UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Revised Policy Framework for State/EPA Enforcement Agreements

FROM: A. 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

I am pleased to transmit to you a copy of the Agency's revised Policy Framework for State/EPA Enforcement Agreements. The Policy Framework, originally developed in 1984, along with program-specific implementing guidance, will continue to serve as the blueprint for our State/EPA enforcement relationship. The revised Policy Framework integrates new guidance developed since its original issuance. It reinforces the Guidance for the FY 1987 Enforcement Agreements Process which I transmitted to you on April 15, 1986 and should serve as your guide for negotiations and implementation of the Enforcement Agreements.

Although the intent of the revisions was to incorporate new policy, the process gave the Agency, with the assistance of the Steering Committee on the State/Federal Enforcement Relationship, an opportunity to reassess with the States our original approach. This process has clearly reaffirmed that the basic approaches we put in place in 1984 for an effective working partnership are sound and that all parties continue to be committed to its effective implementation.

The revisions incorporate into the Policy Framework addenda developed over the past two years in the areas of oversight of State civil penalties, involvement of the State Attorneys General

in the Enforcement Agreements process, and implementation of nationally managed or coordinated cases. The revisions also reflect, among other things, some of the points that have been emphasized in my annual guidances on the Enforcement Agreements process, the Evaluation Report on Implementation of the Agreements, and the Agency's Criminal Enforcement and Federal Facilities Compliance draft strategies.

I am firmly committed to full and effective implementation of the Policy Framework and am relying on your continued personal attention to this important effort. I plan to review the Region's performance in implementing the revised Policy Framework and the program-specific guidance, particularly the "timely and appropriate" enforcement response criteria, as part of my semi-annual regional visits.

I encourage you to share the revised Policy Framework with your State counterparts.

Attachments

cc: Steering Committee on the State/Federal Enforcement Relationship

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS

August 1986
(originally issued June 1984)

OFFICE OF ENFORCEMENT
AND COMPLIANCE MONITORING

POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS[1/]

Achieving and maintaining a high level of compliance with environmental laws and regulations is one of the most important goals of Federal and State environmental agencies, and is an essential prerequisite to realizing the benefits of our regulatory programs. While States and local governments have primary responsibility for compliance and enforcement actions within delegated or approved States, EPA retains responsibility for ensuring fair and effective enforcement of Federal requirements, and a credible national deterrent to noncompliance. An effective State/Federal partnership is critical to accomplishing these goals, particularly given limited State and Federal resources. The task is difficult and one of the most sensitive in the EPA/State relationship, often compounded by differences in perspectives on what is needed to achieve compliance.

To establish an effective partnership in this area, and implement the State/Federal enforcement relationship envisioned in the Agency Oversight and Delegation policies, EPA called for State-specific enforcement agreements to be in place beginning FY 1985 which will ensure there are: (1) clear oversight criteria, specified in advance, for EPA to assess good State --or Regional-- compliance and enforcement program performance; (2) clear criteria for direct Federal enforcement in delegated States with procedures for advance consultation and notification; and (3) adequate State reporting to ensure effective oversight.

This document is the Agency's policy framework for implementing an effective State/Federal enforcement relationship through national program guidance and Regional/State agreements. It is the product of a Steering Committee effort involving all major national EPA compliance and enforcement program directors, State Associations, State officials from each of the media programs, and the National Governors' Association. EPA anticipates that the relationship, and the use of the agreements first established in FY 1985, will evolve and improve over time. They will be reviewed, and updated where necessary, on an annual basis. The Policy Framework will be subject to periodic review and refinement. Originally issued on June 26, 1984, the Policy Framework has been updated to reflect additional guidance developed since that time.

1/ The term Enforcement Agreement is used throughout to describe the document(s), be it an existing grant, SEA, MOU, or separate Enforcement Agreement, which contains the provisions outlined in the Policy Framework and related media-specific guidance. (See p.4 for description of form of agreement.)

Policy Framework Overview

The Policy Framework applies both to Headquarters program offices in their development of national guidance and to Regions in tailoring program guidance to State-specific needs and agreements. Although enforcement agreements are not required for States which do not have delegated or approved programs, Regions are encouraged to apply to these States certain policies and provisions where relevant, particularly advance notification and consultation protocols. The Policy Framework is divided into six sections, to address the following key areas:

A. State/Federal Enforcement "Agreements": Form, Scope and Substance (pages 4-7)

This section sets forth for Regions and States developing enforcement agreements, the areas that should be discussed, priorities, and the degree of flexibility that Regions have in tailoring national guidance to State-specific circumstances, including the form and scope of agreements.

B. Oversight Criteria and Measures: Defining Good Performance (pages 8-17)

This section is primarily addressed to EPA's national programs, setting forth criteria and measures for defining good performance generally applicable to any compliance and enforcement program whether administered by EPA or a State. It forms the basis for EPA oversight of State programs. A key new area that should receive careful review is the definition of what constitutes timely and appropriate enforcement response, Section B, Criterion #5, pages 11-13.

C. Oversight Procedures and Protocols (pages 18-20)

This section sets forth principles for carrying out EPA's oversight responsibilities, including approach, process and follow-up.

D. Criteria for Direct Federal Enforcement in Delegated States (pages 21-25)

This section sets forth the factors EPA will consider before taking direct enforcement action in a delegated State and what States may reasonably expect of EPA in this regard including the types of cases and consideration of whether a State is taking timely and appropriate enforcement action. It also establishes principles for how EPA should take enforcement action so that we can be most supportive of strengthening State programs.

E. Advance Notification and Consultation (pages 26-30)

This section sets forth EPA's policy of "no surprises" and what arrangements must be made with each State to ensure the

policy is effectively carried out by addressing planned inspections, enforcement actions, press releases, dispute resolution and assurances that publicly reported performance data is accurate.

F. S[illegible]t Reporting (pages 31-35

This section sets forth seven key measures EPA will use, at a minimum, to manage and oversee performance by Regions and States. It summarizes State and regional reporting requirements for: (1) compliance rates; (2) progress in reducing significant non-compliance; (3) inspection activities; (4) formal administrative enforcement actions; and (5) judicial actions, at least on a quarterly basis. It also discusses required commitments for inspections and for addressing significant non-compliance.

In addition, it sets forth State and regional requirements for recordkeeping and evaluation of key milestones to assess the timeliness of their enforcement response and penalties imposed through those actions.

Appendices

Appendix A: Annual priorities and implementing guidance provides a list of the annual priorities for implementing the enforcement agreements and a summary index of what national program guidance has been or will be issued by programs to address the areas covered by the Policy Framework for State/EPA Enforcement Agreements.

Appendix B: Addendum to the Policy Framework on "Implementing Nationally Managed or Coordinated Enforcement Actions," issued January 4, 1985.

Appendix C: Guidance on "Division of Penalties with State and Local Governments," issued October 30, 1985.

A. STATE/FEDERAL ENFORCEMENT AGREEMENTS: FORM, SCOPE, AND SUBSTANCE

This section sets forth the form, scope and substance of the State/Federal Enforcement Agreements as well as the degree of flexibility Regions have in tailoring national policy to individual States.

1. What Form Should the Agreements Take?

We do not anticipate the need for a new vehicle or document for the State/Federal enforcement agreements. Wherever possible, State/Federal agreements should be set forth in one or more of a number of existing formats: grant agreements, State/EPA Agreements Memoranda of Agreement or Understanding or a statement of Regional Office operating policy. Where there are new documents the appropriate linkage should be made to grants and SEA's as applicable. To the extent the areas covered by this Policy Framework translate into specific output commitments and formal reporting requirements, they may belong in the grant agreements as specified in national program grant guidance. Regions should discuss with the States at an early stage in the planning process their views on both the form and substance of the agreements. Once the basic agreements are in place, Regions should consider most aspects of the written agreements as multi-year, minimizing the need to renegotiate the agreements each year. Regions should conduct an annual review with the States to identify needed revisions and additions to the agreements to address identified problems or reflect further national guidance.

2. What is the Scope of the Agreements?

This guidance and the State/EPA agreements cover all aspects of EPA's civil compliance and enforcement programs, including those activities involving Federal facilities. The criminal enforcement program is not included and will be addressed elsewhere.

Discussions between EPA Regions and States should cover the minimum areas listed below:

- Oversight Criteria and Measures: Good Performance Defined --See Section B.
- Oversight Procedures and Protocols -- See Section C.
- Criteria for Direct EPA Enforcement -- See Section D.
- Procedures for Advance Notification and Consultation -- See Section E.
- Reporting Requirements -- See Section F.

However, Regions and States are not expected to duplicate national Program guidance in their agreements -- we are not looking for lengthy documents. Written agreements resulting from these discussions could cover topics which are not clearly specified elsewhere. If not otherwise specified, national policy will apply and should be so stated in the state agreements. Although not required for non-delegated or unapproved programs, Regions are encouraged to apply certain policies and provisions where relevant, particularly advance notification and consultation protocols.

This Policy Framework and the resulting State/EPA Enforcement Agreements are intended to enhance enforcement of State and Federal environmental laws. Each agreement should be careful to note that nothing in them or this Policy Framework constitutes or creates a valid defense to regulated parties in violation of environmental statutes, regulations or permits.

3. Parties to the Agreements and Participants in the Process.

It is important to involve the appropriate State and regional personnel early in the agreements process. In the Regions, this means involving the operating level program staff and the Regional Counsel staff along with top management; and in the States it means the participation of all the organizational units responsible for making enforcement work, e.g., State program staff, those responsible for oversight of field operations, staff attorneys, and the State Attorneys General (AG). The State agency should have the lead in establishing effective relationships with the State AG or State legal staff, as appropriate. The Regions should ensure that there is adequate communication and coordination with these other participants in the enforcement process. States are strongly encouraged to commit advance notification and consultation procedures/protocols between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Region should seek to incorporate these written protocols into the State/EPA Enforcement Agreements (See discussion on pages 17 and 26-27).

