards must prepare a Baseline Monitoring Report (BMR), which describes a facility's operation and waste stream characteristics (40 C.F.R. §403.12). The discharger submits this report to the POTW (if the POTW's pretreatment program is approved) or to the applicable approval authority. The BMR, which generally includes sampling and analysis data of the industrial user's discharge, must be submitted within 180 days of the effective date of final categorical pretreatment standards for that industrial category. If not in compliance, the user must develop and submit a compliance schedule describing the steps it will take to achieve compliance. Within 14 days after the date for each step, the user must submit progress reports. Within 90 days of the final compliance date of an applicable standard, the indirect discharger must submit a compliance data report detailing the nature and concentration of the industry's discharges. Industries subject to categorical standards must also, at least twice a year, submit a report containing self-monitoring results to the Control Authority. In addition, an industry must report immediately any slug loads or significant changes in its discharge characteristics to the POTW.

Pretreatment Enforcement

EPA's pretreatment enforcement efforts have increased with the 1984 deadlines for achieving certain pretreatment categorical standards. On October 28, 1983, EPA issued a Pretreatment Compliance Strategy (Short Term). (See

Water Enforcement Policy Compendium.) The objective of the short-term strategy is to require all POTWs that are obligated to develop and implement pretreatment programs to do so in the shortest possible time. The policy states that POTWs that did not meet the July 1, 1983, deadline for approval of POTW programs under Section 309(a)(5)(A) will receive compliance schedules, through administrative orders or judicial orders, requiring submittal of a program no later than September 30, 1984. The strategy also provides for EPA enforcement of categorical standards in unapproved cities in unapproved states and in approved cities that are not enforcing categorical standards. (See Chapter Eight for a more detailed discussion of pretreatment enforcement.)

On April 12, 1984, EPA issued FY 1984 Pretreatment Enforcement Activities, which included an attachment addressing factors for identifying POTW and industrial user pretreatment referrals. On November 5, 1984, EPA issued Guidance to POTWs for Enforcement of Categorical Standards to advise POTWs of their responsibilities for enforcing pretreatment categorical standards. Further guidance to be considered in making POTW referrals was issued on December 31, 1984, as the POTW Pretreatment Multi-Case Enforcement Initiative.

Recordkeeping, Monitoring, and Entry and Inspection Provisions

Authority

Section 308 of the CWA provides broad authority to EPA to require direct and indirect dischargers to maintain records, make reports, and provide monitoring and sampling data. An approved NPDES state must have equivalent Section 308 authority. EPA may use this authority to gather information for developing effluent limitations and pretreatment standards; to determine whether any person is in violation of any effluent limitation, other limitation, or pretreatment standard; or to carry out the NPDES program, Section 311 (oil and hazardous substances discharges), or Section 404 (dredged and fill permit program). For example, Section 308 authorizes EPA to require NPDES application form data, including testing of toxic substances 40 C.F.R. §122.21, and together with Section 402(a)(1) and 402(a)(2) authorizes EPA to require permittees to submit discharge monitoring reports.

Entry and Inspection

Sections 308(a)(4)(A) and (B) authorize the Administrator or an authorized representative to enter and inspect a discharger's premises, to have access to records and equipment, and to conduct sampling. In Marshall v. Barlow's [436 U.S. 307 (1978)], the Supreme Court held that an OSHA inspector was not entitled to enter the nonpublic portions of a worksite without either the owner's consent or a warrant. The Barlow's decision affects all EPA inspection programs, including inspections conducted by state personnel and EPA contractors. If consent is denied, the Agency must seek an ex parte administrative warrant through the U.S. Attorney. The warrant must

designate specific areas of the facility to be inspected. The Agency may obtain a warrant if it can show that the facility was chosen on the basis of a general administrative plan for enforcing the Act. [See Public Service Company of Indiana v. Environmental Protection Agency, 509 F. Supp. 720 (S.D. Ind. 1981) (Clean Air Act case).] Chapter Three discusses entry and access issues in greater detail.

Confidential Business Information

Under Section 308(b), any records, reports, or other information that is obtained from the discharger or during an inspection and that constitutes effluent data must be made available to the public, unless a person can show that the portion of the information that is not effluent data is entitled to be withheld as a trade secret. Further, Section 402(j) requires permit applications and issued permits to be available to the public, including information submitted on forms and any attachments used to supply information required by the forms [40 C.F.R. §122.7(c)]. The Administrator must review requests for confidential treatment of information in accordance with 18 U.S.C. §1905 and 40 C.F.R. Part 2. Under 18 U.S.C. §1905, criminal penalties are also provided if a federal employee knowingly releases information determined to be confidential.

Oil and Hazardous Substances Spills

Section 311 of the CWA provides a liability and compensation system for the discharge of oil and hazardous substances into the waters of the United States. Section 311(b)(3) prohibits the discharge of oil or hazardous substances in "harmful" quantities. The CWA defines "hazardous substances" as substances that "when discharged in any quantity into or upon [statutorily covered waters or their adjoining shorelines] present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches." The list of hazardous substances is contained in 40 C.F.R. Part 116.

The unauthorized discharge of oil and hazardous substances may result in the assessment by the Coast Guard of an administrative civil penalty of not more than $5,000 per day of violation. In the case of discharges of hazardous substances, the EPA Administrator may, in lieu of the Coast Guard assessments, begin a civil action in district court under Section 311(b)(6)(B) to impose a penalty not to exceed $50,000.* EPA interprets its enforcement authority under this section as applying only to hazardous substances.

---

* EPA and the Coast Guard have entered into an agreement regarding the enforcement of Section 311, which governs which agency will take enforcement action (see 44 Fed. Reg. 50785, August 29, 1979).

Where such a discharge was the result of willful negligence or willful misconduct by the owner, operator, or person in charge, the maximum liability increases to $250,000. Note that civil penalties may not be assessed under both Section 311 and Section 309.

Section 311(b)(5) requires any person in charge of a vessel, offshore facility, or onshore facility to notify the Coast Guard or EPA immediately of any discharge of a harmful quantity from such vessel or facility as soon as he or she has knowledge of the discharge. Failure to notify the government may result in a criminal penalty of not more than $10,000 or imprisonment for not more than one year.

Discharges under Section 311 exclude those discharges permitted under Section 402 or identified in an NPDES permit application and "caused by events occurring within the scope of relevant operating or treatment systems" [Section 311(a)(2)]. Discharges covered by Section 311 are commonly known as spills, since they are generally unforeseen.

In addition to this discharge liability, Section 311(c) authorizes the United States to remove and recover the oil or hazardous substance and to recover the costs of removal up to the limits established in Section 311(f). To finance the cost of removal, Section 311(k) set up a revolving fund of $35 million, which is also available to reimburse dischargers who remove a discharge under very limited circumstances. One-half of this fund has been transferred, however, for use under the Comprehensive Environmental Response, Compensation, and Liability Act (known as "Superfund").

Section 311 Regulations

Pursuant to Section 311, EPA has adopted regulations covering the following categories:

- Oil dischargers -- 40 C.F.R. Part 110
- Oil pollution prevention -- 40 C.F.R. Part 112
- Liability for pollution -- 40 C.F.R. Part 113
- Civil penalties for oil pollution -- 40 C.F.R. Part 114
- Designation of hazardous substances -- 40 C.F.R. Part 116
- Reportable quantities of hazardous substances -- 40 C.F.R. Part 117
- Notification to Coast Guard -- 33 C.F.R. Part 15 (promulgated by the Coast Guard)

Dredged and Fill Material Permit Program

Section 301 of the CWA declares the discharge of pollutants unlawful except in compliance with, among other things, Section 404. Section 404 authorizes the Secretary of the Army, acting through the Chief of Engineers of the Army Corps of Engineers, to issue permits for discharge of dredged or fill material into specified locations [Section 404(a)], after consideration of environmental guidelines [Section 404(b)(1)]. A permit may be issued even if the environmental guidelines would prohibit it based on the economic impact on navigation and anchorage [Section 404(b)(2)]. The Corps' action is subject to an EPA "veto" if the discharge will have certain unacceptable impacts [Section 404(c)].

The 1977 amendments to the CWA authorized issuance of general permits [Section 404(e)], created certain exemptions from permit requirements [Section 404(f) and (r)], authorized transfer of part of the Corps program to the states [Section 404(g) through (l)], and gave the Corps authority to enforce conditions in the Section 404 permits that they issue [Section 404(s)]. The Corps regulations for issuing dredged and fill permits are contained in 33 C.F.R. Parts 320 through 323. EPA's technical regulations under Sections 404(b)(1), 404(c), and 404(g) through (l) are contained in 40 C.F.R. Parts 230 through 233.

Definitions

EPA and the Corps define dredged material as "material that is excavated or dredged from waters of the United States" [33 C.F.R. §323.2(j); 40 C.F.R. §232.2]. According to 33 C.F.R. §323.2(l), "discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within [the term discharge of dredged material] and are subject to Section 402...even though the extraction and deposit of such material may require a permit from the Corps of Engineers." On the other hand, run-off or overflow from a contained land or water dredged material disposal area is handled under Section 404.

EPA and the Corps currently have different definitions of fill material. EPA defines it as material that replaces an aquatic area with dryland or that changes the bottom elevation for any purpose (40 C.F.R. §233.2). The Corps defines it as "any material used for the primary purpose of replacing an aquatic area with any land or changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402..." [33 C.F.R. §323.2(m)]. EPA and the Corps are working together to develop a common definition. In the meantime, EPA's definition is operative. A discharge without a permit violates Section 301 regardless of which permit (NPDES or Section 404) applies.

The dividing line between the Section 404 program and the NPDES program is based on the type of pollutant involved. If the pollutant is dredged or

fill material, Section 404 applies and the Section 404(b)(1) guidelines govern the permit decision. If the discharge consists of any other pollutant, Section 402 applies technology-based effluent limitations and water quality-based limitations.

EPA Permit Review and Veto Authority

EPA has an opportunity to review each permit application or Corps proposal, to submit comments, and to object. EPA may object to a project as being outside the Section 404 guidelines, or because the EIS requirements of NEPA have not been complied with, or on any other grounds within the expertise of EPA. If the Corps District Engineer decides to issue a permit over the objection of the Regional Administrator, he or she must give EPA advance notice, which gives EPA the opportunity to request elevation of the permit decision or start Section 404(c) veto proceedings in appropriate situations. Procedures for elevation of permit decisions are governed by an interagency memorandum of agreement [see Section 404(q)]. Unless EPA invokes Section 404(c), the Corps may issue a permit over EPA's objection.

While EPA's Section 404(c) authority is generally referred to as a "veto," the Administrator actually prohibits or withdraws the specification of disposal site or denies, restricts, or withdraws the use of an area as a disposal site. EPA may use its Section 404(c) authority only if the Administrator determines, after notice and opportunity for public hearings, that the discharge into an area will have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."

The Administrator may act either before or after the Corps has authorized a site for disposal and may block all dredged and fill material discharges at the site or merely restrict discharges (e.g., restrict the type or amount of material, or specify a particular section of the site). Once the site is prohibited under Section 404(c), the Corps cannot override the Administrator's action. EPA has interpreted its Section 404(c) authority as discretionary.

Section 404 Enforcement

EPA and the Corps share Section 404 enforcement responsibility. Section 309 authorizes the Administrator to act against persons discharging without a permit or in violation of the terms of a permit. Section 404(s) gives the Corps parallel authority to act against violations of a permit. While the Corps has independent enforcement authority under the Rivers and Harbors Act of 1899, this is limited to "navigable-in-fact waters," as opposed to all "waters of the United States." The courts have upheld the Corps' implicit authority to issue administrative cease and desist orders.

State Section 404 Programs

EPA also may approve state Section 404 programs, review the performance of such programs, object to state permits that are outside the requirements of Section 404, and take enforcement action on violations of state-issued Section 404 permits. As of May 1985, one state had an approved Section 404 program. (Note that states may take over the Section 404 program for only some of the waters of the United States. The Corps always retains jurisdiction over waters presently used, or susceptible to use, as a means to transport interstate commerce, including tidal waters and adjacent wetlands.)

Enforcement Provisions

Administrative Orders

Sections 309(a)(1) and (3) of the CWA authorize EPA to issue administrative orders that require compliance with the Act in cases of violations of permit conditions or limitations or of discharges without a permit. Section 309 is not available to a state for enforcement purposes; a state must have independent state law provisions to enforce an NPDES permit. EPA may also issue orders to remedy violations of:

- Effluent limitations -- Section 301;
- Water quality-related effluent limitations -- Section 302;
- New source performance standards -- Section 306;
- Toxic and pretreatment effluent standards -- Section 307;
- Data disclosure and inspections -- Section 308; and
- Sewage sludge disposal -- Section 405.

Section 309(a)(4) requires EPA to send a copy of an administrative order to the state in which the violation occurs. EPA must also serve a copy of an order issued to a corporation on any appropriate corporate officers. These orders are subject to judicial review under Section 509. Finally, orders issued under Section 309(a)(5) must specify the time for compliance. Where EPA issues an order regarding a Section 308 violation, it cannot take effect until the affected person has an opportunity to discuss the violation with the Administrator. The CWA does not authorize administrative assessment of penalties by EPA. Chapter Six discusses administrative enforcement in greater detail.

Injunctive Relief

EPA can obtain injunctive relief pursuant to Sections 309(b), 309(f), 402(h), and 504. Section 309(b) authorizes the Administrator to seek a permanent or temporary injunction for any violation for which he or she could issue an administrative order. Federal district court has jurisdiction over such violations. Again, EPA must notify the state of its action.

Section 504 authorizes EPA to bring an emergency action to restrain a discharge of pollutants that is presenting an imminent and substantial endangerment to human health and welfare. However, the use of Section 504, more clearly than Section 309(b), is discretionary. [See Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); Committee for the Consideration of the Jones Falls Sewage System v. Train, 387 F. Supp. 526 (D. Md. 1975); but compare Sierra Club v. Train, 575 F. 2d 485 (5th Cir. 1977) with United States v. Phelps Dodge Corp., 391 F. Supp. 1181 (D. Ariz. 1975).

Section 309(f), added in the 1977 amendments to the CWA, authorizes a separate civil action against an industrial contributor and a receiving POTW for violation of pretreatment requirements. If the owner or operator of a treatment works does not commence enforcement action within 30 days of the Administrator's notification of a violation, the Administrator may commence a civil action for appropriate relief, including but not limited to a permanent or temporary injunction against the owner or operator and the industrial contributor. EPA must also notify the state of this action.

Civil Penalties

Section 309 authorizes EPA to bring a civil action for "violation of any condition or limitation which implements sections 301, 302, 306, 307, 308, 318, or 405." Alternatively, in states that have been approved for primary enforcement authority, EPA may first notify the appropriate state and the persons in alleged violation and give the state 30 days to bring its own enforcement action. This is known as a "notice of violation." Section 309(d) provides that violators of these sections, of administrative orders, or of permit conditions implementing these sections are subject to civil penalties of up to $10,000 for each day of violation. The federal district court in which the defendant is located, resides, or is doing business has jurisdiction. It is Agency policy to recover from a defendant at least the economic benefit gained through noncompliance. See Civil Penalty Policy, July 8, 1980, contained in the Water Compliance/Enforcement Policy Compendium.

When a state receives NPDES program approval, it assumes primary enforcement responsibility, and enforces NPDES requirements under state law. Under 40 C.F.R. §123.27, in order to be approved, the state NPDES program must be able to assess at least $5,000 a day for each civil violation. However, EPA may still intervene in a state enforcement action or take direct action. The EPA Policy Framework for State/EPA Enforcement Agreements discusses criteria for EPA involvement in an enforcement action. Chapter Eight details the EPA civil judicial enforcement program.

Criminal Penalties

Any person who willfully or negligently violates a permit issued by EPA or by a state under an EPA-approved program, discharges without a permit, or violates other NPDES program requirements is subject to a criminal penalty of up to $25,000 a day, or a year's imprisonment, or both under Section 309(c)(1). The Act also provides a penalty of up to $10,000 or six month's imprisonment for making knowing and false statements in any application or report, or for tampering with monitoring equipment. Chapter Nine contains a detailed discussion of the EPA criminal enforcement program.

Contractor Listing

Section 508 of the CWA and Executive Order 11738 authorize EPA to preclude certain facilities from obtaining government contracts, grants, or loans, if the facility is the basis of criminal or civil violations of water pollution control standards. The contractor listing program allows EPA to place the facility on the "List of Violating Facilities" after providing certain procedures to the respondent under 40 C.F.R. Part 15, including an informal Agency hearing called a "listing proceeding."

EPA proposed revisions to Part 15 on July 31, 1984 (49 Fed. Reg. 30628) to provide for mandatory listing for criminal convictions and to clarify the procedural rights of respondents in listing proceedings. As discussed in Chapter Six, contractor listing can be a very effective enforcement tool, particularly where previous formal enforcement proceedings (such as administrative orders, court orders, or consent decrees) have not resulted in compliance.

Citizen Suits

Section 505 provides for two types of citizen suits. First, any citizen may commence a civil action on his or her own behalf against any other person, including the United States and any government agencies, who is alleged to be in violation of effluent standards or limitations under the Act (generally NPDES permit violations) or in violation of a compliance order issued by EPA or the state. Second, a citizen may commence a civil action against the Administrator for his or her alleged failure to perform any nondiscretionary duty under the Act. U.S. district courts have jurisdiction in each of these cases.

Prior to bringing a citizen suit against a violator, the citizen must provide 60 days' notice to EPA, to the affected state, and to any alleged violator of the standard, limitation, or order. A citizen's suit brought against the Administrator requires 60 days' notice to the Administrator. The 60-day notice provision gives EPA the opportunity to consider enforcement against the alleged violator. The procedures governing notice are contained in 40 C.F.R. Part 135. Such notice is not required for violations of NSPS and toxic effluent standards. Citizen actions that could otherwise be brought under the Administrative Procedure Act, federal questions of jurisdiction, and other provisions of law do not require the

60-day notice. [See NRDC v. Train, 510 F. 2d 692 (D.C. Cir. 1974).] Case law on the availability of alternate jurisdictional grounds varies from district to district.

Citizens may recover attorneys' fees and court costs "whenever the court determines such award is appropriate" [Section 505(d)]. Where EPA or the state is diligently prosecuting an enforcement action against a violator, a citizen suit may not proceed against that violator; however, the citizens' group may then intervene as a matter of right.

5 Exhibits

This section contains the following exhibits:

National Effluent Guidelines
(Including Pretreatment Categorical Standards)

EFFLUENT GUIDELINES
PROPOSED AND FINAL RULES - PRIMARY CATEGORIES
FEDERAL REGISTER CITATIONS
(1979 - Present)

2/22/85

Industry	40 CFR PART	TYPE RULE	SIGNATURE*	FEDERAL REGISTER CITATION	
* ALUMINUM FORMING	467	PROPOSED	11/05/82	47 FR 52626	11/22/82
		PROMULGATION	09/30/83	48 FR 49126	10/24/83
		Correction	—	49 FR 11629	03/27/84
		Notice (ICB)	—	50 FR 4513	01/31/85
* BATTERY MANUFACTURING	461	PROPOSED	10/29/82	47 FR 51052	11/10/82
		PROMULGATION	02/27/84	49 FR 9108	03/09/84
		Correction	—	49 FR 13879	04/09/84
		Correction	—	49 FR 27946	07/09/84
		Notice	—	49 FR 47925	12/07/84
* COAL MINING	434	PROPOSED	12/30/80	46 FR 3136	01/13/81
		PROMULGATION	09/30/82	47 FR 45382	10/13/82
		Correction	—	48 FR 58321	11/01/83
		Prop. Amend.	—	49 FR 19240	05/04/84
		Ext. of Comments	—	49 FR 24388	06/13/84
		Notice (ICB)	—	50 FR 4513	01/31/85
* COIL COATING					
Phase I	465	PROPOSED	12/30/80	46 FR 2934	01/12/81
		PROMULGATION	11/05/82	47 FR 54232	12/01/82
		Final Amend.	—	48 FR 31403	07/08/83
		Final Amend.	—	48 FR 41409	09/15/83
		Correction	—	49 FR 33648	08/24/84
Phase II (Canmaking)	465	PROPOSED	01/31/83	48 FR 6268	02/10/83
		PROMULGATION	11/09/83	48 FR 52380	11/17/83
		Correction	—	49 FR 14104	04/10/84
		Notice (ICB)	—	50 FR 4513	01/31/85
* COPPER FORMING	468	PROPOSED	10/29/82	47 FR 51278	11/12/82
		PROMULGATION	08/04/83	48 FR 36942	08/15/83
		Final Amend.	—	48 FR 41409	09/15/83
		Prop. Amend.	—	50 FR 4872	02/04/85
* ELECTRICAL/ELECTRONIC COMPONENTS					
Phase I	469	PROPOSED	08/11/82	47 FR 37048	08/24/82
		PROMULGATION	03/31/83	48 FR 15382	04/08/83
		Interim Final/ Prop. Amend.	—	48 FR 45249	10/04/83
		Final Amendment	—	49 FR 5921	02/16/84
		Notice (ICB)	—	49 FR 34823	09/04/84
		Notice (ICB)	—	50 FR 4513	01/31/85
Phase II	469	PROPOSED	02/28/83	48 FR 10012	03/09/83
		PROMULGATION	11/30/83	48 FR 55690	12/14/83
		Correction	—	49 FR 1056	01/09/84

* Administrator's signature; ( ) is the projected schedule approved by the court on August 25, 1982; October 26, 1982; August 2, 1983; January 6, 1984; July 5, 1984; and January 7, 1985.

NOTE: THIS LISTING DOES NOT INCLUDE RULEMAKING ACTIVITIES SUBSEQUENTLY PUBLISHED BETWEEN PROPOSAL AND PROMULGATION UNLESS THE SCHEDULED PROMULGATION HAS NOT YET BEEN COMPLETED. THESE, AND PUBLICATIONS ISSUED PRIOR TO 1979, ARE IDENTIFIED IN THE PREAMBLES TO EACH PROMULGATED REGULATION.

INDUSTRIAL TECHNOLOGY DIVISION
PROPOSED AND FINAL RULES - PRIMARY CATEGORIES
FEDERAL REGISTER CITATIONS
(1979 - Present)

2/22/85

-continued-

Industry	40 CFR PART	TYPE RULE	SIGNATURE*	FEDERAL REGISTER CITATION	
• ELECTROPLATING (Pretreatment - PSES only)	• 413	PROPOSED	01/24/78	43 FR 6560	02/14/78
		PROMULGATION	08/09/79	44 FR 52590	09/07/79
		Correction	—	44 FR 56330	10/01/79
		Correction	—	45 FR 19245	03/25/80
		Prop. Amend.	—	45 FR 45324	07/03/80
		Prop. Amend.	—	46 FR 9462	01/28/81
		Prop. Amend.	—	46 FR 43972	09/02/81
		Prop. Amend.	—	47 FR 38462	08/31/82
		Prop. Amend.	—	48 FR 2774	01/21/83
		Final Amend.	—	48 FR 32462	07/15/83
		Correction	—	48 FR 43680	09/26/83
		Final Amend.	—	48 FR 41409	09/15/83
		Notice (ICB)	—	49 FR 34823	09/04/84
• FOUNDRIES (Metal Molding and Casting)	464	PROPOSED	10/29/82	47 FR 51512	11/15/82
		Notice (Add. Data)	—	49 FR 10280	03/20/84
		Notice (Add. Data)	—	50 FR 6572	02/15/85
		PROMULGATION	(06/85)	—	—
• INORGANIC CHEMICALS					
Phase I	415	PROPOSED	07/10/80	45 FR 49450	07/24/80
		PROMULGATION	06/16/82	47 FR 28260	06/29/82
		Correction	—	47 FR 55226	12/08/82
Phase II	415	PROPOSED	09/30/83	48 FR 49408	10/25/83
		PROMULGATION	07/26/84	49 FR 33402	08/22/84
		Correction	—	49 FR 37594	09/25/84
• IRON & STEEL MANUFACTURING.....	420	PROPOSED	12/24/80	46 FR 1858	01/07/81
		PROMULGATION	05/18/82	47 FR 23258	05/27/82
		Correction	—	47 FR 24554	06/07/82
		Correction	—	47 FR 41738	09/22/82
		Final Amend.			
		Correction	—	48 FR 51773	11/14/83
		Prop. Amend.	—	48 FR 46944	10/14/83
		Correction	—	48 FR 51647	11/10/83
		Final Amend.	—	49 FR 21024	05/17/84
		Correction	—	49 FR 24726	06/15/84
		Correction	—	49 FR 25634	06/22/84

* Administrator's signature; ( ) is the projected schedule approved by the court on August 25, 1982; October 26, 1982; August 2, 1983; January 6, 1984; July 5, 1984; and January 7, 1985.

NOTE: THIS LISTING DOES NOT INCLUDE RULEMAKING ACTIVITIES SUBSEQUENTLY PUBLISHED BETWEEN PROPOSAL AND PROMULGATI UNLESS THE SCHEDULED PROMULGATION HAS NOT YET BEEN COMPLETED. THESE, AND PUBLICATIONS ISSUED PRIOR TO 197 ARE IDENTIFIED IN THE PREAMBLES TO EACH PROMULGATED REGULATION.

EFFLUENT GUIDELINES DIVISION
PROPOSED AND FINAL RULES - PRIMARY CATEGORIES 2/22/85
FEDERAL REGISTER CITATIONS
(1979 - Present)
- continued -

Industry	40 CFR PART	TYPE RULE	SIGNATURE*	FEDERAL REGISTER CITATION	
* LEATHER TANNING & FINISHING	425	PROPOSED	06/13/79	44 FR 38746	07/02/79
		PROMULGATION	11/07/82	47 FR 52848	11/23/82
		Correction/ Notice (Add. Data)			
		Final Amend.	—	48 FR 30115	06/30/83
		Final Amend.	—	48 FR 31404	07/08/83
		Correction	—	48 FR 32346	07/15/83
		Correction	—	48 FR 35649	08/05/83
		Correction/ Final. Amend. (PSES)	—	48 FR 41409	09/15/83
		Notice (Add. Data)	—	49 FR 17090	04/23/84
		Notice (Waiver, Reg. II)	—	49 FR 42794	10/28/84
		Notice (Waiver, Reg. II)	—	49 FR 44143	11/02/84
* METAL FINISHING	433 & 413	PROPOSED	08/11/82	47 FR 38462	08/31/82
		PROMULGATION	07/05/83	48 FR 32462	07/15/83
		Final Amend.	—	48 FR 41409	09/15/83
		Correction	—	48 FR 43680	09/26/83
* NONFERROUS METALS					
Phase I	421	PROPOSED	01/31/83	48 FR 7032	02/17/83
		PROMULGATION	02/23/84	49 FR 8742	03/08/84
		Correction	—	49 FR 26738	06/29/84
		Correction	—	49 FR 29792	07/24/84
Phase II.....	421	PROPOSED	05/15/84	49 FR 26352	06/27/84
		Notice (Hearing)	—	49 FR 29625	07/23/84
		Notice (Comment Period)	—	49 FR 33026	08/20/84
		PROMULGATION	(07/85)	—	—
* NONFERROUS METALS FORMING	471	PROPOSED	02/03/84)	49 FR 8112	03/05/84
		Notice (Hearing)	—	49 FR 10132	03/19/84
		Notice (Add. Data)	—	50 FR 4872	02/04/85
		PROMULGATION	(06/85)	—	—

* Administrator's signature; ( ) is the projected schedule approved by the court on August 25, 1982; October 26, 1982; August 2, 1983; January 6, 1984; July 5, 1984; and January 7, 1985.

NOTE: THIS LISTING DOES NOT INCLUDE RULEMAKING ACTIVITIES SUBSEQUENTLY PUBLISHED BETWEEN PROPOSAL AND PROMULGATION UNLESS THE SCHEDULED PROMULGATION HAS NOT YET BEEN COMPLETED. THESE, AND PUBLICATIONS ISSUED PRIOR TO 1979, ARE IDENTIFIED IN THE PREAMBLES TO EACH PROMULGATED REGULATION.

EFFLUENT GUIDELINES DIVISION
PROPOSED AND FINAL RULES - PRIMARY CATEGORIES 2/22/85
FEDERAL REGISTER CITATIONS
(1979 - Present)
- continued -

Industry	40 CFR PART	TYPE RULE	SIGNATURE*	FEDERAL REGISTER CITATION	
* ORE MINING	440	PROPOSED	05/25/82	47 FR 25682	06/14/82
		PROMULGATION	11/05/82	47 FR 54598	12/03/82
* ORGANIC CHEMICALS AND PLASTICS & SYNTHETIC FIBERS	414 & 416	PROPOSED	02/28/83	48 FR 11828	03/21/83
		Notice (Records)	—	49 FR 34295	08/29/84
		PROMULGATION	(03/86)	—	—
* PESTICIDES	455	PROPOSED	11/05/82	47 FR 53994	11/30/82
		Proposed (Analytical Methods)	—	48 FR 6250	02/10/83
		Notice (Add. Data)	—	49 FR 24492	06/13/84
		Notice (Comment Period)	—	49 FR 30752	08/01/84
		Notice (Add. Data)	—	50 FR 3366	01/24/85
		PROMULGATION	(08/85)	—	—
* PETROLEUM REFINING	419	PROPOSED	11/27/79	44 FR 75926	12/21/79
		PROMULGATION	09/30/82	47 FR 46434	10/18/82
		Prop. Amend.	—	49 FR 34152	08/28/84
* PHARMACEUTICALS	439	PROPOSED	11/07/82	47 FR 53584	11/26/82
		PROMULGATION	09/30/83	48 FR 49808	10/27/83
		Correction	—	48 FR 50322	11/01/83
		Notice (ICB)	—	50 FR 4513	01/31/85
		PROPOSED - NSPS	—	48 FR 49832	10/27/83
		Correction	—	49 FR 1190	01/10/84
		BCT Cost Extension	—	49 FR 8967	03/09/84
		Notice (Add. Data)	—	49 FR 17978	04/26/84
			—	49 FR 27145	07/02/84
* PLASTICS MOLDING & FORMING	463	PROPOSED	02/03/84	49 FR 5862	02/15/84
		PROMULGATION	12/04/84	49 FR 49026	12/17/84

* Administrator's signature; ( ) is the projected schedule approved by the court on August 25, 1982; October 26, 1982; August 2, 1983; January 6, 1984; July 5, 1984; and January 7, 1985.

NOTE: THIS LISTING DOES NOT INCLUDE RULEMAKING ACTIVITIES SUBSEQUENTLY PUBLISHED BETWEEN PROPOSAL AND PROMULGATION UNLESS THE SCHEDULED PROMULGATION HAS NOT YET BEEN COMPLETED. THESE, AND PUBLICATIONS ISSUED PRIOR TO 1979, ARE IDENTIFIED IN THE PREAMBLES TO EACH PROMULGATED REGULATION.

EFFLUENT GUIDELINES DIVISION
PROPOSED AND FINAL RULES - PRIMARY CATEGORIES 2/22/85
FEDERAL REGISTER CITATIONS
(1979 - Present)
- continued -

Industry	40 CFR PART	TYPE RULE	SIGNATURE*	FEDERAL REGISTER CITATION	
* PORCELAIN ENAMELING.....	466	PROPOSED	01/19/81	46 FR 8860	01/27/81
		PROMULGATION	11/05/82	47 FR 53172	11/24/82
		Final Amend.	—	48 FR 31403	07/08/83
		Final Amend.	—	48 FR 41409	09/15/83
		Prop. Amend.	—	49 FR 18226	04/27/84
* PULP & PAPER.....	430	PROPOSED	12/11/80	46 FR 1430	01/06/81
	& 431	PROMULGATION	10/29/82	47 FR 52006	11/18/82
		Notice (Add. Data)	—	48 FR 11451	03/18/83
		Correction	—	48 FR 13176	03/30/83
		Final Amend.	—	48 FR 31414	07/08/83
		Notice (FDF)	—	48 FR 43682	09/16/83
		Correction	—	48 FR 45105	10/06/83
		Public Hearing (NPDES Decision)	—	48 FR 45841	10/07/83
		Notice (Petition Denied)	—	49 FR 40546	10/16/84
		Notice (Variance Denied)	—	49 FR 40549	10/16/84
		PROPOSED (PCB)	—	47 FR 52066	11/18/82
		Notice (Comment Period)	—	48 FR 2804	01/21/83
* STEAM-ELECTRIC.....	423	PROPOSED	10/03/80	45 FR 68328	10/14/80
		PROMULGATION	11/07/82	47 FR 52290	11/19/82
		Final Amend.	—	48 FR 31404	07/08/83
* TEXTILE MILLS.....	410	PROPOSED	10/16/79	44 FR 62204	10/29/79
		PROMULGATION	08/27/82	47 FR 38810	09/02/83
		Notice (Add. Data)	—	48 FR 1722	01/14/83
		Correction	—	48 FR 39624	09/01/83
* TIMBER.....	429	PROPOSED	10/16/79	44 FR 62810	10/31/79
		PROMULGATION	01/07/81	46 FR 8260	01/26/81
		Final Amend.	—	46 FR 57287	11/23/81

* Administrator's signature; ( ) is the projected schedule approved by the Court on August 25, 1982; October 26, 1982; August 2, 1983; January 6, 1984; July 5, 1984; and January 7, 1985.

Approved State NPDES Programs
(as of May 1, 1985)

State	Approved State NPDES Permit Program	Approved To Regulate Federal Facilities	Approved State Pretreatment Program
Alabama	10/19/79	10/19/79	10/19/79
California	05/14/73	05/05/78	—
Colorado	03/27/75	—	—
Connecticut	09/26/73	—	06/03/81
Delaware	04/01/74	—	—
Georgia	06/28/74	12/08/80	03/12/81
Hawaii	11/28/74	06/01/79	08/12/83
Illinois	10/23/77	09/20/79	—
Indiana	01/01/75	12/09/78	—
Iowa	08/10/78	08/10/78	06/03/81
Kansas	06/28/74	—	—
Kentucky	09/30/83	09/30/83	09/30/83
Maryland	09/05/74	—	—
Michigan	10/17/73	12/09/78	06/07/83
Minnesota	06/30/74	12/09/78	07/16/79
Mississippi	05/01/74	01/28/83	05/13/82
Missouri	10/30/74	06/26/79	06/03/81
Montana	06/10/74	06/23/81	—
Nebraska	06/12/74	11/02/79	09/07/84
Nevada	09/19/75	08/31/78	—
New Jersey	04/13/82	04/13/82	04/13/83
New York	10/28/75	06/13/80	—
North Carolina	10/19/75	09/28/84	06/14/82
North Dakota	06/13/75	—	—
Ohio	03/11/74	01/28/83	07/27/83
Oregon	09/26/73	03/02/79	03/12/81
Pennsylvania	06/30/78	06/30/78	—
Rhode Island	09/17/84	09/17/84	09/17/84
South Carolina	06/10/75	09/26/80	04/09/82
Tennessee	12/28/77	—	08/10/83
Vermont	03/11/74	—	03/16/82
Virgin Islands	06/30/74	—	—
Virginia	03/31/75	02/09/82	—
Washington	11/14/73	—	—
West Virginia	05/10/82	05/10/82	05/10/82
Wisconsin	02/04/74	11/26/79	12/24/80
Wyoming	01/30/75	05/18/81	—
TOTALS	37	27	21

Key Sections of NPDES Regulations

EPA's NPDES regulations are contained in 40 C.R.F. Part 122-125. The key sections in Part 122, which cover substantive requirements, are:

- 122.2 Definitions
- 122.3 Exclusions
- 122.4 Prohibitions
- 122.6 Continuation of expired permits
- 122.7 Confidentiality of permits, permit applications, and effluent data
- 122.21 Permit application requirements, including testing requirements
- 122.22 Who must sign a permit application
- 122.28 General permit program requirements
- 122.29 Requirements for new sources and new discharges
- 122.41-122.45 Required effluent limitations and permit conditions for NPDES permits
- 122.46 Duration of permits
- 122.47 Schedules of compliance
- 122.48 Recording and reporting monitoring results
- 122.50 Disposal of pollutants into wells
- 122.61 Tranferring permits
- 122.62 Permit modification and revocation
- 122.64 Permit termination

Part 123 contains requirements for state NPDES programs.

- 123.2 Definitions
- 123.21-123.24 Contents of state program submission
- 123.25 Substantive NPDES requirements applicable to states

- 123.26-123.27 Compliance evaluation and enforcement requirements
- 123.44 EPA review of state permit
- 123.61 EPA approval process for state program requests
- 123.63 Criteria for EPA withdrawal of state programs

Part 124 contains procedures for issuing NPDES permits and holding hearings on EPA-issued permits as follows:

- 124.11-124.21 and 124.51-124.61 Procedures
- 124.71-124.91 Evidentiary hearings for EPA-issued NPDES permits

Part 125 contains regulations for setting effluent limitations in NPDES permits including variances.

General NPDES Permits by Category
(as of May 1985)

	CATEGORY	DRAFT	PROPOSED	FINAL
1.	Coal mines			X
2.	Placer mines	X		
3.	Deep seabed mining			X
4.	Sand and gravel extraction	X(2)*		
5.	Onshore oil and gas	X(3)		
6.	Stripper wells			X
7.	Coastal oil and gas		X(2)	
8.	Offshore oil and gas	X(5)	X	X(7)**
9.	Construction activities (dewatering)		X	X
10.	Hydrostatic testing (natural gas transmission pipelines)		X(3)	X
11.	Petroleum storage and transfer; marketing terminals			X(4)
12.	Noncontract cooling water uncontaminated storm water			X(4)
13.	Seafood processors (onshore and at sea)			X
14.	Trout fish hatcheries	X		
15.	Animal feedlots			X(3)
16.	Minor POTWs (secondary treatment)	X(6)		
17.	Ballast water treatment facilities	X		
18.	Log transfer facilities		X	
19.	Water supply	X		

* ( ) indicates the number of permits -- usually a number of states covered by the same category permit.
** Includes expired BPT permits.

	CATEGORY	DRAFT	PROPOSED	FINAL
20.	Army: Water Purification Mobile Unit	X		
21.	Navy: Weapons Training (Vieques, Puerto Rico)			X
22.	Stormwater (Lake Tahoe)		X	
	TOTAL	21	9	25

Chapter Two

General Operating Procedures

Chapter Contents

1 Introduction

The Environmental Protection Agency and the Department of Justice (DOJ) share the federal government's compliance and enforcement activities for water pollution control laws.* The basic framework for the responsibilities of each EPA office that participates in enforcement activities is found in the Administrator's memorandum of July 6, 1982, entitled "General Operating Procedures for the Civil Enforcement Program," and the memorandum of October 27, 1982, entitled "General Operating Procedures for the Criminal Enforcement Program." (Both of these documents are contained in the EPA General Enforcement Policy Compendium.)

This chapter first describes the roles of the various EPA offices that are involved with administrative and civil enforcement of water pollution violations. Second, the chapter discusses procedures for EPA referral of cases to DOJ. Finally, the chapter contains organizational charts of EPA offices.

EPA's enforcement program includes both compliance-oriented and legal-oriented activities. The compliance activities are primarily the responsibility of EPA's program offices while the legal-oriented activities are principally charged to the Regional Counsel or the Headquarters' Office of Enforcement and Compliance Monitoring (OECM). Issues of legal interpretation are the responsibility of the Office of General Counsel. Many enforcement activities are not clearly "compliance" or "legal" as they involve elements of both. Where both elements are present, the EPA employee must coordinate his or her work with the activities of the other participating offices. For example, when an EPA inspector is denied access to an NPDES-permitted facility, he or she must consult the Office of Regional Counsel as to whether an administrative warrant should be obtained.

---

* The U.S. Army Corps of Engineers and the Coast Guard also have enforcement responsibilities under Sections 404 and 311 of the CWA, respectively.

2 Primary Office Responsibilities

The following describes the basic administrative and civil enforcement functions as they are divided among the various EPA offices.

Regional Administrator

Program Office

- Identifies instances of noncompliance;
- Establishes priorities for handling instances of noncompliance;
- Evaluates the technical sufficiency of actions designed to remedy violations;
- Identifies for formal enforcement action those cases that cannot be resolved informally;
- Provides technical support necessary for developing cases and conducting litigation;
- Issues NPDES permits (where the state is not approved by EPA to administer an NPDES program);
- Reviews permit variance requests;
- Issues notices of violation;
- Issues administrative orders under Section 309 of the Clean Water Act (CWA); and
- Assists in developing civil actions for referral to DOJ (for direct referrals) or via Headquarters' Office of Enforcement and Compliance Monitoring (OECM).

Regional Counsel

- Acts as attorney for program offices;
- Assists program office in drafting the terms and conditions of NPDES permits and responses to variance requests;
- Assists program office in drafting notices of violations and administrative orders, and drafts complaints (in cooperation with DOJ);
- Prepares case referrals and formally concurs in civil referrals prior to signature by the Regional Administrator;
- Requests DOJ (through the Regional Administrator) to file a complaint, where EPA policy permits direct referral;
- Ensures consistency of action with OECM guidance;
- Negotiates enforcement matters and settlements;
- Attends any negotiations in which outside parties are represented by counsel;
- Serves as lead attorney in handling specific enforcement actions [consistent with Section VII(B) of the May 7, 1982, memorandum on regional reorganization]:
  - -- Manages case for EPA,
  - -- Coordinates case development for EPA, and
  - -- Coordinates litigation activity with DOJ; and
- Provides legal representation for the Agency in administrative proceedings (evidentiary hearings) originating in the Region and in appeals from those proceedings.

Headquarters

Program Office: Assistant Administrator for Water

- Manages national program policy matters;
- Establishes national compliance and enforcement priorities;
- Provides overall direction to and accountability measures for the compliance and enforcement program;
- Maintains the Permit Compliance System (PCS), which tracks permit issuance and compliance;

Office of General Counsel

- Provides legal interpretation of applicable statutes and regulations to support the water enforcement programs; and
- Has lead responsibility, in consultation with OECM, for defensive litigation arising out of enforcement actions.

National Enforcement Investigations Center

The National Enforcement Investigations Center (NEIC), which reports to the Assistant Administrator for Enforcement and Compliance Monitoring, is located at the Denver Federal Center. The NEIC functions as a national technical and financial resource and as an investigative unit. NEIC has expertise in investigation and evidentiary discovery, assists in case development, and provides litigation support. Regional Administrators and the Assistant Administrator for Water should involve NEIC in cases that have precedential implications, national significance, or are multi-regional in nature.

Department of Justice and Referral Procedures

Section 506 of the Clean Water Act and an EPA/DOJ Memorandum of Understanding (MOU), issued on June 15, 1977, establish the basic relationship between DOJ and EPA in conducting civil judicial litigation. The MOU is found in the General Enforcement Policy Compendium (Policy #GM-3). The relationship is defined in greater detail by the April 8, 1982, memorandum entitled "Draft DOJ/EPA Litigation Procedures." A copy of that document, commonly referred to as the "Quantico (VA) Guidelines," can also be found in the General Enforcement Policy Compendium (Policy #GM-8). EPA issued guidance on case development and referrals in a September 7, 1982, memorandum from the Acting Enforcement Counsel, entitled "Case Referrals for Civil Litigation contained in the General Enforcement Policy Compendium (Policy #GM-13)." This guidance is also contained in Exhibit 2-1.

On September 29, 1983, the Deputy Administrator established a procedure for direct referral of certain routine cases in a letter to the Acting Assistant Attorney General. Under the terms of this letter, EPA Headquarters has waived concurrence in certain types of routine civil cases. The letter is also contained in the EPA Water Compliance/Enforcement Policy Compendium. Under the procedures for direct referral, the following cases will be referred directly from EPA Regional Offices to the Land and Natural Resources Division of DOJ:

- Cases involving discharges without a permit by industrial dischargers;
- All cases against "minor" industrial dischargers;

- Cases involving failure by industrial dischargers to monitor or report;

- Referrals to collect stipulated penalties from industrial dischargers under consent decrees; and

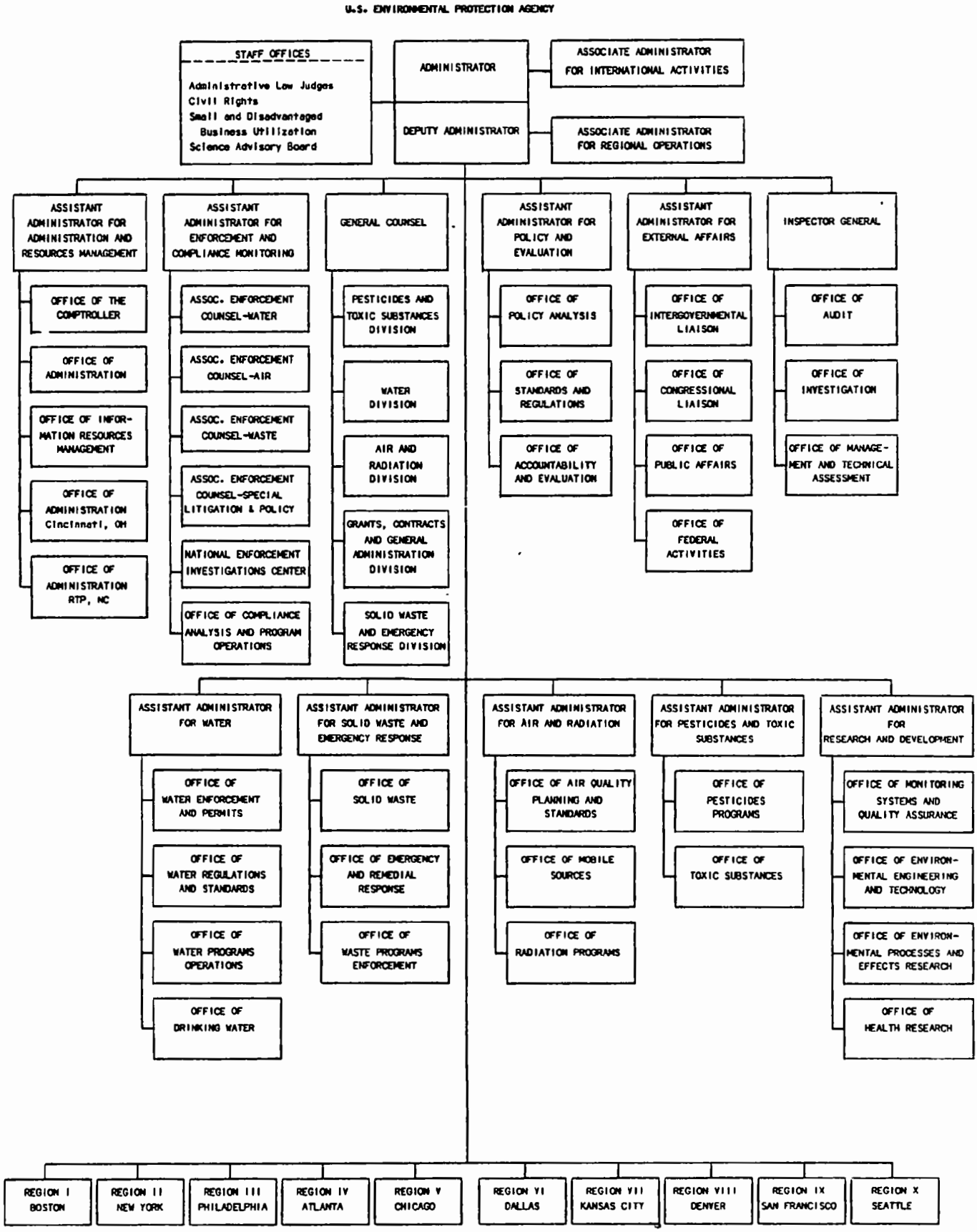
- Referrals to collect administrative penalties under Section 311(j) of the CWA.

On November 28, 1983, the Assistant Administrator for Enforcement and Compliance Monitoring issued a memorandum to EPA enforcement personnel, which provided guidance on implementing the September 29, 1983, direct referral agreement. These two documents are contained in Exhibit 2-2.

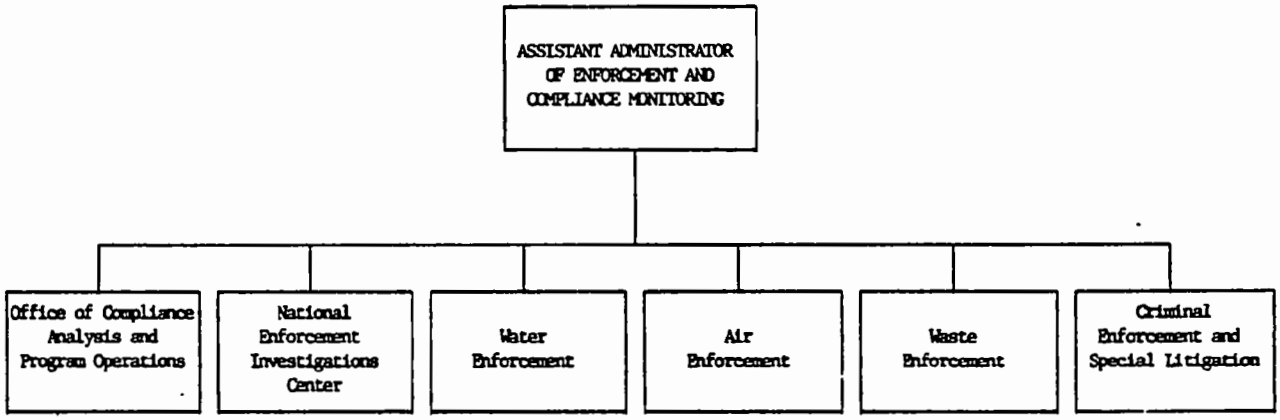
3 Organizational Charts

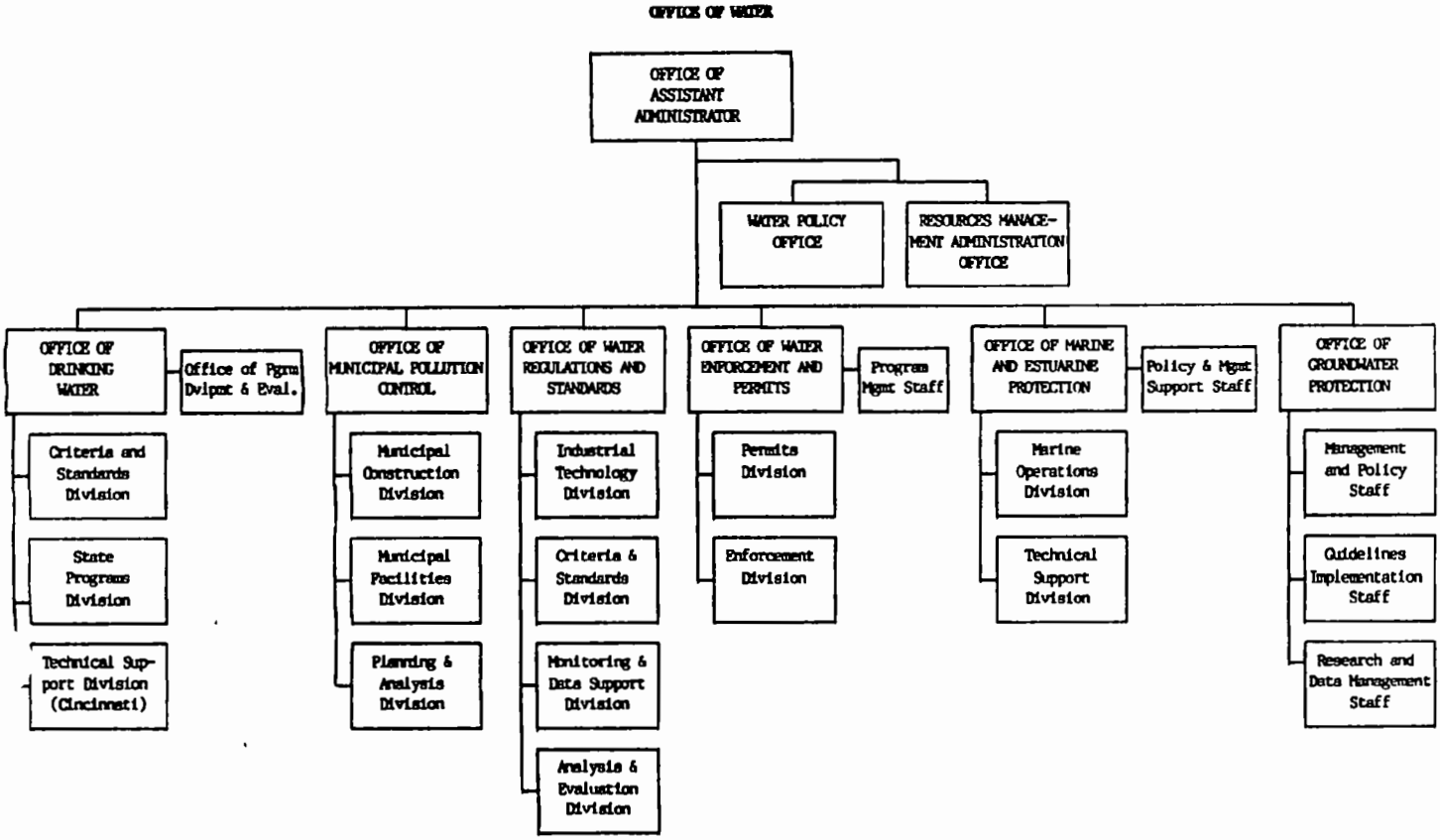
This section contains the following organizational charts:

- U.S. Environmental Protection Agency
- Office of Enforcement and Compliance Monitoring
- Office of Water


U.S. ENVIRONMENTAL PROTECTION AGENCY
STAFF OFFICES
Administrative Law Judges
Civil Rights
Small and Disadvantaged Business Utilization
Science Advisory Board
ADMINISTRATOR
DEPUTY ADMINISTRATOR
ASSOCIATE ADMINISTRATOR FOR INTERNATIONAL ACTIVITIES
ASSOCIATE ADMINISTRATOR FOR REGIONAL OPERATIONS
ASSISTANT ADMINISTRATOR FOR ADMINISTRATION AND RESOURCES MANAGEMENT
OFFICE OF THE COMPTROLLER
OFFICE OF ADMINISTRATION
OFFICE OF INFORMATION RESOURCES MANAGEMENT
OFFICE OF ADMINISTRATION Cincinnati, OH
OFFICE OF ADMINISTRATION RTP, NC
ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE MONITORING
ASSOC. ENFORCEMENT COUNSEL-WATER
ASSOC. ENFORCEMENT COUNSEL-AIR
ASSOC. ENFORCEMENT COUNSEL-WASTE
ASSOC. ENFORCEMENT COUNSEL-SPECIAL LITIGATION & POLICY
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER
OFFICE OF COMPLIANCE ANALYSIS AND PROGRAM OPERATIONS
GENERAL COUNSEL
PESTICIDES AND TOXIC SUBSTANCES DIVISION
WATER DIVISION
AIR AND RADIATION DIVISION
GRANTS, CONTRACTS AND GENERAL ADMINISTRATION DIVISION
SOLID WASTE AND EMERGENCY RESPONSE DIVISION
ASSISTANT ADMINISTRATOR FOR POLICY AND EVALUATION
OFFICE OF POLICY ANALYSIS
OFFICE OF STANDARDS AND REGULATIONS
OFFICE OF ACCOUNTABILITY AND EVALUATION
ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS
OFFICE OF INTERGOVERNMENTAL LIAISON
OFFICE OF CONGRESSIONAL LIAISON
OFFICE OF PUBLIC AFFAIRS
OFFICE OF FEDERAL ACTIVITIES
INSPECTOR GENERAL
OFFICE OF AUDIT
OFFICE OF INVESTIGATION
OFFICE OF MANAGEMENT AND TECHNICAL ASSESSMENT
ASSISTANT ADMINISTRATOR FOR WATER
OFFICE OF WATER ENFORCEMENT AND PERMITS
OFFICE OF WATER REGULATIONS AND STANDARDS
OFFICE OF WATER PROGRAMS OPERATIONS
OFFICE OF DRINKING WATER
ASSISTANT ADMINISTRATOR FOR SOLID WASTE AND EMERGENCY RESPONSE
OFFICE OF SOLID WASTE
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
OFFICE OF WASTE PROGRAMS ENFORCEMENT
ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION
OFFICE OF AIR QUALITY PLANNING AND STANDARDS
OFFICE OF MOBILE SOURCES
OFFICE OF RADIATION PROGRAMS
ASSISTANT ADMINISTRATOR FOR PESTICIDES AND TOXIC SUBSTANCES
OFFICE OF PESTICIDES PROGRAMS
OFFICE OF TOXIC SUBSTANCES
ASSISTANT ADMINISTRATOR FOR RESEARCH AND DEVELOPMENT
OFFICE OF MONITORING SYSTEMS AND QUALITY ASSURANCE
OFFICE OF ENVIRONMENTAL ENGINEERING AND TECHNOLOGY
OFFICE OF ENVIRONMENTAL PROCESSES AND EFFECTS RESEARCH
OFFICE OF HEALTH RESEARCH
REGION I BOSTON
REGION II NEW YORK
REGION III PHILADELPHIA
REGION IV ATLANTA
REGION V CHICAGO
REGION VI DALLAS
REGION VII KANSAS CITY
REGION VIII DENVER
REGION IX SAN FRANCISCO
REGION X SEATTLE

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING




OFFICE OF WATER
OFFICE OF ASSISTANT ADMINISTRATOR
WATER POLICY OFFICE
RESOURCES MANAGEMENT ADMINISTRATION OFFICE
OFFICE OF DRINKING WATER
Office of Pgm Dvlpmt & Eval.
Criteria and Standards Division
State Programs Division
Technical Support Division (Cincinnati)
OFFICE OF MUNICIPAL POLLUTION CONTROL
Municipal Construction Division
Municipal Facilities Division
Planning & Analysis Division
OFFICE OF WATER REGULATIONS AND STANDARDS
Industrial Technology Division
Criteria & Standards Division
Monitoring & Data Support Division
Analysis & Evaluation Division
OFFICE OF WATER ENFORCEMENT AND PERMITS
Program Mgmt Staff
Permits Division
Enforcement Division
OFFICE OF MARINE AND ESTUARINE PROTECTION
Policy & Mgmt Support Staff
Marine Operations Division
Technical Support Division
OFFICE OF GROUNDWATER PROTECTION
Management and Policy Staff
Guidelines Implementation Staff
Research and Data Management Staff

4 Exhibits

This section contains the following exhibits:

Exhibit 2-1: Case Referrals for Civil Litigation
Exhibit 2-2: Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

Case Referrals for Civil Litigation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

SEP 7 1982

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Case Referrals for Civil Litigation

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

TO: Regional Counsels

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

Quality of Referrals

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

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

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

-2-

Case Development Process

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

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

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

Referral Package

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

-3-

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

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

Lead Attorney

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

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

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

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

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

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

-5-

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

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

Further Clarification

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

Goal

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

cc: Robert M. Perry
Steve Ramsey
Associate Enforcement Counsels

Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

NOV 28 1983

OFFICE OF
ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983

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

TO: Regional Administrators, Regions I - X
Regional Counsels, Regions I - X
Associate Enforcement Counsels
OECM Office Directors

I. BACKGROUND

On September 29, 1983, the Environmental Protection Agency (EPA) and the Land and Natural Resources Division of the Department of Justice (DOJ) entered into an agreement which, beginning on December 1, 1983, allows certain categories of cases to be referred directly to DOJ from EPA Regional offices without my prior concurrence. A copy of that agreement is attached to this memorandum.

This memorandum provides guidance to EPA Headquarters and Regional personnel regarding procedures to follow in implementing this direct referral agreement. Additional guidance will be issued as required.

II. PROCEDURES FOR CASES SUBJECT TO DIRECT REFERRAL

The attached agreement lists those categories of cases which can be referred directly by the Regional Administrator to DOJ. All other cases must continue to be reviewed by Headquarters OECM and will be referred by me to DOJ. Cases which contain counts which could be directly referred and counts which require Headquarters concurrence should be referred to EPA Headquarters. If you are uncertain whether a particular case may be directly referred, you should contact the appropriate Associate Enforcement Counsel for guidance.

-2-

Many of the procedures for direct referral cases are adequately explained in the September 29th agreement. However, there are some points I want to emphasize.

Referral packages should be addressed to Mr. F. Henry Habicht, II, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, D.C. 20530, Attention: Stephen D. Ramsey. The time limitations set forth in the agreement for review and initial disposition of the package will commence upon receipt of the package in the Land and Natural Resources Division, and not at the DOJ mailroom. Delivery of referral packages to the Land and Natural Resources Division will be expedited by use of express mail, which is not commingled with regular mail in DOJ's mailroom.

The contents of a referral package (either direct to DOJ or to EPA Headquarters) should contain three primary divisions: (1) a cover letter; (2) the litigation report; (3) the documentary file supporting the litigation report.

The cover letter should contain a summary of the following elements:

(a) identification of the proposed defendant(s);

(b) the statutes and regulations which are the basis for the proposed action against the defendant(s);

(c) a brief statement of the facts upon which the proposed action is based;

(d) proposed relief to be sought against the defendant(s);

(e) significant or precedential legal or factual issues;

(f) contacts with the defendant(s), including any previous administrative enforcement actions taken;

(g) lead Regional legal and technical personnel;

(h) any other aspect of the case which is significant and should be highlighted, including any extraordinary resource demands which the case may require.

A referral to DOJ or to Headquarters EPA is tantamount to a certification by the Region that it believes the case is sufficiently developed for the filing of a complaint, and that the Region is ready, willing and able to provide such legal and technical support as might be reasonably required to pursue the case through litigation.

As provided in the September 29, 1983, agreement, information copies of the referral package may be provided to the U.S. Attorney for the appropriate judicial district in which the proposed case may be filed. These information packages should be clearly labelled or stamped with the following words: "Advance Copy -- No Action Required At This Time". Also, information copies should be simultaneously provided to the appropriate OECM division at Headquarters. It is important that the directly referred cases be tracked in our case docket system and Headquarters oversight initiated. Copies of the referral cover letter will be provided to OECM's Office of Management Operations for inclusion in the automated case docket system when Headquarters informational copy is received at OECM's Correspondence Control Unit.

Department of Justice Responsibilities

DOJ shares our desire to handle these cases as expeditiously as possible. To that end, DOJ has agreed that, within thirty days of receipt of the package in the Land and Natural Resources Division at DOJ Headquarters, it will determine whether Headquarters DOJ or the U.S. Attorney will have the lead litigation responsibilities on a specific case. DOJ will notify the Regional offices directly of its determination in this regard, with a copy to the appropriate OECM division. Although USA offices will have lead responsibilities in many cases, the Land and Natural Resources Division will continue to have oversight and management responsibility for all cases. All complaints and consent decrees will continue to require the approval of the Assistant Attorney General for the division before the case can be filed or settled.

DOJ has reaffirmed the time frame of the Memorandum of Understanding, dated June 15, 1977, for the filing of cases within 60 days after receipt of the referral package, where possible. Where it is not possible, DOJ will advise the Region and Headquarters of any reasons for delays in filing of the case. However, when DOJ determines that the USA should have the lead responsibilities in a case, DOJ will forward the case to the USA within thirty days of referral to the extent feasible.

DOJ can request additional information from a Region on a case or return a case to a Region for further development. In order to avoid these delays, referral packages should be as complete as possible and the Regions should work closely with DOJ to develop referral packages.

The Deputy Administrator has expressed concern in the past on the number of cases returned to the Regions or declined by EPA or DOJ. I have assured the Deputy Administrator that I will closely track the number of cases declined by DOJ or returned to the Regions and the reasons for the declination or return as indications of whether direct referrals are a feasible method of handling EPA's judicial enforcement program.

Headquarters OECM Responsibilities

Although OECM will not formally concur on cases directly referred to DOJ, OECM will still review these packages and may offer comments to the Regions and DOJ. DOJ is free to request EPA Headquarters assistance on cases, as DOJ believes necessary. EPA Headquarters review will help to point out potential issues and pinpoint areas where future guidance should be developed. OECM will also be available as a consultant to both DOJ and the Regions on these cases. OECM will be available to address policy issues as they arise and, as resources permit, may be able to assist in case development or negotiation of these cases. Any request from a Regional office for Headquarters legal assistance should be in writing from the Regional Administrator to me, setting forth the reasons for the request and the type of assistance needed.

OECM also maintains an oversight responsibility for these cases. Therefore, Regional attorneys must report the status of these cases on a regular basis through use of the automated case docket. All information for the case required by the case docket system must appear in the docket and be updated in accordance with current guidance concerning the automated docket system.

Settlements in Cases Subject to Direct Referral

I will continue to approve and execute all settlements in enforcement cases, including those in cases subject to direct referral and amendments to consent decrees in these cases. This is necessary to ensure that Agency policies and enforcement activities are being uniformly and consistently applied nationwide. After the defendants have signed the settlement, the Regional Administrator should forward a copy of the settlement to me (or my designee) with a written analysis of the settlement and a request that the settlement be signed and referred for approval by the Assistant Attorney General for the Land and Natural Resources Division and for entry. The settlement will be reviewed by the appropriate OECM Enforcement Division for consistency with law and Agency policy.

-5-

Within twenty-one days from the date of receipt of the settlement by the appropriate OECM division, I will either sign the settlement and transmit it to DOJ with a request that the settlement be entered, or transmit a memorandum to the Regional Office explaining factors which justify postponement of referral of the package to DOJ, or return the package to the Region for changes necessary before the agreement can be signed.

Obviously, we want to avoid the necessity of communicating changes in Agency settlement positions to defendants, especially after they have signed a negotiated agreement. To avoid this, the Regional office should coordinate with Headquarters OECM and DOJ in development of settlement proposals. A copy of all draft settlement agreements should be transmitted by the Regional Counsel to the appropriate Associate Enforcement Counsel for review before it is presented to the defendant. The Associate Enforcement Counsel will coordinate review of the settlement with the Headquarters program office and respond to the Regional office, generally, within ten days of receipt of the draft. The Regional office should remain in contact with the Headquarters liaison staff attorney as negotiations progress. Failure to coordinate settlement development with appropriate Headquarters offices may result in rejection of a proposed settlement which has been approved by the defendant(s) and the Regional office.

I will also continue to concur in and forward to DOJ all requests for withdrawal of cases after referral. In addition, I will review and concur in any delay in the filing or prosecution of a case after referral. This is appropriate because cases which are referred to DOJ should be expeditiously litigated to conclusion, unless a settlement or some other extraordinary event justifies suspending court proceedings. The review of reasons for withdrawal or delay of cases after expenditure of Agency and DOJ resources is an important function of OECM oversight. Therefore, should the Regional offices desire to request withdrawal or delay of a case which has been referred to DOJ, a memorandum setting forth the reasons for such a request should be forwarded to the appropriate OECM division, where it will be reviewed and appropriate action recommended to me.

III. CASES NOT SUBJECT TO DIRECT REFERRAL

Those cases not subject to direct referral will be forwarded by the Regional Administrator to the Office of Enforcement and Compliance Monitoring for review prior to referral to DOJ. OECM has committed to a twenty-one day turn-around time for these cases. The twenty-one day review period starts when the referral is received by the appropriate OECM division.

Within this twenty-one day period, OECM will decide whether to refer the case to DOJ (OECM then has fourteen additional days to formally refer the case), to return the case to the Region for further development, or to request additional information from the Region.

Because of this short OECM review period, emphasis should be placed on developing complete referral packages so that delay occassioned by requests for additional information from the Region will be rare. OECM may refer a case to DOJ which lacks some information only if the referral can be supplemented with a minimum of time and effort by information available to the Regional office which can immediately be gathered and transmitted to DOJ. However, this practice is discouraged. In the few instances in which a case is referred to DOJ without all information attached, the information should, at a minimum, be centrally organized in the Regional office and the litigation report should analyze the completeness and substantive content of the information.

A referral will be returned to the Region, with an explanatory memorandum, if substantial information or further development is needed to complete the package. Therefore, the Regions should work closely with OECM attorneys to be certain referral packages contain all necessary information.

IV. MEASURING THE EFFICACY OF THE DIRECT REFERRAL AGREEMENT

I will use EPA's case docket system, OECM's quarterly Management Accountability reports and DOJ's responses to the referral packages to review the success of the direct referral agreement. OECM will review the quality of the litigation reports accompanying directly referred cases and discuss the general quality of referrals from each Regional office at case status meetings held periodically with DOJ's Environmental Enforcement Section.

If you have any questions concerning the procedures set out in this memorandum, please contact Richard Mays, Senior Enforcement Counsel, at FTS 382-4137.

Attachment

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

Sep 29, 1983

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, 1983 and the subsequent discussions of respective staffs, we are in agreement that, subject to the conditions set forth below, the classes of cases listed herein will be referred directly from EPA's Regional Offices to the Land and Natural Resources Division of the Department of Justice in Washington, D.C.

The terms, conditions and procedures to be followed in implementing this agreement are:

1. The Assistant Administrator for Enforcement and Compliance Monitoring will waive for a period of one year the requirement of the Assistant Administrator's prior concurrence for referral to the Department of Justice for the following classes of judicial enforcement cases:

   (a) Cases under Section 1414(b) of the Safe Drinking Water Act which involve violations of the National Interim Primary Drinking Water Regulations, such as reporting or monitoring violations, or maximum contaminant violations;

   (b) The following cases under the Clean Water Act:

      (i) cases involving discharges without a permit by industrial dischargers;

      (ii) all cases against minor industrial dischargers;

      (iii) cases involving failure to monitor or report by industrial dischargers;

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

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

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

(i) cases involving the steel industry;

(ii) cases involving non-ferrous smelters;

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

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

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

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

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

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

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

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

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

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

(b) OECM shall review the referral package within twenty-one (21) calendar days of the date of receipt of said package from the Regional Administrator and shall, within said time period, make a determination of whether the case should be (a) formally referred to DOJ, (b) returned to the Regional Administrator for any additional development which may be required; or (c) whether the Regional Administrator should be requested to provide any additional material or information which may be required to satisfy the necessary and essential legal and factual requirements for that type of case.

-4-

(c) Any request for information, or return of the case to the Region shall be transmitted by appropriate letter or memorandum signed by the AA for OECM (or her designee) within the aforementioned twenty-one day period. Should OECM concur in the proposed referral of the case to DOJ, the actual referral shall be by letter from the AA for OECM (or her designee) signed within fourteen days of the termination of the aforementioned twenty-one day review period. Copies of the letters referred to herein shall be sent to the Assistant Attorney General for the Lands Division of DOJ.

(d) Upon receipt of the referral package by DOJ, the procedures and time deadlines set forth in paragraph No. 8 of the MOU shall apply.

In order to allow sufficient time prior to implementation of this agreement to make the U.S. Attorneys, the Regional Offices and our staffs aware of these provisions, it is agreed that this agreement shall become effective December 1, 1983. Courtney Price will distribute a memorandum within EPA explaining this agreement and how it will be implemented within the Agency. (You will receive a copy.)

I believe that this agreement will eliminate the necessity of formally amending the Memorandum of Understanding between our respective agencies, and will provide necessary experience to ascertain whether these procedures will result in significant savings of time and resources. In that regard, I have asked Courtney to establish criteria for measuring the efficacy of this agreement during the one year trial period, and I ask that you cooperate with her in providing such reasonable and necessary information as she may request of you in making that determination. At the end of the trial period—or at any time in the interval—we may propose such adjustments in the procedures set forth herein as may be appropriate based on experience of all parties.

It is further understood that it is the mutual desire of the Agency and DOJ that cases be referred to the USA for filing as expeditiously as possible.

I appreciate your cooperation in arriving at this agreement. If this meets with your approval, please sign the enclosed copy in the space indicated below and return the copy to me for our files.

Sincerely yours,

Alvin L. Alm
Deputy Administrator

Approved:

F. Henry Habicht, II
Acting Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

Chapter Three

Compliance Monitoring Procedures

Chapter Contents

1 Introduction

The Clean Water Act (CWA) authorizes EPA or an approved NPDES state to issue permits and to set effluent limitations, conditions, and pretreatment standards to be met by permittees and indirect dischargers. Section 308 authorizes monitoring and inspections to determine whether NPDES permit limitations and conditions are met. Specifically, Section 308 of the Act:

- Requires permittees and indirect dischargers to maintain records, make reports, install and maintain monitoring equipment, and sample effluents.
- Authorizes EPA to enter and inspect facilities to examine and copy records and monitoring equipment and to sample effluents.
- Authorizes public access to records unless they are shown to require confidential treatment in order to protect trade secrets.

States with approved NPDES programs carry out NPDES compliance monitoring activities. EPA may grant such approval if a state has authority equivalent to Section 308 of the CWA. After a state is approved, however, EPA continues to play an important oversight role in enforcement, compliance monitoring, and permit development.

With 37 states approved to run NPDES programs, most compliance monitoring activity takes place at the state level. The CWA and NPDES regulations (40 C.F.R. §123.26) require that an approved state conduct NPDES compliance monitoring. Several non-NPDES states conduct their own compliance monitoring activities and conduct joint inspections with EPA personnel.

This chapter provides a brief introduction to compliance monitoring and inspection issues, including review of a facility's recordkeeping and reporting. For a more detailed discussion on the technical aspects of compliance monitoring and inspections, refer to the NPDES Compliance Inspection Manual (June 1984), which consolidates and supersedes earlier NPDES inspection manuals.

2 Self-Monitoring and Other Information Gathering

In passing the Clean Water Act, Congress placed initial responsibility for determining compliance on the regulated community. Section 308 authorizes EPA to require sources (both direct and indirect) to maintain records, to make reports, to install and maintain monitoring equipment, and to sample effluents. The NPDES program regulations (40 C.F.R. §§122.41, 122.42, and 122.48) require permittees to monitor effluent limitations, and require routine sampling and analysis of effluents and the reporting of numerical effluent limitations at the frequency stated in the permit, but in any event not less than once a year. These results are reported on standard Discharge Monitoring Reports (DMRs). (See Exhibit 3-1.) State-approved NPDES programs are required to use the standard DMR form.

The NPDES regulations contain a number of other reporting requirements relating to actual or potential permit or other violations. Permittees must orally report noncompliance that may endanger health or the environment within 24 hours after becoming aware of the violation and must submit a written report within 5 days after becoming aware of the violation [40 C.F.R. §122.41(l)(6)(i)]. In addition, permittees must report violations of maximum daily discharge limitations for any pollutant listed for such reporting within 24 hours [40 C.F.R. §122.41(l)(6)(ii)].

The NPDES permit regulations also require reporting of compliance or noncompliance with final permit compliance dates and with interim compliance schedule requirements [40 C.F.R. §122.41(l)(5)].

The General Pretreatment Regulations set reporting requirements for indirect dischargers that may establish strong evidence of violations of pretreatment categorical standards. First, 40 C.F.R. §403.12(d) requires an industrial user subject to a categorical pretreatment standard to submit to the Control Authority (either EPA or an approved state or local program authority) a report indicating the nature and concentration of all pollutants in the discharge that are limited by applicable pretreatment standards. The user must submit this report within 90 days following the date for final compliance with categorical pretreatment standards or, for a new source, following commencement of the introduction of wastewater into the POTW. The report must state whether the user is meeting these standards and, if not, what additional measures are needed to bring the user into compliance.

Second, 40 C.F.R. §403.12(e) requires industrial users subject to categorical pretreatment standards to submit to the Control Authority (during the months of June and December following the compliance date of such standard) a report on the nature and concentration of pollutants in the effluent that are limited by categorical pretreatment standards. Both reports must contain the results of sampling and analysis of the discharge. Control Authorities establish monitoring frequencies.

