

Date Signed: March 31, 1987

MEMORANDUM

SUBJECT: Guidance for the FY 1988 State/EPA Enforcement Agreements Process

FROM: A. James Barnes (signed by James Barnes)
Deputy Administrator

TO: Assistant Administrators
Associate Administrator for Regional Operations
Regional Administrators
Regional Counsels
Regional Division Directors
Directors, Program Compliance Offices
Regional Enforcement Contacts

State/EPA Enforcement Agreements negotiated between EPA Regions and States continue to be one of the mechanisms we are relying upon to ensure that compliance and enforcement efforts are strong and effective nationwide. This year's guidance does not include any new directions; rather, it emphasizes areas where further attention to existing guidance may be needed. In particular, the Regions need to focus on fully implementing the FY 1986 revisions to the Policy Framework with respect to oversight of State penalties and the involvement of the State Attorneys General in the process, as well as last year's guidance on reaching understandings with the States on Federal facility compliance issues. The status reports on the FY 1987 Enforcement Agreements submitted by the Regions in October indicated a great deal of variation among programs within a Region and across Regions on the extent to which these areas were addressed.

The recently issued report on the Implementation of the Timely and Appropriate Enforcement Response Criteria, also highlights some areas needing increased attention by Headquarters program offices, Regions, and States. I encourage you to read this report and work closely with the program offices on ways to improve Regional and State performance and tracking of violations and enforcement follow-up. I plan to discuss each Region's performance in implementing the timely and appropriate guidance as part of my semi-annual regional visits. I also have asked the program offices to continue to diligently implement and oversee this guidance as part of their ongoing management systems and regional reviews.

***Note: May need to be updated.**

In an effort to improve enforcement planning, OECM recently developed, with the program offices, summaries of enforcement priorities for each program based on the results of strategic planning sessions with the program offices and the FY 1988 Operating Guidance. These summaries were provided to assist in developing operating plans among Regional program divisions, Regional counsels, and Environmental Service Divisions, and to accommodate any shifting emphasis in case selection, inspection targeting, etc. The Regions may also wish to use these summaries and the results of their internal planning sessions to facilitate State/EPA meetings on enforcement priorities as part of the development and negotiation of the Enforcement Agreements, as recommended in the revised policy framework.

I remain firmly committed to full and effective implementation of the policy framework and am relying on your continued personal attention to this important effort.

Attachments

cc: Steering Committee on the State/Federal Enforcement
Relationship

GUIDANCE FOR IMPLEMENTING THE FY 1988 ENFORCEMENT AGREEMENTS PROGRESS

Refining the Existing Agreements Process

Changes to the national guidance continue to be kept to a minimum. All new or amended guidance documents applicable to the FY 1988 enforcement agreements process are identified in Attachment 2.

The Agreements are multi-year blueprints for guiding State/Federal enforcement. However, they should be reviewed each year with the States and amended if any problems have arisen or new guidance has been issued. Regions should continue to improve the integration/linkage of the enforcement agreements into existing documents and processes to the extent possible, to avoid duplication and ensure that the enforcement agreements are part of ongoing management and oversight systems.

Finally, as again highlighted in the Performance-based Assistance Policy study this year, Regions need to pay attention to improving the way in which they oversee State programs so that our oversight is constructive and supportive of strong State programs.

Achieving Timely and Appropriate Enforcement Response

The FY 1986 end of year report on the implementation of the Timely and Appropriate Enforcement Response Criteria, prepared by the RCRA, Air, and NPDES programs and coordinated by OECS, gave us some hard data on how well that part of the guidance is being implemented. EPA and the States have made a good start in implementing the guidance and the guidelines are generally having a favorable impact. However, the performance varies widely by program. One of the key indicators of success is the extent to which the timeframes have been incorporated into the ongoing management and accountability systems by the Regions and States so that the guidance can be used as intended as a management tool.

In an effort to integrate timely and appropriate guidance with the Agency's management systems, the RCRA program, beginning in FY 1987, has a reporting measure to track the timeframes for SNCs in the beginning of year universe.

It is expected that the programs that did not prepare a report this year (PWSS, UIC, FIFRA, and TSCA) will be incorporating into their management systems the capability for assessing the implementation of their timely and appropriate guidance.

For FY 1987 and 1988, the UIC and PWSS programs will have an Exceptions List system, similar to the approach successfully used by the NPDES program.

Regions and States should closely monitor the implementation of the criteria to make sure that sources subject to the guidance are properly identified and made part of the system and that adequate tracking and follow-up systems are in place.

The report highlighted that the State performance in assessing required penalties lags behind EPA's. The Regions need to work with their States on improving their use of penalty or sanction authorities, consistent with program guidance.