4. What Flexibility do Regions Have?

Regions must be allowed substantial flexibility to tailor agreements to each State, as the agreements process is intended to be based upon mutual understandings and expectations. This flexibility should be exercised within the framework of national program policy and the Agency's broad objectives. Specifically,

a. Oversight Criteria:

Oversight criteria would generally be provided in national program guidance but Regions should tailor their general oversight to address environmental and other priorities in the Region or State, and other specific areas of concern that are unique to an individual State, including any issues raised by the scope of State enforcement authorities, unique technical problems and available expertise, and areas targeted for improvement.

In addition, Regions and States should adapt national timely and appropriate enforcement response criteria to State-specific circumstances to fit State authorities and procedures as follows:

(i) Timeliness: The national program guidance on key milestones and timeframes should be applied to all States with adjustments to accommodate each State's laws and legal procedures. Such adjustment can be important particularly where the proposed enforcement action cannot possibly take place within the proposed timeframes or where a State chooses to address problems more expeditiously than the Federal guidelines. The trigger points should be realistic expectations, but within modest variance from the national goals. Other adjustments should not be made solely because a State program consistently takes longer to process these actions due to constraints other than procedural requirements, e.g., resources. However, if this is the case the timeframes should serve as a basis for reviewing impediments with the State to identify how problems can be overcome and to explore ways over time for the State program to perform more efficiently. (See discussion in Section B, p.13)

The timeframes are not intended to be rigid deadlines for action, but rather are: (1) general targets to strive for in good program performance; (2) trigger points that EPA and States should use to review progress in individual cases; and (3) presumptions that, if exceeded, EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State. It is not the Agency's intention to assume the major enforcement role in a delegated State as a result of these timeframes. The trigger points should be realistic expectations, but within modest variance from the national goals. It must also be realized that in some programs we need experience with the timeframes to assess how reasonable and workable they really are and further, that judgments on what is a reasonable timetable for action must ultimately be case specific. For example, complex compliance problems may require longer-term studies to define or achieve an appropriate remedy.

(ii) Appropriate Enforcement Response:

(a) Choice of response: National medium-specific program guidance applicable to State programs on appropriate enforcement response should be followed (See Appendix A). There is usually sufficient flexibility within such guidance to allow the exercise of discretion on how best to apply the policies to individual cases. The Agency is making every effort to set forth a consistent national policy on enforcement response for each program. It is therefore essential that in setting forth clear expectations with States this guidance not be altered.

(b) Definitions of formal enforcement actions: Regions should reach agreement with States as to how certain State enforcement actions will be reported to and interpreted by EPA. This should be based upon the essential characteristics and impact of State enforcement actions, and not merely upon what the actions are called. National program guidance setting forth consistent criteria for this purpose should be followed, pursuant to the principles listed in Section B, pages 11-12.

(c) Civil Penalties and Other Sanctions: Program guidance must also be followed on where a penalty is appropriate. Regions have the flexibility to consider other types of State sanctions that can be used as effectively as cash penalties to create deterrence, and determine how and when it might be appropriate to use these sanctions consistent with national guidance. Regions and States should reach understanding on documantation to evaluate the State's penalty rationale. Maximum flexibility in types of documentation will be allowed to the State.

5. Procedures and Protocols on Notification and Consultation:

Regions and States should have maximum flexibility to fashion arrangements that are most conducive to a constructive relationship, following the broad principles outlined in this document.

6. State-Specific Priorities:

In addition, while of necessity EPA must emphasize commitments by States to address significant noncompliance and major sources of concern, Regions should be sensitive to the broad concerns of State Programs including minor sources and the need to be responsive to citizen complaints. Regions should discuss the State's perspective on both its own and national priorities, and take into account State priorities to the extent possible.

7. What Does it Mean to Reach Agreement?

To the extent possible, these agreements should reflect mutual understandings and expectations for the conduct of Federal and State enforcement programs. At a minimum, EPA Regions must: (1) be clear and ensure there are "no surprises"; (2) make arrangements with the States so that actions taken are constructive and supportive; and (3) tailor the application of the national program guidance to the States' programs and authorities. Where mutual agreement cannot be achieved, clear unilateral statements of policy will have to suffice, with commitments to try to seek further agreements over time. Areas where agreements have not been reached should be clearly identified for senior Agency management attention.

B. OVERSIGHT CRITERIA AND MEASURES: DEFINING GOOD PERFORMANCE

The first step to achieving strong and effective national compliance and enforcement programs is a clear definition of what constitutes good performance. Because each of EPA's programs embodies unique requirements and approaches, good performance must be defined on a program-specific basis. Adjustments also must be made in applying criteria and measures to the States and Regions, based upon their environmental problems and authorities. Nevertheless, there are several basic elements which will generally be applicable to a good compliance and enforcement program in any of our medium-specific programs. The following outlines the criteria and measures that form the common framework for defining a quality program. The framework is to serve as a guide to the national programs as they develop, in cooperation with Regions and States, the criteria they will use to assess their performance in implementing national compliance and enforcement programs.

The framework is not intended to be adopted word-for-word by the programs, nor is there any format implied by this list. What is important are the concepts. This section addresses only the elements of a quality program. Issues such as how oversight should be conducted are addressed in Section C. Each national program may choose to focus on certain elements of performance in a given year.

These criteria and measures are intended to apply to the implementing agency, that is, to an approved or delegated State or to an EPA Region in the event a program is not "delegated." Our philosophy is that EPA should be held to the same standards as we would apply to the States if they were implementing the program. Portions may also apply to those non-approved or non-delegated States which are administering portions of the programs under cooperative agreements.

CRITERION #1 Clear Identification of and Priorities for the Regulated Community

A quality compliance and enforcement program is based upon an inventory of regulated sources which is complete, accurate and current. The data should in turn be accessible, preferrably in automated data systems which are accurate, and up-to-date. The scope of coverage for the inventory should be appropriately defined by each program as it is probably not feasible to identify every person or facility subject to environmental laws and regulations, especially when they are numerous small sources. Those priorities should be clearly established in national program guidance and tailored to State-specific circumstances as appropriate.

The inventory of sources or other relevant information on sources should be utilized as a basis for a priority-setting system established by the administering agency. These priorities should reflect and balance both national priorities and state-specific priorities. A quality program uses these priorities as a basis for program management. National priorities are generally set forth in EPA's Operating Year Guidance and program-specific compliance and enforcement strategies. State-specific priorities should address not only efforts to achieve broad based compliance but also should assess the expected environmental impact of targeting enforcement and compliance monitoring to specific geographic areas or against certain source types. Ambient monitoring systems can provide an important point of departure for priority-setting.

CRITERION #2 Clear and Enforceable Requirements

Requirements established through permits, administrative orders and consent decrees should clearly define what a specific source must do by a date certain, in enforceable terms. It is not EPA's intention in this policy framework to suggest that EPA conduct a top down review of a State or Regional program's entire regulatory program. However, areas where provisions cannot be enforced due to lack of clarity or enforceable conditions should be identified and corrected.

CRITERION #3 Accurate and Reliable Compliance Monitoring

There are four objectives of compliance monitoring:

- reviewing source compliance status to identify potential violations;
- helping to establish an enforcement presence;
- collecting evidence necessary to support enforcement actions regarding identified violations; and
- developing an understanding of compliance patterns of the regulated community to aid in targeting activity, establishing compliance/enforcement priorities, evaluating strategies, and communicating information to the public.

The two factors in assessing the success of a compliance monitoring program are coverage and quality.

Coverage: Each program's strategy should reflect a balance between coverage: (1) for breadth, to substantiate the reliability of compliance statistics and establish an enforcement presence; and (2) for targeting those sources most likely to be out of compliance or those violations presenting the most serious environmental or public health risk.

Inspections: Each administering agency should have a written and reviewable inspection strategy, reviewed and updated annually, as appropriate: in some programs a multi-year strategy may be preferable. The strategy should demonstrate the minimum coverage for reliable data gathering and compliance assessment set forth in national program guidance and meet legal requirements for a "neutral inspection scheme." The strategy should also address how the inspections will most effectively reach priority concerns and potential noncompliers including the use of self-reported data, citizen complaints and historic compliance patterns. The strategy will be assessed on whether it embodies the appropriate mix of categories of inspections, frequency and level of detail. Inspections should then be carried out in a manner consistent with the inspection strategy.

Source Self-Monitoring and Reporting: The administering agency should ensure that minimum national requirements for source self-monitoring and reporting are imposed and complied with, either through regulation or permit condition, pursuant to national guidance as appropriate.

Quality: Each program should define minimum standards for quality assurance of data and data systems, and timely and complete documentation of results. At a minimum, each program should have a quality assurance program to insure the integrity of the compliance monitoring program. This quality assurance program should address essential lab analysis and chain of custody issues as appropriate.

Inspections: Inspectors should be able to accurately document evidence needed to determine the nature and extent of violations, particularly the presence of significant violations. Documentation of inspection findings should be timely, complete and able to support subsequent enforcement responses, as appropriate to the purpose of the inspection. Federal oversight inspections should corroborate findings. Oversight inspections are a principal means of evaluating both the quality of an inspection program and inspector training.

Source Self-Monitoring: The administering agency should have a strategy for and implement quality assurance procedures, with sufficient audits and follow-up action to ensure the integrity of self-reported data.

