



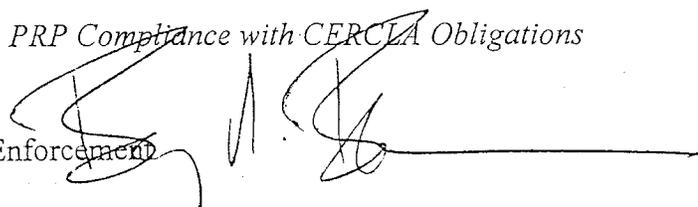
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

SEP 28 2000

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

**SUBJECT:** Transmittal of Final Report: *PRP Compliance with CERCLA Obligations*

**FROM:** Barry N. Breen, Director  
Office of Site Remediation Enforcement 

**TO:** Director, Office of Site Remediation and Restoration, Region I  
Director, Emergency and Remedial Response Division, Region II  
Director, Hazardous Site Cleanup Division, Region III  
Director, Waste Management Division, Region IV  
Director, Superfund Division, Regions V, VI, VII, and IX  
Assistant Regional Administrator, Office of Ecosystems Protection  
and Remediation, Regions VIII  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship, Region I  
Regional Counsel, Regions II, III, IV, V, VI, VII, IX and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and  
Environmental Justice, Region VIII

Attached is the final report summarizing the findings of efforts to assess potentially responsible party (PRP) compliance with EPA's active orders and settlement agreements for CERCLA studies, response work and cost recovery.

While the assessment found that PRPs are reportedly in general compliance with more than 90% of active CERCLA instruments, it is critical that Regional Superfund programs and enforcement offices focus on identifying instances of non-compliance and taking appropriate action to address non-compliance in a timely manner.

We greatly appreciate the efforts of the regional personnel that contributed to this assessment. If you have questions regarding this report, please contact Nancy Browne at 202-564-4219.

Attachment

cc: Office of Regional Counsel Branch Chiefs, Regions I-X  
Fred Stiehl, Director, Enforcement Planning, Targeting and Data Division,  
Office of Compliance

# PRP COMPLIANCE WITH CERCLA OBLIGATIONS

## *Project Report*

### SUMMARY

In November 1998, the Office of Site Remediation Enforcement (OSRE) announced an effort to assess compliance by Potentially Responsible Parties (PRPs) with EPA's active orders and settlement agreements for CERCLA studies, response work and cost recovery. The effort was intended to determine if PRPs meet their commitments in a timely and satisfactory manner.

The assessment found that PRPs are reportedly in general compliance with more than 90% of active CERCLA instruments, with most of the Regions reporting a 3-7% rate of substantial non-compliance (SNC). Regions reported that approximately 1,700 CERCLA instruments were "active", and of these approximately 125 (7%) had instances of SNC during the assessment period.

In addition, the assessment revealed that SNC occurred at a significantly higher rate for unilateral administrative orders (UAOs) than for consensual agreements. Most instances of SNC were associated with UAOs for work or studies, followed (in descending order) by administrative orders on consent (AOCs) for work or studies, consent decrees for work, and settlements for cost recovery only.

Although data collection and verification efforts were extensive, and OSRE believes that this report represents the best data available to assess PRP compliance, we acknowledge that the data relied on for this analysis have some limitations.

## **I. INTRODUCTION**

In November 1998, OSRE announced an effort to assess compliance by PRPs with EPA's active orders and settlement agreements for CERCLA studies, response work and cost recovery. *See Appendix 1.* Historically, EPA has focused on securing PRPs' commitment to conduct and/or finance cleanups. From the inception of the Superfund program through FY 1999, EPA obtained agreements from PRPs to conduct more than \$13.5 billion worth of cleanup work and to reimburse nearly \$2.7 billion to the Trust Fund. The effort announced in November 1998 was intended to examine if PRPs met their commitments in a timely and satisfactory manner.

The Agency began designing this compliance assessment effort in November 1997. With significant Regional input, OSRE analyzed and resolved numerous issues relating to the project's design before launching the effort in November 1998. Design work included analyzing currently available data, determining the scope of the analysis (*e.g.*, NPL/non-NPL, work obligations/all obligations), defining substantial non-compliance, and developing an approach to identify communities that might have environmental justice concerns.

Section II of this report describes the methodology used to conduct this assessment. Section III discusses the analysis of the data collected as part of this effort. Section IV sets forth several findings made as a result of this effort. The final section provides recommendations for next steps. This is followed by two appendices containing relevant documents.

## **II. METHODOLOGY**

This section describes how this compliance assessment was undertaken. The specific methodology was initially set forth in OSRE Director Barry Breen's 11/3/98 memorandum (*see Appendix 1*). The project was broken down into two phases, described below.

### **A. Phase One**

The first phase, the "compliance assessment," called for the Regions to: (1) identify all "active" EPA orders, consent decrees and agreements ("instruments"); (2) identify from among these active instruments those with PRP acts or omissions that constituted "substantial noncompliance" on or after 10/1/97 to 11/3/98; and (3) identify from these recent instances of substantial noncompliance, those sites in potential environmental justice ("potential EJ") communities, in Indian country, or in tribal areas in Alaska. Regions were asked to provide their compliance assessments in January 1999.

To implement this first phase, definitions for four key terms were developed:

**Active:** All instruments requiring any further work or payment by PRPs, including studies, design, cleanup or monitoring or PRP payment of response or oversight costs. The only obligation explicitly excluded from the definition was record retention.

**Instruments:** All consent decrees and administrative orders (unilateral and consent) containing obligations for CERCLA studies, response work or cost recovery. The definition excluded federal facility agreements under CERCLA § 120, but did include other types of CERCLA settlements with federal agencies (*e.g.*, cashouts). Court judgements and access-only UAOs were excluded.

**Substantial Noncompliance (SNC):** Any noncompliance that: exacerbates a release or threatened release of a hazardous substance; significantly deviates from the terms of the settlement, order or agreement; represents a pattern of recalcitrance or chronic violation; and/or is deemed by the Region to be substantial for other reasons.

**Potential EJ:** To classify a community as an EJ community, EPA typically considers: 1) the demographics of the particular community, and 2) whether the community is suffering a disproportionate impact from pollution. To avoid the resources needed and difficulties associated with making the requisite finding for the second prong, EPA limited the definition to race and income demographics for this project. The word “potential” was used to indicate that a final determination of EJ status may not yet have been made, but based on certain demographics, the site potentially might be located in an EJ community. Each Region was to use its own pre-existing EJ policy for identifying the relevant demographic levels.<sup>1</sup>

Regions used a variety of approaches and sources to gather the requested data. Nearly all Regions relied on CERCLIS/Wastlan<sup>2</sup> and a few consulted the Docket database. To supplement this data, most Regions interviewed attorneys and RPMs to determine the compliance status of active instruments. Some Regions conducted file reviews. In Regions 3, 4, 5, 7, 8 and 10, managers were extensively involved in gathering and reviewing the data. OSRE staff

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<sup>1</sup> The definition of “Indian country” is codified at 18 U.S.C. § 1151. For a discussion of “tribal areas in Alaska”, see pp. 45-46 of EPA’s July 1998 resource guide on working effectively with tribal governments.

<sup>2</sup> CERCLIS/Wastlan is EPA’s database for CERCLA program and enforcement information.

interviewed Regional personnel in an attempt to ensure that all relevant types of instruments had been considered. OSRE staff also conducted limited quality control checks of the data provided by the Regions (*e.g.*, by comparing the number of active instruments reported by a Region to the data available for that Region in the CERCLIS database).

### B. Phase Two

The “enforcement plan and report” phase of the project called for the Regions to submit descriptions of the recent instances of SNC they identified. Where action had already been taken to address the SNC, descriptions of such actions (*e.g.*, issuance of NOV, assessment of stipulated penalty) and their effect were requested. For cases where a Region had not yet taken action or was planning additional action, Regions were asked to submit their plans for future steps.

OSRE staff subsequently interviewed Regional contacts about specific SNC instances to clarify the information provided in the enforcement plans and reports. OSRE staff also analyzed the data for SNC and enforcement response trends and the effectiveness of various response actions. The results of this analysis are discussed in the next section.

## III. ANALYSIS

### A. Active Instruments

The Regions reported approximately 1,700 active instruments.

