



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

JUL - 1 1996

MEMORANDUM

SUBJECT: Transmittal of Sample Documents for Compliance
Monitoring

FROM: Charles Breece, Acting Director *Charles Breece*
Regional Support Division
Office of Site Remediation Enforcement

TO: UAO Workgroup
CERCLA and RCRA Program Branch Chiefs, Regions I-X
CERCLA and RCRA ORC Branch Chiefs, Regions I-X

Attached are eleven sample documents developed by the Compliance Team of the Regional Support Division to assist the Regions when faced with non-compliance with CERCLA unilateral administrative orders ("UAOs"), administrative orders on consent ("AOCs"), and consent decrees ("CDs"), or RCRA documents requiring corrective action (i.e., UAOs, AOCs, CDs, and permit conditions). The team is also providing "participate and cooperate" language for use in UAOs and settlements; there are versions for both cooperative and uncooperative parties. Please note that these documents are sample documents. The use of these documents is at the Regions' discretion.

On behalf of the Compliance Team, let me express our appreciation for the assistance and comments received from the Regions and the Department of Justice. The Compliance Team drew on the experience and expertise of the Regional offices to develop samples that Regions can refer to when faced with non-compliance situations. While we received many beneficial comments, we recognize that those who use these documents may find areas that can be improved. If, in using these or similar documents in non-compliance situations, you develop language that you believe is more applicable to that non-compliance situation, please let us know so that we can improve the samples and share those changes with the rest of the Regions.



Recycled/Recyclable
Printed with Soy/Canola Ink on paper that
contains at least 75% recycled fiber

A second package will be sent in the near future with samples of additional documents to use in non-compliance situations (e.g., letters assessing stipulated penalties for violations of CDs and AOCs, follow-up letters, etc.).

If you have any questions or would like to receive a electronic copy of these sample documents, please contact Yolaanda Walker at 202-564-4281.

Attachments (11):

Sample Kick-Off Letter

Sample Comment Letter after reveiw of unacceptable deliverable

Sample Comment Letter after review of unacceptable RCRA corrective action deliverable for entities with limited ability to pay

Sample Justification Memo with AO/CD violation form attached

Sample Warning Letter for late and/or unacceptable deliverables

Sample Notice Letter Granting an Extension

Sample Letter providing notice of violation of RCRA corrective action

Sample Letter providing notice of violation of CERCLA deliverable requirements

Participate and Cooperate language for AOC and RD/RA Settlement

Participate and Cooperate language for UAO (to be issued to parties expected to comply)

Participate and Cooperate language for UAO (to be issued to parties not expected to comply)

cc: Compliance Team (Doug Dixon, Mike Northridge, Yolaanda Walker, Kimberly Barr, Lourdes Bufill), RSD
Charles Breece, Acting Director, RSD
Nancy Browne, RSD
Linda Boornaizan, Director, PPED
Karen Harrison, PPED
David Nielson, Director, RCRA Enforcement Division, ORE

ATTACHMENT 1
Sample Kick-Off Letter

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

Re: [Insert Enforcement Document/Deliverable]

Dear Mr./Ms. [name]:

The U.S. Environmental Protection Agency (EPA) looks forward to the successful performance of a [insert name of activity to be performed (e.g., interim measure, RFI, CMS, etc)] in accordance with the [Order/Decree/Permit] executed between EPA and [insert name of Respondent/Settling Defendant]. As you are aware, the terms of the [Order/Decree/Permit] require the submission of a workplan for the [Insert activity] for the [name of site] on or before [insert due date].

To assist you in the preparation of the [Name of first deliverable], I have enclosed a copy of a [sample deliverable] for the [Name of Site] site, as a example of a [deliverable] which has been approved by EPA. In addition, the [Order/Decree/Permit] identifies EPA guidance document(s) that are available to assist you in your preparation and implementation of the [insert name of activity]. These documents are suggested for your reference [Region may want provide instructions on how to obtain information].