CRITERION #4 High or Improving Rates of Continuing Compliance

The long-term goal of all of our compliance and enforcement programs is to achieve high rates of continuing compliance across the broad spectrum of the regulated community. Until that goal is achieved, compliance rates can fluctuate for several reasons. In assessing how well an administering agency is meeting the goal of high or improving rates of

compliance, other factors must be assessed in addition to the overall compliance rate. Improved inspections or inspection targeting often can result in a temporary decrease in rates of compliance until newly found violations are corrected and the regulated community responds to the more vigorous attention to specific compliance problems. In these instances, a decrease in the rate of compliance would be a sign of a healthy compliance and enforcement program. At a minimum, programs should design mechanisms to track the progress of all sources out of compliance through major milestones up to achieving final physical (full) compliance with applicable regulations and standards.

Program quality must also be assessed in terms of how well the program is returning significant noncompliers to compliance. The use of lists of significant violators and specific commitments to track and resolve significant noncompliance should be part of the planning process of the administering agency, and, between States and Regions. The lists should be developed in consultation with the States and continually updated each fiscal year and sources on it tracked through to final physical compliance.

CRITERION #5 Timely and Appropriate Enforcement Response

Quality enforcement programs ensure that there is timely and appropriate enforcement response to violations. Expectations for what constitutes timely and appropriate action should be based upon national program guidance, tailored to the procedures and authorities in a given State and assessed in regard to particular circumstances surrounding each instance of violation. National programs must establish benchmarks or milestones for what constitutes timely and appropriate enforcement action, forcing progress in enforcement cases toward ultimate resolution and full physical compliance. This concept is a key new feature to our compliance and enforcement program implementation.

In designing oversight criteria for timely enforcement response, each program will attempt to capture the following concepts:

1. A set number of days from "detection" of a violation to an initial response. Each program should clearly define when the clock starts, that is, how and when a violation is "detected."

2. Over a specified period of time, a full range of enforcement tools may be used to try to achieve compliance, including notices of violation, warning letters, phone calls, site visits, etc. The adequacy of these responses will be assessed based upon whether they result in expeditious compliance.

3. A prescribed number of days from initial action within which a determination should generally be made, that

either compliance has been achieved or an administrative enforcement action has been taken (or a judicial referral has been initiated, as appropriate) that, at a minimum:

- Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
- Explicitly is based on the issuing Agency's determination that a violation has occurred;
- Requires specific corrective action, or specifies a desired result that may be accomplished however the recipient chooses, and specifies a timetable for completion;
- May impose requirements in addition to ones relating directly to correction (e.g., specific monitoring, planning or reporting requirements); and
- Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

4. A specific point at which a determination is made either that final physical compliance has been achieved, that the source is in compliance with a milestone in a prior order, or that escalation to a judicial enforcement action has been taken if such actions have not already been initiated.

   In developing program-specific guidance, this milestone may be treated more as a concept than as a fixed timetable, taking into account the fact that the administrative hearing process and the State Attorney General's actions are not within the direct control of the administering agency.[2/] What is important, is the embodiment of the concept of timely follow-up and escalation, in requirement for tracking and management.

5. Final physical compliance date is firmly established and required of the facility. Although it is not possible for programs to establish any national timeframes, the concept of final physical compliance by a date certain should be embodied in EPA and State enforcement actions.

6. Expeditious physical compliance is required. It may not be possible for programs to define "expeditious" in terms of set time periods, but some concept of "expeditious" (i.e., that the schedule will result in a return to full physical compliance as quickly as can reasonably be expected) should be embodied in each program's guidance.

2/ See p. 17, 26-27, regarding the State Agency's responsibilities for coordinating with the State Attorney General or other legal staffs.

Timeframes established by the national programs for each of these minimum milestones are principally intended to serve as trigger points and not as absolute deadlines, unless specifically defined as such. Whatever timeframes are established are intended to apply only to Federal requirements as adopted by the States, and do not apply to State statutes and requirements that go beyond those required by Federal law. The timeframes are key milestones to be used to manage the program, to trigger review of progress in specific cases, and a presumption of where EPA may take direct enforcement action after consideration of all pertinent factors and consultation with the State.

Timeframes and their use in management will evolve over time as they will have to reflect different types of problems that may warrant different treatment. For example, programs will have to take into account such factors as new types of violations, the difference between operating and maintenance violations versus those that require installation of control equipment, emergency situations which may fall outside the scope of the normal timeframes for action, etc.

Administering agencies are expected to address the full range of violations in their enforcement responses considering the specific factors of the case and the need to maintain a credible enforcement presence. However, the new management approach setting forth desired timeframes for timely action could have resource implications beyond what is currently available to or appropriate for the full range of sources and violations. Therefore, as we begin to employ the concept of timely and appropriate enforcement response, at a minimum, the focus should be on the greatest problems, i.e., the significant noncompliers. Over time, and with more experience, this concept should be phased-in to cover a broader range of violations. This in no way should constrain the programs from applying the concepts broadly.

The choices of appropriate response are to be defined within the constraints of national program guidance and applied by the administering agency based upon consideration of what is needed: (1) in general, to achieve expeditious correction of the violation, deterrence to future noncompliance and fairness; and (2) in individual circumstances, based upon the gravity of the violation, the circumstances surrounding the violation, the source's prior record of compliance and the economic benefits accrued from noncompliance. With three exceptions, the form of the enforcement response is not important by itself, as long as it achieves the desired compliance result. The exceptions generally fall into the following three categories:

1. If compliance has not been achieved within a certain timeframe, the enforcement response should meet minimum requirements, usually associated with at least the issuance of an administrative order (see criteria listed above) or judicial referral.

2. Because of the need to create a strong deterrence to noncompliance, it is important to assess penalties in certain cases, and only certain types of enforcement actions can provide penalties. Each program must clearly define, as appropriate, the circumstances under which nothing less than a penalty or equivalent sanction will be acceptable. (See Criterion #6 below.)

3. In some circumstances, a judicial action or sanction is usually the only acceptable enforcement tool. Each program must define these circumstances as appropriate. For example, a judicial action might be required where a compliance schedule for Federal requirements goes beyond Federal statutory deadlines.

A good program should have adequate legal authority to achieve the above objectives. Where deficiencies have been identified, steps should be taken to fill identified gaps.

CRITERION # 6 Appropriate Use of Civil Judicial and Administrative Penalty and Other Sanction Authorities to Create Deterrence[3/]

1. Effective Use of Civil Penalty Authorities and Other Sanctions:

Civil penalties and other sanctions play an important role in an effective enforcement program. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detecting a violation, 2) the speed of the enforcement response, and 3) the likelihood and severity of the sanction. While penalties or other sanctions are the critical third element in creating deterrence, they can also contribute to greater equity among the regulated community by recovering the economic benefit a violator gains from noncompliance over those who do comply.

Effective State and regional programs should have a clear plan or strategy for how their civil penalty or other sanction authorities will be used in the enforcement program. At a minimum, penalties and/or sanctions should be obtained where programs have identified that a penalty is appropriate (see Criterion #5 above).

The anticipated use of sanctions should be part of the State/EPA Enforcement Agreements process, with Regions and States discussing and establishing how and when the State generally plans to use penalties or other approaches where some sanction is required.

3/ Excerpts from the Policy on "Oversight of State Civil Penalties" 2/28/86. The focus of the policy is on both civil judicial and civil administrative penalties, and does not cover criminal penalties.

EPA generally prefers the use of cash penalties to other types of sanctions.[4/] However, there may be other sanctions which are preferable to cash penalties in some circumstances. In particular, States may have a broader range of remedies than those available at the Federal level. Examples of other sanctions may be: pipeline severance (UIC), license revocation (FIFRA) or criminal sanctions including fines and/or incarceration. National program guidance should clarify in general terms how the use of other types of sanctions fits into the program's penalty scheme at the Federal and State levels, e.g., whether they are substitutes for or mitigate a cash penalty.[5/] In any case, States are urged to use cash penalty authorities in those cases for which a penalty is "appropriate" and/or to use other sanctions pursuant to these agreements with the Regions.

EPA encourages States to develop civil administrative penalty authority in addition to civil judicial penalty authority, and to provide sufficient resources and support for successful implementation where they do not already have this authority. In general, a well designed administrative penalty authority can provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities. Both civil judicial and administrative penalty authorities are important, complementary, and each should be used to greatest advantage. EPA is similarly seeking to gain administrative penalty authority for those Federal programs which do not already have it. To support State efforts to gain additional penalty authorities, EPA will share information collected on existing State penalty authorities and on the Federal experience with the development and use of administrative authorities.

2. Oversight of Penalty Practices:

EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on individual penalty calculations and regional penalty practices and patterns.

4/ In limited circumstances where they meet specified criteria, EPA and DOJ policies and procedures allow for alternative payments -- such as beneficial projects which have economic value beyond the costs of returning to compliance -- in mitigation of their penalty liability.

5/ Until program-specific guidance is developed to define the appropriate use of civil sanctions, the Region and State should consider whether the sanction is comparable to a cash penalty in achieving compliance and deterring noncompliance. Costs of returning to compliance will not be considered a penalty. Criminal authorities, while not clearly comparable to cash penalties, can be used as effectively as cash penalties to create deterrence in certain circumstances.