**Table 1: Number of Active CERCLA Instruments and Affected Sites**

Region	1	2	3	4	5	6	7	8	9	10	Total
# Active Instruments <sup>3</sup>	62	162	219	149	546	154	80	124	103	100	1699
# Active & Closed Instruments (CERCLIS) <sup>4</sup>	414	682	781	650	919	267	519	448	319	242	5241
% of Instruments considered Active	15%	24%	28%	23%	59%	58%	15%	28%	32%	41%	32%
# Sites associated w/ Active Instruments	47	114	132	134	~296	~56	66	~47	62	~43	~997

<sup>3</sup> This applies to active orders and settlement agreements (CDs, AOCs, UAOs) for CERCLA studies, response work and cost recovery.

<sup>4</sup> This row reports the number in CERCLIS for all enforcement instruments, both active and closed. Report pull date: 2/17/99.

As shown in Table 1, Region 5 (R5) reported 546 active instruments. This is more than double the next highest reported figure (219). While R5 was expected to report a high figure given its large number of sites, its large size alone does not explain the disparity. It is likely that, as a result of prior efforts, R5 had accumulated significant experience in identifying active instruments, and, unlike the other Regions, had already done an initial "scrubbing" of its data at the time of this assessment. Indeed, in its first attempt at identifying all its active instruments, R5 omitted many sites where the only remaining PRP obligation was to conduct O&M. Subsequent inclusion of those instruments increased R5's total number of active instruments. It is possible that other Regions similarly did not include such sites/instruments in their initial data collection attempts, and as a result, the number of active instruments reported for this assessment may be understated.

In an attempt to analyze the active instruments disparity between R5 and the other Regions, OSRE compared the number of active instruments reported by the Regions for this exercise with the numbers of all instruments reported in CERCLIS (CERCLIS does not distinguish between active and inactive instruments). As illustrated in Table 1, CERCLIS shows 919 total instruments for R5. The Region reported 546 active instruments for this exercise, a figure arrived at after several rounds of thorough analysis, resulting in R5 showing that roughly 60% of all the instruments that it ever negotiated or issued were still active. By comparison, seven other Regions reported figures suggesting only 15-32% of all their instruments were still active.

Regional personnel confirmed that they initially applied the "active" definition too narrowly in some cases. For example, one Region stated that it may have missed instruments where the only remaining PRP obligation involved O&M. Another Region reported that it had difficulty identifying all instruments with active work obligations; its reported figure stemmed largely from a list of instruments with unresolved payment obligations. Most of the other Regions, however, reported that they did not have any problems interpreting the "active" definition.

In a further attempt to analyze the active instrument disparity between R5 and the other Regions, OSRE compared the number of sites covered by the active instruments. As shown in Table 1, the results of the analysis were similar to above: R5 reported that approximately 296 sites were covered by active instruments, more than double the next highest number of 132. This comparison further indicates that the total number of active instruments was probably understated.

Yet another indication of more active instruments is shown in Table 2. EPA is tracking 530 CERCLA accounts receivable that, as of April 2000, were more than 120 days overdue.<sup>5</sup> This 530 figure cannot be directly compared with the 1,700 figure of reported active instruments. However,

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<sup>5</sup>A Superfund account receivable is established each time EPA issues a bill for payment (e.g., a bill for oversight costs or stipulated penalties) or when specific costs are agreed to be paid within a CD or AOC (e.g., past or future costs, penalties). The account is closed upon full payment of the amount owed or when a decision document authorizing the debt write-off is finalized. Regions have been asked to review and update the information in the IFMS system to accurately reflect the current status on these accounts.

based on Regional interviews, at least some of the 530 accounts receivable arise from active instruments that apparently are not included in the 1,700 instruments figure. (See Section III.B.3.b)

**Table 2: CERCLA Accounts Receivable Greater Than 120 Days Past Due**

Region	1	2	3	4	5	6	7	8	9	10	Total
Accounts receivable overdue >120 days	64	36	78	77	153	27	14	35	30	16	530

This analysis demonstrates that the 1,700 active instruments figure is likely understated. The sample size, however, while not 100%, is sufficiently large to draw conclusions.

## B. Recent instances of SNC

### 1. Number of recent instances of SNC and Regional Distribution

As shown in Table 3, the Regions reported approximately 125 instances of SNC for 1,699 active instruments, with numbers of SNCs varying widely across the Regions (from 0 to 43).<sup>6</sup> Most of the Regions reported a SNC rate in the range of 3% - 7%.

**Table 3: Rate of Substantial Noncompliance**

Region	1	2	3	4	5	6	7	8	9	10	Total
# Active instruments	62	162	219	149	546	154	80	124	103	100	1699
Instruments with SNC	0	8	15	6	31	4	1	43	11	6	125
Rate of SNC	0%	5%	7%	4%	6%	3%	1%	35%	11%	6%	7%

At the low end were SNC rates of 0% and 1% for the two Regions that also reported the lowest number of active instruments. If they had reported even one or two additional instances of SNC, they would have been in the same SNC rate range as the majority of the other Regions. At the high end were SNC rates of 11% and 35%. The 11% rate is not greatly disproportionate to the

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<sup>6</sup> Regions identified 125 instances of SNC. However, some instruments for which SNCs were identified contained both work/study and payment obligations. This overlap explains why Table 5 (work/study obligations) and Table 6 (payment obligations) each reflect 65 instances of SNC, totaling 130, rather than 125.

other Regions' 3-7% range. The 35% rate is partly explained by 31 of that Region's recent instances of SNC involving noncompliance with payment provisions of agreements or orders related to only two sites (see Table 6 and footnote 11). Without these two sites, this Region's SNC rate would decrease from 35% to 13%.

## 2. Type of instrument that was violated

(a) UAOs versus settlements: The Regions identified the type of instrument (e.g., AOC, CD, UAO) for the recent instances of SNC. As shown in Table 4, most of the SNCs were associated with UAOs: 64 out of 124 (52%). To draw a conclusion about whether SNC generally occurred at a different rate with UAOs than it did with settlements, the universe of active UAOs and the number of active settlements is needed. Because this data is not available, information on the total numbers of UAOs and settlements (both active and inactive) was used as a rough proxy for the analysis. As of September 1999, EPA had issued approximately 1,500 UAOs and negotiated roughly 3,500 settlements (consent decrees, administrative orders on consent, etc.) under CERCLA.<sup>7</sup> Although there were more than twice as many settlements than UAOs, the majority of SNC instances were associated with UAOs, not settlements. Assuming that the distribution of instruments to date is representative of the recent distribution, we can conclude that SNC occurs at a higher rate for UAOs than for settlements.

(b) Types of instruments/response action: As shown in Tables 4 and 5, the 125 recent instances of SNC arose from a variety of enforcement instruments covering different types of response actions.

**Table 4: Types of Instruments associated with Recent Instances of SNC**

Type of instrument	UAO for work/study/pymt	AOC for work/pymt	CD for work/pymt	AOC for cost rec. only	CD for cost rec. only	Total
Recent SNC instances	64 (52%)	34 (27%)	13 (10%)	8 (6%)	5 (4%)	124* (100%)

\* One R8 SNC remains unidentified by category.

<sup>7</sup> The settlement figure is based on an ENFR-03 report dated 9/7/99. Subtracting from the 4,859 total the 1,340 judgements, voluntary administrative arrangements, and UAOs where respondents notified EPA that they intended to comply left a figure of 3,519 settlements reached in the CERCLA program to date. The UAO figure (1,497) is from an ENFR-25 report, also dated 9/7/99.

### 3. Type of Violation

(a) Violations of work obligations: Half of the recent instances of reported SNC (65) involved work or study obligations. As shown in Table 5, a breakout of the 65 recent instances of SNC involving work/study obligations reveals that the majority involve UAOs, not settlements.