Alternative language (in italic and bold print): To assist you in the preparation of the [first deliverable], I have enclosed a copy of a [sample deliverable] for the [name of site] site, as a example of a [deliverable] which has been approved by EPA, as well as EPA guidance document(s) for conducting a [insert name of activity]. The enclosed document is a sample which EPA considers to be relevant for the activities which are to be performed by you at this Site.

In addition, the following list of documents, although not comprehensive, is suggested for your reference: [Regions might consider sending any significant specific guidance related to the site specific contaminants (e.g. PCBs) or site type (e.g. municipal landfill)]

Please inform me if you would like to be provided with any of the guidance documents listed above.

[Optional language: The documents should facilitate your timely preparation of high quality submissions, thereby minimizing any revisions which may be necessary as a condition to EPA's approval of submissions.]

If you have any questions or would like further guidance, please contact me at [EPA Project Coordinator number].

Sincerely,

[Name of EPA Project Coordinator]

Enclosure

bcc: [Site attorney, ORC (w/o enclosures)]
[Section Chief Regional Program Office (w/o enclosures)]

ATTACHMENT 2
Sample Comment Letter

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

Dear Mr./Ms. [name]:

The U.S. Environmental Protection Agency (EPA) has completed its review of the [name of document] dated [insert date] for the [name of facility] Site located at [insert address]. This document was submitted in accordance with the [Order/Consent Decree] between EPA and [insert Respondent name].

EPA does not approve of the [name of document] as submitted, and requires [Respondent/Settling Defendant] to amend the document in accordance with the attached comments. A revised [insert name of document] workplan must be submitted within [insert days] days of your receipt of this letter as specified in [Section ___ of the Order/Decree]. EPA expects all of the enclosed comments to be fully addressed. If all comments are not adequately addressed, EPA may exercise its right to modify the document unilaterally and provide the revised document to you for implementation [RPM/Project Coordinator should confirm that this statement is consistent with provisions of the appropriate enforcement document and reference the applicable provision].

If you believe that any changes are necessary, other than those directed by EPA's attached comments, those changes should be discussed with, and approved by, EPA's Project Coordinator prior to re-submittal of the document. In addition, all changes made to the document, other than those made specifically at the direction of EPA, must be specified in writing to EPA upon re-submittal of the document.

If you have any questions concerning this matter, or would like to discuss the attached comments in detail, please contact [Project Coordinator's name] of my staff [insert number].

Optional language to insert in place of paragraph 3 [at Project Coordinator's discretion]: Based on the number and complexity of the comments, you should submit your written response to all EPA's comments prior to resubmitting the documents. If you wish to meet with EPA to discuss EPA's comments and/or your written response, please contact [Project Coordinator's name] of my staff at [insert number].

Sincerely,

[Regional Program Branch Chief or individual delegated signature authority]

Attachment

cc: [state counterpart]
[ORC attorney]
[site file]

ATTACHMENT 3
Comment Letter
RCRA Corrective Action Entities
with limited Ability to Pay

[Situations where EPA has previously provided comments and is willing to allow the work to be conducted in phases]

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

or

Name and address of entity

Re: [insert name of document]

Dear Mr./Ms. [name]:

The U.S. Environmental Protection Agency (EPA) has completed its review of the [name of document] dated [insert date] for the [name of facility] Site located at [insert address]. This document was submitted in accordance with the [Order/Consent Decree] between EPA and [insert Respondent name].

Optional language, if Respondent has requested advice on compliance with order/decreed/permit: In response to your request for advice on compliance with the [Order/Decree/Permit] issued to you on [insert date], EPA recognizes [name of Respondent] is a small company with limited financial resources. We continue to look for an economically feasible approach to investigating [name of Site] while still protecting human health and the environment.