EPA will review state penalties in the context of the State's overall enforcement program not merely on its use of cash penalties. While individual cases will be discussed, the program review will more broadly evaluate how penalties and other sanctions can be used most effectively. The evaluation will consider whether the penalties and other sanctions are sought in appropriate cases, whether the relative amounts of penalties or use of sanctions reflect increasing severity of the violation, recalcitrance, recidivism etc., and bear a reasonable relationship to the economic benefit of noncompliance (as applicable) and whether they are successful in contributing to a high rate of compliance and deterring noncompliance. EPA may also review the extent to which State penalties have been upheld and collected.

3. Development and Use of Civil Penalty Policies:

EPA Regions are required to follow written Agency-wide and program specific penalty policies and procedures.

EPA encourages States to develop and use their own State penalty policies or criteria for assessing civil penalties. The advantages of using a penalty policy include:

- leads to improved consistency;
- is more defensible in court;
- generally places the Agency in a stronger position to negotiate with the violator;
- improves communication and support within the administering agency and among the agency officials, attorneys and judges especially where other organizations are responsible for imposing the penalty;
- when based on recoupment of economic benefit and a component for seriousness, deters violations based upon economic considerations while providing some equity among violators and nonviolators; and
- can be used by judges as a basis for penalty decisions.

EPA encourages States to consider EPA's penalty policies as they develop their own penalty policies.

4. Consideration of Economic Benefit of Noncompliance:

To remove incentives for noncompliance and establish deterrence, EPA endeavors, through its civil penalties, to recoup the economic benefit the violator gained through noncompliance. EPA encourages States to consider and to quantify where possible, the economic benefit of noncompliance where this is applicable. EPA expects States to make a reasonable effort to calculate economic benefit and encourages States to attempt to recover this amount in negotiations and litigation. States may use the Agency's computerized model (known as BEN) for calculating that benefit or different approaches to calculating economic benefit. EPA will provide technical assistance to States on calculating the economic benefit of noncompliance, and has made the BEN computer model available to States.

CRITERION #7 Accurate Recordkeeping and Reporting

A quality program maintains accurate and up-to-date files and records on source performance and enforcement responses that are reviewable and accessible. All recordkeeping and reporting should meet the requirements of the quality assurance management policy and procedures established by each national program consistent with the Agency's Monitoring Policy and Quality Assurance Management System. Reports from States to Regions, Regions to Headquarters must be timely, complete and accurate to support effective program evaluation and priority-setting.

State recordkeeping should include some documented rationale for the penalties sought to support defensibility in court, enhance Agency's negotiating posture, and lead to greater consistency. These records should be in the most convenient format for administration of the State's penalty program to avoid new or different recordkeeping requirements.

CRITERION #8 Sound Overall Program Management

A quality program should have an adequate level, mix and utilization of resources, qualified and trained staff, and adequate equipment. The intention here is not to focus on resource and training issues unless there is poor performance identified elsewhere in the program. In those instances, these measures can provide a basis for corrective action by the administering agency. There may be, however, some circumstances in which base level of trained staff and equipment can be defined by a national program where it will be utilized as an indicator of whether the program is adequate.

Similarly, a good compliance and enforcement program should have a clear scheme for how the operations of other related organizations, agencies and levels of government fit into the program, especially the State Attorneys General or other appropriate State legal organizations. The State Agency should, at a minimum, ensure that the State AG, internal legal counsel, or other appropriate government legal staff are consulted on the enforcement commitments the State is making to EPA to assure that the level of legal enforcement support and associated resources needed to accomplish the agreed-upon goals are secured. This coordination should result in timely review of initial referral packages, satisfactory settlement of cases, as appropriate, timely filing and prosecution of cases, and prompt action where dischargers violate consent decrees. (See Section E, p. 26-27).

C. OVERSIGHT PROCEDURES AND PROTOCOLS

This section addresses how EPA should conduct its oversight function: its approach, process and follow-up, to build and improve individual programs and overall national performance. On May 31, 1985, the Agency issued the Policy on Performance-Based Assistance, which contains guidance on how Regions should oversee assistance agreements. Both of these policies call for oversight with a problem-solving orientation with clear identification of actions needed to correct problems or recognize good performance.

1. Approach

The goal of oversight should be to improve the State (or Regional) compliance and enforcement program. To accomplish this, oversight should be tailored to fit State performance and capability. The context must be the whole State compliance and enforcement program, although EPA's focus for audit purposes will be on national priority areas.

No new oversight process is intended here. Existing procedures such as mid-year reviews, periodic audits and oversight inspections as established by each program and Region should be used. Administering agencies should identify strengths and weaknesses of the State and Federal programs and develop mutual commitments to correct problems.

EPA oversight of State performance should be consistent with the following principles:

a. Positive oversight findings should be stressed as well as the negative ones.

b. Positive steps that can be taken to build the capability of State programs in problem areas should be emphasized. This should include providing technical assistance and training -- by EPA staff to the extent possible

c. EPA action to correct problems should vary, depending on the environmental or public health effect of the problem and whether it reflects a single incident or a general problem with the State program.

d. The States should be given an opportunity to formally comment on EPA's performance. Regions should provide information to the States that is available on its performance against the national standards, including their performance on meeting the "timely and appropriate" criteria, as well as their performance on commitments to that State.

e. EPA should give States sufficient opportunity to correct identifi problems, and take corrective action pursuant to the criteria for direct enforcement established in Section D.

f. EPA should use the oversight process as a means of transferring successful regional and State approaches from one Region or State to the other.

2. Process

Several actions can result in the most constructive review of the State's programs:

a. To the extent possible, files to be audited will be identified in advance, with some provision for random review of a percentage of other files if necessary.

b. Experienced personnel should be used to conduct the audit/review -- EPA staff should be used to the extent possible to build relationships and expertise.

c. There should be an exit interview and every opportunity should be made to discuss findings, comment on and identify corrective steps based upon a review draft of the written report.

d. Opportunity should be made for staffs interacting on enforcement cases and overseeing State performance to meet personally rather than rely solely upon formal communications -- this applies to both technical and legal staffs.

3. Follow-Up and Consequences of Oversight

When State performance meets or exceeds the criteria and measures for defining good program performance, EPA should reward this performance in some of the following ways:

a. reduce the number, level or scope, and/or frequency of reviews or of some reporting requirements consistent with statutory or regulatory requirements;

b. reduce the frequency and number of oversight inspections; and/or

c. allow the program more flexibility in applying resources from an almost exclusive focus on national priorities e.g., major sources, to addressing more priorities of concern to the State e.g., minor sources.

When State performance fails to meet the criteria for good State performance, EPA may take some of the following actions, as appropriate:

a. suggest changes in State procedures;

b. suggest changes in the State's use of resources or training of staff;

c. provide technical assistance;

d. increase the number of oversight inspections and/or require submittal of information on remedial activities;

e. provide other workable State models and practices to States with problems in specific areas and match State staff with expertise in needed areas;

f. if State enforcement action has not been timely and appropriate, EPA may take direct enforcement action;

g. track problem categories of cases more closely;

h. grant awards could be conditioned by targeting additional resources to correct identified problems or reduced based on poor performance where such performance is not due to inadequate resources; and/or

i. consider de-delegation if there is continued poor performance.

D. CRITERIA FOR DIRECT FEDERAL ENFORCEMENT IN DELEGATED STATES

This section addresses criteria defining circumstances under which approved State programs might expect direct Federal enforcement action and how EPA will carry out such actions so as to be most supportive of strengthening State programs.

1. When Might EPA Take Direct Enforcement Action in Approved States?

A clear definition of roles and responsibilities is essential to an effective partnership, since EPA has parallel enforcement authority under its statutes whether or not a State has an approved or delegated program. As a matter of policy in delegated or approved programs, primary responsibility for action will reside with State or local governments with EPA taking action principally where a State is "unwilling or unable" to take "timely and appropriate enforcement action. Many States view it as a failure of their program if EPA takes an enforcement action. This is not the approach or view adopted here. There are circumstances in which EPA may want to support the broad national interest in creating an effective deterrent to noncompliance beyond what a State may need to do to achieve compliance in an individual case or to support its own program.

Because States have primary responsibility and EPA clearly does not have the resources to take action on or to review in detail any and all violations, EPA will circumscribe its actions to the areas listed below and address other issues concerning State enforcement action in the context of its broader oversight responsibilities. The following are four types of cases EPA may consider taking direct enforcement action where we have parallel legal authority to take enforcement action:

a. State requests EPA action
b. State enforcement response is not timely and appropriate
c. National precedents (legal or program)
d. Violation of EPA order or consent decree

In deciding whether to take direct enforcement in the above types of cases, EPA will consider the following factors:

- Cases specifically designated as nationally significant (e.g., significant noncompliers, explicit national or regional priorities)
- Significant environmental or public health damage or risk involved
- Significant economic benefit gained by violator
- Interstate issues (multiple States or Regions)
- Repeat patterns of violations and violators

How these factors are applied for the various types of cases is discussed below.

a. State requests EPA action:

The State may request EPA to take the enforcement action for several reasons including but not limited to: where State authority is inadequate, interstate issues involving multiple States which they cannot resolve by themselves, or where State resources or expertise are inadequate, particularly to address the significant violation/violators in the State in a timely and appropriate manner. EPA should honor requests by States for support in enforcement. EPA will follow its priorities in meeting any such requests for assistance, considering significance of environmental or public health damage or risk involved, significant economic benefit gained by a violator, repeat patterns of violations and violators. Based on this general guidance, each program office may develop more specific guidance on the types of violations on which EPA should focus. Regions and States are strongly encouraged to plan in advance for any such requests for or areas needing EPA enforcement assistance during the State/EPA Enforcement Agreements Process.

b. State Enforcement is not "Timely and Appropriate"

The most critical determinant of whether EPA will take direct enforcement action in an approved State is whether the State has or will take timely and appropriate enforcement action as defined by national program guidance and State/Regional agreements. EPA will defer to State action if it is "timely and appropriate" except in very limited circumstances: where a State has requested EPA action (a, above), there is a national legal or program precedent which cannot be addressed through coordinated State/Federal action (c, below), EPA is enforcing its own enforcement action (d, below) or the case of a repeat violator, where the State response is likely to prove ineffective given the pattern of repeat violations and prior history of the State's success in addressing past violations.