Certain types of NPDES permits also require special reporting. Many of these requirements are discussed in greater detail in Chapter Eleven. For example, permittees must notify the regulatory authority of planned changes in or expansion of production facilities [40 C.F.R. §122.41(l)(1)] and non-POTWs must provide notification when the effluent contains toxics in amounts over the notification level [40 C.F.R. §122.42(a)]. POTWs must provide information on new indirect discharges and on substantial changes in the type or volume of materials received from existing contributors [40 C.F.R. §122.42(b)].

Section 308(a) further authorizes EPA to require a source to provide specific information to assist EPA in determining compliance. Where a DMR reflects permit violations, EPA may request copies of permittee-retained monitoring documents to confirm the number of days of violation of maximum effluent limitations, particularly where an on-site inspection cannot be easily scheduled. [See, 40 C.F.R. §122.41(h).] EPA may also use a Section 308 letter to request information from a suspected discharger who does not currently have a permit. Finally, a Section 308 information request can require sampling, analysis, and reporting of data formerly required under the terms of an expired but not extended NPDES permit. This occurs where the state runs the NPDES program although state law does not have a statutory provision for extending state-issued permits beyond their expiration date even where a timely application is filed.

Section 308 is also used as an informal information-gathering tool to assist in implementing EPA regulatory programs or in issuing permits. For example, Section 308 authorizes EPA to request information on an industrial discharger's facility for the purpose of collecting data for use in developing national effluent guidelines. Section 308 can also be used to require information that would be necessary for the preparation of an NPDES permit.

Section 308 requests may be particularly helpful in providing EPA with sufficient information to modify an existing NPDES permit, where enforcement of existing permit conditions is not at issue. For example, the Regional Office may suspect that an NPDES-permitted facility is causing toxicity problems in a receiving stream. However, the existing permit does not place effluent limitations on toxic pollutants. Although EPA may not be able to enforce against a discharger for pollutants that are not limited in the permit (see "Permit as a Shield" section in Chapter Eleven), it can request the discharging facility to perform toxicity analyses that would enable EPA to set toxics limits in a modified or reissued permit. Failure to comply with the request may result in an enforcement action under Section 309.

Chapter Six addresses Section 308 letters in the context of administrative enforcement actions.

3 Inspections

EPA may conduct an administrative inspection wherever there is an existing discharge permit, or where a discharge exists or is likely to exist, even though no permit has been issued. Inspections can be used either to inspect a regulated facility even though there is no reason to believe there is a CWA violation or where a CWA violation is suspected. Inspections extend to facilities where records are maintained and located elsewhere.

State and federal inspectors have two major areas of responsibility:

- Legal responsibilities include presenting proper EPA credentials prior to inspections and properly handling any confidential business information that may be obtained as a result of the inspection. The inspector must also be familiar with the statutory and regulatory sections that apply to the inspected facility.

- Procedural responsibilities include collecting and preserving evidence in such a way as to avoid jeopardizing a potential legal action. This also involves keeping detailed inspection records and preparing an accurate inspection report.

Following the inspection, the inspector should do the following:

- Supplement facts contained in the inspection report with evidence, including samples of effluent, photographs, statements from witnesses, and personal observations;

- Determine what data should be collected to serve as possible evidence;

- Clearly report the facts observed; and

- Relate the facts and data observed, either in court or in an administrative hearing.

The inspector should also be aware of the requirements contained in the statute, regulations, and the NPDES Compliance Inspection Manual (June 1984). This section is based largely on the NPDES Compliance Inspection Manual.

Neutral Inspection Scheme

In planning inspections, EPA uses the "Neutral Inspection Plan for the NPDES Program" (policy issued February 17, 1981, and contained in the Water Compliance/Enforcement Policy Compendium). Under this plan, EPA selects facilities for routine inspections only on the bases of the time that has passed since the last inspection and their geographic location. EPA does not schedule routine inspections with any bias to any one category or treatment type.

When EPA plans a routine inspection, it prepares an inspection plan. The plan determines the type of inspection, purpose, tasks to be completed, schedules, and milestones.

The requirements of a neutral inspection plan do not apply, however, when the Agency has probable cause to inspect a facility for suspected violations. Probable cause is usually present when, for example, a violation is reported to EPA by the facility's self-monitoring reports or by the public.

Types of Inspections

Program enforcement personnel conduct the following types of facility inspections. Note that these inspections may also include a component for pretreatment.

Compliance Evaluation Inspection (CEI) is a nonsampling inspection designed to verify permittee self-monitoring requirements and compliance schedules. This inspection is based on facility record reviews and on visual observations and evaluations of treatment facilities, effluents, and receiving waters. The CEI inspection is scheduled routinely for all major facilities on a rotating schedule.

Compliance Sampling Inspection (CSI) involves the collection of representative samples of the permittee's influent or effluent (or both) during an inspection. EPA performs chemical analyses (1) to verify the accuracy of the permittee's self-monitoring program and reports, (2) to determine the quantity and quality of the effluents, and (3) when appropriate, to provide evidence in enforcement proceedings. This inspection also includes the nonsampling tasks of the CEI. EPA schedules CSI inspections on a rotating basis for all major facilities.

Toxics Sampling Inspection (TSI) is a sampling inspection that focuses on priority pollutants other than heavy metals, phenols, and cyanide, which are typically included in a CSI. The TSI is only scheduled when there are significant toxics problems in a particular discharge, either in an industrial source or in a municipal treatment works that is treating toxic discharges.

Diagnostic Inspection (DI) of a publicly owned treatment works (POTW) is used to identify compliance problems and direct them to the permittee for correction, and to evaluate why the POTW is not able to meet its discharge limits. EPA conducts the inspection as part of an enforcement data-gathering effort. The inspector conducts a visual inspection of the facility and discusses operational issues with facility management personnel.

Performance Audit Inspection (PAI) is used to verify the permittee's reported data and compliance through a check of laboratory records. The inspector reviews the permittee's self-monitoring program, from sample collection to final report. (EPA does not separately sample and analyze the effluents.) EPA may request the facility's laboratory to run performance audit samples (standardized test samples) as part of the performance audit to ensure that the analyses of the facility laboratory are adequate. EPA performs this inspection only when it has reason to believe that a facility laboratory is not producing correct analytical results.

Compliance Biomonitoring Inspection (CBI) evaluates the biological effect of the permittee's effluent on test organisms using acute toxicity bioassay techniques and includes the steps involved in a CEI. EPA may use data collected from this inspection to determine whether more stringent water quality-based limitations should be placed in an NPDES permit.

Reconnaissance Inspection (RI) is used to obtain a preliminary overview of a permittee's compliance program. The inspector performs a brief visual inspection of the permittee's treatment facility, effluents, and receiving waters. The RI utilizes the inspector's experience and judgment to quickly summarize a permittee's compliance program. It is the briefest of all NPDES inspections.

Legal Support Inspection (LSI) is a resource-intensive inspection conducted as part of case referral preparation following a routine inspection.

Notification of a Pending Inspection

State Notification

EPA will notify the appropriate state regulatory agency in a timely manner of inspections to be conducted within the state's jurisdiction, with the possible exception of emergencies, consistent with the State/EPA Enforcement Agreement.

Facility Notification

The regulatory authority may send a letter pursuant to Section 308 to notify a facility that it is scheduled for an inspection. The letter advises that an inspection is imminent but generally does not specify the exact date of the inspection. The letter may request information on such

issues as on-site safety requirements and safety equipment needed by an inspector. The letter generally also informs the permittee of the right to assert a claim of confidentiality, in cases where a trade secret might be disclosed. A model notification letter is contained in Exhibit 3-2.

EPA can conduct the inspection without prior notice or can present notification during entry. EPA does not generally give notification when it suspects illegal discharges or improper recordkeeping since conditions can be altered or records destroyed before the inspection.

Chronology of Inspection Procedures

The inspector should follow the overall chronology of inspection procedures described below:

Pre-Inspection Activities

- Establish the purpose, objectives, type, and scope of the inspection considering the importance of the facility and the available Agency resources;
- Review background information, including a description of the facility, records on monitoring results, correspondence, and the most recent permit;
- Provide timely notification to the appropriate state regulatory agency;
- Develop a project plan for carrying out the inspection. The project plan addresses the purpose, tasks, scope, procedures, and needs for the inspection, including personnel and equipment;
- Gather forms and equipment for the inspection; and
- Coordinate time for completing the inspection with the laboratory, if samples are to be taken.

Entry to Facility Premises

Established entry procedures involve the following steps:

- Present official Agency employee credentials; and
- Obtain approval to inspect from person authorized to give consent (or take appropriate action on a denial of entry, including obtaining an administrative warrant).

Opening Conference With Facility Officials

After entry, the inspector normally conducts an opening conference with the facility's management. During the conference, the inspector will:

- Discuss the inspection plan, including objectives and scope, with the facility management; and
- Establish a working relationship with the facility officials.

Facility Inspection

During the inspection, the inspector will determine compliance with the permit and the regulations and collect evidence of any violations. The inspector will:

- Review facility self-monitoring records;
- Inspect monitoring equipment, treatment processes, and associated manufacturing processes, treatment operation logs, parts inventories, laboratory facilities, as well as sampling points and procedures;
- Collect samples (and provide split samples for permittee if requested) if inspection includes sampling; and
- Accurately record all data collected and observations made during the course of the inspection.

Closing Conference With Plant Operator

At the closing conference, the inspector normally concludes the inspection by:

- Collecting additional information, if needed; and
- Clarifying any misconceptions with facility officials.

Inspection Report and Post-Inspection Activities

In order to document, organize, and complete his or her inspection activities, the inspector will do the following:

- Complete the NPDES Compliance Inspection Report (EPA Form 3560-3; see Exhibit 3-3);
- Follow sample chain-of-custody requirements (see discussion in Chapter Four) and deliver samples to the laboratory;

- Follow required sample preservation techniques and holding times for sample storage; and
- Prepare narrative report.

Professional Conduct During the Inspection

EPA has adopted revised regulations on employee ethics in conducting governmental business [40 C.F.R. §3.103, 49 Fed. Reg. 7528 (February 29, 1984)]. All inspectors should conduct themselves in accordance with these regulations. The regulations provide that "[e]mployees may not use their official positions for private gain or act in such a manner that creates the reasonable appearance of doing so."

Inspectors may not accept favors, benefits, or meals from the facility owner or operator because such action might be construed as influencing the inspectors' performance of their governmental duties. Inspectors may accept refreshments or nominally priced meals when refreshments are offered as part of a general meeting; however, these occasions should be kept to a minimum.

Entry

Unless entry is authorized by an administrative warrant, the facility owner or operator must give consent to the inspector before he or she can enter the facility. The EPA inspector must give the facility's owner or operator an opportunity to examine the inspector's credentials and to call the Agency office to verify the credentials. The inspector must present credentials to preclude personal liability for his or her actions. An inspector may, however, be personally liable if he or she threatens the owner/operator, uses force to enter the premises, or accepts gifts or payment from a permittee.

Releases and Waivers

EPA employees must not sign any type of waiver or visitor release that would relieve the facility of responsibility for injury to the EPA employee or that would limit the rights of EPA to use the data gathered during the inspection. If entry is made conditional on signing either type of release, the inspector should contact the Regional Counsel's Office.

Denial of Entry and Administrative Warrants

Where entry is refused or the owner or operator asks the inspector to leave during an inspection, the inspector must follow the procedures listed

below, which have been developed in accordance with the U.S. Supreme Court's decision in Marshall v. Barlow's, Inc.* [436 U.S. 307 (1978)].

- Ensure that all credentials and notices have been presented to the facility owner or operator;
- Determine the reasons for the denial of entry. Officials of the facility may wish first to seek advice from their attorneys on EPA's inspection authority under Section 308;
- If entry is still denied, the inspector should withdraw from the facility and inform his or her supervisor who will confer with the Office of Regional Counsel to consider obtaining a warrant; and
- Carefully note all observations made and data collected to support the denial, including the name and title of persons approached, reason(s) for denial, date and time of denial, condition of the facility, attitude of the owner or operator toward compliance inspections, effluent quality, previous noncompliance with permit limits, and any other probable cause to suspect a violation. These factors are extremely important because they may form the basis for requesting an inspection warrant.

If denied access to some parts of the facility, the inspector should note the reasons for the denial and the parts of the inspection that could not be completed. The inspector should contact the Regional Office to discuss whether to obtain a warrant to complete the inspection.

A warrant is a judicial authorization for Agency personnel to enter specifically described locations and to perform specific inspection functions. An inspector may request a warrant prior to inspection if he or she suspects that violations may be hidden during the time required to obtain a search warrant. The documents required in securing a warrant are discussed in the April 11, 1979 memorandum, "Conduct of Inspections After the Barlow's Decision" (contained in General Enforcement Policy Compendium, GM-5). Section 5 of this chapter ("Warrants") discusses procedures for obtaining a warrant.

Contractor Inspections

EPA considers contractors as "authorized representatives" under Section 308 of the Clean Water Act, and they may, therefore, conduct inspections. Industry, however, has challenged EPA's authority to consider contractors

* In Marshall v. Barlow's Inc., the Supreme Court held that the Constitution prohibits an OSHA inspector from entering the nonpublic portions of a work site to conduct searches without either proper consent or an administrative search warrant.

as "authorized representatives." In Stauffer Chemical Co. v. EPA [647 F. 2d 1075, 1079 (10th Cir. 1981)], the court held that employees of an independent contractor are not authorized representatives of the EPA Administrator under Section 114(a)(2) of the Clean Air Act. (Section 308 of the Clean Water Act contains comparable entry and inspection language.) The Sixth Circuit arrived at the same conclusion in United States v. Stauffer Chemical Co. [684 F. 2d 1174, 1189-90 (6th Cir. 1982), aff'd on other grounds United States v. Stauffer Chemical Co., No. 82-1448 (U.S. Sup. Ct.)]. However, in another Clean Air Act case, the Ninth Circuit has held that contractors are "authorized representatives," Bunker Hill Co. Lead and Zinc [658 F. 2d 1280, 1284 (9th Cir. 1981)]. Accord Aluminum Co. of America v. EPA, No. M-80-13 (M.D.N.C. Aug. 5, 1980).

Opening Conference

After entry, the inspector should outline inspection plans with facility officials and conduct an opening conference. At the opening conference, the inspector should cover the following items:

- Discuss objectives and scope of the inspection;
- Discuss inspection authority under the CWA and its regulations;
- Advise the facility manager (or equivalent) of his or her right to request that trade secret information be held confidential;
- Plan meetings with personnel and schedule inspections of the various plant areas;
- Outline the list of records to review and obtain copies;
- Discuss plant safety requirements and emergency procedures;
- Establish ground rules for taking photographs; and
- Advise company officials of their right to sample or conduct observations or measurements simultaneously with the EPA inspector.

Conducting the Inspection

The inspector should consider requesting a facility official to accompany him or her during the inspection who can describe facility processes and minimize safety and liability concerns.

The inspector's field notebooks, facility operator's formal statements, photographs, drawings and maps of the facility, printed matter, mechanical drawings, and copies of facility records and documents can all be used as evidence of possible violations.

The field notebook should contain only objective facts and observations; it is a part of the Agency files, not a personal record. The inspector should number, date, initial, and include the facility name and location on any document collected during the inspection.

Photographs can provide an objective record of plant conditions. The inspector should obtain the approval of the facility official before taking any photographs. The inspector should avoid photographing sensitive operations, such as equipment, that are claimed as trade secrets by the operator. If refused permission, the inspector may contact the Regional Counsel's Office for further instructions. Inspectors may, however, take photographs from areas of public access and should log these photographs in their field notebooks.

The inspector, plant employee, or a private citizen may also prepare a formal statement. The statement must contain factual information, and it must positively identify the person making the statement and his or her qualifications. The person who makes the statement should sign it. Chapter Four discusses types of evidence in more detail.

Sampling and Laboratory Analysis

The inspection may, depending on the type, include sampling or evaluation of the facility's sampling program. In addition, the inspection will often evaluate the quality control measures employed by the facility to ensure data integrity, including the collection and analysis of samples by the facility. The inspector should properly seal and preserve samples, follow established chain-of-custody procedures, and verify the following:

- Compliance with effluent limitations;
- Self-monitoring data;
- Compliance of facility's sampling program with the permit and other applicable regulations;
- Adequacy of data to support an enforcement action; and
- Permit reissuance or permit revision.

The results of these activities are often used as evidence in Agency enforcement actions.

The procedures that facility laboratories must follow in analyzing water pollutants are contained in 40 C.F.R. Part 136. Anyone may apply to the Regional Administrator for approval of an alternative test procedure (40 C.F.R. §§136.4 and 236.5). Finally, the inspector must ensure that all

data introduced into the inspection file are complete, accurate, and representative of existing conditions at the facility.

Chapters Five and Six of the NPDES Compliance Inspection Manual contain a detailed, technical discussion of sampling collection and flow measurement. Chapter Seven of that manual addresses biomonitoring inspections.

Deficiency Notice

Where the inspector finds deficiencies in the permittee self-monitoring program (i.e., sampling and analysis), he or she should complete a deficiency notice that can be issued on-site following the inspection or issued later by the Regional program office. Exhibit 3-4 contains a deficiency notice form. The deficiency notice provides a quick response to problems with a permittee's self-monitoring program.

The permittee can respond to a deficiency in one of two ways:

- Include the response as part of a regular DMR; or
- Submit a separate response within a specified period following receipt of the deficiency notice (15 working days are generally sufficient to correct self-monitoring problems).

For either response option, however, the inspector should specify in the deficiency notice a deadline for the permittee's response to the notice.

Confidential Business Information

Records, reports, and any other information obtained during an inspection relating to effluent data are required to be available to the public under Section 308 of the CWA. If the facility can show that the information contains trade secrets, the Administrator must keep such information confidential. However, a business cannot refuse access merely by making a confidentiality claim under Section 308 of the CWA to the inspector. Regulations on handling confidentiality claims are contained in 40 C.F.R. §§2.201 through 2.215. Under 18 U.S.C. §1905, disclosure of confidential information by federal employees may be punishable by fines or imprisonment. Confidential information cannot be disclosed to the public, but may be disclosed to EPA representatives for purposes of enforcement.

Enforcement personnel must treat all material claimed to be confidential as such until a Regional Office determines otherwise. Confidential information includes equipment or process flows that are regarded as trade secrets. All confidential information must be marked as such and must be kept in a locked filing cabinet following an inspection.

EPA must keep a chain-of-custody record for all confidential information. A chain-of-custody record documents possession of evidence from the time of the inspection to the time it is introduced as evidence in a case.

While traveling, inspectors should keep sensitive information in a locked briefcase and out of public view. When the briefcase is not in the inspector's possession, he or she should place it in a locked area such as a motel room or the trunk of a car (see 40 C.F.R. Part 2.211).

Chapter Eleven contains a more detailed discussion of confidential business information.

Exit Interview

Inspectors may discuss any deficiencies in self-monitoring procedures and the need for corrective action with the facility owner or operator, unless the inspector feels a permit violation has occurred. When the inspector has reason to believe that an enforcement action may be necessary, he or she should not release information on the violation before consulting with the Regional Office. The inspector should never discuss compliance status or enforcement consequences of noncompliance, nor should he or she recommend a particular consultant or consulting firm.

The exit conference with facility officials allows the inspector to complete any work that remains after the inspection. During the exit conference, the inspector may do several things:

- Collect missing or additional information;
- Answer any questions;
- Prepare receipts for samples and data;
- Accept claims of confidential business information; and
- Provide for the permittee to obtain the results of the sampling analysis when completed.

Documentation and Inspection Report

As soon as possible after the inspection, the EPA employee must prepare an inspection report. The report should contain the inspection report and narrative and documentary support. EPA should mail the sampling and analysis data to the permittee or industrial user no later than 30 days following the completion of the analysis. The narrative portion of the inspection report should document and support suspected violations.

4 Reviewing Facility Recordkeeping and Reporting

NPDES Requirements Review

NPDES permits impose recordkeeping and reporting requirements. During an inspection, EPA or an approved NPDES state may review the recordkeeping practices of the permittee against the recordkeeping and self-monitoring requirements stated in the permit and in 40 C.F.R. §§122.41, 122.42 and 122.48. Where an industrial user is involved, EPA should review the pretreatment reporting requirements in 40 C.F.R. §403.12.

The types of records EPA reviews may include sampling and analysis data, monitoring records, laboratory records, plant manuals, operating records, management records, and pretreatment records (e.g., baseline monitoring reports). Exhibit 3-5 contains a checklist inspectors should use to verify that:

- Information on the facility that is contained in the permit is correct;
- Records and reports required by permit are complete, including laboratory analyses; and
- The permittee is meeting its compliance schedule, including construction and permit milestones.

The checklist is also contained in the NPDES Compliance Inspection Manual.

EPA should determine that information is maintained at least three years from the date of a sample, measurement report, or application pursuant to 40 C.F.R. §122.41(j). In particular, the inspector should check items such as changes in the raw wastewater volume, changes in the location or characteristics of the waste discharged, and changes in the treatment process.

POTW and Industrial Contributor Pretreatment Requirements Review

The inspector must do the following when addressing pretreatment requirements:

1. Determine the status of the POTW's pretreatment program.

   - Has the program been approved by EPA or a state, or is the approval in progress?

   - Is the POTW in compliance with the pretreatment requirements of its permit? If not, what information is lacking, why is the information overdue, and what is the POTW doing to get back on schedule?

2. Collect information about the compliance status of contributing industrial facilities with Categorical Pretreatment Standards. The inspector should review POTW records to determine:

   - Number of contributing industries;

   - Whether these industries have been notified of applicable standards;

   - Whether industries have submitted baseline monitoring and other compliance reports to the POTW;

   - Number and names of contributing industries in compliance with standards; and

   - Whether contributing industries with compliance schedules are meeting deadlines.

3. Collect information about the status of compliance of contributing industries with prohibited discharges (40 C.F.R. §403.5) and local limits, if more stringent than EPA Categorical Pretreatment Standards. This applies in cases where the POTW determines that more stringent discharge requirements are needed due to industrial loadings in relation to available POTW treatment systems. The inspector should report:

   - How many and which industrial facilities appear not to be in compliance;

   - Any reasons for noncompliance; and

   - Any follow-up action recommended, such as further inspections, monitoring, review of discharge limits, etc.

Exhibit 3-5 contains a checklist for reviewing pretreatment requirements.

5 Warrants

In the vast majority of cases, EPA obtains the consent of the facility's management in order to enter the premises and to conduct compliance monitoring activities. However, some facilities refuse to allow EPA employees access to premises, especially where "trade secrets" are claimed or surreptitious illegal activities may be conducted. When consent cannot be obtained (or is withdrawn) an administrative warrant can be used to gain entry.

Policy

It is EPA policy to obtain a warrant when all other efforts to gain lawful entry have been exhausted and the inspector has carefully followed established entry procedures. This policy, of course, does not apply to pre-inspection warrants.

Marshall v. Barlow's, Inc.

In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Supreme Court addressed the need for an administrative warrant when an Occupational Health and Safety Administration inspector sought entry into a workplace where consent for the inspection was not voluntarily given by the owner. The Court concluded that an administrative warrant was required to conduct such regulatory inspections unless the industry is one with a history of pervasive regulation, such as liquor or firearms. The Agency applies the requirements of the Barlow's decision to all CWA inspections.

According to Barlow's, a warrant may be obtained on either of two bases:

- Where there is probable cause to believe that a violation has been committed; or
- When the inspection is pursuant to a neutral inspection scheme. (On February 17, 1981, EPA issued "Neutral Inspection Plan for the NPDES Program," contained in the Water Complinace/Enforcement Policy Compendium.

Probable cause (for purposes of administrative warrants) means that there is specific evidence of an existing violation or the threat of one. The application for the warrant must be supported by factual information sufficient to apprise a court of the specific nature of the circumstances giving rise to the need for a warrant.

Seeking a Warrant Before Inspection

Normally, EPA arrives at a facility and requests entry without having first obtained a warrant. If the facility denies entry, EPA then obtains the warrant. However, it is sometimes advisable to obtain a warrant prior to going to the facility. A pre-inspection warrant may be obtained at the discretion of the Regional Office if:

- A violation is suspected and could be covered up within the time needed to secure a warrant;
- Prior correspondence or other contact with the facility to be inspected provides reason to believe that entry will be denied when the inspector arrives; or
- The facility is unusually remote from a magistrate or a district court and, thus, obtaining a warrant after a refusal of entry would require excessive travel time.

Civil Versus Criminal Warrants

If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, a civil warrant should be secured if entry is refused.

If the primary purpose of the inspection is to gather evidence for a criminal prosecution and there is sufficient evidence available to establish probable cause for a criminal warrant, then a civil warrant should not be used to gain entry. Rather, a criminal search warrant must be obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure. (See "The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations" contained in the General Enforcement Policy Compendium, #GM-36.)

Evidence obtained during a valid civil inspection is generally admissible in criminal proceedings.

Securing and Serving an Administrative Warrant

EPA developed certain procedures for obtaining and serving warrants in light of the Barlow's decision.

Important Procedural Considerations

- The application for a warrant should be made as soon as possible after the denial of entry or withdrawal of consent.

- In order to satisfy the requirements of Barlow's, the affidavit in support of the warrant must include a description of the reasons why the establishment has been chosen for inspection. The only acceptable reasons are specific probable cause or selection of the establishment for inspection pursuant to a neutral administrative inspection scheme.

- A warrant must be served without undue delay and within the number of days stated (usually 10 days). The warrant will usually direct that it be served during daylight hours.

- Because the inspection is limited by the terms of the warrant, it is very important to specify to the greatest extent possible the areas intended for inspection, records to be inspected, samples to be taken, etc. A vague or overly broad warrant probably will not be signed by the magistrate.

- If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the U.S. Attorney.

Procedures for Obtaining a Warrant

1. Contact the Regional Counsel's Office. The inspector should discuss with the Regional Counsel's Office the facts regarding the denial or withdrawal of consent or the circumstances that gave rise to the need for a pre-inspection warrant. A joint determination will then be made as to whether or not to seek a warrant.

2. Contact Headquarters Program Office. The Regional Office should notify Headquarters.

3. Contact the United States Attorneys Office. After a decision has been made to obtain a warrant, the designated regional official should contact the U.S. Attorney for the district in which the property is located. The Agency should assist in the preparation of the warrant and necessary affidavits.

4. Apply for the Warrant. The application for a warrant should identify the CWA as authorizing the issuance of the warrant. The name and location of the site or establishment to be inspected should be clearly identified and, if possible, the owner or operator (or both) should be named. The application can be a one- or two-page document if all factual requirements for seeking the warrant are stated in the affidavit and the application so states. The application must be signed by the U.S. Attorney. Exhibit 3-6 contains a model application for an administrative warrant.

5. Prepare the Affidavits. The affidavits in support of the warrant application are crucial documents. Each affidavit should consist of consecutively numbered paragraphs that describe all of the facts in support of warrant issuance. Each affidavit should be signed by a person with first-hand knowledge of all the facts stated, most likely the inspector. An affidavit is a sworn statement that must be notarized or sworn to before the magistrate. Exhibit 3-7 contains a model affidavit.

6. Prepare the Warrant for Signature. The draft should be ready for the magistrate's signature. Once signed, the warrant is an enforceable document (i.e., failure by a facility to comply with the warrant is treated as a contempt of the court). The warrant should contain a "return of service" or "certificate of service" that indicates upon whom the warrant was served. This part of the warrant is to be dated and signed by the inspector after the warrant is served. Exhibit 3-8 contains a model administrative warrant.

7. Serve the Warrant. The warrant is served on the facility owner or the agent in charge at the time of the inspection. Where there is a probability that entry will still be refused, or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal. In this case, the U.S. Marshal is principally charged with executing the warrant, and the inspector must abide by the U.S. Marshal's decisions.

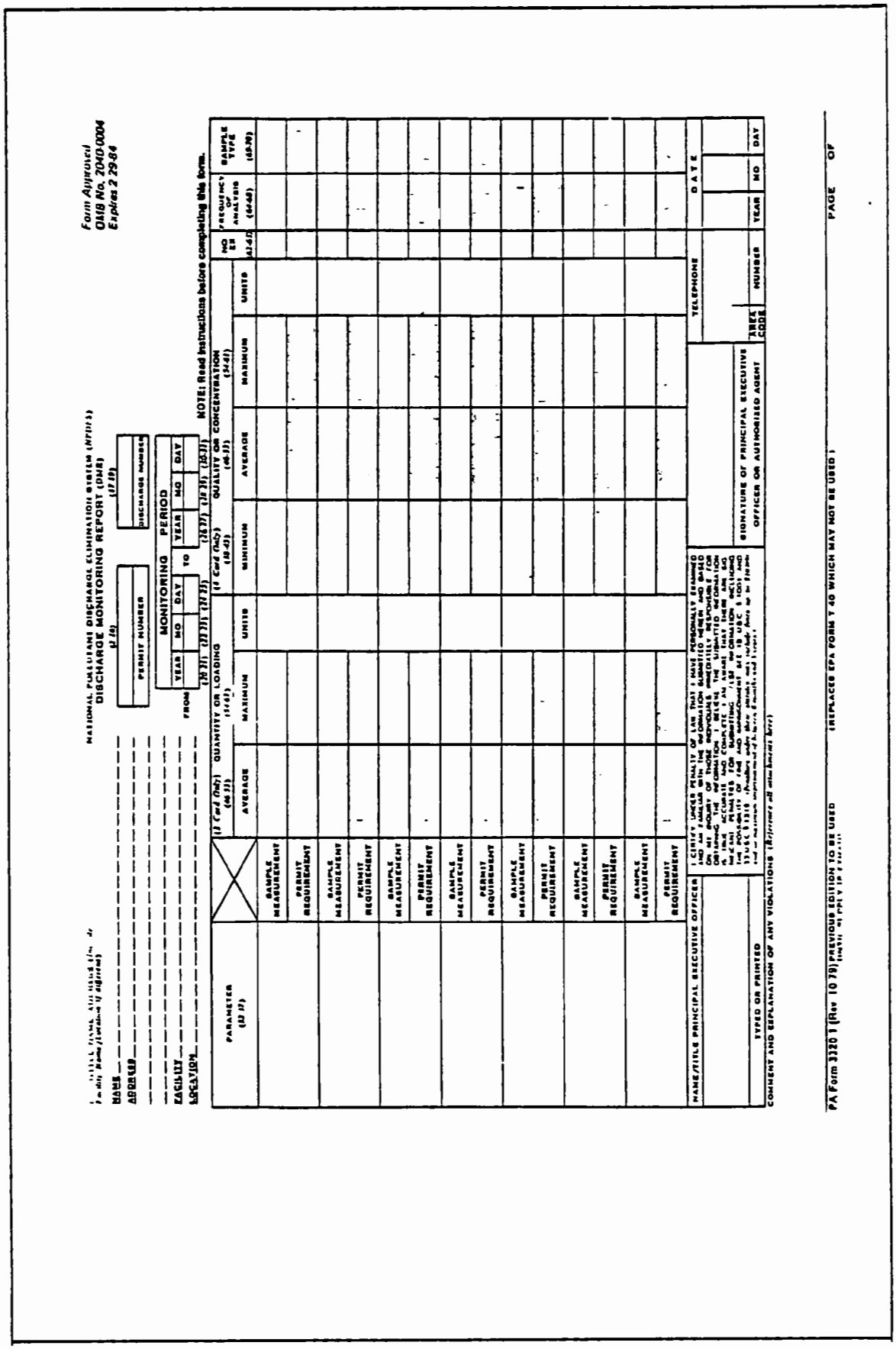
8. Perform the Inspection. The inspection should be conducted strictly in accordance with the warrant. If sampling is authorized, all procedures must be followed carefully, including presentation of receipts for all samples taken. If records or other property is authorized to be taken, the inspector must issue a receipt for the property and maintain an inventory of anything removed from the premises. This inventory will be examined by the magistrate to ensure that the inspector has not overstepped the warrant's authority.

9. Return the Warrant. After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant (i.e., the U.S. Marshal or whoever performs the inspection) must sign the return of service form indicating to whom the warrant was served and the date of service. The executed warrant is then returned to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

6 Exhibits

This section contains the following exhibits:

Discharge Monitoring Report



EPA Form 3320 1 (Rev. 10-79) PREVIOUS EDITION TO BE USED (REPLACES EPA FORM T 40 WHICH MAY NOT BE USED)

GENERAL INSTRUCTIONS

1. If form has been partially completed by preprinting, disregard instructions directed at entry of that information already preprinted.
2. Enter "PERMITTEE NAME/MAILING ADDRESS (and facility name/location, if different)," "PERMIT NUMBER," and "DISCHARGE NUMBER" where indicated. (A separate form is required for each discharge.)
3. Enter dates beginning and ending "MONITORING PERIOD" covered by form where indicated.
4. Enter each "PARAMETER" as specified in monitoring requirements of permit.
5. Enter "SAMPLE MEASUREMENT" data for each parameter under "QUANTITY" and "QUALITY" in units specified in permit. "AVERAGE" is normally an intake average (geometric average for bacterial parameters) of all sample measurements for each parameter obtained during "MONITORING PERIOD." "MAXIMUM" and "MINIMUM" are normally extremes (high and low measurements obtained during "MONITORING PERIOD." (NOTE to municipals with secondary treatment requirement, enter 30-day average of sample measurements under "AVERAGE" and enter maximum 7-day average of sample measurements obtained during monitoring period under "MAXIMUM.")
6. Enter "PERMIT REQUIREMENT" for each parameter under "QUANTITY" and "QUALITY" as specified in permit.
7. Under "NO. EX." enter number of sample measurements during monitoring period that exceed maximum (and/or minimum or 7-day average as appropriate) permit requirement for each parameter. If none, enter "0."
8. Enter "FREQUENCY OF ANALYSIS" both as "SAMPLE MEASUREMENT" (actual frequency of sampling and analysis used during monitoring period) and as "PERMIT REQUIREMENT" specified in permit (e.g., Enter "CONT" for continuous monitoring, "1/7" for one day per week, "1/30" for one day per month, "1/90" for one day per quarter, etc.)
9. Enter "SAMPLE TYPE" both as "SAMPLE MEASUREMENT" (actual sample type used during monitoring period) and as "PERMIT REQUIREMENT" (e.g., Enter "GRAB" for individual sample, "24HC" for 24-hour composite, "N/A" for continuous monitoring, etc.)

FOLD HERE FIRST

10. WHERE VIOLATIONS OF PERMIT REQUIREMENTS ARE REPORTED, ATTACH A BRIEF EXPLANATION TO DESCRIBE CAUSE AND CORRECTIVE ACTIONS TAKEN. REFERENCE EACH VIOLATION BY DATE.
11. If "no discharge" occurs during monitoring period, enter "NO DISCHARGE" across form in place of data entry.
12. Enter "NAME/TITLE OF PRINCIPAL EXECUTIVE OFFICER" with "SIGNATURE OF PRINCIPAL EXECUTIVE OFFICER OR AUTHORIZED AGENT," "TELEPHONE NUMBER" and "DATE" at bottom of form.
13. Mail signed Report to Office(s) by date(s) specified in permit. Retain copy for your records.
14. More detailed instructions for use of this DISCHARGE MONITORING REPORT (DMR) form may be obtained from Office(s) specified in permit.

LEGAL NOTICE

This report is required by law (33 U.S.C. 1318, 40 C.F.R. 125.27). Failure to report or failure to report truthfully can result in civil penalties not to exceed $10,000 per day of violation, or in criminal penalties not to exceed $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

FOLD HERE SECOND

PLACE STAMP HERE

FOLD HERE THIRD

STAPLE HERE

Model Pre-Inspection Notification Letter

Certified Mail - Return Receipt Requested

Dear Sir: Date

Pursuant to the authority contained in Section 308 of the Clean Water Act (33 U.S.C. §1251 et seq.), representatives of the U.S. Environmental Protection Agency (EPA), or a contractor retained by EPA, shall conduct, within the next year, a compliance monitoring inspection of your operations including associated waste treatment and/or discharge facilities located at (site of inspection). This inspection will ascertain the degree of compliance with the requirements of the National Pollutant Discharge Elimination System (NPDES) permit issued to your organization.

Our representatives will observe your process operations, inspect your monitoring and laboratory equipment and methods, collect samples, examine appropriate records, and will be concerned with related matters.

In order to facilitate easy access to the plant site, please provide the name of an individual who can be contacted upon arrival at the plant. Additionally, we would appreciate receiving a list of the safety equipment you would recommend that our representatives have in their possession in order to safely enter and conduct the inspection. Please provide the information requested within 14 days of receipt of this letter.

If you have any questions relating to anything concerning this inspection, please call (appropriate designated official).

Sincerely yours,

Director
Water Management Division

NPDES Compliance Inspection Report

United States Environmental Protection Agency
Washington, D. C. 20460

EPA **NPDES Compliance Inspection Report**

Form Approved
OMB No. XXXX-XXX
Approval Expires XX-XX-XX

Section A National Data System Coding

Transaction Code	NPDES	yr/mo/day	Inspection Type	Inspector
1 2	3 11	12 17	18	19

Remarks: 21 58

Facility Evaluation Rating	BI	QA	Reserved	
59	71	72	73 74	75 80

Section B Facility Data

Name and Location of Facility Inspected	Entry Time ☐ AM ☐ PM	Permit Effective Date
	Exit Time/Date	Permit Expiration Date

Name(s) of On-Site Representative(s)	Title(s)	Phone No(s)

Name, Address of Reponsible Official	Title	
	Phone No	Contacted ☐ Yes ☐ No

Section C. Areas Evaluated During Inspection

(S = Satisfactory M = Marginal U = Unsatisfactory N/E = Not Evaluated)

☐ Permit	☐ Flow Measurement	☐ Pretreatment	☐ Records/Reports
☐ Facility Site Review	☐ Laboratory	☐ Compliance Schedules	☐ Operations and Maintenance
☐ Sludge	☐ Effluent/Receiving Waters	☐ Self-Monitoring Audit	☐ Other

Section D: Summary of Findings/Comments *(Attach additional sheets if necessary)*

Signature(s) of Inspector(s)	Agency/Office	Date
Signature of Reviewer	Agency/Office	Date

Regulatory Office Use Only

Action Taken	Date	Compliance Status
		☐ Noncompliance ☐ Compliance

EPA Form 3560-3 (Rev 10-84) Previous editions are obsolete

INSTRUCTIONS

Section A: National Data System Coding

Column 1: Transaction Code: Use N, C, or D for New, Change, or Delete All inspections will be *new* unless there is an error in the data entered.

Columns 3-11: NPDES Permit No. Enter the facility's NPDES permit number (Use the Remarks columns to record the State permit number, if necessary)

Columns 12-17: Inspection Date. Insert the date entry was made into the facility Use the year/month/day format (e g , 82/06/30 = June 30, 1982).

Column 18: Inspection Type. Use one of the codes listed below to describe the type of inspection:

A-Performance Audit	E-Corps of Engineers Inspection	S-Compliance Sampling
B-Biomonitoring	L-Enforcement Case Support	X-Toxic Sampling
C-Compliance Evaluation	P-Pretreatment	
D-Diagnostic	R-Selective Inspection	

Column 19: Inspector Code. Use one of the codes listed below to describe the *lead agency* in the inspection

C-Contractor or Other Inspector (Specify in comment field)	N-NEIC Inspectors
	R-EPA Regional Inspector
E-Corps of Engineers	S-State Inspector
J-Joint EPA/State Inspectors-EPA Lead	T-Joint State/EPA Inspectors-State Lead

Column 21-58: Remarks. These columns are reserved for remarks at the discretion of the Region

Column 59: Facility Evaluation Rating. Use information gathered during the inspection (regardless of inspection type) to evaluate the quality of the facility self-monitoring program Grade the program using a scale of 1 to 5 with a score of 5 being used for very reliable self-monitoring programs and 1 being used for very unreliable programs

Column 71: Biomonitoring Information. Enter D for static testing Enter F for flow through testing Enter N for no biomonitoring.

Column 72: Quality Assurance Data Inspection. Enter Q if the inspection was conducted as followup on quality assurance sample results Enter N otherwise.

Columns 73-80: These columns are reserved for regionally defined information.

Section B. Facility Data

This section is self-explanatory

Section C. Areas Evaluated During Inspection

Indicate findings (S, M, U, or N/E) in the appropriate box Use Section D and additional sheets as necessary Support the findings, as necessary, in a brief narrative report Use the headings given on the report form (e g , Permit, Records/Reports) when discussing the areas evaluated during the inspection The heading marked 'Other' may include activities such as SPCC, BMP's, and multimedia concerns

Section D Summary of Findings/Comments

Briefly summarize the inspection findings This summary should abstract the pertinent inspection findings, not replace the narrative report Include a list of attachments Include effluent data here instead of permit limits when effluent sampling has been done Use extra sheets as necessary

Deficiency Notice

DEFICIENCY NOTICE

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES)

(Read instructions on back of last part before completing)

PERMITTEE (Facility) NAME AND ADDRESS

PERMITTEE REPRESENTATIVE (Receiving this Notice)/ TITLE

NPDES PERMIT NO.

During the compliance inspection carried out on (date) _____ the deficiencies noted below were found. Additional areas of deficiency may be brought to your attention following a complete review of the Inspection Report and other information on file with the REGULATORY AUTHORITY administering your NPDES PERMIT

DEFICIENCIES

MONITORING LOCATION (Describe)

FLOW MEASUREMENT (Describe)

SAMPLE COLLECTION/HOLDING TIME (Describe)

SAMPLE PRESERVATION (Describe)

TEST PROCEDURES, SECTION 304(h), 40 CFR 136 (Describe)

RECORD KEEPING (Describe)

OTHER SELF-MONITORING DEFICIENCIES (Describe)

ADDITIONAL COMMENTS

REQUESTED ACTION—Your attention to the correction of the deficiencies noted above is requested. Receipt of a description of the corrective actions taken will be considered in the determination of the need for further Administrative or Legal Action. Your response is to be (Inspector line out inappropriate response method). *(1) included with your next NPDES Discharge Monitoring Report (DMR) or (2) submitted as directed by the inspector.* Questions regarding possible follow-up action can be answered by the REGULATORY AUTHORITY to which your DMRs are submitted and which administers your NPDES Permit.

INSPECTOR'S SIGNATURE	INSPECTOR'S ADDRESS/PHONE NO.	REGULATORY AUTHORITY/ADDRESS	DATE
INSPECTOR'S PRINTED NAME			

EPA Form 3560-4 (2-80)

Records, Reports, and Schedules Checklist

A. Permit Verification

YES NO N/A	INSPECTION OBSERVATIONS VERIFY INFORMATION CONTAINED IN PERMIT
Yes No N/A	1. Correct name and mailing address of permittee.
Yes No N/A	2. Facility is as described in permit.
Yes No N/A	3. Notification has been given to EPA/State of new, different, increased discharges.
Yes No N/A	4. Accurate records of influent volume are maintained, when appropriate.
Yes No N/A	5. Number and location of discharge points are as described in the permit.
Yes No N/A	6. Name and location of receiving waters are correct.
Yes No N/A	7. All discharges are permitted.

B. Recordkeeping and Reporting Evaluation

YES NO N/A	RECORDS AND REPORTS ARE MAINTAINED AS REQUIRED BY PERMIT
Yes No N/A	1. All required information is available, complete, and current; and
Yes No N/A	2. Information is maintained for required period.
Yes No N/A	3. Analytical results are consistent with the data reported on the DMR's.
	4. Sampling and Analysis Data are adequate and include:
Yes No N/A	a. Dates, times, location of sampling
Yes No N/A	b. Name of individual performing sampling
Yes No N/A	c. Analytical methods and techniques
Yes No N/A	d. Results of analysis
Yes No N/A	e. Dates of analysis
Yes No N/A	f. Name of person performing analysis
Yes No N/A	g. Instantaneous flow at grab sample stations
	5. Monitoring records are adequate and include
Yes No N/A	a. Flow, pH, D.O., etc. as required by permit
Yes No N/A	b. Monitoring charts
Yes No N/A	6. Laboratory equipment calibration and maintenance records are adequate.
	7. Plant Records are adequate* and include
Yes No N/A	a. O&M Manual
Yes No N/A	b. "As-built" engineering drawings
Yes No N/A	c. Schedules and dates of equipment maintenance and repairs
Yes No N/A	d. Equipment supplies manual
Yes No N/A	e. Equipment data cards
	*Required only for facilities built with Federal construction grant funds.

Records, Reports, and Schedules Checklist

	8. Pretreatment records are adequate and include:
Yes No N/A	a. Industrial Waste Ordinance (or equivalent documents)
Yes No N/A	b. Inventory of industrial waste contributors, including:
Yes No N/A	1. Compliance records
Yes No N/A	2. User charge information
Yes No N/A	9. SPCC properly completed, when required.
Yes No N/A	10. Best Management Practices Program available, when required.

C. Compliance Schedule Status Review

YES NO N/A	THE PERMITTEE IS MEETING THE COMPLIANCE SCHEDULE
Yes No N/A	1. The permittee has obtained necessary approvals to begin construction.
Yes No N/A	2. Financing arrangements are complete.
Yes No N/A	3. Contracts for engineering services have been executed.
Yes No N/A	4. Design plans and specifications have been completed.
Yes No N/A	5. Construction has begun.
Yes No N/A	6. Construction is on schedule.
Yes No N/A	7. Equipment acquisition is on schedule.
Yes No N/A	8. Construction has been completed.
Yes No N/A	9. Start-up has begun.
Yes No N/A	10. The permittee has requested an extension of time.
Yes No N/A	11. The permittee has met compliance schedule.

Records, Reports, and Schedules Checklist

D. POTW Pretreatment Requirements Review

YES NO N/A	THE FACILITY IS SUBJECT TO PRETREATMENT REQUIREMENTS
	1. Status of POTW Pretreatment Program
Yes No N/A	a. The POTW Pretreatment Program has been approved by EPA. (If not, is approval in progress? _____)
Yes No N/A	b. The POTW is in compliance with the Pretreatment Program Compliance Schedule. (If not, note why, what is due, and intent of the POTW to remedy)

	2. Status of Compliance with Categorical Pretreatment Standards.
Yes No N/A	a. How many industrial users of the POTW are subject to Federal or State Pretreatment Standards?_____
Yes No N/A	b. Are these industries aware of their responsibility to comply with applicable standards?
Yes No N/A	c. Have baseline monitoring reports (403.12) been submitted for these industries?
Yes No N/A	i. Have categorical industries in noncompliance (on EMR reports) submitted compliance schedules?
Yes No N/A	ii. How many categorical industries on compliance schedules are meeting the schedule deadlines?_____
Yes No N/A	d. If the compliance deadline has passed, have all industries submitted 90 day compliance reports?
Yes No N/A	e. Are all categorical industries submitting the required semiannual report?
Yes No N/A	f. Are all new industrial discharges in compliance with new source pretreatment standards?
Yes No N/A	g. Has the POTW submitted its annual pretreatment report?
Yes No N/A	h. Has the POTW taken enforcement action against noncomplying industrial users?
Yes No N/A	i. Is the POTW conducting inspections of industrial contributors?

Yes No N/A	3. Are the industrial users subject to Prohibited Limits (403.5) and local limits more stringent than EPA in compliance? (If not, explain why, including need for revision of limits.)

Model Application for Administrative Warrant

UNITED STATES DISTRICT COURT
_____DISTRICT OF_____

IN THE MATTER OF:) Docket No._____
) Case No._____
) Application for an Administrative Warrant

NOW COMES a duly designated representative of the Administrator of the United States Environmental Protection Agency, by and through (name), United States Attorney for the _____ District of _____ and applies for an administrative warrant to enter, inspect, reproduce records, photograph, and sample for compliance with the Clean Water Act, 33 U.S.C. §1251 et seq., and as authorized by Section 308 of the Act, 33 U.S.C. §1318, the premises at (description of the premises) in the possession, custody, or control of the (name of company or owner). In support of this application, the duly designated representative of the Administrator respectfully submits an affidavit and a proposed warrant.

Respectfully submitted,

(Signature of U.S. Attorney)
United States Attorney for the
_____District of_____

(Date)

Model Affidavit in Support of Application for an Administrative Warrant

UNITED STATES DISTRICT COURT
_____DISTRICT OF_____

IN THE MATTER OF:) Docket No._____
)
) Case No._____
)
)
)
) Affidavit in Support of
) Application for an
) Administrative Warrant
)
)
)
)

State of_____:

County of_____:

(Name of Affiant)_____, being duly sworn upon his(her) oath, according to law, deposes and says:

1. I am compliance officer with the (division), United States Environmental Protection Agency, Region _____, and a duly designated representative of the Administrator of the United States Environmental Protection Agency for the purpose of conducting inspections pursuant to Section 308 of the Clean Water Act, 33 U.S.C. §1318. I hereby apply for an administrative warrant of entry, inspection, reproduction of records, photography, and sampling of the premises in the possession, custody, or control of the (name of company or owner).

2. (Name of establishment, premises, or conveyance) is a (describe business) that the undersigned compliance officer of the United States Environmental Protection Agency has reason to believe is in violation of the Clean Water Act. This belief is based upon the following facts and information: (Summarize the reasons why a violation is suspected and the specific facts that give rise to probable cause or summarize the neutral administrative inspection scheme used to select the premises for inspection).

3. The entry, inspection, reproduction of records, photography, and sampling will be carried out with reasonable promptness, and a copy of the results of analyses performed on any samples or material collected will be furnished to the owner or operator of the subject premises.

4. The compliance officer may be accompanied by one or more other compliance officers of the United States Environmental Protection Agency.

5. A return will be made to the court at the completion of the inspection, reproduction of records, photography, and sampling.

(Signature of Affiant)_____

(Title)_____

(Division)_____

Region ( )
United States Environmental
Protection Agency

Before me, a notary public of the State of _____, County of _____, on this _____ day of _____, 19__, personally appeared _____, and upon oath stated that the facts set forth in this application are true to his (her) knowledge and belief.

(Signature of Notary)_____

A Notary Public of _____

My Commission Expires_____

Model Administrative Warrant

UNITED STATES DISTRICT COURT
_____DISTRICT OF_____

IN THE MATTER OF:) Docket No._____
) Case No._____
) Warrant of Entry, Inspection, Reproduction of Records, Photography, and Sampling

To ___(name)___, _____(title)_____, United States Environmental Protection Agency, Region _____, and any other duly designated representatives of the Administrator of the United States Environmental Protection Agency:

Application having been made by the United States Attorney on behalf of the United States Environmental Protection Agency (EPA) for a warrant of entry, inspection, reproduction of records, photography, and sampling to determine compliance with regulations under the Clean Water Act, 33 U.S.C. §1251 et seq., and the court being satisfied that there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied;

IT IS HEREBY ORDERED that EPA through its duly designated representatives ____(Names of representatives)___ is hereby entitled and authorized to have entry upon the following described premises:

(Description of premises.)

IT IS FURTHER ORDERED that entry, inspection, reproduction of records, photography, and sampling shall be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner.

IT IS FURTHER ORDERED that the warrant shall be for the purpose of conducting an entry, inspection, reproduction of records, photography, and sampling pursuant to 33 U.S.C. §1318 consisting of the following activities:

(Describe specific activities.) For example:

- Entry to, upon, or through the above-described premises including all buildings, structures, equipment, machines, devices, materials, and sites to inspect, sample, monitor, and investigate the said premises.
- Access to and reproduction of all records pertaining to or relating to water pollutant discharges.
- Inspection, including photographing of any equipment, methods, or sites used to monitor or control water pollutants.

IT IS FURTHER ORDERED that, if any property is seized, the duly designated representative or representatives shall leave a receipt for the property taken and prepare a written inventory of the property seized and return this warrant with the written inventory before me within 10 days from the date of the inspection.

IT IS FURTHER ORDERED that this warrant shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist the representatives of the United States Environmental Protection Agency in such manner as may be reasonable, necessary, and required.

(Signature of Magistrate)

(Date)

RETURN OF SERVICE

I hereby certify that a copy of the within warrant was served by presenting a copy of same to (facility owner or agent) on (date) at (location of establishment or place).

(Signature of person making service)

(Official title)

RETURN

Inspection of the establishment described in this warrant was completed on (date).

(Signature of person conducting the inspection)

Chapter Four

Documentation of Evidence

Chapter Contents

1 Introduction

Chapter Three discussed compliance monitoring procedures, including self-monitoring reports, inspections, and review of records. This chapter discusses documentation of evidence to ensure its usefulness as admissible evidence in an EPA enforcement proceeding. Documentation serves to freeze the actual conditions existing at the time of the inspection so that evidence may be examined objectively at a later date by compliance personnel. In addition to monitoring reports, types of documentation include the field notebook, statements, photographs, drawings and maps, printed matter, mechanical recordings, and copies of records. EPA documents the evidence for a CWA enforcement action based on the following sources:

- Discharger self-monitoring reports;
- Data obtained by EPA in its own compliance/monitoring activities;
- State-generated information;
- POTW-generated information; and
- Information obtained from state or local police.

Section 2 of this chapter, "Self-Monitoring Reports," discusses the use of self-monitoring reports as admissible evidence. The remainder of the chapter discusses documentation of other evidence generally obtained in the course of an EPA inspection.

2 Self-Monitoring Reports

Discharger self-monitoring reports often constitute the most significant admissible evidence in a CWA enforcement action. As discussed in Chapter Three, the CWA and the NPDES regulations require NPDES permittees to submit discharge monitoring reports (DMRs) and 24-hour reporting of noncompliance. The DMR provides EPA with data on whether the permittee is achieving its permit effluent limitations. The NPDES program relies extensively on these monitoring reports for evidence.

Monitoring reports are generally sufficient to establish liability for violations of an NPDES permit. See Student Public Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528 (D. N.J. 1984). In that case, a citizen group filed a motion for partial summary judgment, claiming that permit violations recorded on the defendant's own DMRs and noncompliance reports (NCRs) established liability. The defendant argued that many of its test results were actually due to inaccurate measurements or faulty test procedures, although its results did not constitute evidence of reporting inaccuracies. The court ruled that the DMRs and NCRs may be used as admissions to establish a defendant's liability. See also, Student Public Interest Research Group, Inc. v. Monsanto Co., 22 ERC 1137, 1141 (D. N.J. 1983) and Sierra Club v. Raytheon Co. 22 ERC 1050, 1053 (D. Ma., 1984). However, where defendant offers evidence to contradict its own DMR, plaintiff's motion for partial summary judgment may not be granted. See Friends of the Earth v. Facet Enterprises, Inc. 22 ERC 1143, 1146 (W.D. N.Y. 1984).

In addition to filing the required DMRs, a facility may conduct a compliance audit on its own. Note that these independent audits are generally not protected against disclosure to the government or to other parties nor do they protect the alleged violator from an enforcement action. Such information may help EPA enforcement personnel to determine the reason for noncompliance.

As discussed in Chapter Three, the General Pretreatment Regulations also set reporting requirements for indirect dischargers that may establish strong evidence of violations of pretreatment categorical standards.

While the required reporting for NPDES permitting and pretreatment constitutes key evidence of liability, inspections may provide more detailed and reliable information on the facility's violations, and thus help fashion an appropriate enforcement response. For example, the Region may want to conduct sampling at the violating facility to verify the results of a DMR that was prepared by a facility with little experience in monitoring. The remainder of this chapter deals with evidence other than permittee or industrial user monitoring reports.

3 Compliance File Review

To ensure the validity and probative value of documentary evidence for an administrative or judicial enforcement proceeding, enforcement personnel must review the evidence obtained for objectivity, adequacy, and proper identification. In some instances, enforcement personnel may request a Headquarters Enforcement Case Review, which includes an interpretation of laboratory test results. In all cases, enforcement personnel must verify that all procedural safeguards were implemented. This section is based on the EPA NPDES Compliance Inspection Manual, June 1984.

Organizing Compliance Data

EPA may conduct NPDES inspections as part of a routine inspection or as a follow-up to violations identified in a discharge monitoring report or other self-monitoring report. Upon completion of an NPDES inspection, the inspector must organize the documentary evidence that he or she has collected into a compliance file. An inspection file may actually consist of two separate files--a nonconfidential file and confidential business information (CBI) file.

The inspector organizes information gathered during an NPDES inspection that has not been claimed as NPDES CBI into a package referred to as the nonconfidential inspection file. This file contains the inspector's report and all forms and nonconfidential documentary evidence secured by the inspector that relate to the inspection.

The CBI inspection file contains information gathered during an NPDES inspection that has been claimed as CBI. When an inspector returns from an inspection with information that has been declared confidential, the inspector should immediately give the information to the Document Control Officer (DCO), who then assigns a document control number to the confidential material. (The inspector does not have authority to grant or deny a CBI request.) In addition, the inspector informs the DCO of any physical samples that were claimed as confidential. The DCO assigns a document control number to physical samples and notifies the laboratory of this number. (The document control number is used by laboratory personnel in completing the sample chain of custody and laboratory analysis forms.)

Controlled Identification of Samples

Regional enforcement personnel must determine that samples were properly collected and accurately and completely identified. Any label used to identify the sample must be moisture resistant and able to withstand field conditions. Whenever enforcement personnel take a sample, they should prepare a receipt for the sample that includes the following information:

- Name, office address, and signature of the inspector (sampler);
- Sample site location, discharge, and facility;
- Date and time of collection;
- Indication of grab or composite sample with appropriate time and volume information;
- Identification of parameter to be analyzed;
- Notation of preservative used;
- Indication of any unusual condition at the sampling location or in the appearance of the water;
- Notation of conditions (such as pH, temperature, residual chlorine, and appearance) that may change before the laboratory analysis, including the identification number of instruments used to measure parameters in the field.

When a facility claims that samples or documents are confidential, EPA must follow the confidential business information (CBI) procedures in 40 C.F.R. Part 2. (Chapter Eleven contains a detailed discussion of EPA handling of CBI.)

Samples that are to be used as evidence must be identified with tags and sealed with EPA seals (see Exhibit 4-1). The EPA inspector places the seals on sample containers.

Transfer of Custody and Shipment

In order to ensure the admissability of the permit compliance sampling data in court, there must be accurate written records tracing the custody of each sample through all phases of the monitoring program. The primary objective of this chain of custody is to create an accurate written record that can be used to trace the possession and handling of the sample from the moment of its collection through analysis and introduction as evidence.

The EPA Chain of Custody Record contains the following information (see Exhibit 4-2):

- Sampler's name;
- Site location;
- Sampling location;
- Sample and inspection number;
- Date and time of collection;
- Sample analysis required;
- Remarks; and
- Names and dates of individuals involved in accepting and relinquishing samples.

The NPDES Compliance Inspection Manual contains a more detailed discussion of sampling and chain of custody procedures.

4 Review of Sources of Evidence

An NPDES violation can be documented through a combination of evidential sources. These sources include DMRs as well as the inspection report, samples, statements, photographs, drawings and maps, printed matter, and copies of records. Enforcement personnel should review the available evidence to ensure that it is sufficient to support an enforcement action:

- The validity and quality of the evidence;
- That all necessary documentation has been provided; and
- That such documentation is adequate to substantiate the substance of the violation.

This section is based on the NPDES Compliance Inspection Manual, June 1984.

Compliance File Documentation

Inspector's Field Notebook

The core of all documentation relating to an inspection is the field notebook, which provides accurate and inclusive documentation of all inspection activities. The notebook will form the basis for written reports and should contain only facts and pertinent observations.

Language should be objective, factual, and free of personal feelings or terminology that might prove inappropriate. Notebooks become an important part of the evidence package and can be entered in court as evidentiary material.

Inspection Entries

Since an inspector may be called to testify in an enforcement proceeding, each inspector must keep detailed records of inspections, investigations, samples collected, and related inspection functions. Types of information that should be entered into the field notebook include:

- Observations. All conditions, practices, and other observations that will be useful in preparing the inspection report or that will validate evidence should be recorded.

- Documents and Photographs. All documents taken or prepared by the inspector should be noted and related to specific inspection activities. (Photographs taken at a sampling site should be listed and described.)

- Unusual Conditions and Problems. Unusual conditions and problems should be noted and described in detail.

- General Information. Names and titles of facility personnel and the activities they perform should be listed along with statements they may have made and other general information. Weather condition should be recorded. Information about a facility's record-keeping procedures may be useful in later inspections.

The field notebook is a part of the Agency's files and is not to be considered the inspector's personal record. Notebooks are held indefinitely pending disposition instructions.

Samples

Samples are the evidence most frequently gathered by inspectors. For the analysis of a sample to be admissible as evidence, a logical and documented connection must be shown between samples taken and analytical results reported. This connection is shown by using a chain of custody system that identifies and accompanies a sample between the time it is collected and the time it is analyzed. (See discussion in Section 3 of this chapter.)

Statements

Inspectors may obtain formal statements from persons who have personal, first-hand knowledge of facts pertinent to a potential violation. Statements can be used to verify data collected during an inspection. They can also be used as admissions by the facility as to who owns, operates, or controls the facility. The statement of facts is signed and dated by the person who can testify to those facts in court, and it may be admissible as evidence.

The principal objective of obtaining a statement is to record in writing, clearly and concisely, relevant factual information so that it can be used to document an alleged violation.

Photographs

The documentary value of photographs ranks high as admissible evidence. Clear photos of relevant subjects, taken in proper light and at proper lens settings, provide an objective record of conditions at the time of

inspection. If possible, photographs should be taken in such a way as to keep "sensitive" buildings or operations out of the background. Note that photographs may always be taken from areas of public access (e.g., across a stream, from a parking lot, etc.). The photographs should be identified by location, purpose, date, time, inspector's initials, and related sample number. A log of all photographs taken should be maintained in the inspector's field notebook, and the entries should be made at the time the photograph is taken.

When a situation arises that dictates the use of photographs, the inspector should obtain the permittee's approval to take photographs. The inspector must be tactful in handling any concerns or objections a permittee may have about the use of a camera. In some cases, the inspector may explain to the permittee's representative that waste streams, receiving waters, and wastewater treatment facilities are public information, not trade secrets. In the event the permittee's representative still refuses to allow photographs and the inspector believes the photographs will have a substantial impact on future enforcement proceedings, regional enforcement attorneys should be consulted for further instructions. At all times, the inspector is to avoid confrontations that might jeopardize the completion of the inspection.

Drawings and Maps

Schematic drawings, maps, charts, and other graphic records can be useful in supporting violation documentation. They can provide graphic clarification of site location, relative height and size of objects, and other information. Drawings and maps should be simple and free of extraneous details. Basic measurements and compass points should be included to provide a scale for interpretation. Drawings and maps should be identified by source and be dated.

Printed Matter

Brochures, literature, labels, and other printed matter may provide important information regarding a facility's conditions and operations. These materials may be collected as documentation if, in the inspector's judgment, they are relevant. All printed matter should be identified with date, inspector's initials, and origin.

Mechanical Recordings

Records produced electronically or by mechanical apparatus can be entered as evidence. Charts, graphs, and other "hard copy" may also serve as evidence. Data collected should be identified by date of collection, inspector's initials, and related sample number.

Copies of Records

Records and files may be stored in a variety of information retrieval systems, including written or printed materials, computer or electronic systems, or visual systems such as microfilm and microfiche.

When copies of records are necessary for an inspection report, storage and retrieval methods must be taken into consideration:

- Written or printed records can generally be photocopied on-site. Portable photocopy machines may be available to inspectors through the Regional Office. When necessary, however, inspectors are authorized to pay a facility a "reasonable" price for the use of facility copying equipment.
  - At a minimum, all copies made for or by the inspector should be initialed and dated for identification purposes. (See identification details below.)
  - When photocopying is impossible or impracticable, close-up photographs may be taken to provide suitable copies.
- Computer or electronic records may require the generation of "hard" copies for inspection purposes. Arrangements should be made during the opening conference, if possible, for these copies.
  - Photographs of computer screens may possibly provide adequate copies of records if other means are impossible.
- Visual systems (microfilm, microfiche) usually have photocopying capacity built into the viewing machine, which can be used to generate copies.
  - Photographs of the viewing screen may provide adequate copies if "hard" copies cannot be generated.

Identification Procedures

Immediate and adequate identification of records reviewed is essential to ensure the ability to identify records throughout the Agency custody process and to ensure their admissibility in court. When inspectors are called to testify in court, they must be able to positively identify each particular document and state its source and the reason for its collection.

Initial, date, number, and write in the facility's name on each record, and log these items in the field notebook.

- Initialing/Dating. Each inspector should develop a unique system for initialing (or coding) and dating records and copies of records so that he or she can easily verify their validity. This can be done by initialing each document in a similar position, or by another method, at the time of collection. Both the original

and copy should be initialed. All record identification notations should be made on the back of the document.

- Numbering. Each document or set of documents substantiating a suspected violation or violations should be assigned an identifying number unique to that document. The number should be recorded on each document and in the field notebook.

- Logging. Documents obtained during the inspection should be entered in the field notebook by a logging or coding system. The system should include the identifying number, date, and other relevant information:

  - The reason for copying the material (i.e., the nature of the suspected violation or discrepancy).

  - The source of the record (i.e., type of file, individual who supplied record).

  - The manner of collection (i.e., photocopy, other arrangements).

Further Processing of the Compliance File--Enforcement Case Review

Once the compliance file has been initially reviewed, further case development may be necessary. If so, regional enforcement personnel should send the file to OECM and the program office. Otherwise, the Region may use the evidence collected to take enforcement action or to prepare a litigation report. (The contents of a litigation report are discussed in Chapter Eight.)

Headquarters case development may include:

- Review of compliance with recordkeeping and reporting requirements;

- Scientific review to determine the significance of any discrepancy in chemical composition, toxicity, or risk assessment;

- Review of relationship of the suspected CWA violation to other federal environmental laws;

- Review of new program elements for which policy interpretations must be established; and

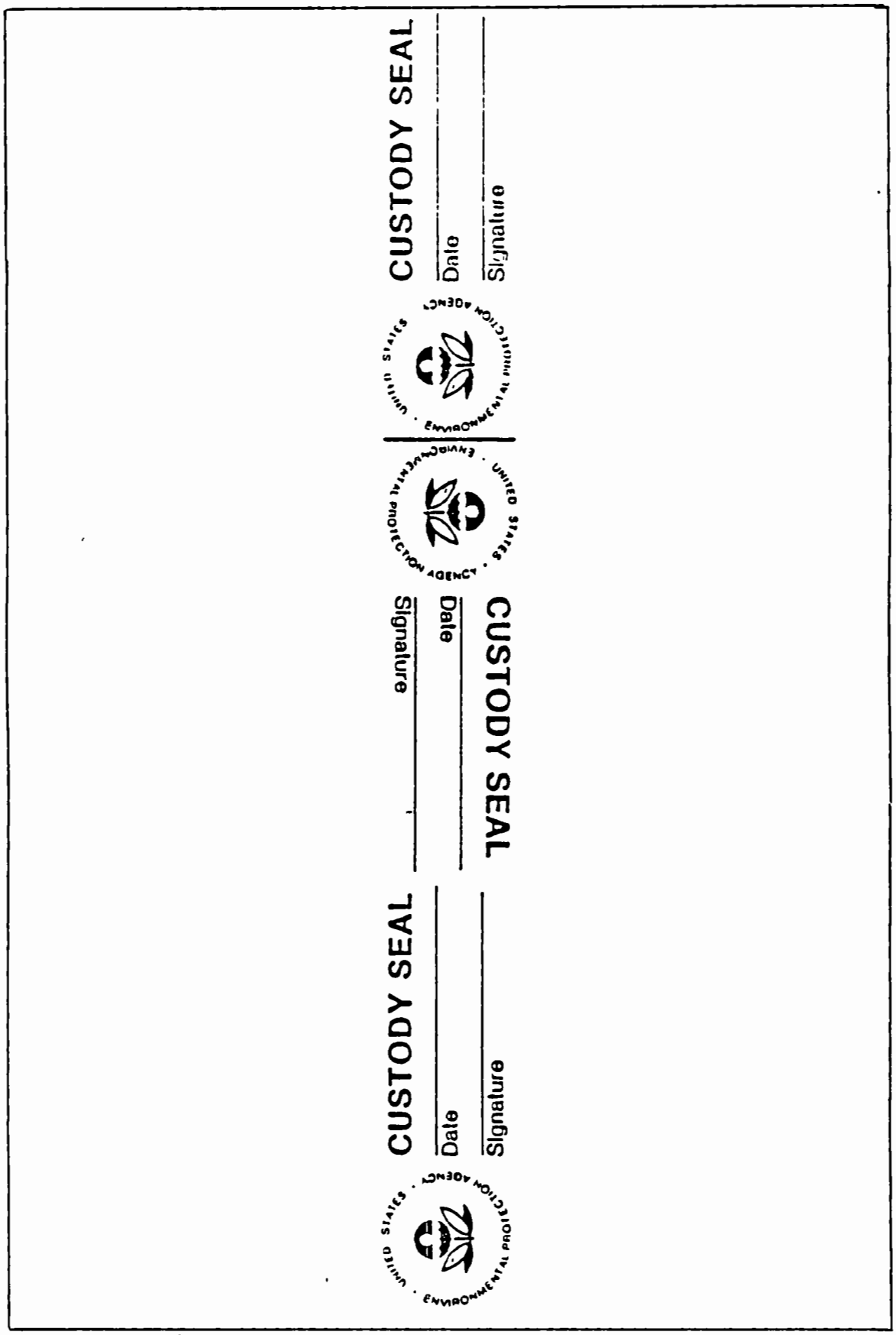
- Review of program information that is normally kept on file at Headquarters.

5 Exhibits

This section contains the following exhibits:

Exhibit 4-1: Custody Seal
Exhibit 4-2: Chain of Custody Record

Custody Seal



Chain of Custody Record

CHAIN OF CUSTODY RECORD

SURVEY				SAMPLERS: (Signature)					
STATION NUMBER	STATION LOCATION	DATE	TIME	SAMPLE TYPE			SEQ NO.	NO OF CONTAINERS	ANALYSIS REQUIRED
				Water		Air			
				Comp	Grab				

Relinquished by: (Signature)	Received by: (Signature)	Date/Time
Relinquished by: (Signature)	Received by: (Signature)	Date/Time
Relinquished by: (Signature)	Received by: (Signature)	Date/Time
Relinquished by: (Signature)	Received by Mobile Laboratory for field analysis: (Signature)	Date/Time
Dispatched by: (Signature) / Date/Time	Received for Laboratory by:	Date/Time
Method of Shipment:		

Distribution: Orig. – Accompany Shipment
1 Copy – Survey Coordinator Field Files

GPO 831-464

1 Introduction

EPA enforcement staff may consider a broad range of enforcement responses once they have collected all of the noncompliance data from various reports and inspections (see Chapter Three). This chapter addresses informal Agency responses to noncompliance (i.e., all enforcement activities other than administrative and judicial actions). The manual discusses formal enforcement actions in Chapter Six, "Administrative Enforcement," Chapter Eight, "Judicial Enforcement: Civil Actions," Chapter Nine, "Criminal Enforcement of the Clean Water Act," and Chapter Ten, "Enforcement of Consent Decrees."

EPA must ensure that there is timely and appropriate enforcement of violations. See "Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement Agreements." As discussed in the "National Guidance for Oversight of NPDES Programs, FY 85," July 6, 1984, an appropriate response is one that results in the violator's returning to compliance as expeditiously as possible. Under this guidance, "the administering agency should strive to take appropriate formal enforcement responses against 100 percent of its significant noncompliers before they appear on two consecutive quarterly noncompliance reports (QNCR) for the same violation (generally within 60 days of the first QNCR) if the permittee has not returned to compliance. All other instances of noncompliance should be addressed consistent with the procedures and time frames in administering the agency's Enforcement Management System (EMS)."

The EMS, issued on March 7, 1977 and discussed below, contains guidance on the appropriate use of enforcement responses. The Office of Water is currently revising the EMS.

Informal enforcement responses are generally less resource-intensive than formal responses and are often used as a fact-finding effort on the extent of noncompliance. Where these responses will not achieve immediate compliance, formal enforcement actions should be considered. Informal enforcement actions include the following:

- Telephone calls;
- Warning letters;
- Meetings;

- Informal requests for information;
- Inspections; and
- Deficiency notices.

In carrying out their enforcement responsibilities, EPA regional enforcement personnel must coordinate closely with the states consistent with the State/EPA Enforcement Agreement. For example, where EPA discovers noncompliance through the receipt of monitoring reports, it should notify the state and determine the adequacy of any actual or planned state response.. The State/EPA Enforcement Agreements are the basis for EPA coordination with the state. In addition, the "National Guidance for Oversight of NPDES Programs" sets criteria for NPDES program enforcement.

2 Level of Action Policy

Enforcement Response Guide

Exhibit 5-1 lists the recommended enforcement responses outlined in the EMS and serves as a guide for NPDES enforcement personnel. The recommended responses serve three purposes:

- Provide appropriate responses (for both the severity of action and the use of Agency resources) for different levels and types of NPDES permit and reporting violations;
- Ensure a relatively consistent enforcement response for comparable violations nationwide; and
- Provide a quick reference for enforcement personnel.

EPA and state enforcement personnel should not apply the EMS guidelines rigidly in any particular case, because the guidelines will not always prescribe the most appropriate means for achieving compliance. EPA should determine its response by considering several factors:

- Severity of the violation and its impact on the environment;
- Compliance history of the discharger;
- Potential impact of an enforcement action on other dischargers;
- Availability of Agency and judicial resources; and
- Considerations of fairness and equity.

When using the EMS, enforcement personnel should generally apply the following rules:

- Judicial actions will be preceded by administrative orders;
- Violations of administrative orders will result in judicial action;
- When corrective actions are not taken by the violator, a minor violation may result in judicial action;

- Industrial facility production is generally assumed to be controllable; and

- "Warning" letters are useful to discourage violations by warning permittees of future enforcement if noncompliance continues.

As provided in the "National Guidance for Oversight of NPDES Programs," enforcement response procedures must also include time frames for escalating enforcement responses where the noncompliance has not been resolved.

Informal Responses

EPA and the states may use any combination of the following types of informal responses, or other responses, as deemed appropriate. Note that all enforcement contacts with a discharger (including summaries of telephone calls and meetings) should be described and placed in the permit or the compliance file. Under the National Oversight Guidance, EPA must prepare and maintain accurate and complete documentation that can be used in future formal enforcement actions.

Telephone Calls to the Violator

Telephone contact with the permittee is a cost-effective means of obtaining information and resolving isolated or infrequent violations. EPA's prompt response to such violations helps to deter future violations by showing the permittee that EPA is serious about enforcing NPDES program requirements. Depending on the type of noncompliance, EPA may want to talk with a particular person. For example, if a DMR has not been received, EPA may want to call the plant lab supervisor rather than the plant manager.

When contacting a permittee by telephone, EPA enforcement personnel should keep the following points in mind:

- Be courteous;

- Identify the specific violations that have prompted the call;

- Seek resolution of the violation; and

- Make no commitment of nonenforcement for past violations.

The EPA employee should note the date and time, the person contacted, and the substance of the conversation (see Exhibit 5-2, Record of Communication). The employee places these notes in the permittee's compliance file, which may serve as the basis for an escalated enforcement response. The employee should also document his or her ability to contact a permitee by telephone or the permittee's failure to return phone calls.

Preliminary Warning Letter

The warning letter indicates EPA's seriousness about enforcing NPDES program violations and deters future violations. A warning letter is not a formal Section 308 information request or a Notice of Violation (discussed in Chapter Six). The warning letter should be courteous in tone and cover the following points:

- Identify the specific violation(s);
- Seek resolution of the violation, if it is continuing;
- Warn of future enforcement actions that will result from continued violative conduct; and
- Make no commitment of nonenforcement for past violations.