[Note: Project Coordinator may want to insert a brief paragraph discussing why the activity must occur. Project Coordinator could reference documents such as sampling reports that show or indicate that there has been a release or threat of a release at the site].

My advice, therefore is that you investigate contamination as required to comply with the [Order/Decree/Permit], but that you phase your efforts. [Project Coordinator could insert a paragraph providing the respondent suggestions on how the investigation should be phased, for example: Phase 1 should focus on the groundwater monitoring wells. EPA's previous comments to [name of respondent] recommended abandonment of the wells. That recommendation was based on turbidity of the samples, suggesting that the louvered screens are allowing the passage of fines, and on the fact that the screen lengths span more than one hydrologic unit.

I hope this will give you a workable process to begin to achieve compliance with the [Order/Decree/Permit]. If you have any questions, please contact [RPM/Project Coordinator name] at [insert number]. We look forward to working with you on this matter.

Sincerely,

[Regional Program Branch Chief signature or individual delegated signature authority]

Attachment 4
Sample Justification Memo with **Optional**
AO/CD Violation Form attached

Privileged and Confidential
Prepared in Anticipation of Litigation
Attorney-Client Communication
FOIA Exempt

MEMORANDUM

Date:

Subject: Recommendation for Response to Defendant's/Respondent's
Non-compliance: [name of RCRA or Superfund Site]

From: [name, Project Coordinator]
[name, Assistant Regional Counsel]

To: [name, Chief, Waste Management Branch]
[name, Chief, ORC CERCLA or RCRA Office]

This memorandum contains a recommendation, with supporting information (see attachment), for action in response to the described incidence of non-compliance.

Type of Activity: [Specify activity, e.g., RI/FS, RFI, IM, RD/RA, etc that Respondent/Defendant is required to conduct.]

Document establishing obligation
for this activity: [Specify document]

Nature of Non-Compliance: [Cite Section of AOC, UAO, CD violated and fully describe facts of non-compliance]

Stipulated Penalties: [Cite Section of AOC/CD which specifies applicable stipulated penalty amounts; specify amount of penalty potentially owed and how amount is calculated. Attach worksheet from 106/107 guidance or attachment 4]

Judicial Referral for
Statutory Penalties: [Where appropriate, discuss Region's plans for preparing and referral of a judicial action seeking statutory penalties]

FOR CERCLA, discuss the following:

Mitigating Factors: [Discuss factors specified in Headquarters
Judicial Consent Decree Tracking and Follow-
up Directive (James M. Strock, January 19,
1990)]

Aggravating Factors: [Discuss factors specified in
Headquarters directive]

FOR BOTH CERCLA and RCRA SITES

Recommended Action: [State the case team's recommended action and
the reason(s) for the recommendation]

Attachment

cc: Site File

Attachment 4
SAMPLE ADMINISTRATIVE ORDER/CONSENT DECREE FORM

[Note: Project Coordinators in CERCLA and RCRA may find this form useful in determining whether to prepare a formal or informal response in cases of non-compliance.]

I. General Information

Site name: _____
Document establishing obligation for this activity: _____
Provision violated: _____
Description of violation: _____

II. Evaluation of Violation

1. Degree of deviation from expectation of compliance (substantial, moderate, minor):
2. Degree of harm expected to result from non-compliance.
_____ substantial threat
_____ minor threat
_____ none likely
3. Respondent's/Defendant's previous non-compliance record on the project and/or on the specific aspect of the project at issue.
_____ previous violations have been frequent or serious
_____ previous violations have been few or minor
_____ no previous violations
4. Degree to which non-compliance jeopardizes meeting subsequent schedule.
_____ will significantly delay project

- _____ may cause significant delay
- _____ may cause delay
- _____ no delay expected

5. Actions taken by Respondent/Defendants to remedy non-compliance (if any).

Explain: _____

6. Duration of violation: from _____ to _____

7. Respondents/Defendants ability to pay penalties (if any assessed).

- _____ Respondent/PRP has limited financial resources
- _____ Respondent/PRP has the ability to pay penalties