**Table 5: Types of Instrument for Recent Instances of SNC involving Work/Study Obligations**

Region	1	2	3	4	5	6	7	8	9	10	Total
<b>Work/study SNCs<sup>8</sup></b>	0	8	11	4	20	1	1	7	7	6	65
<b>Instrument</b>											
-- UAOs	-	7	9	3	17	1	1	7	6	2	53
-- AOCs	-	1	1	1	2	-	-	-	1	3	9
-- CD's	-	-	1	-	1	-	-	-	-	1	3

(b) Violations of payment obligations: As Table 6 shows, Regions reported 65 SNCs involving payment obligations. This is in contrast to IFMS data showing 530 CERCLA accounts receivable 120 days overdue. While there are many reasons that the 530 figure may be too high, it appears that violations of payment obligations as recent instances of SNC were under-counted. OSRE is working with the Regions and the Financial Management Division to accurately identify the scope of current CERCLA payment obligations ("accounts receivable").<sup>9</sup> Efforts continue to determine, confirm and accurately maintain the status of all outstanding receivables, including late payments, payments in dispute, payments referred to the Department of Justice (DOJ), bankruptcies, fines and penalties. More recently, EPA is focusing on the collection of these receivables.<sup>10</sup>

<sup>8</sup> The Regions reported very few violations of PRPs reporting obligations. As a result, for purposes of this report, reporting obligations have been folded into "work/study" obligations.

<sup>9</sup> Memorandum from Jack Shipley, FMD and Linda Boornazian, OSRE, "Superfund Accounts Receivable Collections", 7/26/99.

<sup>10</sup> Memorandum from Sandra Connors, OSRE and Juliette McNeil, FMD, "Delinquent Accounts Receivable: Interim Guidance on the Referral Process and Timing for Collection of Delinquent Debts Arising Under Superfund Judicial or Administrative Settlements", 4/6/00.

**Table 6: Types of Instruments for Recent Instances of SNC involving Payment Obligations**

Region	1	2	3	4	5	6	7	8	9	10	Total
Payment SNCs	-	-	4	3	12	3	-	38 <sup>11</sup>	4	1	65
<b>Instrument</b>											
- CDs	-	-		2	3	-	-	6	3	-	14
- AOCs	-	-		1	4	3	-	26	1	-	39
- UAOs	-	-		-	5	-	-	6	-	1	12

#### 4. Action(s) taken or planned in response to SNC

As a result of significant uncertainties with the data collected on the type of enforcement action(s) taken (or planned to be taken) *in response* to instances of SNC during the assessment period, and with the data on the *effect* of any enforcement action, OSRE was unable to draw any conclusions regarding the effectiveness of various response actions.

Regions reported that they have already taken some action to address the vast majority of the instances of SNC they identified. In many cases, Regions called the violator or held a meeting to discuss the noncompliance with possible plans to undertake a more significant action (*e.g.*, preparation of a referral to DOJ) in the future. The Regions reported transmitting 14 penalty referrals to DOJ in connection with the 125 instances of SNC identified in this assessment. In a few cases, Regions did not report any action; OSRE will continue to follow-up with the Regions on SNCs where no action was reported. In this regard, recent guidance from OSRE provides time frames and processes for referring overdue payments to DOJ for collection. (See footnote 10.)

#### C. Potential EJ communities; Indian country; Tribal areas in Alaska

Regional personnel reported that they generally did not have difficulty in making judgements regarding whether a site with a SNC was located in an EJ/IC/TAA community using the approach outlined in the Breen 11/3/98 memorandum. Regions 3, 5 and 7 went further than requested and identified the potential EJ status for all of their active instruments, not just those associated with recent instances of SNC. R6 and R10 also went beyond the request and identified the potential EJ/IC/TAA status for some of the active instruments not associated with recent instances of SNC.

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<sup>11</sup> R8 reports that the majority of these SNC instances involve noncompliance with payment provisions of various agreements or orders related to the Anaconda Smelter (13 SNCs) and Silver Bow Creek (18 SNCs) sites.

As shown in Table 7, roughly 36% of the recent instances of SNC involving work/study obligations (23 out of 65) were in potential EJ/IC/TAA areas. We do not know whether this 36% figure is disproportionate (*i.e.*, whether there is a disproportionate incidence of noncompliance in potential EJ/IC/TAA locales compared to other areas) because we do not have EJ/IC/TAA information on all Superfund sites for comparison.

**Table 7: Recent instances of SNC involving Work/Study Obligations in Potential EJ Areas**

Region	1	2	3	4	5	6	7	8	9	10	Total
Work/study SNCs	0	8	11	4	20	1	1	7	7	6	65
# of SNCs in potential EJ	n/a	5	4	2	7	1	0	0	0	4	23

#### IV. FINDINGS

- A. Although the total universe of active instruments is likely understated, the sample provided is sufficiently large to inform some conclusions.
- B. Regions reported a wide range of numbers (from 0 to 43) for recent instances of SNC. Most of the Regions reported an SNC rate of 3-7%. In total, PRPs were reportedly in general compliance with more than 90% of active CERCLA instruments during the time relevant to this assessment.
- C. The additional SNC analysis done in R5 justify using the R5 work obligation violation SNC rate as a reference point. Using this reference point, the SNC rates reported by most other Regions for work obligations was consistent, and we conclude that the reported SNC *rate* for work obligations was not understated
- D. Based on information from other Agency reporting systems, the payment obligation violation rate appears understated. OSRE and the Financial Management Division are currently taking steps to address both the violations and the data accuracy.
- E. Substantial noncompliance occurred at a higher rate for UAOs than for settlements.
- F. Most instances of SNC were associated with UAOs for work or studies, followed (in descending order) by AOCs for work or studies, consent decrees for work, and finally settlements for cost recovery only.

- G. Approximately half of the recent instances of SNC involved work/study obligations; the other half involved payment obligations.
- H. EPA does not currently have sufficient information to make a finding on whether there was a disproportionate incidence of PRP noncompliance with instruments relating to sites located in potential EJ/IC/TAA communities.

**V. RECOMMENDATIONS**

- A. EPA should continue its emphasis on addressing PRP noncompliance with payment obligations. Regions should continue to update the information in IFMS to accurately reflect the current status on overdue accounts receivable. In addition, EPA and DOJ should continue the ongoing initiative on collections for these receivables. EPA should work to ensure that, in appropriate cases, DOJ seeks penalties as well as overdue costs and interest.
- B. OSRE and the Regions should closely review recent instances of SNC where no action other than a phone call or a meeting has reportedly been taken yet.
- C. Based on the outcome of OSRE follow-up with the Regions on SNCs where no action has been taken, EPA and DOJ should determine whether an initiative (*e.g.*, a coordinated filing of complaints seeking CERCLA § 106 penalties or CERCLA § 107(c)(3) treble damages) is appropriate.
- D. Regions should continue to improve CERCLIS data related to the number of active instruments, the compliance status of those instruments, the response to instances of non-compliance, and the EJ/IC/TAA status of CERCLA sites.

**VI. APPENDICES**

Appendix 1: 11/3/98 memorandum from Barry Breen, Director, OSRE, "Ensuring Potentially Responsible Party Compliance with CERCLA Obligations."

Appendix 2: 2/22/99 memorandum from Barry Breen, Director, OSRE, "Phase 2 of PRP Compliance Assessment: Enforcement Plan and Report."



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

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

NOV 3 1998

MEMORANDUM

SUBJECT: Ensuring Potentially Responsible Party Compliance with CERCLA Obligations

FROM: Barry Breen, Director  
Office of Site Remediation Enforcement

TO: Director, Office of Site Remediation and Restoration, Region I  
Director, Emergency and Remedial Response Division, Region II  
Director, Hazardous Site Cleanup Division, Region III  
Director, Waste Management Division, Region IV  
Director, Superfund Division, Regions V, VI, VII and IX  
Assistant Regional Administrator, Office of Ecosystems Protection and  
Remediation, Region VIII  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship, Region I  
Regional Counsel, Regions II, III, IV, V, VII, IX and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and  
Environmental Justice, Region VIII

This memorandum sets out steps to ensure compliance by Potentially Responsible Parties (PRPs) with EPA's active orders and settlement agreements for CERCLA studies, response work, and cost recovery. As of the end of FY 1998, the CERCLA enforcement program has over \$13 billion in PRP work commitments and \$2.4 billion in cost recovery commitments. Ensuring PRPs meet these commitments is a key step. Accordingly, we request that each Region conduct an assessment of PRP compliance with CERCLA orders and consent decrees and prepare an action plan for responding to every instance of substantial non-compliance.

With this in mind, we ask that each Region conduct a compliance assessment to:

- (1) identify all PRP-lead sites with active enforcement orders, consent decrees or agreements;
- (2) for those sites with active orders, CDs or agreements, identify any with substantial non-compliance;
- (3) provide a plan for addressing every instance of continuing substantial non-compliance; and
- (4) for those sites with substantial non-compliance, indicate which are located in potential Environmental Justice (EJ) communities or Indian country and tribal areas in

Alaska.<sup>1</sup> This report should also include any substantial non-compliance since October 1, 1997 which the Region has already addressed (formally or informally) and the effect of the Regional action.