The letter may informally solicit information from the permittee about the magnitude, extent, and environmental effect of the violation, as well as information regarding any action taken by the permittee to mitigate the violation. (Exhibits 5-3 through 5-6 contain several model warning letters to dischargers, covering alleged reporting and effluent limitation violations.) In addition, EPA must ensure that the affected state is aware of the noncompliance by forwarding to the state copies of warning letters sent to violators in the state consistent with the terms of the State/EPA Agreements.

Requests for Information

If the Agency can obtain information voluntarily from a permittee, it may include an informal request for information as part of a warning letter. Although Section 308 of the Clean Water Act need not be cited, the following information should be requested:

- Information on the nature and extent of the violation;
- Environmental effects;
- Action taken to mitigate the discharge and to meet the construction schedule;
- The monitoring schedule of the facility; and
- Any other information that may be pertinent to achieving compliance.

EPA does not have to establish a violation prior to making an information request; however, the request may help in determining Agency action once a violation is confirmed. EPA also has the option of sending a formal Section 308 letter to the permittee, which notes that a failure to respond may result in a civil enforcement action. (Chapter Six discusses formal Section 308 letters used to supplement administrative enforcement actions.)

Meetings

The permittee and EPA may clarify the permittee's legal responsibilities and agree on corrective action through an informal meeting. In setting up the meeting, EPA must clarify that it will be informal and may not preclude formal enforcement proceedings.

Technical staff members of both EPA and the permittee typically attend these meetings. However, the EPA personnel must determine prior to the meeting whether the permittee is planning to include legal counsel. If so, the Regional Counsel's Office should provide an attorney to represent the Agency at the meeting. A Regional Counsel's Office representative should also attend all meetings that may affect future or ongoing enforcement cases. EPA personnel should summarize all discussions and any decisions made. These summaries will be made a part of the file.

Compliance Inspections

As discussed in Chapter Three, inspections are an integral part of the Agency's NPDES compliance/enforcement program. EPA conducts NPDES inspections with the understanding that the information obtained may be used as evidence in enforcement actions. In addition to conducting routine inspections to verify compliance with NPDES permit conditions and effluent limitations and to verify the reliability of self-monitoring data, EPA may conduct follow-up inspections to provide support for enforcement actions. The deficiency notice addresses those permit violations associated with self-monitoring and recordkeeping activities. An inspector may issue a deficiency notice to a permittee immediately following the compliance inspection for self-monitoring deficiencies. Deficiency notices are discussed in greater detail in Chapter Three.

3 Exhibits

This section contains the following exhibits:

Exhibit 5-1: Enforcement Response Table
Exhibit 5-2: Model Record of Communication
Exhibit 5-3: Model General Informal Warning Letter
Exhibit 5-4: Model Overdue Discharge Monitoring Report (DMR) Letter
Exhibit 5-5: Model Deficiencies in Completing the DMR Letter
Exhibit 5-6: Model Violation of Effluent Limitations and Failure To File Reports Letter

Enforcement Response Table

EFFLUENT LIMITS

Noncompliance	Circumstances	Response
Exceeding Final Limits	Infrequent or isolated minor violation	Warning letter
Exceeding Final Limits	Infrequent or isolated major violations of single effluent limit	Warning letter, administrative order, or judicial action
Exceeding Final Limits	Frequent violations of effluent limits (i.e., those which occur more often than once in any four consecutive quarters)	Administrative order or judicial action
Exceeding Final Limits	Within Technical Review Criteria and time frame for its use	Warning letter or request explanation
Exceeding Final Limits	Varied frequency or continuation	Warning letter or administrative order
Exceeding Interim Limits (for discharge under permittee's control)	Results in known environmental damage	Administrative order or judicial action
Exceeding Interim Limits (for discharge under permittee's control)	Without known damage	Warning letter, administrative order or judicial action
Exceeding Interim Limits (uncontrolled)	No harmful effects known	"No action" letter
Exceeding Interim Limits (uncontrolled)	With substantial environmental damage	Administrative order or judicial action

REPORTING

Permit Compliance	Circumstances	Response
Failure to report to EPA (routine reports, discharge monitoring reports)	Isolated or infrequent	Phone call* or warning letter that requires reports to be submitted immediately
Failure to report to EPA (one-time reports)	Isolated or infrequent	Warning letter that requires reports to be submitted immediately
Failure to notify EPA (noncompliance with schedule requirement)	Isolated or infrequent	Phone call* or warning letter that requires reports to be submitted immediately
Failure to report or notify EPA	Permittee does not respond to letters, or does not follow through on verbal or written agreements, or commits frequent violations	Administrative order or judicial action if nonresponse continues
Failure to notify EPA of effluent limit violation	Known environmental damage results	Administrative order or judicial action
Failure to notify EPA of effluent limit violation	Isolated or infrequent; no known effects	Warning letter
Failure to notify EPA of effluent limit violation	Continuing	Second warning letter or administrative order
Minor reporting deficiencies	Isolated or infrequent	Warning letter that requires corrections to be made on next submittal
Minor reporting deficiencies	Continuing	Administrative order, if continued

* Phone calls should be followed up with warning letters if reports are not received within agreed-upon time frame.

Major or gross reporting deficiencies	Isolated or infrequent	Warning letter that requires corrections to be made on next submittal
Major or gross reporting deficiencies	Continuing	Administrative order
	COMPLIANCE SCHEDULES (Construction Phases or Planning)	
Missed interim date	Will not cause late final date or other interim dates	Send warning letter
Missed interim date	Will result in other missed interim dates and/or late final date	Send "no action" letter, warning letter, or administrative order
Missed interim date	Will result in other missed dates (no good or valid cause)	Send warning letter (first time only), administrative order, or judicial action
Missed final date	Compliance likely within 90 days	Send warning letter; follow up to verify status
Missed final date	Violation for good or valid cause (strike, act of God, etc.)	Contact permittee, require documentation of good or valid cause; issue administrative order if beginning construction date was missed or other delays in construction occurred without good or valid cause
Missed final date	Compliance is 90 days or more outstanding; failure or refusal to comply without good or valid cause	Issue administrative order or take judicial action

Major or gross deficiencies	Continuing	Issue administrative order or take judicial action
Failure to install monitoring equipment	Continuing	Issue administrative order to require monitoring (using outside contracts, if necessary) and install equipment
Reporting false information		Take judicial action

Record of Communication

RECORD OF COMMUNICATION	☒ PHONE CALL ☐ DISCUSSION ☐ FIELD TRIP ☐ CONFERENCE ☐ OTHER (SPECIFY) (Record of item checked above)	
TO NPDES File No. _____.	FROM	DATE October 26, 1985 TIME 2:15 P.M.

SUBJECT

Permitte ABC -- Receipt of DMRs

SUMMARY OF COMMUNICATION

On October 26, 1982, I called ____(name)____ of Permittee ABC, and requested information on the lack of self monitoring reports.

I obtained no response. The switchboard operator, after requesting name and company, stated Mr. Doe was "out" as was his plant operator. I requested _____ to call back. This is the third such unsuccessful attempt to reach a company representative since ___(date)___.

CONCLUSIONS, ACTION TAKEN OR REQUIRED

Send letter for information request, requiring self monitoring reports for past 2 months.

INFORMATION COPIES

TO: file,

EPA Form 1300-6 (7-72) REPLACES EPA HQ FORM 6900-1 WHICH MAY BE USED UNTIL SUPPLY IS EXHAUSTED

Model General Informal Warning Letter

RE: NPDES Permit #_____

Addressee:

This letter is to notify you that there has been a violation of permit requirements; specifically _____, of permit #00000000001. A response on behalf of the owner/operator of XYZ facility is requested.

According to the terms of the above-cited permit, the XYZ facility is required to meet:

1. Effluent limits #1 through #6.
2. Monitoring requirements for sections 1 to 5 of the permit.
3. Compliance schedule, dated December 6, 1979, on construction of treatment facilities.

My review of the available material indicates these requirements have not been met with regard to:

1. Effluent limits #2 and #4 for May, June, and July 1982.
2. Monitoring requirements B2 for May and June 1982.
3. Compliance schedule, page 4, June 1982, milestone.

This notice is intended to ensure that you are provided adequate notice of violations and requirements of the permit. We request that you take immediate steps to correct the above violations and return compliance by ___(date)___.

[Informal meeting] If an informational meeting would be of value in understanding legal requirements under the Clean Water Act and the subject permit, please notify the Water Compliance Section at (___) _____. A meeting will be scheduled as soon as possible.

[Information request] Based on our review of your permit and information available, we request that you respond to EPA, Region IX on the following questions:

1. Have steps been taken to require plans and specifications for installation of equipment A and B?
2. Has the facility installed self-monitoring equipment C for the plant?

Sincerely,

Branch Chief (Water Management Division)

cc: State Agency

Model Overdue Discharge Monitoring Report (DMR) Letter

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

_____
_____
_____
_____

Subject: Delinquent Discharge Monitoring Report (DMR)
NPDES Permit No.: _____

Dear _____:

Your facility has been issued a National or State Pollutant Discharge Elimination System (N/SPDES) permit, which authorizes you to discharge wastewater to the surface waters of the United States and requires you to perform certain discharge monitoring tests and report the results to this office. We have not received your last required report covering the three-month period ending _____ and due during the following month.

You may have overlooked our previous notification(s) concerning this matter. Whatever the reason, we are concerned about the continuing nature of your failure to comply. Consequently, you are required to submit both the overdue report and an explanation for your noncompliance within 14 days of receipt of this letter. Your explanation must include a plan to ensure that all future DMRs are submitted in a timely manner.

We know that you understand the importance of complying with the terms of your permit; nevertheless, we must emphasize that failure to comply with the DMR requirement can result in referral of this matter to our Regional Counsel for further action.

If you have any questions regarding these requirements, please write to Chief Permits Administration Branch at the above address or call _____ at_____.

Thank you for your cooperation in this matter.

Sincerely,

Chief
Water Permits and Compliance Branch
Water Management Division

cc: State Agency

Model Deficiencies in Completing the DMR Letter

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

_____
_____
_____
_____

Subject: Deficient Discharge Monitoring Report
Permit No. PR_____

Dear _____:

Your facility has been issued a National or State Pollutant Discharge Elimination System (N/SPDES) permit, which authorizes you to discharge wastewater to the surface waters of the United States and requires you to meet certain conditions. Accordingly, you have submitted the required Discharge Monitoring Report (DMR) pursuant to 40 C.F.R. §122.41 for the monitoring period ending _____.

Our review of your DMR has uncovered certain deficiencies (see attachment). Please send a revised DMR that corrects these deficiencies. The correct monitoring requirements must be complied with when completing your next DMR. If you have any questions concerning this letter, or if you cannot comply with any of your self-monitoring requirements, please contact the Permits Administration Branch, at the above address or call _____.

Thank you for your cooperation in this matter.

Sincerely yours,

Chief
Water Permits and Compliance Branch
Water Management Division

cc: State Agency

Model Violation of Effluent Limitations and Failure To File Reports Letter

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

_____
_____
_____
_____

Subject: Apparent Violation of Effluent Limitations
NPDES Permit No. _____

Dear _____:

Your facility has been issued a National or State Pollutant Discharge Elimination System (N/SPDES) permit, which authorizes you to discharge wastewater to the surface waters of the United States and requires you to meet certain conditions. Accordingly, you have submitted the required Discharge Monitoring Report (DMR) under 40 C.F.R. §122.41 for the reporting period ending _____. Our review of the report reveals that the discharge may not comply with certain effluent limitations specified in your permit (see attachment).

According to the conditions of your permit you are also required to provide this office and the appropriate state Agency with information concerning any apparent noncompliance that occurs under 40 C.F.R. §122.41. Each notification must include the following:

a. A description of the noncompliance and its cause;
b. The duration, and exact dates and times;
c. The impact upon the receiving waters;
d. The steps taken or planned to be taken to reduce or eliminate the noncompliance;
e. The steps already taken, planned, or currently being taken to prevent recurrence of the condition and to ensure future compliance with permit limitations.

We have not received this notification from you. The noncompliance notification must be sent to the Chief of the Permits Administration Branch within 14 days of the date of this letter. We know you understand the importance of complying with the terms of your permit; nevertheless, we must emphasize that failure to comply with effluent limitations and noncompliance reporting can result in referral of this matter to our Regional Counsel for further action.

If you have any questions regarding this request, please write to the Permits Administration Branch, at the above address or call _____ at _____.

Sincerely yours,

Chief
Water Permits and Compliance Branch
Water Management Division

cc: State Agency

Chapter Six

Administrative Enforcement

Chapter Contents

1 Introduction

This chapter outlines the types of administrative enforcement actions that are available once the Agency has determined that an administrative enforcement response is the appropriate action for a detected violation. This chapter discusses the following administrative actions:

- Request for Information [Section 308(a)]
- Notice of Violation [Section 309(a)(1)]
- Administrative Order [Section 309(a)(3)]
- Contractor Listing [Section 508]
- Permit Actions [Section 402]

Section 309 of the CWA provides EPA with administrative enforcement mechanisms. An administrative order is frequently the most expeditious approach to compliance; however, it cannot be used to resolve every type of violation. Where further information regarding the cause of a violation or where a corrective measure is needed to reach compliance, it may be more appropriate to first use a Section 308 letter. Generally, the Agency prefers the administrative order as the initial formal approach for resolving a compliance problem, thus avoiding the resource commitments of litigation.

2 Administrative Enforcement

Section 308 Letters

Purpose and Authority

Section 308 of the CWA authorizes the Administrator to require the owner or operator of any point source or indirect discharger to provide whatever information the Administrator may reasonably require, including reports, sampling, and monitoring. A Section 308 letter is an Agency request for information and can constitute the first step in enforcement against a violating facility. Note, however, that a Section 308 letter, itself, can only request information or testing; it cannot be used to require compliance with other CWA sections or with permit requirements. Thus, the Section 308 letter serves to complement formal administrative enforcement.

A Section 308 request either may be sent by itself or may accompany an administrative order. For example, where EPA has identified violations at a publicly owned treatment works (POTW), it may require submission of a composite correction plan. For violating industrial facilities, a Section 308 request can accompany a notice of violation or an administrative order.

EPA's broad information-gathering authority withstood several constitutional challenges in United States v. Tivian [589 F. 2d 49 (1st Cir. 1978) cert. denied 442 U.S. 942 (1979)]. In that case, the court held that:

- Authorizing EPA to require the owner or operator of any emission or point source to provide EPA with such information as the Agency may reasonably require to carry out its responsibilities under the Act does not violate the Fourth Amendment;
- Requiring a corporation to supply data does not constitute involuntary servitude, which is prohibited by the Thirteenth Amendment; and
- Taking records was not without procedural due process that is required by the Fifth Amendment.

Failure to respond to a Section 308 information request is grounds for issuance of an administrative order or a civil judicial action under Section 309.

A Section 308 letter is not a prerequisite to issuance of an administrative order or a civil judicial or criminal action. However, in many instances where violations are suspected but further data is needed, EPA may request detailed information on the facility and its effluent prior to issuing an administrative order. For example, EPA may require a permittee to submit data to verify effluent violations.

It may also be appropriate to use a Section 308 letter rather than an administrative order, where EPA wants to correct noncompliance problems but needs further information from the facility to determine what constitutes an expeditious schedule for compliance. This is often the case when a Section 308 letter is sent to a municipality.

Contents of a Section 308 Letter

A Section 308 letter should contain the following elements:

- Name of discharging facility and permit number, if any;
- Citation to the Agency's legal authority (Section 308);
- Specific description of the information that EPA is requiring the recipient to submit;
- Notification that failure to respond may result in a Section 309 civil action;
- Deadline for compliance with information request;
- Notification of certification requirement pursuant to 40 C.F.R. §122.22(d) or 28 U.S.C. §1746;
- Notification that the information requested is exempt from the requirements of the Paperwork Reduction Act of 1980; and
- Agency contact to receive requested information and to answer questions.

A Section 308 letter that is issued to a municipality for the purpose of implementing the National Municipal Policy should also contain the following elements:

- Reference that the letter is the Agency's first step in bringing the discharger into compliance;
- Citation to the applicable substantive law and statutory deadline for meeting that law;

- Specific findings of violations and documents where such information is contained; and

- Request for information from the facility to assist EPA in setting up a compliance schedule, including a specific date certain for achieving final compliance (optional). (This may include a list of questions on the treatment capabilities of the facility or on a more formal plan, such as a municipal compliance plan.)

The Regional Administrator or the director of the Regional Water Management Division, depending upon Regional Office practice, issues Section 308 letters after consultation with the Office of Regional Counsel. The letter is sent by certified mail, return receipt requested, or by personal service (although the latter method is not the Agency's usual practice). Usually, a Section 308 letter is issued to a corporation, so it is important that the letter is addressed to the appropriate company official. That official is typically the president of the company, although sometimes the appropriate official may be a plant manager or an attorney.

Exhibits 6-1 and 6-2 contain model Section 308 letters that are addressed to municipalities to implement the National Municipal Policy. Exhibit 6-1 contains a model Section 308 letter requesting preparation of a municipal compliance plan, and Exhibit 6-2 contains a model Section 308 letter requesting preparation of a composite correction plan. These two exhibits are contained in the August 20, 1984, EPA memorandum entitled "Example Non-Judicial Enforcement Documents for Obtaining Compliance with the National Municipal Policy." Exhibit 6-3 contains a sample Section 308 letter requesting information from an industrial discharger.

Notices of Violation

Purpose and Authority

A notice of violation (NOV) is a letter issued by EPA pursuant to Section 309(a) of the Act that notifies the state that a violation of the CWA has been detected. The violating facility also receives a copy of the NOV. Section 309(a)(1) states that, if EPA finds a violation of a permit issued by an approved state program, the Agency shall either bring a civil action, issue an administrative order, or issue an NOV.

Although an NOV is not a prerequisite to federal enforcement [see U.S. v. City of Colorado Springs, 455 F. Supp. 1365 (D. Colo. 1978)], an NOV can be a useful enforcement tool.

Notice to the state of the issuance of an NOV provides the state with an opportunity to take enforcement action. EPA is not required to give the state such notice; however, it typically does so as a matter of policy pursuant to the "State/EPA Enforcement Policy Framework," issued on July 26, 1984. Note that NOVs only apply to NPDES-approved states although EPA may choose to issue NOV-like letters for violations in states that do not

have NPDES-approved programs. In some cases, a state/EPA Memorandum of Agreement may require state notification prior to issuing an NOV. Such notification may prompt the state to commence enforcement action. According to the Policy Framework, EPA may take action where the state fails to take timely and appropriate enforcement action.

The NOV also serves several practical purposes in the compliance and enforcement program. An NOV may serve to draw the owner's attention to violations with which he or she may be unaware and encourage the owner to rectify the problem. In other cases, an owner may want to comply with the law but does not know what the law requires. An NOV can serve to clarify the legal obligations imposed by the Act.

Contents of an NOV

The CWA does not set forth any specific requirements for the contents of an NOV. Exhibit 6-4 contains a model NOV and cover letter. The Agency has followed the practice of including the following elements in most NOVs:

- Specific reference to the legal requirement that has been violated;
- Specific reference to the point source or industrial user in violation of the standard;
- The factual basis for the NOV, including the date, time, and evidence of the violation;
- An explanation of further administrative or judicial action that may be taken if the state does not begin enforcement action or the source does not comply:

  Example: "Section 309(a) of the Clean Water Act permits EPA to issue an administrative order requiring compliance with applicable standards. In addition, Section 309 authorizes EPA to initiate a civil action in U.S. district court for injunctive relief or to recover a $10,000 civil penalty per day of violation, or both, if the Administrator finds that the violation has continued beyond the 30th day after this notification. Moreover, Section 309(c) authorizes the initiation of criminal prosecution for willful or negligent violations."

- An indication that (1) the source may confer with EPA officials concerning the violations within 30 days of the notification; (2) the source is entitled to the presence of an attorney if he or she so desires; and (3) a record of any such conference will be made (optional);
- The name, address, and telephone number of the EPA official to be contacted concerning the scheduling of a conference; and
- The signature of the appropriate EPA official.

In addition, the NOV may include a requirement under Section 308 for the source to report within a specified time on actions it has taken to address the noticed violations.

Issuing the NOV

Like Section 308 letters, NOVs are issued under the signature of the director of the regional water management division after consultation with the Office of Regional Counsel or by the Regional Administrator, depending upon Regional Office practice. The NOV and a form cover letter is addressed to the state agency and an appropriate company official and sent by certified mail or by personal service.

Administrative Orders

Purpose and Authority

Sections 309(a)(1) and 309(a)(3) of the CWA authorize the Administrator to issue administrative compliance orders for violations of the following CWA provisions:

- Section 301 (effluent limitations and prohibitions against discharges not authorized by a permit);
- Section 302 (water quality-related effluent limitations);
- Section 306 (new source performance standards);
- Section 307 (toxic and pretreatment effluent standards);
- Section 308 (information requests and inspections);
- Section 318 (aquaculture); and
- Section 405 (sewage sludge disposal).

EPA may issue administrative orders for violations of any conditions or limitations that are contained in a permit issued under Section 402 or in a state permit issued under Section 404 that implement any of these listed sections. An order that is issued for a violation of Section 308 does not take effect until the alleged violator is provided an opportunity to confer with the Administrator. [See Section 309(a)(4).] Note that Section 309 does not apply to grant agreements and schedules in grants.

The Administrator has delegated issuance of administrative orders to the Regional Administrators, who, in most Regions, have in turn delegated issuance to the regional water management division directors.

On April 18, 1975, EPA issued "Guidelines for the Issuance of Administrative Compliance Orders Pursuant to Title III, Sections 309(a)(3) and 309(a)(4) of the Federal Water Pollution Control Act, as amended [33 U.S.C. §§1319(a)(3) and 1319(a)(4)]." These guidelines are contained in the Water Compliance/Enforcement Policy Compendium. The guidelines were based on the 1972 Federal Water Pollution Control Act Amendments.

On July 30, 1985, EPA issued "Recommended Format for Clean Water Act Section 309 Administrative Orders," which replaces the April 18, 1975 guidelines. The new guidance details specific statutory requirements and options and suggestions on format for administrative orders. The new guidance discourages use of successive administrative orders for the same violation, clarifies legal authority (e.g., Sections 308 and 309) as the basis for order requirements, clarifies the scope of order requirements, identifies sanctions for order violations and sets out sample provisions. The recommended format guidance is contained in Exhibit 6-5.

Under the 1972 Amendments, administrative orders had to require compliance with the terms of the permit or other applicable requirements within 30 days of issuance. The April 18, 1975 guidance reflected this requirement. In the 1977 Amendments to the Act, Congress amended Section 309(a)(5) to state that an administrative order that is issued for a violation of an interim compliance schedule must specify a time for compliance not to exceed 30 days. However, regarding compliance with final deadlines, the Administrator may specify a time that he or she determines to be reasonable (taking into account the seriousness of the violation) and any good faith efforts on the part of the violator to comply with applicable requirements. This requirement is reflected in the July 30, 1985 guidance.

The courts have addressed the issue of the Administrator's duty to issue compliance orders. In the only court of appeals decision, Sierra Club v. Train [557 F. 2d 485 (5th Cir. 1977)], the court held that the issuance of an administrative compliance order under Section 309(a)(3) is discretionary. However, in the majority of district court cases, including South Carolina Wildlife Federation v. Alexander [457 F. Supp. 118, 134 (D. S.C. 1978)], the court held that Section 309(a)(3) imposes a nondiscretionary duty on the Administrator to issue compliance orders once he or she becomes aware of a violation of the Act. Nonetheless, the court did not believe that the Administrator must bring enforcement proceedings in the courts by either a civil or criminal action. This is consistent with the Clean Air Act interpretation of EPA's duty. [See, e.g., Council of Commuter Organizations v. M.T.A., 683 F. 2d 663, 671-672 (2d Cir. 1982).]

Issuance of an administrative order is not a prerequisite to instituting a civil judicial action. In addition, compliance with an administrative order does not preclude civil judicial action that seeks penalties for the underlying violation. [See, e.g., United States v. Earth Sciences, Inc., 599 F. 2d 368, 375-76 (10th Cir. 1979).] Nonetheless, mitigation and good faith efforts to achieve compliance may be equitable arguments in determining the size of the penalty.

Finally, an administrative order may not be issued for past violations that have been corrected. The violation (or the condition giving rise to viola-

tions) must, therefore, be current based on information available at the time of the order. Some NPDES permit violations occur on an intermittent basis (e.g., once every other month). The Region may issue an administrative order for a violation of a permit condition that is the cause of intermittent permit effluent limitation violations (such as an operation and maintenance requirement or failure to adhere to best management practices).

Contents of an Administrative Order

The administrative order must state, with reasonable specificity, the nature of the violation [i.e., the Region must make a factual finding that there has been a violation of one of the above-specified sections, typically Section 301(a)]. To determine the compliance date, the Region must also make a finding in the administrative order on what constitutes a reasonable time to achieve compliance and tailor the administrative order to the Section 309(a)(5) requirements. The order must also include an explicit order based on the factual findings of the violation and that imposes requirements related as closely as possible to achieving and maintaining compliance by a certain date.

While an administrative order must specify compliance with the relevant statutory section, such as Section 301, it may not impose the particular treatment technology that a permittee must use to reach compliance. Specifying such actions is not consistent with the CWA's intent to allow the permittee to achieve statutory compliance deadlines in a manner chosen by the permittee. (Similarly, an NPDES permit may not require a specific treatment to achieve compliance, but may only include the statutory compliance deadlines and appropriate effluent limits. This does not preclude imposition of requirements such as best management practices.)

The administrative order may contain, however, a Section 308 information request (which references Section 308 as its authority), as long as it is reasonably necessary to determine the status of the violator and to correct the violation (e.g., requiring sampling and monitoring at weekly intervals). Of course, the Region may still use Section 308 authority to elicit information in a nonenforcement context.

Note that where EPA issues an administrative order for failure to submit information pursuant to Section 308, the order may not take effect under Section 309(a)(4) until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. Thus, in issuing such an order, the Region should include an opportunity for the violator to confer with EPA.

Administrative Orders for Municipalities Violating Secondary Treatment Requirements

The EPA memorandum entitled "Example Non-Judicial Enforcement Documents for Obtaining Compliance With National Municipal Policy" contains model administrative orders for use against discharge violations by publicly owned

treatment works (POTW). The models conform to minimum federal requirements for obtaining compliance by unfunded municipalities.

Under EPA policy, noncomplying municipalities that receive a Section 308 letter or an administrative order are generally grouped into two types--those requiring a Composite Correction Plan (CCP) and those requiring a Municipal Compliance Plan (MCP). A municipality that has a constructed POTW that is not in compliance with its NPDES permit effluent limits may be required to develop a CCP. A model administrative order requiring a CCP is contained in Exhibit 6-6. Note that the 30-day compliance requirement for a nondeadline violation is specifically stated in paragraph (a) of the order, and the preparation of the CCP where corrective measures are not completed in paragraph (1)(b) of the order. An affected municipality that needs to construct a wastewater treatment facility in order to achieve compliance must develop an MCP. A model administrative order requiring an MCP is also contained in Exhibit 6-6.

Administrative Orders for New Sources

New source dischargers of water pollutants must have in operation and must start up all pollution control equipment that is required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time (not to exceed 90 days), the owner or operator must meet all permit conditions [40 C.F.R. §122.29(d)(4)]. Although new source dischargers may not receive permit compliance schedules, EPA may issue administrative orders to new sources containing such schedules. If the new source does not meet all permit limitations within 90 days, EPA may bring a civil injunctive action to cease the discharge until compliance is achieved; such civil action may include a request for civil penalties. However, where the new source facility meets its permit conditions as part of its start-up requirement, and subsequently violates permit limitations or conditions, EPA may issue an administrative order to address these violations.

Administrative Orders for Administratively Extended Permits

Where the administrative order involves an expired permit, the order must explain whether the permit has been administratively extended by operation of law. Section 558(c) of the Administrative Procedure Act (APA) extends the duration of a permit term by operation of law where the permittee submits a timely application for permit reissuance and the Agency does not act on the permit application. The majority of states that are approved to administer the NPDES program have similar provisions.

Administrative Penalties

The CWA does not currently authorize administrative penalties for violations of the NPDES permit or the Section 404 program. Section 311(b) authorizes the Coast Guard to assess administrative penalties for oil spills and Section 311(j)(2) authorizes EPA to assess penalties for failure

to develop and implement satisfactory spill prevention, containment, and countermeasure plans. The Coast Guard may also assess penalties for failure to observe marine sanitation device regulations under Section 312(j).

Contractor Listing

Section 508 of the CWA, Executive Order 11738, and 40 C.F.R. Part 15 authorize EPA, after providing certain administrative procedures, to preclude certain facilities from being used in connection with government contracts, grants, or loans if the facility is violating CWA standards. Contractor listing can be an effective enforcement tool, and EPA policy calls for Regional Office enforcement personnel to consider this option to obtain compliance. (See "Guidance for Implementing EPA's Contractor Listing Authority," July 18, 1984, contained in the General Enforcement Policy Compendium, GM-31.)

The contractor listing regulations at 40 C.F.R. §15.20(a)(1) provide that a listing recommendation (generally from the Regional Administrator to the Headquarters listing official) may be based on the following:

- Facilities that have given rise to a conviction under Section 309(c) of the CWA.

- Facilities that have given rise to any injunction, order, judgment, decree, or other form of civil ruling by a federal, state, or local court issued as a result of noncompliance with clean water standards, or facilities that have given rise to a conviction in a state or local court for noncompliance with clean water standards; and

- Facilities not in compliance with an order under Section 309(a) of the Act, or that have given rise to the initiation of court action under Section 309(b) of the Act, or have been subjected to equivalent state or local proceedings to enforce clean water standards.

Prior to listing on the second and third bases above, EPA must determine that there is evidence of continuing or recurring noncompliance with clean water standards at the facility [Section 15.20(a)(2)]. EPA has proposed revisions to the contractor listing regulation (49 Fed. Reg. 30628, July 31, 1984), which among other things provide for automatic listing of a facility for a criminal conviction.

The recommending party (generally the Regional Office) sends a listing recommendation to the Agency listing official. Recommendations to list may also come from the Associate Enforcement Counsel for Water Enforcement, a governor, or any citizen. The respondent must first receive notice of the listing recommendation and an opportunity to request a listing proceeding, which is an informal Agency adjudication, before the respondent can be listed.

EPA should consider listing actions for violating facilities when other enforcement actions have not stopped the violator from continuing its pattern of chronic noncompliance. EPA may use listing as an enforcement response where a facility fails to comply with an administrative or judicial order. Note that the district courts have upheld EPA's authority to list facilities of noncriminal violators. [See e.g., U.S. v. Interlake, Inc., 432 F. Supp. 987 (N.D. Ill. 1977).] EPA may also bring a listing proceeding based on present "recurring or continuing" violations and a prior judicial or administrative judgment even if the prior action did not address the present violations. Listing may be appropriate where the value of the facility's government contracts, grants, and loans exceeds the cost of compliance. Of course, a listing action is likely to be more effective if the continuing or recurring noncompliance involves unambiguous and clearly applicable clean water standards. Facilities may be removed from the "List" only after they demonstrate that they have achieved and will maintain compliance.

NPDES Permit Actions

Notices of Deficiency

Pursuant to 40 C.F.R. §124.3(c), EPA must issue notices of deficiency to owners or operators who have failed to submit complete NPDES applications (Exhibit 6-7). (These notices should be distinguished from (1) NOVs or administrative orders under Section 309 and (2) the deficiency notices discussed in Chapter Three, which are used as a follow-up to compliance inspections.) A notice of deficiency should be issued when:

- An owner or operator has not submitted an NPDES application by the due date specified for the application; or
- An owner or operator has submitted a timely but incomplete NPDES application.

The notice of deficiency should do the following:

- Detail deficiencies in the NPDES application; and
- Require submission of a complete NPDES application by a specific date, generally within 30 days from the date of issuance of the notice of deficiency.

In addition, the notice of deficiency should be accompanied by a warning letter advising the recipient that failure to submit a complete application by a particular date will result in the initiation of further enforcement action. In that event, the permit application may be denied under Section 124.3(d) and appropriate enforcement action may be taken under Section 309 of CWA. (If the recipient does not file a timely renewal application, the existing permit cannot be administratively extended, and the recipient

could also be faced with an enforcement action for discharging without a permit.)

Notices of Intent To Deny a Permit

Once a permit application is complete, the director must decide either to prepare a draft permit or to deny the permit application. EPA may issue a notice of intent to deny a permit application under 40 C.F.R. §124.6(b).

Modifications, Revocations and Reissuances, or Terminations of Permits

Under 40 C.F.R. §124.5, an NPDES permit may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon EPA's own initiative. This authority provides the Agency with additional administrative tools to respond to cases of noncompliance. Permits may be modified or revoked and reissued only for the reasons specified in 40 C.F.R. §122.62. Section 309 administrative orders may not be used to modify permits. Permits may be terminated only for the reasons specified in 40 C.F.R. §122.64.

Note that compliance with a new permit does not preclude a civil judicial action or penalties for violations of a previous permit. [See Illinois v. Outboard Marine Corp., Inc., 680 F. 2d 473, 480 (7th Cir. 1982).] However, a request for equitable relief to enjoin future violations of an expired permit may be moot. See Sierra Club v. Aluminium Co. of America, 585 F. Supp. 842, 854 (N.D. N.Y. 1984).

3 Exhibits

This section contains the following exhibits:

Exhibit 6-1: Model Section 308 Letter--
Request for Municipal Compliance Order
Exhibit 6-2: Model Section 308 Letter--
Request for Composite Correction Plan
Exhibit 6-3: Sample Section 308 Letter--Industrial Discharger
Exhibit 6-4: Model Notice of Violation
Exhibit 6-5: Recommended Format for Clean Water Act
Section 309 Administrative Orders
Exhibit 6-6: Model Municipal Administrative Orders
Exhibit 6-7: Model Notice of Deficiency

Model Section 308 Letter—Request for Municipal Compliance Plan

Honorable
Title
Address

Certified: RRR, Restricted Delivery

RE: Request for Information
EPA ID No._____

I am writing this letter requesting information from you in your official capacity as a municipal official. This letter is written under the authority of Section 308 of the Clean Water Act (the Act) and is the initial step in enforcement activities necessary to bring [a] into compliance with the Act as quickly as possible. A response to this letter on behalf of [a] is required.

Owners of publicly owned treatment works were required, under Section 301(b) of the Act, to construct treatment works and to meet effluent limitations representing secondary treatment **[and water quality requirements]**[b] by the July 1, 1977 statutory deadline **[unless time for compliance is extended by the issuance of and compliance with a permit authorized under Section 301(i) of the Act. The maximum extension allowed under Section 301(i) is until July 1, 1988]**[c].

My review of available materials indicates that [a] has been issued National Pollutant Discharge Elimination System (NPDES) Permit No. _____, expiring on (date), for a [d] wastewater treatment works at (location). The currently applicable effluent limitations in that permit reflect secondary treatment **[and water quality]**[b] requirements. **[You have not been issued a permit extending the time for compliance under Section 301(i).]**[e] Based on my review of discharge monitoring reports, Regional Construction Grants records and other records, I have determined that [a] is failing to meet effluent limitations contained in the permit and that one of the reasons for that failure is the absence of necessary treatment works. **[Cite specific findings and documents to substantiate your claim.]** The municipality is, therefore, in violation of the deadline for treatment under Section 301(b) of the Act and in violation of the effluent limitations of its NPDES permit.

A schedule of compliance for necessary construction (including, if appropriate, associated upgrading and expansion) and for compliance with effluent limitations must be established. **[In addition, appropriate interim effluent limitations must be set for the period prior to attainment of final effluent limitations.]**[f] In order to assist this Agency in setting that schedule, the municipality is required to

---

Note: Items in **bold** type indicate optional material. The letters in **bold** type refer to notes that are listed on the last page of this exhibit.

prepare a Municipal Compliance Plan (MCP) as described in Enclosure 1, and answer the other questions in Enclosure 1, including appendices. These questions are to be answered based on the assumption that EPA Construction Grants will not be available to fund any portion of the design or construction of the required wastewater treatment facility. After considering the information you submit, I will issue an Administrative Order (or request the commencement of a court action) requiring [a] to take appropriate and timely action.

The failure to respond to this request may result in the taking of legal action under Section 309 of the Act. The municipality remains responsible for compliance with the statutory requirements of the Act and with the requirements of its permit. **[In addition, the municipality must comply with any currently effective order issued by EPA or the State of _____.]**[g]

The municipality's response to this inquiry is required within _____ days after receipt of this request. The response must be signed by an authorized person who is a principal executive officer or a ranking official of [a]. [h] The responses must be certified as to accuracy. The certification must substantially conform to one of the forms contained in Attachment B. The response is to be mailed or delivered to (address).

Please affix the ID notation, shown above, on the cover page of the response, and, if appropriate, on the cover page of any material claimed to be treated as confidential.

The notice of deficiency should do the following:

[Information reporting required of permittee is not subject to the requirements of the Paperwork Reduction Act of 1980.][i]

If you have any questions concerning this matter, please contact _____ of my office at (address and telephone number).

Very truly yours,

(Authorized official)
(Title)

Enclosure 1
Information To Be Furnished on Behalf of Municipality*

The following information is to be furnished on the assumption that no portion of the money that will be necessary for design, construction, or operation of required treatment works will be available in the form of Construction Grants under Title II of the Clean Water Act, unless permittee has been awarded such grant or has been preliminarily certified by the state for the award of such grant on or before September 30, 1985.

1. Prepare (obtain approval from governing body of the permittee) and deliver a copy of a Municipal Compliance Plan (MCP) and proof of approval. The MCP must show how the permittee proposes to attain continuing compliance with the effluent limitations in its NPDES permit and the secondary treatment **[and water quality]** requirements of Section 301(b) of the Clean Water Act at the earliest possible time. The MCP shall minimally contain the following elements:

   - The proposed capacity and effective removal capability of the new or upgraded facility and description of the treatment (and conveyance) technology and/or other activities proposed to be undertaken in order to attain compliance, including list and capacity of principal components.

   - The cost, in 198_ dollars, of construction and other activities required for attaining compliance.

   - A statement of sources and methods of financing the new or upgraded facility.

   - The annual cost in 198_ dollars for operating and maintaining the completed facility and for replacing equipment or appurtenances that are portions of the completed facility and that have a useful life shorter than that of the facility (OM&R).

   - The financial mechanisms (sources of revenue) to be used to fund repayment of those portions of financing that are required to be repaid and to finance OM&R.

   - A proposed, fixed-date compliance schedule showing proposed dates of completion of improvements, attainment of continuing compliance, completion of financing-required activities, and other milestones appropriate to attaining compliance. (See Attachment for suggested format.)

---

* If any portion of the material furnished is claimed as business confidential, that claim must be made at the same time the information is furnished. The procedures for making such a claim and EPA's handling of the claims appear in 40 C.F.R. Part 2, Subpart B. A copy of these regulations will be furnished on request.

[The phrase "other milestones" includes all proposed interim activities that will ensure reduction in the size of effluent violations pending attainment of compliance. Examples of such activities, some of which may not directly relate to final attainment, are:

[— Improved operation and maintenance of existing system;
[— Expedited implementation of approved pretreatment program;
[— Replacement of equipment;
[— Improved enforcement of existing sewer use ordinance;
[— Expedited completion of upgrade or secondary (where advance waste treatment is required);
[— Minor structural modifications or rehabilitation.][k]

Please answer Question 2 only if the proposed date of completion under a final date compliance schedule occurs after **[July 1, 1988]**[l]

2. (a) Complete the attached [m].

(b) State in detail any facts or circumstances, other than those disclosed in the Municipal Compliance Plan, that will prevent [a] from completing construction of secondary treatment wastewater facilities **[and facilities to meet water quality-based limitations]**[j] and having those facilities fully operational and in compliance with permit effluent limits by **[July 1, 1988]**[l].

All municipal officials or their representatives shall respond to the following:

3. (a) Do you have any reason to believe that your treatment facility is currently incapable of meeting the effluent limitations listed in Attachment A? (Attachment A is a copy of the interim effluent limitations in effect on June 30, 1977, in your then current NPDES permit.)

(b) If your answer to Question 3(a) is yes, what do you consider to be reasonable effluent limitations for the period prior to attaining secondary treatment **[and water quality-based]**[j] requirements? **[Why do you believe the suggested numbers are reasonable?]**[n]

(c) If the compliance schedule includes "other milestones" the performance of which result in the immediate improvement of water quality, please state the effluent limitations that the facility will be capable of meeting upon completion of performance of those activities, either by single activity or by groups of activities to be completed over a period of time not to exceed 12 months.

ATTACHMENT A
PERMIT LIMITS
6/30/77

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning _____ and lasting through _____ the permittee is authorized to discharge from outfall(s) serial number(s) _____.

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	kg/day(lbs/day)		Other Units (Specify)			
	Monthly Avg	Weekly Avg	Monthly Avg	Weekly Avg	Measurement Frequency	Sample Type
Flow-m^3/Day (MGD)	--	--	--	--		

The pH shall not be less than _____ standard units nor greater than _____ standard units and shall be monitored.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Attachment B
Form of Certification

A. For use at all plants but most appropriate at large plants (where signatory has ultimate responsibility but lacks direct control or specific knowledge of details):

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.
>
> (40 C.F.R. §122.22(d); 48 Fed. Reg. 39,619, September 1, 1983)

B. Alternate form that is appropriate for use at smaller plants (where signatory has direct control over and specific knowledge of details):

> I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (28 U.S.C. §1746)

Notes

a Name of the municipality/permittee.

b Applies only if the municipality is subject to water quality standards or other Section 301(b)(1)(C) requirements.

c Include only when appropriate.

d Description of size and type of current treatment (e.g., 3/4 MGD primary).

e Include this sentence only when appropriate. The sentence may be modified to show receipt of a Section 301(i) application and subsequent rejection, or violation of a previously issued Section 301(i) permit. If the permittee received an Enforcement Compliance Schedule Letter (ECSL) that has been previously voided, recite facts of issuance, reason for cancellation, and method of receipt by the permittee of notice of cancellation in lieu of this sentence. Cancellation cannot be solely by statement of such in this document.

f Does not apply if there is an existing order setting interim effluent limitations, and these limits are not to be changed.

g Applies if there is an outstanding state or EPA order.

h If desired, add reference to representative authority for executing documents under 40 C.F.R. §122.22(b) when a request is made to a large city that has decentralized management.

i Optional in EPA- or state-issued letters.

j Include only if treatment beyond secondary is required.

k Preferred, but not required. See Page 10 of Regional and State Guidance on the National Municipal Policy, March 1984.

l Modify to reflect a date earlier than July 1, 1988, that requester can reasonably expect all work to be completed, if appropriate.

m To be identified when the new financial analysis form has been approved. Subject to further expansion or modification at that time.

n To be included only if interim limits are to be included in Final Administrative Order.

Model Section 308 Letter—Request for Composite Correction Plan

Honorable Certified: RRR, Restricted Delivery
Title
Address
RE: Request for Information
EPA ID No._____

I am writing this letter requesting information from you in your official capacity as a municipal official. This letter is written under the authority of Section 308 of the Clean Water Act (the Act) and is the initial step in enforcement activities necessary to bring [a] into compliance with the Act as soon as possible. A response to this letter on behalf of [a] is required.

Owners of publicly owned treatment works are required, under Section 301(b) of the Act, to meet effluent limitations in the National Pollutant Discharge Elimination System (NPDES) permits issued for the operation of those treatment works.

My review of available materials indicates that the municipality has been issued NPDES Permit No. _____ _____, expiring on (date), for a wastewater treatment plant at (location). [b]

The permit requires the attainment of the effluent limitations listed in Attachment A during the time the permit is in effect. Discharge Monitoring Reports filed by [a] for the period beginning _____19_____ and ending _____19___ show continuing discharges in excess of permit limitations as follows:

Period/Date	Pollutant	Permit Limitation	Reported Value

The reported values that are outside permit limits are found to be true. I, therefore, find the municipality in violation of its NPDES permit.

[A preliminary diagnostic evaluation of facility effectiveness was performed by _____ at the request of EPA Region ____. That evaluation, a copy of which is attached, as Attachment B indicates that the following may be among the major causes of [a]'s failure to meet the permit limits:

[Specify major findings of evaluation][c]

---

* Note: Items in **bold** type indicate optional materials. The letter in **bold** type refer to notes that are listed on the last page of this exhibit.

The preparation by [a] of a Composite Correction Plan (the Plan) as described in Attachment C is necessary in order to determine the the activities required for bringing its treatment works into compliance with permit effluent limitations.

Within 45 days of the receipt of this request [a] shall:

(1) Advise me of the name(s) of the persons who will prepare or review the Plan and provide me with a statement of their qualifications to prepare or review the Plan, and

(2) Provide me with the dates on which [a] will commence and complete the Plan. If the date for completion of the plan is after (date), the municipality shall explain why the Plan cannot be completed on or before that date.

Unless otherwise advised to the contrary within 30 days of forwarding the above-requested information, [a] shall proceed to prepare its Composite Correction Plan. It shall provide an interim report of progress on (date) and every ___ days thereafter, and furnish me a copy of the Plan and proof of its acceptance by the municipality within 15 days of the municipality's target completion date of the Plan.

Following receipt of the Plan, I will issue an Administrative Order (or request the commencement of court action leading to the entry of a legally enforceable equivalent order) requiring [a] to take appropriate action that will result in attainment of permit effluent limitations by the municipality.

The failure to respond to this request may result in EPA taking legal action under Section 309 of the Act. [a] remains responsible for compliance with the statutory requirements of the Act **[and]**[d] **[,]**[e] with the requirements of its permit **[and with the requirements of any outstanding orders issued by the State of _____, EPA, or the Courts].**[e]

The municipality's responses to this inquiry are required within the times specified above. Each response must be signed by an authorized person who is a principal executive officer or a ranking official of the municipality. [f] The responses must be certified as to accuracy. The certification must substantially conform to one of the forms contained in Attachment D. The responses are to be mailed or delivered to (address).

Please affix the ID notation shown above on the cover page of the response and, if appropriate, on the cover page of any material claimed to be treated as confidential.

[Information reporting required of the municipality is not subject to the Paperwork Reduction Act of 1980.][g]

If you have any questions concerning this order, contact my office at (address and telephone number).

Very truly yours,

(Authorized official)
(Capacity)

Enclosures

ATTACHMENT B
PERMIT LIMITS
6/30/77

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

During the period beginning _____ and lasting through _____ the permittee is authorized to discharge from outfall(s) serial number(s)_____.

Such discharges shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	kg/day(lbs/day)		Other Units (Specify)			
	Monthly Avg	Weekly Avg	Monthly Avg	Weekly Avg	Measurement Frequency	Sample Type
Flow-m^3/Day (MGD)	--	--	--	--		

The pH shall not be less than _____ standard units nor greater than _____ standard units and shall be monitored.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Attachment C
Composite Correction
Plan Instructions

Composite Correction Plan

I. INTRODUCTION

The Composite Correction Plan (CCP) is designed to identify and correct those areas in a POTW that are limiting the plant's ability to comply with its NPDES permit effluent limitations. The CCP is a two-step process that should provide the most economical method for improving POTW performance. The approach consists of an evaluation step and a plan development step.

The evaluation step is a thorough review and analysis of a POTW's design capabilities and the associated administration, operation, and maintenance practices. It is conducted to provide information upon which to make decisions regarding efforts to improve performance. The primary objective is to determine whether significant improvement in treatment can be achieved without making major capital improvements. This objective is accomplished by assessing the capabilities of key unit processes and by identifying and prioritizing the factors that limit performance and that can be corrected.

The plan development step uses the results of the evaluation to develop step-by-step instructions to correct each deficiency identified in the evaluation. The plan also must include a detailed schedule for implementation and an associated itemized cost estimate.

II. CONTENT OF COMPOSITE CORRECTION PLAN

The Composite Correction Plan prepared using the above evaluation shall address all factors that are currently limiting or that could limit plant operating efficiency and the plant's ability to meet its permit effluent limitations. The plan shall include the following information:

a. A list of all factors that are limiting the plant's treatment capability.

b. An estimate of the effluent quality that the treatment plant is theoretically capable of achieving if all plant operations are optimized.

c. Specific, proposed actions to correct each limiting factor, including (where appropriate) specific changes to operating, maintenance, staffing, user charge system, sludge handling, pretreatment or budgeting practices, or any other change that will optimize plant performance. Such proposed actions shall include capital improvements to the existing physical plant, where appropriate.

d. A proposed schedule and cost estimate for implementing each change, including the date for full permit compliance. This schedule shall include specific dates by which each change will be initiated and completed.

e. A certificate showing the method of financing any capital improvements or any other portions of the activities listed in Paragraph C that will not be furnished from current receipts.

Attachment D
Form of Certification

A. For use at all plants but most appropriate at large plants (where signatory has ultimate responsibility but lacks direct control or specific knowledge of details):

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.
>
> (40 C.F.R. §122.22(d); 48 Fed. Reg. 39,619, Sept. 1, 1983)

B. Alternate form that is appropriate for use at smaller plants (where signatory has direct control over and specific knowledge of details):

> I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (28 U.S.C. §1746)

NOTES

a Name of permittee

b If the permit has expired but has been continued by operation of law and the expired permit had Section 301(b)(1) limits, add sentence showing continuing applicability of final permit limits.

c Applies only if there has been a preliminary diagnostic evaluation. Language cross referencing any reports, etc., that indicates problem sources or solutions may be substituted. Such reference, obviously may be deleted if the Region or state does not wish to send, or if previously transmitted.

d Applies if there are no outstanding orders.

e Applies if there are outstanding EPA or state orders or court decrees.

f If desired, add reference to authority of representative to execute documents under 40 C.F.R. §122.22 where request is to large municipality that may have decentralized management.

g Inclusion of this sentence is optional in EPA- or state-issued requests.

Sample Section 308 Letter—Industrial Discharger

Mr. B. G. Caldwell
Dow Chemical Company
Dow Center
Midland, Michigan 48640

JAN 20 1981

Dear Mr. Caldwell:

The enclosed information request is directed to you under the authority of the Federal Clean Water Act, Section 308, 33 U.S.C. 1318, and the Resource Conservation and Recovery Act, Sections 3007 and 8003, 42 U.S.C. 6927 and 6983. The response must be returned to the United States Environmental Protection Agency, Region V, Attn. Arnold Leder, Chief, Compliance Section, within 21 days of receipt.

The written statements submitted pursuant to this request must be notarized and submitted over an authorized signature certifying that they are true and accurate to the best of the signatory's knowledge and belief. Moreover, any documents submitted to Region V pursuant to this information request must be certified as authentic to the best of the signatory's knowledge and belief. Should the signatory find, at any time after submittal of the requested information, that any portion of the submission certified as true is false or incorrect, the signatory should so notify Region V. If any response or document certified as true is found to be untrue, the signatory can be prosecuted under 18 U.S.C. 1001 and other Federal statutes.

The information requested herein must be provided notwithstanding its possible characterization as confidential information or trade secrets. Should you so request, however, any information (other than public information) which the Administrator of this Agency determines to constitute methods, processes, or other business information entitled to protection as trade secrets will be maintained confidential. Request for confidential treatment must be made when the information is provided, since any information not so identified will not be accorded this protection by the Agency.

If you have any specific questions concerning this request, please contact Jonathan T. McPhee, an attorney on my staff, at (312) 256-0078.

Very truly yours,

ORIGINAL SIGNED BY DALE S. BRYSON
Sandra S. Gardebring
Director, Enforcement Division

cc: Jack Bails
Michigan Department of Natural Resources

Jay Brant
Assistant U.S. Attorney

Jose Allen
U.S. Department of Justice

bcc: Bryson, Fenner, Grimes/Schulteis/McPhee
Miner
Bremer/Hesse
Pratt/Barney.
Amendola
Zar
Leder/308 Tracking
Winkelhofer/Amendola
McGrath/Saulys
Manzardo/Dzikowski/Newman/Clemens

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION V

DOW CHEMICAL COMPANY, MIDLAND, MICHIGAN Respondent	)	DIRECTION TO PRODUCE INFORMATION UNDER SECTION 308(a) OF THE CLEAN WATER ACT AND SECTIONS 3007 AND 8003 OF THE RESOURCE CONSERVATION AND RECOVERY ACT

Dow Chemical Company shall produce the following information regarding operations at its Midland, Michigan plant, within 21 days following receipt of this request. The response shall be made under oath by a responsible corporate official.

DEFINITIONS AND INSTRUCTIONS

A. As used herein, "Dow-Midland facility" shall mean the plant, facilities and operations, including brine fields, pipes or plumbing appurtenant thereto, and reinjection or underground injection wells or systems which are used or employed in the production, treatment, transport, or disposal of chemicals or chemical waste in and around Midland, Michigan, by Dow Chemical Company.

B. As used herein "laboratory quantities" shall mean small quantities of materials (less than 2 kilograms per month) which are used for analytical purposes or pilot or bench scale operations in the development or testing of new processes or production methods.

C. "Documents" shall include, but not by way of limitation, all correspondence, memoranda, notes, letters, reports, drafts, laboratory notes, chromatograms or other direct analytical data, minutes of meetings, scientific papers (whether published or unpublished), and tape or disc recordings, and copies of any of the above.

D. "Chemical waste" or "waste products" shall mean wastewater; process contact water (or non-contact water where it is possible that such could be contaminated or infiltrated, e.g., by leaks in condenser or heater tubes); discarded or unwanted products, byproducts, filtrates, extracts, or contaminants.

E. " Identify" shall mean:

1. With respect to a person, state that person's (a) full name, (b) business and residence address, (c) employer's name and address, (d) position or occupation, and (e) if a corporation, the state and date of incorporation and location and address of its principal headquarters.

2. With respect to a document, state (a) its title or, if none, its suoject matter, (b) its date, (c) the author or address, (d) the addressee, if any, (e) the recipents of all copies, (f) the form, file, or document control number, if any, (g) it's location and its custodian.

3. With respect to a chemical or chemical waste, state the common chemical name and any synonymous names, listed in the 8th or 9th Collective Index of Chemical Abstracts.

F. "Relating to" shall mean constituting, defining, containing, embodying, identifying, stating, referring to, dealing with or in any way pertaining to.

G. "Production process" shall mean all structures, pipes or other plumbing, electrical or electronic apparatus, tanks, vessels, reactors, condensers and other equipment associated with the manufacture, production, refinement filtration or other activity involved in creation of any saleable product by Dow-Midland, including all influent and effluent streams or pathways for raw materials, catalysts, sorbents, modifiers, product, by-product, waste product and any other input or output from each such discrete process.

H. "Waste stream" or "wastewater" shall include, but not by way of limitation, solid, liquid and gaseous material which is not a raw material, intermediate product or saleable byproduct of each production process or other source at Dow-Midland and any rejected, spilled, dumped, leaked or otherwise lost or unconfined raw material, intermediate product, or saleable product or byproduct which has not been recovered or reclaimed for sale or reuse and which is disposed of, stored for disposal or consigned for disposal by Dow-Midland or by any other person by incineration, landfilling, discharge with or without treatment to waters of the United States, deep-well injection or reinjection, or otherwise.

-3-

I. "Dispose of" shall mean to burn, vaporize, volatilize, leach, spill, dump, landfill, discharge, inject or pump into subterranean structures or soils, or otherwise dissipate into the ambient environment.

J. As used herein, the singular shall include the plural and the plural the singular, verb tenses shall be taken to include past, present and future, and the masculine the feminine, "each" shall include "every" and "every" shall include "each", "any" shall include "all" and "all" shall include "any".

K. With respect to analytical data provided in response to this document, describe the sampling, preservation techniques and analytical protocols used to determine the results and specify the detection limits of each analysis.

INFORMATION TO BE PRODUCED

1. Provide a complete description, by trade name and chemical name, of all products, intentional or unintentional byproducts, secondary products and waste products (whether disposed of, recycled or otherwise handled) now used or produced at the Dow-Midland facility, or used or produced there since January 1, 1970, other than laboratory quantities of such materials. This description should attribute each material so identified to the production process which employs or generates it.

2. Provide a complete description of all raw materials , by trade name and chemical name or species, now used at the Dow-Midland facility, or used there since January 1, 1970, other than laboratory quantities of such materials, including all information on the identity and quantity of impurities and/or contaminants contained therein. This description should attribute each material so identified to the production process which employs it.

3. Identify the sources and the amounts of the materials described in paragraphs 1 and 2 above, used or produced during the period January 1, 1970 to November 30, 1980, on an annual basis and by production process.

-4-

4. Describe, by use of flow diagrams, blueprints, and written descriptive material, each production process at the Dow-Midland facility; list the wastewater or waste stream volumes from each production process or other source at Dow-Midland facility, and describe the location within the plant from which such wastewater or waste stream emanates or originates by the use of flow diagrams or schematics, blueprints or otherwise, which diagrams or schematics should also reflect inputs of raw materials and outputs of product.

5. For each wastewater stream source characterized in paragraph 4 above, identify each chemical substance, other than water, by chemical name which is known or suspected to be present in such waste stream, except for waste streams which contain only domestic sewage.

6. Describe, with flow diagrams or schematics, blueprints, or otherwise, the disposition, transfer, and treatment of all wastewater streams at the Dow-Midland facility described in paragraph 4 above.

7. Describe for each material listed under paragraphs 1 and 2 above, the methods of disposal now in use, or used by the Dow-Midland facility, since January 1, 1970, of each such material which is not sold as a marketable product or consumed in the manufacture of a marketable product at the Dow-Midland plant, including spilled, off-specification or contaminated product and raw material. This description shall include an identification of the material; the production process or operation which produces the material; the method of disposal of such material; the names, addresses, and the dates of employment of, and volumes of materials handled by, waste haulers, transporters or disposers employed by the Dow-Midland facility; and the names, addresses and dates of employment of disposal or recycling facilities used by the Dow-Midland facility, including any which are owned and/or operated by Dow Chemical Company, or any of its operational units or subsidiaries, wholly or in partnership or concert with others.

8. For each point-source discharge from the Dow-Midland facility, provide

-5-

a complete characterization and quantification of each constituent of effluent discharged for said point source at the present time, where such information has not been provided as part of a permit application under the Clean Water Act, 33 U.S.C. 1251 et seq. To the extent that analytical data are available, provide such a characterization for each effluent and each point source discharge since January 1, 1975. This request is not directed to the Monthly Operating Reports (MORs).

9. To the extent that responses to the foregoing do not describe them, specify the identity and quantity of each constituent of any waste stream placed into any underground injection system, whether deep-well or reinjection, or lagoon, pond or similar facility, operated in conjunction with any production or waste disposal process at the Dow-Midland facility, since January 1, 1965. Include a description of the geologic and hydrogeologic conditions surrounding and/or underlying each such location, and identify all studies relating to the original and subsequent condition of groundwater surrounding or underlying each such location.

10. Identify all studies done by the Dow-Midland facility or its contractors or employees relating to the exposure of animals or plants to effluents from or internal process waste streams within the Dow-Midland facility, whether based on direct exposure to the effluent or waste stream, or in-stream or after dilution. Identify all studies by the Dow Chemical Company or its contractors or employees relating to concentrations of organic chemicals present in receiving waters both upstream and downstream from the Dow-Midland facility.

11. Provide copies of all documents relating to each study described in paragraph 10 above.

12. Identify all studies done by the Dow Chemical Company, or it contractors or employees, relating to the presence of metallic or organic contaminants in animals or plants in surface waters which are or could be affected by effluents or discharges

from the Dow-Midland facility.

13. Provide copies of all documents relating to each study described in paragraph 12 above.

14. Identify all protocols or methodologies used, initiated, discovered or employed by the Dow Chemical Company, its contractors or employees to extract, from effluents or from ambient water or biological samples, and analyze quantitatively or qualitatively for the presence of, any chlorinated organic compounds expected or demonstrated to be present at levels less than one part per billion, especially the class of chemicals known familiarly as dioxins.

15. Provide copies of all documents relating to the analysis or extraction procedures described under paragraph 14 above.

ENTERED THIS 21 DAY OF [illegible], 1981.

SANDRA S. GARDEBRING
Director, Enforcement Division

Model Notice of Violation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region _____

_____

_____

In reply refer to

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Addressee -- the State
Addressee -- the Violator

Re: Notice of Violation No. _____
NPDES Permit No. _____

Dear _____:

The enclosed Notice of Violation sets forth the findings of the United States Environmental Protection Agency (EPA) that ____ has violated certain limitations of the above-captioned NPDES permit. This permit was issued on _____ by _____ pursuant to the Clean Water Act, as amended (Act).

The Notice is issued pursuant to Section 309(a) of the Act. If the___ does not commence appropriate enforcement action within thirty (30) days of this notification, the EPA may undertake enforcement action pursuant to Section 309 of the Act.

If you require any information or assistance regarding this matter, please contact _____, an engineer on my staff whose telephone number is _____. Please inform this agency of all action taken with regards to this matter.

Sincerely,

Director
Water Management Division

Enclosure

Region III
Curtis Building
6th & Walnut Streets
Philadelphia, Pennsylvania 19106

IN THE MATTER OF:

Facility name and address:

_____ :
_____ : Docket No. _____
_____ :

PROCEEDINGS UNDER SECTION 309(a) : NOTICE OF VIOLATION
OF THE CLEAN WATER ACT :
AS AMENDED, 33 U.S.C. §1319(a) IN :
RE: NPDES PERMIT NO. _____ :

STATUTORY AUTHORITY

The following FINDINGS are made and NOTICE OF VIOLATION issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency (hereinafter "EPA") under Section 309 of the Clean Water Act, as amended, 33 U.S.C. §1319 (hereinafter "Act"), which authority has been delegated by the Administrator to the Regional Administrator of Region _____, and redelegated by the Regional Administrator of Region _____ to the Director, Water Management Division of Region ____.

FINDINGS OF VIOLATION

1. On _____, EPA, Region _____, and the (applicable state agency) issued National Pollutant Discharge Elimination System Permit Number _____ (hereinafter "Permit") to [source] _____ (hereinafter "Permittee") to discharge from its facility located at _____ to the _____ River, a navigable waterway, in accordance with effluent limitations and monitoring requirements and other conditions set forth in the permit. The permit became effective____.

2. Paragraph _____ of the permit, as amended, entitled "Future Effluent Limitations and Monitoring Requirements" required that the permittee attain certain specified effluent limitations for outfall 001 by _____.

3. Part IB of the permit, as amended, entitled "Monitoring and Reporting" requires the permittee to submit Discharge Monitoring Reports (hereinafter "DMRs") on a quarterly basis showing the results of all monitoring for the preceding three months.

4. An evaluation of the DMRs submitted for the months of July, 1977 through April, 1978 shows that the permittee has violated the effluent limitations for outfall 001 as reported in Attachment A.

NOTICE OF VIOLATION

Notice is hereby given to the permittee and the [state agency] that the undersigned, by the authority duly delegated by the Administrator of EPA to the Regional Administrator of EPA, Region _____, and by him duly sub-delegated, finds that the permittee is in violation of a condition or a limitation that implements Section 301 (33 U.S.C. §1311) of the the Act in a permit issued under Section 402 (33 U.S.C. §1342) of the Act.

If the state has not commenced appropriate enforcement action within thirty (30) days of the date of this Notice, EPA, Region _____, will commence appropriate enforcement action pursuant to Section 309 of the Act (33 U.S.C. §1319).

Signed this _____ day of _____, 19_____

Director
Water Management Division Region _____

Recommended Format for Clean Water Act Section 309 Administrative Order

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

JUL 30 1985

OFFICE OF WATER

MEMORANDUM

SUBJECT: Recommended Format for Clean Water Act Section 309 Administrative Orders

FROM: Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits (EN-335)

TO: Water Management Division Directors
Regions I - X

One of the most frequently used Environmental Protection Agency mechanisms in the formal enforcement process is the Administrative Order (AO) issued under Section 309 of the Clean Water Act. It is our belief that AO's should be used in a consistent and effective manner since they are a major part of the enforcement scheme. For this reason, the Office of Water Enforcement and Permits has undertaken an effort to assess AO content and format during the past year. The outcome of that assessment was the draft Recommended Format for Administrative Orders forwarded to you on May 9, 1985. We have received comments and suggestions from several Regions which were utilized in preparing the final documents. Attached you will find the final Recommended Format for Clean Water Act Section 309 Administrative Orders (Attachment 1).

The Recommended Format was developed with the cooperation and assistance of the Office of Enforcement and Compliance Monitoring. The purpose of the Recommended Format is to provide a general guide which delineates (1) the specific statutory requirements (such as the requirements of Section 309(a)(4) on opportunity for a recipient to confer with the Administrator on violations based on failure to submit information); and (2) options and suggestions on format for Administrative Orders (such as the option of including violations in a separate section after Findings of Fact). The Recommended Format, as utilized by the Regions, should result in more effective and even-handed national enforcement through Administrative Orders.

In addition to the Recommended Format, we are forwarding the Checklist on Administrative Orders (Attachment 2). The Checklist should be used for reviewing EPA and State-issued AO's. There will obviously be some variation among States with regard to AO's; however, the use of a Checklist should assure that the State-issued AO's are complete and enforceable.

The new guidance replaces a document dated April 18, 1975 that was developed by the Office of Water Enforcement. It should be noted that the statute was revised twice since 1975. In particular, the new guidance: discourages use of successive AO's for the same violation; clarifies which legal authority (e.g., Sections 308 and 309) EPA should cite as the basis for certain requirements imposed through an AO; clarifies the scope of requirements which EPA may impose through AO's; identifies sanctions available for AO violations; and sets out sample provisions which AO's should include to clarify the legal effect of the Order.

In the coming fiscal year, the Office of Water Enforcement and Permits, with extensive coordination with the Office of Enforcement and Compliance Monitoring (OECM), will develop further information on the use of Section 309 Administrative Orders. Some of those documents will cover: use of AOs on consent (bilateral and joint signature); principles for negotiation of bilateral orders especially for National Municipal Policy; use of multiple AO's and alternatives to AO's for the same facility when an AO is violated; and increased use of Section 308 to require information (including use of show cause proceedings).

If you have any specific questions on the above, please call me (FTS-475-8488) or Bill Jordan, Director, Enforcement Division (FTS-475-8304). The staff contact is Virginia Lathrop (FTS-475-8299).

Attachments

ATTACHMENT 1

Recommended Format for Clean Water Act Section 309

Administrative Orders

The following is the recommended format and content for an Administrative Order (AO). Examples and suggested wording are included at various points in the discussion and in the sample AO (Attachment 1-D). Adherence to the Recommended Format should result in more effective and evenhanded national enforcement through Administrative Orders.

Introduction

The following should be followed for the venue, title, docket identification and preamble paragraph.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION ____

IN THE MATTER OF	DOCKET NO. XI-84-06
Wastewater Treatment Works #4 Sludge River Pollution Control District Sludge Falls, Columbia	
PROCEEDING UNDER SECTION 309(a) of the Clean Water Act, 33 U.S.C. Section 1319(a); 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 United States Environmental Protection Agency (EPA) under Section 309 of the Clean Water Act, 33 U.S.C. §1319, (hereinafter the Act) and by him delegated to the Regional Administrator of EPA, Region XI (and redelegated by the Regional Administrator of Region XI to the Director, Water Management Division, Region XI)."

- 2 -

Venue and Title

The Region identification is included to establish the specific venue of the issuing authority. The full address of the Region is to be in the letterhead or under the Regional Administrator's (or his designee's) signature to the Order and on the blue back cover (which is optional).

Docket Number

To identify the proceeding, a docket number is required. To avoid confusion, the NPDES number should not be used as the Docket Number. However, the NPDES number, if any, should be referred to under the proceedings identification in the title. The docket number "XI-84-06" identifies the Order as being the 6th Order issued in 1984 in Region XI. An Administrative Order docket should be kept separate from any other docket. However, if a common docket is kept then a prefix should be added to the docket number, e.g., "XI-AO-84-06".

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 has redelegated his authority to the Director of the Regional Water Management Division, this redelegation should also be stated here or in the preamble to the Order portion of this document. It should be noted that there is no authority to redelegate this authority to other EPA Regional staff below the Division Director level. If the redelegation is asserted here, the paragraph should be amended by adding:

"... and redelegated by the Regional Administrator of Region XI to the (undersigned) Director, Water Management Division, Region XI".

The Administrative Order can be signed by a duly authorized Acting Regional Administrator or Director. However, the Agency should be prepared to show that the person signing as Acting Regional Administrator or Director has the requisite authority to sign the Order.

- 3 -

FINDINGS OF FACT

The Findings should adequately set forth the specific permit, statutory (and regulatory)* requirements violated and the specific nature and dates of the violations. In order to avoid difficulty in determining from the face of the Findings whether the order was necessary and timely, and the remedy was appropriate, the Findings and Order should be able to stand without reference to extraneous facts. The Findings should speak to all the pertinent facts and law much as a complaint in a civil action does. With these observations in mind, the following recommendations are made as to the specific facts to be alleged in the Findings.

Status of Violator

Findings of Fact should first identify fully the entity to whom the order is to be issued and define its legal status (i.e., corporation, partnership, association, state, municipality, commission or political subdivision of a state). Clearly identifying the orderee limits the possibility of challenges to jurisdiction or venue and establishes a record upon which subsequent enforcement actions may rely. The Findings should next establish the orderee's status under the Clean Water Act, (i.e., permittee, industrial user, control authority, etc.) and, in the case of permittees, the permit number, date issued, and current permit status. The Findings should name the receiving stream into which the violator discharges and should establish the violator discharges to "navigable waters" under Section 502(7) of the Act through a specific point source as defined in Section 502.

Basis of Violations

Section 309(a)(5)(A) requires that all orders ". . . should state with reasonable specificity the nature of the violation . . . ." It is imperative that the Findings contain the specific permit provision or statutory or regulatory requirement which has been violated and the authority by which it was imposed on the orderee. Next, the evidence or basis for the specific violation (such as DMR, inspection report, BMR) and dates of violation should be set forth concisely. In cases of more than one violation, identify what the documentation is for each and give the specific dates of violation. [In instances where only approximate dates are known or where there is a continuing violation say "on or about" or "beginning on or about".] Alternatively the violations may be set off in a separate section entitled "Violations" which can follow the "Findings of Fact."

* An AO should not set out a regulatory requirement that was violated without setting out the underlying statutory requirement. The Section 309(a)(3) authorizes AO's for violations of permit and statutory provisions.

Where the violation is based on a failure to provide required information, a finding can usually only state that the required information was not received by the agency. In those cases, the lack of receipt of the required information must serve as the basis of the violation. Section 308 violations have additional requirements as described below.

CWA Section 308 Violations

Administrative Orders issued for violations based on a failure to submit information requested under Section 308 of the Act do not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator (or his or her designee) concerning the alleged violation. (See CWA Section 309(a)(4)). It is essential that such person be provided with a reasonable opportunity to confer. Any order issued for a Section 308 violation either exclusively or in conjunction with other violations should provide for a period of time in which the orderee may confer with an authorized person designated in the Order. If an opportunity has been provided prior to the issuance of the order, the order should so state and set forth the documentation of the opportunity to confer and the outcome of the conference, if any.

Prior Enforcement Contacts

Administrative Orders frequently set forth prior contacts with the orderee in an attempt to obtain compliance. Generally, this is a good practice since it helps to build a record and may provide additional support in any subsequent enforcement action. This can be done by cataloguing the meetings, letters, telephone calls, etc., made in an attempt to secure voluntary compliance or by stating that repeated attempts were made. The repeated attempts may be set out in an attached summary or log of meetings, notices, letters, and telephone calls and dates thereof, along with dates of responses from the orderee, if any (see Attachment 1-A).

Other Findings

In certain circumstances it may be necessary or useful to include other findings which are supportive to the specific requirements of the order (e.g., "the company's treatment works are currently capable of meeting the effluent limits contained in its permit" or "the POTW has adequate authority to enforce the categorical pretreatment standards"). Whether or not to include such statements must be determined on a case by case basis but, if included, should be incontrovertible facts.

- 5 -

ORDER FOR COMPLIANCE

The format for the Order should be as follows:

Order

"Based on the foregoing FINDINGS and pursuant to the authority vested in the Administrator, Environmental Protection Agency, under Sections 308 and 309(a) of the Act, and by him delegated to the undersigned (or if the Regional Administrator redelegates his authority to the Division Director, add after "of the Act" - "and by him delegated to the Regional Administrator, and redelegated to the undersigned"), it is hereby ordered:".

If the delegation statement is stated in the Preamble, this statement may simply be: "Based on the foregoing Findings, and pursuant to the authority of Sections 308 and 309(a) of the Act, it is hereby ordered:"

Terms of the Order

Section 309(a)(1) and (a)(3) authorizes the Administrator to issue an order requiring compliance with enumerated sections of the Act or a condition, limitation or permit requirement implementin the enumerated sections of the Act. Any requirement contained in the order must be directly related to achieving that compliance with those legal requirements. The terms of the order must set forth what EPA specifically expects the Orderee to do in order to achieve and maintain compliance.

Section 309(a)(5)(A) sets forth the time periods by which the orderee must comply. In cases of an interim compliance schedule or an operation and maintenance requirement the time for compliance may not exceed thirty days. In cases of compliance with a final deadline, the time for compliance must be "reasonable" as determined by the Administrator, taking into consideration the seriousness of the violation and past efforts of the orderee. Every order must contain a specific final date by which the orderee must achieve compliance (i.e., cease its violation(s)) consistent with the statutory language.

Although some Orders have included a prescribed method by which an orderee is to achieve compliance, specific prescribed steps or methodologies (such as a treatment technology) may be difficult to enforce. Because Section 309 specifies in explicit terms only that AO's require compliance by a date certain the more closely a requirement in the AO is related to actually achieving compliance, the sounder the legal position to include that requirement. Section 308 of the Act can provide substantial support in this area by requiring reporting of the specific steps or methods.

The Orders containing interim milestones leading to final compliance should include reporting requirements under Section 308. The order should specify the manner and timeframe for reporting compliance with the terms of the order to the issuing authority. The order should contain requirements for reporting on the compliance progress and submitting suitable documentation to show the Orderee has taken action to meet the AO requirements. The attached sample AO sets forth sample language on order requirements (Attachment 1-D), as well as a sample blue back (Attachment 1-C) and cover letter (Attachment 1-B).

Additional Provisions

It has been the long term practice of many of the Regions to include standard provisions regarding additional remedies, nonwaiver of permit conditions, etc., in all administrative orders or as part of the cover letter accompanying the AO. This practice should be used by all the Regions for every order issued. In addition to promoting national consistency, it alerts the violator to the array of sanctions which could be used should additional enforcement be necessary and helps encourage compliance with the Order as issued.

The following are sample provisions which should be added to Administrative Orders singly or in combination and may be modified based on the particular facts of the case. They may also be included in the cover letter.

Non Waiver of Permit Conditions:

> "This ORDER does not constitute a waiver or a modification of the terms and conditions of the Orderee's permit which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Section 309(b) (c) or (d) of the Act for any violation cited in this ORDER."

Potential Sanctions for Administrative Order Violations (for Non-Municipals):

> "Failure to comply with this ORDER or the Act may result in civil penalties of up to $10,000 per day of violation, ineligibility for contracts, grants or loans (Clean Water Act, Section 508) and permit suspension."

General Disclaimers:

> "Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act."

"Compliance with the terms and conditions of this ORDER shall not be construed to relieve the orderee of its obligations to comply with any applicable federal, state or local law."