(i) Untimely State Enforcement Response:

If a State action is untimely, EPA Regions must determine after advance notification and consultation with the State whether the State is moving expeditously to resolve the violation in an "appropriate" manner.

(ii) Inappropriate State Action:

EPA may take direct action if the State enforcement action falls short of that agreed to in advance in the State/EPA Enforcement Agreements as meeting the requirements of a formal enforcement response (See Section B, page 13) where a formal enforcement response is required. EPA may also take action if the content of the enforcement action is inappropriate, i.e., if remedies are

clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or other sanction.

(iii) Inappropriate Penalty or other Sanction:

For types of violations identified in national program guidance as requiring a penalty or equivalent sanction, EPA will take action to recover a penalty if a State has not assessed a penalty or other appropriate sanction. EPA generally will not consider taking direct enforcement action solely for recovery of additional penalties unless a State penalty is determined to be grossly deficient after considering all of the circumstances of the case and the national interest. In making this determination, EPA will give every consideration to the State's own penalty authority and any applicable State penalty policy. EPA will consider whether that State's penalty bears any reasonable relationship to the seriousness of the violation, the economic benefit gained by the violator (where applicable) and any other unique factors in the case. While this policy provides the basis for deciding whether to take direct Federal action on the basis of an inadequate penalty, this issue should be discussed in more detail during the agreements process to address any state-specific circumstances and procedures established to address generic problems in specific cases. Where identified in national guidance and agreed to between the Region and State, other sanctions will be acceptable as substitutes or mitigation of penalty amounts in these considerations.

Program-specific national guidance on expectations for State penalty assessments may be developed in consultation with the States and applied for determining adequacy of penalty amounts after being applied in practice in EPA Regions. It is the current expectation of Agency managers that EPA will continue to gain experience in implementing its own penalty policies before national programs consider such guidance. Thus, in the near term a determination that a penalty is "grossly deficient" will remain a judgment call made on a case-by-case basis.

c. National Precedents

This is the smallest category of cases in which EPA may take direct enforcement action in an approved State, and will occur rarely in practice. These cases are limited to those of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis. Some of these cases may most appropriately be managed or coordinated at the national level. Additional guidance on how potential cases will be identified, decisions made to proceed and involvement of States and Regions in that process, has been developed as Appendix B to this document.

d. Violation of EPA order or consent decree:

EPA places a high priority on following through on enforceme actions until final compliance is achieved. If EPA has taken administrative, civil or criminal judicial enforcement in a delegated or approved State, EPA will take any follow up enforcement action on violations of those agreements or orders to preserve the integrity of Federal enforcement actions

2. How Should EPA Take Action So As To Better Support Strong State Programs?

Section E describes in some detail the principles and procedures for advance notification and consultation with States. These are imperatives for a sound working relationship. In all of these circumstances, where EPA may overfile a State action on the basis that it is not timely and appropriate EPA should work with the State as early as possible in the case, well before completion of a State action which, if resulting in expeditious compliance by the facility, would render any subsequent EPA involvement unconstructive, ineffective or moot. This is particularly important since it is EPA policy that once a case has been commenced, EPA generally will not withdraw that case in light of subsequent or simultaneous State enforcement action.

In particular, Regions also should identify, with their States, particular areas in which arrangements can or should be made, in advance, for direct EPA enforcement support where State authorities are inadequate or compliance has been a continuing problem.

There are several other approaches identified here for how EPA can take enforcement action, where it is appropriate, in a manner which can better support States.

To the maximum extent possible, EPA should make arrangements with States to:

a. Take joint State/Federal action -- particularly where a State is responsibly moving to correct a violation but lacks the necessary authorities, resources, or national or interstate perspective appropriate to the case.

b. Use State inspection or other data and witnesses as appropriate.

c. Involve States in creative settlements and to participate in case development -- so that the credibility of States as the primary actor is perceived and realized.

d. Arrange for division of penalties with State and local governments[6/] (to the extent they participate in Federal enforcement actions, and where permitted by law) -- to enhance Federal/State cooperation in enforcement.

e. Issue joint press releases and [illegible] it with the State -- to ensure EPA is not in competition with the State and that EPA action is not erroneously perceived as a weakness or failure in the State's program.

f. Keep States continually apprised of events and reasons for Federal actions -- to avoid conflicting actions and to build a common understanding of goals and the State and Federal perspectives.

3. How Do the Expectations for "Timely and Appropriate Action" Apply to EPA in Delegated States?

In delegated States, EPA performs an oversight function, standing ready to take direct Federal enforcement action based upon the factors stated above. In its oversight capacity, in most cases, EPA will not obtain real-time data. As indicated in Section F on State Reporting, EPA will receive quarterly reports and will supplement these with more frequent informal communications on the status of key cases. Therefore, we do not expect EPA Regions, through their oversight, to be able to take direct enforcement action following the exact same timeframes as those that apply to the administering agency. However, when EPA does determine it is appropriate to take direct Federal action, EPA staff are expected to adhere to the same timeframes as applicable to the States starting with the assumption of responsibility for enforcement action.

6/ See Appendix C for Agency Policy on "Division of Penalties with State and Local Governments," issued October 30, 1985.

E. ADVANCE NOTIFICATION AND CONSULTATION

A policy of "no surprises" must be the centerpiece of any effort to ensure the productive use of limited Federal and State resources and an effective "partnership" in achieving compliance. This principle should be applied to all aspects of the compliance and enforcement program covering inspections, enforcement activities, press releases and public information, and management data summaries upon which State and national performance are assessed.

In order to guarantee that there is ample advance notification and consultation between the proper State and Federal officials, EPA Regions should confer annually with each State, discuss the following areas and devise agreements as appropriate. The agreements should be unique to each State and need not cover all areas -- so long as there is a clear understanding and discussion of how each area will be addressed.

1. **Advance Notification to Affected States of Intended EPA Inspections and Enforcement Actions**

   Agreements should identify:

   - **who should be notified, e.g.**
     - **-- the head of the program if it involves potential Federal enforcement; and**
     - **-- who is notified of proposed/planned Federal inspections.**

   - **how the State will be notified, e.g.**
     - **-- the agencies share inspection lists; and**
     - **-- the agency contact receives a telephone call on a proposed Federal enforcement case.**

   - **when they will be notified -- at what point(s) in the process, e.g.**
     - **-- when a case is being considered; and/or**
     - **-- when a case is ready to be referred, or notice order issued.**

   Some specific provisions need to be made to address the following:

   a. **Advance Notification of State Attorneys General or other legal staff of potential EPA enforcement actions[7]**

      While EPA's primary relationship with the State is and should continue to be with the State agency that has been delegated or been approved to administer the programs, EPA needs to ensure that all parties in the

[7] In some States there are legal organizations that have direct enforcement authority which by-passes the State AG, e.g., District Attorneys, internal legal counsel, Governor's General Counsel. In these instances, this guidance would apply to these other organizations.

State affected by a pending EPA enforcement action receiv appropriate advance notification. In addition, when EPA negotiates commitments each year with the State to address specific significant violators, it is important that all the parties affected by these comm[illegible] aware of the legal enforcement support and associated resources needed to accomplish these goals.

As part of the State/EPA Enforcement Agreements process, the Region should discuss with the State agency their internal procedures and/or protocols for advance notification and consultation with the State AG or other legal staff. The State agency is responsible for assuring that the State AG or other legal staff are properly notified and consulted about planned Federal enforcement actions and/or enforcement initiatives on an ongoing basis. States are strongly encouraged to commit advance notification and consultation procedures/protocols reached between the State agency and the State AG (or State legal staff, as appropriate) to writing. The Regions should seek to incorporate these written protocols into the State/EPA Enforcement Agreements.

The Region should do everything possible to work through the State agency on the issue of communicating with the State AG or other legal staff on potential EPA enforcement actions as well as other matters. However, if the State agency does not have a workable internal procedure and if problems persist, the Region, after advance notification and consultation with the State agency, may make arrangements for directly communicating with the State AG or other legal staff.

The Region and State agency should discuss how the outside legal organizations will be consulted on the commitments the State is making to EPA on addressing significant violators each year. These consultations are intended to clarify the legal enforcement support needed to accomplish these goals. This is particularly important for those State agencies dependent upon the State AG or other outside legal organizatio to implement their enforcement program.

State agencies are also encouraged to notify these organizations of the anticipated timing of the negotiations each year with EPA on the Enforcement Agreements, grants, and related documents.

Regions are encouraged to work with their State agencies to set up a joint meeting at least annually to which all parties are invited--the program and legal staffs of both the EPA Region and the State agency(s), plus U.S. Attorney staff and State AG staff--to review EPA's enforcement priorities and recent program guidance.

b. Federal Facilities

Federal facilities may involve a greater or different need for coordination, particularly where the Federal facilities request EPA technical assistance or where EPA is statutorily required to conduct inspections (e.g., under RCRA). The advance notification and consultation protocols in the State/EPA Enforcement Agreements should incorporate any of the types of special arrangements necessary for Federal facilities. The protocols should also address how the State will be involved in the review of Federal agency A-106 budget submissions, and include plans for a joint annual review of patterns of compliance problems at Federal facilities in the State.

c. Criminal Enforcement

Although the Policy Framework does not apply to the criminal enforcement program, to improve the coordination with States on criminal investigations and assist the States in their criminal enforcement efforts the Regions should discuss with States any affirmative plans for cross-referrals and cooperative criminal investigations. Such discussions should include the Special Agent in Charge and appropriate program staff familiar with criminal enforcement.