Solely for purposes of this project, substantial non-compliance is defined to mean any non-compliance that:

- Exacerbates a release or threatened release of a hazardous substance;
- Significantly deviates from the terms of the settlement, order, or agreement;
- Represents a pattern of recalcitrance or chronic violation; and/or
- Is deemed by the Region to be substantial for other reasons (to be explained by the Region).

Illustrations of these criteria are provided in Attachment 1. These factors should be applied to situations in which all or some of the PRPs have failed to comply with the relevant order, decree or agreement.<sup>2</sup>

By **November 13, 1998**, please identify your Regional lead for this effort by providing his or her name to Mike Northridge, Regional Support Division (e-mail: Northridge-Michael, phone (202) 564-4263).

## **PHASE 1: COMPLIANCE ASSESSMENT**

Each Region is asked to conduct a compliance assessment that includes the following:

- A.) Identify all active EPA orders, consent decrees and agreements at PRP-lead sites. "Active" means all orders, decrees or agreements which require any further work or payment by the PRPs, including studies, design, cleanup or monitoring (except record retention requirements) or PRP payment of response or oversight costs.<sup>3</sup> Report the total number of sites with active orders, consent decrees or agreements.
- B.) From among the active orders, decrees and agreements, identify those at which PRP acts or omissions constitute substantial non-compliance on or after October 1, 1997, to the present.

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<sup>1</sup> "Potential" is used to indicate demographics only (low-income populations and minority populations reflected in the U.S. Census data) and does not involve an analysis of risk or "disproportionate impacts". Regions should use their regional EJ policy for identifying potential EJ communities.

<sup>2</sup> To ensure fairness, EPA should evaluate for appropriate enforcement response actions "split compliance" situations (where one or more PRPs are recalcitrant, and others are in compliance) even if all of the cleanup work is being done in a timely and quality manner by other PRPs.

<sup>3</sup> This definition stems from the DOCKET Manual's definition of "closed" settlements.

- C) Of the active orders, consent decrees, and agreements with instances of substantial non-compliance, identify those at sites located in potential EJ communities, in Indian Country, or in tribal areas in Alaska.<sup>4</sup>

This request includes the identification of all active orders, consent decrees, or agreements and corresponding sites that have been in substantial non-compliance at any time on or after October 1, 1997, even if such non-compliance has been corrected since that time. This information will be used to help assess the relative effectiveness of various enforcement approaches.

As always, Regions should enter all compliance data into CERCLIS, as OSRE will use CERCLIS to track PRP compliance with CERCLA orders and consent decrees. By **January 1, 1999**, please submit the results of your Regional assessment using the Compliance Assessment Report format, Attachment 2. This manual reporting is necessary because, as a direct result of Regional input, we are focusing on “substantial” non-compliance versus all non-compliance, and CERCLIS data cannot provide a “substantial” determination. Some elements of the Compliance Assessment Report can be generated from the CERCLIS database.

## **PHASE 2: ENFORCEMENT PLAN AND REPORT**

Regions should address all substantial non-compliance. By **March 1, 1999**, please submit your Region’s specific plan for addressing each instance of continuing substantial non-compliance, and site-specific information on enforcement actions that already have been taken at substantial non-compliance sites and the effect of such actions. We will develop the format for this information in consultation with the Regions and circulate it in advance. The Assistant Administrator’s Memorandum on “Operating Principles for an Integrated Enforcement and Compliance Assurance Program” (November 27, 1996) (Attachment 3) provides a framework for selecting the appropriate enforcement response for each site. (See section IV.A.)

In developing enforcement responses for these sites, please ensure that all communities have access to the CERCLA enforcement process through the availability of appropriate government information and decision-makers. To that end, my staff will collect and share information with you on communication and community involvement strategies for EJ, Indian Country, and Alaskan tribal communities.

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<sup>4</sup> We request that the Regional EJ Coordinator concur with the identification of sites designated as being located in potential EJ communities, and that the Regional Indian Program Manager concur with the identification of sites designated as within Indian country or tribal areas in Alaska.

My staff will analyze the information the Regions submit for substantial non-compliance and enforcement response trends at all sites, and the effectiveness of our response actions. Any further actions will be determined with the benefit of this information and analysis.

If you have questions, then please contact Mike Northridge (202/564-4263, or e-mail: Northridge-Michael). If you have questions regarding CERCLIS, then please contact Dela Ng (202/564-6073, or e-mail: Ng-Dela). If you have questions regarding identifying your EJ sites, please contact Rose Harvell (202/564-6056, or e-mail: Harvell-Rose).

#### Attachments

cc: Steve Luftig, OERR, OSWER  
Kent Benjamin, EJ Coordinator, OSWER  
Robert Knox, Acting Director, OEJ, OECA  
Sherry Milan, EJ Coordinator, OECA  
Earl Salo, OGC  
Regional EJ Coordinator, Regions I-X  
EJ Contact for Regional Legal Program, Regions I-X  
Kathy Gorospe, Director, American Indian Environmental Office, OW  
Regional Indian Program Managers  
Pete Rosenberg, Director, ECOO, OECA  
Ruth Miller, Acting OECA Tribal Coordinator  
Bruce Gelber, EES, DOJ

**Attachment 1:**

**Definition of Substantial Non-Compliance  
for purposes of the  
CERCLA Compliance Assessment and Report**

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*Substantial Non-Compliance* is any non-compliance that falls within any of the following categories:

1. **Exacerbates a release or threatened release of a hazardous substance.**  
Examples include:
  - Actions or failures to act that cause or allow further contamination or threats to human health or the environment to occur.
  
2. **Significantly deviates from the terms of the settlement or order.**  
In determining the "significance" of a deviation, consider the following factors: the degree of harm caused by the non-compliance; impact of the deviation on site conditions and the affected community; quality or timeliness of response activities; integrity of the enforcement program; increasing site costs; other parties in compliance. An adverse impact on any one of these factors may be cause for a determination of "significant" deviation.  
Examples include:
  - Delayed performance of important milestones.
  - Missed deadlines for major submittals (e.g., draft RI/FS, contractor on board).
  
3. **Represents a pattern of recalcitrance or chronic violation.**  
Examples include:
  - Strong resistance by respondent to complying with settlement or order, considering respondent's degree of responsibility, financial and technical ability, past practices at the site and other relevant factors.
  - Chronic violations include multiple misses or delays in submitting even minor reports or in performing even minor work requirements, the pattern of which may lead to, amongst other things poor project management, increased oversight, significant work delays or increased costs.
  
4. **Other**  
Circumstances which the Region deems substantial and which are not encompassed within the first criteria. Please provide a brief written description of these circumstances.

ATTACHMENT 2

**Phase 1: Compliance Assessment Report**  
**Region \_\_\_\_\_, (Date)**

Total number of active CERCLA orders, consent decrees and agreements in Region \_\_:

EPA ID #	Site Name	EJ, IC, TAA *	Document (CD, AOC, UAO, other)	Action (Removal, RI, FS, RD, RA, other)	Substantial Non-Compliance Status **

\* EJ - Site is located in a potential EJ community

IC - Site is located in Indian Country

TAA- Site is located in a tribal area in Alaska

Regional EJ Coordinator or Indian Program Manager (as appropriate) must certify that designations are in accordance with Regional policy (initials). \*\* IVAT = in violation, action taken

IVAP = in violation, action planned

IVNA = in violation, no action planned (justification in file)

RTC = returned to compliance

*Regional Contact Person* (name, telephone number & e-mail address):

## **Operating Principles for an Integrated Enforcement and Compliance Assurance Program**

### **MEMORANDUM**

**SUBJECT:** Operating Principles for an Integrated Enforcement and Compliance Assurance Program

**FROM:** Steve Herman, Assistant Administrator

**DATE:** November 27, 1996

**TO:** Addressees

The purpose of this memorandum is to transmit the attached document (in PDF format) entitled "Operating Principles for an Integrated Enforcement and Compliance Assurance Program."

