



# **Federal Facility Reference Documents**

**Volume II**

## APPENDIX E

### EPA "HOTLINE" ASSISTANCE

#### Toll-Free Numbers Offered by EPA Headquarters

- RCRA/Superfund Hotline -  
National Toll-Free 800-424-9346  
Washington, D.C., Metro 202-382-3000

EPA's largest and busiest toll-free number, the RCRA/Superfund Hotline answers nearly 100,000 questions and document requests each year. Hotline specialists answer regulatory and technical questions and provide documents on virtually all aspects of the RCRA and Superfund programs. Because of the complexity and changing nature of these programs, the hotline is used widely by the regulated community, people involved in managing and cleaning up hazardous waste, federal, state, and local governments, and the general public. The RCRA/Superfund Hotline can be reached Monday through Friday from 8:30 a.m.-4:30 p.m. Eastern Standard Time (EST).

- National Response Center Hotline -  
National Toll-Free 800-424-8802  
Washington, D.C. Metro 202-426-2675

Operated by the U.S. Coast Guard, the National Response Center Hotline responds to all kinds of accidental releases of oil and hazardous substances. Callers should contact this hotline to report chemical spills. The National Response Center Hotline is available 24 hours a day, seven days a week, every day of the year.

- The Emergency Planning and Community Right-to-Know (Title III) Hotline -

National Toll-Free 800-535-0202  
Washington, D.C., Metro and Alaska 202-479-2449

The Title III Hotline has been in operation since late 1985, responding to questions concerning community preparedness for chemical accidents. The Superfund Amendments and Reauthorization Act (SARA) has increased the CEPP Hotline's responsibilities, which now also include Emergency Planning and Community Right-to-Know, SARA Title III, questions and requests. The CEPP Hotline, which complements the RCRA/Superfund Hotline is maintained as an information resource rather than an emergency number. Calls are answered Monday through Friday from 8:30 a.m.-4:30 p.m. EST.

- ° National Pesticides Telecommunications Network (NPTN) -  
National Toll-Free 800-858-7378  
(858-P-E-S-T) Texas 806-743-3091

Operating 24 hours a day, seven days a week, every day of the year, the NPTN provides information about pesticides to the medical, veterinary, and professional communities as well as to Federal agencies and the general public. Originally a service for physicians wanting information on pesticide toxicology and on recognition and management of pesticide poisonings, the NPTN has expanded to serve the public and Federal agencies by providing impartial information on pesticide products, basic safety practices, health and environmental effects, and cleanup and disposal procedures. Staffed by pesticide specialists at Texas Tech University's Health Sciences Center School of Medicine, this hotline handles about 18,000 calls each year.

- ° Small Business Hotline -  
National Toll-Free 800-368-5888  
Washington, D.C., Metro 703-557-1938

Sponsored by the EPA Small Business Ombudsman's Program, this hotline assists small businesses in complying with environmental laws and EPA regulations. The Small Business Hotline gives companies easy access to the Agency, and investigates and resolves problems and disputes with EPA. Acting as a liaison with Agency program offices, the hotline ensures that EPA considers small business issues during its normal regulatory activities. Federal agencies with only limited environmental activities or just a few, minor facilities may want to consider utilizing this service. The Small Business Hotline operates Monday through Friday from 8:30 a.m.-5:00 p.m. EST, handling over 7,000 inquiries each year.

- ° Safe Drinking Water Hotline -  
National Toll-Free 800-426-4791  
Washington, D.C., Metro 202-382-5533

The Environmental Protection Agency's Safe Drinking Water Hotline started operating in July, 1987. Its primary function is to assist the public and the regulated community, including Federal facilities, in understanding EPA's regulations and programs developed in response to the Safe Drinking Water Act Amendments of 1986. The Hotline service provides information on EPA's drinking water programs, including the Public Water Supply (PWS) and Underground Injection Control (UIC) Programs. The Hotline operates Monday through Friday (except Federal Holidays) from 8:30 a.m.-4:30 p.m., East Coast Time.

- ° Inspector General's Whistle Blower Hotline -  
National Toll-Free 800-424-4000  
Washington, D.C., Metro 202-382-4977

The EPA Inspector General's Office maintains the Whistle-Blower Hotline to receive reports of Agency-related waste, fraud, abuse, or mismanagement from the public and from EPA and other government employees. EPA employees may make complaints or give information to the Inspector General's office confidentially and without fear of reprisal. The Whistle-Blower Hotline is staffed to answer calls in person from 10:00 a.m. - 3:00 p.m. EST, Monday through Friday at other times, callers may leave a message to be answered during the next work day. This hotline handles about 1,500 calls each year.

Commercial Numbers Offered by EPA Headquarters

- ° TSCA Assistance Office -  
202-554-1404

The TSCA Assistance Office provides information on TSCA regulations to the chemical industry, labor and trade organizations, environmental groups, Federal facilities, and the general public. Technical as well as general information is available. To help facilities comply with TSCA, a variety of services are offered, including TSCA regulation and support documents, a bi-monthly newsletter, publications, and audiovisual material. In addition, the TSCA Assistance Office will arrange meeting between EPA and industry to discuss and clarify TSCA regulations and arrange for Agency speakers, upon request. The TSCA Assistance Office now handles about 2,500 calls a month, and can be reached from 8:30 a.m. - 5:00 p.m. EST, Monday through Friday.

- ° Control Technology Center Hotline -  
919-541-0800

A component of EPA's Air Toxics Strategy, the Control Technology Center Hotline provides information to state and local pollution control agencies on sources of emissions of air toxics. Sponsored by EPA's Office of Air Quality Planning and Standards in Research Triangle Park, NC, this hotline takes about 100 calls a month, and can be reached from 8:00 a.m. - 4:30 p.m. EST, Monday through Friday.



- ° Public Information Center (PIC) -  
202-829-3535

EPA's Public Information Center (PIC) answers inquiries from the public and Federal agencies about EPA, its programs, and activities, and offers a variety of general, nontechnical information materials. The public is encouraged to reach the PIC through its commercial telephone line or by writing to PIC (PM-211B), U.S. EPA, 401 M Street, SW, Washington, D.C. 20460.

#### Toll-Free Numbers Offered by EPA's Regional Offices

- ° General Information Numbers

Five of EPA's 10 Regional Offices offer toll-free numbers providing the public general information on Agency programs, and making referrals as needed. These general information numbers are:

- ° EPA Region 3, Philadelphia, PA  
800-438-2474 for all Region 3 states (DC, DE, MD, PA, VA, WV)
- ° EPA Region 4, Atlanta, GA  
800-282-0239 in GA  
800-241-1754 in other Region 4 states (AL, FL, KY, MS, NC, SC, TN)
- ° EPA Region 5, Chicago, IL  
800-572-2515 in IL  
800-621-8431 in other Region 5 states (IN, MI, MN, OH, WI)
- ° EPA Region 7, Kansas City, KS  
(Will offer an 800 number by early June 1987, serving the states of IA, KS, MO, and NE)
- ° EPA Region 8, Denver, CO  
800-332-3321 in CO  
800-525-3022 in other Region 8 states (MT, ND, SD, UT, WY)

- ° Specialized Information Numbers -

Several EPA Regional Offices sponsor specialized issue-specific toll-free numbers to meet the demands of frequent regional inquiries.

<u>Hotline</u>	<u>Toll-Free &amp; Commercial #s</u>	<u>Description</u>
Region 1 Unleaded Fuel Hotline	800-631-2700 (MA) 800-821-1237 (other Region 1 states - CT, ME, NH, RI, VT)	Enforcement-related line takes calls about tampering with vehicles, pumps, and other prob- lems related to un- leaded fuels.
Northeast Industrial Waste Exchange	800-237-2481 (ME, VT, NH, MA, RI, CT, PA, NJ, DE, VA, WV, OH, MD, MI, Washington, D.C.) 315-422-6572 (other states)	Information on waste ex- change in the Northeast but with access to other areas. Joins those who generate waste with those who desire waste.
Region 2 Superfund Hotline	800-346-5009 (NJ) 800-722-1223 (NY)	Answers local hazard- ous waste questions.
Region 3 Waste Minimization Hotline	800-334-2467 (PA) 800-826-5320 (other Region 3 states)	Technical assistance and education on waste minimization.
Region 7 Iowa RCRA Hotline	800-223-0425 (Iowa only)	Information on imple- mentation of RCRA in Iowa
Region 7 Missouri Superfund/ Dioxin Hotline	800-892-5009 (Missouri only)	Information on dioxin and related concerns for contaminated areas in Missouri

Commercial Numbers Offered by EPA's Regional Offices

° A number of EPA Regional offices offer commercial numbers for specific issues or sites.

<u>Hotline</u>	<u>Commercial #</u>	<u>Description</u>
Region 1 (Maine) McKin Site Hotline	207-657-2087	Information on clean- up efforts at Super- fund site in Grey, ME.

Region 6  
RCRA On-Scene  
Coordinators'  
Hotline

214-767-2666  
(AK, LA, NM,  
OK, TX)

Responds 24 hrs. a  
day to questions and to  
reports of chemical  
spills, other emer-  
gencies.

Region 9  
RCRA  
Hotline

415-974-7473  
(AZ, CA, HI, NV,  
Guam, American  
Samoa, Pacific  
Trust Territories)

Information to Region 9  
states on RCRA issues.

# presidential documents

[3195-01-M]

## Title 3—The President

Executive Order 12088

October 13, 1978

### Federal Compliance With Pollution Control Standards

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 22 of the Toxic Substances Control Act (15 U.S.C. 2621), Section 319 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1329), Section 1447 of the Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300j-6), Section 118 of the Clean Air Act, as amended (42 U.S.C. 7418(b)), Section 4 of the Noise Control Act of 1972 (42 U.S.C. 4903), Section 6001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6961), and Section 301 of Title 5 of the United States Code, and to ensure Federal compliance with applicable pollution control standards, it is hereby ordered as follows:

#### 1-1. *Applicability of Pollution Control Standards.*

1-101. The head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency.

1-102. The head of each Executive agency is responsible for compliance with applicable pollution control standards, including those established pursuant to, but not limited to, the following:

- (a) Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*).
- (b) Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 *et seq.*).
- (c) Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*).
- (d) Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*).
- (e) Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*).
- (f) Solid Waste Disposal Act, as amended (42 U.S.C. 6901 *et seq.*).
- (g) Radiation guidance pursuant to Section 274(h) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021(h); see also, the Radiation Protection Guidance to Federal Agencies for Diagnostic X Rays approved by the President on January 26, 1973 and published at page 4377 of the FEDERAL REGISTER on February 1, 1978).
- (h) Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1401, 1402, 1411-1421, 1441-1444 and 16 U.S.C. 1431-1434).
- (i) Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*).

1-103. "Applicable pollution control standards" means the same substantive, procedural, and other requirements that would apply to a private person.

#### 1-2. *Agency Coordination.*

1-201. Each Executive agency shall cooperate with the Administrator of the Environmental Protection Agency, hereinafter referred to as the Adminis-



trator, and State, interstate, and local agencies in the prevention, control, and abatement of environmental pollution.

1-202. Each Executive agency shall consult with the Administrator and with State, interstate, and local agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

*1-3. Technical Advice and Oversight.*

1-301. The Administrator shall provide technical advice and assistance to Executive agencies in order to ensure their cost effective and timely compliance with applicable pollution control standards.

1-302. The administrator shall conduct such reviews and inspections as may be necessary to monitor compliance with applicable pollution control standards by Federal facilities and activities.

*1-4. Pollution Control Plan.*

1-401. Each Executive agency shall submit to the Director of the Office of Management and Budget, through the Administrator, an annual plan for the control of environmental pollution. The plan shall provide for any necessary improvement in the design, construction, management, operation, and maintenance of Federal facilities and activities, and shall include annual cost estimates. The Administrator shall establish guidelines for developing such plans.

1-402. In preparing its plan, each Executive agency shall ensure that the plan provides for compliance with all applicable pollution control standards.

1-403. The plan shall be submitted in accordance with any other instructions that the Director of the Office of Management and Budget may issue.

*1-5. Funding.*

1-501. The head of each Executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

1-502. The head of each Executive agency shall ensure that funds appropriated and apportioned for the prevention, control and abatement of environmental pollution are not used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget.

*1-6. Compliance With Pollution Controls.*

1-601. Whenever the Administrator or the appropriate State, interstate, or local agency notifies an Executive agency that it is in violation of an applicable pollution control standard (see Section 1-102 of this Order), the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard. This plan shall include an implementation schedule for coming into compliance as soon as practicable.

1-602. The Administrator shall make every effort to resolve conflicts regarding such violation between Executive agencies and, on request of any party, such conflicts between an Executive agency and a State, interstate, or a local agency. If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

1-604. These conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards.

1-605. Except as expressly provided by a Presidential exemption under this Order, nothing in this Order, nor any action or inaction under this Order, shall be construed to revise or modify any applicable pollution control standard.

*1-7. Limitation on Exemptions.*

1-701. Exemptions from applicable pollution control standards may only be granted under statutes cited in Section 1-102(a) through 1-102(f) if the President makes the required appropriate statutory determination: that such exemption is necessary (a) in the interest of national security, or (b) in the paramount interest of the United States.

1-702. The head of an Executive agency may, from time to time, recommend to the President through the Director of the Office of Management and Budget, that an activity or facility, or uses thereof, be exempt from an applicable pollution control standard.

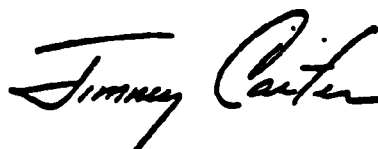
1-703. The Administrator shall advise the President, through the Director of the Office of Management and Budget, whether he agrees or disagrees with a recommendation for exemption and his reasons therefor.

1-704. The Director of the Office of Management and Budget must advise the President within sixty days of receipt of the Administrator's views.

*1-8. General Provisions.*

1-801. The head of each Executive agency, that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.

1-802. Executive Order No. 11752 of December 17, 1973, is revoked.



THE WHITE HOUSE,  
October 13, 1978.

[PR-Doc. 78-29406 Filed 10-13-78; 2:40 pm]

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**EDITORIAL NOTE:** The President's statement of Oct. 13, 1978, on signing Executive Order 12088 and his memorandum for the heads of departments and agencies, dated Oct. 13, 1978, on Federal compliance with pollution control standards are printed in the Weekly Compilation of Presidential Documents (vol. 14, no. 41).

## Presidential Documents

Executive Order 12146 of July 18, 1979

### Management of Federal Legal Resources

By the authority vested in me as President by the Constitution and statutes of the United States of America, it is hereby ordered as follows:

#### *1.1. Establishment of the Federal Legal Council.*

1-101. There is hereby established the Federal Legal Council, which shall be composed of the Attorney General and the representatives of not more than 15 other agencies. The agency representative shall be designated by the head of the agency.

1-102. The initial membership of the Council, in addition to the Attorney General, shall consist of representatives designated by the heads of the following agencies:

- (a) The Department of Commerce.
- (b) The Department of Defense.
- (c) The Department of Energy.
- (d) The Environmental Protection Agency.
- (e) The Equal Employment Opportunity Commission.
- (f) The Federal Trade Commission.
- (g) The Department of Health, Education, and Welfare.
- (h) The Interstate Commerce Commission.
- (i) The Department of Labor.
- (j) The National Labor Relations Board.
- (k) The Securities and Exchange Commission.
- (l) The Department of State.
- (m) The Department of the Treasury.
- (n) The United States Postal Service and
- (o) the Veterans Administration.

1-103. The initial members of the Council shall serve for a term of two years. Thereafter, the agencies which compose the membership shall be designated annually by the Council and at least five positions on the Council, other than that held by the Attorney General, shall rotate annually.

1-104. In addition to the above members, the Directors of the Office of Management and Budget and the Office of Personnel Management, or their designees, shall be advisory members of the Council.

1-105. The Attorney General shall chair the Council and provide staff for its operation. Representatives of agencies that are not members of the Council may serve on or chair subcommittees of the Council.

#### *1-2. Functions of the Council.*

1-201. The Council shall promote:

- (a) coordination and communication among Federal legal offices;

(b) Improved management of Federal lawyers, associated support personnel, and information systems;

(c) Improvements in the training provided to Federal lawyers;

(d) the facilitation of the personal donation of *pro bono* legal services by Federal attorneys;

(e) the use of joint or shared legal facilities in field offices; and

(f) the delegation of legal work to field offices.

**1-202.** The Council shall study and seek to resolve problems in the efficient and effective management of Federal legal resources that are beyond the capacity or authority of individual agencies to resolve.

**1-203.** The Council shall develop recommendations for legislation and other actions: (a) to increase the efficient and effective operation and management of Federal legal resources, including those matters specified in Section 1-201, and (b) to avoid inconsistent or unnecessary litigation by agencies.

**1-3. *Litigation Notice System.***

**1-301.** The Attorney General shall establish and maintain a litigation notice system that provides timely information about all civil litigation pending in the courts in which the Federal Government is a party or has a significant interest.

**1-302.** The Attorney General shall issue rules to govern operation of the notice system. The rules shall include the following requirement:

(a) All agencies with authority to litigate cases in court shall promptly notify the Attorney General about those cases that fall in classes or categories designated from time to time by the Attorney General.

(b) The Attorney General shall provide all agencies reasonable access to the information collected in the litigation notice system.

**1-4. *Resolution of Interagency Legal Disputes.***

**1-401.** Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

**1-402.** Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

**1-5. *Access to Legal Opinions.***

**1-501.** In addition to the disclosure now required by law, all agencies are encouraged to make available for public inspection and copying other opinions of their legal officers that are statements of policy or interpretation that have been adopted by the agency, unless the agency determines that disclosure would result in demonstrable harm.

**1-502.** All agencies are encouraged to make available on request other legal opinions, when the agency determines that disclosure would not be harmful.

**1-6. *Automated Legal Research and Information Systems.***

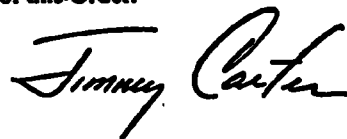
**1-601.** The Attorney General, in coordination with the Secretary of Defense and other agency heads, shall provide for a computerized legal research system that will be available to all Federal law offices on a reimbursable basis. The system may include in its data base such Federal regulations, case briefs, and legal opinions, as the Attorney General deems appropriate.

**1-602.** The Federal Legal Council shall provide leadership for all Federal legal offices in establishing appropriate word processing and management information systems.

**1-7. Responsibilities of the Agencies.**

**1-701.** Each agency shall (a) review the management and operation of its legal activities and report in one year to the Federal Legal Council all steps being taken to improve those operations, and (b) cooperate with the Federal Legal Council and the Attorney General in the performance of the functions provided by this Order.

**1-702.** To the extent permitted by law, each agency shall furnish the Federal Legal Council and the Attorney General with reports, information and assistance as requested to carry out the provisions of this Order.

A handwritten signature in cursive script, reading "Jimmy Carter".

**THE WHITE HOUSE,**  
**July 18, 1979.**

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## Presidential Documents

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**Executive Order 12580 of January 29, 1987**

### Superfund Implementation

By the authority vested in me as President of the United States of America by Section 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9615 *et seq.*) ("the Act"), and by Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

**Section 1. *National Contingency Plan.*** (a)(1) The National Contingency Plan ("the NCP"), shall provide for a National Response Team ("the NRT") composed of representatives of appropriate Federal departments and agencies for national planning and coordination of preparedness and response actions, and regional response teams as the regional counterpart to the NRT for planning and coordination of regional preparedness and response actions.