In cases where other States or jurisdictions may be directly and materially affected by the violation, i.e., environmental or public health impacts, EPA's Regional Offices should attempt to notify all of the States that are interested parties or are affected by the enforcement action through the communication channels established by the State agreements, working through the appropriate Regional Office. This notification process is particularly important for hazardous waste cases in which regulatees often operate across State boundaries.

Protocols for advance notification must be established with the understanding that each party will respect the other's need for confidentiality and discretion in regard to the information being shared, where it is appropriate. Continuing problems in this regard will be cause for exceptions to the basic principle of advance notification.

Many of our statutes or regulations already specify procedures for advance notification of the State. The State/Federal agreements are intended to supplement these minimum requirements.

2. Establishment of a Consultative Process

Advance notification is only an essential first step and should not be construed as the desired end result of these

State/Federal agreements. The processes established should be consultative and should be designed to achieve the following:

a. Inspections

Advance notice to States through sharing of lists of planned Federal inspections should be designed so that State and Federal agencies can properly coordinate the scheduling of site inspections and facilitate joint or multi-media inspections as appropriate. This should generally be done for all programs whether or not they are delegated, except for investigative inspections which would be jeopardized by this process.

b. Enforcement Actions

Federal and State officials must be able to keep one another current on the status of enforcement actions against noncomplying facilities. Regularly scheduled meetings or conference calls at which active and proposed cases and inspections are discussed may achieve these purposes.

3. Sharing Compliance and Enforcement Information

The Region and State should discuss the need for a process to share, as much as practicable, inspection results, monitoring reports, evidence, including testimony, where applicable for Federal and/or State enforcement proceedings. The Regions should also establish mechanisms for sharing with the States copies of reports generated with data submitted by the Regions and States, including comparative data -- other States in the Region and across Regions.

4. Dispute Resolution

The Region and State should agree in advance on a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instances of noncompliance. As stated in the policy on Performance-Based Assistance, the purpose in laying out a process by which issues can be surfaced quickly up the chain of command in both the Regions and States is to ensure that significant problems receive the prompt attention of managers capable of solving these problems expeditiously.

5. Publicizing Enforcement Activities

EPA has made commitments to account publicly for its compliance and enforcement programs. It is EPA's policy to publicize all judicial enforcement actions and significant administrative actions to both encourage compliance and serve as a deterrent to noncompliance.

While State philosophies on these matters may vary, the Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement.

Discussions should address how and when this coordination would take place. Regions should consult with the State on any enforcement related EPA press release or other media event which affects the State. To the extent possible, the State should be given an opportunity to join in the press release or press conference if it has been involved in the underlying enforcement action. Further, EPA generated press releases and public information reports should acknowledge and give credit to relevant State actions and accomplishments when appropriate.

6. Publicly Reported Performance Data

Regions should discuss with States mechanisms for ensuring the accuracy of data used to generate monthly, quarterly and/or annual reports on the status of State and Federal compliance and enforcement activities. Opportunities should be provided to verify the accuracy of the data with the States prior to transmittal to headquarters. Time constraints may be a real limitation on what can be accomplished, but it is important to establish appropriate checks and control points if we are to provide an accurate reflection of our mutual accomplishments. If there are no data accuracy concerns, these mechanisms may not be needed.

F. STATE REPORTING

This section reviews key reporting and recordkeeping requirements for management data and public reporting on compliance and enforcement program accomplishments. It also addresses related reporting considerations such as reporting frequency and quality assurance.

1. Overview

A strong and well managed national compliance and enforcement program needs reliable performance information on which to judge success and identify areas needing management attention. The following outlines the reporting and recordkeeping framework for monitoring enforcement and compliance program performance. The information will be used by the Agency's chief executives to manage EPA operations, and to convey our combined Federal and State performance record to others outside the Agency. This framework is limited in its application to information gathered for management purposes. It is not intended to apply to the environmental data and reporting on a source-by-source basis which is gathered routinely by the Agency from Regions and States under its source reporting programs and ongoing operations. The framework should serve as a stable guide to the national programs as they develop, in cooperation with the Regions and States, the measures and reporting requirements they will use to assess performance in implementing national compliance and enforcement programs.

Five measures of compliance and enforcement performance will be used for reporting purposes, identified in sequence below. The first two measure compliance results: (1) overall compliance rate for the regulated community; and (2) correction of the most significant violations. The Agency is working diligently to establish clear and reliable indicators for these two measures, recognizing the desirability of managing based as much as possible on results. While it is most desirable to find ways to ultimately examine the environmental benefits of compliance and enforcement actions, i.e., pollution levels reduced, this will not be accomplished in the near term.

The two compliance results measures are supplemented with three measures of enforcement activity: (3) inspection levels as an indicator of the reliability of compliance data and as an indicator of field presence for deterrence purposes; (4) formal administrative enforcement actions undertaken; and (5) judicial referrals and filed court cases, the latter two measures of enforcement activities both serving as indicators of enforcement strength and the will to enforce.

In addition to these five reporting requirements, the Agency is introducing two new areas of recordkeeping requirements to support general management oversight of the national enforcement effort: (1) success in meeting new management milestones for defining timely and appropriate enforcement action; and (2) the level of penalties assessed and collected. Records should be maintained by States and Regions for review during the course of the year and to support an assessment at the end of the year on how well the agencies have done and how appropriate performance expectations might best be defined.

2. Reported Measures of Performance

Programs and Regions should ensure the first five measures of performance are required to be reported on a quarterly basis:

a. Compliance levels can be measured according to several different approaches. National program guidance should describe the approach each has selected as most appropriate given the characteristics of its program and regulated community. Each program should, at a minimum, report full physical compliance rates and also distinguish where relevant in reporting compliance levels between final "physical" compliance (compliance with emissions limits) and "paper" compliance (violation of emissions limits but following a compliances schedule).

b. Progress in Returning Significant Violations to Compliance: Each program in putting together its guidance should specifically define what it measures as significant violations. Lists of significant violators should be compiled jointly by the Region and State. The Agency has two indicators of performance in this area: one is a static measure of progress against a beginning-of-year backlog of significant violators not yet brought into compliance. The second is a dynamic balance sheet which adds to the beginning-of-year inventory any new significant violators as they are found and keeps a running tally of those for which a formal enforcement action was taken, those which were brought into compliance, or those which remain, pending enforcement action.

Each program should also anticipate being required to set quarterly targets for reduction of its beginning-of-year backlog of significant violators. Targets will be set for States and Regions on the basis of either returning the violator to compliance or taking a formal enforcement action which will lead to expeditious physical (full) compliance. Reporting of progress against significant violations will be set on the basis of these same two categories of response. In developing its guidance, each program should specify the types of enforcement actions which qualify as having taken "a formal enforcement action."

Other potential enforcement management indicators, such as the deterrence effects of enforcement, the quality of enforcement actions, an extended compliance picture, and overall environmental results of enforcement actions, are longer term issues to be considered after the near-term issues are addressed.

5. Reporting Considerations

There are three areas for special consideration by the programs as they put together their guidance on reporting requirements:

a. Quality assurance and quality control of reported data is essential as these are the critical indicators of program performance which will be used in making program management decisions of priority, resource levels, and direction. This information must be as reliable as possible. Quality assurance and quality control of data encompasses three types of activities including: (1) setting up initial reporting procedures; (2) building in information review and confirmation loops; and (3) conducting routine audits and reviews of reports and reporting systems. Each program in preparing its guidance should describe the safeguards it uses in its reporting, review and confirmation procedures, and describe the audit protocols it will use to ensure the reliability of enforcement and compliance data.

b. The frequency of formal reporting should be done on a quarterly basis unless there is a specific performance problem in a State or compelling program need for more frequent (e.g., monthly) reporting, which may be necessary on an interim basis due either to their newness or their importance. A quarterly reporting frequency is designed for oversight purposes. It is not designed to provide for "real time" information, that is, instant access to information on the status of a case. However, it is anticipated that formal reporting will be supplemented with more frequent informal communications, such as monthly conference calls, between the Regions and States on the progress of key cases of concern.

c. Federal facility compliance data should be reported as part of each program's reporting measures and commitments. The Regions may also request States to provide additional information on Federal facilities compliance status, if needed, and if mutual agreement can be reached, as part of the Enforcement Agreements process.

a. Timeliness and appropriateness of State and Federal response to violations is the principal subject of new guidance being developed by each program. Administering agencies need to ensure that adequate tracking systems are in place to assess the timeliness and appropriateness of actions on an ongoing basis. Implementation of timely and appropriate criteria should also be closely monitored to ensure that sources subject to the guidance are properly identified and made part of the covered universe. The Program Offices, in conjuction with the Regions, are expected to report periodically on both EPA's and the States' performance in meeting the timely and appropriate criteria and to periodically reassess the criteria. As programs gain experience, they should consider whether "timeliness" should be measured quantitatively as a performance accountability measure or qualitatively through program audits.

b. Penalty programs are essential to the effective working of an environmental enforcement program. Sufficient documentation needs to be kept to enable the Region to evaluate whether the State obtained a penalty where appropriate, the State's rationale for the penalty, and, where appropriate, a calculation of any economic benefit of noncompliance gained by the violator. Records need to be kept of the number and amount of penalties issued by State and Federal program offices regularly assessing penalties, both those assessed and collected. These records and summary data should be available for review at the time of annual program audits and, in the event of information requests by external groups, on the extent of penalties assessed at any point in time. Each program office in preparing its guidance should specifically address the need for recordkeeping on penalties.