Since the 1994 reorganization of the enforcement and compliance assurance program, we have developed and implemented many new policies, programs, and initiatives. At our FY 1996 national conference, there were many discussions during which the need became apparent for a statement of general principles and a set of common definitions of terms. At the conclusion of our national conference, I announced the formation of a senior level group, chaired by OECA Deputy Assistant Administrator Michael Stahl, to develop a set of guiding principles. The Operating Principles document is the result of the group's work. I want to thank the members of this group and commend them for the fine work they have done.

I hope the Operating Principles will be useful to managers and staff of the Agency's enforcement and compliance assurance program, managers and staff of the Agency's media program offices, our state and tribal partners, and to interested external stakeholders. The Principles should help guide planning and decision making of Agency enforcement and compliance assurance personnel. I also believe they will help other Agency personnel and external stakeholders understand all of aspects of the OECA program. I urge you to take the time to read and consider the Operating Principles.

Regional briefings about the Operating Principles are being scheduled through the end of January. We want to include all enforcement and compliance assurance personnel in these briefings, as well as managers and key staff of media programs. I am requesting all regional enforcement coordinators or enforcement division directors to work with Marie Muller of my

office (202 564-2431) to schedule these briefings. We are also interested in conducting briefings for headquarters media program offices, and we will schedule these in response to any requests we receive. (These request should also go to Marie Muller.) We look forward to hearing from you about scheduling these briefings and about your reactions to the Operating Principles document.

**Addressees:**

Regional Administrators  
Deputy Regional Administrators  
Regional Counsels  
Regional Enforcement Division Directors  
Regional Enforcement Coordinators  
Assistant Administrators  
Deputy Assistant Administrators  
All OECA Personnel

**cc:**

Carol Browner  
Fred Hansen  
Peter Robertson  
Mark Badalamente  
Denise Graveline  
Randy Deitz  
Shelley Metzenbaum  
Lois Schiffer  
Mark Coleman

# **OPERATING PRINCIPLES FOR AN INTEGRATED EPA ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM**

Interim Final -- 11/18/96

## **I. INTRODUCTION**

The purpose of this document is to articulate a set of operating principles for the Environmental Protection Agency's (EPA) enforcement and compliance assurance program. This document is designed to provide program managers and staff with a set of principles which: defines each of the tools in the program; describes the appropriate use of those tools; describes our approach to measuring success; and provides a general framework for program planning and decisionmaking.

## **II. BACKGROUND**

America's last twenty-five years of environmental improvements are attributable to a strong set of environmental laws and an insistent and enforced expectation of compliance with those laws. Preserving and building on those improvements and successfully addressing a new generation of environmental problems will require the combined and sustained efforts of all levels of government, regulated entities (both public and private), and the public. Government must target significant environmental and noncompliance problems, develop and use a range of tools to address those problems, apply its authorities in a fair and consistent manner, and measure the results of its efforts. Regulated entities are expected to obey the law and bear responsibility for prevention and correction of environmental problems. Citizens must be able to obtain information and hold industry and government accountable.

Throughout the past twenty-five years, the EPA has relied on a strong, aggressive enforcement program as the centerpiece of its efforts to ensure compliance with national environmental laws. This approach has served the nation well, and has created a culture of environmental compliance that is unsurpassed in the world. Indeed, in response to enforcement efforts a professional class of environmental managers within the regulated sector has emerged, managing people and systems oriented toward compliance and pollution prevention.

Today, we must apply a full range of approaches to motivate compliance and build on our past success. EPA has consolidated its headquarters enforcement programs and taken steps to enhance coordination and integration of enforcement implementation. Established enforcement tools have been refined and strengthened. Formal law enforcement surely will continue to be the central and indispensable element of effective governmental efforts to ensure compliance. Additional tools and capabilities for ensuring compliance have been developed. Improved measures of success are being developed and used. This document attempts to articulate a set of core principles to guide the Agency's program (Section III), define the tools and discuss the best opportunities for their use (Section IV), and provide principles about the integration of those tools (Section V).

### **III. CORE PRINCIPLES**

- 1.** The goal of EPA's enforcement and compliance assurance program is to bring about environmental protection through immediate, full and continuous compliance with all Federal environmental laws and requirements and to address past, present, and future threats to public health and the environment. This goal is most likely to be achieved when:
  - a)** The governmental response to violations is fair, predictable and increasingly severe as the scope, duration, significance, wilfulness and economic advantage gained by violators increases;
  - b)** The statutory and regulatory requirements are clearly articulated, and are widely known and understood within the regulated community;
  - c)** There is no economic advantage for violators compared to those who timely comply; there is a "level playing field" and it does not pay to violate;
  - d)** The regulated community sees that proactive self-disclosing and self-correcting activities are preferable to the consequences of a government enforcement action;
  - e)** Awaiting governmental (or citizen) response to noncompliance results in adverse consequences significantly greater than any economic advantage gained by delaying compliance;
  - f)** There is a reasonable likelihood that violations will be detected by government or others (e.g. citizens, whistle blowing employees);
  - g)** Adverse governmental responses to violations are publicized and well known.
- 2.** Because government will never be able to bring about compliance at every regulated facility through direct intervention on a facility-by-facility basis, government must maximize its effectiveness through deterrence, publicizing cases, and support of effective efforts by citizens and

all levels of government. Governmental efforts must motivate and enhance the capacity and will of the regulated community to promptly and fully comply with the law, to voluntarily and promptly disclose and correct violations before they come to the attention of government, and to respond proactively to releases of substances into the environment for which they are responsible.

3. In programs where states and tribes are delegated and/or authorized to operate and enforce federal environmental laws, there are important and complementary state, local, tribal and federal roles in enforcing and assuring compliance with such laws. The base-line or minimum federal role is described in the February 21, 1996 EPA document entitled "Core EPA Enforcement and Compliance Assurance Functions."

4. EPA is accountable to the public for its actions, and therefore will report on the amount and types of enforcement and compliance assurance activities it undertakes, measure the environmental impact and results of those activities, and assess industry performance through industry sector compliance rates.

5. These principles apply equally to the public and private sector, and with full force to requirements which ensure disclosure of vital information to the government and the public, in addition to requirements which prevent, reduce, or control pollution.

6. EPA's enforcement of site remediation laws and regulations should encourage parties that are legally responsible for responding to releases of substances into the environment to respond proactively to those releases.

#### **IV. ENFORCEMENT AND OTHER COMPLIANCE ASSURANCE TOOLS**

This section defines the enforcement and compliance tools -- civil and criminal enforcement, compliance monitoring, compliance incentives and compliance assistance -- and describes the best opportunities for their use.

##### **A) CIVIL AND CRIMINAL ENFORCEMENT**

Civil and criminal environmental enforcement have proven to be very effective tools. Such enforcement serves the following purposes:

- remedies the environmental harm caused by environmental violations and prevents future environmental harm from occurring;
- addresses conditions which may present an imminent and substantial endangerment to human health, welfare or the environment;

- addresses violations of the law and ensures that all necessary steps are taken to achieve and maintain compliance with the applicable requirements of federal environmental laws and regulations;
- deters others from similar illegal behavior;
- “levels the economic playing field” by ensuring that those who violate the law do not enjoy an economic advantage over those who comply;
- recovers the government’s costs for environmental response actions (e.g., CERCLA and OPA actions);
- implements site remediation provisions of the environmental laws.

## 1. Definitions and Opportunities for Use

**a) Written notices of violation.** A written notice of violation, when used alone, is best suited for minor, inadvertent, first-time violations. Under some statutes (e.g., CAA, SDWA), notices of violation are legal prerequisites to proceeding with more serious formal enforcement responses. Under other laws, such notices or warnings are not legally required and are appropriate principally where the violations at issue have little or no environmental or regulatory significance or impact on economic competition with complying firms. Oral notices of violation, which are not reduced to writing in the inspection report, are rarely appropriate as the sole enforcement response.

**b) Judicial and administrative orders, judicial and administrative penalty actions, and cost recovery actions.** EPA will address violations discovered through regular inspections, tips, complaints, or other compliance monitoring with penalty actions or orders, or both, and in the case of the significant expenditure of government funds (e.g., remediation) with cost recovery actions.

Standard civil enforcement actions take three separate forms: penalty actions, orders, and cost recovery actions. A single set of facts often requires some combination of these three, as they serve distinct purposes.