(2) The following agencies (in addition to other appropriate agencies) shall provide representatives to the National and Regional Response Teams to carry out their responsibilities under the NCP: Department of State, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Transportation, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, United States Coast Guard, and the Nuclear Regulatory Commission.

(3) Except for periods of activation because of a response action, the representative of the Environmental Protection Agency ("EPA") shall be the chairman and the representative of the United States Coast Guard shall be the vice chairman of the NRT and these agencies' representatives shall be co-chairs of the Regional Response Teams ("the RRTs"). When the NRT or an RRT is activated for a response action, the chairman shall be the EPA or United States Coast Guard representative, based on whether the release or threatened release occurs in the inland or coastal zone, unless otherwise agreed upon by the EPA and United States Coast Guard representatives.

(4) The RRTs may include representatives from State governments, local governments (as agreed upon by the States), and Indian tribal governments. Subject to the functions and authorities delegated to Executive departments and agencies in other sections of this Order, the NRT shall provide policy and program direction to the RRTs.

(b)(1) The responsibility for the revision of the NCP and all of the other functions vested in the President by Sections 105(a), (b), (c), and (g), 125, and 301(f) of the Act is delegated to the Administrator of the Environmental Protection Agency ("the Administrator").

(2) The function vested in the President by Section 118(p) of the Superfund Amendments and Reauthorization Act of 1980 (Public Law 96-480) ("SARA") is delegated to the Administrator.

(c) In accord with Section 107(f)(2)(A) of the Act and Section 311(f)(5) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(f)(5)), the following shall be among those designated in the NCP as Federal trustees for natural resources:

(1) Secretary of Defense;

(2) Secretary of the Interior:

(3) Secretary of Agriculture:

(4) Secretary of Commerce:

(5) Secretary of Energy.

(d) Revisions to the NCP shall be made in consultation with members of the NRT prior to publication for notice and comment. Revisions shall also be made in consultation with the Director of the Federal Emergency Management Agency and the Nuclear Regulatory Commission in order to avoid inconsistent or duplicative requirements in the emergency planning responsibilities of those agencies.

(e) All revisions to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget ("OMB").

**Sec. 2. Response and Related Authorities.** (a) The functions vested in the President by the first sentence of Section 104(b)(1) of the Act relating to "illness, disease, or complaints thereof" are delegated to the Secretary of Health and Human Services who shall, in accord with Section 104(i) of the Act, perform those functions through the Public Health Service.

(b) The functions vested in the President by Sections 104(e)(7)(C), 113(k)(2), 119(c)(7), and 121(f)(1) of the Act, relating to promulgation of regulations and guidelines, are delegated to the Administrator, to be exercised in consultation with the NRT.

(c)(1) The functions vested in the President by Sections 104(a) and the second sentence of 126(b) of the Act, to the extent they require permanent relocation of residents, businesses, and community facilities or temporary evacuation and housing of threatened individuals not otherwise provided for, are delegated to the Director of the Federal Emergency Management Agency.

(2) Subject to subsection (b) of this Section, the functions vested in the President by Sections 117(a) and (c), and 119 of the Act, to the extent such authority is needed to carry out the functions delegated under paragraph (1) of this subsection, are delegated to the Director of the Federal Emergency Management Agency.

(d) Subject to subsections (a), (b) and (c) of this Section, the functions vested in the President by Sections 104(a), (b) and (c)(4), 113(k), 117(a) and (c), 119, and 121 of the Act are delegated to the Secretaries of Defense and Energy, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of their departments, respectively, including vessels bare-boat chartered and operated. These functions must be exercised consistent with the requirements of Section 120 of the Act.

(e)(1) Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(a), (b), and (c)(4), and 121 of the Act are delegated to the heads of Executive departments and agencies, with respect to remedial actions for releases or threatened releases which are not on the National Priorities List ("the NPL") and removal actions other than emergencies, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, including vessels bare-boat chartered and operated. The Administrator shall define the term "emergency", solely for the purposes of this subsection, either by regulation or by a memorandum of understanding with the head of an Executive department or agency.

(2) Subject to subsections (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(b)(2), 113(k), 117(a) and (c), and 119 of the Act are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases where either the release is on or sole source of the release is from any facility or vessel under the jurisdiction



custody or control of those departments and agencies, including vessels bareboat chartered and operated.

(f) Subject to subsections (a), (b), (c), (d), and (e) of this Section, the functions vested in the President by Sections 104(a), (b) and (c)(4), 113(k), 117(a) and (c), 119, and 121 of the Act are delegated to the Secretary of the Department in which the Coast Guard is operating ("the Coast Guard"), with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(g) Subject to subsections (a), (b), (c), (d), (e), and (f) of this Section, the functions vested in the President by Sections 101(24), 104(a), (b), (c)(4) and (c)(9), 113(k), 117(a) and (c), 119, 121, and 128(b) of the Act are delegated to the Administrator. The Administrator's authority under Section 119 of the Act is retroactive to the date of enactment of SARA.

(h) The functions vested in the President by Section 104(c)(3) of the Act are delegated to the Administrator, with respect to providing assurances for Indian tribes, to be exercised in consultation with the Secretary of the Interior.

(i) Subject to subsections (d), (e), (f), (g) and (h) of this Section, the functions vested in the President by Section 104(c) and (d) of the Act are delegated to the Coast Guard, the Secretary of Health and Human Services, the Director of the Federal Emergency Management Agency, and the Administrator in order to carry out the functions delegated to them by this Section.

(j)(1) The functions vested in the President by Section 104(e)(5)(A) are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, to be exercised with the concurrence of the Attorney General.

(2) Subject to subsection (b) of this Section and paragraph (1) of this subsection, the functions vested in the President by Section 104(e) are delegated to the heads of Executive departments and agencies in order to carry out their functions under this Order or the Act.

(k) The functions vested in the President by Section 104(f), (g), (h), (i)(11), and (j) of the Act are delegated to the heads of Executive departments and agencies in order to carry out the functions delegated to them by this Section. The exercise of authority under Section 104(h) of the Act shall be subject to the approval of the Administrator of the Office of Federal Procurement Policy.

**Sec. 2. Cleanup Schedules.** (a) The functions vested in the President by Sections 116(a) and the first two sentences of 105(d) of the Act are delegated to the heads of Executive departments and agencies with respect to facilities under the jurisdiction, custody or control of those departments and agencies.

(b) Subject to subsection (a) of this Section, the functions vested in the President by Sections 116 and 105(d) are delegated to the Administrator.

**Sec. 4. Enforcement.** (a) The functions vested in the President by Sections 109(d) and 122(e)(3)(A) of the Act, relating to development of regulations and guidelines, are delegated to the Administrator, to be exercised in consultation with the Attorney General.

(b)(1) Subject to subsection (a) of this Section, the functions vested in the President by Section 122 (except subsection (b)(1)) are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases not on the NPL where either the release is on or the sole source of the release is from any facility under the jurisdiction, custody or control of those Executive departments and agencies. These functions may be exercised only with the concurrence of the Attorney General.

(2) Subject to subsection (a) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Section 122 of the Act, are delegated to the heads of Executive departments and agencies, with

respect to releases or threatened releases not on the NPL where either the release is on or the sole source of the release is from any facility under the jurisdiction, custody or control of those Executive departments and agencies. These functions may be exercised only with the concurrence of the Attorney General.

(c)(1) Subject to subsection (a) and (b)(1) of this Section, the functions vested in the President by Sections 106(a) and 122 of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(2) Subject to subsection (a) and (b)(2) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Sections 103 (a) and (b), and 122 of the Act, are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(d)(1) Subject to subsections (a), (b)(1), and (c)(1) of this Section, the functions vested in the President by Sections 106 and 122 of the Act are delegated to the Administrator.

(2) Subject to subsections (a), (b)(2), and (c)(2) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Sections 103 and 122 of the Act, are delegated to the Administrator.

(e) Notwithstanding any other provision of this Order, the authority under Sections 104(e)(5)(A) and 106(a) of the Act to seek information, entry, inspection, samples, or response actions from Executive departments and agencies may be exercised only with the concurrence of the Attorney General.

**Sec. 5. Liability.** (a) The function vested in the President by Section 107(c)(1)(C) of the Act is delegated to the Secretary of Transportation.

(b) The functions vested in the President by Section 107(c)(3) of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 107(c)(3) of the Act are delegated to the Administrator.

(d) The functions vested in the President by Section 107(f)(1) of the Act are delegated to each of the Federal trustees for natural resources designated in the NCP for resources under their trusteeship.

(e) The functions vested in the President by Section 107(f)(2)(B) of the Act, to receive notification of the state natural resource trustee designations, are delegated to the Administrator.

**Sec. 6. Litigation.** (a) Notwithstanding any other provision of this Order, any representation pursuant to or under this Order in any judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General.

(b) Notwithstanding any other provision of this Order, the authority under the Act to require the Attorney General to commence litigation is retained by the President.

(c) The functions vested in the President by Section 113(g) of the Act, to receive notification of a natural resource trustee's intent to file suit, are delegated to the heads of Executive departments and agencies with respect to response actions for which they have been delegated authority under Section 2 of this Order. The Administrator shall promulgate procedural regulations for providing such notification.

(d) The functions vested in the President by Sections 310 (d) and (e) of the Act, relating to promulgation of regulations, are delegated to the Administrator.

**Sec. 7. Financial Responsibility.** (a) The functions vested in the President by Section 107(k)(4)(B) of the Act are delegated to the Secretary of the Treasury.

The Administrator will provide the Secretary with such technical information and assistance as the Administrator may have available.

(b)(1) The functions vested in the President by Section 108(a)(1) of the Act are delegated to the Coast Guard.

(2) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(a)(1) of the Act, are delegated to the Coast Guard.

(c)(1) The functions vested in the President by Section 108(b) of the Act are delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.

(2) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(a)(3) of the Act, are delegated to the Secretary of Transportation.

(3) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(b) of the Act, are delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.

(d)(1) Subject to subsection (c)(1) of this Section, the functions vested in the President by Section 108 (a)(4) and (b) of the Act are delegated to the Administrator.

(2) Subject to Section 4(a) of this Order and subsection (c)(3) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108 (a)(4) and (b) of the Act, are delegated to the Administrator.

**Sec. 8. Employee Protection and Notice to Injured.** (a) The functions vested in the President by Section 110(e) of the Act are delegated to the Administrator.

(b) The functions vested in the President by Section 111(g) of the Act are delegated to the Secretaries of Defense and Energy with respect to releases from facilities or vessels under the jurisdiction, custody or control of their departments, respectively, including vessels bare-boat chartered and operated.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 111(g) of the Act are delegated to the Administrator.

**Sec. 9. Management of the Hazardous Substance Superfund and Claims.** (a) The functions vested in the President by Section 111(a) of the Act are delegated to the Administrator, subject to the provisions of this Section and other applicable provisions of this Order.

(b) The Administrator shall transfer to other agencies, from the Hazardous Substance Superfund out of sums appropriated, such amounts as the Administrator may determine necessary to carry out the purposes of the Act. These amounts shall be consistent with the President's Budget, within the total approved by the Congress, unless a revised amount is approved by OMB. Funds appropriated specifically for the Agency for Toxic Substances and Disease Registry ("ATSDR"), shall be directly transferred to ATSDR, consistent with fiscally responsible investment of trust fund money.

(c) The Administrator shall chair a budget task force composed of representatives of Executive departments and agencies having responsibilities under this Order or the Act. The Administrator shall also, as part of the budget request for the Environmental Protection Agency, submit to OMB a budget for the Hazardous Substance Superfund which is based on recommended levels developed by the budget task force. The Administrator may prescribe reporting and other forms, procedures, and guidelines to be used by the agencies of the Task Force in preparing the budget request, consistent with budgetary reporting requirements issued by OMB. The Administrator shall prescribe

forms to agency task force members for reporting the expenditure of funds on a site specific basis.

(d) The Administrator and each department and agency head to whom funds are provided pursuant to this Section, with respect to funds provided to them, are authorized in accordance with Section 111(f) of the Act to designate Federal officials who may obligate such funds.

(e) The functions vested in the President by Section 112 of the Act are delegated to the Administrator for all claims presented pursuant to Section 111 of the Act.

(f) The functions vested in the President by Section 111(o) of the Act are delegated to the Administrator.

(g) The functions vested in the President by Section 117(e) of the Act are delegated to the Administrator, to be exercised in consultation with the Attorney General.

(h) The functions vested in the President by Section 123 of the Act are delegated to the Administrator.

(i) Funds from the Hazardous Substance Superfund may be used, at the discretion of the Administrator or the Coast Guard, to pay for removal actions for releases or threatened releases from facilities or vessels under the jurisdiction, custody or control of Executive departments and agencies but must be reimbursed to the Hazardous Substance Superfund by such Executive department or agency.

**Sec. 10. Federal Facilities.** (a) When necessary, prior to selection of a remedial action by the Administrator under Section 120(e)(4)(A) of the Act, Executive agencies shall have the opportunity to present their views to the Administrator after using the procedures under Section 1-6 of Executive Order No. 12088 of October 13, 1978, or any other mutually acceptable process. Notwithstanding subsection 1-602 of Executive Order No. 12088, the Director of the Office of Management and Budget shall facilitate resolution of any issues.

(b) Executive Order No. 12088 of October 13, 1978, is amended by renumbering the current Section 1-602 as Section 1-603 and inserting the following new Section 1-602:

"1-602. Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."

**Sec. 11. General Provisions.** (a) The function vested in the President by Section 101(77) of the Act is delegated to the Administrator.

(b)(1) The function vested in the President by Section 105(f) of the Act, relating to reporting on minority participation in contracts, is delegated to the Administrator.

(2) Subject to paragraph 1 of this subsection, the functions vested in the President by Section 105(f) of the Act are delegated to the heads of Executive departments and agencies in order to carry out the functions delegated to them by this Order. Each Executive department and agency shall provide to the Administrator any requested information on minority contracting for inclusion in the Section 105(f) annual report.

(c) The functions vested in the President by Section 120(c) of the Act are delegated to the Administrator, to be exercised in consultation with the Secretary of the Interior.

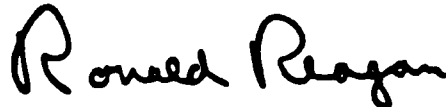
(d) The functions vested in the President by Section 301(c) of the Act are delegated to the Secretary of the Interior.

(e) Each agency shall have authority to issue such regulations as may be necessary to carry out the functions delegated to them by this Order.

(f) The performance of any function under this Order shall be done in consultation with interested Federal departments and agencies represented on the NRT, as well as with any other interested Federal agency.

(g) The following functions vested in the President by the Act which have been delegated or assigned by this Order may be redelegated to the head of any Executive department or agency with his consent: functions set forth in Sections 2 (except subsection (b)), 3, 4(b), 4(c), 4(d), 5(b), 5(c), and 6(c) of this Order.

(h) Executive Order No. 12316 of August 14, 1981, is revoked.



THE WHITE HOUSE,  
January 23, 1987.

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# **FEDERAL FACILITIES COMPLIANCE STRATEGY**

This brochure provides an overview of the EPA Federal Facilities Compliance Strategy (i.e., the "Yellow Book"), issued November 1988. The Strategy is the primary EPA policy and guidance document which outlines EPA's approach for undertaking compliance monitoring and enforcement activities at facilities or lands owned or operated by the Federal government.

## **BACKGROUND**

Federal agencies are required to comply with Federal, State, and local environmental regulations in the same manner and degree as non-Federal entities. To help ensure increased compliance, Executive Order 12088 was issued, mandating Federal agency compliance with all environmental laws and requiring EPA to assist Federal agencies in achieving compliance at their facilities.

In addition, each of the environmental statutes provides EPA the authority for taking enforcement actions for violations at Federal facilities.

Due to certain constitutional and statutory constraints, there are some differences in EPA's compliance and enforcement procedures for Federal facilities. This policy document outlines EPA's strategy for maximizing use of its available enforcement tools for improving compliance at Federal facilities.

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The Strategy serves as a guidance and policy document for EPA Headquarters and Regions, States, Federal Facilities and an information document for the public, and any concerned interest groups.

## **PURPOSE**

The Strategy serves as the framework for all EPA programs to follow to ensure that Federal facilities are fully integrated into all EPA program compliance monitoring and enforcement activities.

This policy document establishes a comprehensive and proactive approach to assist EPA in fulfilling its new goal of helping "ensure that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities."

The Strategy also attempts to reconcile EPA's dual responsibilities to provide technical assistance and advice to Federal facilities pursuant to E.O. 12088, and its statutory authorities to take enforcement actions for violations at Federal facilities in appropriate circumstances.

This guidance sets forth the enforcement response and dispute resolution procedures which EPA will follow when environmental violations occur at Federal facilities. The Strategy also outlines EPA's efforts to assist Federal agencies in achieving and maintaining high rates of compliance at their facilities.

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## **KEY PROVISIONS**

Several key provisions are contained in the Strategy which:

- Clarifies Federal agencies' requirement to comply with environmental laws to the same extent as non-Federal entities and EPA's commitment to use all its available enforcement mechanisms to ensure compliance by Federal facilities.
  - Emphasizes negotiation of compliance agreements or consent orders with Federal facilities within established "timely and appropriate" timeframes prior to EPA's taking any further action.
  - Establishes a formal dispute resolution process with specific escalation timeframes when mutual agreement cannot be reached at the Regional level.
  - States that EPA can use the full range of its enforcement authority against contractor operators of government-owned/contractor-operated Federal facilities (GOCOs).
  - Outlines selected initiatives for improving the identification, tracking, and compliance monitoring of the Federal facilities universe.
  - Clarifies the important role of States in the Federal facilities compliance and enforcement process.
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- Emphasizes the use of innovative compliance management techniques including environmental auditing and more effective use of the Federal Agency A-106 Pollution Abatement Planning Process.
- Promotes improved and more systematic EPA technical assistance for Federal agencies.
- Defines responsibilities for Federal facilities at both Headquarters and Regional levels.

#### ORDERING INFORMATION

To obtain a copy of the Federal Facilities Compliance Strategy, please fill out this form and send it to:

U.S. Environmental Protection Agency  
Office of Federal Activities (A-106) **OS-530**  
Federal Facilities Compliance Program  
401 M Street, S.W. **Enforcement**  
Washington, D.C. 20460

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*Please send the Federal Facilities  
Compliance Strategy to:*

Name: \_\_\_\_\_

Agency/Affiliation: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_ Number of copies: \_\_\_\_\_



## FEDERAL FACILITIES COMPLIANCE STRATEGY

*An  
Overview*



Office of Federal Activities  
Environmental Protection Agency  
Washington, D.C.