4. Future Improvements in Enforcement Management Information Systems

EPA is working to fill the gaps in its current enforcement management information and is developing a guide to State and national program managers in setting priorities for future design and development work on these systems.

In the near term, EPA is exploring ways to use the current management systems to better reinforce timely and appropriate enforcement response and follow-through on enforcement actions. EPA Program Offices, in consultation with Regions and States, should develop ways to better measure and report on timeliness of enforcement actions. The focus for follow-through will be on tracking compliance with EPA consent decrees and administrative orders. State follow-through will be part of general regional oversight.

c. Inspections are conducted for many purposes, including confirmation of compliance levels. Reporting on inspections has been a long standing practice. Regions and States should be asked to provide specific quarterly commitments and reporting on the number of inspections to be conducted. Where programs have broken down inspection reporting into different classes to reflect the different purposes, for example, sampling inspections, "walk-through," or records check inspections, this reporting is expected to continue. Each program, as it draws up its guidance, should be as clear and specific as possible in defining the different categories of inspection activity to be reported.

d. Formal administrative enforcement actions will be reported as the critical indicator of the level of administrative enforcement activity being carried on by environmental enforcement agencies. It is not our intention to provide a comprehensive reporting of all actions, both informal and formal, being taken to secure compliance. At the same time, it is recognized that there are many different informal techniques used which succeed in getting sources to return to compliance. What is sought here is a telling indicator which will keep reporting as clear cut and unburdensome as possible.

In preparing its guidance each program should list the specific actions to be included under this reporting area. Each program should be guided by the characteristics of a formal administrative action set forth in Section B on "Timely and Appropriate Enforcement Action." For programs without formal administrative authority, such as Drinking Water, other surrogate measures should be defined.

e. Judicial Actions is an area where there has been a long standing practice of Federal reporting with no corresponding State data. Commensurate with current reporting practices within EPA, the number of State civil referrals and filed cases will now be reported. We will also now include criminal judicial actions. These should be reported as a separate class and be counted only after they are filed in court in recognition of their sensitive nature.

3. Recordkeeping for Performance Measurement

There are two performance areas for which States and Regions will be asked to retain accessible records and summary data: (1) timeliness and appropriateness of response to violations; and (2) penalties. These categories of information will be considered for future development as measures for possible inclusion in the Agency's management and reporting systems.

APPENDIX A: ANNUAL PRIORITIES AND PROGRAM GUIDANCES

Annual Priorities for Implementing Agreements

FY 1985: Given the e[illegible]ty of the task in the first year, 3 priorities were established:

- defining expectations for timely and appropriate enforcement action;
- establishing protocols for advance notification and consultation; and
- reporting State data.

FY 1986: Building on the FY 1985 process, three areas were emphasized:

- expanding the scope of the agreements process to cover all delegable programs;
- adapting national guidance to State-specific circumstances; and
- ensuring a constructive process for reaching agreement.

FY 1987: Continuing to refine the approaches and working relationships with the States, three areas are to be emphasized:

- improving the implementation and monitoring of timely and appropriate enforcement response with particular emphasis on improving the use of penalty authorities;
- improving the involvement of State Attorneys General (or other appropriate legal staff) in the agreements process; and
- implementing the revised Federal Facilities Compliance Strategy.

APPENDIX A

EXISTING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS — Revised: 8/14/86

Cross-cutting National Guidance:
- Revised Policy Framework for State/Federal Enforcement Agreements—reissued 8/86
- Agency-wide Policy on Performance-Based Assistance—issued by Admin. 5/3 '85

NOTE: Underlining represents guidance still to be issued.

Water - NPDES	Drinking Water	Air	RCRA	FIFRA	Fed. Fac.
"National Guidance for Oversight of NPDES Programs FY 1987." (issued 4/18/86) Final Regulation-Definition of instances of non-compliance reported in QNCR. (8/26/85) QNCR Guidance (issued 3/86) Inspection Strategy and Guidance (issued 4/85) Revised EMS (Enforcement Management System) (issued 3/86) NPDES Federal Penalty Policy (issued 2/11/86) Strategy for issuance of NPDES minor permits (issued 2/86)	••"FY 85 Initiatives on Compliance Monitoring & Enforcement Oversight." 6/29/84 ••"Final Guidance on PWS Grant Program Implementation" (3/20/84) •Regs - NIPDWR, 40CFR Part 141 and 142. •DW annual Reporting Requirements - "Guidance for PWSS Program Reporting Requirements" 7/9/84 ••"FY's 85-86 Strategy for Eliminating Persistent Violations at Community Water Systems." Memo from Paul Baltay 3/18/85. •Guidance for the Development of FY 86 PWSS State Program Plans and Enforcement Agreements" (issued 7/3/85)	••"Guidance on Timely & Appropriate"... for Significant Air Violators." 6/28/84 ••"Timely and Approp. Enforcement Response Guidance" 4/11/86 •National Air Audit System Guidelines for FY 1986. (issued 2/86) ••"Guidance on Federally-Reportable Violations." 4/11/86 •Inspection Frequency Guidance (issued 3/19/85 and reissued 6/11/86) ••"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)	••"Interim National Criteria for a Quality Hazardous Waste Management Program under RCRA." (reissued 6/86) ••"RCRA Penalty Policy" 5/8/84 •FY 1987 "RCRA Implementation Plan" (reissued 5/19/86) ••"RCRA Enforcement Response Policy" (issued 12/21/84) (to be revised by 12/86) ••"Compliance and Enforcement Program Descriptions in Final Authorization Application and State Enforcement Strategies," memo from Lee Thomas to RAs. (issued 6/12/84)	•Final FY 87 Enforcement & Certification Grant Guidance (issued 4/18/86) •Interpretative Rule - FIFRA State Primacy Enforcement Responsibilities. 40 FR Part 17 1/5/83.	•FF Compliance Strategy (to be issued 10/86) •FF Prog. Manual for Implementing CERCLA Responsibilities of Federal Agencies (draft/85: to be issued in final after CERCLA reauthorization)

NPDES	DRINKING WATER	AIR	RCRA	FIFRA	FED FAC
	•Guidance on FY 86 UIC Enforcement Agreements" ICRG #40 (issued 6/28/85) •"FY 87 SPMS & OMAS Targets for the PWSS Program" (SNC definition) (issued 7/10/86) •Guidance on FY 87 UIC Enforcement Agreements (Draft issued 7/1/86) •Guidance on FY 87 PWSS Enforcement Agreements (issued 8/8/86) •Guidance on Use of AO Authority under SDWA Amendments (to be issued pending legislation)	•"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	•Compliance Monitoring & Enforcement Log - form for recording monthly compliance data from States & Regions. •Technical Enforcement Guidance on Ground Water Monitoring (Interim Final Aug. 1985) •Compliance order Guidance for Ground Water Monitoring (issued Aug. 85) •Loss of Interim Status Guidance (issued Aug. 85)		

EPA POLICY ON IMPLEMENTING NATIONALLY MANAGED OR COORDINATED ENFORCEMENT ACTIONS

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A. Criteria for Nationally Managed or Coordinated Enforcement Cases

Most enforcement cases are handled at the state, local or EPA regional level for reasons of efficiency and effectiveness and because of the primary role that States and local governments have in enforcement under most of the major environmental statutes. The Policy Framework identifies several instances in which direct enforcement actions may be taken by EPA, which in most instances will be handled by EPA Regions pursuant to the State/EPA Enforcement "Agreements." However, some of those cases may most appropriately be managed or coordinated at the national level by EPA Headquarters.

In addition to instances in which an EPA Region requests Headquarters assistance or lead in an enforcement case, these "national" cases will usually arise within the context of three of the criteria for direct EPA action mentioned in the Policy Framework:

-- National Precedent (legal or program precedent): the degree to which the case is one of first impression in law or the decision is fundamental to establishing a basic element of the national compliance and enforcement program. This is particularly important for early enforcement cases under a new program or issues that affect implementation of the program on a national basis.

-- Repeat Patterns of Violations and Violators: the degree to which there are significant patterns of repeat violations at a given facility or type of source or patterns of violations within multi-facility regulated entities. The latter is of particular concern where the noncompliance is a matter of national (e.g., corporate) policy or the lack of sound environmental management policies and practices at a national

*Issued by the Assistant Administrator for the Office of Enforcement and Compliance Monitoring on 1/4/85

level which can best be remedied through settlement provisions which affect such national policies and practices.

-- Interstate Issues (multiple States or Regions): the degree to which a case may cross regional or state boundaries and requires a consistent approach. This is particularly important where there may be a potential for interregional transfers of pollution problems and the case will present such issues when EPA Regions or States are defining enforcement remedies.

EPA's response to any of these circumstances can range from increased headquarters oversight and legal or technical assistance, to close coordination of State and Regional enforcement actions, to direct management of the case by Headquarters.

There are essentially two types of "National" cases. A nationally managed case is one in which EPA Headquarters has the responsibility for the legal and/or technical development and management of the case(s) from the time the determination is made that the case(s) should be nationally managed in accordance with the criteria and process set forth in this policy. A nationally coordinated case(s) is one which preserves responsibility for lead legal and technical development and management of the cases within the respective EPA regions and/or state or local governments. This is subject, however, to the oversight, coordination and management by a lead Headquarters attorney and/or program staff on issues of national or programmatic scope to ensure that all of the cases within the scope of the nationally coordinated case are resolved to achieve the same or compatible results in furtherance of EPA's national program and enforcement goals.