III. Recommended Response Actions

- _____ Phone call reminder or verbal warning
- _____ Letter granting a time extension until _____
- _____ Warning letter to discuss violation
- _____ Invocation of dispute resolution provisions of order/decre
- _____ Issuance of a demand for stipulated penalties
- _____ Take over work from the Respondent/PRP pursuant to the terms of order/decre
- _____ Administrative assessment of a civil penalty
- _____ Judicial action to enforce an administrative order or consent decree, seeking stipulated penalties and/or statutory penalties
- _____ Judicial Action for civil or criminal contempt

If penalties are the selected enforcement option, when did they begin accruing? _____. When did they stop? _____.

At what rate do they accrue? _____

Describe any corrective action required to bring Respondent/Defendant back to compliance. _____

RPM/Project Coordinator/OSC (signature): _____

Site Attorney (signature): _____

Enforcement Section Chief (signature): _____

cc: Site File
[list other individuals who will need to receive a copy of
this form]

Attachment 5
Sample Warning Letter for
Late and/or Unacceptable Deliverables

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

or

Name and address of Respondent/Settling Defendant

Re: [insert name of deliverable]

Dear Mr./Ms. [name]:

By this letter, EPA is notifying the Respondent/Settling Defendants of non-compliance with the [Order/Decree/Permit], Docket No. [insert number]. The due date for submittal of the [name of document] was [insert date]. In accordance with Paragraph [insert paragraph number/section] of the [Order/Decree/Permit], stipulated penalties shall accrue from the receipt of this notice until the [name of document] is received by EPA. For UAOs, use the following language to replace last sentence to state the following: Pursuant to Section 106(b) of CERCLA, [insert Respondent/Settling Defendant name] shall be subject to civil penalties of not more than \$25,000 for each day in which such failure to comply continues.

Optional language, delete last sentence and incorporate the following as the next paragraph: EPA would like to stress that your conduct constitutes a violation of the [Order/Decree/Permit] and that [name of Respondent/Settling Defendant] must take immediate actions to ensure compliance with the terms of the [Order/Decree/Permit]. [Project Coordinator may want to provide details regarding what actions the Respondent/Settling Defendant may take to come into compliance]. EPA may determine that your failure to perform the required activities constitutes a continuing event of non-compliance and may subject Respondent/Settling Defendants to the assessment of penalties by EPA under the terms of the [Order/Decree/Permit].

If you have any questions concerning this matter, please contact [name of Project Coordinator] at [insert number].

Sincerely,

[Insert name of individual delegated signature authority]

ATTACHMENT 6
Sample Notice of Grant
of Extension

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

or

Name and address of Respondent/Settling Defendant

Re: [insert name of document]

Dear Mr./Ms. [insert name]:

EPA has reviewed the [Respondent/Settling Defendants'] request for an extension of the due date for [insert name of document or description of obligation]. Pursuant to paragraph ____ of the [Order/Decree/Permit], EPA agrees to extend the schedule for [name of document or obligation]. The new due date for the [deliverable, payment obligation] is [insert due date].

EPA expects the [Respondent/Settling Defendants] to make best efforts to minimize the impact of this delay on the overall schedule. All subsequent deliverables shall be submitted according to the schedule set forth in the [order/decree/permit]. Please contact [insert name of RPM/Project Coordinator] at [insert number], if you have any questions regarding this matter.