# **FEDERAL FACILITIES COMPLIANCE STRATEGY**

**OFFICE OF FEDERAL ACTIVITIES**

## **CHAPTER I - INTRODUCTION**

### ***PURPOSE OF STRATEGY***

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- **ESTABLISHES FRAMEWORK FOR EPA/STATES TO ADDRESS FEDERAL FACILITY (FF) ENVIRONMENTAL COMPLIANCE PROBLEMS**
- **INTEGRATES FFs INTO ALL EPA COMPLIANCE MONITORING ACTIVITIES**
- **SETS FORTH APPROACH OF NOTIFICATION, NEGOTIATION, AND FORMAL ADMINISTRATIVE ACTION FOR RESOLUTION OF PROBLEMS**
- **PROVIDES A MORE PROACTIVE APPROACH TOWARD PREVENTING COMPLIANCE PROBLEMS**

# **CHAPTER I - INTRODUCTION**

## ***STRATEGY DEVELOPMENT AND IMPLEMENTATION***

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- **DEVELOPMENT:**
  - **EPA Agencywide Workgroup (Headquarters and Regions)**
  - **Comments on Draft from EPA, States and Federal Agencies**
- **IMPLEMENTATION:**
  - **Implementation of the Strategy Will Begin in FY87 and Will Be Phased in Over Next Few Years**
  - **Enforcement Response Will Be Implemented Immediately**
  - **EPA Program Operating Year Guidance Will Set Annual Priorities for the Implementation of This Strategy**

# **CHAPTER I - INTRODUCTION**

## ***STRATEGY CHAPTERS***

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**THE STRATEGY IS DIVIDED INTO NINE CHAPTERS AS FOLLOWS:**

- **I - INTRODUCTION**
- **II - ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS**
- **III - IDENTIFICATION OF THE REGULATED COMMUNITY**
- **IV - COMPLIANCE PROMOTION, TECHNICAL ASSISTANCE, AND TRAINING**
- **V - COMPLIANCE MONITORING**
- **VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS**
- **VII - STATE/EPA ENFORCEMENT AGREEMENTS**
- **VIII - EPA ROLES AND RESPONSIBILITIES**
- **IX - MANAGEMENT ACCOUNTABILITY AND EVALUATION**

## **CHAPTER II - SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS**

### ***STATUTES - GENERAL***

---

- **FEDERAL ENVIRONMENTAL STATUTES REQUIRE FEDERAL AGENCIES TO COMPLY WITH:**
  - **All Provisions of Federal Environmental Statutes**
  - **All Applicable State and Local Requirements**
- **STATUTES PROVIDE LIMITED PRESIDENTIAL EXEMPTIONS IN CASES OF:**
  - **National Security**
  - **Paramount Interest of the United States**

## **CHAPTER II - SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS**

### ***RELEVANT ENVIRONMENTAL STATUTES***

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#### **RELEVANT FEDERAL ENVIRONMENTAL STATUTES ARE:**

- **Clean Air Act (CAA)**
- **Clean Water Act (CWA)**
- **Resource, Conservation and Recovery Act (RCRA)**
- **Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)**
- **Toxic Substance Control Act (TSCA)**
- **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)**
- **Safe Drinking Water Act (SDWA)**

**SUMMARIES OF THESE STATUTES ARE PROVIDED IN APPENDIX B OF THE  
STRATEGY**

## **CHAPTER II - SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS**

### ***EXECUTIVE ORDERS***

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#### **EXECUTIVE ORDERS WHICH PROVIDE THE FRAMEWORK FOR FEDERAL COMPLIANCE WITH ENVIRONMENTAL STATUTES ARE:**

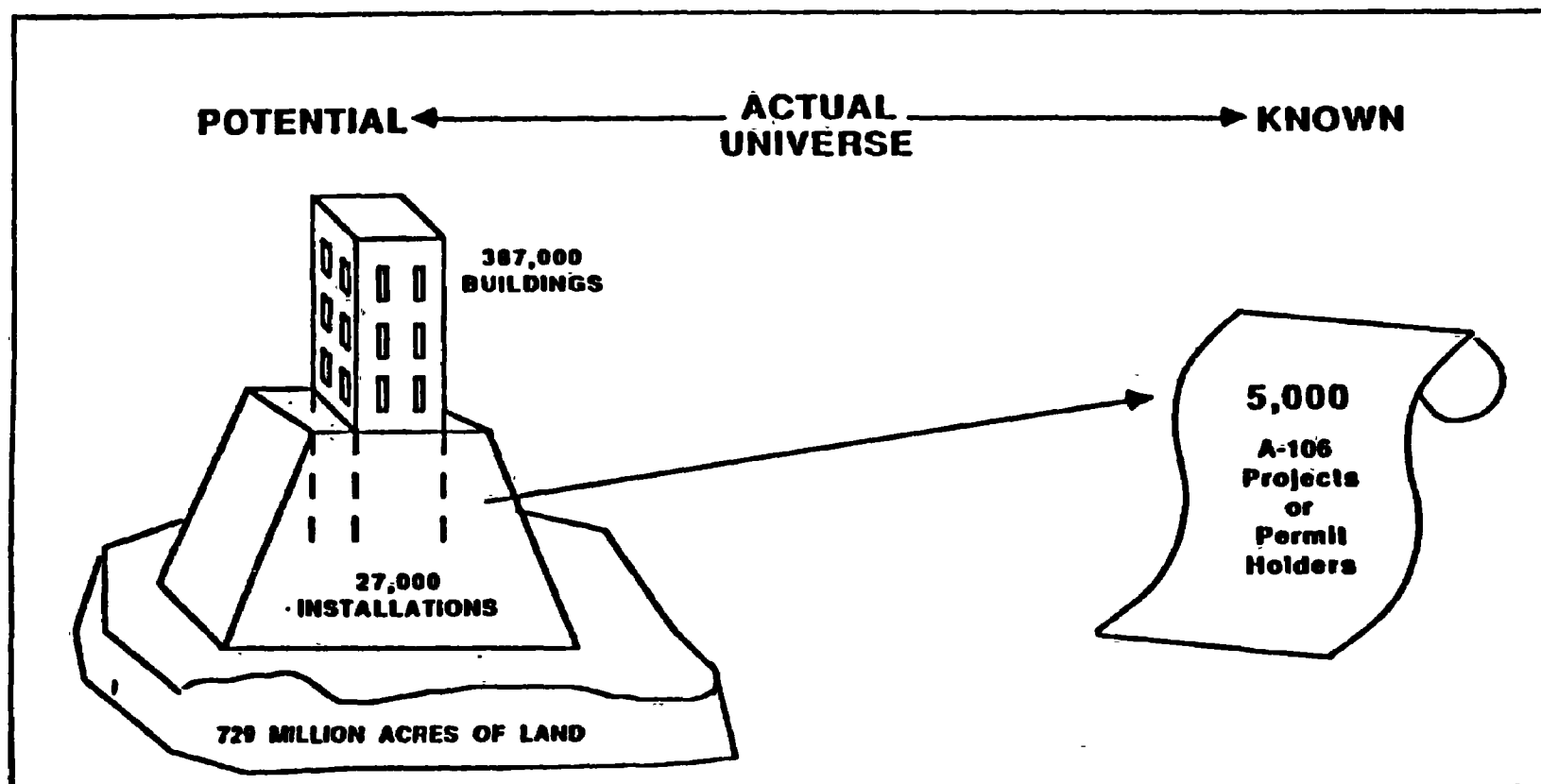
- **E.O. 12088 - FEDERAL COMPLIANCE WITH POLLUTION CONTROL  
STANDARDS**
  - **Establishes OMB Dispute Resolution and Escalation Process (Ch. 6)**
  
- **E.O. 12146 - MANAGEMENT OF FEDERAL LEGAL RESOURCES**
  - **Establishes Federal Legal Council for Resolution of Legal Issues  
through DOJ**
  
- **E.O. 12316 - RESPONSES TO ENVIRONMENTAL DAMAGE**
  - **Addresses Delegation of Duties and Power Assigned to President in  
CERCLA (being revised based upon SARA)**

**COPIES OF THESE E.Os. ARE CONTAINED IN APPENDIX A OF THE STRATEGY**



# CHAPTER III - IDENTIFICATION OF THE REGULATED COMMUNITY

## DEFINING FEDERAL FACILITY UNIVERSE



# **CHAPTER III - IDENTIFICATION OF THE REGULATED COMMUNITY**

## ***CLASSIFICATION OF FEDERAL FACILITIES/LANDS FOR TRACKING PURPOSES***

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### **CLASSIFIED AS FEDERAL FACILITY FOR TRACKING PURPOSES**

- GOCO
- GOGO
- GOPO
- POGO
- CLAIMANT
- LEASEE
- PERMITTEE
- WITHDRAWAL  
FROM PUBLIC  
USE

### **CLASSIFIED AS PRIVATE PARTY FOR TRACKING PURPOSES**

- COCO
- COCO(E)
- GRANTEE
- PATENT HOLDER
- HOLDER

## **CHAPTER III - IDENTIFICATION OF THE REGULATED COMMUNITY**

### ***IMPROVED USE OF AVAILABLE INFORMATION AND EXISTING SYSTEMS***

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#### **SOURCES OF INFORMATION AVAILABLE TO IDENTIFY AND TRACK FFs:**

- **MEDIA PROGRAM INFORMATION SYSTEMS**
- **A-106 SUBMISSIONS**
- **STRATEGIC PLANNING AND MANAGEMENT SYSTEM (SPMS)**
- **FACILITY INDEX SYSTEM (FINDS)**
- **FEDERAL FACILITIES INFORMATION SYSTEM (FFIS)**
- **OTHER INFORMATION SOURCES**

## **CHAPTER III - IDENTIFICATION OF THE REGULATED COMMUNITY**

### ***SPECIAL EPA INITIATIVES***

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**EXAMPLES OF SPECIAL INITIATIVES THAT EPA WILL UNDERTAKE TO  
IMPROVE INFORMATION ON FF UNIVERSE INCLUDE:**

- **FEDERAL AGENCY RECLASSIFICATION REVIEW**
- **REVIEW OF MAJOR/MINOR DEFINITIONS**
- **REGIONAL LISTS OF IMPORTANT FF MINORS**
- **REGIONAL LISTS OF ENVIRONMENTALLY SIGNIFICANT FFs**
- **IMPROVED USE OF A-106 PROCESS**

## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***COMPLIANCE PROMOTION***

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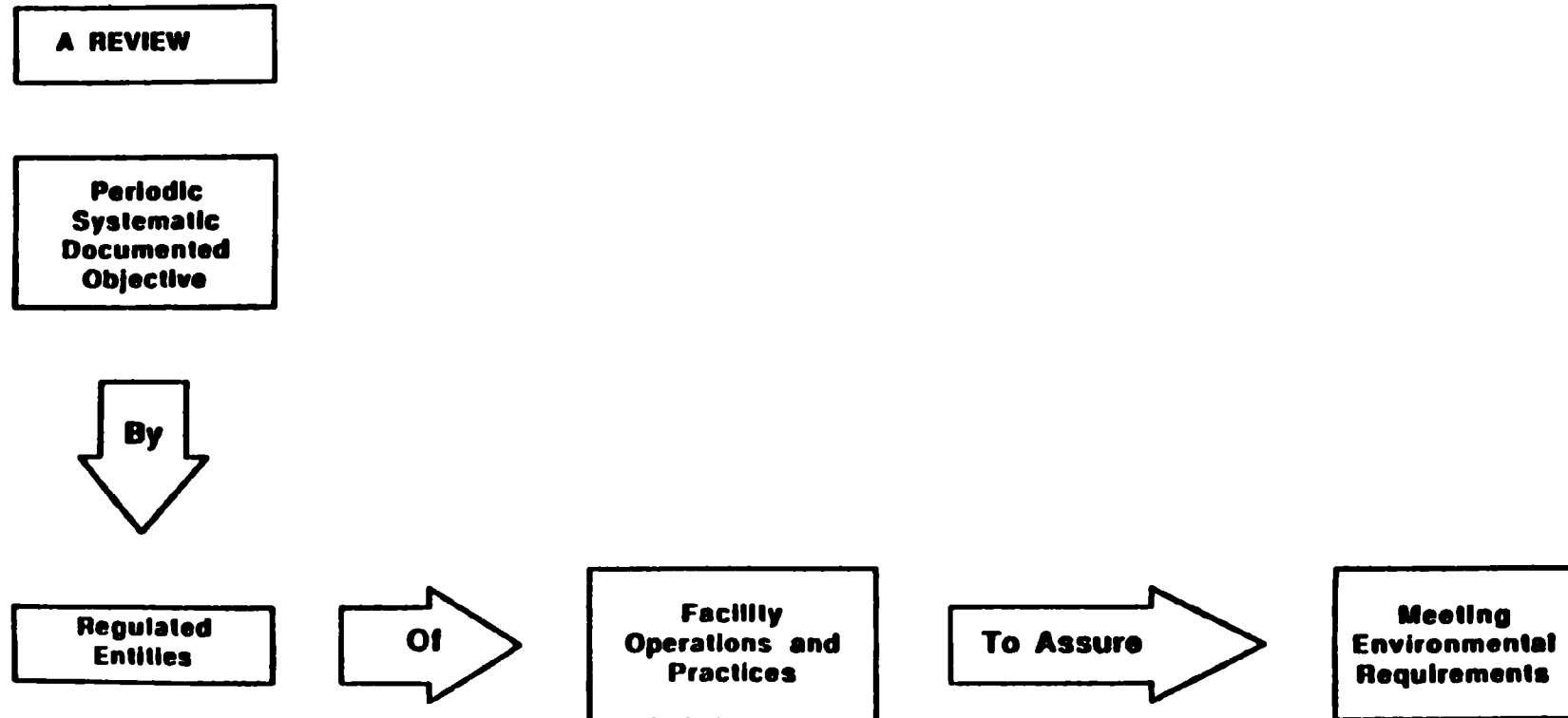
**COMPLIANCE PROMOTION IS A VARIETY OF ACTIVITIES TAKEN TO FACILITATE TIMELY COMPLIANCE**

- **COMPLIANCE PROMOTION INCLUDES TECHNIQUES WHICH:**
  - **Prevent or Anticipate Noncompliance Situations**
  - **Enhance Public Perceptions of Federal Compliance**
  - **Improve Working Relationships Among Federal Agencies**
- **MECHANISMS FOR BETTER "UP-FRONT" COMPLIANCE ARE:**
  - **Information Transfer**
  - **Identifying Compliance Patterns of Federal Agencies**
  - **Environmental Auditing**

## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***DEFINITION OF ENVIRONMENTAL AUDITING***

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## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***ENVIRONMENTAL AUDITING POLICY STATEMENT***

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#### **ENVIRONMENTAL AUDITING POLICY STATEMENT**

- **DEFINITION**
- **ENCOURAGEMENT**
- **REQUESTS FOR REPORTS**
- **INSPECTIONS AND ENFORCEMENT**
- **FEDERAL FACILITIES**
- **STATE AND LOCAL ROLES**
- **ELEMENTS OF AUDITING**

**ISSUED IN FEDERAL REGISTER ON JULY 9, 1986 (Vol. 51, No. 131, p. 25004)**



## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***ENVIRONMENTAL AUDITING PROGRAM***

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#### **ELEMENTS OF AN EFFECTIVE ENVIRONMENTAL AUDITING PROGRAM:**

- **EXPLICIT TOP MANAGEMENT SUPPORT**
- **INDEPENDENT AUDIT FUNCTION**
- **ADEQUATE STAFFING AND TRAINING**
- **PROCESS FOR COLLECTING, ANALYZING, AND INTERPRETING DATA**
- **DETAILED WRITTEN PROCEDURES**
- **PROMPT, CANDID, CLEAR, AND APPROPRIATE WRITTEN REPORTS**
- **QUALITY ASSURANCE PROCEDURES**

## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***TECHNICAL ASSISTANCE***

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#### **E.O. 12088 REQUIRES EPA TO PROVIDE "TECHNICAL ASSISTANCE AND ADVICE"**

- **PRIMARY RESPONSIBILITY OF OFA AND FEDERAL FACILITY COORDINATORS (FFCs)**
- **TECHNICAL ASSISTANCE MAY BE AVAILABLE FROM STATE AGENCIES**
- **FEDERAL AGENCIES AND SPECIFIC FACILITIES ARE ENCOURAGED TO REQUEST TECHNICAL ASSISTANCE**

## **CHAPTER IV - COMPLIANCE PROMOTION AND TECHNICAL ASSISTANCE AND TRAINING**

### ***TRAINING OPPORTUNITIES***

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#### **EPA WILL ESTABLISH A MORE FORMAL TECHNICAL ASSISTANCE AND TRAINING PROGRAM:**

- **AGENCY-WIDE EFFORT COORDINATED BY OFA**
- **OFA WILL DEVELOP ANNUAL TRAINING MANUAL FOR FEDERAL AGENCIES**
- **OFA WILL PROVIDE QUARTERLY TRAINING TO FFCs**
- **MORE SPACES WILL BE AVAILABLE FOR FFs IN EPA TRAINING COURSES**
- **STATES ARE ENCOURAGED TO INVITE FEDERAL AGENCIES TO ATTEND THEIR TRAINING COURSES**

## **CHAPTER V - COMPLIANCE MONITORING**

### ***OBJECTIVES OF COMPLIANCE MONITORING ACTIVITIES***

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#### **PRIMARY OBJECTIVES OF EPA'S COMPLIANCE MONITORING ACTIVITIES:**

- **REVIEW COMPLIANCE STATUS OF FFs TO IDENTIFY POTENTIAL VIOLATIONS**
- **ESTABLISH STRONG ENFORCEMENT PRESENCE AT ALL FEDERAL AGENCIES**
- **DEVELOP UNDERSTANDING OF COMPLIANCE PATTERNS AND COMPLIANCE STATUS OF FF UNIVERSE TO:**
  - **Assist in Targeting Inspection Activities**
  - **Prevent Recurring Violations**

## **CHAPTER V - COMPLIANCE MONITORING**

### ***COMPLIANCE MONITORING TOOLS AND ACTIVITIES***

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#### **MAJOR COMPLIANCE MONITORING TOOLS AND ACTIVITIES FOR DETECTING FF VIOLATIONS:**

- **EPA AND STATE INSPECTIONS (Exhibit V-1)**
- **SOURCE SELF-MONITORING, REPORTING, AND RECORD-KEEPING  
(Appendix C)**
- **FEDERAL AGENCY A-106 PROCESS**