The report also looked at the level of EPA direct enforcement action in delegated/approved States. Although the guidance has made it clearer when EPA should take direct action, for the partnership to work in the long term, it is important for the States to be committed to taking the enforcement actions, rather than using the guidance to pass cases to EPA. Regions need to work with their States to explore how the direct enforcement criteria are working and how to most effectively use our scarce resources.

Finally, the Deputy Administrator and each program office will review each Region's performance in meeting the timely and appropriate guidance as part of the scheduled regional visits and reviews.

Improving the Use of Penalty Authorities

Regions need to continue to work with the States on improving the use of penalties and other sanctions. Regions should establish how and when the State generally plans to use penalties and other sanctions, with the State committing to obtain a penalty or sanction where appropriate, according to program guidance. The Regions should also discuss with the State their approach to calculating penalties and agree on appropriate documentation to support general oversight. Just as the Headquarters program offices will be strengthening their oversight of the Region's penalty practices, Regions should pay particular attention this year to enhancing the oversight of the State penalty practices, in the context of the overall enforcement program. Regions should continue to encourage States to develop civil administrative penalty authority and should support them in this effort.

Involving the State Attorneys General

Based on reports to date on the FY 1987 process, it appears that only modest change has occurred in the State agency's involvement of the State AG's or other appropriate legal organizations in the enforcement process.

Regions need to continue to work with the State agencies on improving the communications between the agencies and State AGs to assure that State AGs are properly notified and consulted about planned Federal enforcement actions.

Regions should encourage the States to commit advance notification and consultation protocols to writing and seek to incorporate these written protocols into the State/EPA Enforcement Agreements.

Regions are strongly encouraged to work with the State agencies on planning a joint meeting with all parties (program and legal staffs of EPA and State agency, plus U.S. Attorney and State AG staff) to review EPA's enforcement priorities and recent program guidance. The summaries of the enforcement priorities for FY 1988 for each program should facilitate this effort.

The National Association of Attorneys General (NAAG) is currently surveying the State AGs about their involvement in the Enforcement Agreements process as set forth in the revised policy framework of 1986. The results of the survey should be available mid-May and Regions and States are encouraged to use these results to make further improvements in implementing the policy framework in this area.

Clarifying the Involvement of States in the Federal Facilities Compliance Process

Although the Federal Facilities Compliance Strategy was not finalized in FY 1986 as planned, most Regions attempted to address some aspect of Federal facilities compliance in the FY 1987 agreements.

Regions should continue to address the following areas and incorporate into the agreements, as appropriate, understandings reached with the States on:

- Enforcement approach the State generally plans to use for responding to Federal facility violations;
- Types of situations where the State would request EPA support or direct action;
- Any additional information the State has agreed to report to EPA on Federal facilities compliance and enforcement activities;
- How the State will be involved in the A-106 process; and
- Plans for joint EPA/State annual review of compliance problems at Federal facilities in the State.

Regions are encouraged to involve the Federal Facilities Coordinators in the development and negotiation of this aspect of the enforcement agreements.

FY '88 DEFINITION OF SIGNIFICANT NONCOMPLIER (SNC)

A Significant Noncomplier (SNC) is a community water system which meets any of the following criteria:

- (1) violates the microbiological MCL for four or more months during any 12 consecutive month period, or
- (2) violates the turbidity MCL for four or more months during any 12 consecutive month period, or
- (3) is a "major" violator of the microbiological monitoring or reporting requirements for 12 consecutive months, or
- (4) is a "major" violator of the turbidity monitoring or reporting requirements for 12 consecutive months, or
- (5) is a "major" violator of the TTHM monitoring or reporting requirements for 12 consecutive months, or
- (6) violates the microbiological MCL or is a "major" violator of the microbiological monitoring requirements for a combined total of 12 consecutive months, or
- (7) violates the turbidity MCL or is a "major" violator of the turbidity monitoring requirements for a combined total of 12 consecutive months, or
- (8) exceeds the level for any regulated inorganic, organic (excluding TTHM), or radiological contaminant, prescribed in guidance above which exemptions may not be issued, or
- (9) exceeds the level for TTHM, prescribed in guidance above which exemptions may not be issued, for two or more annual averages during the year, or
- (10) fails to monitor for, or report the results of, any one of the currently regulated inorganic, organic (other than TTHM), or radiological contaminants since the Federal requirements for that contaminant became effective (June 24, 1977), or
- (11) violates a requirement of a written, and bilaterally negotiated compliance schedule.

