

Date Signed: November 15, 1989

MEMORANDUM

SUBJECT: Implementation of Enforcement Provisions in the EPA Federal Facilities Compliance Strategy

FROM: Edward E. Reich (signed by Edward E. Reich)
Acting Assistant Administrator

TO: Deputy Assistant Administrators
Deputy Regional Administrators

The EPA Federal Facilities Compliance Strategy (i.e., the "Yellow Book") was signed by the EPA Administrator in November, 1988. The Strategy is the primary EPA policy and guidance document which outlines our approach for understanding compliance monitoring and enforcement activities at Federal facilities. The provisions of the Strategy became effective immediately but there are certain items which require more detailed follow-up guidance to ensure that they are consistently implemented across all media programs and Regions. The following enforcement-related provisions are in need of additional guidance to ensure proper implementation of the Federal facilities program:

- (1) applicability of media "timely and appropriate" guidelines for Federal facilities;
- (2) program definitions of what constitutes "formal enforcement actions" for Federal facilities; and
- (3) submission of Federal facilities enforcement actions to EPA Headquarters.

" "Timely and Appropriate" Enforcement Guidance

The Strategy clarifies that the media program "timely and appropriate" enforcement response timeframes apply fully to Federal facilities. The guidance emphasizes the negotiation of either consent orders or compliance agreements within the required media-specific timeframes for issuance of formal enforcement actions. Program guidance should specify that where EPA has statutory administrative order authority for Federal facilities, consent orders will be the preferred enforcement mechanism and, where such authority does not exist, compliance agreements will be utilized. Chapter VI, Section B.1.c. of the Strategy further clarifies that "if compliance is not achieved or a compliance agreement or consent order cannot be negotiated

within required media-specific timeframes, EPA generally will issue a proposed order or proposed compliance agreement..." This is the equivalent of the point in the enforcement process where EPA normally would issue a unilateral administrative order or a referral for a non-Federal entity. A "proposed consent order" or "proposed compliance agreement" should contain the same type and level of information as a unilateral order; e.g., schedules for achieving compliance, corrective actions which need to be taken, reporting requirements, etc. It represents EPA's "bottom line" to the Federal facility on what it expects them to do to correct the violation and the desired timeframes for accomplishing the fix. The procedures and timeframes for negotiation and issuance of proposed compliance agreements or proposed consent orders are explained in detail in Chapter VI, Sections B.1.d. and e of the "Yellow Book." Each media program compliance office needs to revise its "timely and appropriate" guidance to clarify that the timeframes for achieving compliance and issuing enforcement actions apply to Federal facilities the same as all other regulated entities.

" Definition of "Formal Enforcement Action"

For accountability purposes, however, there are some differences for Federal facilities in terms of what constitutes a "formal enforcement action" since there are constraints on EPA's ability to issue unilateral orders to Federal facilities. There are two ways for EPA Regions to meet the definition of formal enforcement for Federal facilities actions:

- (1) Negotiation of a consent order or compliance agreement signed by both the EPA Region and the affected Federal facility within the applicable media-specific timeframe for formal enforcement action; or
- (2) Issuance of a proposed consent order or proposed compliance agreement to the Federal facility when the applicable timeframe has expired and subsequent escalation and formal referral of the dispute to EPA Headquarters for resolution.

As outlined in Chapter VI, B.1.f. of the Strategy, "the formal referral shall be sent to EPA Headquarters within 60 days after the established media timeframe for formal enforcement action has been exceeded and the Federal facility has failed to sign a proposed order or proposed compliance agreement." Where necessary, Headquarters media program offices should revise their existing "timely and appropriate" guidance so that the Regions are getting proper credit for formal enforcement actions at Federal facilities for accountability purposes, even if such actions may be different than those EPA would take at non-Federal facilities.

" Submission of Enforcement Actions to Headquarters

The Strategy requires that the Regional media program offices submit copies of all EPA Federal

facilities enforcement actions to EPA Headquarters. EPA has instituted this process to enable Headquarters offices of other agencies to become aware of violations at their facilities in a timely manner. This should help to ensure that appropriate pressure can be provided to help correct identified problems as expeditiously as possible.