Administrative Action Resulting in Ineligibility for Federal Contracts, Grants or Loans:

"Violations of this order may result in initiation of Agency action to prohibit the facility from obtaining Federal contracts, grants, or loans pursuant to Clean Water Act, Section 508, E.O. 11738, and 40 CFR Part 15."

Effective Date of the Order

When the Order does not address a violation of a requirement to provide information under Section 308, the ORDER can merely recite that:

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

For Section 308 violations where an opportunity for conference before the ORDER can become effective is required by section 309 and this was not done prior to the issuing of the ORDER, the last paragraph should read:

"The COMPANY shall have the opportunity, for a period of (_____) days from receipt of this ORDER, to confer with the following designated Agency representative: Mr. N. Force, Director, Water Management Division, Environmental Protection Agency, Room 5013, Region XI, Old National Bank Building, 1414 Main Street, Brewsterville, Centralia, 11101, (555) 123-4567; unless the Agency official issuing the Order decides otherwise, this ORDER shall become effective at the expiration of said period for consultation; and, 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."

Signing of the Order

When the Order is dated and signed, the name of the signing official (Regional Administrator, or Director, Water Management Division) should be typed below the signature, together with the address of the Regional office.

- 8 -

Other Considerations

The use of legal blue-back at least on the primary copy of the Findings and Order served, while not necessary, tends to impress upon the person served of the legal seriousness of the action being taken. Attachment 1-C provides a proposed format and content of the legal blue back. When a Order is issued to a Corporation, a copy of the Order shall be served on appropriate corporate officers.

As in court actions, the order should be retained and placed in a permanent file with the Docket Clerk, along with the affidavit or certification of service attached. If service is made by certified mail restricted delivery, 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 important that every file contain, at the minimum, a closing memo to the files delineating the final disposition of the matter. (The AO will only be closed out when the facility has returned to compliance or when appropriate EPA action is taken, i.e., escalating the enforcement response.)

When a file is closed out, a brief letter should be sent to the orderee with a carbon copy to Headquarters advising that the action has been completed. Attachment 1-E is an example of what a close out letter might look like.

ATTACHMENT 1-A

Prior Contacts with Orderee

Despite repeated written and telephone requests, as more fully set out in the log attached as Exhibit __ 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

12/04/83	DMR data showed significant noncompliance (memo from X. Amin to file).
12/07/84	308 Letter sent to Company.
12/10/84	Plant Visit: Some data from inspection (by N. Spector).
04/23/84	Telephone - N. Force to Company. Follow-up requests for information on recent DMR from Company. No information sent.
04/24/84	Telephone - N. Force to Company. To request additional data by phone from Company. No information obtained.
05/06/84	Note filed by N. Force - No letter or further information from Company.

ATTACHMENT 1-B

February 21, 1985

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Ms. Alice Smith, Director
Sludge River Pollution Control
District
13 Plain Street
Sludge Falls, Columbia 12345

RE: NPDES Permit No. CL0003456

Dear Ms. Smith:

Enclosed is an Administrative Order issued to the Sludge River Pollution Control District (SRPCD), by the Regional Administrator of the Environmental Protection Agency ("EPA"), Region XI, under Sections 308 and 309 of the Clean Water Act (the "Act"). The Regional Administrator has found that the SRPCD has violated Section 301 of the Act by failing to comply with certain requirements of its National Pollutant Discharge Elimination System permit. Specifically, during 1984 SRPCD consistently violated its effluent limitations on ammonia and phosphorus and intermittently violated effluent limitations for biochemical oxygen demand and total suspended solids.

The Order, which is effective upon receipt, seeks to remedy the violations by requiring SRPCD to submit a plan for meeting its effluent limitations and requiring SRPCD to then implement the plan and comply with its effluent limitations.

This Order does not modify your current NPDES permit; nor will compliance with the Order excuse any violation of the permit. Failure to comply with the enclosed Order may subject the District to further enforcement action. EPA may initiate a civil action in federal district court for violations of an Order seeking injunctive relief and civil penalties.

If you have any questions concerning this matter, please contact Mr. Jones, an engineer in the Permit Compliance Section, at 222-3922.

Sincerely yours,

Prudence Purewater
Regional Administrator

Enclosure

cc: State Division of Water Pollution Control
State Department of the Attorney General

ATTACHMENT 1-C

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION _

IN THE MATTER OF

SLUDGE RIVER POLLUTION CONTROL
DISTRICT
SLUDGE FALLS, COLUMBIA
PERMITTEE*

NPDES PERMIT NO. CL0003456*

PROCEEDINGS UNDER THE CLEAN
WATER ACT
AS AMENDED (33 U.S.C.
1319(a)(3))**

FINDINGS OF VIOLATION
AND
ORDER OF COMPLIANCE

Issued by:

Prudence Purewater
Regional Administrator
Environmental Protection Agency.
Region XI
Federal Building
Hokum, Centralia 12345

* Where Permit has been issued.

** May also have proceeding under
33 USC 1318.

ATTACHMENT 1-D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION XI

IN THE MATTER OF	)	DOCKET Number AO-85-13
	)	
Sludge River Pollution Control District Wastewater Treatment Works #4	)	FINDINGS OF VIOLATION AND
	)	
NPDES Permit No CL003456	)	ORDER FOR COMPLIANCE
	)	
Proceedings under Section 309(a) of the Clean Water Act, 33 U.S.C. §1319(a)	)	

STATUTORY AUTHORITY

The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 309 of the Clean Water Act, 33 U.S.C. §1319, (the Act), and by the Administrator delegated to the Regional Administrator of EPA, Region XI.

FINDINGS

1. The Sludge River Pollution Control District (the "District") is a political subdivision of the state organized under the laws of the State of Columbia and as such is a "person" under Section 502 of the Act, 33 U.S.C. §1362.
2. The Sludge River Pollution Control District is the owner and operator of a wastewater treatment facility which provides advanced treatment to wastewater from the Towns of Locus and Sludge Falls. The facility discharges pollutants into the Sludge River, a navigable water of the United States as defined by Section 502 of the Act, 33 U.S.C. §1362.

3. The discharge of pollutants by any person into the waters of the United States, except as authorized by an NPDES permit, is unlawful under Section 301(a) of the Clean Water Act.

4. On January 22, 1981, the District was issued National Pollutant Discharge Elimination System (NPDES) Permit Number CL0003456 (the "Permit") by the Regional Administrator of EPA pursuant to the authority given the Administrator of EPA by Section 402 of the Clean Water Act, which authority has been delegated by the Administrator to the Regional Administrator. The Permit became effective on February 22, 1981, and will expire on February 22, 1986.

5. The permit authorizes the discharge of pollutants into the Sludge River, in accordance with effluent limitations and other conditions contained in the Permit. The limitations contained in Special Condition A1 of the Permit require the plant to achieve monthly average limits of 7 mg/l for BOD and TSS, 1 mg/l for total phosphorus (Total P) and 1 mg/l for ammonia nitrogen (NH_3-N).

6. Attached hereto and incorporated herein by reference is a summary of effluent data submitted by the District to EPA for the period from December, 1983 to November, 1984. The data shows that:

   a.) the District violated the monthly average limits for TSS during two of the twelve months and violated the maximum daily limits for BOD nine times and TSS twelve times over periods of three months and five months, respectively;

b.) The District violated the limits on daily maximum concentrations thirty times for NH_3-N and twenty times for Total P over a six month period;

c.) The District violated average monthly concentration limits for NH_3-N and Total P each month over a period of four months and six months, respectively.

7. EPA personnel performed a diagnostic audit inspection at the facility during 1984. The purpose of the inspection was to determine the cause of non-compliance with the effluent limitations for NH_3-N and Total P. The inspection report was completed on December 8, 1984 and is attached hereto and incorporated herein by reference as a part of these Findings.

8. Based on the inspection report, the facility is currently capable of meeting the concentration limits for NH_3-N and Total P if properly operated in accordance with Condition D2 of the permit which requires maximizing the removal of those pollutants.

9. Based on the above, I find that the District is in violation of Section 301 of the Act, 33 U.S.C. §1311, and permit conditions implementing that section contained in a permit issued under Section 402 of the Act, 33 U.S.C. §1342.

- 4 -

ORDER

Based on the foregoing FINDINGS and pursuant to the authority of Sections 308 and 309 of the Act, IT IS HEREBY ORDERED:

1. Within sixty days of receiving this ORDER, the District shall submit to EPA a plan for achieving compliance with the effluent limitations on NH_3-N, Total P, BOD, and TSS. The plan shall address the operational problems cited in EPA's December 8, 1984, diagnostic audit inspection report and identify any changes in plant operation, funding, and staffing necessary to meet the permit conditions.
2. The District shall immediately comply with all effluent limitations contained in Special Condition A1 of the Permit for BOD and TSS.
3. The District shall immediately achieve and comply with the interim effluent limitations specified in Attachment A for NH_3-N and Total P as an intermediate step toward achieving final compliance. These interim effluent limitations shall terminate on May 1, 1985. During the time period that the interim effluent limitations are in effect, all requirements and conditions of the Permit remain fully effective and enforceable.
4. By May 1, 1984, the District shall have implemented any operational changes necessary to meet the permit effluent limitations for NH_3-N and Total P. The District shall comply with all effluent limitations contained in the Permit by May 1, 1985.

- 5 -

5. Where this ORDER requires a specific action to be performed within a certain time frame, the District shall submit a written notice of compliance or non-compliance with each deadline. Notification shall be mailed within seven days after each required action.

6. If non-compliance is reported, notification shall include the following information:

   a) A description of the nature and dates of violations;

   b) A description of any actions taken or proposed by the District to comply with the requirements;

   c) A description of any factors which tend to explain or mitigate the non-compliance;

   d) The date by which the District will perform the required action.

All reports shall be in writing and addressed as follows.

Director
Water Management Division
U.S. Environmental Protection Agency
Federal Building - Room 13
Hokum, Centralia 12345

7. This ORDER does not constitute a waiver or a modification of the terms and conditions of the District's permit, which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Sections 309(b), (c) or (d) of the Act for any violation cited in this ORDER.

8. Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act.

9. This Order shall become effective upon the date of receipt by the District.

Dated this _____ day of _____

Signed: _____

Prudence Purewater
Regional Administrator
U.S. EPA, Region XI
Federal Building
Hokum, Centralia 12345

Attachment 1-E

Mr. Adams
Peerless Company
RR #3
Burning River, Centralia 12346

RE: Administrative Order #XI-AO-85-06
(NPDES Permit NO. 1111112)

Dear Mr. Adams:

This is to notify you that as of May 15, 1985 the above named permittee appears to have complied with Administrative Order #XI-AO-85-06 issued on February 24, 1985. This Administrative Order has been placed on inactive status, and the Agency intends no further enforcement action at this time based on presently available information.

Sincerely,

Director
Water Management Division

cc: Compliance Information and Support Branch
OWEP (EN-338)

ATTACHMENT 2

SAMPLE EVALUATION CHECKLIST FOR EPA's
CWA SECTION 309 ADMINISTRATIVE ORDERS or STATE EQUIVALENT

The purpose of this checklist is to serve as a guide for review of State AO's or EPA's AO's.

1. Region: _____

2. State: _____

3. Date Issued: _____

4. [ ] Major [ ] Minor

5. [ ] Municipal [ ] Non-Municipal

		Yes	No
6.	Does the administrative order contain a title?	[ ]	[ ]
*7.	Does the order establish the venue of the issuing authority? (i.e., identification of EPA Region).	[ ]	[ ]
8.	Does the order provide the address of the issuing authority?	[ ]	[ ]
9.	Does the order contain a standard docket number? (i.e., X-AO-84-01: X=Region; AO=AO; 84=Year; 01=Serial Number).	[ ]	[ ]
10.	Does the order state the appropriate statutory authority for issuing the order? (i.e., CWA Section 309(a) and where reports or information are required, Section 308).	[ ]	[ ]
*11.	Does the order contain a suitable statement of delegation? (i.e., Delegation should correspond to signatory of order).	[ ]	[ ]
12.	Does the order identify the legal status of the violating party? (i.e., legal status as a corporation, municipality, etc.).	[ ]	[ ]

* These questions are of particular interest for EPA issued Administrative Orders.

	Yes	No
13. Does the order describe the legal authority/ instrument which is the subject of the violation? (e.g., statutory provision, regulatory provision, if applicable, statutory authority for permit issuance, name of permittee, permit number, date permit issued, permit modification or extension, date previous administrative order issued, etc.).	[ ]	[ ]

Examples

[ ] Statute

[ ] NPDES Permit

14. Does the order contain a specific finding that the discharger is in violation of a specific statutory or permit requirement?	[ ]	[ ]
15. Does the order describe or reproduce the specific terms of the legal authority/ instrument which are the subject of the violation? (e.g., effluent limitations, compliance schedules, etc.).	[ ]	[ ]
16. Does the order state, with reasonable specificity, the nature of the violation? (e.g., type of violation, date, evidence, etc.).	[ ]	[ ]

Examples

[ ] Reporting or monitoring violation

[ ] Effluent limitation violation

[ ] Violation of special permit condition

[ ] Pretreatment violation

[ ] Unpermitted or unauthorized discharge

[ ] Failure to meet O&M/construction schedule

[ ] Violation of a Section 308 letter

[ ] Improper O&M

[ ] Other _____

		Yes	No
17.	Does the order specify the duration of violation, if known?	[ ]	[ ]
	Estimated violation _____		
*18.	Does the order document prior requests to the violating party for compliance with the legal authority/instrument? (e.g., telephone calls, letters, meeting, etc.).	[ ]	[ ]
*19.	Where the order is issued for a CWA Section 308 violation does the order provide the violating party with an opportunity for prior consultation?	[ ]	[ ]
20.	Does the order establish interim effluent limitations?	[ ]	[ ]
21.	Does the order set out clearly any specific steps which EPA/State wants the violating party to take to achieve compliance?	[ ]	[ ]

Examples

[ ] Submission of monitoring reports

[ ] Compliance with existing effluent limitations

[ ] Submission of pretreatment program

[ ] Submission of correction/compliance plan or study evaluating compliance options

[ ] Compliance with existing O&M/construction schedule

[ ] Compliance with interim effluent limitation

[ ] Compliance with categorical or general pretreatment Standards

[ ] Other

22.	Are the number of days reasonable for the type of relief sought?	[ ]	[ ]

		Yes	No
23.	Does the order contain a specific requirement and date for final compliance?	[ ]	[ ]
24.	Does the order specify a manner and time frame for reporting compliance with the terms of the order to the issuing authority?	[ ]	[ ]
25.	Does the order specify the effective date of the order? (e.g., Date of receipt, date of consultation, etc.).	[ ]	[ ]
26.	What is the elapsed time between the dates of violation and the date of issuance of the order? Is the elapsed time reasonable?		

Number of days _____

*27. Who is the signatory of the order? (Choose <u>two</u> or less).

[ ] Regional Administrator

[ ] Regional Counsel

[ ] Water Division Director

[ ] State Water Pollution Control Officer

[ ] Other _____

Attachment 3

Recommended Format - CWA - Administrative Orders

Summary of Changes from the
April 18, 1975 Guidelines on
Administrative Order Format

General Approach

The April 18, 1975 guidance entitled "Guidelines for issuing Administrative Compliance Orders Pursuant to Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as Amended," has been clarified and been brought up to date with the new July 1985 "Recommended Format for Clean Water Act Section 309 Administrative Orders."

Some examples of the modifications and additions are:

- The new guidance makes it clear that citations of the regulatory basis of violations must also include the underlying statutory basis of the regulation.
- The new guidance makes it clear that the basis of the violation may be set off in a separate section of the order if the Region so chooses.
- The Section on Terms of the Order has been expanded to explain in greater detail the need for a final date for time periods for coming into compliance. This section also deals with prescribed methods which may be imposed on Orderees through AO's (i.e., the closer the requirement to achieving compliance, the sounder the legal position to include the requirement in an AO).
- The discussion on using successive AO's has been eliminated since the current view, successive AO's for the same noncompliance problems should normally be avoided and the case should be escalated to the referral process.
- The discussion on personal service of AO's has been eliminated since this is extremely resource intensive and the accepted method of service is now by Certified Mail-Restricted Delivery with a return receipt.
- New attachments have been included such as the sample AO. Other attachments were updated.
- We have added a section on Additional Provisions, such as a commonly used statement that further violations of the requirements of the AO and the permit may result in civil action including a penalty of up to $10,000 per day, ineligibility for Federal contracts, grants and loans and suspension of the permit.
- The Order portion of the Guidance and the Sample AO indicate that Orders which include milestones should include reporting requirements under Section 308 of the Act.

Model Municipal Administrative Orders

Cover letter - AO's for Preparing MCP's and CCP's

Honorable

Certified Mail - Restricted Delivery

RE:

Dear :

Attached hereto is an Administrative Order directed to _____[a]_____, (the municipality) which makes findings that _____[a]_____ is in violation of the requirements of [the Clean Water Act (the Act) and][x] its National Pollutant Discharge Elimination System (NPDES) permit. The Order requires the performace of certain activities aimed at correcting those violations at the earliest possible time. The Order is served on you as a municipal offical.

[The municipality may wish to review the enclosed facility plan which you have previously prepared as an aid in responding to the questions asked in the Order.][xx]

After _____[a]_____ response has been reviewed, a second Administrative Order will be entered or a court action may be commenced. The Order or prayer for relief will require correction of violations in a timely manner. Interim effluent limits pending attainment of permit limits may also set.

The responses to the questions asked in the Order must be signed by a principal executive officer or a ranking official of _____[a]_____. The person signing the responses must certify as to their accuracy. The form of certification should be substantially the same as either the forms contained in Attachment _____.

The failure to comply with the terms of the Order may result in the taking of legal action under Section 309 of the Act. Compliance with the terms of the order will, however, not excuse past or future violations of the NPDES permit [or the Act].[x]

If you have any questions concerning the Order, please contact:

Very truly yours,

NOTES

[a] Name of Municipality
[x] Omit bracketed words if CCP is requested
[xx] Use bracketed words if accompanying MCP request and Facility Plan has been submitted. May be deleted, at option of Agency.

AO - Request for MCP

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION __

IN THE MATTER OF	)	Docket No. _____
	)	
	)	FINDINGS OF VIOLATIONS
Proceedings under Section 309(a)(3) of the Clean Water Act, as amended, 33 U.S.C. 1319(a)(3), in re: NPDES Permit No.	)	AND
	)	ORDER FOR COMPLIANCE
	)	

STATUTORY AUTHORITY

This Order is issued pursuant to Section 309(a)(3) of the Clean Water Act (the Act), 33 U.S.C. 1319(a)(3), which grants to the Administrator of the United States Environmental Protection Agency (EPA) the authority to issue orders requiring persons to comply with Sections 301, 302, 306, 307, 308, and 405 of the Act and to comply with any conditions or limitations implementing any of such sections, in a National Pollutant Discharge Elimination System (NPDES) permit issued under Section 402 of the Act. This authority has been delegated to the Regional Administrator.

The Order is based on findings of violations of effluent limitations contained in an NPDES permit and of violations of Section 301(b) of the Act.

FINDINGS

1) The [a] (the "Permittee"), is a municipality which owns and operates a publicly owned treatment works including a __ million gallon per day design capacity [b] wastewater treatment facility which discharges to the _____, a water of the United States.

2) Section 301(b) of the Act set a deadline of July 1, 1977 for completion of all construction necessary to meet secondary treatment [and water quality][c] requirements and to discharge effluent meeting those limits. [Certain publicly owned treatment works may, pursuant to Section 301(i) of the Act, be issued NPDES permits which allow attainment at a later date, but not later than July 1, 1988.][g]

3) On , _____[a]_____ was issued National Pollutant Discharge Elimination System (NPDES) Permit Number (the "permit") by the_____ pursuant to Section 402 of the Act, 33 U.S.C. 1342. The permit became effective on _____19__, and will expire on _____ 19__.[f] That permit requires the attainment of secondary treatment [and water quality][b] limitations after its effective date, [and does not contain any extension of time authorized by Section 301(i) of the Act].[e]

4) Discharge Monitoring reports and the records of EPA Region ____ relating to construction grants under Title II of the Act show that permittee has consistently failed to meet and continues to fail to meet the numerical effluent limits contained in the permit and has failed to construct treatment works necessary to achieve compliance with the requirements of Section 301(b)(1) of the Act. (Cite specific documentation showing recent violations per DMR's, etc. and specific records showing lack of construction). _____[a]_____ is therefore found to be in violation of a final deadline contained in Section 301(b)(1) of the Act, and is also found to be in violation of the effluent limitations of its NPDES permit implementing Section 301(b) of the Act.

5) Section 309(a)(5) of the Act requires that Administrative Orders to correct failures to meet final deadlines established under the Act specify a time for compliance that does not exceed the time determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. Following receipt of (1) information concerning the type of construction it proposes to use to meet treatment requirements and its NPDES permit, (2) the method of financing that construction, and (3) permittee's estimate of the time necessary to complete the necessary work, I will determine what is a reasonable time for _____[a]_____ to meet permit effluent limits and the statutory deadline.

[6) I will require certain information from the Permittee to determine appropriate interim effluent limitations until the final permit effluent limitations are required to be met.][d]

Based on the above findings it is hereby ORDERED:

_____[a]_____ shall, within __ days furnish responses to all questions contained in Exhibit 1, including confirmation of approval of Municipal Compliance Plan by the municipality and send the responses to_____.

This order entered this ___ day of ____, 198__, shall be effective on receipt.

_____
(Name and Title of Authorized Signatory)

Note:

[a] Fill in name of municipality.

[b] Describe current facility, e.g., primary.

[c] Applies only if subject to Section 301(b)(1)(C) requirements.

[d] Does not apply if the Permittee is currently under order to comply with interim limits and the order is not going to be superseded. Revise paragraph if interim order is in effect but further information is needed to confirm that those limitations are still appropriate.

[e] Include only if appropriate. This sentence may be modified to show receipt of a §301(i) application and subsequent rejection. Substitute language showing issuance of and subsequent withdrawal of ECSL, if appropriate.

[f] Modify or expand if permit has expired but is currently effective under applicable State or Federal law.

[g] Include only if appropriate.

Exhibit 1 to this AO is identical to Enclosure 1 of Exhibit 6-1 attached to §308 letter requesting preparation of MCP.

Table BB to
Enclosure I
Proposed
Compliance
Schedule

Table BB

Work	Date completed or to be completed
1. Employ engineer to plan project	_____
2. Approve Planning, including obtaining State approval	_____
3. Complete Plans & Specifications	_____
4. Approve Plans & Specifications including obtaining necessary State (and EPA) approvals	_____
5. Commence any required real property acquisition or condemnation proceedings	_____
6. Obtain possession of acquired or condemned property	_____
7. Obtain financing, including but not limited to awarding of State and Federal grants if any, and other financial commitments	_____
8. Advertise for bid	_____
9. Award construction contract	_____
10. Commence construction	_____
11. Complete construction	_____
12. Commence Operations	_____
13. Attain permit effluent limits and full compliance with §301(b), Clean Water Act	_____

Note: Also include dates for progress reports on principal anticipated events, e.g. construction and equipment fabrication dates

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

ATTACHMENT A

PERMIT LIMITS
6/30/77

During the period beginning and lasting through
the permittee is authorized to discharge from outfalls(s) serial number(s)

Such dischargers shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	kg/day(lbs/day)		Other Units (Specify)			
	Monthly Avg	Weekly Avg	Monthly Avg	Weekly Avg	Measurement Frequency	Sample Type
Flow-m^3/Day (MGD)	—	—	—	—		

The pH shall not be less than standard units nor greater than standard units and shall be monitored

There shall be no discharge of floating solids or visble foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

AO - Request for CCP

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION __

IN THE MATTER OF	)	Docket No. _____
	)	
	)	FINDINGS OF VIOLATIONS
Proceedings under Section 309(a)(3) of the Clean Water Act, as amended, 33 U.S.C. 1319(a)(3), in re: NPDES Permit No.	)	AND
	)	ORDER FOR COMPLIANCE
	)	

STATUTORY AUTHORITY

This Order is issued pursuant to Section 309(a)(3) of the Clean Water Act (the Act), 33 U.S.C. 1319(a)(3). Section 309(a)(3) grants the Administrator of the United States Environmental Protection Agency (EPA) the authority to issue orders requiring persons to comply with Sections 301, 302, 306, 307, 308, and 405 of the Act and to comply with any conditions or limitation implementing any of such sections in a National Pollutant Discharge Elimination System (NPDES) permit issued under Section 402 of the Act. This authority has been delegated to the Regional Administrator.

The Order is based on findings of violations of conditions of an NPDES permit issued under Section 402 of the Act relating to compliance with section 301(b) of the Act.

FINDINGS

1) The a _____ (the "Permittee"), is a municipality which owns and operates a publicly owned treatment works including a ___ million gallon per day design capacity wastewater treatment facility _____ which discharges to the _____, a water of the United States.

2) On _____, a _____ was issued NPDES Permit No._____ (the permit) by _____ pursuant to Section 402 of the Act 33, U.S.C. 1342. The permit became effective on _____, 19__, and will expire on _____ __, 19___.

3) The permit (Part I, Section A) requires the attainment of the weekly average, monthly average and other effluent limitations listed in Attachment B (the permit limits) on a continuing basis during the term of the permit.

4) Based upon my review of Discharge Monitoring Reports furnished by permittee, I find that ____[a]____ has consistently discharged pollutants outside the effluent limitations stated in its NPDES permit. (Specify Nos. and source (DMR, etc.) of most recent obtained information). I further find that these discharges continue at this time.

5) ____[a]____ is in violation of the effluent limitations of its NPDES permit.

[6) A preliminary diagnostic evaluation of facility effectiveness was performed by _____ at the request of EPA Region___. That evaluation, a copy of which is attached, indicates that the following may be among the major causes of permittee's failure to meet the permit limits:

]b

Based on the above findings it is hereby ORDERED:

1a) ____[a]____ shall perform any and all needed corrective action and achieve compliance with effluent limitations as shown in Part I, Section A of the permit and in Attachment B to this order within 30 days. The permittee shall within 45 days notify me of the corrective actions taken and certify that it believes the actions will result in continuous future compliance with permit limitations.

1b) If for any reason ____[a]____ is unable to complete necessary corrective measures within the time called for in paragraph 1a, it shall prepare a Composite Correction Plan, (Plan) as described in Attachment A, as follows:

(i) Within 45 days of the effective date of this order, permittee shall furnish me with the following:

(A) a confirmation that it will prepare or employ a consultant to prepare a Composite Correction Plan, and a statement of the dates it proposes to start and complete the Plan. If the date for proposed completion is after _____, permittee will advise why it cannot complete the Plan by that date.

(B) a statement of the names of the persons who will prepare and review the plan and information concerning their qualifications to prepare and/or review the plan and supervise its execution.

(ii) Unless otherwise advised to the contrary within 30 days of furnishing materials required under subdivision 1(b)(i) of this order, ___[a]___ will commence preparation of the Plan forthwith and shall complete the Composite Correction Plan by _____198_, or if not disapproved by EPA, by the later completion date proposed in response to question 1b)(i)(A). (Add clause calling for interim reporting, if desired.) Permittee shall send a copy of the Plan and proof of its acceptance by permittee within 45 days of the required completion date, as determined above.

All responses are to be sent to _____.

A failure to comply with paragraphs 1a) or 1b) hereof shall constitute a violation of this order.

This order entered this __ day, of ____, 198_, shall be effective on receipt.

_____
(Name and Title of Authorized Signatory)

Notes

[a] Name or permittee.

[b] Applies only if there has been a prelimary diagnostic evaluation. Language cross referencing any reports, etc., which indicate problem sources or solutions may be substituted, or entire sentence deleted.

[d] If the permit has expired but has been continued by operation of law and the expired permit had 301(b)(1) limits, add sentence showing continuing applicability of final permit limits.

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

ATTACHMENT B

PERMIT LIMITS

During the period beginning and lasting through
the permittee is authorized to discharge from outfalls(s) serial number(s)

Such dischargers shall be limited and monitored by the permittee as specified below:

Effluent Characteristic	Discharge Limitations				Monitoring Requirements	
	kg/day(lbs/day)		Other Units (Specify)			
	Monthly Avg	Weekly Avg	Monthly Avg	Weekly Avg	Measurement Frequency	Sample Type
Flow-m^3/Day (MGD)	--	--	--	--		

The pH shall not be less than standard units nor greater than standard units and shall be monitored

There shall be no discharge of floating solids or visble foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s):

Attachment
Diagnostic
Evaluation

Attachment

(Preliminary)

DIAGNOSTIC EVALUATION

ATTACHMENT A
Composite Correction
Plan Instructions

COMPOSITE CORRECTION PLAN

I. INTRODUCTION

The Composite Correction Plan (CCP) is designed to identify and correct those areas in a POTW which are limiting the plant's ability to comply with its NPDES permit effluent limitations. The CCP is a two step process which should provide the most economical method to improve POTW performance. The approach consists of an evaluation step and a plan development step.

The evaluation step is a thorough review and analysis of a POTW's design capabilities and the associated administration, operation and maintenance practices. It is conducted to provide information upon which to make decisions regarding efforts to improve performance. The primary objective is to determine if significant improvement in treatment can be achieved without making major capital improvements. This objective is accomplished by assessing the capabilities of key unit processes and by identifying and prioritizing the factors which limit performance and which can be corrected.

The plan development step uses the results of the evaluation to develop step by step instructions to correct each deficiency identified in the evaluation. The plan also must include a detailed scheduled for implementation and an associated itemized cost estimate.

1. QUALIFICATIONS OF PREPARER

The below mentioned evaluation and plan may be prepared by staff from the municipality if qualified personnel are available. Such staff qualifications shall include training and experience in evaluating the design, construction, operation, maintenance and management of sewage treatment plants. If no such staff are available, the preparer shall be an engineering consultant with the above stated qualifications. In any case, the plan must be either prepared or reviewed by a professional engineer licensed for this type of analysis in the State where the plant is located.

2. IN-DEPTH DIAGNOSTIC EVALUATION

The Composite Correction Plan shall be prepared using the results of an in-depth diagnostic evaluation of the plant's ability to meet its permit effluent limits. This evaluation shall at a minimum include:

a. A review of the plans and specifications as currently constructed. (Also a review of the results of EPA's or State's preliminary evaluation of the facility, if appropriate)

b. A review of all aspects of the current operations and maintenance practices at the plant.

c. A review of all influent loading data in both quality and quantity including where appropriate a review of all industrial contributors to the plant and their pretreatment requirements.

d. A review of all sludge handling practices at the plant.

e. A review of the staffing, training, management, budget, and financial accounting at the plant, including and evaluation of the user charge system currently in effect.

f. A review of all recent sampling, preservation and laboratory analysis and associated records used for determining in-plant process controls and compliance with the permit effluent limitations.

g. A review of other significant factors affecting compliance which are unique to the plant.

3. CONTENT OF COMPOSITE CORRECTION PLAN

The Composite Correction Plan prepared using the above evaluation shall address all factors which are currently limiting or which could limit plant operating efficiency and the plant's ability to meet its permit effluent limitations. The plan shall include the following information:

a. A list of all factors which are limiting the plant's treatment capability.

b. An estimate of the effluent quality which the treatment plant is theoretically capable of achieving if all plant operations are optimized.

c. Specific, proposed actions to correct each limiting factors, including where appropriate specific changes to operating, maintenance, staffing, user charge system, sludge handling, pretreatment or budgeting practices or any other change which will optimize plant performance. Such proposed actions shall include capital improvements to the existing physical plant where appropriate.

d. A proposed schedule and cost estimate for implementing each change, including the date for full permit compliance. This schedule shall include specific dates by which each change will be initiated and completed.

e. A certificate showing the method of financing any capital improvements or any other portions of the activities listed in paragraph c which will not be furnished from current receipts.

Attachment ____
(Form of
Certification)

Form of Certification

A. For use at all plants but most appropriate at large plants (where signatory has ultimate responsibility but lacks direct control or specific knowledge of details):

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.
>
> (40 CFR 122.22(d); 48 FR 39619, Sept. 1, 1983)

B. Alternate form. Appropriate for use at smaller plants (where signatory has direct control over and specific knowledge of details):

> I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (28 U.S.C. 1746)

Model Notice of Deficiency

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region _____

_____
_____

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John Doe
Plant Manager
Smith Industries, Inc.
36 Sunshine Drive
Clark, VA 24077

RE: Notice of Deficiency
EPA Identification No._____
Smith Industries, Inc.

Dear Mr. _____:

The Environmental Protection Agency (EPA) has conducted an initial review of your permit application submitted on December 22, 1982, for an NPDES permit at the facility referenced above. This phase of our review was conducted to determine whether information submitted in your application was complete in accordance with the requirements of 40 C.F.R. Part 122. Upon determining that the application is complete, EPA will conduct a thorough technical review.

After reviewing the submitted material, we have determined that the application is deficient and have specified additional information needed to make it complete. A copy of our comments is enclosed. It is our intent that these comments assist you in the preparation of a complete NPDES application.

If you have any questions regarding the review of your application or if you desire a meeting with EPA, please contact _____ of my staff at the above address or at (telephone #). All correspondence should reference the EPA Identification Number.

Sincerely,

Jane Jones, Director
Water Management Division

Enclosure

Chapter Seven

Administrative Enforcement Actions: Civil Penalty Provisions

Chapter Contents Page

Chapter Seven

Administrative Enforcement Actions: Civil Penalty Provisions

As of this writing, the Clean Water Act does not provide for the assessment of administrative civil penalties, except for penalties under Section 311(j)(2) for failure to have, update, or implement an individual oil or hazardous substance contingency plan. The President's authority to assess these penalties has been delegated to the EPA Administrator.

Chapter Eight

Judicial Enforcement: Civil Actions

Chapter Contents

1 Introduction

In addition to administrative enforcement responses, the Administrator may initiate civil judicial actions under the Clean Water Act's enforcement provisions. Such civil judicial actions may be used to compel compliance with the CWA's statutory and regulatory requirements as well as to seek civil judicial penalties. If one or more of the following factors are present, a civil judicial action is generally preferable to issuing an administrative order:

- A person has failed to comply with an administrative order;
- EPA must immediately stop or require continuance of a person's conduct (e.g., continue treatment of a discharge) to prevent irreparable injury, loss, or damage to the waters of the United States;
- EPA must compel long-term compliance;
- A judicial action will deter others from violating the requirements of the Act; or
- Violators have gained substantial economic benefit from acts of noncompliance because administrative penalties are not available under Section 309 of the CWA.

Statutory Authority

Section 309(b) of the CWA authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he or she is authorized to issue an administrative compliance order under Section 309(a). Section 309(a)(3) authorizes compliance orders for violations of Sections 301, 302, 307, 308, 318, or 405 or for violations of conditions or limitations in a Section 402 or Section 404 permit implementing these sections. Before bringing a judicial enforcement action, EPA may notify the violator and the applicable state and may give the state 30 days to bring its own enforcement action. As a matter of Agency policy, EPA provides prior notification to states and

consults with them before taking action. (See "Implementing the State/ Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements,'" issued June 26, 1984.)

Section 309(d) provides that violations of these sections, of an administrative order, or of permit conditions implementing these sections give rise to liability for civil penalties of up to $10,000 for each day of each violation. EPA may commence both administrative and judicial enforcement for the same violations.

The federal district court in which the defendant is located, resides, or is doing business has jurisdiction to restrain such violations. The government must give notice of any federal enforcement action to the affected state. Section 309(b) establishes the venue of Section 309 actions as "the district court of the United State in which the defendant is located or resides or is doing business."*

Typical CWA judicial enforcement cases involve discharges without an NPDES permit or a Section 404 permit or violations of NPDES permit effluent limitations. EPA may also address violations of pretreatment standards, prohibitions, or requirements through these authorities. When EPA files suit against a publicly owned treatment works (POTW) or other municipally owned or operated facilities, it also must join the state under Section 309(e).

Section 309(f), added in the 1977 Amendments to the CWA, authorizes a separate civil action for violation of pretreatment requirements. If the owner or operator of a treatment works (generally a POTW) does not commence appropriate enforcement action within 30 days of the Administrator's notification of a pretreatment violation by a source discharging into the POTW, the Administrator may commence a civil action for appropriate relief, including but not limited to a permanent or temporary injunction against the POTW owner or operator and the industrial user.

Section 402(h) provides for injunctive relief where a POTW permit condition is violated by authorizing EPA or an approved state to commence an enforcement action to restrict or prohibit the introduction of any pollutant into such treatment works by a source not using such treatment works prior to the finding that such condition was violated.

Section 311(b)(3) prohibits the discharge of oil or hazardous substances in "harmful quantities" (see 40 C.F.R. §§110.3, 116.4, and 117.3) and authorizes EPA to bring a civil action in district court for such hazardous substance discharges and to obtain up to $50,000 in penalties. (The Coast Guard has authority to assess an administrative civil penalty of not more than $5,000 for oil discharges.) Where such discharge resulted from willful negligence or willful misconduct, liability may increase up to $250,000. This larger penalty is available only for hazardous waste discharges. Civil penalties may not be assessed under both Section 311 and

---

* The same standard is adopted by Section 311(b)(6)(B) for Section 311 cases.

Section 309. (Note that discharges under Section 311 exclude those discharges permitted under Section 402 or identified in an NPDES permit application and "caused by events occurring within the scope of relevant operating or treatment systems.")

Section 311(c) authorizes the United States to remove and recover the oil or hazardous substances and to recover the costs of removal under Section 311(b)(6)(D), up to the limits established in Section 311(f).

Section 504 provides for injunctive relief if a water pollution source or combination of sources presents an imminent and substantial endangerment to the health or welfare (i.e., livelihood) of persons. The venue of Section 504 actions is "the appropriate district court." Relief is legally available under this section independent of whether a source is complying with permit requirements. Where a cause of action under Section 504 is taken, it often accompanies an enforcement action under Section 309(b). Civil penalties are not available under Section 504.

2 Elements of a Violation: Civil

Evidence in Support of Civil Actions

Evidence that can be presented to a court in accordance with the Federal Rules of Evidence is necessary to support each element of a civil cause of action. Therefore, before a civil action is filed, each element of the offense should be reviewed to ensure that there is competent evidence to support each element of the violation. Note that certain matters may not be easily established at trial as may first appear (e.g., the existence of a partnership and the number of days in violation).

The following is a list of general evidentiary showings that should be met to prove the most common civil actions arising under the CWA.

General Requirements for Civil Actions Brought Under Section 309

Violations of Section 301(a). The elements of proof in a Section 301 case (basically for a discharge not authorized by a permit or for permit violations) are the following:

- The defendant is a person within the meaning of the CWA [see Section 502(5)];
- The defendant discharged pollutants within the meaning of the CWA [see Sections 502(12) and 502(6)] for each day alleged; and
- Such actions were not in compliance with Sections 301, 302, 306, 307, 318, 402, or 404 of the CWA, or a permit condition implementing these sections.

Note that under Section 402(k), compliance with a validly issued NPDES permit generally constitutes compliance, for purposes of Section 309, with Sections 301, 302, 306, and 403. (This does not include, however, Section 307 toxics standards, a Section 311 spill, or Section 504 imminent and substantial endangerment. The permit-as-a-shield rule is discussed in more detail in Chapter Eleven.)

The most common violations occur under Sections 301 and 402 (i.e., either discharging without an NPDES permit or violating the limitations or conditions of an NPDES permit). For violations of Section 301 concerning unpermitted discharges, the government need only prove that the defendant has not been authorized to discharge pollutants but has done so. For violations of Section 301 concerning permit violations, however, the government must plead the terms of the permit being violated and demonstrate the defendant's noncompliance with those terms. Because the CWA is a strict liability statute, neither a showing of intent [United States v. Earth Sciences, 599 F. 2d 368, 374 (10th Cir. 1979)] nor a showing of environmental harm [Crown Simpson Pulp Co. v. Costle, 642 F. 2d 323, 328 (9th Cir.), cert. denied, 454 U.S. 1053 (1981)] is required for liability to attach in Section 309 civil actions.

Violations of Section 309 Orders. In actions that also address violations of a Section 309(a) administrative order, EPA must demonstrate the existence of a valid administrative order and the defendant's noncompliance with the order. Note that Section 309 explicitly only authorizes civil penalties (as opposed to injunctive relief) as relief available to address administrative order violations. This does not preclude application for injunctive relief to correct the underlying violations that were the basis of the administrative order.

Violations of Section 307(d). In a Section 307(d) pretreatment case, EPA must plead the applicable pretreatment regulations--either a categorical standard or a requirement in the general pretreatment regulations, such as a violation of the general prohibitions under 40 C.F.R. §403.5--as well as the defendant's violations of those regulations. Note that pretreatment reporting violations are violations of Section 308, and not Section 307(d). Since the majority of industrial users are subject to both electroplating categorical standards (due April 27, 1984 for non-integrated facilities and June 30, 1984 for integrated facilities) and metal finishing categorical standards (due February 15, 1986), EPA should ensure that the treatment for electroplating will be consistent with the treatment needed to meet the metal finishing requirements by the metal finishing deadline. (This will help avoid relitigation for violations of metal finishing standards.)

In an enforcement case involving alleged violation of pretreatment categorical standards, a defendant may argue that he or she is entitled to removal credits pursuant to Section 307(b)(1) and 40 C.F.R. §403.7 (i.e., a credit for the extent to which the POTW can treat the indirect discharge). Unless the POTW has applied for and been granted removal credits, such an argument is not a defense.

POTW Violations of Requirements for Local Pretreatment Program. If the POTW is required to prepare a local pretreatment program for approval by EPA or the state (if the state has an approved pretreatment program) and implement that program, this requirement must be contained in the POTW's

NPDES permit to place EPA in the strongest enforcement posture.* Sections 309(b) or 309(f) may provide a federal cause of action in limited circumstances even if the requirement is not in a permit, particularly if the POTW has other permit violations or there are industrial user violations exacerbated by the absence of a pretreatment program. Note that a POTW with an approved local program is expected to take an active enforcement role.

In some cases, a POTW may have both NPDES permit and pretreatment violations. In general, EPA should enforce against all available violations in a single action. However, in certain circumstances, EPA may wish to pursue only the pretreatment violations, and preserve its right to enforce subsequently against the NPDES violations. To minimize any res judicata problems, the complaint should include only the facts necessary to support the pretreatment violations.

The government may decide to proceed simultaneously against a POTW and an indirect discharger violating general pretreatment prohibitions, categorical standards, or properly adopted local limits.

Violations of Section 404. EPA may bring a Section 404 case if there has been a discharge without an Army Corps of Engineers (Corps) or state-issued permit or for the violation of a state-issued permit. Where a Corps permit has been violated, the Corps has primary enforcement responsibility. In these cases, the enforcing agency must prove the discharge occurred without any authorizing dredged or fill material permit under the appropriate regulatory definition. (The EPA definitions are provided at 40 C.F.R. §233.3.) Note that under Section 404(p), compliance with a valid dredged or fill permit generally constitutes compliance with Sections 301, 307, and 403 of the CWA.

General Requirements for Civil Actions Under Section 311

In a Section 311 discharge case, EPA must prove that the defendant discharged a harmful quantity of oil or a reportable quantity of hazardous substance into the waters of the United States, an adjoining shoreline, a contiguous zone, or an open ocean if the resources of the United States are affected, and that the discharge occurred within a 24-hour period.

Hazardous substances are defined at 40 C.F.R. §116.4 and reportable quantities are defined at 40 C.F.R. §117.3. The courts have held that due care provides no defense to liability (See e.g., United States v. Coastal States Crude Gathering Co., 643 F. 2d 125 (5th Cir. 1981).

---

* The cause of action here is for violation of a permit condition imposed under Section 402(b)(8) for the purpose of implementing Section 307.

3 Procedures for Filing Actions

The Assistant Administrator for OECM (or the Assistant Administrator's delegatee), refers requests for CWA civil judicial actions to the Department of Justice (DOJ), unless direct referral from the Regional Office is permitted.* In most instances, the designated lead Agency regional attorney prepares a referral package with technical support from the Regional water program office.** The Regional Administrator signs the referral package and forwards it to OECM (with a copy to the appropriate Headquarters program office).

Preparation of the Referral Package

The referral package should contain a referral memorandum and a civil litigation report.

Referral Memorandum

A referral memorandum identifies the primary elements of the proposed litigation. Specifically, the memorandum should include the following items:

- Identification of the potential defendants;
- Brief factual summary of the case;

---

* The Regional Office also has independent authority to refer requests for emergency temporary restraining orders under the Act to the Department of Justice and the appropriate United States Attorneys Office. When exercising this authority, however, the Regional Administrator must notify the Assistant Administrator for OECM (or the Assistant Administrator's designee).

** Headquarters program and Enforcement Counsel staff may participate more actively in the case development process if precedential or nationally significant issues are involved. See "EPA Policy on Nationally Managed or Coordinated Enforcement Actions," January 4, 1985.

- Identification of the major issues (including potential problems that may exist with the case);
- Status of past Agency enforcement efforts; and
- Names of regional legal and technical staff and the DOJ attorney who are involved in the case, including the lead attorney.

Civil Litigation Report

In addition to the referral memorandum, the referral package must contain a civil litigation report (signed by the designated lead EPA attorney) and supporting documents. (See Exhibit 8-1 for a complete outline and guide to preparing the report.) The report must include the following items:

- A draft complaint;
- Sections of the CWA and regulations that have been violated;
- A description of the evidence sufficient to prove each element of the violation, including a copy of documentary evidence and a summary of expected expert testimony;
- A description of attempts to resolve the violation, including a description of any administrative action taken to date;
- Any past, anticipated, or pending state or federal actions (administrative or judicial) against the violator;
- Evaluation of potential defenses and how the government would refute them;
- List of equities that may weigh against granting the relief;
- Evaluation of any issues of national or precedential significance;
- Description of environmental harm or other factors that justify prosecution;
- Description of the pollution control remedy to be sought; and
- Discussion of an acceptable civil penalty settlement figure and potential for settlement.

In addition, it may be appropriate to include an enforceable draft consent decree that:

- Provides for compliance as expeditiously as practicable;
- Is in accordance with requirements of applicable statutes, regulations, and policies;

- Contains adequate reporting and testing provisions;
- Includes an appropriate termination date or specifies some other process for concluding the court's jurisdiction;
- Includes an appropriate penalty in accordance with the applicable penalty policy; and
- Otherwise comports with "Guidance for Drafting Judicial Consent Decrees" (see General Enforcement Policy Compendium, GM-17) and "Guidelines for Enforcing Federal District Court Orders in Environmental Cases" (see General Enforcement Policy Compendium, GM-27). (For municipal cases, see also "Municipal Enforcement Guidance," October 25, 1984.)

Civil Penalty Amount. The litigation report should state the maximum possible civil penalty, which is calculated on the basis of the number of violations, multiplied by the number of days of violation, multiplied by $10,000. The report should also contain the "initial penalty target figure." As provided in the EPA "Civil Penalty Policy," July 8, 1980, (contained in the Water Compliance/Enforcement Policy Compendium), and the "Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment," November 5, 1984, contained in the General Enforcement Policy Compendium, GM-33, this figure includes the economic benefit factor (i.e., benefit gained from delayed compliance) plus the adjusted gravity factor. This figure represents the Agency's first settlement goal. The gravity figure may be adjusted during negotiations as more information becomes available. However, the economic benefit figure should not be adjusted downward unless EPA obtains more accurate, verifiable information that would justify recalculation of economic benefit. Because the minimum acceptable figure is usually lower than the maximum statutory amount, EPA and DOJ negotiators must guard this minimum sum in the strictest confidence so that the potential for maximum penalties serves as an impetus for the violator to settle.

EPA issued a new Civil Penalty Policy on February 16, 1984 (contained in the General Enforcement Policy Compendium, GM-21). EPA is developing a CWA-specific penalty policy to implement the new policy.

Enforceable Consent Decree. The report may include a draft consent decree designed to secure compliance as expeditiously as practicable. If the discharger has agreed to a settlement, the decree should accompany the report. [Note that any offer of settlement to a potential defendant should be discussed with OECM staff before being released. See "Headquarters Review and Tracking of Civil Referrals" (March 8, 1984) and "Implementation of Direct Referrals for Civil Cases Beginning December 1, 1983," (November 28, 1983) contained in General Enforcement Policy Compendium, GM-26 and 18, respectively.] If the source has not agreed to settle, the draft decree should contain schedules and other agreements most favorable to the Agency because the draft decree will represent the starting point for negotiations.

The contents of a consent decree ultimately depend upon the underlying violation and the circumstances under which the violation will be remedied. Section 4 of this chapter discusses the terms of a settlement agreement in greater detail. In addition, General Enforcement Policy Compendium documents GM-17 and GM-27 should be reviewed when preparing consent decrees.

Headquarters and Department of Justice Review

Once the referral package is received by Headquarters, Enforcement Counsel attorneys will conduct a limited final legal review to ensure completeness, accuracy, and consistency with applicable Agency enforcement policies. The Headquarters water program office provides a technical and program policy review of litigation reports. Headquarters will transmit the case to DOJ. OECM will notify the Regional Administrator upon the transmittal of the civil referral.

Following the referral of a case, the lead EPA attorney will be responsible for coordinating responses to all requests for supplemental information by DOJ or the U.S. Attorney's office. The lead Agency attorney also will be responsible for keeping program officials, the Office of Public Affairs, and other previously involved Agency attorneys apprised of case developments. After EPA refers the case to DOJ, DOJ prepares the necessary court papers and gathers information needed to support a court action (sometimes in conjunction with the local Assistant U.S. Attorney) and then sends the case to the U.S. Attorney for filing.

Direct Referrals

On September 29, 1983, EPA and DOJ agreed to permit Regional Offices to refer certain cases directly to DOJ without Headquarters concurrence. In those cases the Regions should send referral packages to the Assistant Attorney General, Lands and Natural Resources Division, Department of Justice, P.O. Box 23495, Washington, D.C. 20026. The Regions may directly refer the following cases under the CWA:

- Cases involving discharges without a permit by industrial dischargers;
- All cases against minor industrial dischargers;
- Cases involving only failure to monitor or report by industrial dischargers;
- Referrals to collect stipulated penalties from industrial dischargers under consent decrees; and
- Referrals to collect administrative penalties under Section 311(j) of the CWA.

See "Implementation of Direct Referrals for Civil Cases," November 28, 1983, contained in the General Enforcement Policy Compendium, GM-18.

Regional Offices should send copies of direct referrals simultaneously to OECM and the Headquarters program office. If elements of a referral include national or precedentially significant issues, or otherwise do not fall within these guidelines, the Regional Office must refer the case to EPA Headquarters.

Enforcement Docket System

Regional and Headquarters staff enforcement attorneys must enter and track all civil judicial cases in the EPA Enforcement Docket System. Guidance on docket procedures is contained in the March 8, 1984, memorandum entitled "Headquarters Review and Tracking of Civil Referrals," which is contained in the General Enforcement Policy Compendium, GM-26.

Guidance Documents on Case Development Procedures

Agency employees who are involved in the investigation and referral to DOJ of CWA civil judicial actions should familiarize themselves with the Agency documents listed below. These documents are contained in the General Enforcement Policy Compendium:

- Memorandum of Understanding Between the Department of Justice and the Environmental Protection Agency (June 15, 1977) GM-3;
- Quantico Guidelines for Enforcement Litigation (April 8, 1982) GM-8;
- General Operating Procedures for EPA's Civil Enforcement Program (July 6, 1982) GM-12;
- Working Principles Underlying EPA's National Compliance/Enforcement Programs (November 22, 1983) GM-24;
- Case Referrals for Civil Litigation (September 7, 1982) GM-13; and
- Headquarters Review and Tracking of Civil Referrals (March 8, 1984) GM-26.

Interrelationship of Referral Process, Litigation, and Negotiations

Concurrently with the preparation of the civil litigation report, the referral process, and the pendency of litigation, the government may conduct negotiations with the violator aimed at settling the case. The vast majority of CWA cases are settled by negotiation. However, litigation reports must be prepared and negotiations must be conducted on the

assumption that the case will eventually go to trial and will require proof of each element of violation, as well as support for the civil penalty and injunctive relief sought.

Before beginning settlement negotiations, the federal government's litigation team must agree upon what constitutes an acceptable settlement. The team must know what pollution-control remedies are required, the schedule for compliance, the penalty figure, and any other facility-specific requirements either necessary or desirable to abate the pollution and to monitor compliance.

Filing the Complaint

The civil action commences with the filing of a complaint (Federal Rules of Civil Procedure, Rule 3). The complaint may be filed in the U.S. district court in which the violation occurred or in which the defendant resides or does business.

Complaints are governed by the General Rules of Pleading established by Rule 8 of the Federal Rules of Civil Procedure. Complaints must state a cause of action (i.e., the complaint must allege facts that constitute a violation of the CWA).

Complaints are filed on behalf of the United States of America. Consequently, the complaint should be styled as "United States v. Polluter" rather than "Environmental Protection Agency v. Polluter" or "(Name of EPA Administrator) v. Polluter." In filing a complaint, EPA should consider joining corporate officials or city officials, in addition to the corporations and cities themselves. EPA should also consider joining the parent corporation of a defendant subsidiary.

The complaints must also state the grounds upon which the court's jurisdiction lies. Usually, the government asserts federal court jurisdiction under Section 309 of the CWA, 28 U.S.C. §1331 (the "federal question" jurisdiction when the amount in controversy exceeds $10,000), 28 U.S.C. §1345 (the United States as a plaintiff), and 28 U.S.C. §1355 (when the government seeks a civil penalty).

Complaints must also contain a demand for relief. CWA complaints generally request both injunctive relief and the imposition of civil penalties. Once the government files a complaint, the source is potentially liable for payment of penalties and must report the potential liability to shareholders and the Securities and Exchange Commission in its "10-K" form. This requirement does not apply to closely held corporations, which are often a major problem. Shareholder pressure may help force the company's officers to settle sooner. A filed complaint can improve the quality and timing of a settlement because the source is faced with a trial and potentially large penalties.

Exhibits 8-2 and 8-3 contain sample complaints used in industrial and municipal enforcement cases, respectively.

In addition, on October 17, 1984, EPA issued "Model Pretreatment Complaints and Consent Decrees." The model complaints address the following pretreatment violations:

- Failure of an industrial user to submit a baseline monitoring report (BMR) — industrial user as defendant;
- Failure of a POTW to submit a pretreatment program — POTW and state as defendants;
- Failure of an industrial user to meet categorical standards — industrial user as defendant; and
- Failure of an industrial user to meet categorical standards -- industrial user, POTW, and state as defendants.*

Exhibit 8-4 contains a sample pretreatment complaint alleging violations of categorical pretreatment standards and national prohibited discharge standards, and alleging failure to submit a BMR and other pretreatment reports.

Injunctive Relief

EPA generally seeks injunctive relief to obtain compliance with permit limitations or conditions or other CWA requirements. Injunctions are an equitable form of relief within the discretion of the court. [See United States v. Romero-Barcelo, 456 U.S. 305 (1982).]

In seeking injunctive relief in NPDES permit violation cases, EPA generally requests a compliance schedule for meeting the required pollution control and final compliance dates. This will include interim effluent limitations that will ensure the greatest amount of pollution control reasonably achievable. In addition to specifically requiring compliance with effluent limitations, EPA may also require certain actions and practices including sampling, monitoring, and reporting requirements. Should the discharger fail to comply, the court order, if entered on consent, should include stipulated penalties.

---

* The reader may obtain the sample complaints in the October 17, 1984 memorandum from the Office of Enforcement and Compliance Monitoring, Associate Enforcement Counsel for Water Enforcement, LE-134W, Washington, D.C. 20460.

The government must prove that there was a violation of the CWA and that there is no adequate remedy at law (e.g., civil penalties are not adequate to "right the wrong" because they will not mitigate the environmental harm caused by the defendant's violation). The remedy should correct the violations without being unnecessarily burdensome to the defendant. However, the government need not necessarily prove irreparable injury. [See, e.g., Bowles v. Huff, 146 F. 2d 428 (9th Cir. 1944).]

In the case of municipal defendants, it is usually advisable to determine the financial capability of the defendant to finance the injunctive relief. While financial inability of a defendant does not, by itself, constitute a reason not to take enforcement action, it is proper for the government to consider financial ability or inability in determining its priorities in demanding relief. In some cases a defendant's financial or other inability to comply may require that the defendant cease operations [U.S. Steel v. Train, 556 F. 2d 822, 838 (7th Cir. 1977]. Where the defendant is a POTW, such a result would always be counterproductive in terms of pollution control. More appropriate remedies may include the following:

- An order to develop a financial plan for achieving compliance as expeditiously as possible;
- An order compelling maximum use of existing facilities until final compliance can be achieved;
- An order containing an extended compliance schedule that takes into account the municipality's financial situation;
- An order requiring initiation and prosecution of a legal action to recover from other responsible parties, such as the architect/engineer, contractor, or manufacturer (perhaps with EPA technical and legal assistance under Section 203(a) of the CWA); and
- An order prohibiting the POTW from accepting new contributors until it is able to treat the additional wastes adequately [See Section 402(h)].

Note that the "National Municipal Policy," January 23, 1984 (contained in Water Compliance/Enforcement Policy Compendium) expects compliance with secondary treatment by no later than July 1, 1988. For further guidance, see this policy as well as "Municipal Enforcement Guidance," October 25, 1984.

When injunctive relief may result in prohibiting a discharger from operating, EPA must show that the discharger either seriously or imminently threatens public health or causes substantial and unavoidable nonhealth injuries [Harrison v. Indiana Auto Shredders Co., 529 F. 2d 1107 (7th Cir. 1975; Clean Air Act case)].

An injunction operates in personam (meaning "against the particular person"), so that the district court in which the motion is filed must have in personam jurisdiction over the party against whom the injunction is sought. Usually this means that the person or corporation who is the defendant must live or have a place of business within the state. Further, service of process, or the delivery of written notice, is subject to the territorial limits of the state in which the district court is located unless otherwise provided for in a statute. [See also, Federal Rules of Civil Procedure, Rule 4(f).]

Temporary Restraining Order

A temporary restraining order (TRO) is an order of a court that prohibits or limits specified acts of a defendant. The TRO operates for no more than ten days, unless extended for good cause for another ten-day period, or a longer period if the party against whom the order is directed consents to the longer period. [See Federal Rules of Civil Procedure, Rule 65(b).]

To obtain a TRO, EPA must prove from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result before the adverse party (the discharger) can be heard in opposition. The ex parte nature of TROs distinguishes them from other court orders. EPA must certify in writing the efforts, if any, the Agency made to give notice of the hearing to the adverse party.

A draft TRO should accompany the motion. When a court grants a TRO, the court must set a date for a hearing on a preliminary injunction at the earliest possible time. The discharger may seek to dissolve the TRO by giving EPA two days' notice and persuading the court at the hearing either that the underlying alleged violation is not occurring or that immediate and irreparable injury, loss, or damage will not result.

Preliminary Injunction

A preliminary injunction preserves the status quo pending final determination of the action after notice and a full hearing on the merits. The injunction may not be issued without notice to the discharger. In addition, the preliminary injunction can last longer than ten days and is effective for the time during which the court decides (pendente-lite) to issue a permanent injunction.

The applicant has the burden of establishing the right to injunctive relief. To do so, EPA will rely on affidavits and oral testimony, when available and if necessary, to substantiate the Agency's contentions.

The court may order the advancement and consolidation of the trial on the merits with the hearing on the application for preliminary injunction. Therefore, the government attorney should be prepared to go forward with the prosecution of the case when seeking a preliminary injunction. Exhibit 8-5 contains a sample motion for preliminary injunction.

Permanent Injunction

A permanent injunction is generally unlimited in duration. It is generally granted after a full trial on the merits or on consent. Consequently, the judgment granting a permanent injunction constitutes final disposition of the suit, although the judgment may be appealed to a circuit court.

Mere passage of time will not dissolve a permanent injunction, unless the judgment so provides. However, the court may terminate or modify the prospective features of a final injunctive decree when warranted by changed conditions.

Discovery

Discovery is the process by which information--documentary, testimonial, and physical--in the possession of one party to a civil action is secured by another party.* Discovery serves as a device to (1) narrow and clarify the basic issues between the parties, and (2) ascertain the facts, or information as to the existence or whereabouts of facts, relative to those issues.

Discovery prepares the parties for trial by apprising each party as fully as possible of the proof in the possession of the other party. In almost all cases, it is advantageous to institute discovery as soon as possible, which can generally be simultaneously with the commencement of the action.

Filing discovery requests may be necessary to develop the government's case. While violations of effluent limitations can be supported with discharge monitoring reports, the significance of these violations may sometimes be established only through discovery, such as through the deposition of the plant manager.

The several different discovery methods are listed in Rule 26 of the Federal Rules of Civil Procedure. This chapter provides several sample pleadings used in discovery in Clean Water Act enforcement cases. Exhibit 8-6 contains a sample request for admissions. Exhibit 8-7 contains a sample notice of deposition upon oral examination. Exhibit 8-8 contains sample written interrogatories. Exhibit 8-9 contains a sample request for production of documents.

---

* This discussion on discovery is based on the American Law Institute - American Bar Association Environmental Litigation course materials.

Issues That Are Not Reviewable at Trial

Section 509(b)(2) provides:

> Action of the Administrator with respect to which review could have been obtained [under Section 509(b)(1)] shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

This provision severely limits the number and type of defenses that a defendant can raise in an enforcement proceeding. Generally, Section 509(b)(1) provides for review of rules or orders promulgated pursuant to Sections 301, 302, 306, 307, and 402 (including actions issuing or denying permits) or any other final Agency action of the Administrator, within 90 days of publication of the rule or order in the Federal Register. Jurisdiction lies in the U.S. Court of Appeals for the appropriate circuit for applicable rules or orders, or in the D.C. Circuit. After the 90-day period has expired, the defendant may not challenge the rule or order.

Thus, in an action to enforce the effluent guideline limitations established by an industrial effluent guideline, for example, the discharger may not challenge the rule as being inapplicable due to a defect in the rulemaking (such as the failure of the Agency to consider cost in establishing the standard). In other words, although the discharger may defend against the enforcement action on the grounds that the standard does not apply to or may not be applied against the discharger, it may not challenge the reasonableness of or adoption procedures of the standard itself. In addition, the discharger may not so challenge the terms of a permit.

Motion for Summary Judgment

The United States may file a motion for partial summary judgment in a CWA case on the question of liability for NPDES permit violations or unpermitted discharges. Such a motion can be useful in encouraging the defendant to reach a settlement with the government. Rule 56 permits any party to a civil action to move for summary judgment upon a claim, counterclaim, or cross-claim where there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law (see Charles Wright, Federal Courts, 663-670). The motion may be based on the pleadings or it may be supported by affidavits.

The government's motion papers in an NPDES permit violation case generally include the relevant permit application, a copy of the issued NPDES permit (indicating interim and final effluent limitations), copies of discharge monitoring reports and other noncompliance reports, and affidavits of Agency enforcement personnel (generally the technical compliance chief or

site inspector). As discussed in Chapter Four, an unchallenged monitoring report may be sufficient to establish liability for permit violations. [See Student Public Interest Group of New Jersey, Inc. v. Fritzsche, Dodge and Olcott, Inc., 579 F. Supp. 1528 (D. N.J. 1984) and Facet Enterprises, Inc. v. Friends of the Earth, 22 E.R.C. 1143 (W.D. N.Y. 1984).]

The court does not try issues of fact on a motion for summary judgment, but determines whether there are issues to be tried. The court generally gives the party opposing the motion the benefit of all reasonable doubt in deciding whether a genuine issue exists. Further, the court may deny summary judgment if, in its judgment, fairness dictates proceeding to trial.

Exhibit 8-10 contains a sample motion for summary judgment filed by the government covering issues of liability for discharging without a permit and failing to report discharges to the Agency.*

* In Exhibit 8-10, the government's motion goes beyond what is generally required in such a motion, because it, in part, responds to issues raised by defendant's own motion for summary judgment, including whether discharges to "waters of the United States" are involved (see pages 13 through 22 of the memorandum in support of the motion for summary judgment).

4 Consent Decrees

Civil judicial actions are often settled prior to trial by consent of the parties; such settlements normally take the form of negotiated consent decrees.

Contents of the Consent Decree

The consent decree must ensure that EPA has met its goals for the litigation. A consent decree will explain the future rights and obligations of the parties, will address reasonably foreseeable issues that may arise in the decree's implementation, and will ensure the prompt and effective enforcement of the decree by EPA, the Department of Justice, and the court should the defendant not honor the agreement.

While consent decrees negotiated by the Agency differ because each decree embodies a separate negotiating process and a different set of facts, there are elements common to most settlements. The following is a brief outline of the elements that should be considered when drafting a consent decree.*

Elements of the Consent Decree

I. Preliminary Statements. Preliminary statements establish a background for the agreement. These statements relate the general intentions and purposes of the parties regarding settlement. Although preliminary statements do not set forth the specific, substantive liabilities and rights of the parties, they are very useful should the substantive provisions of the agreement need clarification. These statements may be presented as stipulations and findings of fact by the court.

---

* For further discussion on consent decrees, consult the October 19, 1983, "Guidance for Drafting Judicial Consent Decrees," and the April 18, 1984, "Guidelines for Enforcing Federal District Court Orders," both contained in the General Enforcement Policy Compendium, GM-17 and 27, respectively.

Preliminary statements often include one or more paragraphs on:

- The dates that the complaint and amendments to the complaint were filed;
- The statutory authority for the action;
- The parties to the agreement;
- The gravamen or alleged gravamen of the action. (To the extent that the parties can agree, the decree should state facts concerning the case, including the conduct that violates the CWA or conditions that endanger public health or the environment. If a defendant will not agree to such facts, the facts should then be characterized as allegations by the United States); and
- A statement of reasons why the parties believe the settlement is in the public interest. (These may include the avoidance of prolonged litigation or an expeditious and desirable environmental remedy.)

II. Jurisdiction. The agreement should always contain a stipulation that the court has jurisdiction over both the subject matter and the parties, and should cite the statutory basis for such jurisdiction.

III. Parties Subject to the Terms of the Consent Decree. The settlement document should state that the parties and their successors, assigns, and heirs (if a person) agree to be bound by the document. The agreement should also state what terms are applicable to individual parties. For example, a decree may have a separate paragraph referencing the paragraphs applicable to each party or may identify each party's responsibilities in separate paragraphs.

IV. Injunctive Relief. The heart of a consent decree is the means by which compliance with statutory and regulatory requirements will be achieved. The consent decree should require the defendant to report, certify, or otherwise document compliance with all injunctive measures required under the decree. This places the burden of confirming compliance on the defendant. The decree should include every CWA provision, regulation, or permit condition with which the violator must comply, and detail the action that will be taken to achieve and maintain compliance.

V. Reporting and Recordkeeping. To assist EPA in monitoring the performance of the agreement's terms, it may be necessary to require periodic reports. These reports may include sampling and monitoring requirements, a monthly accomplishments report, and submission of logs or other documents generated during the term of the decree.

VI. Access Agreements. EPA must have prompt, immediate access to the facility at all reasonable times to ensure compliance with the terms of the agreement. When a consent decree requires remedial work at a facility, EPA should obtain an explicit right of access.

VII. Schedule for Compliance. An agreement must provide a practical and expeditious schedule for completion of its terms. In some instances, it may not be practical to specify a date. In such a case, the decree should provide for the fulfillment of specific requirements upon performance of a condition precedent (e.g., entry of the decree).

VIII. Stipulated Penalties. Stipulated penalties are normally provided in decrees to ensure compliance with its terms. Such penalties are advisable when corrective action or work by defendants is likely to take a substantial period of time. Penalties should be reasonable in terms of the violation they address but large enough to deter violations effectively.

IX. Penalties for Past Violations. Penalties for past violations are a key part of a CWA settlement. The decree should specify how, by whom, and to whom the penalty should be paid (generally to the United States Attorneys Office, made out to "Treasurer, United States of America.") If a defendant will pay a penalty in installments, the decree should provide a clear schedule of payment. Delinquent payments should accelerate payment of the entire penalty sum. The penalty amount should be consistent with applicable penalty policies.

X. Oversight of Completed Work. For the orderly management of a consent decree, it is often necessary for EPA to oversee the completed compliance schedule activities.

XI. Force Majeure. A force majeure clause, if included, should be narrowly and explicitly drawn. Note that economic hardship should not be included as a force majeure event.

XII. Compliance with Other Laws. A consent decree should state that a defendant is required to comply with other federal, state, or local laws, regulations, or permit requirements not addressed by the consent decree. The decree should not be used as an excuse for violation of other legal obligations, or as an inference that the decree settles potential government claims with respect to those obligations.

XIII. Extent of the Release Given Under the Decree. Any release from liability must be explicit and limited to the controversy involved in the case. No criminal liability may be released in a civil settlement. Also, the agreement should state that any nonsettling parties are not released by the agreement.

XIV. Good Faith Negotiation Clauses. This paragraph has proved desirable in multi-party cases where the Agency has not settled with all parties. The paragraph commonly declares that all parties negotiated and entered the decree in good faith, and that they believe the settlement is fair and equitable. This language may be considered self-serving by any nonsettling parties. However, it may be useful in defending collateral actions by nonsettling parties.

XV. Termination and Effective Dates Clauses. Each agreement should establish specific dates by which action under its terms is required and when the defendant's obligation ends, such as a specific term after the defendant has demonstrated it has achieved and is maintaining compliance.

Exhibit 8-11 contains a sample consent decree for an industrial direct discharger that has violated its NPDES permit limitations. Two items in the sample decree need to be qualified. First, while the sample decree provides for EPA to send a demand letter to the defendant for collection of stipulated penalties, the preferred approach is to provide for automatic payment of such penalties upon violation of a decree. This is discussed in Chapter Ten, "Enforcement of Consent Decrees." Second, the decree should provide for the jurisdiction of the court to additionally extend to assessment of stipulated penalties that accrue during the term of the decree.

Exhibit 8-12 contains a sample consent decree involving violations of an NPDES permit by a municipal discharger. Exhibit 8-13 contains a sample consent decree involving pretreatment violations by an industrial contributor to a POTW.

5 Citizen Suits (Reserved)

6 Exhibits

This section contains the following exhibits:

Exhibit 8-1: Model Civil Litigation Report Outline and Guide
Exhibit 8-2: Sample Complaint for Industrial Discharger
Exhibit 8-3: Sample Complaint for Municipal Discharger
Exhibit 8-4: Sample Pretreatment Complaint
Exhibit 8-5: Sample Motion for Preliminary Injunction
Exhibit 8-6: Sample Request for Admissions
Exhibit 8-7: Sample Notice of Deposition Upon Oral Examination
Exhibit 8-8: Sample Interrogatories
Exhibit 8-9: Sample Request for Production of Documents
Exhibit 8-10: Sample Motion for Summary Judgment
Exhibit 8-11: Sample Industrial Consent Decree
Exhibit 8-12: Sample Municipal Consent Decree
Exhibit 8-13: Sample Pretreatment Consent Decree

Model Civil Litigation Report Outline and Guide

Title Page

A. Identify the facility by name and location and indicate the parent company if different from the facility name.

B. Identify who prepared the report (both legal and technical personnel) indicating addresses and telephone numbers.

C. Show the date of completion/submission of the report.

Table of Contents (Standardized Example)

B. Potential for Summary Judgment Page ___

C. Settlement Potential Page ___

D. Other Potential Defendants Page ___

X. Index of Attachments Page ___

XI. Attachments Page ___

- Copies of correspondence
- Copies of relevant regulated submissions
- Copies of relevant policy memos, regulations, interpretations

Body of the Report

I. Information Identifying the Defendant(s)

A. Legal name of company

B. Address: Corporate headquarters

C. Name of facility (if different from "A")

D. Address of facility (if different from "B")

E. SIC code

F. State of incorporation

G. Registered agent for service

H. Legal counsel (name, address, telephone number)

I. Judicial district in which violator is located

II. Synopsis of the Case

This section should be a one- or two-page articulation of the heart of the case. It should describe both the violation and the proposed relief. It should not describe statutory authority or intricate legal issues in detail.

This succinct statement of the case will provide the reader a framework in which to fit the details developed and presented in the body of the litigation report.

The factual basis of the case should be touched upon. Purely conclusory characterization of the case is not as useful as showing the facts of a violation and requested relief. For example, it is better to say a violator discharged or emitted X quantity of Y pollutant for Z days, than to simply say that the violator did not comply with the terms of a permit, State Implementation Plan (SIP), or statute.

The environmental seriousness of the violation, its ongoing nature, and a violator's recalcitrance may be touched upon in this section (but will also be developed later in paragraph IV(C)).

III. Statutory Authority

A. Present the substantive requirements of the law and applicable regulations. Reference all federal statutes by U.S.C. citation as well as by the section of the pertinent Act. Summarize the enforcement authority, jurisdiction, and venue. Specific elements of proof are to be addressed in paragraph VI.

B. Lengthy dissertation on the law is unnecessary. However, in the instance of State Implementation Plans under the Clean Air Act, or Water Quality Standards under the Clean Water Act, or involvement of any other state law or regulation, a more extensive explanation of the law or regulation may be necessary. Pertinent excerpts from any applicable state laws or regulations should be identified and attached to the litigation report.

C. Any prior interpretation of pertinent state laws or regulations that are germane to the case should be referenced when identifying the law violated. If a state's interpretation of the law has been different from ours, the issue should be discussed with the state and fully explained in this section of the litigation report. (This section may then be referenced when discussing potential defenses, etc., in paragraph VIII.)

D. List any other possible theories of violation under federal, state, or common law.

IV. Description of the Defendant's Business and Technical Description of the Pollution Source

A. Describe the violating corporation and the particular division or facility in question. Any interesting corporate interrelationships or subsidiaries should be noted.

B. Discuss the business of the corporation and/or division, providing details about the facility in question, what is produced, and what causes the pollution. Emphasis should be on the particular process that is causing the problem. Plant and process should be thoroughly explained, including those outfalls or emission points not subject to this enforcement action. Diagrams should be referenced and attached to, or included in, the litigation report. Photographs of the source may be helpful.

C. Discuss the types of pollutants being discharged, and potential health and environmental effects. Although the seriousness of the violation is not technically a requirement of proof in enforcement of certain statutes, it is sometimes relevant to the assessment of penalties and equitable relief. For this reason, it should be discussed in the report although it will not be the sole determinant of whether a case has prosecutorial merit. The Department of Justice has suggested the following considerations in assessing the seriousness of the violation:

- The discharge of toxics or mutagens or carcinogens is more serious than the discharge of conventional pollutants;
- The discharge of large quantities of pollutants is more important than the discharge of small quantities;
- Bioaccumulative wastes posing long-term threats are more serious than biodegradable wastes;
- The discharge of pollutants in an area not attaining primary ambient air quality standards is more important than discharges in an area not meeting secondary standards;
- The discharge of pollutants that directly and demonstrably affect health or the environment is more than those that have no direct or obvious effect;
- Ongoing present violations that the government seeks to stop are more important than episodic violations which have ceased; and
- A defendant with a history of violations is more worthy of attention than a first offender.

If a case does not present obvious "serious" health effects or environmental harm, but is compelling for some other reason (e.g., deterrence of continued, blatant violations of the law), this should be indicated.

D. Discuss available methods of controlling the problem. Specify technology(ies) that will achieve the imposed limits, and indicate the time requirements for a schedule of compliance that considers time necessary for design, contracting, construction, and startup. (This is not inconsistent with EPA policy of not prescribing specific compliance technologies. This information may be necessary in court to illustrate technical feasibility if requested by the judge.)

