

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 57

Date Signed: August 23, 1990

MEMORANDUM

SUBJECT: Tracking Compliance with Administrative Orders in the
PWSS and UIC Programs

FROM: Michael B. Cook, Director (signed by A. Kuzmack, Acting)
Office of Drinking Water
Office of Water

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TO: Water Management Division Directors
Regions I - X

Regional Counsels
Regions I-X

Attached for your use is the final "Guidance on Administrative Order Tracking and Follow-up for the PWSS and UIC Programs."

The draft guidance was sent to your staff for review in April. A summary of the Regional comments and HQ responses is attached. If you have any questions, please direct them to Valerie Wilson (FTS 238-2303) or Betsy Devlin ((202) 564-2245) for the PWSS program and Peter Bahor ((202) 564-7029) for the UIC program. Thank you for your cooperation in this effort.

Attachment

cc: Drinking Water/Groundwater Protection Branch Chiefs
PWSS and UIC Section Chiefs
ORC Water Branch Chiefs

GUIDANCE ON ADMINISTRATIVE ORDER TRACKING AND FOLLOW-UP FOR THE PWSS AND UIC PROGRAMS

INTRODUCTION

This guidance is designed to supplement existing PWSS and UIC guidance on administrative order tracking and follow up activities. The guidance is divided into three sections. The first deals with tracking compliance and with active administrative orders; the second concerns Regional responses to violations of administrative orders; and the third deals with closing out administrative orders once all the requirements have been satisfied.

POLICY STATEMENT

It is the Agency's policy that compliance with the terms of administrative orders, including collection of assessed penalties, be monitored and that appropriate administrative or judicial action be taken for noncompliance. EPA Regions are responsible for tracking compliance with all Federal administrative orders. As part of their oversight of State enforcement programs, the Regions should confirm that States are monitoring compliance with the terms of any State-issued administrative orders and are following up on any violations. Note: The principles in this guidance could be used by the Regions as a model for State tracking systems.

The Regional Drinking Water/Groundwater Protection Branches in the PWSS and UIC programs are responsible for tracking compliance with all Federal administrative orders. This may be accomplished through the receipt of reports and other deliverables from the order respondents, through the use of inspections, or other means available to the Region. In order to determine whether a party is in compliance with the terms of an administrative order, the staff must compare the requirements of the order with the information gathered through the deliverables, inspections, or other means. The staff must also determine if the deliverables submitted adequately document compliance and meet the requirements of the order. If through its tracking and evaluation of the deliverables, the staff determines there is a violation of the order, the Region must then determine the appropriate response and document that decision. Once the respondent has met the requirements of the administrative order, the order must be closed out.

TRACKING COMPLIANCE WITH ADMINISTRATIVE ORDERS

Each Drinking Water/Groundwater Protection Branch must maintain a record of all administrative orders. The records must include at least the following information for each administrative order: name of respondent, docket number, section of the SDWA under which the order was issued (i.e, 1414, 1423, or 1431), violation(s) for which the order was issued, all required milestones and due dates (including penalty payments and due dates for UIC penalty orders), an indication of the date each milestone was completed, and the date the order was closed out or terminated. For UIC penalty orders, the information must also include the penalty originally sought and the penalty finally assessed. The case file must contain the rationale for differences in the penalty sought versus the amount finally assessed.

These records may be maintained in the form that best suits the Branch's needs (and any requirements of Regional management); that is, in a manual log, on a personal computer, as part of a Regional data base, or tied in with other reporting requirements. Moreover, the Region need not use the same system for both PWSS and UIC orders. Nevertheless, to ensure the availability of oversight, the case file should include where this file is maintained. (Note: The Regional UIC programs currently report information on administrative orders to Headquarters according to HQ guidance. This guidance is not meant to alter those reporting requirements. The Regions should continue to report that information and can use the "Comment" fields in that system to track compliance schedules, deliverables, due dates, etc.)

In order to effectively monitor compliance with the terms of administrative orders:

- (1) Milestones/deliverables (and any revisions) must be entered for all orders. This includes penalty payment(s) and due date(s) for UIC penalty orders.
- (2) On a regular schedule, but not less than quarterly, all currently due (and any overdue) milestones must be listed and made available to staff. This use as a tickler system will allow for effective follow-up.
- (3) Completion dates for milestones/deliverables must be entered into the record.

The establishment of such a tracking system for PWSS and UIC orders will greatly assist the Regions in determining compliance with the terms of already issued orders, in overseeing progress of systems towards ultimate compliance with the SDWA, and in providing documentation of case histories for audits or for additional enforcement activities.

RESPONSES TO VIOLATIONS OF ADMINISTRATIVE ORDERS

The Drinking Water/Groundwater Protection Branch staff are responsible for determining if a violation of an administrative order has occurred and of recording that violation in the official case file. A violation occurs when any milestone is missed.

Once a violation has occurred and has been documented, the Regional program staff under the supervision of management and in consultation with Office of Regional Counsel (as necessary) must determine the appropriate response. The responses may vary depending on the facts of the situation. In some cases, the violation does not constitute a threat to public health nor jeopardize the respondent's ability to meet subsequent milestones or the final compliance date. In such instances, the Region may decide that no follow-up action is required or that an informal response may be appropriate. Other violations may be more serious; in those cases the Region may decide that a complaint for an administrative penalty or a civil judicial action may be the appropriate course of action. Whatever the decision, it is critical that the decision and the Region's rationale be documented in the official case file.

In selecting the appropriate response to the violation of the order, the following factors or criteria should be considered:

- Environmental Harm Caused by the Violation -- What is the risk to human health and the environment due to the continuing violation?
- Duration of the Violation -- How long has the violation continued? Has it been corrected?
- Good Faith/Bad Faith -- Was the violation deliberate? Was the party notified that it was in violation and then did it continue to violate? Has the party demonstrated good faith or bad faith in its past efforts to comply? Has the party re-established meaningful dialogue with a State agency? Is the party receiving technical assistance from a State agency?
- Deterrence value -- Will an action deter future violations either by this party or by respondents of other orders?
- Ability to Respond -- Can the party respond positively and come into compliance? Is the party taking steps to apply for financial assistance from State agencies? Is the party undergoing reorganization or change of ownership?
- Economic Gain -- Has the party gained an economic advantage over its competitors as a result of the violation?

There may be cases where the Region may decide not to respond formally to the violation of the order. Two examples of situations where a formal response may not be needed are:

- The submission of a late report, where there has not been a past pattern of delay or late milestones.
- A missed milestone, where the milestone is not critical to reaching full compliance within the time specified in the order, and where the Region expects the party to be in compliance with the next milestone.

The Region must document its decision and rationale in the official case file.

CLOSING OUT ADMINISTRATIVE ORDERS

Once all the requirements of the administrative order have been satisfied, the administrative order should be closed out. The Branch staff must record the fact that all requirements were met in the case file and delete the order from the list of active administrative orders.

Additionally, in any case where an order has been proposed and then not issued in final, the Region must document in the case file the reason for not pursuing the order. For example, the party returned to compliance or the State took over the action.