**i) Orders** (both administrative and judicial, and both unilateral and on consent) serve four purposes: 1) to return violators to compliance; 2) to ensure their continued compliance; 3) to remedy environmental harm; and 4) to keep new environmental harm from occurring. As such, orders provide legal assurance that the regulatory system will be respected in the future, that the environment will be restored, or that the environment will be protected in the future. They have some specific deterrent effect, but without penalties they will not serve as a general deterrent.

***Opportunities for Use.*** Orders and other forms of injunctive relief are most effective in bringing violators into compliance and ensuring their future compliance with regulatory requirements, especially if compliance is to be achieved through the implementation of a compliance schedule or similar milestones.

**ii) Penalties** serve to level the economic playing field, and as such EPA penalty policies usually include recapture of at least the economic benefit of noncompliance. Civil judicial and administrative penalties serve the important role of deterring violators and ensuring that noncompliers do not enjoy or gain a competitive advantage over competitors who have invested time and money in achieving compliance.

Much of the success of other tools, such as compliance assistance and compliance incentives, relies on a general expectation in the regulated community that there is a substantial risk that violations discovered by government will be the subject of enforcement actions with sanctions. Penalties can serve as an incentive to the violator to address and prevent other violations, including violations at different facilities or under different statutory requirements. Moreover, for the regulatory system as a whole to work, voluntary compliance for all facilities and entities will likely improve greatly when the regulated community expects enforcement penalties as a response to violations.

***Opportunities for Use.*** Penalties are most effectively used for noncompliance which adversely impacts the environment, the integrity of our regulatory framework, or the “economic playing field”. Penalties must be substantial enough to erase the economic gain of noncompliance, and create specific and general deterrence.

In some cases, as set out in the Supplemental Environmental Projects (SEP) policy, penalties can be mitigated in light of action taken by the violator to improve the environment directly. In such cases, penalties in combination with a SEP can address environmental harm in addition to leveling the economic playing field and serving as a deterrent.

**iii) Cost recovery actions** implement the principle that polluters, rather than the general public, should pay for the damage they cause and the cost of cleaning it up.

**c) Criminal enforcement.** Criminal prosecution is the strongest sanction that the government has to address violations.

While decisions whether to prosecute criminal violations of federal law rest within the Department of Justice, EPA exercises considerable influence upon such decisions through its investigation, development and referral of criminal cases. In this regard, EPA has established certain general principles to guide the operation of its criminal enforcement program, including the identification of nine specific criteria for determining whether a particular violation is appropriate for criminal investigation. (See E. Devaney, “The Exercise of Investigative Discretion”, Office of Criminal Enforcement, Jan. 12, 1994.) As indicated in that document,

criminal proceedings are best suited for those instances where the strong deterrent impact of criminal sanctions is especially needed, both upon the specific violator and upon the regulated community in general. They are most often used where the conduct in question is particularly egregious, or the harm caused or threatened to public health or the environment is the most severe, or both. Criminal prosecutions are also important in those instances where those who are required by law to provide sampling results, scientific data, or other information to governmental agencies fail to do so in an accurate and timely manner, thereby impeding the ability of those agencies to fulfill their regulatory missions.

Criminal sanctions frequently can be employed to impose terms of imprisonment upon individuals and fines upon both individuals and organizations. Criminal enforcement authority can lead to settlements which include requirements for environmental restoration, restitution to government and to others for damages incurred (similar to cost recovery in civil actions), and other requirements designed to recapture economic benefit and to ensure future compliance.

## **B. COMPLIANCE MONITORING**

### **1. Definition and Description**

**Compliance monitoring** consists of actions: 1) to determine compliance with applicable laws, regulations, permit conditions, orders and settlement agreements (including remediation requirements); 2) to review and evaluate the activities of the regulated community or potentially responsible parties (PRPs) under Superfund; and 3) to determine whether or not conditions presenting imminent and substantial endangerment may exist. The most common regulatory compliance monitoring activities are surveillance, inspections, information-gathering, and record reviews. Common remediation compliance monitoring activities for work required by permit, order, or settlements include ensuring timely submissions, review of submittals for adequacy, and oversight of remediation actions. Elements of these activities include sampling, sample analysis, observations, issuance of information requirement letters or subpoenas, and ensuring data quality.<sup>1</sup>

Compliance monitoring includes a wide range of activities in six basic categories which may overlap:

**a) Surveillance** is generally a pre-inspection activity which consists of obtaining general site information prior to actually entering the facility. Surveillance may include such things as ambient sampling at the property line, or observations of activity at the site.

**b) Inspections (on site)** may include sampling, observations, record reviews, interviews, etc., and have traditionally been confined to one media. EPA is currently pursuing an integrated

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<sup>1</sup> Compliance monitoring may be performed by the regulated entity as self-monitoring or self-auditing. Because this document focuses on actions which are initiated by regulatory agencies, these activities will not be further discussed here.

program where multi-media inspections are performed within an entire eco-system or geographic area, or on a facility or industry sector-wide basis.

**c) Investigations** are generally more comprehensive than inspections and may be warranted when an inspection or record review suggests the potential for serious, widespread, and/or continuing civil or criminal violations.

**d) Record reviews** may be conducted at various locations, such as at EPA's offices, at state or local offices, or at the facility, and may or may not be combined with field work. Records may be derived from routine self-monitoring requirements, citizen/employee tips, or remote sensing such as aerial photography, geophysical satellite data, infrared photography, etc.

**e) Targeted information gathering** may be used to provide or acquire more accurate information on the status of compliance and/or environmental conditions. A facility, business, or PRP may be required to: report information such as emission/discharge rates, the nature of a release of a hazardous substance, or the status of remediation at a Superfund site; verify the purchase, installation, and use of pollution control equipment; or submit operating logs or financial records. Information may be sought on facility or operator ownership, compliance history, sampling results, production processes or materials. Stack tests or other compliance demonstrations may be required.

## **2. Opportunities for Use**

**a)** On-site inspections are most often used to determine compliance and detect violations. There are two primary methods of targeting these inspections:

**i) Neutral Inspection Scheme:** A certain randomly selected portion of regulated entities in a given category should be inspected to acquire an indication of the overall compliance rate of that class of entities. It should be noted however, that random inspection schemes may be developed according to strategies which consider such aspects as source or sector non-compliance rates, potential human health or environmental risk associated with an industry, size of business, etc. Random inspections also encourage compliance because entities do not want to be caught noncomplying.

**ii) Targeted Inspections:** EPA may inspect certain facilities to address a known, suspected or perceived risk to human health or the environment. Targets may be selected for a variety of reasons: ambient data analysis which shows a high risk; a spill or other environmental incident (for cause); a request by a state or a tribe; a response to a citizen or whistle blower tip or complaint; or to address community concerns.

**b)** Compliance monitoring activities can also be used after violations have been detected and an enforcement response undertaken. Inspections and other activities can be used to monitor the

status of compliance with settlements or orders and thereby assess the effectiveness of specific legal actions, ensure that the original or subsequent violations are corrected and the facility returns to compliance, and to deter and properly respond to violations of such settlements and orders.

c) Compliance monitoring may also involve remote pollution monitoring to support risk-based inspection targeting, to supplement planned inspections (such as emissions test inspections), or to document changes in emissions after an inspection or enforcement action.

## C. COMPLIANCE INCENTIVES

### 1. Definition and Description

**Compliance incentives** refer to those policies that encourage regulated entities to voluntarily discover, disclose and correct violations or clean up contaminated sites before they are identified by the government for enforcement investigation or response. These voluntary compliance efforts generally fall into two categories:

a) **Audit and compliance management** programs that are developed and maintained by the regulated community;

b) **Partnerships** between government and industry, such as the Environmental Leadership Program;

These efforts require the regulated community to volunteer or participate in the discovery of violations or cleanup of past contamination.

### 2. Opportunities for Use

a) **Combined with deterrence:** Compliance incentives are more likely to encourage the regulated community to identify, disclose and correct violations before they are detected by government in an enforcement action if there is a widespread perception that taking advantage of incentives reduces the prospect of such enforcement action. EPA's experience suggests that time limits for participation and the risk of follow-up inspections can encourage a rapid response from the regulated community.

b) **Preventing violations :** Compliance incentives, like compliance assistance, can be effective ways to provide opportunities for companies to prevent violations and maintain a high standard of care.

c) **Public recognition:** EPA's compliance incentive programs and policies can also be effective ways to publicly acknowledge and recognize effective environmental management, thereby

encouraging more companies to improve their environmental practices.