This reporting requirement has been set forth in the Federal Facilities Compliance Strategy, Chapter V, Section C.2 "Regional Reporting of Inspection and Enforcement Activities at Federal Facilities," as follows:

EPA's Regional media program offices will submit copies of NOV's and other enforcement actions issued to Federal facilities to EPA Headquarters. This information will be submitted to the appropriate Headquarters media enforcement office with copies sent to the Office of Federal Activities and the Regional Federal Facilities Coordinator. EPA will formally transmit this information to the Headquarters offices of the affected Federal agencies. Arrangements shall be made between OFA and each EPA media program regarding how and when this information shall be transmitted to the other Federal agencies. The transmittal shall explain that they have a compliance problem or violation at one of their facilities and request that they take appropriate action to help expedite resolution and correct the identified violation.

Through our review of media program compliance data bases and SPMS reporting, we are aware of over 100 notices of violation (NOV's) and other enforcement actions that were issued to Federal facilities during the first two quarters of FY '89 and yet OFA Headquarters has received only a handful of copies of these actions from the Regions. The Regional offices need to implement this "Yellow Book" requirement immediately. At a minimum, the media program offices should provide copies directly to the Regional Federal Facilities Coordinator, who will subsequently transmit them to OFA.

In addition, we are requesting that each Headquarters media program office instruct its Regional offices in writing to send copies of all EPA enforcement actions for Federal facilities to their respective Headquarters compliance offices and OFA. We will discuss with the media program offices OFA's plans to send copies to the Headquarters offices of the effected Federal agencies. OFA will include these copies with its Quarterly Compliance Status Reports (QCRS) (Attachment 2) which it has already begun to transmit to each Federal agency. These QCSR's consist of name lists of all RPA and State inspections conducted, violations identified, and enforcement actions taken at their agency's facilities during the preceding quarter. Including hard copies of enforcement actions should help the Federal agency headquarters offices gain an improved understanding of the exact nature of the problem and violation which has occurred. This should assist them in both the general oversight of their facilities and in providing timely assistance to correct the identified violations.

Another related area in need of clarification is the referral process for Federal facilities disputes being transmitted from the Regions to EPA Headquarters. In the Strategy, Chapter VI.B.1.f -- "Federal Facilities Dispute Resolution Process," explains that disputes are to "be formally referred by the Regional Administrator to the Assistant Administrator (AA) for the affected media program and the AA for Office of Enforcement and Compliance Monitoring." These are considered to be joint referrals to both the lead media program office and OEEM. To date, we have had some problems with RA referrals coming solely to the media AA. This procedural flow needs to be corrected for all future Federal facilities referrals. It also is important to emphasize that these Federal facilities referral packages should be equivalent to civil judicial referrals which the Regions prepare for non-Federal cases. As outlined in the "Yellow Book," the referral package should describe the identified violation, provide a historical summary of the communications and negotiations with the facility, identify enforcement actions taken (including any State or citizen actions), identify the unresolved issues and include appropriate support data, with documentation similar to a litigation report. The referral package must be signed by the EPA Regional Administrators.

One final area that needs to be re-emphasized is the need to continue to track the compliance status of Federal facilities as a separate component in each media program compliance database and tracking system (e.g., SPMS, HWDMS, OWAS, etc.). Some programs already track Federal facilities separately through SPMS and their other tracking systems. Those programs which currently do not track Federal facilities compliance status separately from other types of regulated entities (e.g., industrial and/or municipal) need to do so as soon as practicable.

Each Headquarters program office is requested to provide a written response to this memorandum explaining how it has addressed or plans to address the issues discussed above in their program guidance. Please provide this response to us by November 30, 1989. The Regional media program offices should begin providing copies of Federal Facilities enforcement actions to their Regional Federal Facilities Coordinators immediately. If you have any questions or would like to discuss these issues prior to your written response, please contact me or Jim Edward, Deputy Director, Federal Facilities Compliance Staff, FTS-382-3270.

Attachment

cc: Richard Sanderson, Director, OFA, OEEM
 Bruce Diamond, Director, OWPE, OSWER
 Jim Elder, Director, OWEP, OW
 Mike Cook, Director, ODW, OW
 John Seitz, Direct, SSCD, OAR
 Gus Conroy, Director, OEEM, OPTS
 Regional Federal Facility Coordinators

Attachment could not be located. Please contact EPA staff person mentioned in document.

***Note: May need to be updated due to changes in 1996 SDWA Amendments.**