## **CHAPTER V - COMPLIANCE MONITORING**

### ***A-106 REVIEW PROCESS***

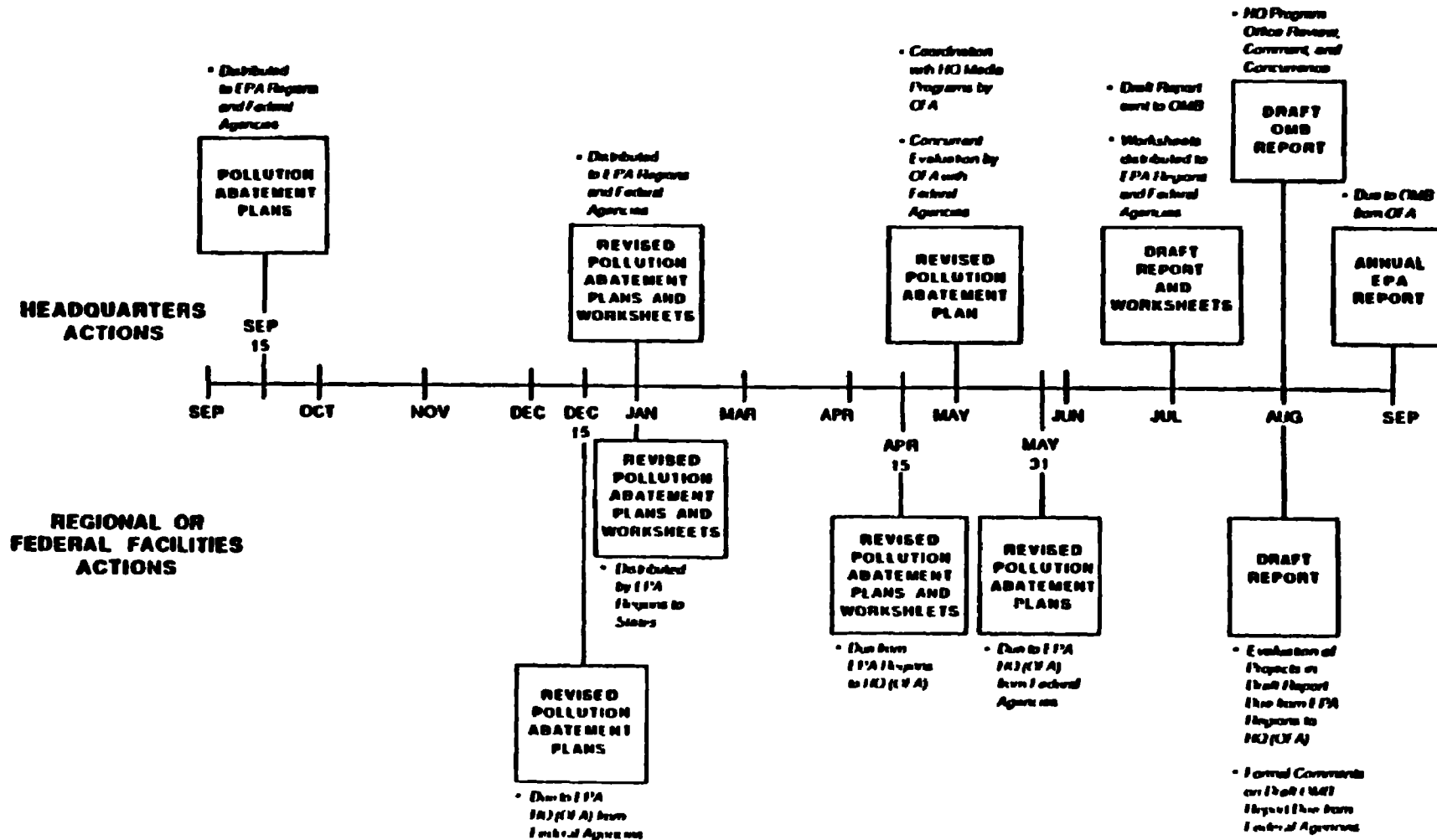
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#### **E.O. 12088 REQUIRES ALL FEDERAL AGENCIES TO SUBMIT A-106 PLANS SEMI-ANNUALLY**

- **A-106 PLANS AND PROJECTS ARE ASSESSED FOR ADEQUATE:**
  - **Engineering**
  - **Timing**
  - **Cost**
- **EPA RATES EACH PROJECT AS HIGH, MEDIUM, OR LOW IN TERMS OF THEIR POTENTIAL ENVIRONMENTAL IMPACT IF NOT FUNDED**
- **EPA'S ASSESSMENT OF EACH PROJECT IS PROVIDED IN A REPORT TO OMB IN SEPTEMBER OF EACH FISCAL YEAR**
- **EPA IDENTIFIES A-106 PRIORITIES FOR EACH MEDIA PROGRAM**

# CHAPTER V - COMPLIANCE MONITORING

## ANNUAL TIMETABLE OF KEY A-106 EVENTS



# **CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES**

## ***OVERALL COMPLIANCE POLICY AND PHILOSOPHY***

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### **EPA'S OVERALL COMPLIANCE POLICY AND PHILOSOPHY:**

- **ENFORCEMENT ESSENTIAL TO ENSURE FF COMPLIANCE**
- **ADHERENCE TO CONCEPT OF TIMELY AND APPROPRIATE  
ENFORCEMENT RESPONSE**
- **EMPHASIS ON NEGOTIATION TO EXPEDITIOUSLY RESOLVE  
NONCOMPLIANCE PROBLEMS**
- **SAME ENFORCEMENT RESPONSE FOR FF VIOLATIONS IN GENERAL  
AS NON-FEDERAL FACILITIES**



## **CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES**

### ***EPA'S RESPONSE TO FEDERAL FACILITIES VIOLATIONS***

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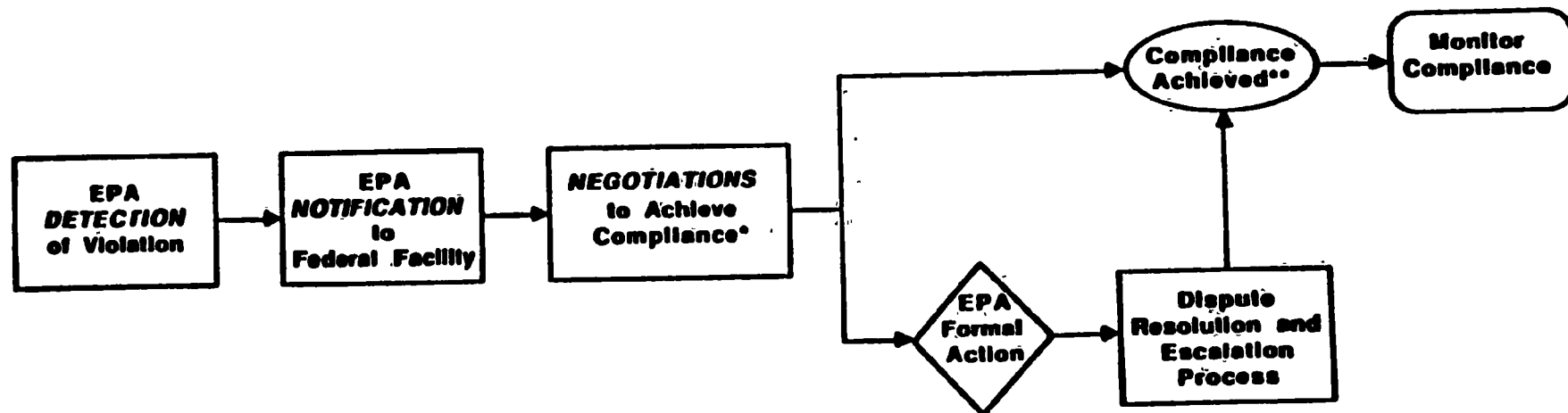
#### **FACTORS WHICH DISTINGUISH EPA'S ENFORCEMENT RESPONSE AT FFs:**

- **E.O. 12088 MANDATE TO PROVIDE TECHNICAL ASSISTANCE**
- **EMPHASIS ON BILATERAL, MUTUAL NEGOTIATIONS**
- **NO JUDICIAL ACTION BY EPA**
- **NO ASSESSMENT OF CIVIL PENALTIES AGAINST FFs**
- **RELIANCE UPON ADMINISTRATIVE ENFORCEMENT MECHANISMS**
- **ADDITIONAL DISPUTE RESOLUTION PROCEDURES TO ADDRESS UNRESOLVED COMPLIANCE ISSUES**

# CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES

## FEDERAL FACILITIES COMPLIANCE RESOLUTION PROCESS

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\* Within media-specific timely and appropriate timeframes.

\*\* In physical compliance OR on acceptable schedule.

# **CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES**

## ***EPA INITIAL ENFORCEMENT RESPONSE***

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### **INITIAL ENFORCEMENT RESPONSE DIRECTED AT FEDERAL FACILITY**

- **GOGO**
- **PERMITTEE**
- **WITHDRAWAL  
FROM PUBLIC  
USE**

### **INITIAL ENFORCEMENT RESPONSE DIRECTED AT PRIVATE PARTY**

- **GOCO**
- **GOPO**
- **COCO**
- **COCO(E)**
- **POGO**
- **LEASEE**
- **GRANTEE**
- **CLAIMANT**
- **PATENT HOLDER**
- **HOLDER**

## **CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES**

### ***STATE RESPONSE TO FEDERAL FACILITIES VIOLATIONS***

---

#### **DELEGATED STATES OR AUTHORIZED STATE PROGRAMS HAVE PRIMARY RESPONSIBILITY FOR RESPONDING TO FF VIOLATIONS**

- **EPA RETAINS PARALLEL AUTHORITY AND RESPONSIBILITY TO ENFORCE FEDERAL LAW**
- **EPA ENFORCEMENT ACTION WILL ONLY TAKE PLACE WHEN DELEGATED OR AUTHORIZED STATE:**
  - **Fails to Take Timely and Appropriate Action**
  - **Requests EPA to Take Lead or Joint Enforcement Action**
  - **In Other Limited Circumstances**
- **STRATEGY RECOGNIZES STATES HAVE BROADER ENFORCEMENT AUTHORITIES**
- **STATES ARE ENCOURAGED TO PURSUE:**
  - **Bilateral, Negotiated Agreements, Consent Orders or Decrees, OR**
  - **Three-Party Agreements (EPA/State/Federal Agency)**

## **CHAPTER VI - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS AT FEDERAL FACILITIES**

### ***EPA-LEAD INSPECTIONS***

---

- **EPA GENERALLY PROVIDES DELEGATED STATES WITH:**
  - **Advanced Notification Prior to Inspections**
  - **Opportunity to Participate**
- **DELEGATED STATES ARE ALLOWED FIRST OPPORTUNITY TO TAKE ACTION ON VIOLATIONS IDENTIFIED THROUGH EPA INSPECTIONS**
- **EPA AND STATE WILL MUTUALLY DECIDE WHO WILL TAKE FOLLOW-UP ACTION**
- **EPA MAY PROVIDE TECHNICAL ASSISTANCE AND SUPPORT TO FEDERAL AGENCIES IN CASES WHERE STATES HAVE ASSUMED LEAD**

## **CHAPTER VII - FEDERAL FACILITIES IN THE STATE/EPA ENFORCEMENT AGREEMENTS PROCESS**

### ***STATE/EPA RELATIONSHIP***

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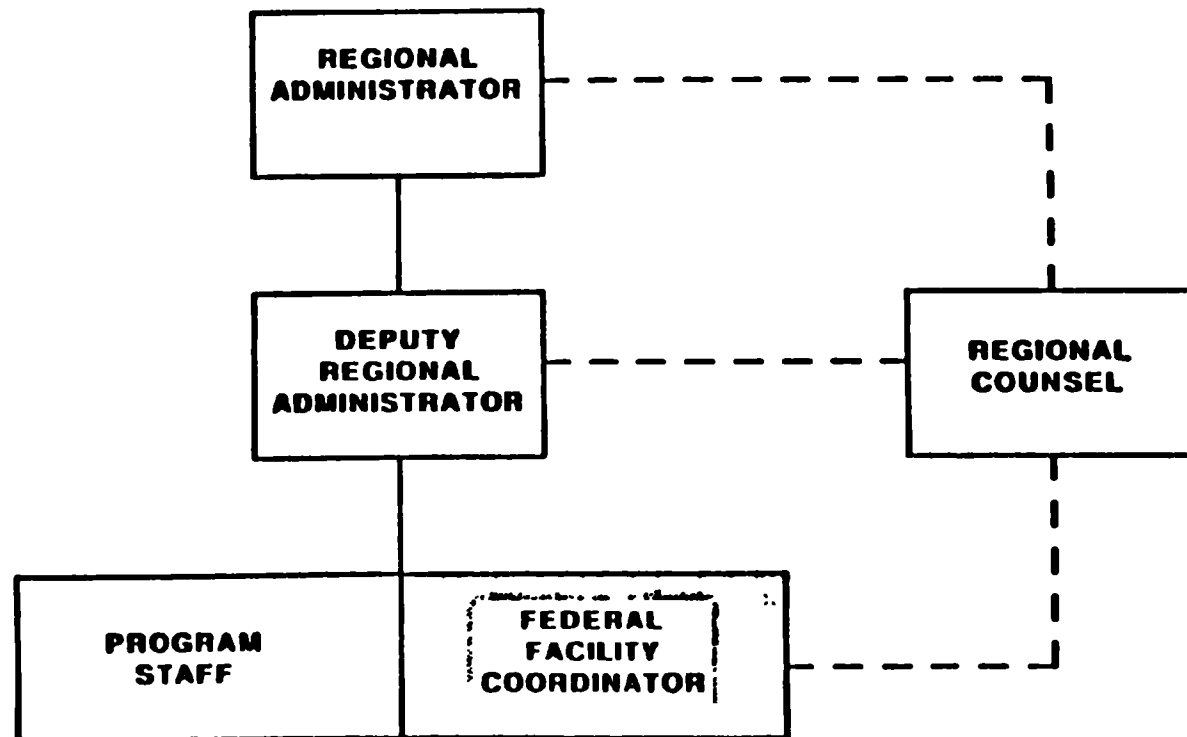
#### **STATE AND FEDERAL ROLES ARE DEFINED THROUGH NEGOTIATED MULTI-YEAR STATE/EPA ENFORCEMENT AGREEMENTS**

- **AGREEMENTS ARE REVIEWED ANNUALLY ON STATE-BY-STATE BASIS  
FOR EACH ENVIRONMENTAL PROGRAM**
- **IMPLEMENTATION OF THESE AGREEMENTS IS GUIDED BY:**
  - **EPA "Policy Framework for State/EPA Enforcement Agreements"**
  - **Associated National Program Implementing Guidance**
  - **Annual Guidance Memo from Deputy Administrator**
- **PURPOSE OF THESE AGREEMENTS IS TO ESTABLISH:**
  - **Criteria for Effective State or EPA Program**
  - **Clear Roles and Responsibilities for State and Federal Enforcement**

# CHAPTER VIII - EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

## *REGIONAL OFFICE STAFF*

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## **CHAPTER VIII - EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION**

### ***DUTIES OF FEDERAL FACILITY COORDINATORS***

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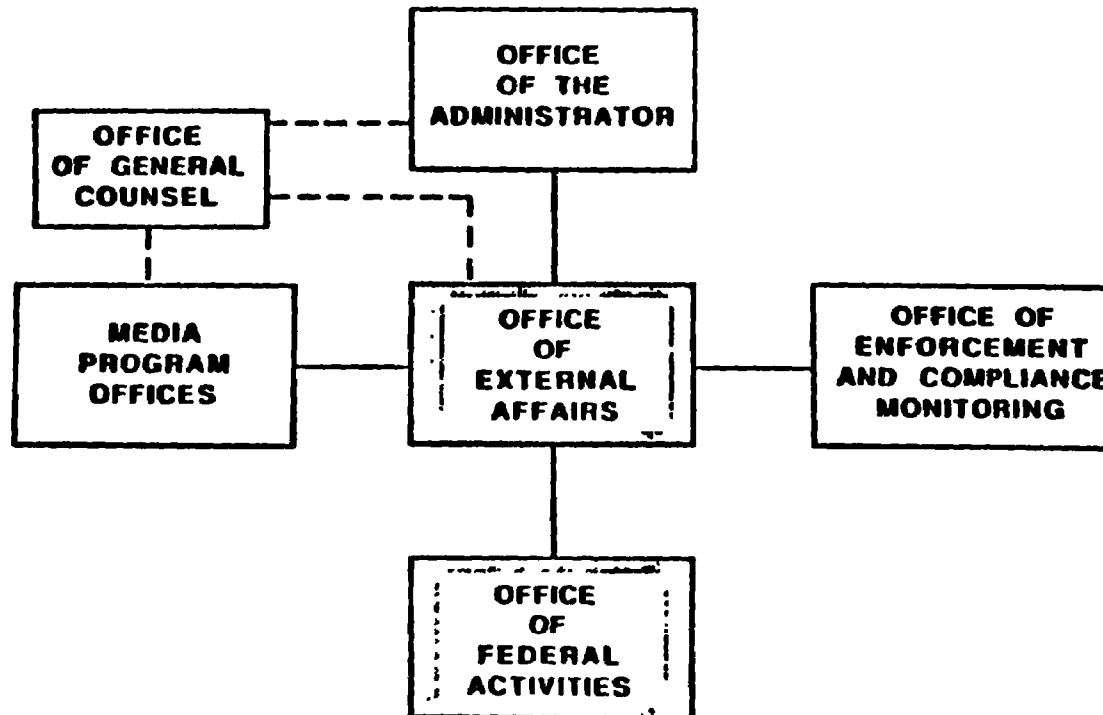
- **THE FFC SERVES AS LIAISON WITH:**
  - **Regional Media Program Offices**
  - **All Federal Agencies**
  - **OFA**
- **SPECIFIC DUTIES INCLUDE:**
  - **Assisting in Resolving FF Compliance Problems**
  - **Monitoring Actions Taken by Regional Staff to Resolve FF Compliance Problems**
  - **Providing Data to OEA/OFA on Compliance Status of FFs in Region**
  - **Ensuring Regional Staff Are Knowledgeable Concerning OEA/OFA Guidance**



## CHAPTER VIII - EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

### *EPA HEADQUARTERS OFFICE STAFF*

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## **CHAPTER VIII - EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION**

### ***DUTIES OF OEA/OFA***

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- **THE SPECIFIC DUTIES OF OEA/OFA INCLUDE:**
  - **Ensuring Proper Implementation of E.O. 12088**
  - **Preparation of Reports on Compliance Status of FFs**
- **OEA/OFA:**
  - **Establishes Agency Policy and Guidance on FF Compliance in Consultation with Other Headquarters Program Offices**
  - **Principal Point-of-Contact with National Offices of Other Federal Agencies**
  - **Lead Office in Resolving FF Compliance Problems Escalated for Dispute Resolution**
  - **Conducts Annual Audits (i.e. FARES reviews) of Regional FF Programs**

## **CHAPTER IX - MANAGEMENT ACCOUNTABILITY AND EVALUATION**

### ***STRATEGIC PLANNING AND MANAGEMENT SYSTEM***

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- **SPMS TRACKS AGENCY'S PROGRESS AND GUIDES IMPLEMENTATION OF ITS LEGISLATIVE MANDATES**
- **SPMS TRACKS PROGRESS OF ANNUAL COMMITMENTS OF EACH MEDIA PROGRAM**
- **QUARTERLY PROGRESS REPORTS ARE PRODUCED FOR KEY PROGRAM AREAS AT NATIONAL, REGIONAL AND STATE LEVEL**
- **SEPARATE REPORTING FOR FF SIGNIFICANT VIOLATORS IS INCLUDED IN EACH PROGRAM'S QUARTERLY REPORT**
- **SPMS MEASURES FOR FF COMPLIANCE PROGRAM FOR FY87:**
  - **Addressing Program Priority Facilities Through A-106**
  - **Potentially Significant Minor Sources**
  - **Environmentally Significant Facilities**
  - **Compliance Management Plans**

## **CHAPTER IX - MANAGEMENT ACCOUNTABILITY AND EVALUATION**

### ***REPORTED PERFORMANCE MEASURES***

---

**EPA HAS FIVE MEASURES OF COMPLIANCE AND ENFORCEMENT PERFORMANCE FOR REPORTING PURPOSES:**

- **COMPLIANCE RESULTS MEASURES ARE:**
  - **Overall Compliance Rate for the Regulated Community**
  - **Correction of the Most Significant Violators or Significant Noncompliers**
- **ENFORCEMENT ACTIVITY MEASURES INCLUDE:**
  - **Inspection Levels or Facilities Inspected**
  - **Formal Administrative Enforcement Actions Undertaken**
  - **Judicial Referrals and Filed Court Cases**