Cost estimates should be included, to the extent known. Indicate the reliability of the estimates. (Reference paragraph VII(E) as appropriate.)

V. Chronological Administrative History and/or Earlier Enforcement Actions (State and Federal)

A. Show all attempts to exact compliance or impose sanctions administratively or judicially that have been considered or taken. A full historical chronology should be presented.

B. Indicate whether necessary notice pursuant to the statutory requirements has been given to the violator prior to initiation of court action.

VI. Required Elements of Proof and Evidence

A. List the necessary elements of proof to establish the violation under each statute involved.

B. Present a detailed, objective, factual analysis of all real, documentary, and testimonial evidence corresponding to each necessary element of proof in paragraph VI(A) above.

Indicate the location of all real evidence.

Reference each item of documentary evidence as an attachment, except where it is too voluminous (in which case indicate its present location).

Identify all witnesses by name (indicating whether lay or expert), when indicating the import and substance of their testimony. Complete addresses and phone numbers of witnesses will be listed in paragraph VII(E) below.

C. Discovery. Where evidence may be made available by discovery, indicate:

1. The type of evidence anticipated;

2. The person or organization currently having the evidence; and

3. The type of discovery to be used.

Assess the quality of the evidence. Be objective. Any facts or circumstances that affect the strength of the Agency's proof should be explicitly set forth. The newness or oldness of evidence is relevant; the dependability of testing techniques is important. Any assumptions, and the reasons for them, should be spelled out.

D. If establishing environmental harm is important to the case, set forth the evidence of harm (as done in paragraph VI(B) for elements of substantive violation).

E. List all evidence favorable to the violator, including test results that differ from EPA's. Any relevant fact that may bear adversely on the government's contentions should be highlighted. Defense witnesses, to the extent they can be anticipated, should be listed in paragraph VI(G).

F. List all government witnesses alphabetically with business address, and telephone number and home telephone number. Qualifications of experts should be given.

All witnesses listed should have been consulted and thoroughly interviewed. Paragraph VI(B) should set out in succinct fashion the actual facts and opinions to be included in the testimony.

G. List all defense witnesses anticipated, identifying their employment, expertise, etc. The likely content of their testimony should be set out in paragraph VI(E).

H. Indicate projected resource needs (e.g., experts, money, etc.).

VII. Relief Requested

This paragraph should include a comprehensive "bottom-line" settlement position on all items of relief necessary, including those set forth below. If there are policy questions or conflicts associated with any requested relief, discuss them. This section should be carefully detailed. It will be relied upon in determining the acceptability of any settlement offers/proposed consent decrees.

A. Preliminary injunction.

B. Standards to be met (interim and final).

C. Compliance schedule for available technology with phasing, duration, etc. (Reference paragraph IV(D), as appropriate.)

D. Stipulated contempt fines in conjunction with compliance schedule.

E. Civil Penalties.

1. Economic savings realized by the violator should be analyzed. The EPA Civil Penalty Evaluation form should be completed, discussed, and attached. Calculations should be included as attachments. This section should include discussion of all elements developed under EPA's civil penalty policy, including ability of the company to pay and recalcitrance.

2. Comment on types of credits possible (or proposed by the violator), as well as credits considered and/or allowed for other similar violators (including municipal POTWs).

3. If economic savings is not a relevant measure of penalty assessment, explain what basis should be used.

F. Necessary bonds.

Witnesses necessary to establish the relief requested should be identified by name, address and telephone number, with a brief summary of the subject of their testimony.

VIII. Anticipated Issues

A. Possible defenses.

(Analyze only defenses that are likely to be presented; fanciful theories can be ignored.)

1. Outline legal issues. Attach legal memoranda on threshold legal issues (e.g., Chapter 11 Reorganization) or collateral legal action asserted as a bar to enforcement litigation.

2. Outline factual issues.

B. Equitable arguments by the violator (e.g., EPA delay in promulgating guidelines; installation of equipment that did not work; in compliance at its other facilities; emission standard to be revised; inability to finance; economic constraints, etc.). Any past action, or inaction (not necessarily judicial or administrative) by a state or any EPA office that the company may use as an excuse, or cite for reliance. (e.g., promises of less stringent limits; agreement not to sue, etc.).

C. Pendency of any action involving the violator or EPA on related issues in any court or administrative forum. (Reference paragraph V(A), as necessary.)

D. Other possible issues that might arise at trial.

E. Discuss any potential practical problems with the case.

IX. Litigation Strategy

A. Need for preliminary injunction.

B. Potential for summary judgment.

C. Settlement potential.

1. Past contacts by EPA, the Department of Justice or the United States Attorney's Office.

2. Present negotiating posture and assessment of potential for settlement. Include comparison of posture with "bottom-line" settlement position from paragraph VII.

D. Other potential defendants.

E. Other pending actions against violator.

X. Index of Attachments

XI. Attachments

Sample Complaint for Industrial Discharger

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
SCM CORPORATION,	)	
	)	
Defendant.	)	
	)	

COMPLAINT

The United States of America, by the authority of the Attorney General and at the request of and on behalf of the United States Environmental Protection Agency ("EPA"), alleges as follows:

1. This is a civil action pursuant to Sections 309(b) and (d) of the Clean Water Act (the "Act"), 33 U.S.C. §1319(b) and (d), for imposition of civil penalties and for injunctive relief against the defendant for its discharge of pollutants into the navigable waters in violation of its discharge permit and in violation of Sections 301 and 402 of the Act, 33 U.S.C. §1311 and 1342, respectively.

2. Authority to bring this civil action is vested in the Department of Justice pursuant to 28 U.S.C. §516 and 33 U.S.C. §§ 1319 and 1366.

3. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §§1345 and 1355 and 33 U.S.C. §1319. Venue is proper in this District pursuant to 28 U.S.C. §1391(b) and (c) and 33 U.S.C. §1319(b).

4. Notice of the commencement of this action has been provided to the State of Maryland pursuant to 33 U.S.C. §1319(b).

5. Defendant SCM Corporation ("SCM") is a New York corporation doing business in the State of Maryland. Service on SCM may be made by serving counsel to SCM Corporation, Joseph S. Kaufman, Melnicove, Kaufman, Weiner and Smouse, P.A., 36 South Charles Street, Sixth Floor, Baltimore, Maryland 21201, who has agreed to accept service on behalf of SCM.

6. Defendant SCM owns and operates the Adrian Joyce Works, a titanium dioxide manufacturing facility ("the facility"), located at 3901 Glidden Road, Baltimore, Maryland, which discharges pollutants in the form of contact and non-contact cooling and process waters into navigable waters.

7. Section 301 of the Act, 33 U.S.C. §1311, prohibits the discharge of pollutants into the navigable waters except, inter alia, in compliance with the terms and conditions of a permit issued pursuant to Section 402 of the Act, 33 U.S.C. §1342. Under the National Pollutant Discharge Elimination System ("NPDES") permit program authorized pursuant to 33 U.S.C. §1342, the Administrator of EPA has the authority to issue NPDES permits for the discharge of pollutants into the navigable waters.

8. Section 402(b) of the Act, 33 U.S.C. §1342(b), provides that the Administrator of EPA may authorize a state to operate its own NPDES permit program in compliance with the requirements of the Act. The State of Maryland was granted authority by the Administrator,

EPA, to operate an NPDES permit system effective September 5, 1974, pursuant to a Memorandum of Agreement between EPA and the State of Maryland (hereinafter "Memorandum of Agreement").

9. The September 5, 1974 Memorandum of Agreement provides, inter alia, that State permits will become NPDES permits upon either reissuance of State Discharge Permits or when State Discharge Permits are continued under the Maryland Administrative Procedures Act following timely application for renewal of State Discharge Permits.

10. On May 28, 1974, EPA issued to defendant SCM NPDES Permit No. MD. 0001261, (Exhibit A, appended hereto) authorizing the discharge of specified pollutants in specified amounts into the Patapsco River which flows into Baltimore Harbor of the Chesapeake Bay. This was the federal portion of the joint federal-state discharge permits which were issued pursuant to a joint federal-state permit process commenced in 1974 by the State of Maryland and EPA in anticipation of EPA's approval of the State of Maryland's administration of the NPDES permit program.

11. On June 19, 1974, the State of Maryland issued to defendant SCM State Discharge Permit No. 74-DIP-164 (Exhibit B, appended hereto) authorizing the discharge of specified pollutants in specified amounts into the Patapsco River. This permit was the state portion of the joint federal-state discharge permits which were issued pursuant to the aforementioned joint federal-state pollutant discharge permits process.

- 4 -

12. The terms and conditions of NPDES Permit Number MD. 0001261 and State Discharge Permit No. 74-DIP-164 were and are identical. By its terms NPDES Permit No. MD 0001261 became effective on June 27, 1974, and expired on June 27, 1979.

13. By its terms State Discharge Permit No. 74-DIP-164 became effective on June 19, 1974, and was to have expired on June 19, 1979. However, the permit terms and conditions remain effective under law and pursuant to the 1974 Memorandum of Agreement, by reason of defendant SCM's application to the State of Maryland for renewal of the State Discharge Permits.

14. Pursuant to the 1974 Memorandum of Agreement, as of June 27, 1979 (the expiration date listed in NPDES Permit No. MD. 0001261), State Discharge Permit No. 74-DIP-164 became and continues to be the NPDES Permit regulating the discharge of pollutants from SCM's facility for the purpose of sections 301 and 402 of the Act, 33 U.S.C. §§1311 and 1342.

15. Part I.A. of the NPDES Permit (Exhibit "A" hereto, pages three through five) specifies numerical effluent limitations for, inter alia, total suspended solids ("TSS") and "pH" in discharges from outfalls Numbers 001 and 002 from the defendant's facility.

FIRST CLAIM

(Violations of pH Discharge Limitation at Outfall 001)

16. The allegations in paragraphs 1-15 above are incorporated herein by reference as if fully alleged below.

17. Section 301 of the Act, 33 U.S.C. §1311, prohibits the discharge of any pollutant by any person except, inter alia, in

compliance with the terms and conditions of an NPDES permit, issued pursuant to Section 402 of the Act, 33 U.S.C. §1342.

18. The term "person" is defined under the Act to include corporations.

19. Defendant SCM Corporation is a "person" under the Act.

20. The industrial wastes discharged by defendant from outfalls Numbers 001 and 002 at all relevant times herein were and are "pollutants" under the Act.

21. The term "point source" is defined under the Act as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, drainage, tunnel, conduit well ... from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

22. The SCM facility and outfalls Nos. 001 and 002 are "point sources" under the Act.

23. The term "navigable waters" is defined under the Act as the "waters of the United States, including the territorial seas." 33 U.S.C. §1362(7).

24. The Patapsco River and the Chesapeake Bay are "navigable waters" under the Act.

25. Section 309(b) of the Act, 33 U.S.C. §1319(b), authorizes the Administrator of EPA to commence a civil action for appropriate relief, including a permanent injunction, for any violation of a condition or limit in a permit issued by EPA or by a state under an approved NPDES permit program.

26. Section 309(d) of the Act, 33 U.S.C. §1319(d), provides that any person violating the Act, including any condition or limitation of a permit issued under Section 402, shall be subject to a civil penalty not to exceed $10,000 per day for each violation of the NPDES Permit.

27. The effluent limitations in Part I.A. of the NPDES Permit were divided into interim and final stages. The interim effluent limitations for outfall No. 001 were effective through June 30, 1977. The final effluent limitations in Part I.A. of the NPDES Permit authorized defendant SCM, as of July 1, 1977, to discharge from outfall 001 industrial wastewater with a pH not less than 6.0 standard units nor greater than 9.0 standard units.

28. Defendant SCM, according to reports filed by it with the State of Maryland, as required under its NPDES Permit, has exceeded continuously the final limitations of Part I.A. of the NPDES Permit for pH at outfall 001 from July 1, 1977 to the present.

29. Both the State of Maryland and the EPA have issued administrative complaints and notices of violation to defendant SCM requiring compliance with the pH limitations in the NPDES Permit for outfall 001, but defendant SCM has continued to violate the terms and conditions of its NPDES Permit at outfall No. 001.

30. The violations of the pH effluent limitations contained in Part I.A. of the NPDES Permit at outfall 001 will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and with the Clean Water Act.

- 7 -

SECOND CLAIM

(Violations of pH Discharge Limitations at Outfall 002)

31. The allegations contained in paragraphs 1-30 above are incorporated herein by reference as if fully alleged below.

32. The interim effluent limitations in Part I.A. of the NPDES Permit for outfall No. 002 were effective through June 30, 1977. The final effluent limitations in Part I.A. of the NPDES Permit authorized defendant SCM, as of July 1, 1977, to discharge from outfall 002 wastewater with a pH not less than 6.0 standard units nor greater than 9.0 standard units.

33. Defendant SCM, according to reports filed by it with the State of Maryland as required under its NPDES Permit, has exceeded continously the final limitations of Part I.A. of the NPDES Permit for pH at outfall 002 from July 1, 1977 to the present.

34. Both the State of Maryland and the EPA have issued administrative complaints and notices of violation to defendant SCM requiring compliance with the pH limitations in the NPDES Permit for outfall 002, but defendant SCM has continued to violate the terms and conditions of its NPDES Permit at outfall 002.

35. The violations of the pH effluent limitations contained in Part I.A. of the NPDES Permit at outfall 002 will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and with the Clean Water Act.

THIRD CLAIM

(Daily Maximum TSS Discharge Limitation Violations)

36. The allegations contained in paragraphs 1-35 above are incorporated herein by reference as if fully alleged below.

37. As of July 1, 1977, the final effluent limitations in Part I.A. of the NPDES Permit authorized defendant SCM to discharge from the facility not in excess of the daily maximum of six thousand five hundred (6,500) pounds per day of total suspended solids ("TSS").

38. Defendant SCM, according to reports filed by it with the State of Maryland as required under its NPDES Permit, has exceeded on numerous occasions the final daily maximum effluent limitations of Part I.A. of the NPDES Permit for TSS at the facility from July 1, 1977 to the present.

39. Both the State of Maryland and the EPA have issued administrative complaints and notices of violations to defendant SCM requiring compliance with the daily maximum TSS effluent limitations in the NPDES Permit for the facility, but defendant SCM has continued to violate the terms and conditions of its NPDES Permit at the facility.

40. The daily maximum TSS effluent limitation violations of Part I.A. of the NPDES Permit at the facility will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and the Clean Water Act.

FOURTH CLAIM

(Monthly Average TSS Discharge Limitation Violations)

41. The allegations contained in paragraphs 1-40 above are incorporated herein by reference as if fully alleged below.

42. As of July 1, 1977, the final effluent limitations in Part I.A. of the NPDES Permit authorized defendant SCM to discharge from the facility not in excess of a monthly average of four thousand three hundred twenty (4,320) pounds per day of TSS.

43. Defendant SCM, according to reports filed by it with the State of Maryland as required under its NPDES Permit, has exceeded on numerous occasions the final monthly average effluent limitations of Part I.A. of the NPDES Permit for TSS at the facility from July 1, 1977 to the present.

44. Both the State of Maryland and the EPA have issued administrative complaints and notices of violations to defendant SCM requiring compliance with the TSS effluent limitations in the NPDES Permit for the facility, but defendant SCM has continued to violate the terms and conditions of its NPDES Permit at the facility.

45. The monthly average TSS effluent limitations violations of Part I.A. of the NPDES Permit at the facility will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and the Clean Water Act.

FIFTH CLAIM

(Five Day Monitoring and Notification Violations at Outfalls 001 and 002)

46. The allegations contained in paragraphs 1-45 above are incorporated herein by reference as if fully alleged below.

47. Parts I.A. and II.A.2. of the NPDES permit set forth self-monitoring and notification requirements which defendant SCM is required to perform. Specifically, these parts require defendant SCM to periodically monitor for total suspended solids ("TSS") and to continuously monitor the pH of its discharges and to notify the EPA Regional Administrator and the State of Maryland within five (5) days of becoming aware of any violations of its daily maximum pH or TSS effluent limitations ("five day letters").

48. Defendant SCM has not reported violations of final effluent limitations at outfalls 001 and 002 in its five day letters. Rather, the limitations contained in the five day letters submitted by defendant SCM to EPA and the State of Maryland are interim limitations which, by the express terms of the NPDES Permit, were less stringent than the final effluent limitations in the NPDES permit and are no longer applicable. Therefore, defendant SCM has not fully reported all violations of its final effluent limitations in five day letters as required by the NPDES Permit.

49. The violations of Part I.C.2. and II.A.2 of the NPDES Permit will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and the Clean Water Act.

SIXTH CLAIM

(Monthly Discharge Monitoring and Notification Violations at Outfalls 001 and 002)

50. The allegations contained in paragraphs 1-49 above are incorporated herein by reference as if fully alleged below.

51. Parts I.A. and I.C.2. of the NPDES Permit set forth self-monitoring and notification requirements which defendant SCM is required to perform. Specifically, these parts require defendant SCM to to periodically monitor for total suspended solids ("TSS") in its discharges and to the continuously monitor the pH of its discharges and to notify the EPA Regional Administrator and the State of Maryland in monthly discharge reports of any violations of its daily maximum or monthly average effluent limitations.

- 11 -

52. Defendant SCM has not reported violations of final effluent limitations at outfalls 001 and 002 in its monthly discharge monitoring reports. Rather, the limitations contained in the monthly discharge monitoring reports submitted by defendant SCM to EPA and the State of Maryland are interim limitations which, by the express terms of the NPDES Permit, were less stringent than the final effluent limitations in the NPDES permit and are no longer applicable. Therefore, defendant SCM has not fully reported all violations of its final effluent limitations in monthly discharge monitoring reports as required NPDES Permit.

53. The violations of Part I.C.2. and II.A.2 of the NPDES Permit will continue unless defendant SCM is ordered by the Court to comply with the NPDES Permit and with the Clean Water Act.

WHEREFORE, Plaintiff, the United States of America, respectfully prays the Court to order the following relief:

a. That defendant SCM be ordered to pay civil penalties of $10,000 per day for each day of each violation of its NPDES Permit and of Section 301 of the Clean Water Act;

b. That defendant SCM be enjoined from discharging from its facility in violation of the final pH and TSS effluent limits contained in NPDES Permit No. MD. 0001261 and the Clean Water Act;

c. That defendant SCM be ordered to comply with the monitoring and reporting requirements pertaining to final pH and TSS effluent limitations contained in NPDES Permit No. MD 0001261;

d. That the United States be awarded its costs of this action; and

e. That this Court grant such additional relief as may be appropriate.

Respectfully submitted,

F. HENRY HABICHT, II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
Washington, D. C. 20530

ROBERT VAN HEUVELEN
Attorney
Environmental Enforcement Section
Department of Justice
Land and Natural Resources Division
Washington, D. C. 20530
(202) 633-5273

J. FREDERICK MOTZ
United States Attorney

By:
GLENDA GORDON
Assistant United States Attorney
8th floor, U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201
(301) 539-2940

JAMES T. HEENEHAN, III
Assistant Regional Counsel
United States Environmental
Protection Agency
Region III
6th and Walnut Streets
(215) 597-8916

Sample Complaint for Municipal Discharger

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA Plaintiff, v. SAINT BERNARD PARISH and STATE OF LOUISIANA, Defendants.	CIVIL ACTION NO. 83-3201 SECT. K MAG. 5

COMPLAINT

The United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges that:

1. This is a civil action pursuant to Section 309 of the Clean Water Act ("the Act"), 33 U.S.C. §1319, for injunctive relief and for assessment of a civil penalty against Saint Bernard Parish, Louisiana for its discharge of pollutants in violation of Section 301 of the Act, 33 U.S.C. §1311, and its National Pollutant Discharge Elimination System (NPDES) permit, and for relief against the State of Louisiana under 33 U.S.C. §1319(e).

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1345 and Section 309 of the Act, 33 U.S.C. §1319. Notice of the commencement

of this action has been given to the State of Louisiana through the Louisiana Department of Natural Resources.

3. Defendant, Saint Bernard Parish ("St. Bernard") is a political subdivision of the State of Louisiana, duly formed under the laws of the State of Louisiana, and is a municipality within the meaning of Section 502(4) of the Act, 33 U.S.C. §1362(4).

4. Defendant, State of Louisiana is a party to this action pursuant to Section 309(e) of the Act, 33 U.S.C. §1319(e).

5. Section 301(a) of the Act, 33 U.S.C. §1311(a), prohibits the discharge of pollutants except as in accordance with Section 301(b) of the Act, 33 U.S.C. §1311(b), and as authorized by a permit issued under Section 402 of the Act, 33 U.S.C. §1342. Section 301(b) of the Act requires that publicly owned treatment works achieve by July 1, 1977 effluent limitations requiring the application of "secondary treatment."

6. Saint Bernard operates and maintains a publicly owned wastewater treatment facility known as the Munster Wastewater Treatment Plant in or near Meraux, Louisiana. On or about September 28, 1974, EPA, pursuant to Section 402(a) of the Act, 33 U.S.C. §1342(a), issued NPDES Permit No. LA0040177 ("the Munster permit") to Saint Bernard. The Munster permit authorized the discharge of pollutants from the Munster Wastewater Treatment Plant into the Forty Arpent Canal strictly subject to the terms and conditions of the Munster permit.

- 3 -

7. The Forty Arpent Canal is a "navigable water" as defined by Section 502(7) of the Act, 33 U.S.C. §1362(7).

8. St. Bernard discharged pollutants in violation of Section 301 of the Act, 33 U.S.C. §1311, and the terms of its Munster permit at the Munster Wastewater Treatment Plant as follows:

(a) At relevant times, St. Bernard unlawfully discharged pollutants having a Biochemical Oxygen Demand (5-day) in excess of the 30-day and 7-day average final effluent limitations contained in Special Condition 1.b, page 5 of the Munster permit.

(b) At relevant times, St. Bernard unlawfully discharged pollutants containing Total Suspended Solids in excess of the 30-day and 7-day average final effluent limitations contained in Special Condition 1.b, page 5 of the Munster permit.

(c) At relevant times, St. Bernard unlawfully discharged Fecal Coliform in excess of the limitations contained in Special Condition 1.b, page 5 of the Munster permit.

(d) At relevant times, St. Bernard unlawfully bypassed the Munster Wastewater Treatment Plant as flows exceeded the design hydraulic capacity of the secondary treatment system and St. Bernard

violated the monthly average flow limitations specified in Special Condition 1.b., page 5 of the Munster Permit.

(e) At relevant times, St. Bernard unlawfully failed properly to dispose of sludges and solids as specified by Condition 9, page 2 of the Munster permit.

9. On or about October 27, 1979, the Munster Permit expired. St. Bernard reapplied for a permit on February 2, 1983. St. Bernard discharged pollutants without the authorization of an effective NPDES permit from about October 27, 1979 until at least February 2, 1983. St. Bernard thereby violated Section 301 of the Act, 33 U.S.C. §1311.

10. St. Bernard is required by Special Condition 4.a.(1) of the Munster Permit to operate the Munster wastewater treatment facility in an efficient manner which would minimize upsets and discharges of excessive pollutants. The condition also requires that St. Bernard provide an adequate operating staff qualified to carry out the necessary operation, maintenance and testing functions. St. Bernard has failed and continues to fail to meet the operation, maintenance and testing requirements of Condition 4.a.(1), and thereby violated the terms of the Munster Permit.

11. St. Bernard is required by Special Condition 2.c., page 8, of the Munster Permit, to submit Discharge

Monitoring Reports no later than the 28th day of the month following specified quarterly reporting periods. At relevant times, St. Bernard failed to submit timely Discharge Monitoring Reports and thereby violated of the terms of the Munster Permit.

12. St. Bernard is required by Special Condition 3, page 10, of the Munster Permit to submit Non-compliance reports providing information to EPA concerning violations of the Act and the Munster Permit. Despite frequent violations during relevant periods, St. Bernard failed to submit Non-Compliance Reports in conformity with Special Condition 3 and thereby violated the terms of the Munster Permit.

13. Pursuant to Section 309(b) and (d) of the Act, 33 U.S.C. §1319(b) and (d), St. Bernard is subject to injunctive relief and civil penalties not to exceed $10,000 per each day St. Bernard discharged pollutants in violation of Section 301 of the Act, 33 U.S.C. §1311, or violated any permit condition implementing sections 301 or section 308 of the Act, 33 U.S.C. §§ 1311, 1318. Unless restrained by Order of this Court, St. Bernard will continue to violate Section 301 of the Act, 33 U.S.C. §1311 and the terms and conditions of the permit.

14. Section 309(e) of the Act, 33 U.S.C. §1319(e), provides:

> Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying

> with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

The State of Louisiana is liable insofar as its laws prevent St. Bernard from raising revenues to comply with the Act or prevent payment of any judgment entered against St. Bernard.

WHEREFORE, the United States of America prays that:

1. St. Bernard be permanently enjoined from discharging pollutants not authorized by the Munster Permit and from all future violations of the terms and conditions of the Munster Permit;

2. St. Bernard be ordered to undertake, on an expedited schedule, a program, including but not limited to design, plans and specifications and construction, to bring its treatment plant discharges into compliance with the Act and the Munster Permit;

3. St. Bernard be ordered to develop and implement programs to assure compliance with permit terms and requirements, including but not limited to proper operation and maintenance, testing, submission of discharge monitoring reports and submission of noncompliance reports;

4. St. Bernard be assessed, pursuant to Section 309(d) of the Act, 33 U.S.C. §1319(d), a civil penalty not to exceed ten thousand dollars ($10,000.00) for each day of

violation of the Munster Permit or of Section 301 of the Act, 33 U.S.C. §1311.

5. Relief be awarded against the State of Louisiana pursuant to Section 309(e) of the Act, 33 U.S.C. §1319(e);

6. The United States be awarded the costs and disbursements of this action; and

7. This Court grant the United States such other relief as it may deem just and proper.

Respectfully submitted,

Carol E. Dinkins

CAROL E. DINKINS
Assistant Attorney General
Land and Natural Resources Division

JOHN VOLZ
United States Attorney
Eastern District of Louisiana

By:

William F. Baity

WILLIAM F. BAITY
Assistant United States Attorney
Hale Boggs Federal Building
New Orleans, Louisiana 70130

J. C. Martin

JOHN C. MARTIN
Attorney
Environmental Enforcement Section
Land and Natural Resources Division
United States Department of Justice
Washington, D. C. 20530
(202) 633-4059

- 8 -

PLEASE SERVE:

1. Mr. Nicholas Cusimano, President
   St. Bernard Parish Police Jury
   8201 Judge Perez Drive
   Chalmette, Louisiana 70043

2. Honorable David C. Treen
   Governor of Louisiana
   P. O. Box 44004
   Baton Rouge, Louisiana 70804

Sample Pretreatment Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL PLATING COMPANY, INC., Defendant.	Civil Action No.

COMPLAINT

Plaintiff, United States of America, at the request of the Administrator of the Environmental Protection Agency ("EPA"), alleges:

Introduction and Nature of Case

1. This is a a civil action pursuant to Section 309(b) and (d) of the Clean Water Act, 33 U.S.C. §1319(b) and (d) (the "Act"), concerning the discharge of pollutants in violation of pretreatment standards under Section 307(b) of the Act, 33 U.S.C. §1317(b), and reporting requirements under Section 307(b) and 308(a) of the Act, 33 U.S.C. §§1317(b) and 1318(a).

Jurisdiction

2. Jurisdiction is vested in this Court pursuant to Section 309(b) of the Act, 33 U.S.C. §1319(b), and 28 U.S.C. §1345.

Notice of the commencement of this action has been given to the State of Rhode Island.

3. Venue is proper in this court pursuant to 28 U.S.C. §1391(b) and (c) and Section 309(b) of the Act, 33 U.S.C. §1319(b), since at all times relevant to this complaint this is the judicial district in which the defendant was and is located and was and is doing business. The claims stated herein arose in this judicial district.

Defendant

4. The defendant, National Plating Company, Inc. ("National"), is a corporation organized and existing under the laws of the State of Rhode Island. Defendant at all relevant times did and does operate an electroplating facility at or about 946 Eddy Street, Providence, Rhode Island 02905 (the "facility").

5. Since approximately 1968, the defendant has been discharging pollutants into a publicly owned treatment works, ("POTW"), as defined in 40 C.F.R. §403.3(o), located in Providence, Rhode Island and currently owned and operated by the Narragansett Bay Commission ("NBC").

First Cause of Action:
National Prohibited Discharge Pretreatment Standards

6. The allegations of paragraphs 1 through 5 of this Complaint are realleged and incorporated by reference herein.

-3-

7. Pursuant to Section 307(b) of the Act, 33 U.S.C. §1317(b), the Administrator of the EPA established prohibited discharge standards as part of the national pretreatment standards. These standards took effect on August 25, 1978, and appear at 40 C.F.R. §403.5.

8. Forty C.F.R. §403.5(b) of the prohibited discharge standards prohibits non-domestic sources from introducing into a POTW discharges with pH values below 5.0.

9. Section 307(d) of the Act, 33 U.S.C. §1317(d), prohibits the operation of any source in violation of any applicable pretreatment standard established pursuant to Section 307(b) of the Act, 33 U.S.C. §1317(b).

10. Defendant, a non-domestic source subject to 40 C.F.R. §403.5(b), has introduced into the NBC POTW discharges with a pH lower than 5.0 on November 29, 1983 and November 14 and 15, 1984 and, on information and belief on other occasions, in violation of 40 C.F.R. §403.5(b) and Section 307(d) of the Act, 33 U.S.C. §1317(d).

11. Defendant continues to violate national prohibited discharge standards and will continue to do so in violation of Section 307 of the Act, 33 U.S.C. §1317, unless restrained by this Court.

-4-

12. Section 309(b) and (d) of the Act, 33 U.S.C. §1319(b) and (d), authorizes injunctive relief and the assessment of civil penalties not to exceed $10,000 for each day of violation of Section 307 of the Act, 33 U.S.C. §1317.

Second Cause of Action:
National Categorical Pretreatment Standards

13. The allegations of paragraphs 1, 2, 3, 4, 5, and 9 are realleged and incorporated by reference herein.

14. Pursuant to Section 307(b) of the Act, 33 U.S.C. §1317(b), the Administrator of EPA established national categorical pretreatment standards governing the Electroplating Point Source Category. These standards appear at 40 C.F.R. Part 413.

15. Existing non-integrated sources within the Elecroplating Point Source Category were required to comply with the standards established for cyanide and metals at 40 C.F.R. Part 413 by April 27, 1984.

16. Defendant is an existing non-integrated source within the Electroplating Point Source Category within the meaning of and subject to 40 C.F.R. Part 413.

17. Since on or about April 27, 1984, defendant has introduced into the NBC POTW electroplating process wastewaters that contain levels of cyanide, copper, nickel, zinc and total metal which exceed the applicable national categorical pretreatment standards for cyanide, copper, nickel, zinc and total metal set forth in

40 C.F.R. Part 413, in violation of 40 C.F.R. Part 413 and Section 307(d) of the Act, 33 U.S.C. §1317(d).

18. Defendant continues to violate national categorical pretreatment standards and will continue to do so in violation of Section 307 of the Act, 33 U.S.C. §1317, unless restrained by this Court.

19. Section 309(b) and (d) of the Act, 33 U.S.C. §1319(b) and (d), authorizes injunctive relief and the assessment of civil penalties not to exceed $10,000 for each day of violation of Section 307 of the Act, 33 U.S.C. §1317.

Third Cause of Action:
Pretreatment Reporting Requirements

20. The allegations of paragraphs 1, 2, 3, 4, 5, 9, 14, 15 and 16 are realleged and incorporated by reference herein.

21. Section 308(a) of the Act, 33 U.S.C. §1318(a), authorizes the Administrator of the EPA to require the submission of reports whenever necessary for the purpose of, inter alia, determining whether any person is in violation of any pretreatment standard.

22. Pursuant to Sections 307(b) and 308(a) of the Act, 33 U.S.C. §§1317(b) and 1318(a), the Administrator promulgated 40 C.F.R. §403.12(d), which requires, inter alia, an industrial user subject to a categorical pretreatment standard to submit, within 90 days following the date for final compliance with applicable

categorical standards, a Compliance Report on discharge concentrations and flows, status of compliance, and, if the industrial user is not in consistent compliance, measures to bring the user into compliance.

23. The date for final compliance with categorical pretreatment standards applicable to the defendant was April 27, 1984. Defendant was and is subject to 40 C.F.R. §403.12(d). Defendant was required to submit its Compliance Report on or about July 26, 1984.

24. Defendant failed to submit a Compliance Report pursuant to 40 C.F.R. §403.12(d) by July 26, 1984, or at any time thereafter.

25. Pursuant to Sections 307(b) and 308(a) of the Act, 33 U.S.C. §§1317(b) and 1318(a), the Administrator promulgated 40 C.F.R. §403.12(e), which requires, inter alia, an industrial user subject to a categorical pretreatment standard to submit Periodic Compliance Reports during the months of June and December after the compliance date of the pretreatment standard. The Periodic Compliance Reports must report discharge concentrations and flows.

26. The compliance date of the pretreatment standards applicable to the defendant was April 27, 1984. Defendant was and is subject to 40 C.F.R. §403.12(e). Defendant was required to submit its Periodic Compliance Reports in June and December, 1984, and will be required to submit Periodic Compliance Reports in June and December of the following years.

27. Defendant failed to submit a Periodic Compliance Report pursuant to 40 C F.R. §403.12(e) in June or December, 1984 or at any time thereafter.

28. Pursuant to Sections 307(b) and 308(a) of the Act, 33 U.S.C. §§1317(b) and 1318(a), the Administrator promulgated 40 C.F.R. §403.12(b), which requires, inter alia, an industrial user who will be subject to a categorical pretreatment standard to submit to the control authority within 180 days of the effective date of the standard, a report containing information about the user and a schedule for compliance where pretreatment is necessary to meet the standard. The report is referred to as a baseline monitoring report ("BMR").

29. On July 15, 1983 EPA promulgated categorical pretreatment standards for total toxic organics ("TTO") applicable to all electroplating facilities. The effective date of those standards was August 29, 1983. Defendant was and is subject to 40 C.F.R. §403.12(b). Defendant was required to submit a BMR on total toxic organics on or about February 24, 1984.

30. Defendant failed to submit a BMR on total toxic organics to the control authority in accordance with the requirements of 40 C.F.R. §403.12(b) on February 24, 1984 or anytime therafter.

31. Each of defendant's failures to submit a Baseline Monitoring Report, a Compliance Report and Periodic Compliance Reports

violates 40 C.F.R. §403.12(b),(d) and (e) and Sections 307(d) and 308(a) of the Act, 33 U.S.C. §§1317(d) and 1318(a).

32. Defendant is continuing to violate Sections 307(d) and 308(a) of the Act, 33 U.S.C. §§1317(d) and 1318(a), and will continue to do so unless restrained by this Court.

33. Section 309(b) and (d) of the Act, 33 U.S.C. §§1319(b) and (d), authorizes injuntive relief and the assessment of civil penalties not to exceed $10,000 for each day of violation of Sections 307 and 308 of the Act, 33 U.S.C. §§1317 and 1318.

Prayer for Relief

WHEREFORE, plaintiff respectfully prays:

1. That this Court issue an injunction enjoining the defendant from the operation of its facility except in full compliance with all applicable pretreatment standards and requirements including prohibited discharge pretreatment standards, categorical pretreatment standards, and reporting requirements.

2. That this Court issue an injunction requiring the defendant expeditiously to bring its facility into compliance with all applicable pretreatment standards and requirements;

3. That the defendant be assessed civil penalties under Section 309(d) of the Act, 33 U.S.C. §1319(d), in an amount not to exceed $10,000 for each day that it has operated its facility

in violation of Sections 307 and/or 308(a) of the Act, 33 U.S.C. §§1317 and 1318(a);

4. That the costs and disbursements of this action be awarded to the plaintiff; and

5. That this Court grant such other relief as it may deem just and proper.

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice
WAshington, D.C. 20530

LINCOLN C. ALMOND
United States Attorney
District of Rhode Island

EVERETT SAMMARTINO
Assistant U.S. Attorney
P.O. Box 1401
Providence, RI 02901

ANDREW S. HOGELAND
Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-1307

OF COUSEL:

Maria L. Rodriguez, Esq.
Office of Regional Counsel
U.S. Environmental Protection
Agency
John F. Kennedy Federal Building
Boston, Massachusetts 02203

Sample Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
COMBINED WATER WORKS AND SEWERAGE SYSTEM BOARD, CITY OF WELLSBURG WEST VIRGINIA; and the STATE OF WEST VIRGINIA;	)	
	)	
Defendants.	)	

MOTION FOR A PRELIMINARY INJUNCTION

The United States of America, for and on behalf of the Administrator of the United States Environmental Protection Agency, hereby moves this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction to enjoin a deliberate past and present course of conduct by the municipal defendant whereby it has engaged in the unlawful discharge of pollutants into Buffalo Creek and the Ohio River, contrary to the conditions set forth in National Pollutant Discharge Elimination System (NPDES) Permit No. WV0026032.

Plaintiff seeks an order enjoining the City of Wellsburg Combined Water Works and Sewerage System Board from:

(a) discharging collected screening, slurries, or other solids (or runoff from such collected screenings, slurries, or other solids) generated at a sewage treatment plant (hereinafter, "plant") located at the confluence of Buffalo Creek and the Ohio River, Brooke County, West Virginia, into any navigable water or any tributary of a navigable water;

(b) discharging any pollutant from the plant except in compliance with National Pollutant Discharge Elimination System Permit No. WV0026832.

Plaintiff seeks this relief on the following grounds:

1. The Defendant has been discovered discharging pollutants into the confluence of Buffalo Creek and the Ohio River, at Wellsburg, West Virginia.

2. The discharges into Buffalo Creek and the Ohio River are in violation of National Pollutant Discharge Elimination System (NPDES) Permit No. WV00226832, issued by the Environmental Protection Agency to the Defendant.

3. These violations will continue in the future unless judicially restrained.

In support of this Motion, Plaintiff refers this Court to the Memorandum of Law, Affidavit and the Complaint filed herein.

WHEREFORE, Plaintiff respectfully prays that this Court enter a Preliminary Injunction, as sought herein.

Respectfully submitted,

CAROL E. DINKINS
Assistant Attorney General
Land and Natural Resources Division

WAYNE R. WALTERS
Attorney, Environmental Enforcement
Section - Room 1714
United States Department of Justice
Land and Natural Resources Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) (FTS) 633-1066

WILLIAM A. KOLIBASH
United States Attorney
Northern District of West Virginia

By: _____
Assistant United States Attorney

OF COUNSEL:
Jed Z. Callen, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region III
Philadelphia, Pennsylvania

Sample Request for Admissions

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. CLARK OIL AND REFINING COMPANY, Defendant.	Civil Action No. CA-84-2367(A)

UNITED STATES' FIRST REQUEST
FOR ADMISSIONS

Plaintiff, United States of America, pursuant to Rule 36 of the Ferderal Rules of Civil Procedure, requests Defendant, Clark Oil & Refining Company to admit the truth of the following matters within 30 days after service of this request.

DEFINITIONS

A. "Clark Oil" shall refer to Defendant Clark Oil and Refining Company.

B. The "Garyville plant" shall refer to a petroleum refinery located in Garyville, St. Mary's Parish, Louisiana, including its wastewater treatment and related facilities.

C. "EPA" shall refer to the United States Environmental Protection Agency.

D. "NPDES" shall refer to the National Pollutant Discharge Elimination System.

E. "Pollutant" is defined in §502(6) of the Clean Water Act, 33 U.S.C. §1362(6).

F. "Discharge" is defined in §502(12) and (16) of the Clean Water Act, 33 U.S.C. §1362(12) and (16), and includes discharges of pollutants to navigable waters from any point source.

G. "Point source" is defined in §502(14) of the Clean Water Act, 33 U.S.C. §1362(14).

H. "Navigable waters" is defined in §502(7) of the Clean Water Act, 33 U.S.C. §1362(7).

I. "DMR" shall refer to Discharge Monitoring Reports.

MATTERS FOR WHICH ADMISSIONS ARE REQUESTED

1. Clark Oil is incorporated under the laws of the State of Louisiana.

2. Clark Oil maintains a principal place of business in Garyville, Louisiana.

3. Clark Oil has owned and operated the Garyville plant since approximately August 1, 1981 to the present.

4. Clark Oil has discharged and continues to discharge water pollutants from the Garyville plant through Outfalls 001, 002 and 003 to the Mississippi River.

5. Outfalls 001, 002 and 003 are point sources.

6. The Mississippi River is a navigable water.

7. On or about August 21, 1981, EPA issued NPDES Permit No. LA0051993 to Clark Oil, which Permit was received by Clark Oil.

8. Exhibit "A" attached hereto is a true and correct copy of NPDES Permit No. LA0051993.

9. On or about August 15, 1983, EPA issued Administrative Order No. VI-83-161 to Clark Oil, which Order was received by Clark Oil.

10. Exhibit "B" attached hereto is a true and correct copy of Administrative Order No. VI-83-161.

11. Clark Oil submitted DMR's to EPA pertaining to Outfalls 001, 002 and 003 at the Garyville plant for the period from January 1, 1981 through September 30, 1984.

12. Exhibits 001-1 through 001-38 attached hereto are true and correct copies of certain DMR's submitted to EPA by Clark Oil pertaining to Outfall 001 at the Garyville plant for the period January 1, 1981 through September 30, 1984.

13. The numerical values reported in Exhibits 001-1 through 001-38 attached hereto are true and correct.

14. Exhibits 002-1 through 002-15 attached hereto are true and correct copies of certain DMR's submitted to EPA by Clark Oil pertaining to Outfall 002 at the Garyville plant for the period April 1, 1981 through September 30, 1983.

15. The numerical values reported in Exhibits 002-1 through 002-15 attached hereto are true and correct.

- 4 -

16. Exhibits 003-1 through 003-16 attached hereto are true and correct copies of certain DMR's submitted to EPA by Clark Oil pertaining to Outfall 003 at the Garyville plant for the period January 1, 1981 through September 30, 1983.

17. The numerical values reported in Exhibits 003-1 through 003-16 attached hereto are true and correct.

Respectfully submitted,

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division

GREGORY WEISS
Assistant United States Attorney
Eastern District of Louisiana

By:
Reed W. Neuman
REED W. NEUMAN, Attorney
Environmental Enforcement Division
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Sample Notice of Deposition Upon Oral Examination

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. CLARK OIL AND REFINING COMPANY, Defendant.	Civil Action No. CA-84-2387(A)

NOTICE OF DEPOSITION UPON ORAL EXAMINATION

Please take notice that Plaintiff, United States of America, will take the oral deposition under oath of a person or persons designated by defendant Clark Oil and Refining Company (hereafter "Clark Oil"), pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, to testify with respect to the matters set forth below. Said deposition will be taken before an officer duly authorized to administer the oath, beginning at 10:00 a.m., Monday, January 14, 1985 at the offices of the United States Attorney, 500 Camp Street, New Orleans, Louisiana, and continuing through Friday, January 18, 1985, or until completed. Clark Oil is requested to designate a person or persons knowledgeable about the operation of Clark Oil, specifically regarding the matters listed below. Pursuant to the Federal Rules of Civil Procedure, including Rules 30(b)(1) and 34, Clark Oil shall bring with it to said deposition the documents listed on Schedule "A" attached hereto.

- 2 -

MATTERS FOR EXAMINATION

Unless otherwise noted, these matters refer to the period from January 1, 1981 through and until the trial of this action. Terms used herein are as defined in the United States' First Set of Interrogatories and First Request for Production of Documents to Clark Oil.

1. Accuracy of each and every pollutant parameter and discharge value reported in Discharge Monitoring Reports submitted by Clark Oil to EPA.

2. All methods, procedures and/or techniques for computing monthly or daily average and daily maximum discharge results as reported by Clark Oil to EPA in Discharge Monitoring Reports.

3. Date, duration, source(s), nature, concentration, quantity and/or discharge configuration and location of each and every discharge of water pollutants exceeding the Garyville permit limits or not expressly authorized by a permit at the Garyville plant; all sampling, measuring, testing, and monitoring and the results thereof done with respect to such discharges;

4. Date, duration, location, source and/or quantity of each and every oil sheen, oil globules or oil spills, known to Clark Oil, observed in the Mississippi River at or near the Garyville plant.

5. Adequacy and conditions of the Garyville plant and wastewater treatment facilities as acquired from Clark Oil's predecessor in interest to comply with its NPDES permit, including the refinery and its operation, the wastewater treatment system, the nature, size and competence of the wastewater treatment plant staff, particularly as the foregoing relate to problems with compliance with the Garyville permit limits, and when Clark inquired into such matters and/or discovered such matters.

6. Monthly production figures for the Garyville plant.

7. Daily and monthly influent pollutant loadings in the Garyville plant's wastewater treatment system.

8. Design specifications and treatment capacity of the Garyville plant's wastewater treatment system.

- 3 -

9. Facilities, operation and management of the Garyville plant regarding monitoring, analysis and reporting of water pollutant discharges; compliance with water pollution control laws, regulations and permits; design, management control or evaluation of production or the production process insofar as it may affect the discharge of water pollutants; training and supervision of employees working with processes or equipment that produce or control water pollutants, design, operation and maintenance of water pollution control equipment, and initiation and evaluation of budget requests for pollution control and other capital equipment.

10. Any and all causes and possible causes for discharges of pollutants from the Garyville plant exceeding the Garyville permit limits or not expressly authorized by the permit.

11. Each and every measure considered by Clark Oil, or by consultants working on behalf of Clark Oil, to reduce water pollutant discharges at the Garyville plant and/or achieve compliance with the Garyville permit limits, including the nature of any such measures, when it was considered, by whom it was considered or evaluated, the approximate costs and impacts of such measures, and when and by what means any such action was implemented and the cost, including tax consequences, of doing so.

12. Any and all acts taken at the Garyville plant to respond to the discharge or to prevent the future discharge of pollutants not expressly authorized by permit, and all costs such acts including capital and operation and maintenance.

13. Particulars of any reports submitted to EPA, in writing or otherwise, by Clark Oil regarding discharges of water pollutants from or operation of the Garyville plant.

Respectfully submitted,

JOHN VOLZ
United States Attorney

GREGORY WEISS
Assistant United States Attorney
Eastern District of Louisiana

By: Reed W. Neuman
REED W. NEUMAN, Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Sample Interrogatories

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff, v. CLARK OIL AND REFINING COMPANY, Defendant.	Civil Action No. CA-84-2387(A)

UNITED STATES OF AMERICA'S
FIRST SET OF INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff United States of America hereby requests that defendant Clark Oil and Refining Company answer under oath the following interrogatories separately and fully in writing. Answers are to be served upon counsel for the United States at the Office of the United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, within 30 days after service of this notice. The answers hereto should include all information known up to the date of verification hereof.

Instructions

1. Identification of a natural person. Whenever in these interrogatories there is a request to identify a natural person, state:

(a) his full name;

(b) his present or last known business address;

(c) his present or last known employer and position with that employer; and

(d) his employer and position at the time relevant to the particular interrogatory involved.

2. Identification of persons with responsibility for certain matters. Whenever in these interrogatories there is a request to identify each person with responsibility over certain matters, the request includes each person with other than wholly clerical duties. The request is not limited to the head of a department or section, but includes subordinate employees other than clerical staff.

3. Identification of an entity other than a natural person. Whenever in these interrogatories there is a request to identify a "person" which is a business organization or other entity not a natural person, state:

(a) the full name of such organization or entity; and

(b) the present or last known address of such organization or entity.

4. Identification of act or activity. Whenever in these interrogatories there is a request to identify an "act" or "activity":

- 3 -

(a) state each transaction or action constituting the act or activity;

(b) state the date it occurred;

(c) state the place it occurred;

(d) identify each document referring or relating to the act or activity; and

(e) identify each person participating or engaging in the act or activity.

5. Identification of a communication. Whenever in these interrogatories there is a request to identify a "communication":

(a) state the date of the communication;

(b) specify the place where it occurred;

(c) identify in accordance with Instruction 1 each person who originated, received, participated, or was present during such communication;

(d) state the type of communication (letter, telegram, telephone conversation, etc.);

(e) identify in accordance with Instruction 7 each document relating or referring to, or comprising such communication; and

(f) state the substance of the communication.

6. Identification of a meeting. Whenever in these interrogatories there is a request to identify a "meeting" state:

(a) the date of the meeting;

(b) the place of the meeting;

(c) an identification in accordance with Instruction 1 of each person attending the meeting;

(e) the substance of the meeting; and

(d) an identification in accordance with Instruction 7 of each document relating or referring to the meeting.

7. Identification of documents. Whenever in these interrogatories there is a request to identify a document, state:

(a) its date;

(b) its author and signatory;

(c) the type of document (letter, memorandum, contract, report, accounting record, etc.);

(d) its title;

(e) its substance;

(f) its addressee and all other persons receiving copies;

(g) its custodian;

(h) its present or last known location; and

(i) if the document was, but no longer is in your possession or subject to your control, state what was done with the document, who disposed of it, why it was disposed of and when it was disposed of.

8. Use of documents in place of an answer. Whenever a full and complete answer to any interrogatory or part of an interrogatory is contained in a document or documents, the documents, if appropriately identified as answering a specific numbered interrogatory or part of an interrogatory, may be supplied in place of a written answer.

9. Numerical information. Interrogatories calling for numerical or chronological information shall be deemed, to the extent that precise figures or dates are not known, to call for estimates. In each instance that an estimate is given, it should be identified as such together with the source of information underlying the estimate.

10. Sources of information. For each interrogatory answer, identify each person who provided information considered in preparing that answer, specifying the nature of the information provided. In answering these interrogatories every source of information to which defendant has access should be consulted, regardless of whether the source is within defendant's immediate possession or control. All documents or other information in the possession of experts or consultants should be consulted.

12. Partial answers. If any interrogatory cannot be answered fully, as full an answer as possible should be provided. State the reason for your inability to answer fully, and give any information, knowledge or belief defendant has regarding the portion unanswered.

13. Time period. Unless otherwise indicated, these interrogatories apply to the time period from January 1, 1981 until the trial of this matter.

14. Supplemental answers. These interrogatories are continuing: supplemental answers must be filed pursuant to Fed. R. Civ. P. 26(e) between the date these interrogatories are answered and the time of trial.

15. Deletions from documents. Where anything has been deleted from a document produced in response to an interrogatory:

(a) specify the nature of the material deleted;

(b) specify the reason for the deletion; and

(c) identify the person responsible for the deletion.

16. Claim of privilege. If objection is made to answering any interrogatory or disclosing the substance of any document on the basis of any claim of privilege, defendant is requested to specify in writing the nature of such information or documents, along with the nature of the privilege claimed, so that the Court may rule on the propriety of defendant's objection. In the case of documents, defendant should state

(a) the title of the document;

(b) the nature of the document (interoffice memorandum, correspondence, report, etc.);

(c) the author or sender;

(d) the addressee;

(e) the date of the document,

(f) the name of each person to whom the original or a copy was shown or circulated,

(g) the names appearing on any circulation list relating to the document,

(h) the basis upon which privilege is claimed, and

(i) a summary statement of the subject matter of the document in sufficient detail to permit the court to rule on the propriety of the objection.

Definitions

1. "Person" unless otherwise specified means a natural person, firm, partnership, association, corporation, proprietorship, governmental body, government agency or commission or any other orgnization or entity.

2. "Document" is defined as any recording of information in tangible form. It includes, but is not limited to, memoranda, reports, evaluations, correspondence, communications, intra-office memoranda, inter-office communications, agreements, contracts, invoices, checks, journals, ledgers, telegrams, handwritten notes, periodicals, pamphlets, computer or business machine print-outs, accountants' work papers, accountants' statements

and writings, notation or records of meetings, printers' galleys, books, papers, speeches, public relations issues, advertising, material filed with government agencies, office manuals, employee manuals or office rules and regulations reports of experts, any other written matter, tape recordings or other sound or visual reproduction materials, computer data bases, or any tangible or physical objects however produced or reproduced upon which words or other information are affixed or recorded or from which by appropriate transcription written matter or a tangible thing may be produced. Where a document is to be identified or produced, all originals or if not available, copies, together with all prior drafts, or all copies which are in any manner different from the original, are to be identified or produced.

3. "Relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

4. "EPA" means the United States Environmental Protection Agency.

5. "Discharge" includes a discharge of a pollutant or pollutants to navigable waters from a point source.

6. "Pollutant" is as defined in 33 U.S.C. §1362.

7. "Clark Oil" shall mean defendant Clark Oil and Refining Company, its subsidiaries, divisions, officers, employees, agents, servants, and, unless privileged, its attorneys.

8. The "Garyville plant" means the petroleum refinery owned and operated by Clark Oil in Garyville, St. Mary's Parish,

Louisiana, including its wastewater treatment and related facilities.

9. The "Garyville permit" means National Pollution Discharge Elimination System (NPDES) Permit No. LA 0051993 as issued, administratively extended or renewed.

10. The "Garyville permit limits" mean any water pollutant discharge limitations or conditions contained in the Garyville permit.

11. The "State" means the State of Louisiana, including its departments, agencies and officials.

Interrogatories

1. State all water pollutant discharge limitations, including any extensions or modifications, Clark Oil contends have applied since January 1, 1981 at its outfalls at the Garyville plant, specifying the source of each of those limitations.

2. Are any of the values contained in any Discharge Monitoring Reports ("DMRs") submitted by Clark Oil to EPA or the State relating to the Garyville plant inaccurate or misleading? If so, for each such value state in what respect it is inaccurate or misleading; what Clark Oil contends the correct value is, specifying the basis for this calculation and identifying any documents relevant to this calculation; the reason for the original error; identify all persons responsible for calculating the original value and the new value; and state whether the allegedly correct value complies

with the Garyville permit limits.

3. List each discharge of water pollutants from any source at the Garyville plant exceeding the Garyville permit limits for such source, or any discharge of water pollutants without a permit, stating for each such discharge the date and duration of the discharge; the source; the quantity and concentration of pollutant discharged; all sampling or testing done with respect to the discharge; any explanation or reason known to or hypothesized by Clark Oil why the discharge exceeded the Garyville permit limits; and an identification of all acts taken to respond to the discharge or to prevent future discharges, including equipment changes, changes in operating or maintenance procedures or operator training or disciplinary actions.

4. Does Clark Oil contend that it could not prevent the discharges listed in response to Interrogatory No. 3 above from exceeding the Garyville permit limits? If so, specify each and every such discharge and for each state all facts supporting the contention that such violations were not preventable.

5. Does Clark Oil contend that operator error caused any of the discharges listed in response to Interrogatory No. 3 above to exceed the Garyville permit limits? If so, identify each employee whose error Clark Oil contends to have contributed to the discharge; identify all acts of the employee which are contended to have resulted in the discharge exceeding

the Garyville permit limits; identify the immediate supervisor of the employee; and identify all documents or communications containing or relating to instructions to the employee regarding discharge limitations, reduction of pollutant discharges, or measures to be taken in the event of discharges in excess of the Garyville permit limits.

6. Does Clark Oil contend that equipment malfunction or defect, including design defect, caused any of the discharges listed in response to Interrogatory No. 3 above to exceed the Garyville permit limits? If so, identify the type of equipment; state the manufacturer of the equipment, the model number and any other identification number for the equipment; describe the malfunction or defect; state in what manner the malfunction or defect is alleged to have caused the discharge to exceed the Garyville permit limits; identify the persons responsible for maintaining the equipment and/or preventing malfunctioning; identify all documents containing instructions for maintaining or servicing or preventing malfunction of the equipment; identify the persons responsible for purchasing or approving the purchase of the equipment; identify all persons responsible for review of the design, operation, or suitability of the equipment; and state whether the equipment is still in Clark Oil's possession and if not, where it is.

7. Does Clark Oil contend that it has not been feasible to comply with any of the limitations contained in

the Garyville permit? If so, state the basis of this contention, identifying all persons, including experts or consultants with knowledge of the basis for this contention, and identifying all documents relating to this contention.

8. During the week preceeding each discharge identified in response to Interrogatory No. 3 above, had Clark Oil made any production process changes, including equipment or formulation changes, which were designed to or had the effect of varying produc time or the production process? If so, describe any such process changes, identifying any documents relating to such changes.

9. Describe each measure considered by Clark Oil to reduce water pollutant discharges or to achieve compliance with the Garyville permit limits, including but not limited to modifications of production processes, and modifications of pollution control facilities, including in the description the nature of the measure, the period of time during which it was considered, and an identification of the persons who participated in the consideration or evaluation of the measure, identifying any documents relating to such consideration. If any such measure was implemented, identify each action taken to implement it, specifying the dates, the action, the costs or expenditures relating to each such act, including operation and maintenance costs, stating what portion of the expense, if any, was eligible for investment tax credit and, if applicable, the tax credit claimed, and identifying all documents relating to

such costs or expenditures and tax credits. For measures not implemented, state the reason the measure was not implemented and the estimated cost of the measure, including operation and maintenance costs.

10. Identify each person now or formerly in the employ of Clark Oil who has or had responsibility with regard to monitoring, analysis and reporting of pollutant discharges from the Garyville plant; compliance by the Garyville plant with water pollution control laws and regulations; design, management, control or evaluation of production or the production process at the Garyville plant insofar as it affects or may affect the discharge of water pollutants; training and supervision of employees working with processes or equipment that produces or controls water pollutants; operation and maintenance of water pollution control equipment at the Garyville plant; and initiation and evaluation of budget requests for pollution control or other capital equipment.

11. Identify all persons who work for or have worked for Clark Oil, or who are or have been consultants to Clark Oil, or who work for or have worked for consultants to Clark Oil, who have knowledge of the nature and amount of water pollutants discharged from the Garyville plant including sampling and testing for BOD_5, TSS, COD, phenols, ammonia, sulfide, chromium and oil and grease; measures considered or taken by Clark Oil to reduce discharges of water pollutants from the Garyville plant;

budgeting, financial, and technical analysis of water pollution control equipment and other capital improvement projects; operation and maintenance of water pollution control equipment at the Garyville plant; sources of wastewaters at the Garyville plant; financial aspects of the Garyville plant, including cash flows, operating expenses and profitability; and initiation and evaluation of budget requests for pollution control or other capital equipment.

12. Identify each person, firm or corporation, including employees, whom Clark Oil has consulted regarding water pollution control at the Garyville plant, stating when such consultant was retained; the nature of any advice or opinion rendered by the consultant; whether any documents were given to the consultant in connection with its work, identifying all such documents; whether any documents were prepared by the consultant in connection with his work, identifying all such documents; and whether any document was prepared by Clark Oil or its agents or other consultants relating to any advice or opinion, or document prepared by the consultant, identifying all such documents.

13. Identify all entities which were predecessors to or connected with Clark Oil with regard to ownership or operation of the Garyville plant, including subsidiaries, divisions, affiliates, partnerships, joint ventures or other entities, state what discussions, if any, Clark Oil had with

any such entity relating to the wastewater treatment facilties and compliance with the Garyville permit, and identify all documents relating to such discussions.

14. State whether Clark Oil has any actual or potential insurance coverage, including comprehensive liability, applicable to any of the claims asserted in this action by the United States. If so, identify the insurers and state the policy number and the amount of the insurance, identifying all such policies. State whether any insurance company has ever performed an environmental risk assessment or other study regarding Clark Oil's compliance with water pollution control laws, identifying the company and the assessment or study.

15. Has Clark Oil ever orally reported to EPA or the State, by telephone or otherwise, any discharge of pollutants from the Garyville plant which exceeded the Garyville permit limits? If so, identify each such oral report, giving exact dates and times, all persons authorizing or making such reports, all persons to whom such reports were made, and the substance of each such report. Identify all documents relating to the above, including any records of telephone calls, giving their present location.

16. State each and every occurrence of oil sheen, oil globules or oil spills in the Mississippi River observed at or near the Garyville plant known to Clark Oil and identify all documents relating to the same including their present location.

For each occurrence state the exact dates and times Clark Oil first became aware of such occurrence, the duration of the same, whether the same was reported, orally or in writing, to the State or EPA, and the names of all persons making or authorizing such observances or reports and all persons to whom such reports were made.

17. State the methods, procedures or techniques for computing monthly or daily average discharge results reported in Clark Oil's discharge monitoring reports for each and every monthly reporting period from August, 1981, to the present at the Garyville plant, stating for each month during the above period the total number of times during each month that sampling was conducted for each parameter in the Garyville permit and the exact dates and times of such sampling; the total number of samples used to compute the monthly average for each parameter and the specific method used to compute that average; all sampling results for each parameter obtained during each month; the average result for each parameter which was obtained, if different from that reported in discharge monitoring reports for each month; the sampling methods or techniques used; and identify all documents relating to the above, including any statements of policy, procedures, schedules, or rationales relating thereto.

18. State the methods, procedures or techniques for computing the daily maximum discharge results for each parameter in the Garyville permit for each and every monthly

reporting period from August, 1981 to the present at the Garyville plant, stating for each month during the above period the total number of times during each month that sampling was conducted for each parameter and the exact dates and times of such sampling; all sampling results for each parameter obtained during each month; the sampling methods or techniques used; the methods, procedures or techniques employed in reporting the results to the State or EPA in discharge monitoring reports, including the reasons for employing such methods, procedures or techniques; and identify all documents relating to the above, including any statements of policy, procedures, schedules or rationales relating thereto, giving the present location of all such documents.

19. State the rate of return on equity (the average anticipated future value of the annual after tax income divided by the total value of common shareholder interest) for Clark Oil for each year since 1981; state all facts or other information supporting or relating to your answer and identify the person(s) who provided the information.

20. State the interest rate on borrowed capital (long term debt) of Clark Oil for each year since 1980; state all facts or other information supporting or relating to your answer and identify the person(s) who provided the information.

21. State the equity share of the total investment of Clark Oil. [The equity share is equal to the proportion of a

corporation'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 a corporation's balance sheet including common stock, retained earnings, capital surplus and any ohter 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).] State further each item in the calculation. State all facts or other information supporting or relating to your answer and identify the person(s) who provided the information.

22. State the depreciable life (minimum number of years over which the particular pollution control equipment may be depreciated) of the facilities installed at the Garyville plant pursuant to the administrative order issued by the Louisiana Environmental Control Commission on June 24, 1982. State all facts or other information supporting or relating to your answer and identify the person(s) who provided the information.

23. Identify all persons having responsibility for or otherwise having substantial knowledge of the financial condition and affairs of Clark Oil and/or any parent or holding company.

24. Identify all experts expected to testify at trial, stating the subject matter on which the expert is

expected to testify, and the substance of the facts and opinion to which the expert is expected to testify with a summary of the grounds for each opinion.

25. Identify all witnesses other than those identified in response to Interrogatory No. 24 above, who are expected to testify at trial, summarizing their expected testimony and identifying all documents upon which they intend to rely.

Respectfully submitted,

JOHN VOLZ
United States Attorney
Eastern District of Louisiana

By: _____
GREGORY C. WEISS
Assistant United States Attorney

Reed W Neuman
REED W. NEUMAN, Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

OF COUNSEL:

ELLIOTT P. LAWS
United States Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Sample Request for Production of Documents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC CORPORATION, Defendant.	)	Civil Action No. 84-CV-681 (MINER, J.)

UNITED STATES OF AMERICA'S FIRST
REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiff United States of America hereby requests that defendant General Electric Corporation produce and permit this plaintiff to inspect, copy or photograph each of the following documents of things which may be in the possession, custody or control of the defendant by the plaintiff, its attorney or someone acting on the plaintiff's behalf. These documents are to be produced at the Office of the United States Attorney for the Northern District of New York, 369 Federal Building, Syracuse, New York 13260, within within 30 days after service of this Request or such other place as counsel for the parties may agree.

Instructions

1. Document no longer in possession. If any document requested is no longer in the possession, custody or control of defendant, state:

(a) what was done with the document;

(b) when such disposition was made;

(c) the identity and address of the current custodian of the document;

(d) the person who made the decision to transfer or dispose of the document;

(e) the reasons for transfer or disposition.

2. Sources of documents. In responding to this Request, every source of documents to which defendant has access should be consulted, regardless of whether the source is within defendant's immediate possession or control. All documents in the possession of experts or consultants should be consulted.

3. Time period. Unless otherwise indicated, this Request applies to the time period from July 1, 1977 until the date upon which production occurs.

4. Supplemental Production. This Request is continuing: defendant's response must be supplemented if defendant obtains further or different information or documents between the date of production and the time of trial.

5. Deletions from documents. Where anything has been deleted from a document produced in response to a request:

(a) specify the nature of the material deleted;

(b) specify the reason for the deletion; and

(c) identity the person responsible for the deletion.

6. Claim of Privilege. If objection is made to production of any documents on the basis of any claim of privilege, defendant is requested to specify in writing the nature of such information or documents, along with the nature of the privilege claimed, so that the Court may rule on the propriety of defendant's objection. In the case of documents, defendant should state:

(a) the title of the document,

(b) the nature of the document (interoffice memorandum, correspondence, report, etc.),

(c) the author or sender,

(d) the date of the document,

(e) the name of each person to whom the original or a copy was shown or circulated,

(f) the names appearing on any circulation list relating to the document,

(g) the basis upon which privilege is claimed, and

(h) a summary statement of the subject matter of the document in sufficient detail to permit the court to rule on the propriety of the objection.

7. Inability to respond. Whenever defendant is unable to produce documents in response to a Request, state the steps taken to locate responsive documents.

8. Relation to particular requests. For each document produced, indicate to which numbered paragraph it responds.

Definitions

1. "Person" unless otherwise specified means a natural person, firm, partnership, association, corporation, proprietorship, governmental body, government agency or commission or any other organization or entity.

2. "Document" is defined as any recording of information in tangible form. It includes, but is not limited to, memoranda, reports, evaluations, correspondence, communications, intra-office memoranda, inter-office communications, agreements, contracts, invoices, checks, journals, ledgers, telegrams, handwritten notes, periodicals, pamphlets, computer or business machine print-outs, accountants' work papers, accountants' statements and writings, notations or records of meetings, printers' galleys, books, papers, speeches, public relations issues, advertising, material filed with government agencies, office manuals, employee manuals or office rules and regulations reports of experts, any other written matter, tape recordings or other sound or visual reproduction materials, computer data bases, or any tangible or physical objects however produced or reproduced upon which words or other information are affixed or recorded or from which by appropriate transcription written matter or a tangible thing may be produced. The complete original, or a complete copy if the original is not available, together with all prior drafts

and all copies which are in any manner different from the original, are to be produced.

3. "Discharge" includes a discharge of a pollutant or pollutants to navigable waters from any point source.

4. "Relating to" means constituting, defining, containing, embodying, reflecting, identifying, stating, referring to, dealing with or in any way pertaining to.

5. The "facility" means defendant's facility located in Waterford, New York, and includes defendant's property surrounding the facility.

6. "Discharge" is defined in § 502(12) and (16) of the Clean Water Act, 33 U.S.C. § 1362(12) and (16).

7. "Pollutant" is defined in § 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6).

8. "NPDES permit" means National Pollution Discharge Elimination System Permit No. N.Y. 0008605 as renewed or modified, and any New York State SPDES permit.

9. "NPDES limits" means any discharge limitations or conditions contained in defendant's NPDES permit.

10. The "State" means the State of New York, including any departments or agencies.

Requests for Production

1. All organizational charts of the Waterford facility.

2. Any organizational charts showing the relationship between the Waterford facility and defendant's headquarters, and the

relationship between the defendant corporation and any parent, subsidiary or affiliated companies.

3. All permits or other documents authorizing water pollutant discharges from the Waterford facility.

4. All documents relating to any test results, laboratory, analyses, flow measurements or concentration analyses of any discharge from the Waterford facility, including all discharge monitoring reports, bypass reports, other reports on discharges maintained by defendant or sent to any government entity, flow logs and measurements, tests or analyses for Biological Oxygen Demand ("BOD_5"), Total Suspended Solids ("TSS"), Total Kjeldahl Nitrogen as N ("TKN"), pH, phenols, copper, Oil and Grease, and all documents used as the basis for or in preparation of such documents.

5. All documents which refer or relate to the quantitative or qualitative characteristics including the toxicity, or chemical or physical characteristics, of the Waterford facility's discharges of water pollutants.

6. All documents which refer or relate to the effects of the Waterford facility's discharges on the water quality of the Hudson River into which defendant discharges, or which refer or relate to whether or not the facility's discharges violate applicable water pollution control laws, including NPDES limits.

- 7 -

7. All documents relating to process or equipment changes at the Waterford facililty which were designed to, or had the effect of, preventing or reducing discharge of water pollutants.

8. All documents relating to change(s) in operating, maintenance or inspection procedures at the Waterford facility which were designed to, or had the effect of, preventing or reducing discharge of water pollutants.

9. All documents relating to difficulties encountered by defendant in meeting NPDES limits, or other water pollutant effluent limitations at the Waterford facility.

10. All documents relating to consideration by defendant of whether to install, not to install and to defer installation of water pollution control equipment at the Waterford facility.

11. All documents relating to consideration by defendant of whether to implement, not to implement and or defer implementation of process changes that would affect pollutant discharges at the Waterford facility.

12. All documents relating to the advantages or disadvantages or potential implications to defendant of delaying installation of water pollution equipment at the Waterford facility.

13. All documents relating to the capital, operating or maintenance costs of water pollution control equipment installed, or considered for installation, at the Waterford facility to achieve, or contribute to the achievement of, applicable water pollution control standards, including NPDES limits.

- 8 -

14. All documents relating to the types, kinds or numbers of pieces of equipment that correspond to the cost figures contained in the documents produced in response to Request 13 above.

15. All documents relating to the choice of rate of return, or discount rate, to be used in calculating a discounted cash flow for, or otherwise analyzing, a particular investment by defendant.

16. All documents relating to decisions to include or to exclude water pollution control equipment as alternatives in deciding upon which capital assets corporate resources should be expended (e.g., corporate planning documents or their equivalent containing such references).

17. All documents relating to criteria used by defendant to determine whether to include or to exclude water pollution control equipment at the Waterford facility within a range of capital investment alternatives.

18. All documents, including bid requests, bids, estimates, contracts or staff memoranda, which relate to any water pollution control equipment installed, or being installed, at the Waterford facility.

19. All documents which relate to the costs of any equipment or work discussed in Request 18 above, if not already there supplied.

20. All documents which relate to defendant's consideration or evaluation of the equipment referred to in Request 18 above, or any other equipment designed or intended to reduce water pollutant discharges by the facility.

21. All documents containing instructions to employees at the Waterford facility regarding the level or amount of water pollutant discharges.

22. All documents containing instructions to employees regarding steps to be taken in the event of an unauthorized discharge.

23. All documents, including training manuals, relating to operating, testing or maintenance procedures with respect to water pollution control equipment.

24. All documents evaluating facility procedures or alternative procedures for reducing water pollution discharges at the Waterford facility.

25. All documents analyzing or evaluating facility equipment with respect to reduction of water pollutant discharges at the Waterford facility.

26. All charts or diagrams illustrating facility operating conditions and production flow at the Waterford facility.

27. All documents relating to control technology, devices or other equipment for the control or reduction of water pollutant discharges at the Waterford facility.

28. All documents relating to meetings, discussions, or oral communications regarding water pollutant discharges at the Waterford facility.

29. All documents or corporate records relating to meetings, discussions or other oral communications regarding technology, personnel training, inspection, maintenance or any other means to reduce water pollutant discharges, or to achieve compliance with NPDES effluent limits at the Waterford facility.

30. All documents relating to meetings, discussions, or any other oral communications relating to the cost of measures for compliance with the NPDES effluent limitations at the Waterford facility.

31. All documents relating to complaints received by defendant from any source regarding water pollutant discharges from the Waterford facility.

32. All documents, including minutes, relating to meetings of defendant's Board of Directors, officers, management personnel, facility personnel or other agents of defendant regarding water pollutant discharges, health or environmental effects of water pollutant discharges or compliance with the NPDES permit for the Waterford facility.

33. All studies, evaluations, tests, reports or other documents prepared by any contractor, agent or employee of defendant or any other person relating to water pollutant discharges,

including health or environmental effects, or compliance with the NPDES permit at the Waterford facility.

34. All documents relating to inquiries made into the causes of water pollutant discharges at the Waterford facility not authorized by NPDES permit.

35. All documents relating to procedures for reporting water pollutant discharges, or violations of water pollution laws or regulations, to EPA or the State.

36. All documents that refer or relate to contacts of any kind between officials of the Federal Government (including but not limited to EPA) or the State, and persons representing or acting on behalf of defendant relating in any way to discharge of water pollutants by the Waterford facility.

37. All documents prepared for or furnished to any person retained by defendant as a consultant or expert in connection with the subject matter of this case.

38. All reports, memoranda, analyses, computations or other documents, including drafts, prepared by any person retained by defendant as a consultant or expert in connection with the subject matter of this case.

39. All documents on which any witness intends to rely.

40. All docments relating to defendant's defenses and affirmative defenses.

- 12 -

41. All documents defendant intends to rely on or introduce into evidence at trial.

42. All documents identified in response to the United States' First Set of Interrogatories.

43. All documents relating to defendant's or the Waterford facility's document retention policies.

FREDERICK J. SCULLIN, JR.
United States Attorney
Northern District of New York

CRAIG A. BENEDICT
Assistant United States Attorney
Northern District of New York
369 Federal Building
100 South Clinton Street
Syracuse, New York 13260

CLIFFORD F. GRIGGS, Attorney
Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D. C. 20530
202-633-2056

OF COUNSEL:

WILLIAM C. TUCKER
Office of Regional Counsel
U.S. Environmental Protection Agency
26 Federal Plaza
New York, New York 10278

Sample Motion for Summary Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civ. No. 83-3201 Section "K"
ST. BERNARD PARISH and STATE OF LOUISIANA,	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUES OF LIABILITY

Pursuant to Rule 56, Fed. R. Civ. P., and for the reasons stated in the attached memorandum, the United States moves for partial summary judgment on the issues of liability. In particular, the United States seeks summary judgment on its claims that:

(1) defendant St. Bernard Parish on 73 occasions failed to comply with monitoring and reporting conditions of its NPDES permit, in violation of permit conditions implementing 33 U.S.C. 1318 in a permit issued under 33 U.S.C. 1342 by a Regional Administrator of the United States Environmental Protection Agency; and

(2) from October 28, 1979, to and including the present, defendant St. Bernard Parish

-2-

discharged pollutants into waters of the United States without an NPDES permit authorizing the discharge, in violation of Section 301 of the Clean Water Act.

Respectfully submitted,

JOHN VOLZ
United States Attorney
Eastern District of Louisiana

By:

WILLIAM F. BAITY
Assistant United States Attorney
Hale Boggs Federal Building
New Orleans, Louisiana 70130
(504) 589-3518

Reed Neuman /s/ WFB

REED NEUMAN
Attorney
Environmental Enforcement Section
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530
(202) 633-4059

Alan W. Eckert

ALAN W. ECKERT
Senior Litigator
Office of General Counsel
United States Environmental Protection Agency
Washington, D.C. 20460

OF COUNSEL:

ELYSE DiBIAGIO-WOOD
Office of Enforcement and
Compliance Monitoring
United States Environmental
Protection Agency
Washington, D.C. 20460
(202) 475-8187

RALPH CORLEY
Office of Regional Counsel
United States Environmental
Protection Agency
Region VI
1201 Elm St.
Dallas, Texas 75270

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civ. No. 83-3201 Section "K"
ST. BERNARD PARISH and STATE OF LOUISIANA, Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUES OF LIABILITY

In the attached motion, the plaintiff United States moves under Rule 56, Fed. R. Civ. P., for partial summary judgment on issues of liability for violations of the Clean Water Act. In particular, the United States seeks summary judgment on defendant St. Bernard Parish's liability for its discharges of pollutants into "waters of the United States" without a valid NPDES permit from October 28, 1979 to the present time, in violation of the Act (Complaint, Paragraphs 7, 9), and its liability, during the period when it held a valid NPDES permit, for repeated violations of its requirements for the submission of discharge monitoring reports and non-compliance reports (Complaint, Paragraphs 11 and 12). This memorandum also states plaintiff's grounds for opposing the Motion for Summary Judgment filed by defendant St. Bernard Parish on or about April 3, 1984.