## **D. COMPLIANCE ASSISTANCE**

### **1. Definition and Description**

**Compliance Assistance** consists of information and technical assistance provided to the regulated community to help it meet the requirements of environmental law.<sup>2</sup> First and foremost, compliance assistance ensures that the regulated community understands its obligations by providing clear and consistent descriptions of regulatory requirements. Compliance assistance can also help regulated industries find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

Compliance assistance at EPA falls into broad categories, such as:

- a) outreach** to the regulated community by EPA or through states through the use of compliance guides, seminars, information services and other means of assistance;
- b) response** to requests for assistance, which may include asking EPA to determine the applicability of a particular regulation to a specific source, or more general inquiries to hotlines or information centers;
- c) on-site assistance** such as compliance consultations or audits.

Compliance assistance is not a substitute for the regulated industries' responsibility to learn and comply with laws and regulations. It complements but does not replace appropriate enforcement.

### **2. Opportunities for Use**

- a) Compliance Education:** The most important goal of EPA's compliance assistance programs is to help regulated entities know what they are expected to do under the law and why.
- b) New Regulations:** It is particularly important that compliance assistance support implementation of new rules. Indeed, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires the preparation of "plain-English" compliance guides to accompany any major new rules with a significant impact on small business and communities, and permits entities to cite these guides when documenting compliance in any enforcement action.
- c) Assistance for Correcting Violations:** EPA may sometimes provide advice about

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<sup>2</sup> Compliance assistance is distinguished from outreach or advice offered through voluntary programs like 33/50 and Green Lights which do not address legally enforceable requirements.

correcting violations during a compliance inspection or even during the negotiation phase of an enforcement action. Advice offered in the context of an inspection or enforcement action is limited by specific policies designed to protect the integrity of the enforcement proceeding.

**d) Economies of Scale:** Compliance assistance at EPA is generally (although not always) provided to targeted groups such as trade associations or states which can supply information to individual entities in the regulated community. This “wholesale” approach reflects economies of scale appropriate to the federal government, and avoids duplicating the on-site services offered by various state programs. EPA and other parts of the federal government provide funding for the kind of on-site consultation provided by states through such mechanisms as the Section 507 grants under the Clean Air Act.

**e) Small Business/Small Community:** Small businesses and small entities are often not as well equipped to comply with environmental laws as large, sophisticated corporations, and generally should have priority in the allocation of EPA’s limited resources for compliance assistance. Federal laws such as Section 507 of the Clean Air Act and SBREFA mandate specific services to small businesses and communities.

## **V. APPLYING THE TOOLS TO ENVIRONMENTAL PROBLEMS**

The following considerations should be used in strategically selecting and applying the above tools:

- 1.** Environmental problems are defined broadly as actual, anticipated, or suspected:
  - 1) conditions which may harm the environment or public health; or 2) instances of noncompliance.
- a)** The scope of environmental problems can be macro (i.e., international, national, state) or micro (i.e., local, community, facility).
- b)** Environmental problems may be past, present, or future, and they may be one-time or recurring incidents.
- c)** Environmental problems can appear in various contexts, including, but not limited to:
  - geographic locations (e.g. stretches of rivers, air basins, etc);
  - communities;
  - natural resources (e.g., an underground water supply);
  - an industry or an industrial process;
  - a company, government agency or a facility;
  - a particular chemical;
  - a commercial product;
  - a household threat;

- an endangered species or habitat; or
- a broad ecological threat (e.g., loss of wetlands)

2. Development of response strategies should be based on an analysis of the contexts, causes and effects of the problem, and an analysis of which tool(s) is likely to be most effective. However, environmental problems with similar circumstances should elicit consistent and fair application of the tools.
3. Development of response strategies should include consideration of all statutory authorities to determine if a single or multi-media approach might be most effective.
4. Tool selection and use is not necessarily step-wise (e.g., it is not necessary to try compliance assistance before resorting to enforcement). In many instances, one tool may solve a problem.
5. A response strategy solution may go beyond compliance, and may stimulate or compel other environmentally beneficial projects or practices.
6. As experience is gained in addressing environmental problems with these tools, regulators may redefine the problem, revise their current response strategy, or change how that tool(s) will be applied to other or future problems.

**VI. COORDINATING AND/OR INTEGRATING FEDERAL, STATE, LOCAL, AND TRIBAL EFFORTS**

EPA fully recognizes that it shares with all levels of government a common interest in environmental protection and compliance with environmental requirements. Indeed, under several of the core federal environmental statutes, implementation and enforcement are expressly shared by the federal, state, tribal, (and sometimes local) governments.

Coordination and/or integration of federal, state, local and tribal enforcement and compliance assurance efforts must be achieved in order to provide the most effective national environmental protection program. EPA, state, localities, and tribes each have capabilities and responsibilities unique or appropriate for their respective jurisdictions. The challenge of coordinating and integrating federal, state, local and tribal agency efforts is to build on the strengths of each, combine their capabilities and allocate responsibilities to produce an efficient and effective enforcement and compliance assurance effort.

There are at least three areas in which cooperative efforts between federal, state, local and tribal agencies foster a more cohesive and efficient approach to enforcement and compliance assurance:

**1. Information sharing** about environmental conditions, threats to public health, noncompliance problems, patterns or incidents of behavior, and actions planned or taken. To be effective, government entities must communicate regularly, develop common performance measures and environmental indicators, actively input information into national data systems, and use this and other information to target problems, allocate resources, and measure effectiveness.

**2. Collaborative planning and targeting** is also indispensable to an integrated program. EPA, states, locals and tribes should develop processes to jointly identify environmental priorities and problems worth addressing, develop strategies to address those problems, and allocate appropriate roles and responsibilities among agencies.

**3. Coordinated strategies and actions** can be appropriate for EPA, state, local and tribal agencies as a means for sharing work on common environmental priorities and problems. In these instances, the use of enforcement activities, compliance monitoring, and compliance incentive and assistance activities should be coordinated, with lead and support responsibilities assigned, and without relinquishing independent authorities to enforce the law.

## **VII. MEASURING RESULTS AND IMPACTS**

A major element of EPA's approach to enforcement and compliance assurance is to improve the methods to measure success. EPA has traditionally relied almost exclusively on counting activities (e.g., enforcement actions initiated, penalty dollars assessed) as its means of measuring success. Counting these activities provides a sense of "enforcement presence" in the regulated universe and the productivity (expressed as enforcement actions) of program resources.

EPA recognizes the need for a more sophisticated and comprehensive approach to measuring success. Development and implementation of this new approach is being guided by the following principles:

- 1.** EPA will strive to measure accomplishments for the full spectrum of enforcement and compliance assurance activities (i.e., enforcement actions, compliance monitoring, compliance assistance and incentives).
- 2.** EPA will continue to count enforcement activities as a measure of success, but will also measure the actual results and environmental impact of these and other activities.
- 3.** EPA will collect, analyze, and present information about: a) actions taken by regulated

parties in response to enforcement and compliance assurance activities; b) the benefits to human health and environment resulting from these activities; and c) the level of compliance in industry sectors.

**4.** EPA will continue to refine its measures of success to find those measures which are most meaningful for judging the effectiveness of EPA efforts and the performance of industry in achieving compliance.