## **CHAPTER IX - MANAGEMENT ACCOUNTABILITY AND EVALUATION**

### ***FEDERAL ACTIVITIES AND REGIONAL EVALUATION SYSTEMS***

---

**OFA CONDUCTS FORMAL COORDINATED EVALUATIONS OF FF COMPLIANCE PROGRAMS THROUGH FARES:**

- **REVIEWS ARE CONDUCTED AT LEAST TWICE A YEAR**
- **PURPOSE OF REVIEW IS TO:**
  - **Evaluate Regional Performance in Achieving National Program Objectives**
  - **Identify Significant Problems and Issues**
  - **Provide Mechanism for Sharing Program Experience and Expertise**
  - **Ensure National Consistency in Program Implementation**

## **CHAPTER IX - MANAGEMENT ACCOUNTABILITY AND EVALUATION**

### ***SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS***

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#### **MEDIA PROGRAMS WITH DEFINITIONS OF SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS (Exhibit IX-1):**

<b><u>WATER</u></b>	<b><u>HAZARDOUS WASTE</u></b>	<b><u>TOXIC SUBSTANCES</u></b>	<b><u>PESTICIDES</u></b>	<b><u>AIR</u></b>
<b>NPDES</b>	<b>CERCLA</b>	<b>TSCA</b>	<b>FIFRA</b>	<b>CAA</b>
<b>PWSS</b>	<b>RCRA</b>			
<b>UIC</b>				

**FF VIOLATORS ARE IDENTIFIED AND TRACKED ON A QUARTERLY BASIS**

# EPA ENFORCEMENT AT GOCO\* FACILITIES

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\* Government-Owned/Contractor-Operated Facilities

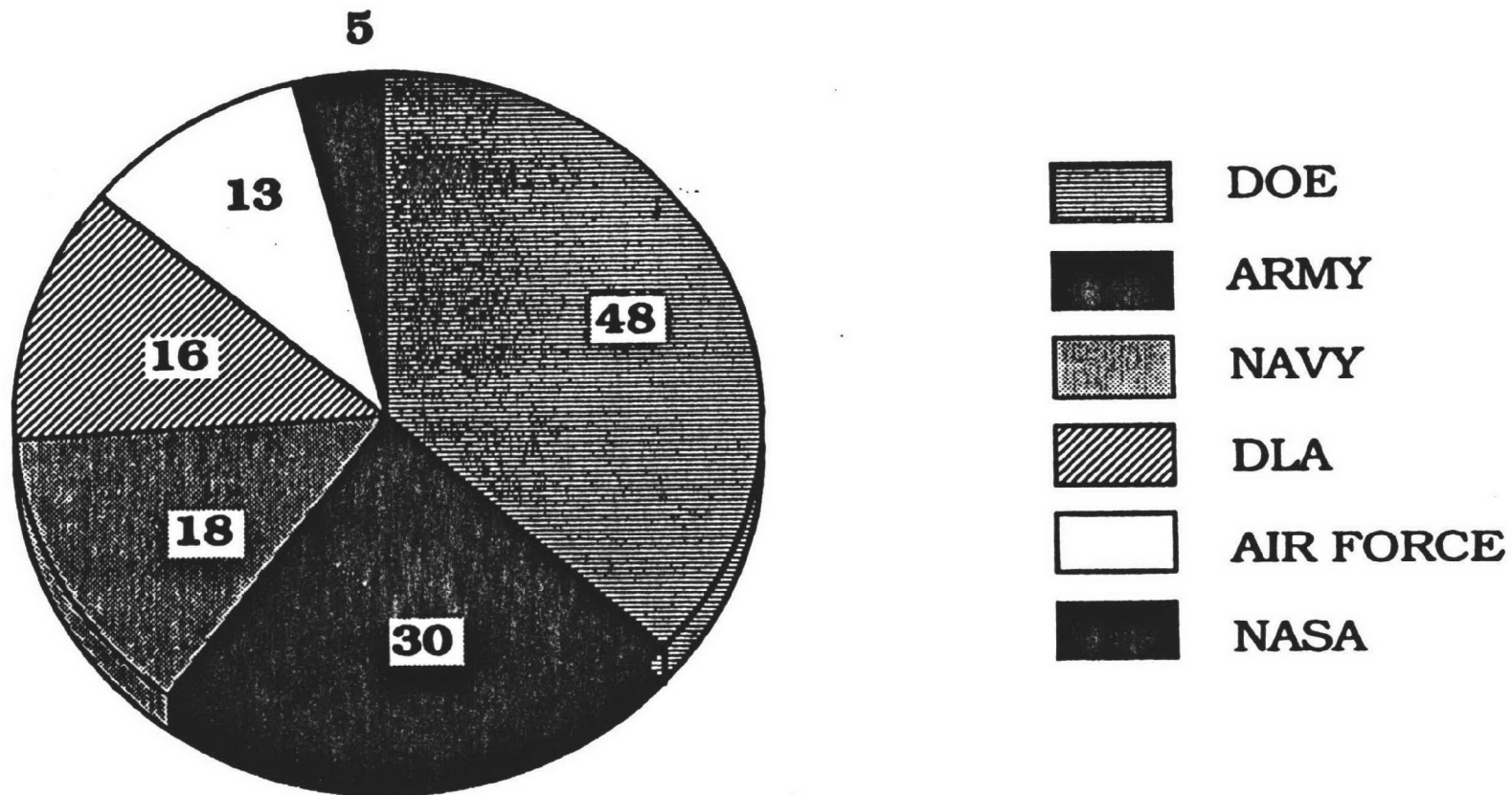


Office of Federal Activities  
Washington, D.C.

---

# IDENTIFICATION OF THE GOCO UNIVERSE

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**"KNOWN UNIVERSE"**

**130 GOCO Facilities identified  
by Federal Agencies**



# **TYPES OF GOCO FACILITIES**

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- **USAF Industrial Plants (Aircraft, Missile, Space Shuttle, Bombing System Production)**
- **Army Ammunition Plants**
- **Army Aircraft, Engine and Tank Plants**
- **Naval Industrial Ordnance Plants**
- **Naval Weapons Plants**
- **Naval Ship Repair Facilities**
- **Defense Fuel Supply Centers (DLA)**

# TYPES OF GOCO FACILITIES

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**(Continued)**

- **DOE National Research Laboratories**
- **DOE Weapons Testing Support Facilities**
- **DOE Atomic Power and Nuclear Reactor Facilities**
- **DOE Strategic Petroleum Reserves**
- **NASA Assembly Facilities and Industrial Plants**
- **NASA Jet Propulsion Laboratories**

# DEFINITION(S) OF GOCO FACILITIES

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## **EPA Federal Facilities Compliance Strategy:**

**GOCO = "Government Facility owned by a  
Federal Agency, but all or portions of it  
are operated by private contractor(s)."**

# FEDERAL FACILITIES WITH PRIVATE ARRANGEMENTS

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<b>GOGO</b>	<b>vs.</b>	<b>GOCO</b>
	<b>vs.</b>	<b>COCO</b>
	<b>vs.</b>	<b>COCO(E)</b>
	<b>vs.</b>	<b>POGO</b>
	<b>vs.</b>	<b>GOPO</b>
	<b>vs.</b>	<b>JOCO</b>
<b>Federal Lands</b>	<b>vs.</b>	<b>Leasee</b>
	<b>vs.</b>	<b>Grantee</b>
	<b>vs.</b>	<b>Claimant</b>
	<b>vs.</b>	<b>Patent Holder</b>
	<b>vs.</b>	<b>Permittee</b>
	<b>vs.</b>	<b>Withdrawal</b>

# HISTORY OF FEDERAL GOVERNMENT GOCO POLICY

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October 1983 • DOJ - Response Letter to Rep. John Dingell:

" . . . is prepared to sue GOCO facilities when the contractor is the responsible party and it is otherwise appropriate . . . "

April 1987 • DOJ - Written Testimony at Oversight Hearing:

" . . . ready to utilize the full panalopy of its judicial enforcement tools against GOCO violators . . . on Federal facilities."

# HISTORY OF EPA GOCO POLICY

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**1983-85 • OAR**

- 2 Memos on GOCO Enforcement to EPA Regions

**1985-88 • OSWER**

- 5 Memos to EPA Regions on GOCO Enforcement, Permit Issues and Operator Determinations

**1988 • EPA Administrator**

- Letter to Other Agencies clarifying full applicability of SARA Title III to contractors at GOCOs

# **EPA GOCO POLICY IN THE FEDERAL FACILITIES COMPLIANCE STRATEGY**

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**". . . pursue full range of its enforcement  
authorities vs. contractor operators of  
government owned facilities. . ."**

**AND**

**". . . also may take enforcement actions  
against Federal agencies . . ."**

**OR**

**". . . it may pursue enforcement action  
against both. . ."**

# **EPA GOCO POLICY IN THE FEDERAL FACILITIES COMPLIANCE STRATEGY**

---

- **Initial Enforcement Response influenced by:**
  - **Statutory language re: owner/operator;**
  - **Party or parties holding permit;**
  - **Contractual arrangements;**
  - **Nature and type of violation(s);**
  - **Other factors.**
- **Focus is on EPA's "Initial" Enforcement Response**
  - **Additional information may affect which party any further action should be taken against.**



# GOCO ENFORCEMENT RESPONSE

## EPA INITIAL ENFORCEMENT RESPONSE TO VIOLATIONS AT FACILITIES WITH FEDERAL INVOLVEMENT

Acronym/ Term	Definition	Exception or Other Comment	Initial Enforcement Response Directed at:
<b>GOGO:</b>	<u>Government owned/government operated</u> facility is the traditional Federal facility where the government owns and operates all regulated activity.		<b>FEDERAL FACILITY</b>
<b>PERMITTEE:</b>	Parties granted a permit for short-term use of government land (special use permit holders).		
<b>WITHDRAWAL FROM PUBLIC USE:</b>	Permit granted to a Federal agency or instrument of the Federal government to use the land of another Federal agency for up to twenty years, under the Federal Land Policy and Management Act, as long as the intended use does not involve destruction of the land (e.g. military uses and dams).	If administering the lands when the violation occurred.	
<b>GODO:</b>	<u>Government owned/contractor operated</u> facility is owned by a Federal agency but all or portions of it are operated by private contractor(s).	Except if dictated by statute or other factors. Action may also be against both parties.	<b>FEDERAL FACILITY OR PRIVATE PARTY</b>
<b>JOGO:</b>	<u>Jointly owned/contractor operated</u> is a facility where a portion is owned by the Federal agency and a portion is owned by a private operator which operates the entire facility and produces some goods and services for the Federal agency and some for its own use or profit.		
<b>GOPD:</b>	<u>Government owned/private operated</u> is a facility where the government has leased all or part of its facility to a private operator for their operation and profit.		
<b>COGO:</b>	<u>Contractor owned/contractor operated</u> facility is a non-government owned, privately operated facility that provides goods and/or services to a Federal agency under contract.	Except if pollution abatement is to be paid by the Federal facility for the furnished equipment.	<b>PRIVATE PARTY</b>
<b>COGO(E):</b>	Same as COGO, however, contractor may be furnished government equipment to manufacture a product or provide a service.	Except if violation resulted because of Federal agency operation.	
<b>POGO:</b>	<u>Privately owned/government operated</u> is a facility where the government leases buildings or space for its operations.	Or non-Federal parties.	
<b>LEASEE:</b>	Parties granted use of government land by a rental agreement or a title transfer with a reversionary clause (municipal landfills, oil and gas, mining, grazing, agricultural and industrial operations).	Or non-Federal parties.	
<b>GRANTEE:</b>	Parties having received a grant for permanent authorization to use government land or given right of way. Grants usually involve a single payment for the land or transfer of land use rights.		
<b>CLAIMANT:</b>	Parties that have properly located, recorded, and maintained mining claims on the public domain under the 1872 mining law (and who) have a possessory right against the U.S. and third parties.		
<b>PATENT HOLDER:</b>	A mining claimant who has met the statutory requirements of the 1872 mining law and has been issued a patent.		
<b>HOLDER:</b>	Any applicant who has received a special use authorization (for the use of National Forest land) from 36 CFR 261.61.		

# EPA GOCO POLICY IN THE FEDERAL FACILITIES COMPLIANCE STRATEGY

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## Notification Procedures for Actions at GOCO Facilities:

- **EPA Enforcement vs. Contractor:**
  - Copy (cc) of notice sent to Federal agency
  - Plus a Letter to agency:
    - Emphasizing importance of responsibilities to oversee contractor
    - Request agency's cooperation in returning facility to compliance quickly
- **EPA Enforcement vs. Federal Agency:**
  - Enforcement Action sent directly to agency officials
  - Copy of notice sent to involved contractor

# **EPA GOCO POLICY IN THE FEDERAL FACILITIES COMPLIANCE STRATEGY**

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- **Contractor Listing Program (CAA, CWA):**
  - **Results in ineligibility to receive government contracts**
  - **Clarifies applicability to GOCO contractors**
  - **Congress has introduced legislation to expand to include RCRA**

# **EPA GOCO POLICY IN THE FEDERAL FACILITIES COMPLIANCE STRATEGY**

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- **EPA commitment "to develop an Agencywide GOCO Enforcement Strategy"**
- **To provide:**
  - ". . . more detailed criteria and factors to be considered in determining which party to pursue enforcement action against."**

# **COLLOQUIUM ON EPA ENFORCEMENT AT GOCO FACILITIES**

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- **Sponsored by EPA Office of Federal Activities (October 1988)**
- **"Springboard" for development of an EPA GOCO Enforcement Strategy**
- **Forum for exchange of viewpoints among all affected parties:**
  - **EPA HQ and Regions**
  - **Federal Agencies**
  - **Government Contractors**
  - **State Agencies**
  - **Environmental and Public Policy Groups**
  - **Private Law Firms**
- **Intended Outcome:**
  - **Identification of key issues for EPA GOCO Strategy**

# **EPA GOCO ENFORCEMENT STRATEGY**

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## **Schedule and Milestones:**

- |                       |   |
|-----------------------|---|
| <b>August 1988</b>    | <b>- Formation of EPA GOCO Enforcement Workgroup</b>      |
| <b>October 1988</b>   | <b>- Colloquium on EPA Enforcement at GOCO Facilities</b> |
| <b>December 1988</b>  | <b>- Colloquim Proceedings Completed</b>                  |
| <b>March 1989</b>     | <b>- Draft Strategy (review/comment)</b>                  |
| <b>September 1989</b> | <b>- Final Strategy</b>                                   |

# KEY QUESTIONS

---

- What are GOCOs?
- Why are there GOCOs?
- Who determines whether a GOCO is a GOCO?
- Are there different types of GOCOs?
- When is a GOCO not a GOCO?
- Which party should EPA enforce against at GOCOs?

**PROCEEDINGS:**

**COLLOQUIUM**

**ON**

**EPA ENFORCEMENT AT**

**GOCO FACILITIES**

**OCTOBER 26-27, 1988**  
**WASHINGTON, D.C.**

**OFFICE OF FEDERAL ACTIVITIES**  
**U.S. ENVIRONMENTAL PROTECTION AGENCY**



## **COLLOQUIUM ON EPA ENFORCEMENT AT GOCO FACILITIES**

### **INTRODUCTORY REMARKS**

BARRY BREEN, Colloquium Moderator, Environmental Law Institute, Washington, D.C.

Mr. Breen welcomed the attendees to the GOCO Colloquium. He spoke of the federal agencies' need for a cohesive, coherent strategy towards government contractors at GOCO (Government Owned, Contractor Operated) facilities. He commended the expert speakers and panelists and looked forward to hearing their opinions of what ought to be EPA's GOCO strategy.

JENNIFER JOY WILSON, EPA Assistant Administrator for External Affairs, Washington, D.C.

Ms. Wilson's Office of External Affairs is responsible for legislative analysis, Congressional liaison, and environmental impact studies, compliance, and enforcement concerns of the federal agencies. Ms. Wilson stressed the importance of a mutually understandable approach towards GOCO enforcement. She was encouraged that this colloquium would provide an important policy forum for dialogue and the active exchange of ideas. This colloquium is consistent with EPA's new Communications Strategy Process, which clarifies the importance of open and accessible communication with the public and advance consultation with interested parties. She is hopeful that the Federal agencies, their contractors, and EPA will learn much from each other.

### **PLENARY SESSION:**

#### **HISTORICAL PERSPECTIVES ON EPA GOCO POLICIES**

Discussion of present and past EPA and Federal government policies and enforcement at GOCO facilities and how this fits into EPA's overall strategy for compliance at Federal facilities.

RICHARD SANDERSON, EPA. Director, Office of Federal Activities, Washington, D.C.

Mr. Sanderson highlighted key points in EPA's Federal Facility Compliance Strategy, a guidance and reference document which provides a uniform framework for all EPA media programs to follow in undertaking compliance and enforcement activities at Federal facilities. (See the Executive Summary of the Strategy in the Colloquium materials.) Mr. Sanderson pointed out that Federal facilities are legally required to comply with the environmental statutes, and it is the EPA Administrator's goal that Federal agencies meet or exceed compliance rates in the industrial and municipal sectors.

He spoke of the efforts of the Office of Federal Activities to implement the Strategy's initiatives through improvements in EPA's oversight role, through the Federal Agency A-106 Pollution Abatement Planning Process, innovative compliance management techniques (e.g., environmental auditing) and refinements of the EPA's compliance and tracking monitoring system for Federal facilities.

The Federal Facilities Compliance Strategy also clarifies EPA's authority to take enforcement actions against GOCOs and commits EPA to development of a follow-up GOCO enforcement strategy.

THOMAS BICK, Trial Attorney, Department of Justice, Environmental Enforcement Section, Washington, D.C.

(Worked on both the Rocky Mountain Arsenal case involving Shell, and the Air Force Plant #4/General Dynamics case)

Mr. Bick declared his strong personal bias against litigation. He feels litigation is one of the worst ways to make decisions about compliance, especially in the environmental area, since it is long, protracted, and expensive. Furthermore, he finds it imprudent to leave the decisionmaking to Federal judges.

Mr. Bick outlined DOJ's five basic principles underlying enforcement at GOCO facilities:

1) Enforcement of Executive Orders: Federal agencies that own GOCO facilities are required to comply with all statutes the same as private facilities. A series of executive orders make it clear that all Federal facilities must conform with environmental laws. However, in the Justice Department's view, executive orders, are not judicially enforceable.

2) Enforcement of Environmental Statutes: Further, although federal environmental statutes require Federal agencies to comply with both their procedural and substantive provisions, there are critical Constitutional and statutory restrictions which preclude enforcement. EPA may not bring a lawsuit against another executive agency to compel it to comply with an environmental statute or regulation. Articles II and III of the U.S. Constitution are cited as establishing the "unitary executive" doctrine. Mr. Bick also argued the principle's practicality: litigation by EPA would be extremely protracted and expensive for the Government.

3) Enforcement through Unilateral Administrative Orders: Based on its interpretation of Article II of the Constitution, DOJ maintains that EPA may not issue unilateral administrative orders against other Federal agencies to compel compliance unless the Federal agency has first had the opportunity to bring the dispute before the President or a Presidential designee.

4) State Enforcement and Citizen Suits: Although EPA may be restricted in enforcement actions against Federal facilities, waivers of sovereign immunity can leave Federal agencies susceptible to state or citizen suits. However, courts construe such waivers narrowly and most waivers do not permit the collection of monetary penalties. Because waivers of sovereign immunity are found in statutes rather than in the Constitution, Congress could expand the scope of the waiver by revising environmental statutes.

(5) Similarity to Contractors at Private Facilities: Private contractors operating GOCO facilities are subject to all procedural and substantive requirements to the same extent as contractors at private facilities (e.g., suit against General Dynamics, a contractor at an Air Force plant in Texas, for Clean Air Act violations.)