A "major" violator of a monitoring or reporting requirement is a system which fails to take any samples for a particular contaminant during a compliance period, or where the system has failed to report results of the analyses to the primacy agent for a compliance period. (If the agent receives no monitoring report or receives a report indicating that no monitoring was conducted, the monitoring violation is classified as "major").

EXISTING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS

- Cross-cutting National Guidance:
- ! Revised Policy Framework for State/Federal Enforcement Agreements -- reissued 8/26/86
 - ! Agency-wide Policy on Performance-Based Assistance -- issued by Admin. 5/31/85
 - ! Annual Guidance for the FY 1988 Enforcement Agreements process -- issued by DA by April 1, 1987

NOTE: Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
<p>! National Guidance for Oversight of NPDES Programs 1987 <u>to be issued 4/18/87</u></p> <p>! Final Regulation Definition of Non-Compliance reported in QNCR 8/26/85)</p> <p>! QNCR Guidance (issued 3/86)</p> <p>! Inspection Strategy and Guidance (issued 4/85)</p> <p>! Revised EMS Enforcement Management System (issued 3/86)</p> <p>! NPDES Federal Penalty Policy (issued 2/11/86)</p> <p>! Strategy for issuance of NPDES minor penalty</p>	<p>! "FY 85 Initiatives on Compliance Monitoring & Enforcement Oversight" (6/29/84)</p> <p>! "Final Guidance on PWS Grant Program Implementation" (3/20/84)</p> <p>! "Regs -- NIPDWR, 40 CFR Part 141 and 142</p> <p>! DW Annual Reporting Requirements -- "Guidance for PWSS Program Reporting Requirements" (7/9/84)</p> <p>! "FY's 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems" Memo from Paul Baltay, 3/18/85</p> <p>! "Guidance for the Development of FY 86 PWSS State Program Plans and Enforcement Agreements" (issued 7/3/85)</p>	<p>! "Timely and Approp. Enforcement Guidance" (issued 6/28/84; reissued 4/11/86): System Guidelines for FY 1986 (issued 2/86)</p> <p>! "Guidance on Federally-Reportable Violations" (4/11/86)</p> <p>! Inspection Frequency Guidance (issued 3/19/85 and reissued 6/11/86)</p> <p>! Final Technical Guidance on Review and Use of Excess Emission Reports" Memo from Ed Reich to Air Branch Chiefs -- Guidance for Regional Offices (issued 10/5/84)</p>	<p>! "Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA" (reissued 6/86)</p> <p>! "RCRA Penalty Policy" (5/8/84)</p> <p>! FY 1987 "RCRA Implementation (issued 5/19/86) <u>(to be revised by 4/1/87)</u></p> <p>! "Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies," memo from Lee Thomas to RAs</p>	<p>! Final FY 88 Enforcement & Certification Grant Guidance (issued 3/10/87)</p> <p>! Interpretative Rule -- FIFRA State Primacy Enforcement Responsibilities 40 FR Part 173 1/5/83</p> <p>! Final TSCA grant guidance for the cooperative agreement States (issued 3/10/87)</p>	<p>! FF Compliance (Strategy to be issued)</p>

NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
	<p>! "Guidance on FY 86 UIC Enforcement Agreements" ICPG #40 (issued 6/28/85)</p> <p>! "FY 87 SPMS & OWAS Targets for the PWSS Program" (SNC definition) (issued 7/10/86)</p> <p>! Guidance on FY 88 UIC Enforcement Agreements <u>(to be issued 4/1/87)</u></p> <p>! Guidance on FY 87 PWSS Enforcement Agreements (issued 8/8/86)</p> <p>! Guidance on Use of AO Authority under SDWA Amendments (issued 1/20/87)</p> <p>! FY ** UIC Reporting Guidance <u>(to be issued 4/1/87)</u></p> <p>! UIC SNC Definition (issued 12/4/86)</p> <p>! PWS Compliance Strategy <u>(to be issued 4/1/87)</u></p> <p>! Guidance on PWS FY 88 Enforcement Agreements <u>(to be issued 4/1/87)</u></p>	<p>! "Technical Guidance on the Review and use of Coal Sampling and Analysis Data" EPA-340/1-85-010 (10/30/85) Guidance for Regional Offices</p> <p>! Class B VOC Source Compliance Strategy <u>(to be issued April, 1987)</u></p>	<p>! Compliance Monitoring & Enforcement Log -- form for recording monthly compliance data from States & Regions</p> <p>! Technical Enforcement Guidance on Ground Water Monitoring (Interim Final Aug. 1985)</p> <p>! Compliance order Guidance for Ground Water Monitoring (issued Aug. 85)</p> <p>! Loss of Interim Status Guidance (issued Aug. 85)</p>		