I. STATUTORY AND REGULATORY BACKGROUND

Before 1972, federal water pollution control efforts were directed towards assisting states in achieving water quality standards. States were required to develop water quality standards for interstate waters within their boundaries according to intended uses (e.g., agriculture, drinking water supply, fish and wildlife management), taking into account the water's ability to assimilate the pollution. Concluding that water quality standards alone were not adequate to restore and maintain the integrity of the nation's waters, Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 et seq. S. Rep. No. 92-414, 92d Cong., 1st Sess. 8 (1971), reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972 in 1426 (1973) (hereinafter "Legislative History"); EPA v. State Water Resources Control Board, 426 U.S. 200, 202-206 (1976). Adding to the water quality approach established in the existing statute, the 1972 Amendments (now referred to as the Clean Water Act) established a detailed regulatory system for technology-based standards to control water pollution from point sources. 1/ The system includes

---

1/ "Point source" is defined in Section 502(14) of the Act to mean:

> 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, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

both substantive control requirements and procedures for putting those controls into effect.

The Act directed the Administrator to promulgate effluent limitations representing the degree of effluent control which can be achieved by point sources using various levels of pollution control technology. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 126-236 (1977). Publicly owned treatment works (POTWs) were required to meet effluent limitations based on secondary treatment 2/ by July 1, 1977. Section 301(b)(1)(B), 33 U.S.C. 1311(b)(1)(B). To ensure compliance with these effluent limitation standards, and water quality standards and other requirements (see Section 301(b)(1)(C)), Congress, in Section 402 of the Act, 33 U.S.C. 1342, established the National Pollutant Discharge Elimination System (NPDES). The CWA prohibits the "discharge of any pollutant," 3/ from a point source, Section 502(6), 33 U.S.C. 1362(6), into the Nation's waters unless such discharge

---

2/ Secondary treatment, defined in 40 C.F.R Part 133, involves uses of biological processes, primarily decomposition, with or without chemical disinfectants, to remove organic wastes which are not removed by mere screening and sedimentation, which is termed "primary treatment."

3/ The term "discharge of a pollutant," as utilized in Section 301(a) and elsewhere in the Act, is defined in Section 502(12), 33 U.S.C. 1362(12), to mean:

> any addition of any pollutant to navigable water from any point source * * *.

(continued)

is in compliance with Section 402. Section 301, 33 U.S.C. 1311; EPA v. State Water Resources Control Board, supra, 426 U.S. at 205. NPDES permits under Section 402 are issued by EPA or by a state agency with an approved NPDES program. 4/

The CWA limits the term of an NPDES permit to five years. Section 402(b)(1)(B), 33 U.S.C. 1342(b)(1)(B). All NPDES permittees must submit an application for renewal of a permit at least 180 days prior to the expiration date of the permit. 40 CFR §122.21(d)(1983). When a timely and sufficient application for reissuance has been made to EPA and the

(continued from previous page)

The term "pollutant" is defined in Section 502(6) of the Act, 33 U.S.C. 1362(b), to mean:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

The term "navigable waters" is defined in Section 502(7) of the Act, 33 U.S.C. 1362(7), to mean:

> * * * the waters of the United States, including the territorial seas.

The term "point source" is defined in Section 502(14) of the Act, n. 1, supra.

4/ Thirty-six states operate their own NPDES programs. The State of Louisiana, however, does not have an approved NPDES program, and EPA thus has permitting authority within the State.

Agency is unable to reissue the permit prior to the stated expiration date, the permit remains in full force and effect until final action on the application. However, if no timely renewal application is submitted, the permit expires. 5 U.S.C. 558(c); 40 C.F.R. §122.6 (1983). See also Costle v. Pacific Legal Foundation, 445 U.S. 198, 210-211 n. 13 (1980).

Section 509(b)(1) of the CWA grants any interested person the right to judicial review of the Administrator's "action * * * in approving or promulgating any effluent limitation or other limitation under sections 301 * * ** (33 U.S.C. 1369(b)(1)(E)), and "in issuing or denying any permit under section 402 * * ** (33 U.S.C. 1369 (b)(1)(F)). Judicial review is limited to the appropriate court of appeals upon petition made within 90 days after the challenged action of the Administrator. 33 U.S.C. 1369(b)(1). This review is exclusive of any other potential avenue for review, including in an enforcement proceeding. Section 509(b)(2), 33 U.S.C. 1369(b)(2), provides:

> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

Section 309 of the Act provides broad federal enforcement authority to issue administrative orders and to sue in United States district courts to compel compliance and for imposition of civil and criminal penalties. Section 309, 33 U.S.C. 1319.

- 6 -

II. STATEMENT

Defendant St. Bernard Parish owns and operates the Munster Plant, a POTW, in Meraux, Louisiana. Answer, ¶6. In 1974, the Parish submitted an application for an NPDES permit for discharges from the Munster Plant into the Forty Arpent Canal. Affidavit of Shirley Bruce, Attachment F (hereafter "Bruce Affidavit"), Exh. A. 5/ EPA issued the permit on September 28, 1974, effective October 28, 1974. Answer, ¶6. The permit expiration date was set at the statutory maximum of five years after issuance on October 27, 1979. Exh. B to Bruce Affidavit at 1.

The interim and final effluent limitations (maximum allowable pollutant discharge levels, see Section 502(11) of the Act, 33 U.S.C. 1362(11)) in the permit were identical, 6/ setting 30-day average and 7 day average limitations on five-day biochemical

---

5/ Ms. Bruce's affidavit refers to "Attachments" to the affidavit. We refer to them as "Exhibits" to avoid confusion with the Attachments to this Memorandum

6/ The permit limited flow from the Munster Plant to 2.5 million gallons per day (mgd) monthly average, and a maximum of 5.0 on any day. The permit also contained the following additional effluent limitations:

	30-day average	7-day average
Biochemical Oxygen Demand (BOD_5)	30mg/l	45mg/l
Total Suspended Solids (TSS) (continued)	40mg/l	60mg/l

oxygen demand (BOD_5), total suspended solids (TSS), and fecal coliform bacteria. The final effluent limitations were effective only until May 1, 1977, but the permit included more stringent "projected effluent limitations" and required the Parish to prepare and submit plants to meet these more stringent limitations "at the earliest possible date." Id., Special Condition 1.b., p. 5(a).

The principal monitoring and reporting requirements were included as Special Condition 2 of the permit. This condition required the Parish to monitor the limited effluent constituents weekly, to record the results on a Discharge Monitoring Report (DMR) (DMR) form, and to submit these forms to EPA quarterly. Id. at 6-10.

ARGUMENT

III. STANDARDS GOVERNING THE MOTION

The function of summary judgment is to avoid a useless trial if there is no genuine dispute of material fact. Moore's Federal Practice ¶56.15. See Adickes v. S.H. Kress Co., 398 U.S. 144 (1970). The burden is on the moving party "to establish the absence of a genuine issue as to any material fact, and that he is entitled to a judgment as a matter of law." Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc., 479 F.2d 135, 138 (5th Cir. 1973). See also Union Planters National Leasing, Inc. v. Woods, 687 F.2d 117 (5th Cir. 1982).

(continued from previous page)

Exh. B to Bruce Affidavit at 5. The terms "7-day average" and "30-day average" were defined as the arithmetic mean of all effluent samples collected within a period of seven or thirty consecutive days, respectively. Id. at 6.

-8-

The United States willingly assumes this burden. As shown by defendant's admissions and other facts as to which there can be no real dispute, the defendant on many occasions violated requirements of its NPDES permit. Moreover, because of defendant's failure to file an application for renewal of its NPDES permit, defendant has since the fall of 1979 been discharging pollutants without a permit in violation of the Clean Water Act. The facts are set forth under Local Rule 3.9 in Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue to be Tried, Attachment A. 7/

In order to prevail on its claim of permit violations, the United States must show that defendant violated the terms of its NPDES permit. In order to prevail on its claim of unlawful discharges, the United States must show that the Parish discharged pollutants without a permit. The Clean Water Act provides for "appropriate relief, including a permanent or temporary injunction," and penalties of up to $10,000 per day of violation, Section 309(b), (d), 33 U.S.C. 1319(b), (d), for, inter alia, a "violation of any permit condition or limitation" implementing the regulatory provisions of the Act. Section 309(a)(3), 33 U.S.C. 1319(a)(3). These regulatory provisions include Section 308, 33 U.S.C. 1318,

---

7/ The Parish's Motion for Summary Judgment failed to comply with Local Rule 3.9. In the interest of expediting the decision, the United States is not filing a Motion to Strike. See Local Rule 3.16.

authorizing the Administrator to require the owners or operators of a "point source" to "install, use and maintain * * * monitoring equipment or methods * * * [and] provide such other information as he may reasonably require." Moreover, it is unlawful for any "person" 8/ to "discharge" a "pollutant" from a "point source" 9/ without an NPDES permit. See pp. 3-4, supra. The same penalties apply as for permit violations. Section 309(d), 33 U.S.C. 1319(d).

Defendant St. Bernard Parish admits it is a "municipality" and therefore a person under the Clean Water Act. Answer, ¶3. Thus in order to prevail on its claims of permit violations, the United States need only show that the defendant at relevant times failed to comply with its permit terms. To prevail on its claim that the Parish has discharged without a permit, the United States must show that the defendant (1) "discharged" (2) "pollutants" (3) into "waters of the United States" (4) without an NPDES permit.

It is not, however, necessary for plaintiff to show intent. The Senate Report discussing the rationale of Section 301 indicates that the provision was modeled on Section 13 of the River and Harbors Act of 1899, 33 U.S.C. 407 (referred to as the Refuse Act),

---

8/ The term "person" is defined to include a "municipality," such as St. Bernard Parish. Section 502(4),(5) 33 U.S.C. 1362(4),(5).

9/ For definitions of the terms "discharge," "pollutant," and "point source," see notes 2 and 4, supra.

and was intended to prohibit all discharges of pollutants, regardless of the motivation or fault leading to the discharge:

> The Committee believes that the no-discharge declaration in Section 13 of the 1899 Refuse Act is useful as an enforcement tool. Therefore, this section [Section 301] declares the discharge of pollutants unlawful. The Committee believes it is important to clarify this point: no one has the right to pollute.

2 Legislative History at 1461. See also, United States v. White Fuel Corp., 498 F.2d 619, 622 (1st Cir. 1974) (Refuse Act is strict liability statute). Similarly, Section 301 of the Clean Water Act has been held to set a strict liability standard. United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). As the court stated in United States v. Amoco Oil Co., No. 80-0801-CV-W-O, slip op. at 15 (W.D. Mo. Jan. 3, 1984) (Attachment D):

> The liability imposed under §1319(d) is a variety of strict liability, and neither fault nor intent are relevant thereto, except in connection with the amount of penalty imposed. [Citations omitted.]

IV. THE PARISH REPEATEDLY VIOLATED THE MONITORING AND REPORTING CONDITIONS OF ITS PERMIT

As indicated above, the Parish's NPDES permit required it to measure several effluent characteristics of the Munster Plant's discharge -- flow, BOD_5, total suspended solids, settleable solids, pH, and fecal coliform bacteria. Flow was to be measured daily, settleable solids twice weekly, and the other characteristics weekly. The Parish was then required to summarize this information monthly on a Discharge

Monitoring Report form and to report the results to EPA quarterly. Exh. B to Bruce Affidavit at 6-10. The Parish has established a consistent pattern of non-compliance with the monitoring and reporting requirements of its permit. For purposes of this motion, plaintiff seeks summary judgment respecting 73 specific instances of failure to monitor and report effluent characteristics. A list of these violations of Condition 2, requiring the submission of DMRs, is attached as Attachment B.

The violations are established by the defendant's own Discharge Monitoring Reports, which are agency records authenticated by the Bruce Affidavit, at Exh. C. Attachment B summarizes the instances where the reports fail to show information required by the permit to be reported.

V. SINCE 1979 THE MUNSTER PLANT HAS DISCHARGED POLLUTANTS WITHOUT AN NPDES PERMIT IN VIOLATION OF THE CWA

The United States is entitled to summary judgment on its claim that the Munster Plant has discharged without an NPDES permit from October 29, 1979, the day after its NPDES permit expired, to the present time. Defendant undeniably lacks an NPDES permit. The Munster Plant "discharges" sewage every day to the Forty Arpent Canal. See Declaration of Robert Hiller, Attachment E. "Sewage" is a "pollutant." Section 502(6), 33 U.S.C. 1362(6). If these daily unpermitted discharges are into a "water of the United States," all the elements of a violation are established. Although defendant in its Motion for Summary Judgment claims that the Forty Arpent

Canal is not "waters of the United States," this claim is raised in the wrong court, ten years too late.

A. Defendant has no NPDES Permit.

Extension of expired NPDES permits is governed by 5 U.S.C. 558(c), which provides in relevant part:

> * * * When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

EPA rules, in conformity with this provision, provide that NPDES permits are automatically extended if renewal applications are "timely" and "complete." 40 C.F.R. §122.6(a)(1)(1983). Under 40 C.F.R. §122.21(d), a renewal application is timely only if submitted at least 180 days before expiration of the existing permit. The same requirement has been continuously in effect since 1973, see 40 C.F.R. §125.12(j)(1978), 38 Fed.Reg. 13533 (May 22, 1973), and was in effect at the time the Munster Plant permit expired in 1979, see 40 C.F.R. §§ 122.10, 122.12 (1979).

Defendant's NPDES permit for discharges from the Munster Plant expired on October 27, 1979. Exh. B to Bruce Affidavit at 1. Yet defendant failed to submit a renewal application until February 2, 1983, more than three years after the permit expired. Exh. E to Bruce Affidavit. Merely submitting an application, of course, does not authorize the discharge of pollutants. Thus, the Munster Plant continues to discharge without a permit to the present day.

B. Defendant is discharging into "waters of the United States."

1. Defendant is barred from challenging its 1974 NPDES permit, which includes EPA's determination that the Munster Plant discharges into "waters of the United States."

The defendant was issued an NPDES permit in 1974 "to discharge from [the Munster Plant] to receiving waters named 40 Arpent Canal (04M) * * *." Bruce Affidavit, Exh. B at 1. Defendant at that time could have sought judicial review of this permit determination in the court of appeals, but did not. This failure is dispositive of its claim that it is not discharging into "waters of the United States."

It is axiomatic that if Congress lodges judicial review powers over a matter in one court, other courts are implicitly excluded from reviewing that same matter. Foti v. INS, 375 U.S. 217 (1963); Whitney National Bank v. New Orleans Bank, 379 U.S. 411 (1965); This is true of NPDES permits, which are reviewable exclusively by courts of appeals under Section 509 of the CWA. E.g., Sun Enterprises, Ltd. v. Train, 532 F.2d 280 (2d Cir. 1976). And it is especially true of review of permit issuance actions in enforcement proceedings, which is specifically barred by Section 509(b)(2). See, e.g., United States v. Cutter Laboratories, Inc., 413 F. Supp. 1295, 1298 (E.D. Tenn. 1976).

Defendant St. Bernard Parish plainly could have raised its claim that the Forty Arpent Canal is not "waters of the United States" on review of its 1974 NPDES permit in the court of appeals. It is a principal function of reviewing courts to inquire into into the jurisdiction of an agency to

take the action under review. E.g., Batterton v. Francis, 432 U.S. 418, 426-29 (1977). Because the Parish failed to seek review when it was proper to do so, it may not now obtain it. A situation similar to this one was presented in United States v. Velsicol Chemical Corp., 438 F. Supp. 945 (W.D. Tenn. 1976). There, the defendant in an action for violation of its NPDES permit conditions contended that it was discharging into a POTW, not waters of the United States. The court rejected this argument, in part because actions in issuing the permit were not reviewable in an enforcement proceeding. Id. at 948-49.

2. The Forty Arpent Canal is "waters of the United States."

Federal jurisdiction under the Clean Water Act extends to "navigable waters," Section 502(7), 33 U.S.C. 1362(7), which are defined as "the waters of the United States, including the territorial seas." Id. It was Congress' intention that this term be given "the broadest possible constitutional interpretation * * *." S. Rept. No. 92-1236, 92 Cong., 2d Sess. at 144 (Conference Report), in 1 Legislative History at 327. See also United States v. Lambert, 705 F.2d 536, 537-38 (11th Cir. 1983); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978). The Fifth Circuit has held that the commerce clause extends to protecting estuarine waters and the fish and wildlife that inhabit them:

> destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas devastating effect on interstate commerce. * * *

Zabel v. Tabb, 430 F.2d 199, 203-04 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971).

In keeping with Congress' intention, EPA has defined the term "waters of the United States" to include all waters, including "'wetlands,' * * * the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce * * *," commerce * * *," 40 C.F.R. §122.2 (definition of "Waters of the United States.") (1983). 10/

10/ The complete definition is as follows:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (b) All interstate waters, including interstate "wetlands;"
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> (3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(fn. continued on next page)

- 16 -

"Wetlands" are defined in the same section to mean:

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Subsection (d) of the definition of "waters of the United States" also includes any "tributary" of a water otherwise falling within the definition. The definition the Corps of Engineers has established of "waters of the United States," which is substantively identical to EPA's, has been approved and applied by the Fifth Circuit in Avoyelles Sportsmen's

---

> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
> (e) Tributaries of waters identified in paragraphs (a)-(d) of this definition;
> (f) The territorial sea; and
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR §423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

This definition was in effect at all relevant times.

League, Inc. v. Marsh, 715 F.2d 897, 914-916 (5th Cir. 1983), and Buttrey v. United States, 690 F.2d 1170, 1185-86 (5th Cir. 1982), and was most recently followed by this Court in Buttrey v. United States, 573 F. Supp. 283 (E.D. La. 1983).

The Forty Arpent Canal is "waters of the United States States" because it is a tributary of wetlands that are themselves "waters of the United States" and because it is a tributary, ultimately, of the Gulf Outlet Channel of the Mississippi River. St. Bernard Parish has previously acknowledged in its 1974 permit application that the Forty Arpent Canal is a tributary of the Gulf Outlet Channel. Under "Name of receiving water or waters," the Parish entered, "40 Arpent Canal to Mississippi River - Gulf Outlet." Exh. A to Bruce Affidavit at 2. Thus, the Parish plainly believed that discharges to the Canal would ultimately find their way to the Gulf Outlet, a water that is navigable in fact. Moreover, in a 1978 report to EPA acknowledging a bypass -- that is, a discharge of raw sewage -- the Parish acknowledged that the bypass condition threatened "extensive oyster leases in the area." Exh. D to Bruce Affidavit at 1. Evidently the Parish knew its discharges would reach waters "from which fish or shellfish are or could be taken and sold in interstate commerce." Such waters are "waters of the United States." See pp. 21-22 infra.

Aside from the Parish's admissions, the evidence plentifully shows that the Forty Arpent Canal is "waters of the

-16-

United States." The Canal, which receives effluent from the Hunster.Plant, is bordered on the northern side by a levee, approximately 30 feet high. Affidavit of Dr. William Kruczynski, Attachment C (hereafter "Kruczynski Affidavit"), ¶8.c. 11/

Two pumping stations along the levee discharge water from the Canal into a wetland area north of the levee. Id. The Parish admits that these discharges periodically occur. See Affidavit of Michael Roy Merkl (hereafter "Merkl Affidavit") attached to defendant's Motion for Summary Judyment, at 2; Memorandum in Support of Defendant's Motion for Summary Judgment (Def. Mem.) at 2, 4.

The two pumping stations discharge into open water pools in the wetland area. These pools in turn are connected by open water channels through the wetland to bayou Bienvenue and the Mississippi River Gulf Outlet. Kruczynski Affidavit, ¶8.c. The areas adjacent to the levee along the entire length of the Forty Arpent Canal are wetlands, permanently saturated both by some fresh water input, probably from the Violet Canal, and by tidal action from the north. Id. ¶8.e, e.g.

These wetlands are characterized by a predominance of wetland vegetation, including Spartina alterniflora, Spartina patens, Panicum virgatum, Scirpus americanus, and Iva frutescens at the northern portions, shading to cypress and other wetland trees and shrubs toward the south. Id., ¶8.d.,

---

11/ It will assist this Court in understanding this evidence to refer to the two maps attached to Attachment G and to the diagram, photographs and infrared aerial photograph attached to the Kruczynski Affidavit, Attachment C.

8.f., 8.g. These plants are adapted for life in saturated soil. Id. The wetlands are adjacent to Bayou Bienvenue and form a a single hydrologic regime with the Bayou. Id., 18.i. See United States v. Lee Wood Contracting, Inc., 529 F. Supp. 119, 121 (E.D. Mich. 1981) (wetland is "adjacent" to water body if there is a "direct water connection" to it).

The evidence clearly shows that Forty Arpent Canal is a tributary of the wetlands and, ultimately, of Bayou Bienvenue and the Mississippi River Gulf Outlet Canal. It has been clear since United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974) that the Clean Water Act extends upstream from waters that are navigable in fact to cover their non-navigable tributaries. Defendants concede as much. Def. Mem. at 3. As this Court observed in Buttrey v. United States, 573 F. Supp. 283, 290, (E.D. La. 1983), the Government has not defined the term, "tributary." However, we submit that the Forty Arpent Canal is precisely the sort of tributary that Congress meant to cover as "waters of the United States."

First, the Congress has prohibited a cramped construction of Clean Water Act jurisdiction. As the Senate Report on the 1972 Amendments explains:

> * * * Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source. Therefore reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.

2 Legislative History at 1495. See also Avoyelles Sportsmen's League, Inc. v. Marsh, supra, 715 F.2d at 915 (quoting and

relying upon Senate Report). Courts have carried out Congress' intent by adopting a broad construction of the term "tributary" to effectuate the goals of the Act. Thus, in Ashland Oil, supra, the court affirmed the conviction of a defendant that had spilled oil into a small tributary to Little Cypress Creek, which flowed into Cypress Creek, which flowed into Pond River, which ultimately flowed into Green River. Only the Green River was navigable in fact. United States v. Ashland Oil and Transportation Co., supra, 504 F.2d at 1320. The Tenth Circuit has held that the Clean Water Act covers a discharge into a small tributary even though the record did not show whether discharges would reach downstream waters absent significant rainfall. United States v. Texas Gas Pipe Line Co., 611 F.2d 345, 346-47 (10th Cir. 1979). See also United States v. Phelps Dodge Corp., 391 F. Supp 1181, 1187 (D. Ariz. 1975) ("waters of the United States" include "normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean * * *.").

The Forty Arpent Canal plainly meets the requirements laid out in these cases. Effluent discharged into the Canal from the Munster Plant ultimately is pumped into pools in the adjacent wetlands, which are directly connected hydrologically to Bayou Bienvenue and through it to the Gulf Intracoastal Waterway and the Mississippi River Gulf Outlet Canal. See Kruczynski Affidavit, ¶¶ 8.c., 8.i.

In light of these undisputed facts, and of the consistent body of case law, defendant's contention that the Forty Arpent Canal is a "closed system," Def. Mem. at 4, must be rejected. Defendant's reliance upon the fact that the Canal is pumped, rather than "freely flowing" into the wetlands, id., is misplaced. For example, in United States v. Texas Gas Pipe Line Co., supra, and United States v. Phelps Dodge Corp., supra, there was no evidence of connection to downstream waters except on a sporadic basis. Moreover, the Parish's argument is an attempt to shift the responsibility for compliance with the Clean Water Act to the Lake Borgne Basin Levee District, a State agency that that operates the two pumping stations on the Forty Arpent Canal (see Affidavit of Peter Romanowsky, Attachment G ("Romanowsky affidavit") at 3), and away from itself. This attempt must fail.

First, the Parish is not the only discharger into the Forty Arpent Canal. The Murphy Oil Company is also a source of discharge affecting the Forty Arpent Canal. See Exh. F to Bruce Affidavit at 1. It would plainly be inconsistent with Congress' directive "that discharge of pollutants be controlled at the source," see p. 18, supra, to place Union's and the Parish's NPDES obligations on the back of the levee district.

More than that, the Forty Arpent Canal is a substantial body of water that itself merits Clean Water Act protection. It is six miles long and from 100 to 150 feet wide. Merkl Affidavit at 1. At least in the past, it supported fish; one State investigation of the Munster Plant resulted from a citizen complaint about a fish kill in the Forty Arpent Canal, a kill that the State investigator found was due in whole or in part to discharges from the Munster Plant. Romanowsky Affidavit at 4. Thus, it seems likely that the Canal meets, or would meet absent gross pollution from the Munster Plant, an independent test in EPA's regulations. Those regulations define "waters of the United States" to include waters:

> • • •
>
> (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes or;
> (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce.

40 C.F.R. §122.2 (1983) (definition of "waters of the United States").

CONCLUSION

Defendant's Motion for Summary Judgment should be denied. Partial summary judgment should be entered for the United States on the issues of liability discussed above because the material facts about which there is no genuine dispute establish that the defendant St. Bernard Parish repeatedly

violated conditions of its NPDES permit, and has discharged and continues to discharge pollutants into "waters of the United States" without an NPDES permit as required by law.

A proposed order is attached.

Respectfully submitted,

JOHN VOLZ
United States Attorney
Eastern District of Louisiana

By:

WILLIAM F. BAITY
Assistant United States Attorney
Hale Boggs Federal Building
New Orleans, LA 70130
(504) 589-3518

Reed Neuman by WFB

REED NEUMAN
Environmental Enforcement Section
Land and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530
(202) 633-5266

Alan W. Eckert

ALAN W. ECKERT
Senior Litigator
Office of General Counsel
United States Environmental Protection Agency
Washington, D.C. 20460
(202) 382-7606

-24-

OF COUNSEL:

ELYSE DiBIAGIO-WOOD
Office of Enforcement and Compliance Monitoring
United States Environmental Protection Agency
Washington, D.C. 20460
(202) 475-8187

RALPH CORLEY
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VI
1201 Elm St.
Dallas, Texas 75270

LIST OF ATTACHMENTS

A. Statement of Facts As To Which There Is No Genuine Issue To Be Tried

B. Table of Monitoring and Reporting Violations

C. Affidavit of Dr. William L. Kruczynski (with attachments)

D. United States v. Amoco Oil Co., No. 80-0801-CV-W-O (W.D. Mo. Jan 3, 1984).

E. Declaration of Robert Hiller

F. Affidavit of Shirley Bruce (with exhibits)

G. Affidavit of Peter Romanowsky

H. Proposed Order

Sample Industrial Consent Decree

GUY G. HURLBUTT
UNITED STATES ATTORNEY
DISTRICT OF IDAHO
ROOM 693 FEDERAL BUILDING
550 WEST FORT STREET
BOISE, IDAHO 83724
Telephone: (208) 334-1211

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. RAINBOW TROUT FARMS, INC. and IDAHO TROUT PROCESSORS COMPANY, Defendants.	Civil No. 82-1439 STIPULATION AND CONSENT DECREE

Plaintiff, United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), having filed a Complaint herein on December 30, 1982 alleging that defendants have discharged pollutants in violation of the Clean Water Act, 33 U.S.C. Section 1251 et seq., and the parties by their attorneys having consented to entry of this Decree;

NOW THEREFORE, before the taking of any testimony herein, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties, by their attorneys and authorized officials, it is

HEREBY STIPULATED AS FOLLOWS:

1. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. Section 1345 and Section 309(b) of the Clean

Water Act, 33 U.S.C. Section 1319(b), and jurisdiction over the parties hereto. The Complaint filed herein states a claim upon which relief can be granted against defendants.

2. The provisions of this Consent Decree shall apply to and be binding upon the parties to this action, their officers, directors, agents, servants, employees and successors or assigns. Defendants shall give notice of this Consent Decree to any successors in interest prior to transfer of ownership and shall simultaneously verify to plaintiff that defendants have given such notice.

3. Defendant Rainbow Trout Farms, Inc. is an Idaho corporation and operates a fish culturing facility near Filer, Idaho. Defendant Idaho Trout Processors Company, also an Idaho corporation, operates a fish processing plant near Filer, Idaho adjacent to the said culturing facility operated by Rainbow Trout Farms, Inc. Effluent from the processing plant is joined with effluent from the culturing facility in a tailrace. The combined effluent in whole or in part discharges directly to Cedar Draw Creek. A portion of the effluent is periodically diverted, typically from May through September annually, to an irrigation and drainage canal operated by the Twin Falls Canal Company. The diversion structure that regulates the amount of water diverted to the canal is located on defendants' property but is operated by the Twin Falls Canal Company, pursuant to the terms of a Judgment entered on February 14, 1957 in the District Court for the Eleventh Judicial District of the State of Idaho. Water from the canal in turn flows to Cedar Draw Creek. Cedar Draw Creek is a tributary to the Snake River.

4. On May 2, 1975, pursuant to Section 402 of the Clean Water Act, 33 U.S.C. Section 1342, EPA issued a National Pollutant Discharge Elimination System ("NPDES") permit to defendants. The permit authorized defendants to discharge certain amounts of pollutants to Cedar Draw Creek and required, inter alia, monthly submission of Discharge Monitoring Reports ("DMRs") to EPA stating the amounts of pollutants discharged each month to Cedar Draw Creek from defendants' fish culturing facility and processing plant. The permit allowed defendants to submit DMRs that did not specify the amounts of pollutants discharged, if defendants represented on such DMRs that for a given calendar month all of the effluent was diverted to the irrigation and drainage canal operated by the Twin Falls Canal Company and none was discharged directly from defendants' facilities to Cedar Draw Creek.

5. Defendants' NPDES permit expired at midnight on December 31, 1979. Defendants have discharged pollutants after the expiration date of that permit. There is a dispute between plaintiff and defendants as to whether defendants reasonably believed that application for renewal of that permit was necessary. Nevertheless, it is agreed that discharges occurring after the expiration date of the permit have violated Section 301 of the Clean Water Act, 33 U.S.C. Section 1311, and entitle plaintiff to the relief set forth in this Decree.

6. Despite the expiration of defendants' NPDES permit, defendants have continued to submit monthly DMRs to EPA. All of the Discharge Monitoring Reports submitted by defendants for the months from January 1980 through January, 1983 have stated that there has been no discharge of effluent from defendants' facilities directly to Cedar Draw Creek.

STIPULATION AND CONSENT DECREE - PAGE THREE OF EIGHTEEN

Form CBD-183
12-8-76 DOJ

These DMRs have been inaccurate. There have been continuous discharges in intermittent quantities of pollutants from defendants' facilities directly to Cedar Draw Creek, even though a substantial portion of the effluent is periodically diverted to the canal operated by the Twin Falls Canal Company as described in Paragraph 3 above.

7. Defendants have ceased discharges of pollutants from their facilities. On January 8, 1983, defendant Rainbow Trout Farms, Inc. removed all of the fish from the fish rearing ponds at its Filer, Idaho facility and transferred them to other locations. Also on January 8, 1983, defendant Idaho Trout Processors Company suspended fish processing at its Filer, Idaho plant.

8. On February 16, 1983, defendants submitted to EPA an application for a new NPDES permit that would authorize discharges from defendants' processing plant and fish rearing facility. EPA is currently evaluating that application and developing a draft NPDES permit in accordance with the permit-issuance procedures set forth at 40 C.F.R. Parts 122 and 124.

NOW, THEREFORE, based on the foregoing, it is hereby ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

SECTION ONE

Interim Discharge Limitations and Interim Monitoring, Sampling and Reporting Requirements

1. Until the effective date of a new NPDES permit, defendant Idaho Trout Processors Company shall record the number of pounds of fish

Effluent Characteristic	Interim Discharge Limitations		Interim Monitoring Requirements	
Parameter (units)	Monthly Average	Daily Maximum	Measurement Frequency	Sample Type
Flow (MGD)	n/a	n/a	1/week	24 hr.total
Biochemical Oxygen Demand Lbs/day	(see paragraph 3.d. below)		1/week	8 hr. composite
Total Suspended Solids Lbs/day	(see paragraph 3.e. below)		1/week	8 hr. composite
Settleable Solids ml/l	n/a	n/a	1/week	grab
Oil & Grease Lbs/day	n/a	n/a	1/week	grab
pH	Not less than 6.0 nor greater than 9.0 standard units (Both as a monthly average and as a daily maximum)		1/week	grab

a. The "daily maximum" is the maximum allowable discharge in any calendar day. The "monthly average" is the arithmetic mean of samples collected during a calendar month.

b. Effluent samples of the combined processing plant and rearing facility discharges to the Creek and/or the canal shall be taken after any treatment and prior to mixing with the receiving waters.

c. A composite sample shall consist of at least six samples taken at equal time intervals and apportioned according to the volume of the flow at the time of the sample.

d. Defendants' discharges of Biochemical Oxygen Demand ("BOD") shall comply with the following limitation: $z \leq [(0.00188)(x)] + y$. Where: x is the weight in pounds of fish processed at the processing

STIPULATION AND CONSENT DECREE - PAGE SIX OF EIGHTEEN

Form OBD-183
2-6-76 DOJ

plant on the day that effluent samples are taken (as recorded pursuant to paragraph 1 above of this Section); y is the amount of BOD discharged from the fish rearing area (as monitored pursuant to paragraph 2 above); and z is the amount of BOD discharged after treatment to Cedar Draw Creek and/or to the canal (as monitored pursuant to this paragraph 3).

e. Defendants' discharges of Total Suspended Solids ("TSS") shall be limited as follows:

i. Discharges occurring during cleaning of the fish rearing ponds or raceways shall comply with the following limitation: $z \leq [(0.00188)(x)] + .15\ y$. Where: x is the weight in pounds of fish processed at the processing plant on the day that effluent samples are taken (as recorded pursuant to paragraph 1 above of this Section); y is the amount of TSS discharged from the fish rearing area (as monitored pursuant to paragraph 2 above); and z is the amount of TSS discharged after treatment to Cedar Draw Creek and/or to the canal (as monitored pursuant to this paragraph 3).

ii. Discharges not occurring during periods of cleaning of the fish rearing ponds or raceways shall comply with the following limitation: $z \leq [(0.00188)(x)] + [(5\ mg/l)(flow\ y)(8.34)]$. Where: x is the weight in pounds of fish processed at the processing plant on the day that effluent samples are taken (as recorded pursuant to paragraph 1 above of this Section); flow y is the amount in millions of gallons per day (MGD) of water flowing from the fish rearing area (as monitored pursuant to paragraph 2 above); and z is the amount of TSS discharged after treatment to Cedar Draw Creek and/or to the canal (as monitored pursuant to this paragraph 3).

STIPULATION AND CONSENT DECREE - PAGE SEVEN OF EIGHTEEN

Form CBD-183
2-8-76 DOJ

f. Defendants may construct waste holding ponds or install any other treatment device in order to meet the discharge limitations of this paragraph 3.

4. Defendant Rainbow Trout Farms, Inc. shall not clean its rearing ponds or raceways by any process that results in the discharge of wastes to Cedar Draw Creek and/or the irrigation and drainage canal in amounts exceeding the discharge limitations stated in paragraph 3 above of this Section.

5. There shall be no discharges of floating solids or visible foam to Cedar Draw Creek and/or the irrigation and drainage canal in other than trace amounts.

6. Within twenty (20) days of entry of this Decree, defendants shall submit to EPA, at the address given in paragraph 10 below of this Section, (a) a composite one-page schematic diagram that shows the relative locations of the raceways, processing plant and the tailrace that receives the process wastes from the rearing facility and the processing plant, and which also indicates the flow patterns and points at which defendants will conduct the monitoring required by this Section of this decree, and (b) a written description of the operational procedures to be adopted by defendants to assure that personnel from the fish rearing facility and processing plant carry out the effluent monitoring required by this Section.

7. Defendants shall take the samples and measurements that are required by this Decree in such a manner to assure that they are representative of the volume and nature of the discharge. All samples required by paragraphs 1, 2 and 3 of the Section shall be taken within

STIPULATION AND CONSENT DECREE - PAGE EIGHT OF EIGHTEEN

Form CBD 183
2-8-76 DOJ

the same calendar day at the respective sampling locations shown in the diagram submitted as required by paragraph 6 above of this Section.

8. Defendants shall conduct the pollutant analyses required by this Decree in accordance with the approved test methods set forth in 40 C.F.R. Part 136.

9. For each measurement or sample required by the terms of this Decree, defendants shall maintain a record of the following information:

a. the exact place, date, and time of sampling or measurements;

b. for samples taken from the fish rearing facility, a statement indicating whether the ponds and raceways at the facility were being cleaned at the time the samples were taken;

c. the person(s) who performed the sampling or measurements;

d. the date(s) the analyses were performed;

e. the person(s) who performed the analyses;

f. the analytical techniques or methods used; and

g. the results of all required analyses.

10. Until the effective date of a new NPDES permit authorizing discharges from defendants' facilities, results of the discharge monitoring required by this decree shall be summarized by defendants on Discharge Monitoring Report forms (EPA No. 3320-1) and submitted on a semi-monthly basis to EPA with the information described in paragraph 9 above of this Section attached thereto. Separate reports shall be submitted for the processing plant and rearing facility. The reports shall be postmarked by the 15th and 30th day of each month and submitted to the following address:

Diana Banta, Chief
Water Compliance Section (M/S 513)
U. S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

Such records shall be maintained for a minimum of three (3) years following the sampling date, or for a longer period of time at the request of plaintiff.

11. Until the effective date of a new NPDES permit authorizing discharges from defendants' facilities, defendants shall notify EPA orally within twenty-four (24) hours of the time that either of them become aware of any pollutant discharge that exceeds the discharge limitations set forth in this Section of this Consent Decree. Such notice shall be made to Diana Banta, Chief, the EPA Water Compliance Section, at (206) 442-1094. Followup written notice of violations of discharge limits shall be postmarked within five (5) days following the time that either of the defendants become aware of such violations. Written notice shall be sent to the address listed supra in paragraph 10 of this Section.

12. Until the effective date of a new NPDES permit authorizing discharges from defendants' facilities, defendants shall notify EPA in writing of any violation of the discharge monitoring requirements set forth in this Section of this Consent Decree. This notice shall be postmarked within five (5) days following the time that either of defendants become aware of such violations of monitoring requirements, and shall be sent to the address listed supra in paragraph 10 of this Section.

13. Defendants shall at all times maintain in good working order and operate as efficiently as possible all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the defendants for water pollution control and abatement to achieve compliance with the terms and conditions of this Consent Decree. Proper

operation and maintenance ncludes, but is not limited to, effective performance based on designed facility removals, adequate funding, effective management, adequate operator staffing training, and adequate laboratory and process controls, including appropriate quality assurance procedures.

14. Any authorized representative of the U. S. Environmental Protection Agency, upon presentation of his credentials, may at any time enter upon the premises of defendants' facilities described herein for the purpose of determining compliance with the discharge limitations and monitoring, sampling, and reporting and recordkeeping provisions of this Decree.

SECTION TWO

Permit Discharge Limitations and Requirements for Monitoring, Sampling and Reporting

1. Except as described in Section Three infra of this Consent Decree, the Interim Requirements set forth above in Section One will be superseded by the terms of an NPDES permit as of the effective date of that permit.

2. Defendants shall comply with the discharge limitations and the monitoring, sampling and reporting requirements of an NPDES permit as of the effective date of such a permit.

SECTION THREE

Stipulated Penalties for Violation of Consent Decree

A. Noncompliance with Discharge Limitations

1. If the defendants fail to comply with the Interim Discharge Limitations for daily maximum discharges as set forth in Section One above, upon demand by the United States, the defendants shall incur and pay, within ten (10) days of the demand, to the United States a stipulated penalty of $500.00 per day of violation for the first five

(5) days (not necessarily consecutive) of such violation, and $1,000.00 per day of violation for the second five (5) days (not necessarily consecutive) of such violation, and $10,000.00 per day for each additional day of violation of such Interim daily maximum limits while these Interim Limitations remain in effect.

2. And further, upon demand by the United States, the defendants shall incur and pay, within ten (10) days of the demand, to the United States a stipulated penalty of $1,000.00 for each month during which defendants violate any of the Interim monthly average limitations set forth in Section One above while these Interim Limitations remain in effect.

B. Noncompliance with NPDES Permit Discharge Limitations

1. If the defendants fail to comply with the daily or instantaneous maximum discharge limits set forth in an NPDES permit on or after the effective date of such an NPDES permit, as referred to in Section Two above, upon demand by the United States, the defendants shall incur and pay to the United States within ten (10) days of the demand, a stipulated penalty of $250.00 per day of violation for each of the first ten (10) days (not necessarily consecutive) of such violation, and $500.00 per day of violation for each of the second ten (10) days (not necessarily consecutive) of such violation, and $1,000.00 per day for each additional day of violation of such NPDES permit daily or instantaneous maximum limits from the twenty-first (21st) such day, until the expiration of this Consent Decree.

2. And further, upon demand by the United States, the defendants shall incur and pay to the United States within ten (10) days of the demand, a stipulated penalty of $500.00 per month for each month during

which defendants violate any of the monthly average discharge limitations set forth in an effective NPDES permit, for the duration of this Consent Decree.

C. Noncompliance with Interim Monitoring, Sampling, and Reporting Requirements

1. If the defendants fail to comply with the Interim Monitoring, Sampling and Reporting requirements as set forth in Section One above, in that the defendants fail to monitor, sample and report by the date required, upon demand by the United States, the defendants shall incur and pay to the United States, within ten (10) days of the demand, a stipulated penalty of $1,000.00 for each such failure while the Interim Monitoring, Sampling, and Reporting requirements are in effect.

2. And further, if defendants submit an inaccurate Discharge Monitoring Report to EPA, upon demand by the United States, the defendants shall incur and pay to the United States, within ten (10) days of demand, a stipulated penalty of $10,000.00 for each such inaccurate report submitted while the Interim Monitoring, Sampling, and Reporting requirements are in effect.

D. Noncompliance with NPDES Permit Monitoring, Sampling, and Reporting Requirements

1. As of the effective date of a NPDES permit issued to the defendants, the terms of that permit shall set forth the applicable monitoring, sampling and reporting requirements. However, if such requirements of the permit are violated during the time that both the permit and this Consent Decree are in force, EPA may, at its discretion, and upon notice to the defendants, re-impose the Interim Monitoring, Sampling, and Reporting requirements set forth in Section One above for the duration of this Consent Decree.

2. If the defendants fail to comply with NPDES permit monitoring, sampling, and reporting requirements during the period of time that both a permit and

this Consent Decree are in force, in that the defendants fail to monitor, sample or report by the date required, upon demand by the United States, the defendants shall incur and pay to the United States within ten (10) days of the demand, a stipulated penalty of $500.00 for each such failure.

3. If defendants submit an inaccurate Discharge Monitoring Report to EPA while both an NPDES permit and this Consent Decree are in force, upon demand of the United States, the defendants shall incur and pay to the United States a stipulated penalty of $10,000.00 for each such inaccurate report that is submitted.

E. Payment of Stipulated Penalties

1. Stipulated penalties due pursuant to this Section shall be paid by cashier's check made payable to the "Treasurer, United States of America," and delivered to the Office of the United States Attorney, Room 693 Federal Building, 550 W. Fort Street, Boise, Idaho 83724.

2. Defendants Rainbow Trout Farms, Inc. and Idaho Trout Processors Company shall be jointly and severally liable for any stipulated penalties made payable under this Section.

3. Any dispute with respect to defendants' liability for a stipulated penalty shall be resolved by this Court.

4. The provisions of this Section shall not be construed to limit any other remedies, including but not limited to institution of contempt proceedings or criminal prosecution, available to plaintiff for violations of this Consent Decree or any other provision of law.

SECTION FOUR

Penalties for Past Violations and Contingent Penalties

1. In full settlement of the Complaint of the United States, defendants agree to pay a civil penalty in the total sum of SEVEN THOUSAND DOLLARS ($7,000.00), which shall be paid within five days of the date of entry of this Decree by a cashier's check made payable to the "Treasurer, United States of America," and delivered to the Office of the United States Attorney, Room 693 Federal Building, 550 W. Fort St., Boise, Idaho 83724.

2. In addition, defendants agree to pay EIGHT THOUSAND DOLLARS ($8,000.00) within five days of the date of entry of this Decree by a cashier's check made payable to the "Clerk, United States District Court for the District of Idaho," and delivered to the Office of the Clerk of the Court, Room 612 Federal Building, 550 West Fort St., Boise, Idaho 83724. By this Decree the Clerk is hereby ordered to deposit said $8,000.00 in a standard interest-bearing savings account at the Statehouse Branch of the Idaho First National Bank in Boise, Idaho. This amount shall be remitted to the defendants according to the following schedule and conditions and in the following prescribed manner.

a. Upon application by the United States and Order by the Court, $2,000.00 shall be remitted to the defendants on or about August 5, 1983, so long as defendants achieve and maintain complete compliance with the terms of this Consent Decree, including any NPDES permit, from the date of lodging of this Decree through July 31, 1983.

b. Upon application by the United States and Order of this Court, $2,000.00 shall be remitted to the defendants on or about October 5, 1983, so long as defendants maintain complete compliance with the terms of this Consent Decree, including any NPDES permit, from August 1, 1983, through September 30, 1983.

STIPULATION AND CONSENT DECREE - PAGE FIFTEEN OF EIGHTEEN

Form CBD-183
2-8-76 DOJ

c. Upon application by the United States and Order of this Court, $2,000.00 shall be remitted to the defendants on or about December 5, 1983, so long as defendants maintain complete compliance with the terms of this Consent Decree, including any NPDES permit, from October 1, 1983, through November 30, 1983.

d. Upon application by the United States and Order of this Court, the remaining $2,000.00, plus any and all accrued interest on the account, shall be remitted to the defendants on or about February 5, 1984, so long as defendants maintain complete compliance with the terms of this Consent Decree, including any NPDES permit, from December 1, 1983 through January 31, 1984.

e. Any violations of the terms of this Decree, or the requirements of any NPDES permit, during any of the two-month periods described in subparagraphs (a) through (d) of this paragraph shall result in forfeiture of a civil penalty to the United States in the amount that otherwise would have been returned to the defendants for that two-month period. In the event of such violation, upon application by the United States and Order of this Court, the Clerk's office will transmit the appropriate amount to the United States Attorney for the District of Idaho in the form of a check made payable to the Treasurer of the United States of America.

SECTION FIVE

General Provisions

1. All information and comments submitted by defendants to EPA pursuant to this Decree shall be subject to public inspection unless identified by defendants as confidential in conformance with 40 C.F.R. Part 2. The

STIPULATION AND CONSENT DECREE - PAGE SIXTEEN OF EIGHTEEN

rm C8D 183
3 76 DOJ

information and documents so identified as confidential will be disclosed only in accordance with EPA regulations at 40 C.F.R. Part 2 and C.F.R. Section 122.19.

2. This Consent Decree in no way affects or relieves defendants of responsibility to comply with any other Federal, State or local laws or regulations.

3. Any modification of this Consent Decree must be in writing and approved by this Court.

4. This Court shall retain jurisdiction of this cause solely for the purpose of enabling any party to apply to the Court at any time for such further relief as may be appropriate to interpret, enforce, modify or terminate the Decree. Otherwise, this Decree shall terminate on March 31, 1985.

5. It is further ordered that each party shall bear its own costs in this litigation, including attorney's fees.

Entered this _____ day of _____, 1983.

_____
United States District Judge

STIPULATED, AGREED and APPROVED for entry waiving notice.

RAINBOW TROUT FARMS, INC.
IDAHO TROUT PROCESSORS COMPANY

By: _____
D. Blair Clark, Attorney
Anderson, Kaufman, Ringert and Clark

/

/

/

STIPULATION AND CONSENT DECREE - PAGE SEVENTEEN OF EIGHTEEN

Form OBD-183
7-8-76 DOJ

UNITED STATES OF AMERICA

Carol E. Dinkins
Assistant Attorney General
Land and Natural Resources Division
U. S. Department of Justice

Guy G. Hurlbutt
United States Attorney

By: Jeffery W. Ring
Assistant United States Attorney
District of Idaho

Courtney M. Price
Special Counsel for Enforcement
U.S. Environmental Protection Agency

David M. Heineck
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10

STIPULATION AND CONSENT DECREE - PAGE EIGHTEEN OF EIGHTEEN

Sample Municipal Consent Decree

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 77-1163-BL

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF WELCH, McDOWELL COUNTY, WEST VIRGINIA, a municipal corporation, WELCH SANITARY BOARD, and the STATE OF WEST VIRGINIA, Defendants.	CONSENT ORDER

THIS MATTER having come before the Court upon the application of the United States of America for entry of this order; and

WHEREAS, the United States of America, the City of Welch (hereinafter, "Welch"), Welch Sanitary Board (hereinafter, "Board"), and the State of West Virginia have consented to entry of this order;

WHEREAS, this Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319(b);

WHEREAS, venue is proper in this Court pursuant to 28 U.S.C. 1391(b) and (c); and

WHEREAS, the Court finds that: Welch owns a sewage collection system in McDowell County, West Virginia, which discharges pollutants into Tug Fork; Welch controls the

financing and initiation of construction of sewage treatment works for that city; Welch created the Board to supervise, control, administer, operate and maintain any and all works for the collection and treatment of sewage which are owned by Welch; Tug Fork is a navigable waterway as defined in the Clean Water Act, section 502(7), 33 U.S.C. 1362(7); on August 23, 1974, pursuant to 33 U.S.C. 1342, and based upon an application submitted on behalf of the Board, the United States (through the U.S. Environmental Protection Agency) issued a national pollutant discharge elimination system (hereinafter, "NPDES") permit for the discharge of pollutants from the Board's sewage treatment system; the terms or conditions of the permit were not contested by the Board, Welch, or the State; the permit became effective on September 22, 1974; the permit required the Board to submit to the United States not later than March 22, 1975, a compliance schedule for termination of its discharge in accordance with 33 U.S.C. 1311(b)(1)(B); the Board has failed to submit the compliance schedule in violation of the permit; on May 17, 1976, the United States pursuant to 33 U.S.C. 1319(a)(3) and (4) issued findings of violation and an order for compliance to the Board, citing the Board for violations of its permit conditions and directing the Board to submit to the United States not later than June 18, 1976, a schedule for compliance; the Board has failed to submit the schedule for compliance in violation of the May 17, 1976, order; neither Welch nor the Board have constructed a sewage treatment works capable of achieving effluent limitations

based upon secondary treatment as defined by the Adminstrator of the Environmental Protection Agency pursuant to 33 U.S.C. 1314(d)(1); Welch and the Board have continued to discharge pollutants within the meaning of 33 U.S.C. 1311; the discharge of pollutants by Welch and the Board is not in compliance with an NPDES permit and is in continued violation of 33 U.S.C. 1311; and

WHEREAS, the parties have agreed that this order shall be lodged and made available for public comment prior to entry by the Court, pursuant to the procedures identified at 28 C.F.R. 50.7; and

WHEREAS, entry of this order is in the public interest; NOW THEREFORE,

Pursuant to F.R.C.P. 65, IT IS on this _____ day of _____, 1983, ORDERED that:

1. Municipal compliance plan.

Within 120 days of the entry of this order, or by November 30, 1983, whichever is earlier, the Board shall pursuant to F.R.C.P. 5 file with the Court and serve upon an individual designated by the United States Environmental Protection Agency (hereinafter, "EPA designate") and serve upon an individual designated by the West Virginia Department of Natural Resources (hereinafter, "WVDNR designate") a plan (hereinafter, "municipal compliance plan") for achieving compliance with the Clean Water Act. The Board shall file a municipal compliance plan which:

(a) has been certified by a registered professional engineer;

(b) identifies a treatment technology which the Board proposes to use and which will achieve the level of effluent quality attainable through the application of secondary treatment;

(c) proposes that construction of the treatment facility which will achieve the level of effluent quality attainable through the application of secondary treatment will be started by no later than May 1, 1984;

(d) proposes that construction of the treatment facility will be completed no later than May 1, 1986;

(e) proposes that the level of effluent quality attainable through the application of secondary treatment will be achieved no later than August 1, 1986;

(f) estimates the capital requirements of the treatment technology proposed;

(g) estimates the operation and maintenance costs of the treatment technology proposed;

(h) identifies the financial mechanisms proposed to be used by the Board for facility construction;

(i) identifies the financial mechanisms proposed to be used by the Board for generating adequate revenues for operation and maintenance

2. Modifications to municipal compliance plan. The United States may inform the Board of any modifications which the United States proposes to the municipal compliance plan.

In the event the Board agrees to modify the municipal compliance plan as proposed by the United States, the Board shall pursuant to F.R.C.P. 5 file with the Court, and serve upon the EPA designate and the WVDNR designate, the modifications to which the Board and the United States have agreed. In the event the Board does not agree to modify the municipal compliance plan as proposed by the United States (or in the event the Board fails to file with the Court modifications to which the United States and the Board have agreed), the United States may pursuant to F.R.C.P. 5 file with the Court and serve upon the Board proposed modifications to the municipal compliance plan. The municipal compliance plan shall be deemed to be modified as proposed by the United States unless, within fourteen days of the filing of the proposed modification, American Cyanamid applies to the Court pursuant to F.R.C.P. 7 for further order.

3. Implementation of municipal compliance plan. The Board shall implement the municipal compliance plan filed by the Board, as modified by (a) modifications filed with the Court to which the Board and the United States have agreed, (b) modifications filed by the United States and for which timely motion for further order has not been made by the Board, and (c) further order of the Court.

4. Minimum effluent limitations. After August 1, 1986, the Board and Wetzel which are enjoined from discharging any effluent from the collection system or treatment works that does not achieve the following effluent limitations:

(1) The arithmetic mean of the values for biological

oxygen demand for effluent samples collected in any period of thirty consecutive days shall not exceed 30 milligrams per liter;

(ii) the arithmetic mean of the values for biological oxygen demand for effluent samples collected in any period of seven consecutive days shall not exceed 45 milligrams per liter;

(iii) the arithmetic mean of the values for biological oxygen demand for effluent samples collected in any period of thirty days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same times during the same period;

(iv) the arithmetic mean of the values of suspended solids for effluent samples collected in any period of thirty consecutive days shall not exceed 30 milligrams per liter;

(v) the arithmetic mean of the values of suspended solids for effluent samples collected in any period of seven consecutive days shall not exceed 45 milligrams per liter;

(vi) the arithmetic mean of the values of suspended solids for effluent samples collected in a period of thirty consecutive days shall not exceed 15 percent of the arithmetic mean of the values for influent samples collected at approximately the same time during the same period;

(vii) the effluent values for pH shall be maintained within the limits of 6.0 to 9.0; and

(viii) the fecal coliform content of the effluent shall not exceed [illegible]0 per 100 milliliter as a 30-day geometric mean

based on not less than five samples during any 30-day period nor exceed 400 per 100 milliliter in more than ten percent of all samples during any 30-day period.

5. Compliance with NPDES permit. After August 1, 1986, the Board and Welch are enjoined from discharging any pollutant from the collection system or treatment works except in compliance with an NPDES permit issued pursuant to the Clean Water Act.

6. Penalty. The Board shall pay a civil penalty of [amount], by tendering a check in that amount payable to the order of the Treasurer of the United States within thirty days of the entry of this order.

7. Stipulated penalties. If the Board violates any provision of this order, the Board shall pay a civil penalty of

(i) $100 per day for each of the first 30 days of violation,

(ii) $200 per day for each of the next 60 days of violation,

(iii) $500 per day for each of the next 60 days of violation, and

(iv) $1000 per day for each of the next 60 days of violation. Thereafter, the United States may apply to the Court for appropriate penalties. The United States may apply to the Court at any time for other non-penalty relief in the event of an violation of the Act, of any permit issued pursuant to the Act, or of this order.

- 8 -

8. Nonwaiver provision. This order in no way relieves any defendant of responsibility to comply with any other State, Federal or local law or regulation. The order dated May 17, 1976, of the United States EPA retains full force and effect.

U.S.D.J.

Sample Pretreatment Consent Decree

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No.
LFE CORPORATION, INC. Defendant.	)	

CONSENT DECREE

WHEREAS, plaintiff, United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint alleging that defendant, LFE Corporation, Inc., has violated sections 307 and 308 of the Clean Water Act (the "Act"), 33 U.S.C. §§1317 and 1318;

WHEREAS, defendant, LFE Corporation, Inc. ("LFE Corporation"), a corporation organized and existing under the laws of the State of Delaware, owns and operates a facility for the production of printed circuit boards located at 55 Green Street, Clinton, Massachusetts 01510 (the "facility");

WHEREAS, the facility generates wastewater which is ultimately discharged to a treatment works owned by the Town of Clinton, Massachusetts, and operated by the Water Division of the Metropolitan District Commission, an Agency of the Commonwealth of Massachusetts;

WHEREAS, LFE Corporation admits, for the purposes of these proceedings only, that it has been and is in violation of applicable federal pretreatment requirements set forth at 40 C.F.R. Parts 403 and 413, which were promutgated pursuant to sections 307 and 308 of the Act, 33 U.S.C. §§1317 and 1318;

WHEREAS, the Court finds that this consent decree is in the public interest; and

WHEREAS, plaintiff and defendant in this action, by their respective attorneys and duly authorized representative, have consented to the entry of this decree;

NOW, THEREFORE, it is hereby ordered, adjudged, and decreed as follows:

JURISDICTION

1. The Court has jurisdiction over the subject matter of this case and the parties consenting hereto pursuant to 28 U.S.C. §1345 and section 309 of the Act, 33 U.S.C. §1319. The complaint states claims upon which relief can be granted against LFE Corporation pursuant to sections 307, 308, and 309 of the Act, 33 U.S.C. §§1317, 1318, and 1319.

APPLICATION

2. The provisions of this decree shall be binding upon LFE Corporation and its officers, directors, agents, servants, employees, successors, assigns and all persons, firms, and corporations acting under, through, or on behalf of LFE Corporation. LFE Corporation shall give notice of this consent

decree to all successors in interest, prior to transfer of ownership or operation, and shall simultaneously notify the EPA and the United States Attorney for the District of Massachusetts that such notice has been given.

CIVIL PENALTY

3. LFE Corporation shall pay a civil penalty to the United States in the amount of fifty-six thousand dollars ($56,000) within fifteen days of the date of entry of this decree. Payment shall be made by certified check payable to "Treasurer, United States of America" and shall be delivered to the United States Attorney for the District of Massachusetts.

SCHEDULE FOR COMPLIANCE

4. LFE Corporation shall construct and install pollution control equipment necessary to comply with applicable federal pretreatment requirements in accordance with the following schedule:

A. By the date of entry of this decree, begin on-site construction and installation of equipment; and

B. By April 22, 1985, complete construction and equipment installation.

5. By May 22, 1985, LFE Corporation shall achieve and thereafter maintain compliance with the General Pretreatment Regulations set forth at 40 C.F.R. Part 403 and the applicable categorical pretreatment standards for the Electroplating Point Source Category set forth at 40 C.F.R. §413.84.

-4-

INTERIM OPERATION

6. Beginning on the date of entry of this decree and continuing until May 22, 1985, LFE Coporation shall operate and maintain its wastewater treatment system so as to:

A. Maximize the efficiency of the system and minimize the discharge of metals and cyanide; and

B. Continuously maintain the pH of the wastewater so that it does not fall below 5.0 for a total of ten minutes or longer during any one day.

MONITORING AND SAMPLING

7. LFE Corporation shall sample and analyze its process wastewater, exclusive of any sanitary wastewater, as follows:

A. Beginning on the date of entry of this decree and continuing until the construction and installation of the pretreatment system is complete as set forth in paragraph 4 of this decree, samples shall be collected from the pH neutralization tank and shall be representative of all process wastewater;

B. Upon completion of construction and installation of the pretreatment system, samples shall be collected at a point subsequent to all pretreatment processes and shall be representative of all process wastewater;

C. Samples shall be obtained through composite sampling techniques and analyzed for concentrations of total cyanide, total copper, total nickel, total chromium, total zinc, total lead, total cadmium, and total metals as set forth at 40 C.F.R. Part 136. Samples shall be collected during all hours of plant operation and in accordance with the schedule set forth in paragraphs 8, 9, and 10 of this decree;

D. If LFE Corporation submits the results of six consecutive samples which demonstrate to the satisfaction of the plaintiff that:

i. Total cyanide or total cadmium is present in its process wastewater at concentrations less than or equal to five percent of the applicable daily maximum categorical standard, measurement of such parameter or parameters will cease to be required under this paragraph; and

ii. Total nickel, total chromium, and total zinc are all present in its process wastewater at concentrations less than or equal to five percent of the applicable daily maximum categorical standards, measurement of these parameters and of total metals will cease to be required under this paragraph.

The period during which the samples are collected may precede the date of entry of this decree, but no more than three samples may be collected during one week. LFE Corporation shall notify the EPA in writing prior to any change in its operations or manufacturing processes. Upon changing its operations or manufacturing processes, LFE Corporation shall repeat the sampling and analysis set forth in this subparagraph;

E. Flow shall be measured as set forth at 40 C.F.R. §403.12(b)(4), and shall be reported for each day during which samples are collected in accordance with the schedule set forth in paragraphs 8, 9, and 10 of this decree; and

F. Continuous monitoring shall be done for pH. Daily maximum and minimum pH levels shall be reported for each day during which samples are collected in accordance with the schedule set forth in paragraphs 8, 9, and 10 of this decree.

8. Beginning on the date of entry of this decree and continuing until May 22, 1985, the sampling, analysis, and monitoring required by paragraph 7 shall be done one day each week.

9. Beginning on May 22, 1985, and continuing until LFE Corporation has demonstrated continuous compliance with the requirements specified in paragraph 5 to the satisfaction of the plaintiff for four consecutive months, the sampling, analysis, and monitoring required by paragraph 7 shall be done three days each week.

10. Beginning after LFE Corporation has demonstrated continuous compliance with the requirements specified in paragraph 5 to the satisfaction of the plaintiff for four consecutive months as set forth in paragraph 9 and continuing until this decree is terminated, the sampling, analysis, and monitoring required by paragraph 7 shall be done one day each week.

REPORTING

11. Not later than seven days following the deadline contained in paragraph 4(B), LFE Corporation shall mail to EPA a notice of compliance or noncompliance with the deadline signed by its authorized representative as defined in 40 C.F.R. §403.12(k). If noncompliance is reported, LFE Corporation shall state the reason for noncompliance, the date on which it expects to comply with the requirement, and an assessment of the probability that it will comply with subsequent requirements. When LFE Corporation has completed the requirement that was the subject of a notification of noncompliance, it shall mail notice to EPA within seven days of completion of the requirement.

-7-

12. Reports on the sampling results required by paragraphs 7, 8, 9, and 10 shall be mailed to EPA on or before the end of the second week following the week in which samples are taken. The reports shall be signed by an authorized representative of LFE Corporation as defined in 40 C.F.R. §403.12(k) and shall include the sampling results, the date and time of each sample, an explanation for the cause of any violation of any applicable pretreatment standard or failure to sample, the duration of any violation, and the remedial steps taken to prevent or minimize any violation.

13. The aforementioned reporting requirements do not relieve LFE Corporation of its obligation to submit any other reports or information required by the Act, by the regulations promulgated thereunder, or by any state or local requirements.

14. Any information provided under the reporting requirements of this decree may be used by the plaintiff as an admission of the defendant in any proceeding to enforce the provisions of this decree or the Act.

STIPULATED PENALTIES

15. LFE Corporation shall pay stipulated penalties to the United States for violations of this decree, as set forth below, unless excused by the provisions of paragraph 18:

A. Five hundred dollars ($500) per day for each day

of operation by which LFE Corporation is late in meeting any of the requirements of the construction and installation schedule set forth in paragraph 4.

B. Five hundred dollars ($500) per day for each day by which LFE Corporation is late in mailing any notification or report required by paragraphs 7, 11, and 12.

C. One thousand dollars ($1000) for each violation of the sampling requirements set forth in paragraphs 7, 8, 9, and 10.

D. If LFE Corporation fails to comply with the federal pretreatment standards by May 22, 1985, as specified in paragraph 5, or fails to maintain compliance thereafter, it shall pay stipulated penalties as follows:

i. Seven hundred fifty dollars ($750) per standard per violation of any applicable daily maximum categorical standard up to and including the tenth violation of such standard;

ii. One thousand two hundred fifty dollars ($1250) per standard for the eleventh violation and each violation thereafter of such applicable daily maximum categorical standard;

iii. If the violation is in excess of twenty-five percent over the applicable daily maximum categorical standard, the penalties, as set forth above in (i) and (ii), shall be increased by two hundred fifty dollars ($250) per standard per violation;

iv. One thousand five hundred dollars ($1,500) per standard per violation of any applicable four day average categorical standard; and

v. Seven hundred fifty dollars ($750) per day for each day that the pH of the facility's discharge falls below 5.0 for a total of ten minutes or longer.

16. Stipulated penalty payments to the United States as specified in paragraph 15 shall be made by certified check

payable to "Treasurer, United States of America" and shall be delivered to the United States Attorney for the District of Massachusetts. Payments shall be made by the fifteenth day of the month following the calendar month in which any violations occur.

17. The United States reserves all legal and equitable remedies available to enforce the provisions of this decree.

FORCE MAJEURE

18. (a) In the event that LFE Corporation fails to comply with any action required to be taken by it under this decree, LFE Corporation shall not be relieved of its obligation to pay stipulated penalties under paragraph 15 of this decree except for those days of noncompliance resulting solely from circumstances beyond the control of LFE Corporation. Actions of any contractors hired by LFE Corporation to accomplish any of the actions required by this decree are presumed to be within the control of LFE Corporation. Neither increased costs associated with compliance with the requirements of this decree nor changed economic or business conditions shall be considered circumstances beyond the control of LFE Corporation.

(b) In the event that there is any dispute as to whether all or a portion of LFE Corporation's failure to comply with any of the actions required to be taken by it under this decree was caused by circumstances beyond its control, LFE Corporation shall

have the burden of proof to show (i) that the noncompliance was caused solely by circumstances beyond its control; (ii) the number of days of noncompliance that resulted from circumstances beyond its control; and (iii) that the defendant took all mitigating measures feasible to minimize the number of days of any noncompliance.

(c) The granting of relief from any obligations by the operation of this paragraph shall have no effect on any other obligations. LFE Corporation must make an individual showing of proof regarding each obligation from which relief is sought.

(d) The provisions in this paragraph shall be inoperative unless LFE Corporation notifies the person listed in paragraph 20 in writing, within fourteen days from the start of any noncompliance, of its belief that all or any portion of the noncompliance is solely the result of circumstances beyond its control.

GENERAL PROVISIONS

19. Until termination of the provisions of this consent decree, the EPA, its contractors, consultants, and attorneys shall have authority to enter the facility, at all times, upon proper identification, for the purposes of monitoring the progress of activity required by this decree, verifying any data or information submitted to EPA under this decree, and taking samples. This requirement does not relieve LFE Corporation of its obligation to allow entry pursuant to the Act.

20. Submissions required by this decree to be made to EPA shall be made in writing to the following address, unless EPA gives written notice that another individual has been designated to receive the submissions:

John E. Cianciarulo, Environmental Engineer
Permit Compliance Section
Water Management Division
U.S. Environmental Protection Agency, Region I
J.F.K. Federal Building
Boston, Massachusetts 02203

21. This decree is neither a permit nor a modification of existing permits under any federal, state, or local law and in no way relieves LFE Corporation of its responsibility to comply with all applicable federal, state, and local laws and regulations.

22. By this decree, plaintiff does not waive any rights or remedies available to it for any violation by LFE Corporation of federal or state laws, regulations, or permit conditions other than those violations specifically covered by this decree.

23. Nothing herein shall be construed to limit the authority of the United States to undertake any action against any person, including LFE Corporation, in response to conditions which may present an imminent and substantial endangerment to the public health, welfare, or the environment.

24. LFE Corporation shall be responsible for any and all expenses of any nature whatsoever incurred by the United States in collecting any outstanding penalties due under paragraphs 3

and 15 and in enforcing the requirements of this decree including, but not limited to, counsel fees.

25. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this decree.

26. Any modification of this decree shall be in writing and shall not take effect unless approved by the Court.

27. This decree shall terminate, and plaintiff will move the Court to dismiss the action, at such time as all penalties that LFE Corporation is obligated to pay under paragraphs 3 and 15 of this decree have been paid in full, all construction and installation of pollution control equipment has been completed, and LFE Corporation has maintained continuous compliance with federal pretreatment standards to the satisfaction of the plaintiff for twelve consecutive months.

28. LFE Corporation consents to the entry of this consent decree without further notice. The United States consents to the entry of this consent decree subject to publication of notice of the decree in the Federal Register, pursuant to 28 C.F.R. §50.7, and an opportunity to consider comments, said publication date to be communicated to the Clerk of the Court and the parties by attorneys for the United States.

-13-

Consented to:

For Plaintiff, United States of America:

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources
Division
United States Department
of Justice

Dated

WILLIAM F. WELD
United States Attorney
District of Massachusetts
1107 John W. McCormack Post
Office and Courthouse Building
Boston, Massachusetts 02109

By: PATTI B. SARIS
Assistant United States Attorney
Chief, Civil Division
District of Massachusetts

Dated

COURTNEY M. PRICE
Assistant Administrator
for Enforcement and
Compliance Monitoring
United States Environmental
Protection Agency

2/27/85
Dated

COLENE M. GASTON
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental
Protection Agency, Region I
J.F. Kennedy Building
Boston, Massachusetts 02203

1.30.85
Dated

Chapter Nine

Criminal Enforcement

Chapter Contents

Chapter Nine

1 Criminal Enforcement

Statutory Authority

Section 309(c) of the CWA provides criminal penalties for "willfully or negligently" discharging pollutants into the waters of the United States without an NPDES or Section 404 permit and for willfully or negligently violating pretreatment and toxic pollutant standards. The section also provides criminal penalties for the following actions:

- Willfully or negligently violating NPDES or state Section 404 permit effluent limitations or conditions [Section 404(s) provides criminal penalties for such violations of Corps of Engineers' dredged and fill permits];
- Knowingly making false statements in any document required by the CWA to be filed or maintained;
- Tampering with monitoring equipment required under the CWA; and
- Failing to give immediate notice to the appropriate federal agency of the discharge of oil or a hazardous substance into the waters of the United States (Section 311).

Exhibit 9-1 contains the CWA criminal enforcement provisions.

In addition to violation of specific federal environmental statutes, defendants in EPA criminal cases are often charged with other crimes under general federal criminal enforcement provisions found in Title 18 of the United States Code. These charges, which may arise out of the activities that ultimately result in environmental criminal charges, include: false statements (18 U.S.C. §1001), for the making of a false statement or concealing of a material fact in a matter within the jurisdiction of a department or agency of the federal government; conspiracy (18 U.S.C §371), for activities by two or more persons to commit an offense against or to defraud the United States; mail fraud (18 U.S.C. §1341), for the use of the mail to further a fraudulent scheme or artifice; and wire fraud (18 U.S.C. §1343), for the use of the telephone, radio, or television to further such schemes or artifices.

Basic Enforcement Policy

The CWA enforcement program promotes compliance with the terms and provisions of the CWA and provides the Agency with a variety of administrative, civil, and criminal enforcement options to accomplish this goal. Potential overlap often exists, however, among these various options. Theoretically, the Agency may pursue criminal sanctions in every situation that presents evidence supporting the requisite elements of proof. In conducting criminal investigations and preparing criminal referrals, it is important for the key offices involved (OECM-Criminal Enforcement, NEIC criminal investigators, Regional Counsel's Office, and program managers) to work closely together.

As a matter of enforcement policy and resource allocation, an unrestrained use of criminal sanctions is neither warranted nor practical. The commitment of investigative and technical resources necessary for the successful prosecution of a criminal case is great. More importantly, a criminal referral for investigation or prosecution can entail profound consequences for the defendant and, therefore, should reflect a considered, institutional judgment that the fundamental interests of society require the application of federal criminal sanctions. Accordingly, EPA generally confines criminal referrals to situations that--when measured by the nature of the conduct, the compliance history of the subject(s), and the gravity of the environmental consequences--reflect the most serious cases of environmental misconduct. Criminal enforcement may also be appropriate to establish a deterrant effect when a pervasive pattern of violations exists.

Criteria for Identification of a Potential Criminal Action

EPA's choice among its varying enforcement options--civil, administrative, and criminal—is, and must remain, a discretionary judgment that balances essentially subjective considerations. This section discusses the factors that EPA should address in reaching a decision to take criminal, as opposed to civil, action for serious misconduct.

Criminal Intent

An individual who engages in conduct prohibited by statute or regulation can be prosecuted civilly or administratively, without regard to the mental state that accompanied the conduct. Criminal sanctions, on the other hand, are ordinarily limited to cases in which the prohibited conduct is accompanied by evidence of "guilty knowledge" or intent on the part of the prospective defendant(s). Referred to as the scienter requirement, this element of proof exists under virtually every environmental statute enforced by the Agency. This requirement to prove a culpable mental state, as well as a prohibited act, is the clearest distinction between criminal and civil enforcement actions.

However, a prosecution for illegal discharges under the Clean Water Act can be based on either willful or negligent conduct [33 U.S.C. §1319(c)(1)]. [Note that the Refuse Act of 1899 (33 U.S.C. §§407, 411) has generally been interpreted as a "strict liability" statute. See, e.g., United States v. White Fuel Corporation, 498 F. 2d 619 (1st Cir. 1974).]

The CWA provides two different standards:

- Violations of the CWA, including the discharge of pollutants into the waters of the United States without a permit, and permit and pretreatment violations are subject to criminal penalties only if done "negligently or willfully." [Section 309(c)(1)]. This standard is unique because it is not used in any other environmental statute. It allows for criminal prosecution in those instances where the conduct is found to be only negligent. [See United States v. Frezzo Brothers, Inc., 461 F. Supp. 266 (E.D. Pa. 1978), aff'd, 602 F. 2d 1123 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).]

- Falsification of documents required to be filed or maintained is subject to criminal penalties if the act was done "knowingly" [Section 309(c)(2)].

Several courts have interpreted the meaning of these phrases as they are used in the CWA. In both standards, courts have found that the government has met its burden of proof if it can demonstrate that the violative acts were done intentionally and not as a result of accident or mistake. However, the government is not required to demonstrate that the defendant intended by these acts to violate the law. [See United States v. Ouelette, 11 ERC 1350, 1352 (E.D. Ark. 1977). (Proof of specific criminal intent in falsifying discharge monitoring reports is unnecessary to sustain conviction; proof of knowingly making false statements is sufficient.)]

The Nature and Seriousness of the Offense

EPA has limited resources for criminal case development. In addition, EPA is only one of many agencies that make demands on the services of the limited prosecutorial staffs of the Department of Justice. As a matter of resource allocation, therefore, as well as enforcement policy, EPA investigates and refers for criminal prosecution only the most serious forms of environmental misconduct.

Of primary importance to the referral decision is the extent of environmental contamination or hazard to human health that has resulted from, or was threatened by, the prohibited conduct. In general, this determination depends upon considerations such as the following:

- The duration of the conduct;

- The toxicity of the pollutants involved;

- The proximity of population centers;
- The quality of the receiving land, air, or water; and
- The amount of federal, state, or local clean-up expenditures.