Mr. Bick then outlined a typical two-step process: first, look at the environmental statute to ascertain whether the contractor is a liable party (e.g., "owner or operator") and second, look at the factual relationship to ascertain who is the actual operator.

Mr. Bick concluded with two rules of thumb: 1) even where the Federal agency and its contractor share responsibility for the operation of a GOCO facility, DOJ contends that the contractor falls within the statutory definition of operator and can be sued, and 2) indemnification provisions are not a consideration when DOJ decides whether to bring an action against a contractor.

IVY MAIN, EPA, Office of General Counsel, Hazardous Waste Division,  
Washington, D.C.

EPA's position on enforcement parallels DOJ's. EPA can bring action against the Federal agency or the contractor, and EPA will bring action against contractors where it sees fit.

RCRA and CERCLA expressly cover "owner or operator." The Clean Air Act refers to "persons," which, under federal regulations and case law, mean both the Federal agency and the contractor.

Where the federal government is itself subject to a statute, the contractor is clearly covered as well. And where the federal government is not subject to a statute, the contractor may, nevertheless, be covered (e.g., Title III of SARA does not cover Federal facilities, but government contractors must comply).

EPA does not regard a contract as shielding the government contractor. Liability cannot be "contracted away." The case law tends to expand liability to make a contractor-operator liable for violations it committed in situations where it does not have full responsibility for the facility.

CHERYL WASSERMAN, EPA, Acting Director, Office of Enforcement  
Policy, Office of Enforcement and Compliance Monitoring

Ms. Wasserman began by questioning the need for a GOCO Colloquium if EPA can legally bring enforcement actions against GOCO contractors. She then pointed out the necessity for clear ground rules, so that all are aware of their accountability. She also noted that policy questions remain open: even though EPA can go after GOCO contractors, when and where should EPA bring such enforcement actions? Ms. Wasserman stressed that confusion is the enemy of compliance.

Ms. Wasserman spoke of EPA's general bias towards private party enforcement. She suggested that a contractor, faced with the prospect of fines, penalties, and debarment listing, may have greater leverage against a Federal agency than EPA does and the GOCO operator may insist on compliance measures. She found it untenable that a Federal agency would shield private party contractors from liability.

Ms. Wasserman identified three major issues:

1) Permit holder issue: Under RCRA the operator must be a signatory (see 6/24/87 memo in the Colloquium materials). Often both the contractor and the Federal agency will sign, but that does not preclude EPA from going after the contractor. Similarly, NPDES permits for POTWs, where the POTW is privatized, are signed by

both the operator and the municipality.

2) Contractual vs. Factual Relationship: EPA will determine who is the responsible party based on the facts, and not necessarily on the wording of the contract.

3) Degree of Control: It is the responsibility of those entering into a contract to specify who is really in control and thus is best able to ensure compliance.

#### QUESTIONS AND COMMENTS FOLLOWING "HISTORICAL PERSPECTIVES" SESSION

In response to a question about the impact of two recent Supreme Court decisions (Boyle and Goodyear), Mr. Bick pointed out that both cases were based on state, not federal, law. Therefore, Mr. Bick felt the decisions will have no impact on the enforcement of federal environmental statutes.

In response to a question about the proposed bill establishing an EPA Special Counsel for Federal facilities compliance (H.R. 3782), Mr. Bick said that DOJ opposes it. He added that Federal agencies may be more likely to hide information from EPA if there is a Special Counsel. Ms. Wasserman added that EPA has practical objections to the bill, in that establishment of a Special Counsel would frustrate the relationship between EPA, Federal agencies, and contractors, and make effective dispute resolution more difficult.

#### PANEL A: DEFINING THE GOCO UNIVERSE

##### Purpose:

Definition(s) of GOCO facilities and examination of the various roles of government contractors in activities and operations at Federal facilities.

JAMES R. EDWARD, EPA, Deputy Director, Federal Facilities Compliance, Office of Federal Activities, Washington, D.C.

EPA can exercise the full range of enforcement actions against contractors at GOCO facilities. Mr. Edward, however, also recognized the necessity of understanding Federal agencies' definitions of GOCOs and their relationships.

The Federal Facilities Compliance Strategy indicates EPA's commitment to develop an agency-wide, multimedia GOCO enforcement strategy. In the Strategy, EPA defines GOCO as a "government facility owned by a Federal agency, but all or portions of it, are operated by private contractor(s)." The critical language in the

definition is "all or portions of," since it acknowledges that an entire site, or simply one discrete unit on a site, may be considered a GOCO.

Mr. Edward pointed out the variety of other private party arrangements at Federal Facilities, such as COCOs, COCO(E)s, and GOPOs, that should be distinguished from GOCOs.

There are an estimated 130 GOCO facilities. The Department of Energy owns GOCO research labs, weapons testing and atomic power sites, which account for 48 facilities. The Department of Defense owns ammunition plants, fuel supply and industrial ordinance plants, constituting another 77 facilities. The remaining 5 facilities belong to NASA.

In anticipation of an EPA GOCO enforcement strategy, Mr. Edward recognizes the need for refining the definition of GOCO. He posed 6 key questions for consideration by the panel: What are GOCOs? Why are there GOCOs? Who determines whether a GOCO is a GOCO? Are there different types of GOCOs? When is a GOCO not really a GOCO? Which party should EPA enforce against at GOCOs?

DENNIS TROSCH, Assistant General Counsel (Logistics), Department of Defense, Washington, D.C.

Mr. Trosch emphasized the diversity, both geographical and functional, of DOD's contractors. DOD has a long tradition of using defense contractor-operated facilities to help fulfill its mission. DOD GOCOs tend to serve in a more technological capacity.

Mr. Trosch said that once a Federal agency has financed a contractor it should expect that contractor to operate the facility as if it were the contractor's own plant.

Under the FAR and DAR, whenever the government acquires any equipment, including real property, and turns it over for the contractor to use, it is considered a "facility", but DOD would not consider a "facility." However, DOD does not consider the mere loan of equipment to a contractor to be a "facility;" real property must be in the equation.

He pointed out that JOCOs (jointly owned, contractor operated) are prevalent in the Navy. There it is visibly difficult to discern who operates particular portions of a facility, and, in fact, it is often treated as an integrated facility.

BILL SNYDER, Chief Counsel, Oak Ridge Operations Office, Dept of Energy, Oak Ridge, TN

DOE resists any single definition of GOCO. In fact, DOE does not consider its contractors to be "GOCO contractors", but instead considers them "management and operating" (M&O) contractors.

In the 1940s the Atomic Energy Commission turned to the industrial and scientific community to help it fulfill its mission. Following World War II the contract arrangements were formalized. Such contracts are still being used, primarily in the nuclear field.

No two M&O contracts are alike, but there are common features. All have a broad scope of work. All the facilities are federally owned. The contractor has no investments in the plant; it owns none of the property and does no private work at the site. DOE advances money to the contractor, so it does not use its own private funds. Furthermore, the GOCO facility's accounting system is financially integrated in to DOE's system to keep track of the property as well as the salaries and expenditures. DOE encourages its contractors to operate at a facility as a self-contained unit, as if the site were a subsidiary to the parent corporation, with separate accounting, purchasing and legal departments.

DOE has struggled with defining the status of its contractors and concludes that, at best, a DOE contractor is an invitee: it does the work and then leaves; it makes no private investments in the plant and operates on funds it receives in advance.

Contracts cover five-year periods, but DOE selects contractors anticipating long-term relations. Most contractors do stay on for a significant time through contract renewals. When there is a change of contractors, DOE expects the new contractor to replace only those who were employed in top management and other policy-making roles. In the interest of continuity, lower level employees do not change. The contract is performed through two instruments: (1) authorizational letters, which are sent periodically to the contractor and set broad terms of production, and (2) funding program approval, which notifies the contractor how much money is authorized in order to do the work.

Most DOE contracts are award fee contracts, where the performance is graded and the fee relates to the grade.

G. TED ANKRUM, Deputy Assistant Associate Administrator, Facilities Management, NASA Headquarters, Washington, D.C.

NASA has several classic GOCOs (e.g., Michoud Assembly Plant, operated by Martin-Marietta) and also some "odd arrangements" (e.g., Jet Propulsion Lab, operated by Cal.Tech., which claims it is not a GOCO but rather a "federally funded R & D center").

Under NASA policy, scientific and engineering work should be performed by civil servants. In order to maintain this core capability, NASA has been contracting out more and more of its non-scientific activities. JFK Space Center is a good example. NASA has three major contracts there: a payload processing contract, a shuttle processing contract, and a base support (steam, heating plants, trash pickup, etc.) contract. Particular facilities are assigned to each contractor, for which each is solely responsible. This prevents any problem with commingling of operations. NASA considers contractor accountability to override the expense of duplication of activities.

Although a NASA contractor has considerable autonomy in its day-to-day operations, it has no authority to undertake major capital projects in the NASA facilities that they occupy and operate. Congress must appropriate funds for any capital project costing more than \$100,000. For example, if there is a hazardous waste storage container that does not meet regulatory requirements and an expensive device is needed to remedy the violation, the contractor lacks the autonomy to undertake the work itself. In such a situation, NASA feels it would serve no useful purpose for EPA to bring an enforcement action against the GOCO contractor. NASA will pay for the expenses as an "allowable cost." On the other hand, if a contractor's wilful misconduct creates a violation, NASA would probably find an EPA enforcement action useful.

NASA feels it has been open with EPA about the operations of its facilities. NASA intends to comply with the environmental laws; it has a long list of projects that need funding and it has gone to Congress to request money. EPA should come to NASA first, to discuss any compliance problems. NASA feels an "across the board" GOCO strategy serves no useful purpose and EPA should address GOCO problems on a case-by-case basis.

BERNARD HYDE, Chief, Hazardous Materials Staff, Bureau of Land Management, Washington, D.C.

Mr. Hyde felt EPA needs to expand its consciousness about GOCOs. BLM administers public lands for an array of uses, sometimes on discrete lands and sometimes on tracts of alternating private, state, and local land ownership. Land is leased for long terms or withdrawn from public use in perpetuity. Federal



agencies, especially DOD, DOE and NASA, need lands for their sheer space requirements of their activities. States and localities use the lands for non-federal purposes, like parks and disposal sites.

BLM objects to the current definition of GOCO, because it makes each BLM user a potential GOCO. BLM contends that it should not be held responsible for releases by others that happen to occur on Federal lands. BLM has little or no control over the day-to-day activities on its lands -- yet when a recalcitrant lessee is unavailable, BLM is considered the guarantor of last resort and the ultimate owner of the site.

Mr. Hyde was particularly concerned about the public lands that have been leased for landfills. Where lease provisions are violated (e.g., hazardous waste problems), the possession of the leased property is required to be returned to BLM. BLM feels it has become an easy target. Mr. Hyde hoped DOI, EPA and DOJ can find better methods and deal more effectively with this problem and find the real violators.

Mr. Hyde advocates improved communication, improved coordination and cooperation, and higher levels of notification by the states and EPA regional offices.

#### QUESTIONS AND COMMENTS FOR PANEL A

In response to a question about the discrete units within a NASA installation (e.g., hazardous waste storage facility), Mr. Edward commented that the current EPA definition of GOCO ("all or portions of") implies that such a discrete unit may be considered a GOCO.

#### PANEL B: LEGAL RELATIONSHIP BETWEEN GOCO'S AND FEDERAL AGENCIES

##### Purpose:

Exploration various contractual arrangements, including the scope of employment and the influence of indemnification provisions and the Federal Acquisition Regulations.

Panel Moderator: PROFESSOR JOHN CIBINIC, George Washington University Law School

Professor Cibinic spoke of the legal relationship between contractors and Federal agencies and the importance of clarifying who will be liable for violations. He emphasized the importance of personal responsibilities as well as institutional obligations.

MARY BOSCH, Department of Energy, Washington D.C.

Ms. Bosch spoke of the variety of contract arrangements with DOE. DOE uses its Management and Operations (M&O) contractors to carry out its statutory functions. (In fact, for every DOE employee there are thirty contractor employees.) The contractors are hired for their technological and managerial expertise. The government sets general standards, but exercises significant oversight to ensure prudent expenditures. As a result, there is a delicate balance between government supervision and the contractors' own control.

DOE considers its relationships with its contractors to be partnerships from which a "commonality of interest" develops outside of the contract.

a) First, the contract is very short and broad. The terms of the job, such as timetables, are worked out between the contractor and DOE, outside the contract.

b) Second, the contractor at a DOE facility is minimally capitalized. DOE essentially expects its contractors to take very few risks. As a result, the contractors recover low fees or even no fees. Costs incurred in the performance of the contract are generally allowable, if they are considered business expenses, including program foul-ups or employee negligence. Fines and penalties are allowable, if the violation occurred in the performance of the contract, or if the payment was approved by the contracting officer. But fines for violations due to willful misconduct are not allowable. Finally, the contractual arrangements are intended to be long-term. The contractor is given significant management responsibilities.

Ms. Bosch noted some areas of tension. DOE has recently been pushed to have an arm's length relationship with its contractors in the area of fee structure; the shift from fixed fees to award fees could be a disincentive for the contractor to be forthcoming with DOE. Also, in the area of technology transfer, some contractors (especially university operators) are entitled to ownership of patents. There is some concern however that this may dilute the commonality of interest.

c) Third, the Price-Anderson amendments on contractor indemnification for nuclear damages authorize the Secretary of DOE to levy fines against contractors. But this final concern should not really pose problems, because DOE is exploring ways to implement the law without destroying the special relationships it has with its contractors.

JONATHAN BLUCHER, U.S. Air Force Systems Command, Bolling AFB, Washington, D.C.

(See handout: "Pollution Prevention and Cleanup--Who Pays?")

Mr. Blucher provided an overview of the types of government contracts -- fixed price and cost type contracts. For every contract there is a significant distinction between allowable and unallowable costs. In negotiations with a contractor the government is expected to agree only to allowable costs. An allowable cost must be reasonable, allocable, and permitted by the cost principles.

There is no specific cost principle for pollution prevention and cleanup costs, but one is currently being drafted. In the mean time, FAR principles instruct one to reason by analogy. Pollution costs are permitted by practice and analogy as ordinary business expenses when they are reasonable and legally required. The costs are allocable to plants and plant contracts. However, the cost is not permitted if the pollution was illegal when it occurred. After all, the government should not subsidize an illegal action.

Mr. Blucher then outlined how the Air Force might pay for a contractor's pollution cost. There may be a direct charge, in response to a consent decree. Or there may be an indirect charge, either via overhead on all the contracts (depreciation, after all, is allocable) or via overhead negotiated in advance of fixed agreement. (Note that the rate would be an estimation and it would not be corrected for fixed price contracts.)

Mr. Blucher commented that pollution costs will be borne by the government in proportion to the government contracts involved. The contractor is considered a mere conduit, and so the costs will not remain with the contract.

Mr. Blucher concluded by appealing to EPA and Department of Justice to inform the Federal agency of noncompliance problems before filing complaints.

ROBERT HUFFMAN, Partner, Miller & Chevalier, Washington, D.C.

(See also copy of "Contractual Recovery of Hazardous Waste Response Costs at Federal Facilities: Hypotheticals/Issues/Relevant Authority" in Colloquium Materials or available from author upon request.)

Mr. Huffman contended that although the existence of indemnification and reimbursement clauses does not affect EPA's ability to bring enforcement actions against the GOCO contractor, EPA should nevertheless take these issues into account. EPA must

educate itself about the contractor's ability to recover costs from the government.

While there is nothing in the Federal Acquisition Regulations (FAR) about reimbursement for response costs, and no uniformly applicable indemnification provision, there is generally indemnification or reimbursement by the government for any damage or loss of property. Insurable damages, though, are often excluded, and damages due to willful misconduct are also excluded. Willful misconduct is narrowly defined as conduct that is worse than gross negligence and more than simply illegal; it really amounts to recklessly illegal action.

Insurance contracts may have clauses on property damage or expenses incurred. Although some courts have considered response costs to be economic loss, most courts are likely to consider the costs to be government property damages.

Many indemnification provisions are worded in terms of "unusual risk or hazard" and the definition will depend on the particular agency's determination. In older GOCO contracts, for instance, the government was more likely to treat contractor work as risky.

There remain questions about third party liabilities. EPA is a Federal agency and so is different from a state environmental enforcement agency. The Anti-Deficiency Act bears directly on indemnification. For a Federal agency to indemnify against uncertainties would be to violate the Anti-Deficiency Act, and yet, that is still the practice.

Indemnification need not be express. Courts will recognize implied indemnification as long as there is some indicia of formal contract (offer, acceptance, mutuality, consent, consideration). But note, when Johns-Mansville tried to argue that they had been implicitly indemnified by the Navy, the court found that strict liability was not within the contemplation of the parties.

Mr. Huffman found it difficult to see how cost principles interact with indemnification provisions, since typically an indemnification provision would cover all expenses, not just allowable and allocable costs.

He would argue that cleanup costs are not punitive and not fines and penalties. If there has been no willful misconduct, and the terms of the indemnification clause have been met, then the contractor ought not to be subject to cleanup cost liabilities.

## Questions and comments for Panel B

Prof. Cibinic compared private enterprises and government contractors. He commented that a private company cannot pass off all its pollution costs to the consumer, and asked why the government contractors should not also have to bear some of the costs, especially since such contractors are not as immediately affected by competition.

Mr. Huffman commented that, as a policy matter, government contractors should not have to bear any of the costs, unless the pollution was clearly willful misconduct.

The comment was made that there seems to be little incentive for compliance when reimbursement is assured. It was proposed that contractors be required to pay insurance, thereby placing the contractor at some risk. Insurance could have a deterrent effect; in the event that the insurance company has to pay for noncompliant activity, the contractor's future premiums will increase.

In response to a question about remedial actions, Mr. Blucher pointed out there is no cost principle for remedial actions and so one draws analogies from fines and penalties as well as attorney fees for defending criminals, where the principle is not to subsidize criminal involved in illegal acts.

## PANEL C: FEDERAL AGENCY MANAGEMENT OF GOCO CONTRACTORS

### Purpose:

Insight into the day-to-day operations at GOCO facilities including Federal agency supervision, contractor's obligations to notify, and the allocation of costs and liabilities.

LTC LARRY HOURCLE, Chief, Environmental Law Office, Headquarters U.S. Air Force, Washington, D.C.

LTC Hourcle commented on the importance of focusing on the interrelationships between Federal agencies and contractors at the operational level.

THOMAS ROW, Martin Marietta Energy Systems, Oak Ridge, Tennessee

Mr. Row summarized the typical exchanges Martin Marietta has with the Department of Energy. At the start of the year the contractor submits proposals about what it needs in order to meet existing standards. This is a full-funding document, but it is understood that not all the projects can be realizable. DOE

provides funding as is available. The money is entered in a tracking system that parallels DOE's. DOE also sends authorization and guidance letters, which charge the contractor to operate within specified guidelines. There is, however, some flexibility within the areas of management and technical skills. Martin Marietta works under a strongly managed award fee system.

Martin Marietta has regular contact with EPA's regional office as well as with DOE, the state, and sometimes local regulatory officials. It receives much input from the regulators. They have frequent meetings and correspond through E-mail and telephone communications.

Environmental audits originate within Martin Marietta and its operations are coordinated by the regulatory agencies.