Section C below describes more fully the roles and relationships of EPA headquarters, regional, and state personnel, both legal and technical, in either nationally managed or nationally coordinated cases.

There are several factors to apply to assess whether, in addition to the normal Headquarters oversight, a case should be handled as: (1) nationally managed; or (2) nationally coordinated. None of these factors may necessarily be sufficient in themselves but should be viewed as a whole. These factors will include:

-- availability or most efficient use of State or EPA Regional or Headquarters resources.

-- ability of the agency to affect the outcome through alternative means. One example is issuance of timely policy guidance which would enable the States, local governments or EPA Regions to establish the appropriate precedent through independent action.

-- favorable venue considerations.

-- environmental results which could be achieved through discrete versus concerted and coordinated action, such as potential for affecting overall corporate environmental practice

-- location of government legal and technical expertise at EPA Headquarters or in the Regions, recognizing that expertise frequently can be tapped and arrangements made to make expertise available where needed.

To the extent possible, where cases warrant close national attention, EPA Headquarters will coordinate rather than directly manage the case on a national basis thereby enabling Regions and States to better reflect facility-specific enforcement considerations.

B. Process for Identifying Nationally-Managed or Coordinated Cases -- Roles and Responsibilities

EPA recognizes the importance of anticipating the need for nationally managed or coordinated cases to help strengthen our national enforcement presence; and of widely sharing information both on patterns of violations and violators and on legal and program precedent with EPA Regions and States. To do this:

Headquarters program offices, in cooperation with the Office of Enforcement and Compliance Monitoring should use the Agency's strategic planning process to help identify upcoming enforcement cases of national precedence and importance. They also should develop and disseminate to Regions information on anticipated or likely patterns or sources of violations for specific industries and types of facilities.

Regional offices are responsible for raising to Headquarters situations which pose significant legal or program precedent or those in which patterns of violations are occurring or which are likely to be generic industry-wide or company-wide which would make national case management or coordination particularly effective.

State and local officials are encouraged to raise to EPA Regional Offices situations identified above which would make national case management or coordination particularly effective.

Whether a case will be managed or coordinated at the national level will be decided by the Assistant Administrator for Enforcement and Compliance Monitoring after full consultation with the affected program Assistant Administrators, Regional Administrators and state or local governments in what is intended to be a consensus building process. There will be a full discussion among all of the parties of all of

the ramifications for the program and a review of all of the important criteria involved in the decision. In the event of a lack of consensus as to whether the case should be managed or coordinated at the national level, the AA for OECM shall make the determination, with an opportunity for a hearing and timely appeal to the Administrator or Deputy Administrator by the Regional or other EPA Assistant Administrator.

The Regions will be responsible for communicating with any affected States using mechanisms established in the State/EPA Enforcement "Agreements," to raise the possibility of national case management or coordination and to ensure that timely information on the status of any independent state, local or regional enforcement actions can and would be factored into the decisions regarding: (1) whether to manage the case nationally; (2) whether to coordinate the case nationally; (3) what legal and technical assistance might be provided in a State lead case; and (4) what facilities to include in the action.

C. Case Development -- Roles and Responsibilities

Nationally managed cases are those that are managed out of EPA Headquarters with a lead headquarters enforcement attorney and a designated lead headquarters program contact. Notwithstanding headquarters lead, in most instances, timely and responsive Regional office legal and technical support and assistance is expected in developing and managing the case. In these instances, the Regions will receive credit for a case referral (on a facility basis) for this effort. The decision on the extent of Regional office involvement and case referral credit will be made at the time of decision that the case should be nationally managed. Regions which play a significant role in the development and/or prosecution of a case will be involved in the decision-making process in any case settlement proceedings and the Regional Administrator will have the opportunity to formally concur in any settlement.

Nationally coordinated cases are those that are coordinated out of EPA Headquarters with lead regional and/or state or local attorneys and associated program office staff. The headquarters attorney assigned to the case(s) and designated headquarters program office contact have clear responsibility for ensuring national issues involved in the case which require national coordination are clearly identified and developed and in coordinating the facility-specific actions of the regional offices to ensure that the remedies and policies applied are consistent. This goes beyond the normal headquarters oversight role. The headquarters officials have both a facilitator role in coordinating information exchange and a policy role in influencing the outcome for the identified issues of national concern.

Whether a case is nationally managed or nationally coordinated, as a general rule if EPA is managing a case, States will be invited to participate fully in case development and to formally join in the proceedings if they so desire by attending meetings and planning sessions. States will be consulted on settlement decisions but will be asked to formally concur in the settlement only if they are parties to the litigation.

On a case-by-case basis, the National Enforcement and Investigations Center (NEIC) may be asked to play a role in either type of national case to coordinate evidence gathering, provide needed consistency in technical case development and policy, witnesses and chain of custody, and/or to monitor consent decree compliance.

D. Press Releases and Major Communications

A communications plan should be developed at an early stage in the process. This should ensure that all of the participating parties have an opportunity to communicate their role in the case and its outcome. Most important, the communications plan should ensure that the essential message from the case, e.g., the anticipated precedents, gets sufficient public attention to serve as a deterrent for potential future violations.

All regional and state co-plaintiffs will be able to issue their own regional, state-specific or joint press releases regarding the case. However, the timing of those releases should be coordinated so that they are released simultaneously, if possible.

It is particularly important that the agencies get maximum benefit from the deterrent effect of these significant national cases through such mechanisms as:

-- more detailed press releases to trade publications i.e., with background information and questions and answers
-- development of articles
-- interviews with press for development of more in-depth reporting
-- press conferences
-- meetings with public/environmental groups -- including meetings on the settlement of national cases which have generated intense local or national interest
-- speeches before industry groups about actions
-- communications with congressional committees

Appendix C

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

OCT 30 1985

OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Division of Penalties with State and Local Governments

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

TO: Regional Administrators
Associate Enforcement Counsels
Program Enforcement Division Directors
Regional Counsels

This memorandum provides guidance to Agency enforcement attorneys on the division of civil penalties with state and local governments, when appropriate. In his "Policy Framework for State/EPA Enforcement Agreements" of June 26, 1984, Deputy Administrator Al Alm stated that the EPA should arrange for penalties to accrue to states where permitted by law. This statement generated a number of inquiries from states and from the Regions. Both the states and the Regions were particularly interested in what factors EPA would consider in dividing penalties with state and local governments. In addition, the issue was raised in two recent cases, U.S. v Jones & Laughlin (N.D. Ohio) and U.S. v Georgia Pacific Corporation (M.D. La.). In each case, a state or local governmental entity requested a significant portion of the involved penalty. Consequently, OECM and DOJ jointly concluded that this policy was needed.

EPA generally encourages state and local participation in federal environmental enforcement actions. State and local entities may share in civil penalties that result from their participation, to the extent that penalty division is permitted by federal, state and local law, and is appropriate under the circumstances of the individual case. Penalty division advances federal enforcement goals by:

1) encouraging states to develop and maintain active enforcement programs, and

2) enhancing federal/state cooperation in environmental enforcement.

However, penalty division should be approached cautiously because of certain inherent concerns, including:

1) increased complexity in negotiations among the various parties, and the accompanying potential for federal/state disagreement over penalty division; and

2) compliance with the Miscellaneous Receipts Act, 31 U.S.C. §3302, which requires that funds properly payable to the United States must be paid to the U.S. Treasury. Thus any agreement on the division of penalties must be completed prior to issuance of and incorporated into a consent decree.

As in any other court-ordered assessment of penalties under the statutes administered by EPA, advance coordination and approval of penalty divisions with the Department of Justice is required. Similarly, the Department of Justice will not agree to any penalty divisions without my advance concurrence or that of my designee. In accordance with current Agency policy, advance copies of all consent decrees, including those involving penalty divisions, should be forwarded to the appropriate Associate Enforcement Counsel for review prior to commencemen of negotiations.

The following factors should be considered in deciding if penalty division is appropriate:

1) The state or local government must have an independent claim under federal or state law that supports its entitlement to civil penalties. If the entire basis of the litigation is the federal enforcement action, then the entire penalty would be due to the federal government.

2) The state or local government must have the authority to seek civil penalties. If a state or local government is authorized to seek only limited civil penalties, it is ineligible to share in penalties beyond its statutory limit.

3) The state or local government must have participated actively in prosecuting the case. For example, the state or local government must have filed complaints and pleadings, asserted claims for penalties and been actively involved in both litigating the case and any negotiations that took place pursuant to the enforcement action.

4) For contempt actions, the state or local government must have participated in the underlying action giving rise to the contempt action, been a signatory to the underlying consent decree, participated in the contempt action by filing pleadings asserting claims for penalties, and been actively involved in both litigating the case and any negotiations connected with that proceeding.1/

The penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality. Penalty division may be accomplished more readily if specific tasks are assigned to particular entities during the course of the litigation. But in all events, the division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties. Penalty division should not take place until the end of settlement negotiation. The subject of penalty division is a matter for discussion among the governmental plaintiffs. It is inappropriate for the defendant to participate in such discussions.

cc: F. Henry Habicht II, Assistant Attorney General
Land and Natural Resources Division

1/ If the consent decree contains stipulated penalties and specifies how they are to be divided, the government will abide by those terms.

EXISTING OR PLANNED NATIONAL GUIDANCE AFFECTING STATE/EPA ENFORCEMENT AGREEMENTS PROCESS Revi 11 3/23/87

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- 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.

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