EPA should also assess the illegal conduct's impact--real or potential--on EPA's regulatory functions. This factor is particularly important in cases of falsification or concealment of required records and reports or other information. For example, even if a technical falsification case can be made, criminal sanctions may not be appropriate if the falsified information could not reasonably have been expected to have a significant impact on EPA's regulatory process or decisionmaking. Where the falsification materially affects EPA decisionmaking, however, EPA should consider criminal sanctions. These cases could include falsification of a discharge monitoring report, omissions in a permit application, or alteration of a treatment process during testing periods.

The Need for Deterrence

Deterring criminal conduct by a specific individual (individual deterrence) or by the community at large (general deterrence) has always been one of the primary goals of criminal law. Where the offense is deliberate and results in serious environmental contamination or human health hazard, EPA can achieve deterrence through the use of strong punitive sanctions.

The goal of deterrence may, on occasion, justify a criminal referral for an offense that appears to be relatively minor. This would be true for offenses that--while of limited importance by themselves--would have a substantial cumulative impact if frequently committed. For example, discharging a small quantity of a toxic pollutant in violation of a permit may not seem significant as an isolated act, but if widespread, it would be extremely dangerous. EPA may also use criminal enforcement to deter an individual with an extended history of recalcitrance and noncompliance.

Compliance History of the Subject

The compliance history of the potential defendent is relevant in determining the appropriateness of criminal sanctions. In federal criminal enforcement, first offenders are generally treated less severely than recidivists (i.e., criminal sanctions become more appropriate as the incidents of noncompliance increase). Further, instituting a civil suit is never a prerequisite to filing a criminal prosecution (United States v. Frezzo Brothers, Inc., cited previously, 461 F. Supp. at 268). However, a history of environmental noncompliance often indicates the need for criminal sanctions to achieve effective individual deterrence.

The Need for Simultaneous Civil or Administrative Enforcement Action

Simultaneous civil and criminal enforcement proceedings are legally permissible [United States v. Kordel, 397 U.S. 1, 11 (1970)] and on occasion are clearly warranted. For example, where remedial or injunctive relief is necessary at the same time that criminal sanctions are appropriate, parallel civil and criminal actions may be brought.

Separate enforcement staffs must be appointed when the government initiates a grand jury investigation, if not before. The use of simultaneous proceedings provides grounds for legal challenges to one or both proceedings that, even if unsuccessful, will consume additional time and resources. Typical objections include the allegation that the government violated the criminal defendant's Fifth Amendment right against self-incrimination by using an administrative or civil enforcement proceeding to obtain from that defendant information for use in the criminal enforcement action. Thus, parallel proceedings should be avoided except where clearly justified. (See Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency, January 23, 1984.)

EPA can achieve some of the goals of a criminal prosecution, including a degree of deterrence and punishment, through a civil action that secures substantial civil penalties in addition to injunctive relief. Moreover, recent experience indicates that, while many convictions may result in a period of incarceration, criminal sentences are often limited to monetary fines and a probationary period. Thus, the use of the additional time and resources necessary to pursue a criminal investigation simultaneously with a civil enforcement action is often not justified. Nonetheless, criminal enforcement has certain advantages. Criminal actions may proceed to quicker resolution; they can reach individuals; and even where only fines and probation result, they may have a substantial deterrent effect.

Criminal Enforcement Priorities

The Office of Criminal Enforcement of the Office of Enforcement and Compliance Monitoring (OECM), in conjunction with the Agency program offices, has developed investigative priorities in each of the Agency's program areas. Through this effort, EPA focuses the investigative resources on the most serious cases of environmental misconduct. These priorities are fluid and are modified to reflect changing programmatic circumstances. In addition, the creation of these priorities does not preclude the possibility of a criminal referral for conduct not falling within these investigative priorities. (See Criminal Enforcement Priorities for the Environmental Protection Agency, October 12, 1982.)

The priorities under the CWA are listed below and can be found in the above policy. The list is random and is not intended to create a ranking within the priorities for a statute; nor is any statute given higher priority than another.

Violations of the NPDES Permit Program

Section 309(c)(1) of the CWA [33 U.S.C. §1319(c)(1)] provides misdemeanor penalties of one year of imprisonment and up to a $25,000 fine for the willful or negligent violation of conditions or limitations in NPDES permits issued by the Administrator or a state. The NPDES permit program is the primary mechanism for monitoring and controlling water pollution under the CWA.

The Agency places a high investigative priority on willful NPDES permit violations that result in, or threaten, significant environmental contamination or that pose a hazard to human health.

The elements of proof necessary for a conviction under this section are as follows:

- The defendant was operating under an effective NPDES permit;
- The defendant's act violated a condition or limitation contained in the permit; and
- The defendant acted willfully or negligently.

Exhibit 9-2 (Counts 1 through 9) contains an example of a criminal information charging violations of an NPDES permit under Section 309(c)(1).

Falsifying CWA Records and Tampering

Section 309(c)(2) of the CWA [33 U.S.C. §1319(c)(2)] provides misdemeanor penalties of six months of imprisonment and a $10,000 fine for knowing falsification of records and for tampering with required monitoring devices. EPA places a high investigative priority on cases in which the falsification or tampering has, or could reasonably be expected to have, a significant impact on EPA's regulatory process or decisionmaking.

The following elements are necessary to sustain a conviction for falsifying records:

- The defendant made a statement, representation, or certification;
- The defendant made the statement, representation, or certification in a document required to be filed or maintained under the CWA;
- The statement, representation, or certification was false; and
- The defendant knowingly made the false statement, representation, or certification.

The following elements are necessary to sustain a conviction for tampering with records:

- The defendant was required to maintain a monitoring device or method under the Act;
- The defendant falsified or tampered with the device or method or rendered the device or method inaccurate; and
- The defendant acted knowingly.

Exhibits 9-2 (Counts 10 through 12) and 9-3 (Counts 7 through 8) contain sample criminal informations charging falsification under Section 309(c)(2).

Unpermitted Discharges

Section 309(c)(1) of the CWA [33 U.S.C. §1319(c)(1)] provide misdemeanor penalties of one year of imprisonment and a $25,000 fine for willful or negligent discharges into navigable waters without an NPDES or "dredged and fill" permit.* EPA places a high investigative priority on willful, unpermitted discharges that cause, or threaten, significant environmental contamination or that pose a hazard to human health.

In order to sustain a conviction for discharging without a permit, the government must demonstrate the following elements:

- The defendant discharged a pollutant;
- From a point source (as defined in the CWA);
- Into navigable waters (as defined in the CWA);
- Without an NPDES or Section 404 permit; and
- The defendant acted willfully or negligently.

Exhibit 9-3 (Counts 1 through 6) contains a sample criminal information charging discharges without such permits in violation of Section 309(c)(1).

Violations of Toxic or Pretreatment Standards

Section 309(c)(1) of the CWA [33 U.S.C. §1319(c)(1)] provides misdemeanor penalties of one year of imprisonment and a $25,000 fine for willful or

* The Refuse Act also contains misdemeanor penalties of one year of imprisonment (including a 30-day minimum sentence) and a $2,500 fine for each violation of that Act [33 U.S.C. §411].

negligent violations of Section 307 of the CWA. Section 307 requires EPA to establish toxic and pretreatment categorical standards. Subsection (d) provides that:

> [a]fter the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

The elements necessary to prove a violation of the toxic or pretreatment standards are as follows:

- Pretreatment or toxic standards were in effect;
- The defendant operated the source;
- The source was operated in violation of a pretreatment or toxic pollutant standard; and
- The defendant acted willfully or negligently.

Violations of Section 404 Permits

Section 404 regulates the discharge of dredged and fill materials and is particularly important in protecting wetland areas. Section 404(s)(4)(A) of the CWA [33 U.S.C. §1344(s)(4)(A)] provides misdemeanor penalties of one year of imprisonment and a $25,000 fine for willfully or negligently violating conditions or limitations of a permit issued by the Corps of Engineers under Section 404 of the CWA. [Section 309(c)(1) provides identical penalties for violations of Section 404 permits issued by a state that has assumed responsibility for administering the program.]

The following elements of proof are necessary for a conviction under this section:

- The defendant was operating under an effective Section 404 permit;
- The defendant's act violated a condition or limitation contained in the permit; and
- The defendant acted willfully or negligently.

Failure To Report Spill of Oil or Hazardous Substance

Section 311(b)(5) of the CWA [33 U.S.C. §1321(b)(5)] provides misdemeanor penalties of one year of imprisonment and a $10,000 fine for failure to notify the National Response Center of a spill of oil or hazardous substance. [This provision is similar to that contained in Section 103(b) of the Comprehensive Environmental Response, Compensation and Liability

Act, 42 U.S.C. §9603(b).] EPA Regional Offices may also receive spill calls that satisfy the notification requirements. Thus, regional records should also be checked whenever a spill case is considered.

The following are elements of this violation:

- The defendant was in charge of a vessel or onshore or offshore facility;
- Oil or a hazardous substance in a reportable quantity was discharged from the vessel or facility;*
- The defendant had knowledge of the discharge; and
- The defendant failed to notify the National Response Center or other appropriate government Agency immediately upon receiving knowledge of the spill.

Procedures for the Investigation and Referral of a Criminal Case

On January 7, 1985, EPA issued "Functions and General Operating Procedures for the Criminal Enforcement Program" (Exhibit 9-4). These procedures establish the process by which suspected criminal activity is investigated, referred, and prosecuted by EPA offices and the Department of Justice (DOJ). The following discussion of investigation and referral procedures is based upon that document.

Investigation

The Office of Criminal Investigations (OCI) of the National Enforcement Investigations Center (NEIC) performs the primary role in investigating and referring to the DOJ allegations of criminal misconduct. This office is staffed by experienced criminal investigators located in each of five area field offices and five area sub-offices, covering all ten EPA Regions, and at EPA Headquarters. Exhibit 9-5 contains a list of the managing head of the OCI and of its offices.

* Discharge under this section is defined to include spilling, leaking, pumping, pouring, emitting, emptying, or dumping. It excludes discharges in compliance with NPDES permits [Section 311(a)(2)(A)]. A reportable quantity of oil is an amount sufficient to violate applicable water quality standards; to cause a film or sheen upon, or discoloration of the surface of water or adjoining shorelines; or to cause a sludge or emulsion to be deposited beneath the surface of water or upon adjoining shorelines (40 C.F.R. §110.3).

EPA may receive an initial allegation of potential criminal activity from any of several sources, including state agencies, routine compliance inspections, public-spirited or disgruntled plant employees, and citizen groups. The Agency employee who receives the allegation should discuss the information with a supervisor and then send it immediately to the Special-Agent-In-Charge or Resident-Agent-In-Charge of the responsible field office. The Special-Agent-In-Charge opens a case file* and assigns a criminal investigator (known as a Special Agent) for follow-up.

If the reliability of the allegation is unclear, the Special Agent conducts a preliminary inquiry solely to determine the credibility of the allegation and to make an initial assessment of the need for more thorough investigation. This initial inquiry is brief and does not involve an extensive commitment of resources or time. The sole purpose is to reach an initial determination on the need for a complete investigation.

Once a determination has been made by the OCI that a thorough investigation is warranted, the Special Agent immediately contacts the Regional Counsel in the Region where the investigation will be conducted. The Regional Counsel determines whether a civil enforcement action is pending or contemplated against the investigative target and assigns an attorney to work with the investigator during the case development process.

The regional attorney and Special Agent also contact the appropriate regional program office to ensure that no administrative enforcement action is pending or contemplated. While simultaneous administrative/civil and criminal enforcement actions are legally permissible, they will be the exception, rather than the rule. Generally, EPA holds an administrative or civil proceeding in abeyance pending the resolution of the criminal investigation. One exception is a situation in which emergency remedial response is mandated.

Where parallel administrative/civil and criminal enforcement proceedings are appropriate, the Office of Regional Counsel will prepare a recommendation and request for such a course of action (in consultation with the Special-Agent-in-Charge) and forward it to the Associate Counsel for Criminal Enforcement for submission to the Assistant Administrator for Enforcement and Compliance Monitoring for approval. Upon approval, such parallel proceedings will thereafter be conducted in accordance with the Agency guidance, "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency," January 23, 1984. Agency supervisors will be guided in managing the respective arms of those proceedings by the further guidance of "The Role of EPA Supervisors During Parallel Proceedings" March 12, 1985.

---

* The opening of a case file does not commit the Agency to proceed with a criminal referral at the culmination of the investigation; nor does it reflect an Agency decision that criminal conduct has occurred. All enforcement options remain open and should be considered until referral to DOJ.

The Special Agent, acting under the supervision of the area office Special-Agent-In-Charge or Resident-Agent-In-Charge, has primary responsibility for managing the investigation. The Special Agent is responsible for determining the basic investigative approach and takes the lead in conducting interviews; assembling and reviewing records; planning and executing surveillances; coordinating with state, federal, and local law enforcement agencies; planning and executing searches; developing informants; and performing other investigative tasks. A technical person from the Regional Office and a regional attorney work with the Special Agent during those portions of an investigation requiring technical and legal expertise.

Referral

A referral recommendation is prepared based on the results of the independent field investigation, or when the case cannot or should not proceed any further without the initiation of a grand jury investigation by DOJ. The Special Agent is responsible for preparing the referral package in consultation with other members of the investigative team (headquarters and regional legal and technical staff and DOJ). The regional attorney prepares a separate legal analysis of the case to be included in that package.

The Special-Agent-In-Charge and the Regional Counsel review the referral package and act as joint signatories. The regional or headquarters program office or the NEIC reviews technical portions of the package--depending on which office was the source of technical support. During this technical review, one of these technical offices should confirm that it has sufficient resources to support litigation.

Following completion of the referral package and concurrence in the referral recommendation by the Special-Agent-In-Charge and the Regional Counsel, the Region sends five copies of the referral package and all exhibits to the Director, Office of Criminal Enforcement (LE-134C), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460. Headquarters sends copies of the referral package to the local United States Attorney and DOJ after the Assistant Administrator for Enforcement and Compliance Monitoring approves the referral.

If either the Special-Agent-In-Charge or the Regional Counsel opposes the referral, that official includes a statement of the reasons for the decision and makes an alternative recommendation (i.e., close out investigation, change to civil referral, or change to administrative action). The package is nevertheless sent to the Ofice of Criminal Enforcement for review, and the Assistant Administrator for Enforcement and Compliance Monitoring makes the final referral decision.

The Headquarters review focuses on the adequacy of case development, sufficiency of evidence, adherence to the criminal enforcement priorities of the Agency, legal issues of first impression, consistency with related program office policy, and general prosecutorial merit. This review should also take into consideration any actions or statements that could undermine a

prosecution. In cases involving particularly complex issues of law, the Office of Criminal Enforcement consults the Office of General Counsel. If, following this review process, the Assistant Administrator accepts the referral recommendation, he or she sends the referral simultaneously to both the United States Attorney and DOJ. The Office of Criminal Enforcement drafts cover letters to those offices.

Referral Package Format

Referral packages should be prepared in accordance with "Format for Criminal Case Referrals," issued by NEIC on October 31, 1984. Exhibit 9-6 contains a copy of this format.*

References

Any Agency employee who is involved in the investigation and referral to the Department of Justice of allegations of criminal violations of the CWA should be familiar with the Agency documents listed below. Although a digested form of some of this material is contained in this chapter, most of the items are not covered in detail. Copies may be obtained by contacting the Office of Criminal Enforcement, OECM, LE-134C, EPA Headquarters, FTS-557-7410.

- Functions and General Operating Procedures for the Criminal Enforcement Program, January 7, 1985;
- Criminal Enforcement Priorities for the Environmental Protection Agency, October 12, 1982;
- Agency Guidelines for Participation in Grand Jury Investigations, April 30, 1982;
- The Use of Administrative Discovery Devices in the Development of Cases Assigned to the Office of Criminal Investigations, February 16, 1984;
- Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency, January 23, 1984;
- Role of EPA Supervisors During Parallel Proceedings, March 12, 1985;

* Special procedures may be used in infrequent and unusual circumstances where immediate resort to the grand jury's compulsory process may be required in investigations of ongoing illegal activity or when there are grounds to anticipate the flight of a witness or defendant. Such procedures are set forth in Part IV of "Functions and Operating Procedures for the Criminal Enforcement Program" (Exhibit 9-4).

- Guidance Concerning Compliance with the Jencks Act, November 21, 1983;

- Guidance on Sampling, Preservation and Disposal of Technical Evidence in Criminal Enforcement Matters, June 11, 1984; and

- Press Relations on Matters Pertaining to EPA's Criminal Enforcement Program (draft).

2 Exhibits

This section contains the following exhibits:

Criminal Enforcement Provisions of the Clean Water Act

CWA §309. Enforcement (33 U.S.C. §1319)

(c)(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

CWA §311. Oil and hazardous substance liability (33 U.S.C. §1321)

(b)(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the

exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

CWA §404. Permits for dredged or fill material (33 U.S.C. §1344)

(s)(4)(A) Any person who willfully or negligently violates any condition or limitation in a permit issued by the Secretary under this section shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(B) For the purposes of this paragraph, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Sample Criminal Information

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL NO. 79-20030
33 U.S.C. § 1319(c)(1)
33 U.S.C. § 1319(c)(2)

CHEMICAL FORMULATORS, INC.,
a Georgia corporation; and
MICHAEL M. WATTS

INFORMATION

The United States Attorney charges:

FIRST COUNT

1. At all times material hereto, CHEMICAL FORMULATORS, INC., a Georgia corporation, was a person engaged in manufacturing chemicals, pesticides and other substances at Nitro, West Virginia, within the Southern District of West Virginia.

2. At all times material hereto, MICHAEL M. WATTS was the production manager or plant manager of the CHEMICAL FORMULATORS, INC., facility at Nitro, West Virginia.

3. At all times material hereto, National Pollutant Discharge Elimination System Permit Number WV0000108, issued April 29, 1976 to CHEMICAL FORMULATORS, INC., upon the application of R. Eugene Kincaid, was effective and binding to regulate the discharge of pollutants from the Nitro facility into the Kanawha River, a navigable water of the United States.

4. On or about the 17th day of March, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River, in violation of Title 33, United States Code, Section 1319(c)(1)

SECOND COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 6th day of April, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River; in violation of Title 33, United States Code, Section 1319(c)(1).

THIRD COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 7th day of April, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River, in violation of Title 33, United States Code, Section 1319(c)(1).

FOURTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 10th day of June, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to

wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River; in violation of Title 33, United States Code, Section 1319(c)(1).

FIFTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 15th day of June, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River; in violation of Title 33, United States Code, Section 1319(c)(1).

SIXTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 16th day of June, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River; in violation of Title 33, United States Code, Section 1319(c)(1).

SEVENTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information

2. On or about the 17th day of June, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River, in violation of Title 33, United States Code, Section 1319(c)(1).

EIGHTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 18th day of November, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River, in violation of Title 33, United States Code, Section 1319(c)(1).

NINTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 19th day of November, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did willfully, negligently and unlawfully discharge a pollutant, to wit phenol, in an amount greater than the amount authorized by National Pollutant Discharge Elimination System Permit Number WV0000108, into the Kanawha River, in violation of Title 33, United States Code, Section 1319(c)(1).

4

TENTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 1st day of April, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did knowingly make a false statement and representation in a document filed with the United States Environmental Protection Agency under Title 33, United States Code, Section 1251, et seq.; in violation of Title 33, United States Code, Section 1319(c)(2).

ELEVENTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 2nd day of July, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did knowingly make a false statement and representation in a document filed with the United States Environmental Protection Agency under Title 33, United States Code, Section 1251, et seq.; in violation of Title 33, United States Code, Section 1319(c)(2).

TWELFTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through three of the First Count of this Information.

2. On or about the 11th day of October, 1977, at Nitro, West Virginia and in the Southern District of West Virginia, MICHAEL M. WATTS, and CHEMICAL FORMULATORS, INC., did knowingly make a false statement and representation in a document filed with the United States Environmental Protection Agency under Title 33, United States Code, Section 1251, et

seq.; in violation of Title 33, United States Code, Section 1319(c)(2).

ROBERT B. KING
United States Attorney

By: _____
MARY STANLEY FEINBERG
Assistant United States Attorney

6

Sample Criminal Information

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. CRIMINAL NO. _____

33 U.S.C. § 1319(c)(1),
33 U.S.C. § 1311, for
Counts 1-6;
33 U.S.C. § 1319(c)(2),
for Counts 7-8.

CUNNINGHAM ENTERPRISES, INC.,
a West Virginia corporation, and
I. V. CUNNINGHAM, JR.

INFORMATION

The United States Attorney charges:

FIRST COUNT

1. At all times material hereto, defendant CUNNINGHAM ENTERPRISES, INC., a West Virginia corporation, was a person engaged in the business of developing and operating a mobile home park, that is, Fairlawn Mobile Home Park, within the Southern District of West Virginia, and in the business of acquiring and disposing of fly ash, that is, refuse or waste material derived from fuel burned in boilers of Union Carbide Corporation, within the Southern District of West Virginia.

2. At all times material hereto, defendant I. V. CUNNINGHAM, JR., was president and controlling stockholder of defendant CUNNINGHAM ENTERPRISES, INC.

3. At all times material hereto, CUNNINGHAM ENTERPRISES, INC., and I. V. CUNNINGHAM, JR., the defendants, owned and operated a main fly ash settling pond and an emergency fly ash settling pond, both ponds located adjacent to Fairlawn Mobile Home Park.

4. At all times material hereto, National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number WV 0002381 issued February 26, 1975, to Cunningham Realty Company transferred to defendant CUNNINGHAM ENTERPRISES, INC., and effective March 26, 1975, regulated the discharge of

pollutants from outfall 001, which was located at the main fly ash pond, into Finney Creek.

5. At all times material hereto, Finney Creek and Dutch Hollow were navigable waters as defined in Title 33, United States Code, Section 1362(7).

6. On or about May 21, 1976, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, I. V. CUNNINGHAM, JR., the defendant, did wilfully and negligently discharge and cause to be discharged a pollutant, to wit, sewage, from a point source into Finney Creek, without having obtained an NPDES permit authorizing said discharge of sewage; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1).

SECOND COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about March 29, 1977, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did wilfully and negligently discharge and cause to be discharged a pollutant, to wit, sewage, from a point source into Finney Creek, without having obtained an NPDES permit authorizing said discharge of sewage; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1).

THIRD COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about June 28, 1977, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did wilfully and negligently discharge and cause

to be discharged pollutants, that is, industrial waste, into Dutch Hollow, from a point source other than the source authorized by NPDES Permit Number WV 0002381, and without having obtained an NPDES permit for said discharge of industrial waste; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1).

FOURTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about November 16, 1977, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did wilfully and negligently discharge and cause to be discharged pollutants, that is, industrial waste, into Dutch Hollow, from a point source other than the source authorized by NPDES Permit Number WV 0002381, and without having obtained an NPDES permit for said discharge of industrial waste; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1).

FIFTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about April 13, 1978, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did wilfully and negligently discharge and cause to be discharged pollutants, that is, industrial waste, into Dutch Hollow, from a point source other than the source authorized by NPDES Permit Number WV 0002381, and without having obtained an NPDES permit for said discharge of industrial waste; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1)

SIXTH COUNT

1.. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about May 28, 1979, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did wilfully and negligently discharge and cause to be discharged a pollutant, to wit, sewage, from a point source into Finney Creek, without having obtained an NPDES permit authorizing said discharge of sewage; in violation of Title 33, United States Code, Sections 1311 and 1319(c)(1).

SEVENTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about April 6, 1978, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did knowingly make and cause to be made a false statement and representation in a document, that is, a letter dated April 6, 1978, which letter was written in response to a request for information made by the United States Environmental Protection Agency pursuant to Title 33, United Stated Code, Section 1318, knowing such document to contain a false statement and representation regarding discharge of sewage from mobile home units of the Fairlawn Mobile Home Park as follows

> "In regard to question number (1), I am advised as of 1973 all of the mobile homes in the Fairlawn Mobile Home Park were disposing of the sewage through connection to the Dunbar Sanitary Board sewer system, excepting 23 mobile home units which were connected to septic tank systems.
>
> 2. The disposal system set forth in paragraph (1) was used until October, 1975, at which time all units were then connected to the West Dunbar Public Service District.

3. (a) City of Dunbar Sanitary Board system;

(b) Occurred prior to the corporate charter of Cunningnam Enterprises, Inc.;

(c) May, 1977, for all but 23 mobile home units and the remainder in July, 1977,

(d) 27th Street lift station.

You should be advised that as noted above, the entire sanitary sewage system for all of the mobile homes comprising the Fairlawn Mobile Home Park were on July 1, 1977, connected to the West Dunbar Public Service District, which is not a municipal sewage collection treatment system, and is a public service district organized under the laws of the State of West Virginia."

when, in truth and in fact, as defendant CUNNINGHAM ENTERPRISES, INC., then and there well knew, sewage from Fairlawn Mobile Home Park was being discharged into the main fly ash pond and thence into Finney Creek; in violation of Title 33, United States Code, Section 1319(c)(2).

EIGHTH COUNT

1. The United States Attorney hereby realleges each and every allegation contained in paragraphs one through five of the First Count of this Information.

2. On or about July 7, 1978, at or near Dunbar, Kanawha County, West Virginia, and within the Southern District of West Virginia, CUNNINGHAM ENTERPRISES, INC., the defendant, did knowingly make and cause to be made a false statement and representation in a document, that is, a letter dated July 7, 1978, which letter was written in response to a request for information made by the United States Environmental Protection Agency pursuant to Title 33, United States Code, Section 1318, knowing such document to contain a false statement and representation regarding discharge of sewage into the main fly ash pond of CUNNINGHAM ENTERPRISES, INC., as follows:

"Sanitary wastes were deposited in the main fly ash settling pond coming from adjacent dwelling houses not owned or controlled by the Permittee

"Not sure. Evidence was noted of the same by the West Virginia Department of Natural Resources but not sure as to whether or not such sanitary waste came from the septic system or from the adjacent dwelling houses inasmuch as they had no septic systems or sewage disposal systems."

when, in truth and in fact, as CUNNINGHAM ENTERPRISES, INC., the defendant, then and there well knew, sewage from Fairlawn Mobile Home Park was being discharged into the main fly ash pond and thence into Finney Creek; in violation of Title 33, United States Code, Section 1319(c)(2).

ROBERT B. KING
United States Attorney

By: Michael E. Wirck
MICHAEL E. WIRCK
Assistant United States Attorney

DATED: February 20, 1981.

Functions and General Operating Procedures for the Criminal Enforcement Program

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

JAN [illegible]35

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Functions and General Operating Procedures for the Criminal Enforcement Program

FROM: Courtney M. Price
Assistant Administrator

To: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Regional Counsels

I am pleased to transmit the final operating procedures for the criminal enforcement program. These procedures were developed after extensive coodination with and comments from the Regional offices and program staffs. Your assistance has been valuable in developing procedures that will accomodate the interests and needs of the various offices of the Agency and enhance our ability to conduct a rigorous and effective criminal enforcement effort. These procedures replace the interim operating procedures which were issued in January, 1984.

We have attempted in this guidance to recognize the significant role that the Regional Counsels, Regional Program Offices and the National Program Managers play in the criminal enforcement program. Active participation by all of us is essential to its success. I look forward to working closely with you.

Specific questions concerning this guidance may be directed to Randall M. Lutz, Assistant Enforcement Counsel for Criminal Enforcement (FTS 382-4543; E-Mail Box EPA2201).

Attachment

FUNCTIONS

and

GENERAL OPERATING PROCEDURES

for the

CRIMINAL ENFORCEMENT PROGRAM

I. PURPOSE AND PHILOSOPHY

These General Operating Procedures establish the process by which suspected criminal activity is investigated and prosecuted by the various agencies and officials involved. In addition, the functions, roles and relationships of these entities are set forth under a variety of circumstances. Because of the need in each case to involve many geographically dispersed professionals of various disciplines, this guidance emphasizes a "team" approach to the investigation and prosecution of criminal cases. The procedures set forth below are not to be rigidly interpreted. It is recognized that certain cases may require flexibility to proceed successfully.

II. ROLES AND RELATIONSHIPS

Most aspects of the Agency's enforcement program have been delegated in significant measure to the Regional Offices. The critical stage in development of the criminal enforcement program, the need for specialized expertise and consistency, however, dictate a centralized management approach for the program. Management of criminal legal and policy functions will be focused at Headquarters, and the management of criminal investigative functions will be focused at the National Enforcement Investigations Center (NEIC). It is understood that the actual enforcement efforts in each case will require a team effort which relies upon the contribution of Headquarters and regional legal and technical staff and the Department of Justice (DOJ).

The Office of Enforcement and Compliance Monitoring (OECM): The Assistant Administrator for Enforcement and Compliance Monitoring

The Administrator has delegated the responsibility to develop and implement this program to the Assistant Administrator for Enforcement and Compliance Monitoring (the Assistant Administrator). The Assistant Administrator maintains policy and operational control for this program through the Associate Enforcement Counsel for Criminal Enforcement and Special Litigation (the Associate Enforcement Counsel) and the Director, NEIC.

Criminal enforcement policies and priorities are established through the Assistant Administrator. The Assistant Administrator oversees the criminal investigating program, and reviews and approves criminal referrals to DOJ. The Assistant Administrator ensures consistent and complementary use of the civil and criminal enforcement authorities available to the Agency (including, where appropriate, parallel proceedings), develops and defends the budget, and allocates investigative resources for the program.

The Associate Enforcement Counsel for Criminal Enforcement and Special Litigation

The Associate Enforcement Counsel, through the Assistant Enforcement Counsel for Criminal Enforcement (the Assistant Enforcement Counsel), is responsible for providing legal guidance to the Agency on all aspects of the criminal enforcement program, informing the Assistant Administrator of ongoing case activity and articulating investigation and litigation priorities by developing an enforcement strategy, together with the NEIC, for the program. To implement these responsibilities, the Associate Enforcement Counsel through the Assistant Enforcement Counsel, supervises the Criminal Enforcement Division (CED) which coordinates the team investigation and prosecution of criminal cases with DOJ's Land and Natural Resources Division and local federal and state agencies; provides legal advice and support to the NEIC's Office of Criminal Investigations (OCI) and to the Regional Counsels; reviews all criminal referrals to DOJ; participates in the prosecution of selected cases of national importance or that exceed the resources of local or regional offices; makes recommendations on the use of parallel proceedings; develops training programs for agency legal and regional program staff; issues legal updates of significant decisions by the United States Supreme Court and other courts; and reviews the legal soundness and consistency of guidances and procedures developed throughout the Agency.

The National Enforcement Investigations Center (NEIC)

The Director, NEIC, through the Assistant Director for Criminal Investigations (the Assistant Director) , monitors and supervises all investigative activities arising under the criminal enforcement program through the Office of Criminal Investigations' Area Offices (and Resident Offices), the Washington Staff Office, and the NEIC Investigative Unit. The NEIC formulates procedural and technical guidance for the conduct of Agency investigations.

The Director, NEIC, assumes overall responsibility for recruiting the Agency's investigative staff, informing the Assistant Administrator of investigative activity; and recommending how investigative resources should be allocated among the Regions consistent with national enforcement strategies. The NEIC develops and implements training programs on operational aspects of criminal case development for Agency personnel. It assumes responsibility for technical support in Agency criminal investigations that have inter-regional ramifications or that exceed the resources of the technical staffs of individual Area or Regional Offices.

The NEIC oversees the criminal investigative activity in each of the Area Offices. Further, while day-to-day investigative

decisions are usually made in the Area Office under the supervision of a Special-Agent-in-Charge (SAIC), in designated cases of national significance or of particular sensitivity, the Assistant Director has the authority to direct the investigative activity of any Area Office. The Assistant Director also reviews and concurs in performance evaluations of the criminal investigators (Special Agents) and conducts the performance evaluations of the SAICs. Final approval of SAIC performance evaluations is given by the Director, NEIC.

Area Offices: A key component of the NEIC's centralized management approach to the criminal enforcement program has been the development of Area Offices. Special Agents constitute Headquarters rather than regional resources and are part of the staff of NEIC. They are housed in an Area Office and are supervised by a SAIC who reports to the Assistant Director. The management of any given investigation is the primary responsibility of the Special Agent, acting under the immediate supervision of the SAIC.

The SAIC in each Area Office ensures that events (witness interviews, investigative developments, opening and closing of investigations) in each of the cases and investigations are properly documented by the investigative staff utilizing standard agency forms. In certain Regions, the numbr of Special Agents assigned and the investigative caseload has not yet risen to a level justifying the presence of an Area Office. A Resident Office will be located in each such Region, directed by a Resident-Agent-in-Charge who reports in turn to the SAIC who is responsible for the Region in which the Area Resident Office is located.

NEIC Investigative Unit: A Special NEIC Investigative Unit, also staffed by experienced Special Agents, is located at the NEIC headquarters in Denver. Unlike Area Offices, this unit has national jurisdiction, focusing on cases that span the jurisdiction of two or more Area Offices, that set national precedent or where investigative demands are beyond the capacity of a particular Area Office. Investigators assigned to this unit also participate, where appropriate, in investigations in which the NEIC is providing technical support. The NEIC Investigative Unit -- like the Area Offices -- is managed on a day-to-day basis by a SAIC, who reports in turn to the Assistant Director.

Washington Staff Office: The Washington Staff Office serves as the OCI's focal point at EPA Headquarters and provides a liaison with all Headquarters program offices and with law enforcement agencies located in the Washington area. This office selectively participates in investigations of national importance.

-4-

The Office of Regional Counsel (ORC)

Special Agents will coordinate closely with Regional Attoneys throughout the investigative process and will utilize the expertise of selected Regional Attorneys for advice on specific cases and EPA's statutes and regulations. To facilitate this consultation, each ORC will designate a Regional Attorney to serve as a contact with the criminal enforcement program. Furthermore, this Regional Attorney will be assigned to a case early in the case development process to assist as needed in the investigation, indictment, and prosecution. Both the Regional Attorney and the Special Agent coordinate and consult with the CED in resolving issues concerning the application of criminal law to the criminal enforcement of environmental statutes.

The Regional Attorney may become a member of the prosecution team, joining the prosecutor, the attorney from the CED, technical and program personnel and the Special Agent. The Regional Attorney may assist in evidence review or documentation and statutory and regulatory interpretation and other functions as assigned by the Regional Counsel necessary for the successful prosecution of the case. The CED supports such activities by providing specialized expertise in the application of criminal law to environmental enforcement.

The Regional Administrator

The Regional Administrator, or his designee, will be kept apprised of criminal enforcement matters occurring in the Region. To coordinate criminal investigations with other Agency activities, notification to the Regional Administrator should occur, for example, when a decision is made to pursue parallel civil/criminal enforcement proceedings, or when investigations involve companies or individuals who are also involved with the Agency on other, unrelated matters. It is the responsibility of the Regional Counsels (as advised by the Regional Attorney assigned to assist in a criminal investigation) to timely notify the Regional Administrators of appropriate cases and developments. The Director, NEIC, and appropriate Regional Program Division Directors will notify the Regional Administrators of appropriate investigative situations. Once apprised of a criminal enforcement activity, it is the Regional Administrator's function to notify State regulatory agencies of important developments in criminal investigations as appropriate.

The Program Assistant Administrators

As the national program managers, the Program Assistant Administrators work with the CED in the establishment of Agency-wide and media-specific compliance and enforcement priorities. These priorities will provide a framework for decisions on the allocation of EPA's criminal investigative and technical resources.

-5-

As in other enforcement areas, Program Assistant Administrators provide technical support and other resources to Headquarters and to the regions to support criminal investigations, case development and prosecution. NEIC and the CED will provide the Program Assistant Administrators with projections of anticipated resource needs to ensure adequate technical and legal support for such purposes.

Each Program Assistant Administrator will appoint one individual to coordinate with the CED and the NEIC on criminal enforcement matters. Subject to the normal constraints on dissemination of information concerning criminal cases, consultation will occur during the referral review process to ensure that a specific case does not raise policy issues that should be brought to the attention of the Assistant Administrator prior to the referral decision.

The Regional Program Division Directors

The Regional Program Division Directors play an important role in the case development process by providing upon request technical support for an investigation through consultation or actual field work, as needed and as resources are available. The expertise of the technical staff in the various media is an excellent resource for case development. Also, in those cases that are prosecuted and go to trial it will often be necessary for the regional technical staff to testify as determined by the prosecutor.

The Regional Program Division Directors will designate a contact staff member for support of criminal investigations involving the functions of that division.

The Office of General Counsel (OGC)

In criminal enforcement matters, as in other areas of Agency activity, the General Counsel is responsible for interpreting laws and regulations to ensure their consistent application. OGC attorneys also assist in resolving legal issues involving the interpretation of environmental statutes that arise during investigations, during the review of criminal referrals, or during the prosecution of criminal cases. OGC also participates in the preparation of briefs and other court documents in criminal cases, and, in consultation with CED, makes determinations whether to appeal adverse court decisions.

The Department of Justice (DOJ)

DOJ and local United States Attorneys provide legal advice upon request during field investigations and obtain criminal search warrants and other court processes in support of EPA criminal cases. They direct the conduct of grand jury investigations and proceedings, and all prosecutions and appeals of

federal criminal environmental cases. In consultation with EPA attorneys and investigators, DOJ prosecutors negotiate and accept plea agreements and make sentencing recommendations. In addition, DOJ monitors the exercise of law enforcement powers by EPA Special Agents.

III. INITIATION AND CONDUCT OF AN INVESTIGATION

This Section describes the interaction of the participating offices in the initiation and pursuit of a routine investigation. The roles described herein are for guidance and can be changed to accommodate the special circumstances of the investigation and prosecution of a specific case.

Initiation of an Investigation: Preliminary Inquiry

An initial "lead" or allegation of potential criminal activity may come to the Agency from any of several sources, including State agencies, routine compliance inspections, citizens or disgruntled company employees, among others. Regardless of its source, the SAIC and/or the Resident-Agent-in Charge (RAIC) should be immediately notified. The SAIC or RAIC evaluates the lead and, if necessary, assigns a Special Agent for follow-up, assigns a case number and opens an investigative file.

If the reliability of the lead is unclear, the Special Agent conducts a preliminary inquiry to determine the credibility of the allegation and makes an initial assessment of the need for a more thorough investigation. This initial inquiry is brief, and involves no extensive commitment of resources or time. The purpose is to reach an initial determination on the need for a complete investigation. The CED is consulted if this determination concerns legal issues of criminal liability.

Conduct of an Investigation

Because the complexity of many environmental criminal investigations requires the skills of various disciplines, a team approach to the prosecution is necessary. If, after the preliminary inquiry, the SAIC feels that the lead warrants thorough investigation, the Special Agent will immediately contact the appropriate Regional Counsel to determine whether any civil enforcement action is pending or contemplated against the investigative target. The Special Agent contacts the designated regional program contact person for assistance and transmittal of information when necessary. The Special Agent contacts the appropriate Regional Program Division Directors to determine whether any administrative enforcement action is pending or contemplated against the target. For any particular case where technical support during the investigation is needed,

-7-

the appropriate Regional Program Division Director will be asked to designate specific individuals to work with the Special Agent during the investigation. These activities are carried out in consultation with the NEIC.

Overall management of the investigation is the sole responsibility of the Special Agent, acting under the supervision of the RAIC or SAIC. The Special Agent is responsible for determining the basic investigative approach, and takes the lead in conducting interviews, assembling and reviewing records, planning and executing surveillances, coordinating with the United States Attorney's offices and other federal, state and local law enforcement agencies, obtaining and executing search warrants, communicating with informants, contacting other witnesses and performing other investigative functions.

In pursuing an investigation, the Special Agent is responsible for completing all required reports and coordination and notification requirements (interview summaries, reports of investigation, etc.). As a general practice, only one member of the investigative team will record or document any stage or development in the investigation.

Issues and problems concerning the use of discovery devices, the confidentiality of business information, delegations of authority within the Agency, interpretation and application of State statutes and enforcement proceedings, internal EPA policy and guidance, the impact of decisions by the United States Supreme Court and other courts, and elements of proof under EPA's environmental criminal provisions are legal issues that will have to be resolved by the CED, ORC and OGC contact. It is the responsibility of the Special Agent to consult with and seek the guidance of the legal contact of the ORC and the Assistant Enforcement Counsel on these and similar issues throughout the pre-referral investigative process.

Parallel Investigations and Proceedings 1/

While simultaneous administrative/civil and criminal enforcement actions are legally permissible, they are resource-intensive

---

1/ Agency guidelines on parallel proceedings were issued on January 23, 1984. (See memorandum "Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency", Assistant Administrator, Office of Enforcement and Compliance Monitoring to Assistant Administrators, Regional Administrators, Regional Counsels, and Director, NEIC, January 23, 1984). Agency officials and staff should consult these guidelines prior to conducting parallel investigations or proceedings. Further guidance on specific issues concerning parallel proceedings is expected to be published.

and fraught with potential legal pitfalls. Parallel proceedings will nevertheless be pursued where the public interest requires a dual approach, e.g., where both injunctive relief or remedial action and criminal sanctions are warranted. Where injunctive relief is not needed, and where the conduct warrants criminal sanctions, an administrative or civil proceeding seeking punitive penalties would generally be held in abeyance by the Region pending the resolution of the criminal investigation. The criminal referral and the parallel administrative/civil action of the Regional Office will each be considered to be separate referrals for Regional management reporting purposes. Where parallel proceedings are justified, the criminal investigation will be pursued in accordance with Agency guidance on the conduct of a parallel proceeding. The Assistant Administrator will approve the conduct of parallel proceedings upon the advice of the Associate Enforcement Counsel and will notify the Regional Administrator of the approval.

Coordination with State/Local Enforcement

It is recognized that many investigations and cases can be prosecuted at either the federal or state/local level. It is the goal under this policy over time to refer more cases more frequently to the state/local level as the abilities and resources at those levels increase and the case load at the federal level becomes more difficult to manage. Although this concurrent jurisdiction raises some issues (e.g., how to avoid duplication of effort, how to obtain the best result, should separate cases ever be brought, etc.), they do not warrant the issuance of a formal general operating policy in this area. If the need becomes apparent, a policy will be drafted for review and comment.

Whatever determinations are made about the level at which environmental criminal cases should be prosecuted, it is vitally important that at the investigative level close coordination is maintained between and among federal and state/local law enforcement and regulatory agencies. SAICs are responsible for ensuring regular communication, exchanges of information under appropriate assurances of security, and coordinated actions between OCI and such agencies in investigative activities generally and with respect to specific investigations.

IV. REFERRAL PROCEDURES

Routine Referrals

Criminal cases shall be developed as thoroughly as possible prior to referral to DOJ. During this investigative and case

preparation process, informal coordination among the Special Agent, the CED, the Regional Attorney, DOJ and local United States Attorneys is encouraged.

A referral recommendation will be developed when the field investigation has been completed. At this point, the results of the investigation are assembled in a referral package by the Special Agent. The Special Agent assigned to the investigation is responsible for coordinating the preparation of the overall referral package and consulting with other members of the investigative team. A separate legal analysis is drafted by the Regional Attorney.

Once the referral package is prepared, it is reviewed by the SAIC and the Regional Counsel, who act as joint signatories. Technical portions of the package are also reviewed by the Region or Headquarters program office or the NEIC, depending upon the source of technical support. During this technical review, the technical resources to support the ensuing prosecution should also be identified and their availability specifically confirmed by the appropriate technical office.

Following completion of the referral package and concurrence in the referral recommendation by the SAIC and the Regional Counsel, five copies of the referral package (with all exhibits) should be directed to the Associate Enforcement Counsel, and one copy to the Director, NEIC. No copies of this referral package will be sent to the local United States Attorney or DOJ until Headquarters has reviewed the referral package and the Assistant Administrator has approved the referral. However, the Special Agent is encouraged to consult and review documents with the local AUSA or DOJ prosecutor who will be handling the case at the earliest possible time, as needed for legal advice and for case development strategy at any point in the invesigative process, even if the formal referral has not yet been made.

The Headquarters review will focus on the adequacy of case development, adherence to the criminal enforcement priorities of the Agency, legal issues of first impression, consistency with related program office policy, and overall prosecutorial merit. In cases involving particularly complex issues of law, the CED will also consult with OGC and DOJ attorneys. If, following this review process, the referral recommendation is accepted by the Assisistant Administrator, copies of the referral package will be directed simultaneously to the local United States Attorney and to DOJ. Appropriate cover letters will be drafted by the CED for the signature of the Assistant Administrator.

-10-

Emergency Assistance from United States Attorneys

In unusual circumstances, it may be necessary to secure the immediate assistance of the local United States Attorney for legal process. For example, immediate resort to the grand jury's compulsory process may be required in investigations of ongoing illegal activity, or when there are grounds to anticipate the flight of a witness or defendant. Such situations will arise infrequently. When they arise, the SAIC, with the knowledge of the Regional Counsel, will contact the NEIC, which will in turn consult with the CED. Following approval by the Assistant Administrator, telephonic authorization to contact the AUSA for appropriate assistance will be granted in appropriate cases. Copies of all materials normally included in a referral package (which have been transmitted to the local AUSA in connection with the emergency situation) will then be directed immediately and simultaneously to NEIC, to the CED and to the Environmental Crimes Unit (ECU) of DOJ's Land and Natural Resources Division. These copies will be sent within 48 hours. Appropriate follow-up letters to the AUSA and DOJ will be drafted by the CED confirming the emergency situation.

V. POST-REFERRAL PROCEDURES

Following referral to DOJ, responsibility for managing the prosecution rests with the prosecutor assigned to the case. Usually, the prosecutor is a member of the local United States Attorney's office. In cases of national significance or beyond the resources of the local United States Attorney, the case may be managed by the ECU. The ECU monitors the progress of federal environmental criminal referrals throughout the country. Within EPA, oversight of the criminal prosecution docket is the responsibility of the CED.

The Special Agent responsible for the investigation, working in close cooperation with the Regional Attorney assigned to the case, acts as primary liaison with DOJ or the local AUSA. This Special Agent performs and coordinates additional investigation as required and usually will be designated a special agent of the grand jury if a grand jury presentation or investigation is initiated.

Many of EPA's criminal cases are developed further through the grand jury. Stringent, closely-monitored rules govern the conduct of grand jury investigations. To ensure the secrecy of the grand jury process, no one may have access to information received by the grand jury without court per-

mission or rule authorization unless otherwise permitted by law. Agency officials are responsible for familiarizing themselves completely with these rules prior to participating in a grand jury investigation. 2/

The CED and ORC attorneys are responsible for fulfilling requests for legal assistance during the litigation of the case. CED attorneys will coordinate with Regional Attorneys and OGC in responding to these requests. Regional program offices and NEIC technical staff will be available to provide technical support as needed.

VI. PLEA BARGAINING

Negotiation of settlements in criminal cases (i.e., plea bargaining) is the sole responsibility of DOJ and the local AUSA although consultation with the investigative team and the Regional Administrator is strongly encouraged. Following referral of a criminal case, Agency officials should never enter into independent negotiations or discussions with the subject(s) of that referral without prior coordination with and approval from the DOJ attorney or the AUSA overseeing the case. It is, of course, entirely appropriate for Agency officials working on the criminal prosecution -- including investigators, attorneys and technical personnel -- to provide input, suggestions and advice during the negotiation process. DOJ or the AUSA conducting settlement negotiations should consult the CED before entering into any final settlement.

VII. CLOSING INVESTIGATIONS

A case may be closed prior to or after referral to DOJ for one or more of the following reasons: initial allegation unfounded, referral for administrative/civil enforcement action, referral to another agency or law enforcement office, lack of prosecutorial

---

2/ Agency guidelines on grand jury investigations were circulated on April 30, 1982. (See memorandum "Agency Guidelines for Participation in Grand Jury Investigations", Associate Administrator for Legal and Enforcement Counsel and General Counsel to Assistant Administrators, Regional Administrators, Regional Counsels and Director, NEIC, April 30, 1982.) Agency officials should consult these guidelines prior to participation with DOJ in a grand jury investigation.

merit, declination by DOJ or resolution of the case after the filing of charges. The decision to close an investigation (unless it occurs because of court action or a jury decision) is one which usually is made after consultation among EPA attorneys, the SAIC and the prosecutors (if it occurs after referral to DOJ).

VIII. DEBARMENT AND SUSPENSION

As stated at 40 C.F.R. § 32.100, "it is EPA's policy to do business only with participants which properly use federal assistance." To protect the interests of the Government, EPA has the authority to deny participation in its programs to those who are either debarred or suspended (listed) for their illegal or improper activities. This guidance sets forth when and how a referral for debarment is to be made.

Upon Conviction

Under the regulations, only convictions mandate listing. Immediately upon obtaining a conviction for the violation of either the Clean Air Act or the Federal Water Pollution Control Act concerning a "facility", as defined in 40 C.F.R. § 15.3(1), the SAIC in the region where the conviction was obtained will telephonically notify the CED for purposes of further referring the matter for "listing" the violating facility. The CED will verify the conviction by obtaining a copy of the court's judgment of conviction and referring the matter with the relevant information and documents to the listing official in OECM.

At Other Times

At any time during the investigation or prosecution of a case, but before the case is closed, the SAIC may review the facts of the case to recommend to the Assistant Director whether a referral should be made to the Director, Grants Administration Division, for debarment and/or suspension of the person or company from the opportunity to participate in EPA assistance or subagreements pursuant to 40 C.F.R. Part 32. If the decision by the Assistant Director, after reveiw by the Director, NEIC, to refer the matter for debarment is made at the time the case is to be closed, the Assistant Director will send the relevant documents along with a report (stating the reasons for the referral) to the CED, which will review those materials and, if meritorious, make a recommendation for referral through the Associate Enforcement Counsel to the Assistant Administrator. If approved by the Assistant Administrator, the matter will then be referred to the Director, Grants Administration Division.

Any decision by the Assistant Director to refer the matter for debarment while the investigation is ongoing or while the prosecution is pending will be done in accordance with the procedures for parallel investigations set forth in Section II of these General Operating Procedures.

IX. REQUESTS FOR ASSISTANCE IN CRIMINAL INVESTIGATIONS CONDUCTED BY THE JUSTICE DEPARTMENT AND THE FBI

EPA may receive requests for technical, legal or investigative assistance in environmental criminal cases that are initiated independently by DOJ or the Federal Bureau of Investigation (FBI).

It is the policy of EPA to provide support for these requests to the extent resources permit. Requests for legal assistance in criminal investigations from DOJ or the FBI are reviewed by the CED and the Assistant Administrator. Requests for investigative assistance involving substantial investigative and technical resources are reviewed and determined by the Director of NEIC and the Assistant Administrator. Accordingly, Regional Offices that receive any such requests should forward the request to the appropriate Area Office SAIC.

X. SECURITY OF CRIMINAL INVESTIGATIONS

Information on criminal investigations must be provided with restraint, and only to persons who "need to know" the information. Additionally, special attention must be given to the care and custody of written materials pertaining to an investigation.

Active criminal investigations shall never be discussed with personnel outside of the Agency except as is necessary to pursue the investigation and to prosecute the case. Agency policy is neither to confirm nor deny the existence of a criminal investigation. Requests for information on active investigations from the news media must be handled by the appropriate SAIC, the Office of Public Affairs or the CED consistent with the official guidance.3/

3/ Agency guidelines on press relations concerning investigations has been circulated in draft. (See memorandum "Press Relations on Matters Pertaining to EPA's Criminal Enforcement Program", Assistant Administrator, Office of Enforcement and Compliance Monitoring and Assistant Administrator for External Affairs to Assistant Administrators, Regional Administrators, Regional Counsels, Director of NEIC and all SAICs).

Finally, in the event of inquiries from Congress, the staff of the Assistant Administrator will work closely with the Congressional Liaison Office prior to releasing any information or making any public statments.

The NEIC criminal investigative offices and CED offices are equipped with secure office space, filing cabinets, and evidence vaults. Similar security measures must be utilized by Regional staff assigned to an investigation.

XI. RESERVATIONS

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

Office of Criminal Investigations: Management and Field Offices

Environmental Protection Agency
National Enforcement Investigations Center
Criminal Investigations
(Management and Field Offices)

ASSISTANT DIRECTOR:	James L. Prange	FTS 776-5128 303/236-5128

EPA - NEIC
Office of Criminal Investigations
P.O. Box 25227, Bldg. 53
Denver Federal Center
Denver, CO 80225

WASHINGTON STAFF OFFICE:

NEIC Office of Criminal Investigations (LE-134C)
Washington Staff Office
401 M Street, S.W.
Washington, D.C. 20460

Special Agent-in-Charge:	Gary Steakley	FTS 557-7410 202/557-7410

NEIC INVESTIGATIVE UNIT - DENVER:

NEIC Office of Criminal Investigations
EPA - NEIC Investigative Unit
P.O. Box 25227, Bldg. 53
Denver Federal Center
Denver, CO 80225

Special Agent-in-Charge:	Daryl C. McClary	FTS 776-5128 303/236-5128
Special Agents:	Kirby O'Neal Ken Wahl Bill Smith	

PHILADELPHIA AREA OFFICE (Regions I, II, and III):

NEIC Office of Criminal Investigations
Philadelphia Area Office
EPA - Region III
841 Chestnut Building
Philadelphia, PA 19107

Special Agent-in-Charge:	Joseph F. Cunningham	FTS 597-1949 215/597-9814
Special Agents:	Philip Andrew	FTS 597-1860
	John Aduddell	597-1795
	Robert Boodey	597-0122
	Michael Byrnes	597-1599

Boston Resident Office (Region I):

NEIC Office of Criminal Investigations
Boston Resident Office
EPA - Region I
60 Westview Street
Lexington, MA 02173

Resident Agent-in-Charge:	Robert Harrington	FTS 861-6209 617/861-6700
Special Agent:	Peter Gerbino	

New York Resident Office (Region II):

NEIC Office of Criminal Investigations
New York Resident Office
c/o Office of Regional Counsel
EPA - Region II
26 Federal Plaza
New York, NY 10278

Resident Agent-in-Charge:	William E. Graff	FTS 264-8917 212/264-8917
Special Agent:	James O'Gara	

ATLANTA AREA OFFICE (Regions IV and VI):

NEIC Office of Criminal Investigations
Atlanta Area Office
EPA - Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Special Agent-in-Charge:	David L. Riggs	FTS 257-4885 404/881-4885
Special Agents:	Clayton Clark	FTS 257-4746
	Martin Wright	257-4747
	John West	257-4748

Dallas Resident Office (Region VI):

NEIC Office of Criminal Investigations
Dallas Resident Office
EPA - Region VI
Earle Cabell Federal Building
Room 3A-8
Dallas, TX 75242

Resident Agent-in-Charge:	Thomas Kohl	FTS 729-9306 729-9307 729-9321
Special Agent:	Stephen K. Wells	214/767-9306

CHICAGO AREA OFFICE (Regions V and VII):

NEIC Office of Criminal Investigations
Chicago Area Office
EPA - Region V
230 South Dearborn Street
Chicago, IL 60604

Special Agent-in-Charge:	Louis M. Halkias	FTS 886-9872 312/886-9872
Special Agents:	Judy Vasey Mike Konyu Jim Swanson Ken Wilk	

Kansas City Resident Office (Region VII):

NEIC Office of Criminal Investigations
Kansas City Resident Office
c/o Office of Regional Counsel
EPA - Region VII
324 East 11th Street
Kansas City, MO 64106

Resident Agent-in-Charge:	Gregory T. Spalding	FTS 758-2069 816/374-2069
Special Agent:	Bill Hare	

SEATTLE AREA OFFICE (Regions IX and X):

NEIC Office of Criminal Investigations
Seattle Area Office
EPA - Region X
1200 Sixth Avenue
Seattle, WA 98101

Special Agent-in-Charge:	Dixon E. McClary	FTS 399-8306 206/442-8306
Special Agents:	Kenneth Purdy Commodore Mann Gerd Hattwig	

San Francisco Resident Office (Region IX):

NEIC Office of Criminal Investigations
San Francisco Resident Office
EPA - Region IX
215 Fremont Street
San Francisco, CA 94105

Resident Agent-in-Charge:	David Wilma	FTS 454-0509 415/974-0509
Special Agent:	Sandra Smith	

Format for Criminal Case Referrals

ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT
NATIONAL ENFORCEMENT INVESTIGATIONS CENTER
BUILDING 53 BOX 25227, DENVER FEDERAL CENTER
DENVER, COLORADO 80225

TO: SAC/RACs

DATE October 31, 1984

FROM: James L. Prange
Assistant Director, Criminal Investigations

SUBJECT: Format for Criminal Case Referrals

1. PURPOSE: This memorandum establishes policy and procedures in the preparation and submission of a Criminal Case Referral within the Office of Criminal Investigations, National Enforcement Investigations Center, U.S. Environmental Protection Agency.
2. SCOPE: The provisions of this order apply to all legal and technical employees involved in the preparation of Criminal Case Referrals and to all employees of the Office of Criminal Investigations, National Enforcement Investigations Center.
3. INTRODUCTION: Effective immediately the following policy and procedures shall be used in the preparation and submission of Criminal Case Referrals. These guidelines should be considered as reflecting the minimum standards necessary in the content of the report.
4. PREPARATION AND SUBMISSION: Criminal Case Referrals will be prepared in every instance where investigation has disclosed substantial criminal violations of the federal environmental statutes and regulations, including ancillary U.S. Code violations, which create a likelihood of criminal prosecution. The timeframe for submission may vary, but in all circumstances submission should be performed whenever a case is substantially proven. This decision for submission should be made in close coordination with the Department of Justice attorneys, Regional and Headquarters legal staff, program technical staff, the responsible

Special Agent in Charge of the Office of Criminal Investigations, and the Special Agent managing the investigation. The Special Agent managing the investigation will be responsible for the preparation and submission of the Criminal Case Referral in acceptable form.

In those criminal investigations not utilizing the services of an investigative Grand Jury, i.e., the agency will use the Grand Jury or other court procedures merely to obtain an indictment or information, the responsible Special Agent will submit a completed Criminal Case Referral, in acceptable form, to the responsible Special Agent in Charge. This submission will be done in sufficient time to allow formal internal review and approval prior to submission to the Department of Justice and the U.S. Attorney. This will ensure adequate agency review prior to the commitment of further agency resources in the particular investigation. The final approval by the Special Agent in Charge shall provide notice to the Special Agent that formal legal proceedings may begin.

5. FORMAT OF A CRIMINAL CASE REFERRAL:

   a. Title Page: The Title Page will be in the format as shown in Attachment A.

   b. Introduction and Signature Page: The Introduction and Signature Page will be in the format as shown in Attachment B. It will contain the following information:

      (1) EPA criminal file number and NEIC project code.

      (2) Federal judicial district by name and the corresponding United States Attorney.

      (3) Approval signatures by the Special Agent in Charge and the Regional Counsel.

(4) A brief introduction outlining the principal violations and the suspect firms and/or individuals.

c. Table of Contents: Each Criminal Case Referral shall have a Table of Contents that includes, at a minimum, the following sections:

Section	Page
I. Title Page	
II. Introduction and Signature Page	
III. Statutory and Regulatory Violations	
IV. Personal History of Defendants	
V. Enforcement and Regulatory History	
VI. Description of Evidence	
Appendix A. List of Witnesses	
Appendix B. List of Exhibits	
Appendix C. Exhibits	

d. A discussion of the individual sections follows:

Section I - Title Page: See Attachment A.

Section II - Introduction and Signature: See Attachment B.

Example of Introduction:

This report is submitted in regard to alleged violations of the United States Code by Richard Roe, John Doe, Mary Doe, and others named as defendants or co-conspirators herein, in that between January 16, 1983, and July 1, 1983, in Fulton County, Northern Judicial District of Georgia, they did conspire to violate the environmental laws of the United States, further, that on July 1, 1984, they did cause the illegal disposal of a listed hazardous waste in Macon County, Middle Judicial District of Georgia.

Section II - Statutory and Regulatory Violations:

This section should contain the statutory and regulatory provisions that provide the basis for the Criminal Case Referral. Pertinent portions of each statute or regulation should be quoted in full. If different charges apply to different defendants, it should be noted.

Section III - Personal History of Defendants:

This section will be utilized to provide pertinent personal history information on the subjects of the Criminal Case Referral. For each individual, the following information should be included in the order listed:

(1) Name.

(2) Title and business.

(3) Home address with zip code.

(4) Home phone.

(5) Work address with zip code (list all known company or corporate affiliations).

For each corporate subject:

(1) Name of company and parent corporation, if appropriate.

(2) Complete address of company.

(3) Complete address of facility associated with offenses.

(4) State of incorporation of corporate subjects.

(5) Registered agent for service.

(6) A brief statement of the business, profits, and size of the company.

-5-

Section IV - Enforcement and Regulatory History:

This section should include a description of all known enforcement activity, both state and federal, taken against the defendants in the past relating to environmental matters generally. In addition, the writer should discuss any previous efforts by EPA or state agencies to remedy the problem through informal, administrative, or civil means. Give only brief summaries.

Section V - Description of the Evidence:

This section includes a chronological narrative of all relevant and material facts constituting the alleged criminal violations. It may be that for several separate incidents the episodic method may be utilized. This section forms the factual basis for criminal charges and should be defendant oriented, i.e., should tell what the defendant(s) did or caused to be done whenever possible.

Each specific fact contained in this report shall be referenced to an exhibit or exhibits which substantiate the statement of fact. Speculation will be avoided. This section will usually constitute the major portion of the case report.

Appendix A - List of Witnesses:

This section is particularly useful to prosecutors supervising the case, and will frequently be used in issuing subpoenas, planning a Grand Jury presentation, and estimating the scope of the prosecution. For each witness, the writer should provide all available background data (i.e., name, residence, work address, telephone numbers, etc.) and a brief summary (one paragraph) of the matters on which testimony is

anticipated. This section should include not only the key substantive witnesses, but also those who will establish the appropriate foundation for documentary or physical evidence (for example: photographers, chain of custody witnesses, record custodians, etc.). Confidential informants should not be identified in this list.

Apendices B, C - List of Exhibits and Exhibits:

Copies of every substantial piece of documentary evidence in the case should be included as an exhibit to the report and should be indexed to allow for easy reference in the main body of the report. Original exhibits or documents should not be included in the case report. Originals will normally be used as evidence in trial and should be retained in the OCI Office until other arrangements are made with the Justice Department prosecutor supervising the case.

6. REVIEW AND APPROVAL PROCESS: The responsible Special Agent will submit the Criminal Case Referral in complete but rough draft form to the Special Agent in Charge (SAIC) in accordance with section entitled "Preparation and Submission" above. The SAIC will conduct a thorough review, and, after any necessary corrections, the SAIC will approve the report for typing in the initial final form. The Special Agent and SAIC will review the initial final draft. If this is approved, the SAIC will arrange for the report to be forwarded, in a confidential manner, to the Regional attorney assigned to the investigation. The Regional attorney may make a copy of the exhibits for future use and review the content of the report for legal sufficiency, preparing any necessary reports that might supplement the Criminal Case Referral. (See Section 8 below.) The Special Agent should also assure that the report is reviewed by

technical personnel assigned to the investigation for technical sufficiency. Approval by technical personnel shall also commit the Agency to support for the case throughout the judicial process. Any corrections that are necessary will be made by the Office of Regional Counsel. The Criminal Case Referral will then be forwarded in a confidential manner to the responsible Regional Counsel for approval. This person shall note approval by affixing his/her signature in the appropriate space on the Signature Page. The approved report shall then be forwarded to the appropriate Special Agent in Charge.

The Special Agent in Charge shall again review the Criminal Case Referral. Any further changes will be discussed with the Regional Counsel or his designee and/or the technical staff as appropriate. When approved, the Special Agent in Charge shall affix his/her signature in the appropriate space on the Signature Page. The referral will then be forwarded to the Criminal Enforcement Division in EPA Headquarters for review and approval. After approval by the Assistant Administrator for Enforcement and Compliance Monitoring, the referral will be sent concurrently to the Environmental Crimes Unit, Department of Justice, and to the appropriate U.S. Attorney's Office. Section 7 describes the ultimate distribution of the referral package.

7. DISTRIBUTION OF THE CRIMINAL CASE REFERRAL:

   a. The original report with copies of exhibits is forwarded to the U.S. Attorney of the principal judicial district. An additional copy or copies may be provided to other U.S. Attorneys, if jurisdiction falls in more than one judicial district.

b. One copy with exhibits should go to the OCI case file.

c. One copy with exhibits should go to the Criminal Enforcement Division legal office in Headquarters.

d. One copy with exhibits should go to the Department of Justice, Environmental Crimes Unit.

e. One copy without exhibits should go to the Regional Counsel.

f. One copy with exhibits should go to the Assistant Director, Criminal Investigations, NEIC.

Original exhibits in EPA custody should be maintained in a secure manner by the Special Agent/Case Agent until such time as their personal delivery to the court or prosecutor is arranged.

Nothing in this section shall preclude communications between the investigating officials, the U.S. Attorneys, the Department of Justice, and Headquarters legal staff at any time. Such contact is encouraged, particularly prior to the initiation of investigative Grand Jury activities.

8. LEGAL ANALYSIS REPORT: The Regional or Headquarters attorney assigned to the investigation may, as part of the review process, prepare a legal analysis report which should be marked in capital letters "PRIVILEGED - ATTORNEY WORK PRODUCT." This report would address the various legal issues involved in the particular investigation, including strengths and weaknesses, legal defenses, evidentiary challenges, and equitable defenses. It may also include a proposed sample indictment, a listing of the elements of the various offenses, parallel proceedings matters, and any other material

counsel may feel would be useful in the prosecution of the criminal matter. It should also include environmental impact information. Distribution of this report should be made to the Regional Counsel or his/her designee, Criminal Enforcement Division legal staff, the U.S. Attorney having jurisdiction, and the Department of Justice, Environmental Crimes Unit. In addition, the Office of Criminal Investigations should get a copy.

Attachments (2)

cc: Thomas P. Gallagher, Director
Carroll G. Wills, Chief, Enforcement Specialist

ATTACHMENT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

OFFICIAL USE ONLY

REPORT OF INVESTIGATION

FRED C. WILLIAMS, dba
UNIVERSAL ENGINEERING

CASE # 84-XI-3-99 69W

AUGUST 1984

NATIONAL ENFORCEMENT INVESTIGATIONS CENTER
OFFICE OF CRIMINAL INVESTIGATIONS
(OFFICE ADDRESS)

ATTACHMENT B

( )
(APPROPRIATE AREA OFFICE)
(LETTERHEAD)
( )

CRIMINAL FILE NUMBER:

PROJECT NUMBER:

REPORT EXAMINED, APPROVED, AND RECOMMENDED FOR PROSECUTION

(date here)

SPECIAL AGENT IN CHARGE

REGIONAL COUNSEL

Larry D. Thompson
United States Attorney
Northern District of Georgia
Richard B. Russell Building, Room 1800
75 Spring Street, S.W.
Atlanta, Georgia 30303

INTRODUCTION:

This report is submitted in regard to alleged violations of the United States Code by Richard Roe, John Doe, Mary Doe, and others named as defendants or co-conspirators herein, in that between January 16, 1983, and July 1, 1983, in Fulton County, Northern Judicial District of Georgia, they did conspire to violate the environmental laws of the United States; Further, that on July 1, 1983, they did cause the illegal disposal of a listed hazardous waste in Macon County, Middle Judicial District of Georgia.

Chapter Ten

Enforcement of Consent Decrees

Chapter Contents

- The government's interest in preserving the integrity of court orders;
- Any mitigating factors; and
- The likelihood that the response will remedy the violation.

EPA can pursue a variety of responses to fit the seriousness of the violation. Often the consent decree provides a specific remedy in cases of noncompliance, such as stipulated penalties. In some cases, it may call for informal negotiation when disputes arise regarding compliance with the decree. Other enforcement responses may include the following:

- Increased decree monitoring;
- Motions to enforce the decree;
- Contempt-of-court motions; and
- Contractor suspension and debarment (discussed in Chapter Six).

2 Consent Decree Tracking and Monitoring

To implement a post-settlement enforcement program effectively, the Agency must carefully track a violator's compliance with terms of a consent order or consent decree. Such tracking ensures that all compliance milestones are met and that any instances of noncompliance are quickly identified.

EPA monitors compliance with consent decrees at two levels. At the first level, legal and technical staff in the Regional Offices review reports submitted by the discharger and may conduct inspections of the discharger as needed to verify compliance with the decree for day-to-day management purposes. The Regional Offices may also use either the automated tracking capability of the Permit Compliance System (PCS) or the automated tracking system developed by the National Enforcement Investigation Center (NEIC) to track progress with specific milestones contained in a consent decree.

The Office of Enforcement and Compliance Monitoring (OECM) conducts the second level of monitoring. The OECM reporting system is described in detailed guidance issued on October 25, 1984 (Exhibit 10-1). Under this system, OECM gathers information on consent decree compliance status from the Regional Offices at the end of each fiscal quarter and summarizes the information for inclusion in the Agency's Strategic Planning and Management System (SPMS) quarterly report. OECM also prepares a report for the Deputy Administrator that provides a name-by-name listing of active decrees along with the current compliance status of each decree.

According to the October 25, 1984 guidance, the information requested by OECM consists of a declaration by the Region as to the compliance status of the decree. Where the decree is being violated, the Region must tell OECM whether formal enforcement action to remedy the violation has been initiated. Under this tracking system, the only enforcement actions tracked are referral of a contempt action, referral of a decree modification, or collection of stipulated penalties.

Where the discharger is not meeting the final compliance limits or conditions of the decree, the discharger shall be reported as in violation of the decree. If the Regional Office has determined that the discharger will be unable to meet the final terms of the decree, the Region will continue to report the discharger in violation until one of the acceptable enforcement actions listed above has been commenced.

Regardless of whether the Regional Offices use PCS or the NEIC system to track consent decree progress, Regional Offices must continue to send hard copies of all new decrees to NEIC for entry into the Consent Decree Library and for entry into the automated summary library features of the current system. Consent decree summaries include the decree dates and requirements and indicate whether the requirements have been met. The NEIC tracking system is contained as Exhibit 10-2.

The Regional Office must also ensure that, at a minimum, it receives notice when penalties that are due under the decree have been paid and should maintain records indicating penalty collection dates. The OECM Office of Compliance Analysis and Program Operations (OCAPO) and the Associate Enforcement Counsel for Water review the Regional Administrator's responses pursuant to Headquarters' national oversight role.

Consent decree monitoring requires Agency determinations on whether individual consent decree requirements are being met. This involves examining discharge monitoring reports on effluent limits and other reports required by the decree to be kept, reviewing any water quality testing results, and tracking compliance schedule deadlines. This effort is supplemented by on-site inspections of discharge sources performed by the Regional Office. Pursuant to the Enforcement Management System (EMS) guidance, Regional Offices must maintain records of their responses to consent decree violations.

3 Consent Decree Enforcement

Factors To Weigh

When the Agency determines that a defendant has not complied with the terms of the consent decree, the Agency must decide how it will enforce the terms of the decree. The government has an interest in upholding the integrity of court orders. As stated in the "Guidelines on Enforcing Federal District Court Orders," EPA must weigh several factors in deciding upon the type and extent of relief to pursue:

- Environmental harm;
- Effect of delay on the final compliance schedule;
- The willfulness or negligence of the defendant;
- The deterrent effect of various enforcement responses;
- The economic benefit the defendant derives through continued noncompliance;
- Any mitigating factors that may exist; and
- The goals that can be achieved through an enforcement action.

All Agency responses to noncompliance must require compliance with the order's terms as quickly as possible.

Environmental Harm

The effect of decree violations on water quality, as well as the goals of the CWA, should weigh heavily in determining the appropriate enforcement response. While some deadlines or schedules may be delayed without immediate harm, frequently delays in complying with the effluent limitation schedule will have important water quality or related environmental impact. Violations of effluent limits, compliance schedule dates, or reporting or recordkeeping may result in either a motion to enforce or a motion for contempt.

Schedule Violation

CWA consent decrees frequently set interim compliance schedules that describe specific acts to be completed by a scheduled date. In many cases, final compliance requires water pollution control equipment to be purchased, installed, brought on line, and finally operated and maintained.

Decree compliance schedules are often quite detailed and are accompanied by effluent limitation deadlines. For example, the decree in United States v. City of Providence [492 F. Supp. 602 (D. Mass. 1979)], required the city to repair and restore its water pollution control facility and equipment by May 1, 1978, and to meet its effluent standards by June 1, 1978. In United States v. City of Detroit [476 F. Supp. 512 (E.D. Mich. 1979)], the decree, which was over 30 pages long, specified construction, financing, staff training, facility planning, and effluent limitations and gave specific dates for compliance in each area [476 F. Supp. at 516-517].

In reviewing a schedule violation, the Agency considers whether a particular preliminary delay of schedule will jeopardize the final date set for compliance. Timely compliance with final effluent limitations is of paramount importance. For example, in the Detroit case, the city's failure to hire adequate staff for its facility affected Detroit's ability to meet the final compliance date required by the decree.

There are particular interim violations that cause EPA great concern, such as when a facility does not place a purchase order for pollution control equipment in time to have the equipment installed and operating prior to the final compliance date. Typically, a vendor requires a large down payment from the facility before delivering water pollution control equipment. Should the facility refuse to take delivery, the down payment is forfeited, and the facility is liable to the vendor for breach of contract. Given the strong economic incentive for a facility to abide by the purchase agreement, the timely placement of a purchase order may show the facility's intention to comply with the rest of the schedule. Thus, where construction or repair of a facility is required, as in City of Providence, Agency staff should closely examine the construction schedule to determine what steps in the schedule are critical to attainment of the overall goals of the settlement.

Delay in commencement of construction is further cause for concern. A construction delay may indicate that a purchase order, which had been placed on time, may have been subsequently cancelled, thus jeopardizing the final compliance date. When construction is not proceeding on schedule, EPA should immediately investigate the reasons for the delay. Some reasons for delay may include the following:

- The vendor of the equipment may have failed to deliver on time (indicating that the defendant inadequately monitors contracts or that the defendant may be reviewing compliance plans);
- The defendant may be planning to shut down the violating facility; or

- The defendant may be planning to use the pollution control equipment at another site.

Normally, the government should avoid agreeing to extensions of compliance schedules without pursuing significant monetary penalties. Extensions without penalties typically should be limited to cases in which the defendant can prove that the violation was caused by circumstances falling squarely within the force majeure clause of the order. Any extension of a court-ordered compliance schedule must receive the approval of the court. Informal agreements not to abide by a consent decree's terms are against Agency policy.

Willfulness and Negligence of the Defendant

Agency staff should also examine the conduct of the defendant in complying with the decree. Agency staff should ask whether the defendant has:

- Placed prompt equipment orders;
- Reported progress to the Agency and the courts;
- Initiated personnel training;
- Expedited construction contracts;
- Notified EPA of problems with a vendor's delivery agreement;
- Requested EPA to observe the operation of new control equipment; and
- Observed operation and maintenance requirements.

Because the defendant has signed a judicially enforceable agreement, he or she cannot plead ignorance of its terms.