**5.** EPA will report annually to the public on its enforcement and compliance assurance program.

## **Operating Principles for an Integrated Enforcement and Compliance Assurance Program Workgroup Members**

### **Chair:**

*Michael M. Stahl*

Deputy Assistant Administrator, OECA

### **Operating Principles Team:**

*Eric Schaeffer*

Director, Office of Planning and Policy Analysis, OECA

*Barry Breen*

Director, Office of Site Remediation Enforcement, OECA

*William Muszynski*

Deputy Regional Administrator, Region 2

*Marcia Mulkey*

Regional Counsel, Region 3

*Sam Coleman*

Director, Compliance Assurance and Enforcement Division, Region 6

### **Senior Consultation Group:**

*Elaine Stanley*

Director, Office of Compliance, OECA

*Robert Van Heuvelen*

Director, Office of Regulatory Enforcement, OECA

*Earl Devaney*

Director, Office of Criminal Enforcement, Forensics, and Training, OECA

*Susan Bromm*

Deputy Director, Office of Site Remediation Enforcement

*Harley Laing*

Director, Environmental Stewardship Division, Region 1

*Laura Livingston*

Enforcement Coordinator, Region 2

*Gail Ginsburg*

Regional Counsel, Region 5

*Diane Callier*

Director, Enforcement Coordination Office, Region 7

*Carol Rushin*

Director, Enforcement Division, Region 8

*Stacey Eriksen*

Enforcement Coordinator, Region 8

### **Staff:**

*Marie Muller*, OECA



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

FEB 22 1999

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Phase 2 of PRP Compliance Assessment: Enforcement Plan and Report

FROM: Barry Breda, Director  
Office of Site Remediation Enforcement

TO: Director, Office of Site Remediation and Restoration, Region I  
Director, Emergency and Remedial Response Division, Region II  
Director, Hazardous Site Cleanup Division, Region III  
Director, Waste Management Division, Region IV  
Director, Superfund Division, Regions V, VI, VII and IX  
Assistant Regional Administrator, Office of Ecosystems Protection and  
Remediation, Region VIII  
Director, Office of Environmental Cleanup, Region X  
Director, Office of Environmental Stewardship, Region I  
Regional Counsel, Regions II, III, IV, V, VII, IX and X  
Assistant Regional Administrator, Office of Enforcement, Compliance and  
Environmental Justice, Region VIII

The purpose of this memorandum is to transmit a standard form ("Enforcement Plan and Report") that the Regions should use in submitting the information requested for the next phase of the Superfund compliance assessment. This fulfills the commitment described in my November 3, 1998 memorandum wherein my office agreed to develop a standard Phase 2 form in consultation with the designated contacts in the Regions. Attached are two documents, the standard form and an example of a completed form for a hypothetical case.

The standard form consists of three Parts: a chart, a narrative, and a request for the names and telephone numbers of the Regional contact persons for the site at which the recent substantial noncompliance ("SNC") took place. Forms only need to be filled out for the sites with recent SNC; no forms are needed for sites without SNC. Using the information that you already submitted in the first phase of this effort, my staff will fill out the initial part of the chart. We plan to send these partially-filled out forms to the designated Regional contacts within the next week. March 1, 1999 remains the due date for the Regions to complete the forms, which should be submitted to Mike Northridge of my office.

As noted above, my staff will fill in the initial portion of Part I ("Chart"), using the basic information the Region has already provided (i.e., EPA ID #; site name; whether the site is

located in a potential environmental justice community, Indian country, or a tribal area in Alaska; the type of document; and the type of action). The Regions should fill in the rest of the Chart, providing information regarding the nature of the SNC, the enforcement action planned and/or taken by the region and the date of such action or planned action, and the effect of any enforcement actions taken. For the Regions' convenience, codes are provided for several chart categories of information, including enforcement actions and the effects thereof. Please note that more than one code may apply to a particular category on the chart. For example, in response to the same instance of SNC, a Region may have sent a warning letter to the violator (enforcement action code #5), may have held a meeting with the violator (enforcement action code #4), and may ultimately plan to refer a case to the Department of Justice for a statutory penalty (enforcement action code # 2). In such cases, regions should select all codes applicable to a particular category.

Part II ("Narrative") asks Regions to elaborate on the nature of the SNC, the enforcement action planned or taken, and the effect of any enforcement action(s) taken. This part is intended to enable Regions to provide greater detail on the substantial noncompliance and enforcement plans or actions than can be captured in the chart. While it is not our intention to require unnecessary or expansive narratives, we do request that Regions provide enough information to impart a complete understanding of the substantial noncompliance and enforcement plans and actions at issue.

Part III ("Regional Contacts") asks for the names and telephone numbers of the Regional contact persons (program, legal, other) for each site at which the SNC has taken place (not the Region's overall contact for this compliance assessment).

Please do not hesitate to contact Mike Northridge (202/564-4263) if you have questions regarding this effort. We appreciate your continued assistance on this important undertaking.

cc: Stan Chin, Region I  
Janet Feldstein, Region II  
Kathy Hodgkiss, Region III  
Joe Donovan, Region III  
Anita Davis, Region IV  
Bob Jourdan, Region IV  
Curt Fehn, Region IV  
Doug Balotti, Region V  
Arnold Ondarza, Region VI  
Baerbel Schiller, Region VII  
Sharon Kercher, Region VIII  
Tom Kremer, Region IX  
Carol Kennedy, Region X  
Deborah Burgess, Region X  
Ed Kowalski, Region X

Attachment 1  
**PHASE 2: ENFORCEMENT PLAN AND REPORT**  
 Region \_\_\_\_\_, (Date)

**I. CHART**

EPA ID#	
Site Name	
EJ, IC, TAA*	
Document (CD, AOC, UAO, other)	
Action (Removal, RI, FS, RD, RA, other)	
Nature of SNC **	
Enforcement Action Planned(P) /Taken(T) † (Date)	
Effect ‡	

Codes for Chart:

\* EJ - Site is located in a potential EJ community; IC - Site is located in Indian Country; TAA - Site is located in a tribal area in Alaska.

\*\*Nature of SNC Codes (select all that apply):

1. SNC with reporting obligation
2. SNC with work obligation
3. Other (please explain)

† Enforcement Action Codes (select all that apply):

- |   |   |
|---|---|
| 1. Assessment of stipulated penalty                 | 6. Referral to DOJ injunctive relief or contempt citation |
| 2. Referral to DOJ for statutory penalty            | 7. Memo to file   |
| 3. Grant of deadline extension                      | 8. Modify requirements                                    |
| 4. Telephone call to violator/meeting with violator | 9. Decision to take no action (please explain)            |
| 5. Warning letter to violator                       | 10. Other (please explain)                                |

‡ Effect Codes (should be filled out for actions that have already been taken; select all that apply):

- |  |                                  |
|--|----------------------------------|
| 1. No effect on compliance status            | 3. Return to complete compliance |
| 2. Ceased being in substantial noncompliance | 4. Other (please explain)        |

**II. NARRATIVE**

Please elaborate on the nature of the substantial noncompliance (SNC), the enforcement action(s) planned or taken, and the effect of any enforcement actions taken.

**III. REGIONAL CONTACTS**

Please provide the names, telephone numbers, and e-mail addresses of the regional contact persons for this site.

Attachment 2 (SAMPLE)  
 PHASE 2: ENFORCEMENT PLAN AND REPORT  
 Region 11, 2/20/99

I CHART

EPA ID#	XXX
Site Name	ABC Site
EJ, IC, TAA*	Potential EJ
Document (CD, AOC, UAO, other)	CD
Action (Removal, RI, FS, RD, RA, other)	RA
Nature of SNC **	2
Enforcement Action Planned/Taken † (Date)	4T (8/6/98; 9/8/98; 10/15/98); 4P (2/26/99); 1P (4/99)
Effect ‡	4T:1

II NARRATIVE

Background

The ABC Site is an abandoned chemical manufacturing site located in Breenville. The population in the one-mile area surrounding the site reflects a relatively high percentages of low-income and/or minorities. On September 30, 1997, EPA issued a Record of Decision documenting its selected remedy for this site (stabilization measures at the site and excavation of contaminated soils -- total estimated to cost \$3 million). Two PRPs (Manufacturer Inc. and Wastegenerator Corp.) signed a CD to conduct the RA. The district court entered the decree on June 5, 1998, thereby triggering certain work requirements.

SNC

The parties failed to hire a contractor by the July 30, 1998 deadline. As a result, they have also failed to begin work on phase I (constructing a berm to contain a disposal lagoon) by the November 15, 1998 deadline.

Enforcement Action(s) Taken & Effect

On August 6, 1998, September 8, 1998 and again on October 15, 1998, our RPM telephoned the defendants to alert them that they were in noncompliance with the CD. Our efforts to date have had no effect: the two parties have made no efforts to come into compliance, and in some cases have failed to return phone calls.

Enforcement Action(s) Planned

On February 26, 1999, the Region plans to hold a meeting with the PRPs to discuss their noncompliance and steps they must immediately take to come into compliance. If the PRPs do not take

several specified steps by March 15, 1999, the Region plans to assess a stipulated penalty in the amount of \$150,000 no later than April 1, 1999. We also plan to hold an information meeting for the public on the status of the site work on March 30, 1999. Fliers announcing the meeting in English and Spanish will be posted in public buildings in the surrounding community.

### **III. REGIONAL CONTACTS**

Jane Smith (RPM) 999-111-1444; John Doe (attorney), 999-111-5555