WILLIAM MELTON, U.S. Army, Lake City Army Ammunition Plant, Jackson County, MO

Mr. Melton works in the Chief Engineering Office at Lake City Army Ammunition Plant, which is contractor-operated by Olin Corp. He outlined the Army's policies and practices at the site. The Army considers the permittee to be the Army Commander, even though it is the contractor that prepares the paperwork for the permit application. This decision is based on the fact that the Commander is in charge of allocating money.

The Army plant manager meets regularly with the contractor but has limited supervision of the contractor's daily, routine operations. Given the current funding constraints, the Army plant manager may establish some legitimate requirements.

Regarding fines, there have been two instances where fines have been assessed to the contractor at the site; in neither case was the expenditure reimbursed to the contractor. On the other hand, the Army prohibits the contractor from investing its own capital in operational improvements and related activities.

The Army has a policy of direct enforcement which acts as leverage against its contractors. The Army is not convinced that any more leverage from EPA is necessary. The Army already feels accountable and is working continuously on improvements. It resents EPA's perception that the Army is recalcitrant.

Finally, Mr. Melton commented on the Army's need for indemnification clauses in contracts; without such protection, the Army feels it would be unable to find contractors willing to work at a National Priorities List (NPL) site.

ROBERT MUELLER, Olin Corporation, Lake City Army Ammunition Plant

Mr. Mueller felt that some contractual relationships inhibit the contractor. The contract authorizes actions "to the extent funds are made available by the Federal government." Since these funds are limited, this affects the contractor's ability to meet new environmental regulations in a timely fashion. Mr. Mueller contended that the FAR should define liabilities in such situations. The contractor is obliged to follow a technical data package. It must follow the numerous specifications from which it may not deviate without express approval. The contractor must consult with the contracting officer before using money up to \$5,000 dollars, and it cannot use money over \$5,000 dollars until it consults with the procurement officer. Furthermore, the Anti-Deficiency Act prohibits even voluntary actions by contractors, including needed capital improvements. The biggest struggle for the contractor is to secure enough money to pay for projects required in the contract, such as recycling, pollution abatement, emergency plans, officials and sanitary programs. The Contract must get approval from the local Army officials for maintenance, repairs, reorganization plans, etc.

JOHN NEPUTE, Chief of Industrial Engineering, Wright-Patterson Air Force Base, Dayton, Ohio

Mr. Nepute began with an overview of Air Force activities. The Air Force expects the contractor to implement environmental programs on-site and to initiate budget proposals to carry them out. The contractor will get legal and technical assistance from senior systems commands, but not much help from the AF Plant Representatives Office or the Defense Contract Administrative Service Plant Representatives Office, since they have been instructed to refrain from environmental activities at GOCOs.

Mr. Nepute pointed out that the basic objectives of the Air Force's environmental program are to comply with the law, to create and maintain an environmentally safe working place, and to continue a positive public image.

He cited progress in Air Force projects: environmental auditing, waste minimization, installation restoration, construction and modification of Treatment Storage and Disposed Facilities, Underground Storage Tank programs, and PCB transformer removal programs.

JAMES LUCAS, Lockheed Corporation, AF Plant No. 6

Mr. Lucas discussed contractor relations at Air Force Plant No. 6, where Lockheed operates a joint DOD/Industrial complex which treats waste for all the site's units. Lockheed gets "Direct Facilities Contract Funding" and it can request anything over normal costs.

ARTHUR LINTON, Federal Facilities Coordinator, EPA Region IV, Atlanta

The EPA Regions are the "enforcers" at Federal agencies' own facilities as well as at their GOCO facilities. Mr. Linton stressed the importance of communication. He contended that all parties involved are interested in what will work.

Mr. Linton talked of the positive history his Region has in dealing with GOCOs. When Region IV issues NOV's to the base commander it sends copies to the GOCO contractor.

Questions and Comments about Panel C

In response to a question about Congressional awareness of the funding problems, Mr. Linton stressed the importance of the A-106 process and urged participation. Mr. Edward of EPA pointed out that agencies should explore the possibility of an environmental compliance line item in the budget and noted that NASA has done this successfully. Mr. Mulhern, Federal Facilities Coordinator, Region III, urged installation commanders and GOCO contractors to go to Congress about funding requirements.

PANEL D: BRINGING ACTIONS AT GOCO FACILITIES

Purpose:

Analysis of procedural issues and government contractor defenses both generally and as they have been used in EPA civil, judicial, and administrative enforcement actions.

Panel Moderator: F. HENRY HABICHT, of Counsel, Perkins, Coie and Vice-President, Ruckelshaus Associates

Mr. Habicht, noted that government contractor arrangements pose pivotal questions of statutory and Constitutional dimension. He spoke of a perception problem and the need to use the institutions of EPA and Federal agencies to provide clearer direction. EPA needs to clarify its approach towards GOCO contractors, and



contractors, in turn, need to know their obligations and responsibilities. Both parties should be aware of the positions and defenses that might be argued. Congress must be convinced of the need for long-term planning and more funding in order to achieve environmental compliance.

CHRISTOPHER GRUNDLER, Director, Federal Facilities Hazardous Waste Compliance Office, EPA, Washington, D.C.

Mr. Grundler outlined EPA's perspective on Federal facilities compliance with hazardous waste laws. He stressed that EPA Office of Solid Waste and Emergency Response (OSWER) is not singling out government contractors. OSWER has recently identified Federal facilities of concern and has implemented monitoring programs as well as planning and management assistance. EPA has also explored enforcement options for Federal facilities that are out of compliance.

EPA considers GOCO contractors to be potentially liable parties as a matter of law, and feels as a matter of policy that contractors should not be shielded. Although EPA has not yet published a formal policy on GOCO enforcement actions, OSWER does not want its EPA Regions to hesitate in bringing actions against recalcitrant facilities. In fact, Mr. Grundler cited three recent actions OSWER has undertaken against GOCO contractors. In the first action, OSWER looked at the degree of control; the contractor was aware of its improper activities and had been warned. EPA has issued a complaint and has proposed a penalty against the GOCO contractor. In the second action, the contractor was doing an RFS without approval by EPA or the state. EPA sent a notice to the contractor and has invited it to negotiate the RFS. In the third action EPA was unsuccessful in reaching a compliance agreement with the Federal agency, so as a result OSWER is pursuing enforcement action against the contractor.

OSWER is establishing criteria for deciding whether to take action against a contractor:

- Who is in control?
- Who is doing the activity/inactivity in question?
- Has there been unsuccessful resolution of the compliance problem with the Federal agency?

OSWER is considering a GOCO enforcement policy in the RCRA compliance area: it may, as a matter of policy, go after the contractor in the first instance. This determination, though, would be on a case-by-case basis, and equitable considerations may affect the decision. (e.g., if the corrective action requires major facility modification, then obviously there are equity considerations.)

Mr. Grundler distinguished compliance from cleanup actions. Compliance problems are more attributable to the contractor; enforcement actions against GOCO contractors for noncompliance are generally more appropriate than cleanup actions against such contractors.

Mr. Grundler concluded by stating that he does not believe that the imposition of GOCO contractor liability will make it difficult for Federal agencies to find contractors to do the work. He also distinguished compliance liability from liability of contractors for nuclear accidents.

PEGGY STRAND, Chief, Environmental Defense Section, Department of Justice, Washington, D.C.

Ms. Strand identified two emerging themes of the Colloquium: process (i.e., determinations about how accountability should be handled, who should pay, and where the funds should come from) and legal authorities. Ms. Strand focused on the second theme and pointed to the clarity of the environmental laws: the laws are clearly applicable to both private and Federal facilities. With that in mind, she contended that the disagreement about GOCO enforcement authority is misguided.

Ms. Strand made reference to a recent Supreme Court decision, Boyle v. United Technologies (1988), which upheld government contractor immunity from a state tort claim. She distinguished that decision from any environmental enforcement action, and stressed that Boyle would not apply, since Congress has spoken loudly and clearly about having Federal facilities comply with federal environmental statutes.

Ms. Strand emphasized the importance of not equivocating about government contractor enforcement. Precedents set by recent Supreme Court cases do not exculpate or immunize government contractors from environmental liability.

Ms. Strand concluded by emphasizing that the more difficult and challenging goal is to develop a process to make statutory compliance work at both Federal facilities and GOCO facilities.

ROBERT LEE, Mott and Associates, Washington, D.C.

Mr. Lee examined what defenses a government contractor would use in the event an enforcement action were brought against it. He first focused on the Boyle decision and contended that, although the Supreme Court holding is narrow, it has broader persuasive authority. He agreed with Ms. Strand of DOE that the narrow holding probably has little effect on environmental enforcement, but felt the Supreme Court decision broadened the government

contractor defense. In Mr. Lee's opinion, Boyle extends the defense to include cases where the plaintiffs are not military persons, and applies even where the government did not itself prepare the specifications but merely approved them. Furthermore, the rationale of Boyle depends, at least in part, on the fact that a "uniquely federal interest" is involved, thus preempting state law.

The Federal Tort Claims Act (on which the decision in Boyle was based) allows the federal government to escape liability when its officers perform a "discretionary function." However, when an environmental statute -- which specifies mandatory, nondiscretionary functions -- is violated, the discretionary function rationale in Boyle is not applicable.

On the other hand, Mr. Lee contended, the government contractor defense upheld in Boyle would be significant in toxic tort actions. In the ongoing litigation at the DOE Feed Production Materials Production, DOE has raised government contractor defenses. DOE insists that its contractors performed the work under DOE direction and therefore should be immune.

Another defense is the "real party in interest" issue. The contractor should demonstrate that the Federal agency and its contractor are so closely connected that the Government is the real party in interest and so the enforcement action should be brought against the Government, not the contractor.

Mr. Lee concluded with the prediction that Congress, aware of the potential impact of Boyle, will change the laws to clarify government contractor liability.

MAJOR DAVID HOARD, Office of the Staff Judge Advocate, Headquarters Air Force Logistics Command, Wright-Patterson AFB, Ohio

Major Hoard narrowed his presentation to examining, in an EPA v. GOCO action, who is really being sued. He pointed out that if the contractor and the government are considered the same entity, then the action is simply an in-house argument between EPA and another Federal agency, and, as such, it is not a "case or controversy" and thus not subject to a judicial determination.

Courts look behind the labels to determine who are the "real parties in interest" in a lawsuit. The "real party in interest" issue arises under the Federal Rules of Civil Procedure, Rule 17, which applies to plaintiffs, but courts have permitted the application of Rule 17 to defendants as well. The Government contractor could argue, in its defense, that it is not the real party in interest and that the Federal agency is the real party in interest. Major Hoard commented that in the GOCO scenario the contractor may have difficulty in proving that the government, the

owner of the facility, has more interest in the facility than the contractor operator. Since some environmental laws create liability for owners and operators and other laws apply to "persons" or "facilities," the contractor, as operator at the site, may have to bear some liability.

In addition to an examination of the contractual relationship courts are likely to inquire into the actual relationship between the Federal agency and its contractor. The following factors may be important: master-servant or principal-agent relations, the nature of the various contractual arrangements, the degree of oversight, and the possibility of independent contractor status.

Major Hoard concluded that the real issue is not the legal argument, but rather the policy concern about placing such an enormous financial burden on the public, since ultimately the taxpayers will pay the costs.

HERBERT FENSTER, McKenna, Conner and Cuneo, Washington, D.C.

Mr. Fenster commented that Congress has vastly underfunded Federal facilities, and he regretted that neither the Executive nor the Legislative branch of the U.S. Government plan to make more money available.

There are twenty tort cases similar to the Boyle case currently pending in federal courts. Six decisions have been rendered since Boyle and all but one have been favorable to the contractors.

Mr. Fenster contended that in a GOCO enforcement action the contractors should make a Yeardsley defense. (Yeardsley was a 1940 Supreme Court decision cited in the Boyle decision.)

Mr. Fenster felt DOJ and EPA have a profound lack of appreciation and understanding of government contractors.

In Mr. Fenster's opinion, a GOCO contractor is liable only if it has breached a contract (generally a cost type contract) with the Federal agency by improperly performing some function that was funded by the government.

Mr. Fenster commented on a contractor's dilemma (as in the Air Force Plant #4/General Dynamics case) when, faced with a noncompliance problem, the Federal agency has not approved actions to correct the problem. It is illegal for a GOCO contractor to pay for an unapproved action, and voluntary activity would violate 31 U.S.C. 1342.

Mr. Fenster disagreed with EPA's assumption that there will continue to be enough willing contractors even when they face such enforcement actions. He said that Federal facilities are not that

valuable to any government contractor operator.

#### QUESTIONS AND COMMENTS FOR PANEL D

In response to a question about who is the operator at DOE facilities, Mr. Fenster said DOE contractors are considered servants and never rise to the level of operator. In simple lease relationships it is possible that a contractor is an operator, but that requires money to remediate the site. Mr. Habicht said that under RCRA both the government and the contractor are considered operators. Mr. Fenster said he instructs his contractor clients not to sign permits.

In response to a comment that under Boyle the contractor seems to have a broader defense than the government, Mr. Fenster agreed and pointed out that a previous Supreme Court case (Shaw v. Grumman) granted the contractor immunity even where U.S. was not immune. Ms. Strand, however, pointed out that Shaw, like Boyle, was a tort case. Ms. Strand reemphasized the important differences between tort cases and environmental compliance cases.

A contractor in the audience suggested three possible consequences should contractors be no longer fully indemnified:

- the Federal agencies will operate the facilities themselves (GOGOs--Government owned and operated);
- GOCO contractors will charge more to the Federal agencies in light of potential liability;
- or GOCO contractors will set up low capital investments so they can dissolve easily in the event of a problem.

Mr. Habicht closed with the comment that public perception about environmental protection is critical. He reminded us that the courts will react to placate the public. Mr. Habicht also suggested that it would be useful to distinguish types of enforcement actions; cleanups are different matters from ongoing environmental compliance with permits and prevention of sporadic incidents of violations.

#### PANEL E: PRACTICAL AND POLICY CONSIDERATIONS

##### Purpose:

Evaluation of external influences, selected institutional and other factors that affect the choice of enforcement responses, including budgeting concerns, permitting requirements, and debarment provisions.

Panel Moderator: CHERYL WASSERMAN, EPA, Acting Director, Office of Legal Enforcement Policy, Office of Enforcement and Compliance Monitoring, Washington, D.C.

Ms. Wasserman opened the panel discussion by questioning how to make all parties involved in a government contract feel accountable.

LEE HERWIG, EPA, Chief, Federal Facilities Compliance Program, Office of Federal Activities, Washington, D.C.

Mr. Herwig acknowledged the problems of Congressional underfunding of greatly needed environmental projects and offered a solution -- the OMB A-106 System, which permits the Federal agencies to itemize all the projects that need funding. A-106 is a five-year pollution abatement plan submitted to EPA annually by the Federal agencies. EPA analyzes the plans and classifies each individual project:

- Class I projects are needed to correct noncompliance problems. Compliance agreements / consent orders that are signed by EPA and the Federal agency are given highest priority. Situations where notices of violation have been issued or when there is noncompliance past a deadline are also considered Class I.

- Class II projects involve situations where the compliance deadline is in the near future.

- Class III are the remaining projects, like obsolescence, that need funding.

Mr. Herwig and the EPA Office of Federal Activities urge Federal facilities and contractors at GOCO facilities to submit all needed projects annually. The A-106 system is unique in government, in that it provides an opportunity to the chain of command to identify needed capital projects and one-time monitoring programs through a system which is related to, but not directly a part of the Federal budget process.

RIDGEWAY HALL, Title Crowell and Moring, Washington, D.C.

Mr. Hall recognized the potential liabilities that a government contractor faces: in addition to the more familiar environmental liability, there is toxic tort liability and the joint, several, retroactive and perpetual liabilities under CERCLA. What is more, there are policy and practical constraints on the Federal Government.

The Anti-Deficiency Act bars a Government agency from spending more than is authorized and appropriated in its budget, which means an agency can only indemnify its contractor for clear and limited amounts. Consequently, Mr. Hall advocated clear delineation of

responsibility for ongoing compliance, as well as assignment or apportionment.

If Federal government sovereign immunity has been waived, both the Federal agency and the contractor may be subject to the statute, although there is still room to argue that civil penalties are unauthorized. In addition, the government can be sued under the Federal Tort Claims Act. Note, however, that there is an exception for "discretionary functions."

Contractors should encourage interagency relationships between EPA and other Federal agencies including cooperative funding of studies and environmental auditing. Mr. Hall also encouraged good relations with Congress and awareness of local political constraints and neighborhood acceptability of remedies.

Ideally a reasonable inter-agency agreement could be reached. But problems may arise if there are strained Federal-State relations or if the parties cannot agree on the scope of remedy or response strategy.

Mr. Hall spoke of the effectiveness of area apportionment agreements, especially at Superfund sites, and cited the success of the agreement at Twin Cities Army Ammunition Plant.

ALEX VARELA, EPA, Contractor Listing Official, Office of Enforcement and Compliance Monitoring, Washington, D.C.

(see handout in materials)

Mr. Varela began by pointing out the complexities of the compliance determination process, especially in remedy selection. He emphasized the enormous policy and practical problems in carrying out compliance agreements.

Mr. Varela enumerated a number of practical and policy considerations which may arise at various points during contractual relationships with a Federal agency. 1) There are inspection and information access problems that must be anticipated. 2) The capital structure and O&M components of a contract may be difficult to reconcile. 3) Parties involved need to be aware of mutually exclusive defenses that may be made by Federal agencies and EPA. 4) One cannot forget Congressional pressures which affect decisions. 5) There are problems of credibility for DOE, DOD, DOJ, and EPA.

Mr. Varela also discussed contractor debarment listings, which currently exist under the Clean Air Act and Clean Water Act, and have been proposed for RCRA. In 1985, new contractor listing regulations were issued. Presently, recommendations for listing can come from the EPA Administrator, a State Governor, or any

citizen. These listings have been used to enforce contractor compliance. Although the listing applies only to a specific facility, not the entire company, EPA interprets a facility to encompass whatever contracting part of the facility was in violation.

ROBERT LINGO, U.S. Army Material Command, Washington, D.C.

Mr. Lingo began with the premise that EPA intends to bring enforcement actions against GOCOs and then questioned when the action would be appropriate. Mr. Lingo stated that contractors want to know what the rules are.

Before the Army decides whether to get involved when EPA brings an enforcement action against a GOCO contractor it should evaluate the effect of the remedy (e.g., the shutdown of a proving ground). It should examine the contractor's obligations and determine who will be responsible for the funding.

Mr. Lingo focused on ongoing RCRA compliance matters. The Army has certain expectations of contractor activity under RCRA. After all, the contractor is funded for such work. But the Army also realizes the limitations of the contractor's own money and appreciates the difficulties in paying for capital investments.

In the event a penalty is levied against the contractor, the Federal Acquisition Regulations (FAR) do not provide for reimbursement except when it has been provided for or approved by the contracting officer. The Army has a provision that if a contractor incurs a penalty because of faulty government equipment, the government will reimburse. But if the contractor had failed to do what it was supposed to do, there will be no reimbursement.

Mr. Lingo stated that it would be inappropriate to seek hard and fast conclusions about enforcement. He urged EPA officials to come to the Federal agencies first with any environmental problems they have identified at GOCO facilities.

QUESTIONS AND COMMENTS FOR PANEL E

Ms. Wasserman named key issues: degree of control, nature of the violation, budget process, availability of effective enforcement tools, accountability, and flexibility.