Applicability of Force Majeure Clauses

The Agency's consent decrees often include specific provisions exempting the defendant from decree enforcement actions for noncompliance caused by factors completely beyond the defendant's control. Such force majeure clauses should be narrowly drafted. (See, General Enforcement Policy Compendium #GM 17.) Where the cause of decree noncompliance is outside the force majeure clause, the liability of the defendant will be sufficient to support a motion to enforce the decree. This remedy does not require the conscious disregard of decree requirements; however, where such willfulness does exist, the Agency also should seek to have the defendant held in contempt. Indeed, where the conscious disregard of decree requirements includes making false statements to Agency staff who monitor decree compliance, EPA may consider a separate criminal prosecution under Title 18 of the U.S. Code. Such a prosecution was successfully pursued for false statements made by defendants in implementing a consent decree under the

CWA and the Toxic Substances Control Act in U.S. v. Transformer Services (Ohio), Inc., et al. C 80-122-A (N.D. Ohio 1983). (A copy of the motion to enforce the consent decree here is contained in Exhibit 10-4.)

Deterrence and Economic Benefit

The defendant may gain an increasing economic benefit, as well as a competitive advantage, as a result of continued noncompliance. Consent decrees should contain stipulated penalty provisions that clearly are capable not only of recovering economic benefit, but imposing substantial additional penalties in light of the defendant's recidivist nature. The government must pursue these stipulated penalties aggressively in response to decree violations.

In the absence of a stipulated penalty provision, the EPA staff still should pursue money penalties substantially in excess of the defendant's economic benefit from violating the court order. The penalty period is measured from the date of the first provable violation to the date of anticipated compliance. In addition to recouping economic benefit, the government's request for a civil contempt penalty should reflect the recalcitrant behavior of the defendant, his or her recidivist nature, and the need to uphold the integrity of the judicial decrees, and should specifically deter future violations. The civil contempt penalty should be substantially higher than if it were a penalty for an initial violation.

Mitigating Factors

Mitigating factors do not excuse noncompliance. Instead, these factors help to explain noncompliance and should be used to determine EPA's enforcement response. The defendant may argue mitigating factors to persuade a court not to exercise its powers to enforce the terms of the decree. A properly drafted force majeure clause can reduce the force of these arguments. The following are some examples of mitigating factors:

- The sole vendor of the required control equipment goes out of business unexpectedly;
- A union with a "no strike" contract violates the contract and calls a strike;
- An economic downturn causes a prolonged shutdown of a facility with little or no prospect of restart;
- A technology that had been successfully applied at one facility fails to achieve the same success at another facility, notwithstanding all good faith attempts to design, modify, and operate the equipment in a manner consistent with good pollution control practices; or

- An action (or lack of action) by the government that interferes with a defendant's ability to comply with the decree's requirements.

The Agency should place the burden of identifying mitigating factors on the defendant as early as possible, typically by notifying the defendant of its noncompliance with a decree requirement and requiring an explanation.

Goal-Oriented Action

Finally, the decision to take enforcement action should be based upon overall goals of achieving compliance and establishing deterrence. For example, a large corporation may willingly pay a penalty or fine as the "price of polluting," but continue its noncompliance. In such cases, EPA should consider a contempt of court petition and a motion to terminate or amend the consent decree. Another defendant may be sufficiently deterred by a civil penalty. For the former, a motion to enforce may be appropriate; for the latter, EPA should seek payment of stipulated penalties.

Types of Enforcement Responses

Adequate enforcement of the terms of a decree quickly corrects the violation, deters future violation (by defendant or others), and preserves the integrity of court-ordered remedies.

As provided in the October 25, 1984 policy on Consent Decree Tracking (Exhibit 10-1), some violations may be dealt with by the collection of stipulated penalties and a bilateral revision to the order, such as requiring increased monitoring. More serious violations may be grounds for collecting stipulated penalties and filing a motion to enforce the order or moving for a contempt of court ruling. Whatever response is appropriate, it is critically important to respond promptly to prevent the order from becoming a fiction (as is also in the case where EPA informally agrees to accept less than full compliance with the terms of a consent decree).

The nature of the defendant in an enforcement action may also affect the choice of response. Some courts have shown some reluctance to require a city or municipality to pay substantial monetary penalties. [See City of Providence, cited previously, at 610, quoting Shakman v. Democratic Organization of Cook Co., 533 F. 2d 344, 352 (7th Cir. 1976).] Remedies other than monetary penalties, such as holding municipal officials in contempt, can be effective where the defendant is a city or local government. Under some circumstances, however, monetary fines against a municipality may well be justified. Where the defendant is a private party, the Agency does not hesitate to seek civil penalties for violations. [See e.g., United States v. Homestake Mining Co., 595 F. 2d 421, 425 (8th Cir. 1979). Agency first sought CWA penalties before stipulated penalties in decree.]

Increased Monitoring

Where EPA suspects relatively small or minor decree violations, the appropriate initial response may be increased Agency monitoring of the defendant's activities. Increased monitoring requirements may be imposed through a revised consent decree that sets new, achievable milestones in conjunction with collecting penalties for violations of the original decree.

For example, if EPA suspects the defendant violated operation and maintenance recordkeeping requirements, the Agency could request or inspect those records at unannounced intervals. (An unannounced inspection is more likely to reveal actual conditions.) A Section 308 letter requiring records of operation and maintenance practices for the past month (or quarter) may also provide an accurate picture of day-to-day operations, as well as serve to deter future noncompliance. The Agency should consider further enforcement where the defendant violated the terms of the decree. An EPA "paper trail" of correspondence (pressing for compliance) with the defendant helps to substantiate the defendant's contempt of the consent decree.

Enforcement of Stipulated Penalties

The Agency should enforce any stipulated contempt penalty provisions that were incorporated into the decree. Although this sanction is within the court's equitable powers, the fact of stipulation should weigh heavily in the government's favor, particularly if the agreed-upon sum is not unduly oppressive. Consequently, stipulated penalty amounts should be realistically drawn, although larger on a daily basis than civil penalties that the government typically might seek in settlement. Application of the stipulated penalty provision should be speedy to avoid an oppressive penalty request. Such requests are candidates for direct referrals. Stipulated penalties should be used when available to the government, and payable to the Treasury without use of a demand letter.

The stipulated penalties in the City of Providence decree provided for the City of Providence to pay a civil penalty of $2,500 for each day that it was in violation of any requirement of the consent decree. The penalty was to be paid to the Treasurer of the United States within 14 days of a demand for payment by the United States [City of Providence, 492 F. Supp. at 607-608].

In obtaining stipulated penalties upon demand, the government sends a demand letter (certified mail, return receipt requested) to the defendant, signed by the Assistant Attorney General of the Lands and Natural Resources Division. stating the dates and nature of the decree violations and demanding payment to the U.S. Treasury. The letter also requests the check to be delivered to the United States Attorney for the district in which the decree was entered or to the Department of Justice, Land and Natural Resources Division, in Washington, D.C. The letter should recite the applicable provision authorizing the demand, the applicable provision that

has been violated, and the time period that the demand covers. Exhibit 10-3 contains a sample demand letter (currently reserved).

No legal defense is available to a defendant in response to a demand letter other than the argument that the violation itself did not occur. A defendant may, however, seek to advance equitable arguments to convince the court to mitigate the penalty.

A better approach, also commonly employed, does not require a government demand letter, but makes payment to the U.S. Treasury obligatory upon the violation of a decree. Under this approach, the following language should be used:

> Defendant shall pay to the United States the following stipulated penalties for violations of this decree:
>
> (1) [Paragraph 1 enumerates stipulated penalties.]
> (2) Payment shall be made by certified check drawn to the order of "Treasurer, United States of America" and tendered to the United States Attorney, District of _____, [address], within 30 days of each violation. Upon failure to pay, Plaintiff shall be entitled to judgment against Defendant in such amounts, plus all costs and attorneys' fees associated with collection.

Note that many court orders provide that any stipulated penalties accrued for delay in scheduled increments of progress will be voided if final compliance is achieved on schedule. Thus, if it appears that a lapse in the schedule will not jeopardize timely final compliance, and there is no other apparent reason to suspect that the delay is indicative of a pattern of noncompliance, it may not be appropriate to demand stipulated penalties. For this reason, this type of consent agreement should be avoided in the future.

Motion To Enforce the Decree

The Agency may seek specific performance of a decree's requirements by using a motion to enforce judgment pursuant to Rule 70 of the Federal Rules of Civil Procedure. A Rule 70 motion often includes a motion to show cause why the defendant should not be held in contempt. An example of such a motion, filed in U.S. v. Transformer Services (Ohio), Inc., is included as Exhibit 10-4. Rule 70 applies where a judgment (Rule 54 defines a decree or order as a judgment) directs a party to perform a specific act within a specified time.

The filing of discovery requests may be necessary prior to filing a motion to enforce a decree. While violations of effluent limitations can be supported with discharge monitoring reports, consent decrees may require, for example, that certain operation and maintenance practices be undertaken at regular intervals. The extent of violations of these requirements can often be established only through discovery, such as through the deposition

of a plant manager. Refer again to Exhibit 8-8, which contains a sample set of interrogatories.

The motion should assert that the defendant has failed to comply with some provision of the order (e.g., the compliance schedule or operation and maintenance requirements) and that the court order in no way excuses noncompliance. The motion should also request that the court compel the violator to pay any accrued stipulated penalties. A referral to DOJ to collect stipulated penalties from industrial dischargers under consent decrees can qualify as a direct referral.

In this motion, the Agency may also move to have further requirements placed upon the defendant. In City of Detroit, cited previously, the Agency moved that the defendant show cause why it should not be compelled to comply with the effluent limitations established in the decree. The motion further sought an order requiring Detroit to report effluent limit violations to the court, the EPA, and the State of Michigan within 24 hours of violation and to submit a written compliance plan and weekly status reports on the defendant's compliance progress. Such motions may also seek more stringent reporting requirements, advance Agency approval for defendant activities, temporary or permanent shut down of violating facilities or parts of such facilities, more stringent operation and maintenance obligations, or letters of credit or performance bonds. This motion to request modification of a consent decree is not a direct referral candidate.

To develop the motion, the Regional Office prepares a litigation report and follows the referral procedures discussed in Chapter Eight. The standard of proof for a motion to enforce the court order is the same as for the underlying complaint (i.e., the government must prove each element of the allegation "by a preponderance of the evidence").

The defendant must answer the motion within 20 days. The answer may admit or deny the allegations, or admit the allegations with some explanation or defense. For example, the defendant may admit the violation, but argue that the force majeure clause excuses the noncompliance.

The defendant may also invoke Federal Rules of Civil Procedure (Fed. R. Civ. P.) 60 and 62 in response to the Agency's motion to enforce the decree. Rule 60 provides that a party may seek relief from a judgment or order for the following reasons:

- Clerical mistakes;
- Mistake, inadvertence, surprise, or excusable neglect;
- Newly discovered evidence;
- Fraud, misrepresentation, or other misconduct of an adverse party;
- The judgment is void;

- The judgment has been satisfied, released, discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and

- Any other reason justifying relief from the operation of the judgment.

Under Fed. R. Civ. P. 62, the defendant may seek to stay the Agency's enforcement proceeding on the grounds that it has filed one of the following:

- A motion for a new trial or to amend a judgment; or

- a motion for relief from a judgment.

In City of Providence, cited previously (at 604), the city initially moved the court to provide relief from a CWA judgment. The court found the city was not entitled to relief and rejected its claim of impossibility.

Contempt of Court Motions: Civil and Criminal

For the most serious violations of a court decree, the Agency may also move that the defendant be adjudged in contempt of the decree or order under Fed. R. Civ. P. 70. A contempt motion (technically styled as a motion to show cause why defendant should not be held in contempt) requests the court to use its inherent authority to ensure that its orders are obeyed. Contempt motions generally accompany motions to enforce the decree. The government must prove each element of a civil contempt action by "clear and convincing evidence." Since this is a difficult burden of proof to maintain, the motion is reserved for not only the most serious consent decree violations but also ones for which EPA has substantial proof.

The standard for granting a motion for civil contempt is stated in City of Providence, cited previously (at 609). The court found the city failed to comply with the terms of the decree and provided no justifiable excuse for its failure; therefore, the city was in contempt of the court's decree.

The defendant must respond to a contempt motion within 20 days. The defendant may file a motion under Fed. R. Civ. P. 60 for relief from the consent decree. The defendant may also raise equitable defenses such as "estoppel," "laches," and "unclean hands" in an attempt to place responsibility for noncompliance on the government.

Other defenses may include the following:

- Claims of financial impossibility or financial inability;

- Failure of EPA to respond to reasonable requests for modification of the decree;

- Failure of the pollution control techniques to accomplish required effluent reductions despite all good faith efforts to operate the equipment;
- EPA acquiescence in a control technique that subsequently failed;
- Interference with compliance efforts by third parties (such as a labor union or equipment vendor); and
- Force majeure.

EPA should oppose all of these arguments.

Where the court finds the defendant in contempt, the court will probably order a new schedule based on EPA estimates of expeditious compliance. The court will also order the defendant to pay any stipulated penalties already accrued and may order periodic payments of any prospective stipulated penalties (sometimes into an escrow account) until compliance is achieved.

The court may also find, either upon motion by EPA under 18 U.S.C. §401(3) or on its own motion, that the defendant willfully and intentionally ignored the court's order, amounting to criminal contempt. In such a case, the court may order a jail sentence and the payment of monetary penalties aimed at punishing the defendant. The defendant's behavior must be willful and intentional "beyond a reasonable doubt" to constitute criminal behavior.

Factors to examine in determining the propriety of a criminal contempt action include the following:

- Scope and duration of the violation;
- Environmental contamination or health hazard;
- Willfulness of the violation;
- Any falsification or misrepresentation by the defendant;
- Ability of the defendant to comply with the terms of the decree; and
- Evidence of motive for the violation.

The motion for contempt should clearly state whether it is for civil or criminal contempt. EPA should request a hearing on the motion and the allegations should be supported with affidavits and other appropriate documentation. In addition, EPA should submit an order for the judge to sign and a memorandum of law supporting the ruling, which help to ensure that the judge is properly informed of EPA's position.

The defendant's response to a contempt motion may include use of Fed. R. Civ. P. 60 and an array of equitable defenses. Many of the available equitable defenses were argued in City of Providence. Providence argued that

it had been unavoidably delayed because of time spent obtaining a permit from the state, that it could not abate the pollution because of the high cost of doing so, that it was delayed by labor problems and sabotage, and that the terms of the decree were impossible to meet. The court rejected all of these defenses [492 F. Supp. at 609]. In United States v. Homestake Mining Co., the lower court granted a private company relief from judgment under Fed. R. Civ. P. 60(6) because of "mechanical problems, weather problems and strikes by various workers" [595 F. 2d at 426-427 (reversing the opinion of the lower court)].

The defendant's responses in Providence and Homestake Mining were similar because they involved causes claimed to be outside of the defendant's control that rendered the defendant unable to comply with the decree. These include natural disasters, acts of God, conflicts with other government requirements, labor disputes, vandalism, or unanticipated changes of conditions or circumstances.

Other Remedies: Receivership and Masters

The court has a broad range of equitable remedies to enforce its decrees. The Detroit case noted that the remedies of contempt proceedings and injunctions may only have invited further confrontation and delay. Therefore, the court turned to the less common remedy of a receivership [476 F. Supp. at 520]. The court appointed the mayor of Detroit to act as receiver or administrator of the wastewater disposal plant for not less than one year. The Providence court, however, rejected motions for appointment of a receiver or a master [492 F. Supp. at 610-611]. The court found the city should continue to manage the facility and that a master was not needed to make any factual findings. Note that appointing a receiver may result in a great expenditure of governmental resources to oversee the receivership.

4 Exhibits

This section contains the following exhibits:

Exhibit 10-1: Consent Decree Tracking Guidance
Exhibit 10-2: NEIC Consent Decree Tracking Guidance
Exhibit 10-3: Demand Letter for Stipulated Penalties (Reserved)
Exhibit 10-4: Motion To Enforce Decree

Consent Decree Tracking Guidance

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

OCT 25 1984

MEMORANDUM

SUBJECT: Consent Decree Tracking

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

TO: Regional Enforcement Contacts

In my September 27, 1984, memorandum to you on consent decree tracking I requested comments on the reporting guidance developed by the consent decree tracking workgroup. We have found your comments to be most useful and I want to thank you for your assistance in this important endeavor.

A clear consensus as to which reporting option should be used was not reached via the comments we received. However, I believe either option will enable us to dramatically improve our understanding of consent decree compliance status, and that over time both will serve our needs well. We have chosen to go with Option A as described in the attachment to the September 27 memorandum with a few adjustments that reflect the comments we received. Attachment 1 contains the description of the approach we will use.

Persuasive arguments were made for choosing Option B on the basis of its more explicit initial focus on results. However, I am convinced that after we get past the first quarter Option A will be able to track results just as well, and the data that the Regions will report will be more current. Under Option B, it is possible that a decree violation could go unreported for nearly 2 quarters.

I understand from my staff that Option B is more compatible with the Quarterly Noncompliance Reports (QNCR's) used by the Water program. The Regions should use the most current data available when reporting on the compliance status of Water program consent decrees. If the most current information available is that obtained from the QNCR's, that is the information that should be reported.

Attachment 1

I. What constitutes a reportable violation?

For the purposes of reporting a decree will be reported as in violation if any term or condition of the decree is not complied with. De Minimis violations of, for example, reporting requirements, are factored out by the timing of reporting.

II. What will be reported and what timeframes will be used for reporting?

All reporting will be done on a name basis. OECM will summarize the data and report aggregated numbers for each reporting category in the quarterly Strategic Planning and Management System (SPMS) report. Although the reports to OECM will not specify the nature of the violation, it is advisable that each Region have a readily available summary of the nature of the reported violations to facilitate responses to requests that we may receive from Congress or other interested parties.

The Regions will report on November 8, 1984, (and henceforth by the 15th day after the close of each fiscal quarter) on the following measures using the best available/most current information (it is recognized most information would be current as of the last round of quarterly reports - here October 1, but that some data lag may exist) on consent decree compliance status as of October 1, 1984.

(a) the names and number of active consent decrees as of 10/1/84.

(b) the names and number of active consent decrees in violation as of 10/1/84.

(c) the names and number of active consent decrees in violation as of 10/1/84, where enforcement action has been commenced (see section III for the list of appropriate enforcement actions).

*(d) the names and number of active consent decrees reported in violation at the end of the previous quarter which have been returned to compliance.

* For the test run, reporting categories d & e will not be used. These categories will be reported on for the first quarter FY85 SPMS report in January.

*(e) the names and number of active consent decrees reported in violation at the end of the previous quarter which have not been returned to compliance and have not had an appropriate enforcement action commenced.

III. What constitutes an appropriate enforcement action?

Appropriate enforcement actions are formal enforcement actions which include contempt actions, collection of penalties, and decree modifications. These actions will be counted in the enforcement action commenced category when they are referred by the Regions to Headquarters or directly to the Department of Justice. Less formal actions such as demand letters, formal warning letters, etc., are not included in the list of appropriate actions. A pending violation means that no action has been taken or that the violation is in the first stages of being addressed (e.g. the source was sent a demand letter).

IV. Final Compliance Determinations

In cases where the final compliance date in the decree has been reached and the source is not meeting the final compliance limits or conditions of the decree, the decree shall be reported as in violation. If the Regional Office has determined that the source will be unable to meet the final terms of the decree, the Region will continue to report the decree in violation until one of the acceptable enforcement actions listed in section III above has been commenced. At the time that such action is commenced, the decree will be reported as in violation/action commenced under category (c) (Section II) until it is returned to compliance with the decree.

V. How will consent decrees covering multiple facilities be counted?

Actions taken to address violations at more than one facility covered by the same decree will only be reported and counted as one decree. The Regional actions against multiple facilities covered by the same decree will be accounted for in the significant noncomplier lists and the enforcement actions tracked in the FY85 SPMS.

VI. What is the role of the Policy and Management Divisions?

In the August 15, 1984, memorandum, Al Alm encouraged the Regional Administrators to have consent decree compliance information reported through the Policy and Management Divisions in each Region. He left open the option for each Regional Office to establish whatever reporting mechanism best suited their needs. This recommendation was not intended to place the P&MD's in charge of the consent decree enforcement program. The August 15, 1984, memorandum did not comtemplate any changes in responsibility for enforcement of consent decrees.

VII. How will reporting take place?

The Regions will send their consent decree compliance status reports directly to OECM's Compliance Evaluation Branch by the 15th day after the end of the each fiscal quarter. OECM/CEB will prepare a summary report and forward the report for inclusion in the quarterly SPMS report. As with other SPMS measures, OECM/CEB will confirm the information contained in the report with the Regions prior to finalization of the quarterly SPMS report.

ATTACHMENT 2

Regional Summary

(a) The number of active consent decrees as of 10/1/84 = _____

(b) The number of active consent decrees in violation as of 10/1/84 = _____

(c) The number of active consent decrees in violation as of 10/1/84, where enforcement action has been commenced = _____

*(d) The number of active consent decrees reported in violation at the end of the previous quarter which have been returned to compliance = _____

*(e) The number of active consent decrees reported in violation at the end of the previous quarter which have not been returned to compliance and have not had an appropriate enforcement action commenced = _____

---

* For the test run, reporting categories d & e will not be used. These categories will be reported on for the first quarter FY 85 SPMS report in January.

Instructions:

- The Regions should use the best information that they have for reporting. It is recognized that this is a new reporting requirment and that data lags and other factors will complicate reporting. It is our desire to minimize the burden on the Regions, therefore, information as of 10/1/84 should be considered as a goal and not as an absolute requirement.

	A Name of Decree	Statute	B In Violation	C In Violation With Action Commenced	*D Violation from Prior Qtr. Returned to Compliance	*E Violation from Prior Qtr. Not Yet Addressed
1.						
2.						
3.						
4.						
5.						
6.						

ETC.

* For the test run, reporting categories d & e will not be used. These categories will be reported on for the first quarter FY 85 SPMS report in January.

Instructions

- List the name of the decree, the applicable statute, and check either column b (in violation) or c (in violation with appropriate action commenced) if the decree is in violation. We will assume that the decree is in compliance if neither column is checked.
- The decree specific data on this chart should reflect the summary numbers presented on the previous page.

NEIC Consent Decree Tracking Guidance

CONSENT DECREE TRACKING SYSTEM GUIDANCE

EPA GENERAL ENFORCEMENT POLICY # GM - 19

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: DEC 20 1983

TABLE OF CONTENTS

Until recently, EPA had no uniform automated information system intended primarily for consent decree compliance tracking. Some Agency offices do use automated information systems to track source compliance generally. However, the use of these systems varies throughout the Agency, making it difficult to integrate compliance data. Moreover, some offices track consent decree compliance by hand, resulting in lengthy information retrieval times.

On August 4, 1982, EPA managers met to discuss establishing a uniform national approach to consent decree compliance tracking which incorporates the use of an automated information system intended primarily for tracking consent decree compliance. They agreed that this tracking system should build upon, rather than replace, existing information systems maintained by various Agency enforcement offices.

Subsequent to that meeting, the National Enforcement Investigations Center (NEIC), working closely with the Office of Legal and Enforcement Policy (OLEP), developed ideas for such a tracking system. This document describes the proposed tracking system and Agency office roles in implementing and maintaining it.

Scope and Exclusions

This tracking system will include information on all court entered judicial consent decrees in enforcement cases to

which EPA is a party, as well as the status of compliance efforts required by these decrees. It will not include:

- State consent decrees to which EPA is not a party. This includes cases in which EPA may have a continuing interest in the compliance status of the decree even though, for example, EPA originally deferred the underlying enforcement action to appropriate State authorities. This topic will be discussed generally in guidance entitled, "Coordinating Federal and State Enforcement Actions".
- Federal Facilities Compliance Agreements. These agreements are negotiated with Federal facilities to bring them into compliance with applicable environmental statutes. Executive Order 12088 provides a non-judicial mechanism for negotiating these agreements. Within EPA, the Office of Federal Activities (OFA) has the lead responsibility for tracking compliance with these compliance agreements. OFA is developing guidance on this area entitled, "Federal Facilities Compliance Program - Resolution of Compliance Problems".

Also, considerations in selecting an appropriate enforcement response to a consent decree violation are discussed generally in forthcoming guidance entitled, "Enforcing Consent Decree Requirements".

-4-

TRACKING SYSTEM

Tracking System Objectives

This uniform national approach to consent decree compliance tracking seeks to achieve the following objectives:

- Facilitate consent decree enforcement by uniformly tracking the compliance status of all EPA consent decrees.
- Keep senior Agency managemement informed of the compliance status of all EPA consent decrees.
- Provide timely, accurate information upon request to Congress and the public concerning the compliance status of EPA consent decrees.

Key Tracking System Components

To achieve these objectives, the tracking system relies on four key components:

1. The Repository
2. The Consent Decree Library
3. Compliance Monitoring
4. Compliance Tracking

These components are described below.

-5-

1. The Repository

The Repository is a collection of physical copies of over 425 EPA consent decrees NEIC has on file. NEIC assembled this collection with the assistance of the Regional Offices, the Department of Justice (DOJ), and the Federal Courts. NEIC is continuing its efforts to complete the collection of consent decrees to be filed in the Repository. To facilitate this effort, the Regional Counsels should forward copies of all new consent decrees to NEIC for inclusion in the Repository.

NEIC maintains the Repository and, upon request, can provide a copy of any EPA consent decree on file to requesting Agency offices.

2. The Consent Decree Library

NEIC developed, and will maintain, the consent decree library as an automated management information system to store summaries of each EPA consent decree on file in the Repository. Each consent decree summary will include the following information:

- Case name.
- Date the consent decree was entered and, if applicable, the date the decree was modified.
- Consent decree requirements, including due dates.
- Information indicating when these requirements were met.

NEIC will develop these summaries and send them to the Regional Counsels' Offices to review and confirm their accuracy. The information in the library can be updated by NEIC, based upon information sent to NEIC by the Office of Enforcement and Compliance Monitoring (OECM), to reflect the current compliance status of EPA consent decrees.

The library contains summaries of most EPA consent decrees on file. Computer terminals will link EPA Headquarters and the Regional Offices electronically with the library. NEIC will provide OECM and Regional Office personnel training on how to use the library.

Direct access to the library will provide the Agency's attorneys and enforcement staff with information on active or terminated consent decrees which may be useful in drafting and negotiating new consent decrees. Direct access to the library will also provide Regional managers with information on upcoming requirements which may be useful in targeting source inspections and in projecting resource needs.

3. Compliance Monitoring

Consent decree compliance monitoring is presently conducted to determine whether individual consent decree requirements are properly met. Compliance monitoring activities often include source reporting and on-site inspections.

-7-

Under the national consent decree tracking system, the Regional Program Offices are primarily responsible for conducting monitoring activities in accordance with national guidance issued by EPA Headquarters. The Regional Program Offices will continue to conduct compliance monitoring using whatever automated information system (e.g., PCS for Water Enforcement) they choose to use to assist them in their monitoring efforts.

4. Compliance Tracking

Compliance tracking is the gathering and compiling of compliance information which Agency management can use to determine and assess general trends in the Agency's consent decree enforcement efforts. Compliance tracking will be based upon the information gathered by the Regional Program Offices in the course of conducting their compliance monitoring activities.

OECM is responsible for tracking EPA's enforcement efforts on a national level, including whether the Agency is meeting its legal responsibility to the Courts for ensuring that consent decree requirements are met. Consequently, OECM will be principally responsible for compliance tracking, through use of the automated Consent Decree Library operated by NEIC, to ensure that Agency consent decree enforcement efforts are adequate.

-8-

To facilitate OECM compliance tracking activities, The Office of Management Operations (OMO) will send each Regional Administrator periodic information requests concerning the compliance status of each consent decree in the Region. These information requests will serve as a tool to ensure that Regional Offices focus on source compliance with individual milestones in each consent decree.

Tracking System Operation

The operation of the tracking system will draw from the information stored in the consent decree library. At the beginning of each quarter, OMO will send to each Regional Administrator two computer print-outs (see attachments) containing consent decree information from the consent decree library. The computer print-outs will list:

a. All consent decree milestones in each Region which are scheduled to come due during the present quarter (prospective).
b. All consent decree milestones in each Region for which the Region was responsible for ensuring compliance during the preceding quarter (retrospective).

-9-

The prospective print-out is intended as a tool for use by the Regional and OECM management generally. It may be used, for example, as an alert device to assist each Regional Administrator in advance preparations for ensuring that consent decree milestones coming due during the quarter are met properly.

The retrospective print-out will contain instructions asking each Regional Administrator to respond to OMO, within ten working days of the transmission date of the print-out, with the following summary information:

- Whether each consent decree milestone which came due during the preceding quarter was achieved.
- The consent decree milestones which were not in compliance.
- Whether any consent decree milestones were renegotiated.
- If any milestone is not achieved or renegotiated, the enforcement response the Region intends to take to ensure that the milestone is achieved.

The Associate Enforcement Counsels in OECM will review the information provided by the Regional Administrator for use in tracking the Agency's overall consent decree enforcement efforts. OMO will send the raw data to NEIC to be used to update the information in the consent decree library.

-10-

It will be important for the Regional Administrator to make sure that the response is properly coordinated between the various offices in the Region (e.g., the Regional Program Offices and the Regional Counsels' Offices). This will better ensure that the information in the tracking system is accurate and complete.

OFFICE RESPONSIBILITIES

Three Agency components will share responsibilities in implementing and maintaining the consent decree tracking system. These three offices are:

1. NEIC
2. Regional Administrators
3. OECM Headquarters

The respective responsibilities of these offices are specified below.

-11-

I. NEIC

NEIC's responsibilities generally will involve the start-up operations and the maintenance of the Repository and the Consent Decree Library. This will include the following:

- Completing the collection of physical copies of EPA consent decrees to be filed in the Repository.
- Maintaining the Repository and making available to Agency personnel upon request copies of consent decrees filed in the Repository.
- Ensuring that summaries of all EPA consent decrees filed in the Repository are fed into the Consent Decree Library. NEIC will send copies of the summaries to the Regional Counsels' Offices for review to ensure the accuracy of the summaries.
- Maintaining the Consent Decree Library and ensuring the smooth technical operation of the library.
- Providing OECM and Regional Office personnel with training on how to use the library and establishing a contact point in NEIC to respond to Agency inquiries on proper library use.
- Updating the Consent Decree Library with compliance information sent to NEIC quarterly by OMO.

-12-

2. Regional Administrators

The Regional Administrators are ultimately responsible for keeping informed of the compliance status of the consent decrees in their Regions, so that they can act promptly to remedy any identified instances of noncompliance. It will be important for the Regional Administrator to make sure that the Region's consent decree compliance efforts are properly coordinated between the Regional Program Offices, the Regional Counsel's Office, and other appropriate offices in the Region. With regard to the consent decree tracking system, these compliance efforts will include:

- Reviewing the consent decree summaries prepared by NEIC for accuracy prior to final entry into the Consent Decree Library.
- Forwarding to NEIC copies of all future EPA consent decrees that have been entered in Court, including any renegotiated consent decrees.
- Conducting compliance monitoring in accordance with policy issued by the national program offices to determine if the terms of each consent decree are met. Regional Offices may use whatever automated information system they choose to assist them in monitoring.

-13-

- Responding to OMO requests for information concerning consent decree compliance status.
- Using the Consent Decree Library as may be necessary to ensure the compliance of existing consent decrees and in drafting and negotiating new consent decrees.

3. OECM

Under the tracking system, OECM's general responsibilities of tracking consent decree compliance will be shared by OMO and the Associate Enforcement Counsels. These responsibilities will include:

- Sending quarterly information requests inquiring about the compliance status of the consent decrees in each Region to each Regional Administrator.
- Forwarding summary information from the Regional Administrator to NEIC to use in updating the Consent Decree Library.
- Forwarding to NEIC copies of all future EPA consent decrees in nationally managed cases, including any renegotiated consent decree in which the Associate Enforcement Counsel took the lead in the renegotiation.

-14-

- Tracking the overall EPA consent decree enforcement effort using information contained in the Regional Adminstrator's responses to OECM's quarterly consent decree compliance information requests.
- Evaluating each Region's accomplishments in monitoring consent decree compliance and responding to noncompliance problems.

The success of this uniform national system for tracking consent decrees depends upon how well Agency offices work together in implementing and maintaining the system. If properly implemented and maintained, the tracking system can enhance EPA's consent decree enforcement efforts.

If you have any questions concerning the system, please contact Michael Randall of OLEP at FTS 382-2931 or Gerald Bryan of OMO at FTS 382-4134.

Attachments

Attachment A

SAMPLE PROSPECTIVE REPORT FOR THE QUARTER BEGINNING 7/1/83

Listed below are the consent decree milestones which will come due during the present quarter.

1. Republic Steel Chicago, Ill

   Milestone: Place purchase order
   Due date: 9/15/83

2. Great Lakes Steel Zug Island, MI

   Milestone: Commence construction
   Due date: 8/1/83

3. Ford Motor Co. Dearborn, MI

   Milestone: Demonstrate compliance
   Due date: 9/30/83

Attachment B

SAMPLE RETROSPECTIVE REPORT FOR THE QUARTER ENDED 6/30/83

Please provide the requested information for the consent decrees milestones listed below.

A. Milestones due in quarter dated 4/1/83 to 6/30/83:

1. Republic Steel Chicago, Ill

Milestone: Submit engineering plan
Due date: 6/30/83

a. Was Milestone Achieved?
(yes or no)

b. If not achieved, was milestone renegotiated?
(yes or no)

c. If renegotiated, please indicate new milestone.
(e.g., new milestone date due is 9/30/83)

d. If not achieved or renegotiated, what action is contemplated to bring source back into compliance?
(e.g., referral to OLEC HQ)

B. Milestones due in previous quarters which were not met in those quarters and had not been renegotiated or achieved as of 3/31/83?

1. Great Lakes Steel Zug Island, MI

Milestone: Place purchase order
Due date: 1/1/83

a. Has milestone been achieved since the previous update?
(yes or no)

b. If not achieved, has milestone been renegotiated since the previous update?
(yes or no)

c. (Repeat above)

d. (Repeat above)

C. Total number of consent decrees with milestones not met or renegotiated by 6/30/83. (number)

D. Total number of consent decrees this quarter brought back into compliance with milestone requirements due to action (including renegotiation) taken by the Region? (number)

Demand Letter for Stipulated Penalties

(Reserved)

(Reserved)

Motion To Enforce Decree

DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

UNITED STATES of AMERICA Plaintiff, v. TRANSFORMER SERVICE (OHIO), INC. Defendant.	)	CIVIL ACTION NO. C-80-122-A JUDGE CONTIE

MOTION BY PLAINTIFF UNITED STATES
TO ENFORCE JUDGMENT AND FOR ORDER
TO SHOW CAUSE WHY DEFENDANT SHOULD
NOT BE HELD IN CONTEMPT

Plaintiff United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges:

1. This is a post judgment proceeding, pursuant to Rule 70 of the Federal Rules of Civil Procedure and 28 U.S.C. §1651, for additional injunctive relief and civil penalties for the continuing failure of the defendant, Transformer Services (Ohio), Inc., to comply with the Consent Decree entered into in this action on July 19, 1980, and filed on November 6, 1980.

JURISDICTION AND VENUE

2. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §1345 and §1651, and Section 17 of the Toxic Substances Control Act (TSCA"), 15 U.S.C. §2616 and §309(b) of the Clean Water Act, 33 U.S.C. §1319(b).

3. Venue is proper in this Court pursuant to 28 U.S.C. §1391 since defendant resides in this judicial district, the claims asserted in this action arose in this district, and the Consent Decree filed herein was filed in this district.

PARTIES

4. Defendant Transformer Service (Ohio), Inc. ("TSI" or "the defendant"), is a corporation organized and doing business under the laws of the State of Ohio. Defendant's business office is located at 680 East Market Street, Akron, Ohio.

PROCEDURAL BACKGROUND

5. On July 17, 1980, the United States filed a Complaint in this action alleging, inter alia, that defendant disposed of polychlorinated biphenyls ("PCBs") at its field shop at 699 Home Avenue, Akron, Ohio in a manner that violated Sections 6 and 15 of TSCA, 15 U.S.C. §§2605 and 2614, including by allowing PCBs to seep into soil at the Home Avenue site. The Complaint also alleged that defendant had discharged pollutants from the Home Avenue site into sewers discharging into the Little Cuyahoga River located near the site.

6. A Consent Decree was entered into by the parties on July 19, 1980 and filed herein on November 6, 1980 (a copy of which is annexed as Exhibit A hereto). The Decree required, inter alia, that TSI "complete the removal and disposal of all PCB-contaminated soils within and adjacent to its field shop located at 699 Home Avenue, in strict accordance with the requirements of 40 C.F.R. §761.10(a)(4)." The clean-up was required to include removal of all PCB-contaminated soils to a level whereby all remaining soils retained PCB concentrations of less than 50 parts per million ("ppm") and disposal of the PCB-contaminated soils was required to be only by the methods listed in 40 C.F.R. §761.10(a)(4). TSI was required to complete the removal and disposal of the PCB-contaminated soil within 6 months of entry of the decree.

CLAIM FOR RELIEF

7. TSI has failed to remove all the PCB-contaminated soil in excess of 50 ppm from the Home Avenue site (see Affidavit annexed as Exhibit B hereto). Testing by EPA indicates that soil contamination levels up to 790 parts per million PCB remain at the site. The most recent information generated by TSI shows an even higher level of contamination of 1000 parts per million PCB in soils at the site (see Affidavit annexed as Exhibit C hereto).

8. It is now almost 4 years since the Consent Decree was entered into by the parties. TSI has clearly failed to complete the removal of PCB-contaminated soils within the 6-month period allowed by the Consent Decree, and shows no sign of completing the removal of the contaminated soil in the near future.

9. Contrary to the requirements of the Consent Decree that removal and disposal of the PCB-contaminated soil from the Home Avenue site be in accordance with all applicable statutory and regulatory requirements, including the requirement that the soil be disposed of at a licensed PCB landfill, TSI's officers attempted to violate the Consent Decree and the law by removing contaminated soils from the Home Avenue site on a weekend and attempting to sell it as non-contaminated soil to an auto wrecking yard. Gregory Booth of TSI and Gerald Rafferty, General Manager of TSI, were indicted for several felonies as a result of these actions and pled guilty to a felony and misdemeanor count.

10. Particularly in light of the egregious and unlawful behavior of defendant and its officers and their protracted delay in cleaning up the Home Avenue site, it is essential that this Court take action to force the defendants to clean up the site promptly and to penalize them for their willful failure to comply with the Consent Decree herein. Since PCBs are highly toxic substances which bioaccumulate in the environment and produce deleterious health effects in humans and animals, including skin lesions, reproductive failure, teratogenicity (abnormal fetal development), and cancer (see ¶6 of Complaint herein), it is of the utmost public concern to ensure that this site is cleaned up immediately.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court issue an order:

1. Directing defendant to file an answer or other responsive pleading to this motion within 20 days after service;

2. Permitting plaintiff to file a reply within 10 days of receipt of defendant's response.

3. Directing defendant to appear before this Court and present evidence why it should not be held in contempt for failure to comply with this Court's Consent Decree of July 19, 1980;

4. Directing defendant to complete the removal and disposal of PCB-contaminated soils at the site in accordance with the requirements of the Consent Decree by no later than November 1, 1984;

5. Requiring defendant to post a bond in the amount of the expected cost of completion of the clean-up within 15 days of the entry of the contempt order requested herein;

6. Requiring defendant to pay a civil penalty of up to $25,000 per day of violation for its past failure to comply with the Consent Decree herein;

7. Requiring defendant to pay penalties to be affixed by the Court in an amount of up to $25,000 per day in the event that defendant does not comply with the contempt order requested herein; and

8. Requiring defendant to pay the United States' costs of this motion.

F. HENRY HABICHT, II
Assistant Attorney General
Land and Natural Resources Division
U.S. Department of Justice

CATHERINE R. McCABE
Attorney, Environmental Enforcement Section
Land and Natural Resources Division
U. S. Department of Justice
Washington, D.C. 20530
(202) 633-2779

J. WILLIAM PETRO
U.S. ATTORNEY

By:
DENNIS P. ZAPKA
Assistant U.S. Attorney
Northern District of Ohio
1404 East Ninth Street, Suite 500
Cleveland, Ohio 44114
(216) 363-3950

OF COUNSEL:

THOMAS DAGGETT
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

Chapter Eleven

Special Topics in the NPDES Program

Chapter Contents

1 Introduction

Chapter One contained a broad overview of the general provisions of the Clean Water Act (CWA) and its implementing regulations. This chapter provides a more detailed discussion of particular topics relevant to the NPDES program.

As discussed in the first chapter, the central mechanism for accomplishing the CWA's goal is the NPDES permit system, outlined in Section 402. The NPDES program prohibits discharges of pollutants from a point source into the waters of the United States unless the discharger acquires a permit from EPA or from an approved state in which the discharge will occur.

This chapter will address the following topics:

- Boilerplate permit conditions;
- A permit as a shield to enforcement;
- Issuance of best professional judgment (BPJ) permits;
- Special evidentiary procedures required for permit hearings;
- The Freedom of Information Act; and
- Protection of Confidential Business Information.

2 Standard Permit Conditions

This section addresses the standard NPDES conditions that EPA or an approved state must place in every permit. These are only minimum conditions; the states are authorized to set more stringent permit conditions. These "boilerplate" provisions are contained in 40 C.F.R. §122.41; any violation of these conditions is actionable in an enforcement proceeding under Section 309 of the CWA. These provisions may be incorporated into a permit either expressly or by reference. Further, in the event a particular condition is held invalid, the remainder of the permit retains its full force and effect. This section discusses the following conditions:

- Duty to comply;
- Proper operation and maintenance;
- Duty to mitigate;
- Duty to halt or reduce activity;
- Duty to provide information;
- Inspection and entry;
- Monitoring and recordkeeping;
- Reporting and signatory requirements;
- Notice of planned physical alterations or additions;
- Bypass of treatment facilities;
- Upset provisions; and
- Duty to reapply.

Duty To Comply [Section 122.41(a)]

The permittee must comply with all of the conditions of the permit. A violation of any of these conditions is grounds for an enforcement

proceeding, permit termination, permit revocation and reissuance or modification, or for denial of a permit renewal application. Under Section 309(d) of the CWA, where the permittee violates conditions implementing CWA Sections 301, 302, 306, 307, 308, 318, or 405, he or she may be liable for civil penalties of up to $10,000 per day of violation. Persons who willfully or negligently violate these same conditions are subject to criminal penalties of $25,000 per day of violation, imprisonment for up to one year, or both.

Proper Operation and Maintenance [Section 122.41(e)]

The permittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the permit holder to achieve compliance with the permit conditions. This includes adequate laboratory controls and appropriate quality assurance procedures. The operation of back-up or auxiliary facilities or similar systems installed by the permittee, is required when such operation is necessary to achieve compliance with the conditions of the permit.

Duty To Mitigate [Section 122.41(d)]

A permittee must take all reasonable steps to minimize or prevent any discharge in violation of the permit that has a reasonable likelihood of adversely affecting human health or the environment. Note that this condition does not impose liability for medical costs for persons harmed by the results of the noncompliance. See "Duty To Halt or Reduce Activity" below.

Duty To Halt or Reduce Activity [Section 122.41(c)]

A permit holder, in an enforcement action, may not defend its facility's noncompliance on the grounds that it would have been necessary to halt or reduce activity of the regulated facility in order to avoid the violation. The permittee is expected to temporarily cease or reduce operations to maintain compliance.

Duty To Provide Information [Section 122.41(h)]

The permittee must, within a reasonable time, provide the NPDES program director (generally either the regional program division director or the state NPDES director) with any information that the director may request to

determine whether cause exists for modifying, revoking and reissuing, or terminating a permit, or to determine permit compliance. For example, upon request, the permit holder must also furnish the director with copies of any records that, under the provision of the permit, are required to be kept.

Inspection and Entry [Section 122.41(i)]

The permittee must allow the NPDES program director or an authorized representative who presents credentials and other documents as may be required by law, to:

- Enter the permit holder's premises where the regulated facility or activity is located or where records must be kept in accordance with permit conditions;
- Have access to and copy, at reasonable times, any records that must be kept in accordance with permit conditions;
- Inspect, at reasonable times, any facility, equipment (including monitoring and control equipment), practices, and operations regulated or required by a permit; and
- Sample or monitor, at reasonable times, for the purpose of ensuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location.

Monitoring and Recordkeeping [Section 122.41(j)]

Monitoring Requirements

The NPDES regulations require the permittee to monitor the mass (or other measurement specified in the permit) for each pollutant or indicator limited by the permit and the volume of effluent discharged from each outfall. In addition, the permittee may be required to take any other appropriate measurements, including:

- Pollutants subject to notification requirements;
- Pollutants in intake water (in the case of net limitations); and
- Frequency and rate of discharge for noncontinuous discharges.

The permittee's samples and measurements must be representative of the regulated activity, and the permittee must take all samples and measurements at the locations and with the frequency specified in the permit. If the permit holder monitors any pollutant more frequently than required by

the permit, he or she must include the results of this additional testing in the calculation and reporting of the data submitted in the DMR. Any calculations made for pollutant limitations, which require an averaging of measurements, shall use an arithmetic means unless the permit specifies otherwise [40 C.F.R. §122.41(a)]. Approved testing procedures for sampling are established in 40 C.F.R. Part 136.

Recordkeeping

The permittee must retain records of all monitoring information for a period of at least three years from the date of each sample, measurement, report, or application. The NPDES director may extend this period upon request. Required records include all calibration and maintenance records, all original strip chart recordings, copies of all reports required by the permit, and records of all data used to complete the permit application.

Monitoring records must include the following:

- The date, exact place, and time of the sample or measurement;
- The individuals who performed the sampling or measurement;
- The dates that the analyses were performed;
- The names of the individuals who performed the analyses;
- The analytical techniques or methods that were used; and
- The results of such analyses.

Reporting and Signatory Requirements (Sections 122.41, 122.42, and 122.22)

Reporting Requirements

Under 40 C.F.R. §§122.41(1)(4) and 123.22(d), the state or EPA permittee must report all monitoring results on a Discharge Monitoring Report (DMR) form. The frequency of submission of the DMR depends on the nature and effect of the discharge and is designated in the permit, but in no case will the frequency be set at less than one year [40 C.F.R. §122.44(i)(2)].

The permittee must report any noncompliance that may endanger health or the environment within 24 hours from the time he or she becomes aware of the circumstances, and, unless waived, must provide the director with a written submission five days later. The written submission must contain a description of the cause of noncompliance, the period of noncompliance (including exact dates and times), the anticipated time it is expected to continue, and finally the steps taken or planned to reduce, eliminate, or prevent a recurrence of the noncompliance.

Under 40 C.F.R. §122.41(l)(6), the permittee must report the following within 24 hours:

- An unanticipated bypass that exceeds any effluent limitation in the permit. (The director may waive the written report on a case-by-case basis if he or she receives the oral report within 24 hours.);
- An upset that exceeds any effluent limitation in the permit; or
- A violation of the maximum daily discharge limitation for any pollutant listed in the permit as requiring 24-hour reporting.

The permittee must report all other instances of noncompliance (which are not required to be reported within 24 hours) at the time he or she submits the DMR. All reports of progress toward interim and final requirements contained in a permit compliance schedule must be submitted no later than 14 days following each schedule date [40 C.F.R. §§122.41(l)(5) and 122.41(l)(7)].

A permittee wishing to transfer his or her permit must notify the director. The director may require modification or revocation and reissuance of the permit to change the name of the permittee [40 C.F.R. §122.41(l)(3)].

A person knowingly making a false statement, representation, or certification in any record or other document submitted or required to be maintained under the permit is subject to a fine of not more than $10,000 per violation, imprisonment of not more than 6 months, or both [see CWA Section 309(c)(2)].

Reporting Toxic Pollutants

A permittee (other than a publicly owned treatment works) must notify the NPDES director as soon as he or she has reason to believe that any activity has occurred or will occur that will result in the discharge of any toxic pollutant that is not limited in the permit and that would exceed the highest of the following levels:

- One hundred micrograms per liter (100 ug/L);
- Two hundred micrograms per liter (200 ug/L) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/L) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/L) for antimony;
- Five times the maximum concentration value reported for that pollutant in the permit application; or
- The level established by the NPDES director in the permit.

The permittee must also notify the NPDES director as soon as the facility has begun or expects to begin to use or manufacture, as either an intermediate or final product or by-product, any toxic pollutant that was not

reported in the permit application [40 C.F.R. §§122.42(a)(1) and 122.42(a)(2)].

POTW Reporting

All publicly owned treatment works (POTWs) must provide adequate notice to the NPDES director of any of the following:

- Any new introduction of pollutants into the POTW from an indirect discharger that would be subject to CWA Section 301 (effluent limitations) and Section 306 (new source performance standards) if the facility were directly discharging the pollutants; and

- Any substantial change in the volume or character of the pollutants introduced into the POTW since the time of permit issuance.

Adequate notice includes information on (1) the quality and quantity of effluent introduced into the POTW, and (2) any anticipated impact of such change on the quality and quantity of the effluent that is discharged from the POTW [40 C.F.R. §122.42(b)].

Signatory Requirements

Under 40 C.F.R. §§122.22 and 122.41(k), the permittee must sign and certify all applications, reports, or information submitted to the director.

Applications. All permit applications must be signed as follows:

- For a corporation, permit applications must be signed by a responsible corporate officer, which means one of the following:

  -- A president, secretary, treasurer, or vice-president of the corporation who is in charge of a principal business function, or any other person who performs similar policy or decision-making functions; or

  — The manager of one or more manufacturing, production, or operating facilities that employs more than 250 persons or that has gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), if the authority to sign such documents has been assigned or delegated to the manager in accordance with corporate procedures;

- For a partnership or sole proprietorship, permit applications must be signed by a general partner or the proprietor, respectively; and

- For a municipality, state, federal, or other public agency, permit applications must be signed by either a principal executive officer or a ranking elected official. A principal executive officer of a federal agency includes:

-- The chief executive officer of the agency, or

-- A senior executive officer having responsibility for the overall operation of a principal geographic unit of the agency [40 C.F.R. §122.22(a)].

Reports. All reports required by permits and any other information requested by the director must be signed by a person described above under "Applications" or by a duly authorized representative of that person. A representative is duly authorized only if the following conditions are met:

- Written authorization is submitted to the director; and
- The authorization specifies either an individual or a position having overall responsibility for environmental matters for the company or responsibility for the overall operation of the regulated facility or activity such as plant manager, operator of a well or a well field, superintendent, or a position of equivalent responsibility [40 C.F.R. §122.22(b)].

Certification. Any person authorized (as described above) to sign a document shall make the following certification:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations [40 C.F.R. §122.22(d)].

Notice of Planned Physical Alterations or Additions [Section 122.41(1)]

The permittee must give advance notice to the director of any planned physical alterations or additions to the permitted facility where:

- The alteration or addition to the facility may meet one of the criteria or determining whether a facility is a new source; or
- The alteration or addition could significantly change the nature of or increase the quantity of pollutants discharged. [This notification requirement also applies to pollutants that are not subject to either effluent limitations in the permit or to the toxic discharge notification requirements in 40 C.F.R. §122.42(a).]

Bypass of Treatment Facilities [Section 122.41(m)]

Bypass occurs where the permittee intentionally diverts a waste stream away from a treatment facility. The NPDES regulations generally prohibit bypass unless:

- The bypass was unavoidable and necessary to prevent loss of life, personal injury, or severe property damage. Severe property damage means substantial physical damage to property, damage to the treatment facilities that causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production; or

- There were no feasible alternatives to the bypass, such as using auxiliary treatment facilities, retaining untreated wastes, or performing necessary maintenance during normal periods of equipment down time. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal equipment down time or preventive maintenance.

Bypass does not constitute a violation where it has not caused effluent limitations to be exceeded, and only if it is necessary for essential maintenance to ensure efficient operation of the treatment facility. Essential maintenance includes repairs and maintenance that cannot wait until the production process is not in operation. Economic considerations alone do not qualify maintenance as essential.

If the permittee knows in advance of the need for a bypass that will exceed the limits of the permit, the permittee must submit prior notice, if possible, at least 10 days before the date of the bypass. The director may approve an anticipated bypass after considering its adverse effects, if he or she determines that it will meet the conditions listed above.

The permittee must submit notice of an unanticipated bypass within 24 hours following the incident.

Upset Conditions [Section 122.41(n)]

An upset is an exceptional incident in which there is unintentional and temporary noncompliance with technology-based limitations due to factors beyond the permittee's reasonable control. An upset does not include noncompliance caused by operational error, improperly designed facilities, inadequate facilities, lack of preventive maintenance, carelessness, or improper operation.

An upset constitutes an affirmative defense to an action brought for non-compliance with technology-based limitations. It is not an affirmative defense for violations of water quality standards. The administrative denial of this affirmative defense alone does not constitute final Agency action subject to judicial review.

A permittee who wishes to establish the affirmative defense of upset must demonstrate, through properly signed, contemporaneous operating logs or other relevant evidence, that the following conditions were in effect at the time of the upset:

- The permittee can identify the cause of the upset;
- The permitted facility was being properly operated at the time;
- The permittee submitted notice of the upset within 24 hours following the incident; and
- The permittee complied with any remedial measures required by the permit.

The permittee who seeks to establish an upset has the burden of proof in an enforcement action.

Duty To Reapply [Section 122.41(b)]

If the permittee wishes to continue an activity after the expiration date of the permit, the permittee must apply for and obtain a new permit. The application must be submitted at least 180 days before the expiration date of the existing permit. The NPDES director may grant permission to submit an application less than 180 days before expiration, but no later than the permit expiration date [40 C.F.R. §122.21(d)].

3 Permit as a Shield

The General Rule

Section 402(k) of the Act states that "[c]ompliance with a permit...shall be deemed compliance, for purposes of Sections 309 [Agency enforcement actions] and 505 [citizen suits]," with the following sections:

§301 Effluent limitations
§302 Water quality-related effluent limitations
§306 National performance standards
§307 Toxic and pretreatment standards
§403 Ocean discharge criteria

The permittee may generally discharge a substance in any quantity not specifically limited by the permit [Montgomery Environmental Coalition v. Costle, 646 F. 2d. 568, 588 (D.C. Cir. 1980)]. Permit compliance may shield the discharger and may establish an absolute defense against either a government enforcement action or a citizen suit. To obtain the shield, permittees must provide all information on their discharge requested by EPA during the permit application process. Permit compliance does not shield the discharger against certain actions such as a Section 504 emergency enforcement action, a Section 307 toxics standards action, or a Section 308 or 309(f) action. Further, EPA may bring suit under the emergency provision of the Safe Drinking Water Act, if there is an endangerment to drinking water supplies.

The shield concept is based on the presumption that the permit writer had adequate information describing the nature of the pollutants to be discharged and has incorporated this information into the permit limitations. Further, it provides the permittee some certainty on how to manage his or her treatment activities.

In E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 138 n. 28 (1977), the U.S. Supreme Court interpreted Section 402(k) as "giving permits finality," and stated that "the purpose of §402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate...the question whether their permits are sufficiently strict."

Exceptions to the General Rule

Section 402(k) provides that compliance with the permit will not be deemed compliance with any standard imposed under Section 307 (toxic and pretreatment standards) for a toxic pollutant injurious to human health. Permit holders must comply with new or revised standards for toxic pollutants by the date specified in the rulemaking. These Section 307(a) standards can be found in 40 C.F.R. Part 129. Thus, the lack of a permit limitation for a toxic standard does not preclude an enforcement action for the violation of that standard.

In the leading Section 402(k) decision, Inland Steel Co. v. EPA [574 F. 2d. 367, 373 (7th Cir. 1978)], the court held that Section 402(a)(3) authorizes EPA to terminate or modify a permit to reflect subsequently adopted toxic pollutant standards. [See 40 C.F.R. §122.62(a)(6).] The court further stated that:

> The language [of §402(k)] should be read to mean that a permit insulates the permit holder from any change in the regulation until the change is incorporated into the permit, and as a recognition that changes in the regulations, except for those prescribing standards for toxic pollutants injurious to human health, are not self-executing but must be placed in a permit before they can be enforced against a permit holder. (564 F. 2d at 373) [emphasis added]

The court reasoned that the protection of human health should not be delayed while proceedings are undertaken to modify the permits of those facilities discharging the toxic pollutant.

The District of Columbia Court of Appeals has agreed with Inland Steel in two opinions. In Hercules Inc. v. EPA [598 F. 2d. 91, 130 (D.C. Cir. 1978)], the court noted that "dischargers must meet newly established toxic standards even before their permits have been revised to include them." In Environmental Defense Fund v. EPA [598 F. 2d. 62, 73 (D.C. Cir. 1978)], the court stated that "citizen suits for violations of Section 307 [are] free from certain procedural requirements of other citizen suits; [and] that Section 307 standards [are] to become effective quickly."

Where a permit is not modified to incorporate a new or revised toxic standard, EPA regulations, nonetheless, require compliance within the time provided in the regulations that establish these prohibitions [40 C.F.R. §122.41(a)(1)]. Of course, once the permit has been modified, the permit holder is also susceptible to either a Section 309 enforcement action or a Section 505 citizen suit for noncompliance.

Section 504 of the CWA provides a second important exception to the shield concept. Section 504 authorizes the Administrator to seek an injunction against any discharger in the event of imminent and substantial endangerment to human health or welfare. Finally, neither Section 308 violations nor Section 309(f) actions are covered by the general rule.

4 Issuance of Best Professional Judgment Permits

Setting BPJ Permit Limitations

As discussed in Chapter One, each discharger must comply with technology-based limitations based on either (1) national effluent limitation guidelines or (2) in the absence of applicable guidelines, a case-by-case determination made by a permit writer of the appropriate level of treatment technology. This latter type of limitation is referred to as a best professional judgment (BPJ) permit limitation. BPJ permit limitations may also be used in conjunction with a national guideline where the guideline does not address a particular pollutant that is discharged.

Section 402(a)(1) of the CWA states:

> [T]he Administrator may...issue a permit for the discharge of any pollutant...upon condition that such discharge will meet either all applicable requirements under Sections 301, 302, 306, 307, 308 and 403 of the Act, or, prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act. (Emphases added)

See also U.S. Steel Corp. v. Train [556 F. 2d. 822, 844 (7th Cir. 1977)] and NRDC v. Train [510 F. 2d. 692, 709-710 (D.C. Cir. 1975)].

The Supreme Court recognized in E.I. du Pont Nemours & Co. v. Train [430 U.S. 112 (1977)] that "large numbers of permits could be issued before the §301 [effluent guideline] regulations were promulgated" (430 U.S. at 134 n.24). [Accord, NRDC v. Train, 510 F. 2d 692, 696 n.9 (D.C. Cir. 1975); United States v. Cargill Inc., 508 F. Supp. 734, 739 (D. Del. 1981); Homestake Mining Co. v. EPA, 477 F. Supp. 1279, 1288 (D. S.D. 1979); and United States v. Cutter Laboratories, Inc., 413 F. Supp. 1295 (E.D. Tenn. 1976).] Section 402(a)(1) and its implementing regulations "clearly provide for the issuance of NPDES permits prior to the establishment of effluent limitations" by regulation (Id. at 1298).

In developing a BPJ permit, the permit writer first determines the appropriate BCT or BAT technology requirements for the entire industry and then considers any site-specific factors that make the particular discharger different from the industry in general [see U.S. Steel Corp. v. Train, 556 F. 2d 827, 844 (7th Cir. 1977)]. In making this determination, permit writers apply the following factors listed in CWA Section 304(b).

General Factors To Consider (all BPJ Permits)

- The age of the equipment and facilities involved;
- The industrial processes used;
- The engineering aspects of the application of various types of control techniques, process changes, nonwater-quality environmental impacts; and
- Any other factor that the Administrator deems appropriate.

Special Factors To Consider for:

BPJ-Best Practicable Technology (BPT) Permits. The total cost of the applicable technology should be considered in relation to the effluent reduction benefits to be achieved from the application of BPT.

BPJ-Best Available Technology (BAT) Permits. Permit writers should consider the following points:

- Existing treatment techniques;
- Process and procedure innovations;
- Operating methods and other alternatives for classes and categories of point sources; and
- Cost of achieving such effluent reduction.

BPJ-Best Conventional Technology (BCT) Permits. Permit writers must analyze the cost of attaining a BCT-level reduction in effluents and the effluent reduction benefits derived by both POTWs and industrial point sources.

Other Factors To Consider

In addition to these general and special factors, permit writers should consider the control measures and practices that are available to eliminate discharge of pollutants from categories and classes of point sources, taking into account the cost of such elimination. EPA has published a Treatability Manual to aid permit writers in these efforts. The manual can be obtained from the Permits Division, Office of Water.

Issuing the BPJ Permit

A fact sheet must accompany the following proposed BPJ permits (see 40 C.F.R. §§124.8 and 124.56):

- Major dischargers;
- General permits;
- Draft permits incorporating a variance;
- Draft permits that raise major issues or are the subject of widespread public interest;
- Draft permits controlling toxic pollutants;
- Draft permits limiting internal waste streams; and
- Draft permits limiting indicator pollutants.

The fact sheet contains an analysis and explanation of the calculations or other determinations of the derivation of the BPJ limitations and conditions in the specific permit. (Note that, when EPA establishes a methodology for setting BCT effluent limitations, it will require all permit writers to use that methodology when developing BPJ-BCT limitations.) A fact sheet that fails to provide adequate rationale for the limitations may result in a successful challenge to the permit.

Effluent guidelines can only be challenged in the U.S. Court of Appeals within 90 days following promulgation of the guidelines and cannot be challenged in an evidentiary hearing. A BPJ determination may be the subject of an evidentiary hearing conducted according to the Administrative Procedure Act (APA), 5 U.S.C. Section 556 and 40 C.F.R. Part 124 Subpart E. However, a permit based on an effluent guideline may not be challenged in an evidentiary hearing except on factual questions relating to application to the particular discharge.

BPJ permits have full force and effect and are binding upon the permit holder. Like permits using BAT and BCT limitation guidelines, BPJ permits are enforceable under Sections 309 and 505 of the Act.

EPA may not relax a BPJ limitation if the final BCT or BAT guideline is less stringent than the BPJ permit, unless the permit holder can show that its operation and maintenance costs are totally disproportionate to those considered in the subsequently promulgated guideline [40 C.F.R. §122.62 (a)]. In the event the BCT or BAT limitations are more stringent, the permittee is shielded from the tougher standards unless the permit is modified.

5 Special NPDES Evidentiary Hearing Procedures

Any interested person may challenge an issued NPDES permit, except a general permit [40 C.F.R. §124.71(a)], by requesting a formal hearing. General permits, which are similar to regulations and not adjudication, cannot be challenged administratively, but only in a court. Requesting an evidentiary hearing and a subsequent appeal to the Administrator are prerequisites to judicial review for an individual EPA-issued NPDES permit, according to 40 C.F.R. §124.91(e), Section 704 of the Administrative Procedure Act (APA), and Section 509(b)(1) of the CWA.

Request for a Hearing

A permittee or any interested person must file a request for an NPDES evidentiary hearing (hereafter referred to as "hearing") with the Regional Administrator (RA) within 30 days of a final permit decision [40 C.F.R. §124.74(a)]. The requestor sends a letter that identifies the requestor, his or her interest in the permit, the contested permit conditions, proposals for alternative conditions (including deletion), the legal and factual issues to be resolved, and an estimate of the amount of time necessary for the hearing.

The RA has 30 days to respond to a hearing request. The RA must deny a request that raises only purely legal issues. The requestor may appeal a denial to the Administrator. The RA will grant a request that raises material issues of fact relevant to permit issuance [see 40 C.F.R. §124.75(a)(1)]. The RA must provide reasons for denying the hearing request. Appeals resulting from an RA's denial must be taken to the Administrator within 30 days of the denial (see 40 C.F.R. §124.91).

Filing Documents

Each party must file (with the Regional Hearing Clerk) an original and one copy of all written submissions related to the hearing. The parties must also serve these documents (either by mail or personal delivery) to all other parties to the proceeding and to the Administrative Law Judge (ALJ).

The party must then file an affidavit of service with the Regional Hearing Clerk [40 C.F.R. §124.80(a-c)].

The clerk will maintain a record of all involved parties, including service addresses, telephone numbers, and the name and telephone number of any attorney representing any party. This information is available on request [40 C.F.R §124.80(d)].

Ex Parte Communications

The APA prohibits any decisionmakers from engaging in ex parte discussions of the merits of a formal hearing with interested persons outside the Agency [5 U.S.C. §557(d)]. The APA also contains a separation-of-functions provision, which prohibits anyone involved in investigative or prosecutorial functions from participating in the hearing, or giving advice to the ALJ [5 U.S.C. §554(d)]. These two provisions are meant to ensure impartial decisionmaking by the Agency. EPA employees, consultants, and contractors who are either called as witnesses or assisted in developing the draft permit (which is the subject of the hearing), have been designated as members of the Agency trial staff, and may not participate in ex parte contacts [see 40 C.F.R. §124.78(a)(1)].

Prehearing Conferences

EPA regulations (40 C.F.R. §124.83) provide for prehearing conferences. These conferences may be convened at the request of any party of record, or on motion of the ALJ [40 C.F.R §124.83(a)]. The prehearing conference may be used to:

- Limit, simplify, or clarify the issues in dispute;
- Establish admissions of facts and the genuineness of documents to be received in evidence;
- Collect all written testimony and mark items for identification;
- Identify expert witnesses (the ALJ can request a summary of the anticipated expert testimony);
- Raise objections to any written documents, or other exhibits, submitted in evidence;
- Agree on stipulations of proof; and
- Determine any remaining scheduling needs.

Following the prehearing conference, the ALJ issues a prehearing order reciting all action taken during the conference, the parameters of the hearing, and the procedures to be used [40 C.F.R. §124.83(e)].

Motions

Any party may file a motion on any matter related to the proceeding, including a motion to dismiss [40 C.F.R. §124.86]. Each motion must be in writing and properly served unless offered orally during the hearing.

Any party may file a response to a motion within 10 days after receiving service. The ALJ may shorten this period to 3 days or extend it for 10 additional days if the respondent can demonstrate good cause.

Unless contrary to legislative intent, motions to apply recently enacted statutory provisions will be granted. Motions to apply new EPA regulations will be granted if they will not unduly prejudice a party [40 C.F.R. §124.86(c)].

Summary Determinations

Any party may file a motion for summary determination with or without supporting affidavits and briefs on any issue on the basis that there is no genuine issue of material fact for adjudication. The motion must be filed at least 45 days before the date set for the hearing* [40 C.F.R §124.84(a)].

Any party must make a response or countermotion for summary determination within 30 days of receipt of service. Responsive motions must clearly demonstrate that the motion involves genuine issues of material fact. All affidavits must be based on personal knowledge and must state that the affiant is competent to testify to the matters stated therein [40 C.F.R. §124.84(c)].

The ALJ must rule on the motion within 30 days of the filing of responsive briefs [40 C.F.R. §124.84(d)]. The denial of a motion for summary determination may be certified for interlocutory appeal under 40 C.F.R. §124.84(e) (see Interlocutory Appeals).

---

* Upon a showing of good cause, the motion may be filed at any time prior to the conclusion of the hearing.

Hearing Procedures

After the RA has granted a hearing request and designated an ALJ and trial staff, he or she must decide which procedures to use in the proceeding. If the permit in controversy constitutes an initial licensing under 40 C.F.R. §124.111 (the first decision on permit issuance to a person who has not previously held one), the RA may elect either the Section 124, Subpart E (evidentiary) hearing procedures, or the Section 124, Subpart F (non-adversary) procedures, even if no party has requested that Subpart F be applied. If the permit is not an initial license under Section 124.111, the RA can still choose to use Subpart F if no party offers a valid objection [40 C.F.R. §124.75(a)(2-3)].

Burden of Proof

Every party may be represented by legal counsel during the proceeding. EPA has the burden to justify final permit conditions that have been challenged. The permittee has the burden of pursuading the Agency to issue a permit authorizing pollutants to be discharged. Third parties have the burden of proof for any issues they raise during the hearing [40 C.F.R. §124.85(a)].

Discretionary Powers of the ALJ

The ALJ may rule on any of the following issues and topics:

- The exact date, time, and place of the hearing;
- Whether to hold a prehearing conference and, if so, its agenda;
- Determination of what facts are in dispute (scope of the hearing);
- Administration of oaths;
- Admissibility of evidence;
- Identification and certification of issues for interlocutory appeal;
- Time limits for filing motions;
- Whether or not issues in complex cases should be decided separately;
- Allowing cross examinations when the proponent can justify the request;
- What information can be claimed as confidential business information;

- Whether testimony of opposing witnesses should be heard simultaneously;
- The conduct of the hearing participants; and
- Taking any other action that would not be inconsistent with Section 124, Subpart E [see 40 C.F.R. §124.85(b)].

Relevancy of Evidence

The federal rules of evidence for judicial proceedings do not apply to hearings. All relevant, competent, and material evidence presented will be admitted unless repetitious [40 C.F.R. §124.85(d)]. The parties should submit all written evidence before the beginning of the hearing unless good cause can be shown by the proponent. The administrative record of the draft permit proceedings is automatically admitted into evidence.* Objections to evidence will be deemed waived unless parties raise their objections promptly. All rulings by the ALJ are appealable to the Administrator.

Interlocutory Appeals

To appeal a particular order or ruling made by the ALJ before the conclusion of the hearing, or before the ALJ's initial decision is issued, a party must obtain a certification that the matter is proper for an interlocutory appeal to the Administrator. The party must file a request for certification in writing, within 10 days of service of the notice of the order or ruling, and the request must briefly state the grounds for the appeal [40 C.F.R. §124.90(a)].

---

* EPA regulations 40 C.F.R. §124.13 and §124.76 authorize the RA to require the submission of all evidence, including supporting information, during the draft permit comment period. The failure to submit these materials in a timely manner will prevent their use during a subsequent evidentiary hearing. The RA must reasonably believe that the permit issuance will be contested and that requiring the information during the comment period may substantially expedite the decisionmaking process.

6 The Freedom of Information Act

The Freedom of Information Act (FOIA), 5 U.S.C. Section 552, is not a part of the CWA, but personnel involved in compliance and enforcement activities occasionally respond to FOIA requests. Essentially, FOIA provides for public access to government documents, subject to some limitations. EPA regulations state that the Agency "will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption." [40 C.F.R. §2.101(a).]

The regulations implementing the FOIA at EPA are contained in 40 C.F.R. Part 2. Actually, these regulations govern any request for information whether styled as an FOIA request or otherwise [40 C.F.R. §2.104].

Each Regional Office and Headquarters has a Freedom of Information Officer to whom public requests for information must be sent and who monitors processing of the request. [The addresses are listed at 40 C.F.R. §2.106.] Should a request for information come to you instead, you must promptly forward it to the appropriate officer. Requests must be in writing and "reasonably describe" the records sought in a way that permits EPA to identify and locate them. [40 C.F.R. §2.108.] If the description is not sufficient, EPA must notify the requestor that the request will not be further processed until additional information is provided. [40 C.F.R. §2.109.]

The Freedom of Information Officer notifies EPA offices believed to be responsible for maintaining the records in the request. Assuming the request is sufficient to permit identification and location of the records, the responsible EPA office(s) must promptly locate the records, or determine that they do not exist, or that they are located in another EPA office or another agency. If the records have been claimed as "business confidential," the office must comply with Subpart B of 40 C.F.R. Part 2 (see below). The responsible office must also determine whether records are exempt from disclosure and why.

EPA must send a written initial determination to the requestor not later than the 10th working day after the date of receipt of the request in the office of the Freedom of Information Officer. The determination must state which of the requested records will, and which will not, be released, and the reason for any denial. [40 C.F.R. §2.112.] Section 2.112(e) permits extensions of time in certain limited circumstances.

Denials of FOIA Requests

EPA may deny an FOIA request only for any of the following reasons:

- The record is not known to exist;
- The record is not in EPA's possession;
- The record has been published in the Federal Register, or is otherwise published and available for sale;
- A statute, regulation under Part 2, or a court order prohibits disclosure;
- The record is exempt from mandatory disclosure under 5 U.S.C. Section 552(b), and EPA has decided that the public interest would not be served by disclosure;
- Initial denial is requested because a third party must be consulted in connection with a confidential business information claim; or
- The record is believed to exist but has not yet been located [40 C.F.R. §2.113(a)].

The initial determination must list which records are being withheld and the basis for withholding them. However, if the acknowledgment of the existence or nonexistence of records would, in and of itself, reveal confidential business information, the initial determination should state that the request is denied "because either the records do not exist or they are exempt from mandatory disclosure . . . " [40 C.F.R. §2.113(d).] If the initial determination denies any part of the request, the determination must state that the requestor may appeal the denial by written appeal within 30 days of receipt of the determination. [40 C.F.R. §2.113(f).]

The Office of General Counsel decides appeals and must make the final determination in writing in most cases within 20 working days of receipt of the appeal. If the Office of General Counsel denies the appeal, the denial must state which exemptions in 5 U.S.C. Section 552(b) apply and the reasons for the denial of the appeal. The denial must also state that judicial review of the determination may be obtained in the U.S. district court in which the complainant resides, or in which the Agency records are situated, or in the District of Columbia. [40 C.F.R. §2.116.]

Exemptions

The FOIA provides nine categories of exemptions from mandatory disclosure [40 C.F.R. §2.118]. If the record does not fall into one of the nine categories listed below, EPA must disclose the record. Even if the record does fall into one of the categories, EPA still must disclose it if no important purpose would be served by withholding the documents. Those categories of exemptions for which EPA will not disclose records unless ordered to do so by a federal court or in exceptional circumstances are noted with an asterisk. [See 40 C.F.R. §2.119.]

- Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.*

- Related solely to the internal personnel rules and practices of an agency.

- Specifically exempted from disclosure by statute if the statute requires the matters be withheld in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding, or refers to particular types of matters to be withheld.*

- Trade secrets and commercial or financial information obtained from a person that is privileged or confidential.*

- Interagency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.

- Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.*

- Investigatory records compiled for law enforcement purposes.

- Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.*

- Geological and geophysical information and data, including maps, concerning wells.*

EPA charges requestors for costs associated with searching and reproducing records. The fees, payment schedules, and waivers of fees are contained in 40 C.F.R. §2.120.

7 Protection of Confidential Business Information

In various circumstances, EPA employees handle information from businesses that includes information falling within "the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information." [40 C.F.R. §2.201(e).] Proper protection of confidential business information (CBI) is extremely important; in fact Congress enacted the following criminal provision more than 20 years before the founding of EPA:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. [18 U.S.C. §1905.]

EPA regulations at 40 C.F.R. Part 2, Subpart B, specifically govern the handling of CBI under all EPA statutes (40 C.F.R. §2.302 applies to CBI under the CWA). The basic rules of Subpart B apply except to the extent modified or superseded by Section 2.302 or 40 C.F.R. §122.7. [40 C.F.R. §2.202(c).]

Effluent data are not entitled to confidential treatment; such data are defined for purposes of the confidentiality regulations at 40 C.F.R. §2.302. Permits, permit applicants, and names and addresses of permit

three working days; see Section 2.204(c)(2)(ii)], then the information is not entitled to confidential treatment.

If the company makes a claim, the EPA office must make a preliminary determination after considering 40 C.F.R. §§2.203 and 2.208 and any previous determinations under Subpart B that might be applicable.

If the EPA office determines that the information might be CBI, the office must:

1. Furnish a written notice to each affected company stating that EPA is determining whether the information is entitled to confidential treatment and affording the company an opportunity to comment;

2. Furnish a determination to the person requesting such information that EPA is inquiring into whether the information is entitled to confidential treatment; that, therefore the request is initially denied; and, that after further inquiry the Office of General Counsel will issue a final determination; and

3. Refer the matter to the Office of General Counsel for a final confidentiality determination. [See 40 C.F.R. §2.205.]