Perhaps fining the Government is appropriate, considering the contractor's narrow profit margin. Ms. Wasserman felt that contractors do have an economic benefit motive and enforcement actions can be effective deterrents. Municipalities use similar arguments, but EPA determined that without fines and penalties a



municipality has little incentive to comply.

Mr. Varela explained how an EPA level of action (e.g., notice of violation or warning letter) is chosen. The remedy can include penalties or injunctive relief, or both.

In response to a question about areas in which contractors do not comply, Mr. Lingo said the biggest problems are operational (e.g., inspection, training) and quasi-operational violations (e.g., ground water monitoring). Mr. Herwig referred to a GAO study of wastewater treatment plants where the greatest problem is operations and maintenance work.

It was suggested that award fee contracts would make contractors most concerned about compliance, and penalties would be critical. A contractor objected to this, pointing out that the contractor would be subject to double dipping: if the contractor is out of compliance, a portion of the fee is not granted, so if EPA were to fine as well, the contractor would lose twice. (Mr. McNett of Rockwell agreed. Rockwell lost \$100,000 in award fee due to a TSCA violation at the DOE Rocky Flats plant and now EPA is fining the contractor \$80,000.)

A DOE representative spoke of the significance of professional reputation and pride, which is too often underestimated. A contractor does not want a poor reputation; noncompliance affects future contracts as well as the award fee.

#### **PANEL F: PERSPECTIVES ON GOCO ENFORCEMENT ISSUES**

##### **Purpose:**

Views on the roles of States and citizens in taking enforcement actions against government contractors at Federal facilities.

**Panel Moderator: EUGENE BERMAN, Executive Vice President, Clean Sites, Inc., Fairfax, Va.**

Mr. Berman pointed out that environmental suits are not limited to actions taken by EPA. CERCLA and other statutes have citizen and state suit provisions. Under CERCLA, for instance, there are a number of enforcement options: 1) EPA action, 2) state and/or citizen participation in EPA-initiated action, 3) independent state action, or 4) independent citizen action. Mr. Berman then identified two critical questions: 1) Which enforcement option best achieves compliance? and 2) What is to be learned from CERCLA's enforcement history in a general sense? There have been CERCLA actions against some, but not all, PRPs which has led to expensive third party actions and has increased legal and other transactional

costs, money which could have been better spent for cleanup or compliance.

LEE PADDOCK, Office of the Attorney General, Minnesota

Mr. Paddock was formerly on the staff of the National Association of Attorneys General (NAAG). He said the issue of federal facility enforcement is a first priority agenda item for NAAG, due to the high visibility of Federal sites. A number of states have enforcement authority stronger than EPA's. This is especially true of a state's ability to file lawsuits and to issue enforceable orders against Federal facilities under various environmental statutes.

At a Superfund site, states go after all PRPs. In addition to the National Priority List, states often have their own lists of priority sites. Funding is critical, and states are aware of the anticipated limitations on federal facilities funds. Mr. Paddock emphasized the potential benefits of settlement agreements when technical people from both sides can work together.

In a situation with a noncomplying GOCO facility, Minnesota prefers to deal primarily with the Federal agency (e.g., settlement negotiations with the Army) but there are some exceptions. Where there has not been a consent decree, but only an administrative order issued, a state has concerns about sovereign immunity and so it will want the GOCO contractor to sign as well. And where an injunction has been ordered, a state may want to involve the contractor as well.

A majority of states have felony statutes for environmental crimes. They are directed at whomever is responsible for the intentional or egregious activity. Enforcement actions are directed at responsible individuals (e.g., a commanding officer or a contractor operator).

SHIRA FLAX, Sierra Club, Washington, D.C.

Ms. Flax emphasized the impact of external factors, namely the power of the press, to influence environmental compliance.

Ms. Flax also decried the limited human resources at the EPA regional offices -- too few people to review permit applications and to keep open lines with Federal agencies regarding environmental compliance at the Federal facilities.

Environmental groups advocate the restoration of full enforcement authority to the EPA and States to deal with violations at Federal facilities.

**TOM BICK, Trial Attorney, Environmental Section, Department of Justice, Washington, D.C.**

Mr. Bick spoke of the partnership between the Federal government, state and local governments, and citizens. He cited the strained relations in the U.S. v. Shell case, which started as litigation by the Army against Shell, but evolved into a major clash between the Federal government and the State of Colorado over enforcement authority regarding cleanup action.

EPA and the states must develop good working relationships and clearly define their goals. He recognized that EPA regions and states have limited resources. States and localities must learn to trust EPA. EPA similarly needs to convince the states and local governments that it is interested in making the process work.

States do have the power and authority to bring enforcement actions against Federal facilities, but before choosing this route they must be sure they have adequate expertise and resources.

Mr. Bick repeated three of the five basic principles he had previously discussed in the "Historical Perspectives" session.

(1) EPA cannot sue Federal agencies. This is a Constitutionally based doctrine so Congress cannot change it via statute.

(2) Citizens and states may be able to bring actions where sovereign immunity has been waived, but in certain cases civil penalties cannot be sought from the Federal facilities. But note: Congress does have the power to change this.

(3) As long as they are "operators," private GOCO contractors are subject to the environmental statutes, irrespective of a contract's indemnification provisions.

CERCLA sections 120 and 121 are critical provisions to understanding states' roles at cleanup sites. Mr. Bick said it is clear that Congress did not have GOCOs in mind when it wrote these provisions. Congress did not envision situations where a Federal agency owner and a GOCO operator would both be liable under CERCLA. In particular section 120(a)(4)-- the "mini-state CERCLA provision" applies to those Federal facilities not on the NPL.

Mr. Bick identified five trends to watch for better understanding the roles of the state and EPA:

1) The New National Contingency Plan, which is the primary vehicle for implementing regulations in CERCLA that spell out the roles of states and also includes a section on Federal facilities;

2) the "alter-ego" or "real party in interest" argument, that because of the close interrelationship, a suit against a contractor is really a suit against the Federal agency and therefore EPA cannot sue the contractor since there is no case or controversy (This argument has been made by General Dynamics);

3) State RCRA authority claims. Courts are undecided on the issue of comprehensive RCRA authority at a CERCLA cleanup site. (i.e., who's to determine cleanup?) Note: states are not obliged to pay anything in GOCO cleanups (compared to the 10% share a state must pay for the cleanup of a private facility)

4) Government contractor defense, which could be especially important regarding state actions at GOCO's (the burden could shift more to the federal government);

5) NPL listings of Federal facilities, including GOCO's.

JEFFREY HOWARD, Miller and Chevalier, Washington, D.C.

Mr. Howard discussed options for a government contractor in the event it is involved in a cost recovery suit brought under CERCLA. If the party bringing the enforcement action is not the United States, then some defenses are not applicable.

The contractor must look to ways to attach liability on Federal agency. Mr. Howard suggested some possible legal hooks:

First, if sole ownership is involved, that offers a minimal hook of 10% or less of the liability.

Second, if the contracting agency has some status as operator, then the contractor should focus on the question of control (i.e., the ability of control to cause or prevent a problem). This is especially critical when facing a multimillion dollar cleanup recovery.

Third, if the contracting agency has status as generator (i.e., in CERCLA terms, "responsible for arranging for disposal by contract or otherwise"), then the agency could also be liable for disposal.

One of the most interesting cases is U.S. v. Aceto Agricultural Chemical Corp. In the pesticide industry, it is common for manufacturers to sell technical grade products to formulators which finish the products. In this case, the formulator was involved in an environmental mess but went bankrupt. The U.S. filed an action against the manufacturers that had sold the products to the formulator. The court found that the United States did indeed have a claim under CERCLA to recover costs from the manufacturer, relying in part on the Restatement of Torts on vicarious liability. The court held that the private manufacturer in its position as the contracting agency was absolutely liable under common law for the environmental problems caused by the independent contractor (the formulator) even though it had not been on site and had exercised no day to day supervision.

Mr. Howard concluded that if a contractor is caught in a cost-recovery action, the contractor can use some of the law developed by the government (e.g., Aceto) to avoid liability.

## **PANEL G: INSTITUTIONAL BARRIERS AND PROPOSED CHANGES**

Examination of Congressional views and legislative initiatives as well as discussion of modifications to the current Federal Acquisition Regulations (FAR) and Federal agency FAR supplements.

**Panel Moderator: KEN MURPHY, Executive Director, Environmental and Energy Study Institute, Washington, D.C.**

Mr. Murphy introduced the panelists and asked them to outline what is in store on the legislative and regulatory fronts. He pointed out that some of the changes may be critical.

**DAVID PRITZKER, Administrative Conference of the United States, Washington, D.C.**

(see ACUS report and recommendation "Federal Government Indemnification of Government Contractors" in the materials)

The Administrative Conference of the United States (ACUS) is limited to examining procedural issues. It recently studied Federal agencies' experiences and recommended how agencies ought to behave when asked to grant an indemnification clause to a government contractor. Since there is some confusion about the extent of the present indemnification authority ACUS suggested each Federal agency issue a public statement of understanding.

When deciding whether to grant indemnification, ACUS recommends the following: identification of public benefits, evaluation of the nature and magnitude of risks involved, assessment of aggregate liability that may be incurred, assessment of insurance coverage, understanding of where the money will come from, and evaluation of the various incentives for adopting or not adopting an indemnification clause.

Some contracting officers within a Federal agency are allowed to indemnify. ACUS recommends these officers seek advice from EPA and NRC.

OMB's Office of Federal Procurement Policy will keep records of any indemnification.

**ROBERT COOPER, Deputy Director, Office of Federal Procurement Policy, Office of Management and Budget, Washington, D.C.**

Mr. Cooper discussed development of the Regulation (FAR). His office, the Office of Federal Procurement Policy Federal Acquisition (OFPP), reviews procurement regulations. Mr. Cooper

commented that it is worthwhile for interested parties to lobby not only Congress but the agencies as well regarding proposed regulations or FAR revisions.

Mr. Cooper identified three regulatory players. First, the OMB Office of Information and Regulatory Affairs. Its primary charter is Executive Order 12291, which directs attention to proposed legislation that is likely to have a major economic impact. In the past, contract and procurement regulations were not considered subject to such review, but since 1984 they have also been reviewed. The second actor is OMB's new FAR Council which has both civilian and defense agency representation. Initially procurement regulations were exempt from public comment, but pursuant to PL 98-577 procurement regulations are now subject to public review and comment. The FAR council develops cases. Two cases are noteworthy. Case 84-45 involves an attempt to incorporate an OMB policy letter regarding federally funded R&D centers. Mr. Cooper noted that many of these centers are GOCO facilities. Another case involves a draft Defense Acquisition Regulation (DAR) on cost principles. Mr. Cooper urged interested parties to submit comments. The third actor is OFPP, which reviews procurement regulations. That office has the authority to rescind or issue regulations and test innovative procedures. OFPP welcomes comments on regulatory initiatives. Finally, OMB is planning to resurrect the old Cost Accounting Standards Board in OFPP.

LTC LAURENT HOURCLE, U.S. Air Force, Chief, Environmental Law Office, Bolling AFB, Washington, D.C.

LTC Hourcle contended the focus of any EPA GOCO policy should be on compliance, not enforcement. Enforcement, he felt, is not always the best tool. He questioned whether the current structure best achieves compliance. He commented that the powerful relationship between an agency and its contractor should be emphasized.

The Defense Acquisition Regulation (FAR Supplement) is likely to be amended to include more than the Clean Air Act and Clean Water Act, which are currently the only two Federal environmental laws explicitly cited in the present FAR and DAR.

LTC Hourcle stated his hope that the contractor community will offer alternatives. After all, the contractors are in the best position to know the processes and to identify both problems and solutions. The Air Force is currently exploring ways to create economic incentives for pollution abatement and disincentives for being out of compliance.

Ninety percent of the ongoing compliance problems at Federal facilities are procedural in nature. If a contractor fails to respond to warnings, it must pay the penalty. LTC Hourcle warned

that if a contractor continued to be recalcitrant, the defense agencies could easily deluge the contractor with agency environmental auditors and reduce the work relationship to micromanagement.

KEN ROSENBAUM, of Counsel, Office of Representative Wyden (D-OR)

Mr. Rosenbaum acknowledged the critical problem of underfunding and advised all interested parties to contact the respective Appropriations Committees.

Regarding contractor accountability, he commented that award fee contracts may not be effective enough to deter GOCO contractors since the percentages of dollars held back by Federal agencies is generally too small. Congress intends EPA to enforce the law against violators and not to rely on other Federal agencies to take enforcement actions against contractors.

Mr. Rosenbaum highlighted key points in the bill introduced by Congressman Wyden in 1988 addressing Federal agency contractor issues. The proposed amendment to RCRA would require that a contractor-operator sign all RCRA permits. It would extend debarment to RCRA contractors and also to its affiliates doing business with the a debarred contractor. Finally the bill would clarify that fines and penalties imposed would not be reimbursable, unless the contractor had notified the Federal agency and the contractor could not have fixed the problem itself.

Mr. Rosenbaum said some contractors felt the bill was reasonable, but others felt it unfair that they should be held accountable for the actions of lower level employees.

The bill introduced by Rep. Wyden did not make it out of committee this year. There was some difficulty with the last point in the bill and a study by the General Accounting Office (GAO) was requested. Mr. Rosenbaum said to watch for Federal facilities and GOCO enforcement issues to be addressed again next year when RCRA is up for reauthorization.

QUESTIONS AND COMMENTS FOR PANEL G

In response to question about contractor debarment, Mr. Varela said EPA goes after contractors responsible for recurrent or repeatedly uncorrected violations.

Mr. Rosenbaum clarified the definition of "affiliate" as a corporation with common control of various facilities.

**Wrap-Up Session: Building Consensus on an EPA GOCO Strategy**

This closing session included all panel moderators. Its purpose was to identify and define the key issues which EPA needs to address in developing its GOCO Enforcement Strategy.

The following issues were identified as the major questions which EPA needs to be able to answer if it is to develop a timely effective and useful GOCO strategy. These questions were identified separately for each panel as outlined in the attached summary.



# **Panel A**

## **DEFINING THE GOCO UNIVERSE**

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**Definition(s) of GOCO facilities and examination of the various roles of government contractors in activities and operations at Federal facilities.**

- 1. Should the definition of GOCO be modified or further refined?**
- 2. How should geographic scope and subdivided facilities be considered in deciding which facilities are GOCO's?**
- 3. Are there meaningful subsets to the general term GOCO (e.g. M&O facilities)?**
- 4. Should the GOCO strategy include a name list of GOCOs? Who should prepare and how?**
- 5. Should the strategy address other types of Federal contractor relationships?**
- 6. Should EPA consider developing "criteria" to define GOCO's?**
- 7. Are environmental statute definitions of "operator" equivalent to term "contractor operator" at GOCO's?**

## **Panel B**

# **LEGAL RELATIONSHIP BETWEEN GOCOs FEDERAL AGENCIES**

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**Exploration of the variety of contractual arrangements including the scope of employment and the influence of indemnification provisions and the Federal Acquisition Regulations.**

- 1. Should the extent of Government indemnification affect enforcement:**
  - a For punitive measures like fines and penalties?**
  - b For remedial measures?**
- 2. Should EPA express a preference for the extent of Agency indemnification?**
- 3. To what extent should EPA get involved in the FAR development process?**
- 4. Whom should EPA pursue for cleanup of offsite contamination at third-party sites?**
- 5. When should EPA enforce against the corporate parent of the GOCO operator?**

# **Panel C**

## **FEDERAL AGENCY MANAGEMENT OF GOCO CONTRACTORS**

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**Insight into the day-to-day operations at GOCO facilities including Federal agency supervision, contractor's obligations to notify, and the allocation of costs and liabilities.**

- 1. When issuing an enforcement action at GOCO facilities, who in the Government chain-of-command should get the NOV?**
- 2. Is an operational vs. capital construction distinction useful?**
- 3. What other tools can be brought to bear besides fines, to give contractors incentives to comply?**
- 4. Should its strategy call for EPA to first consult with the involved Federal Agency before taking enforcement action vs. contractor?**
- 5. Can there be special GOCO notice letters to both parties following identification of violations?**

## **Panel D**

# **BRINGING ACTIONS AT GOCO FACILITIES**

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**Analysis of procedural issues and government contractor defenses both generally and as they have been used in EPA civil, judicial, and administrative enforcement actions.**

- 1. Should EPA enforcement distinguish between cleanup liability for past compliance activity vs. current compliance responsibilities?**
- 2. Does it make a difference who holds the permit in EPA's enforcement response?**
- 3. Should EPA's GOCO policy express a preference in who signs permits?**
- 4. Should EPA policy call for a legal determination of the "real party in interest"?**
- 5. Should we separate the types of enforcement actions EPA would take vs. Federal facilities and vs. GOCO contractors?**
- 6. Does the type of GOCO contract affect enforcement choice? Can they be grouped by Federal agency and/or contract types?**
- 7. Should EPA establish both a transitional enforcement policy for existing contracts and a long-term strategy?**

# **Panel E**

## **PRACTICAL AND POLICY CONSIDERATIONS**

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**Evaluation of external influences, selected institutional and other factors that affect the choice of enforcement responses, including budgeting concerns, permitting, and debarment provisions.**

- 1. Should the GOCO strategy emphasize increased contractor use of the A-106 system?**
- 2. To what extent should GOCO contractors participate in settlement negotiations and/or sign agreements, etc.?**
- 3. How does the violation type and required fix (i.e., capital or O&M) affect enforcement response?**
- 4. How should the EPA contractor listing program be addressed in the GOCO strategy?**
- 5. Should EPA consult with Federal agency first, before taking action against GOCO contractor?**
- 6. Can/should the existence of award fee contracts affect EPA actions, in particular penalties? Should EPA revise its penalty policies to reflect such considerations?**

**Panel E**  
**PRACTICAL AND POLICY**  
**CONSIDERATIONS (Continued)**

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7. How does the degree of Federal Agency oversight affect both EPA's definition of GOCO's and its enforcement responses?
8. Is it appropriate for EPA to take action vs. contractor because it is not having success with enforcement vs. Agency?

## **Panel F**

# **PERSPECTIVES ON GOCO ENFORCEMENT ISSUES**

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**Views on the roles of States and citizens in taking enforcement actions against government contractors at Federal facilities.**

- 1. Are enforcement actions against GOCOs by States or citizens more effective than EPA actions and should GOCO strategy express a preference?**
- 2. Are there any GOCO issues unique to States' enforcement which need to be addressed in Strategy?**
- 3. How can EPA involve States in its GOCO enforcement decisions and/or actions so that we can minimize duplication of effort?**
- 4. Is there any special Relationship to Tort actions?**
- 5. Do GOCO contractors meet the definition of an operator under RCRA?**
- 6. Should EPA somehow involve OSHA in development of this strategy?**

# **Panel G**

## **INSTITUTIONAL BARRIERS AND PROPOSED CHANGES**

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**Examination of Congressional views and legislative initiatives as well as discussion of modifications to the current FAR and Federal agency FAR supplements.**

- 1. Can/should EPA recommend compliance incentives for Federal agencies to include in their GOCO indemnification clauses? (or other economic incentives?)**
- 2. Should EPA consider initiating action through the FAR council for changes to include the other environmental statutes?**
- 3. Should the contractor be excused if it inspected/ audited facility and promptly notified the Federal agency?**
- 4. Can EPA strategy create a special accountability system in its oversight of GOCO contractors?**
- 5. Should a GOCO enforcement advisory board of some kind be established?**