Sincerely,

[name of individual delegated signature authority]

ATTACHMENT 7
Notice of RCRA Violation
Sample Letter

[Note: Situations where the Respondent/Settling Defendant(s) submit a revised document for Agency review and the document still does not adequately address the Agency's comments]

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

or

Name and address of Respondent/Settling Defendant

Re: Notice of Violation

Dear Mr./Ms. [insert name]:

By letter dated [insert date of either the comment letter or notice of deficiency letter to Respondent/Settling Defendants], the United States Environmental Protection Agency (EPA) informed you of several deficiencies with respect to your draft [insert name of document] dated [insert date] for your facility/site located at [insert address of installation]. In your letter dated [insert date], [insert name of company/site] responded to the deficiencies raised by EPA. Upon review, EPA has determined that the response does not adequately address the comments contained in the [insert date of comment letter or notice of deficiency letter]. EPA believes that [insert name of company/site] is not in compliance with the [Order/Decree/Permit].

Specifically the [insert name of company/site] response of [insert date], failed to adequately address the following comments: [Suggest listing each comment in comment letter or notice of deficiency letter which were not adequately addressed in the company or site response. This could be followed by the Respondent's/Settling Defendant's response or summary of the Respondent's/Settling Defendant's response to the comment]

Pursuant to Section____ of RCRA, EPA may issue an order assessing a civil penalty for any past or current violation requiring compliance immediately or within a specified time period. You are hereby requested to submit a response in writing to this office no later than [insert number days] days after receipt of this Notice of Violation which adequately addresses the above comments to establish compliance with the referenced [Order/Decree/Permit].

If you have any questions concerning this matter, please contact [insert name of Project Coordinator] at [insert number].

Sincerely yours,

[insert name of individual delegated signature authority]

Attachment 8
Notice of CERCLA Violation
Sample Letter

[Note: Situations where the Respondent/ Settling Defendant(s) submit a revised document for Agency review and the document still does not adequately address the Agency's comments]

Project Coordinator's Name
Facility/Installation Name
Facility/Installation Address

or

Name and address of Respondent/Settling Defendant

Dear Mr./Ms. [insert name]:

By letter dated [insert date the of either the comment letter or notice of deficiency letter to Respondent/Settling Defendants], the United States Environmental Protection Agency (EPA) informed you of several deficiencies with respect to your draft [insert name of document] dated [insert date] for your facility/site located at [insert address of installation]. In your letter dated [insert date], [insert name of company/site] responded to the deficiencies raised by EPA. Upon review, EPA has determined that the response does not adequately address the comments contained in the [insert date of comment letter or notice of deficiency letter]. EPA believes that [insert name of company/site] is not in compliance with the [insert enforcement/settlement document].

Specifically, the [insert name of company/site] response of [insert date], failed to adequately address the following comments: [Suggest listing each comment in comment letter or notice of deficiency letter which was not adequately addressed in the company or site response. This could be followed by the Respondent's/Settling Defendant's response or summary of the Respondent's/Settling Defendant's response to the comment]

If all comments are not adequately addressed, EPA may exercise its right to modify the document unilaterally and require implementation of the revised document. [Project Coordinator and/or ORC attorney should confirm that this statement is consistent with the provisions of the appropriate enforcement/settlement document].

You are hereby requested to submit a response in writing to this office no later than [insert number days] days after receipt of this Notice of Violation which adequately addresses the above

comments to establish compliance with the referenced [insert name of enforcement/settlement document].

If you have any questions concerning this matter, please contact [insert name of Project Coordinator] at [insert number].

Sincerely yours,

[insert name of individual delegated signature authority]

Language to be Included in AOC and RD/RA Settlement:

Efforts to Coordinate with Non-parties to the AOC - Respondent/Settling Defendant(s) shall make best efforts to coordinate in the performance of the Work required by this Order/Consent Decree with any person not a party to this Order/Consent Decree who offers to perform or, in lieu of performance to pay for, in whole or in part, the Work required by this Order/Consent Decree. Best efforts to coordinate shall include, at a minimum:

- (a) Replying in writing within a reasonable period of time to an offer to perform or pay for Work required by this Order/Consent Decree;
- (b) engaging in good-faith negotiations with any person not a party to this Order/Consent Decree who offers to perform or to pay for Work required by this Order/Consent Decree; and
- (c) good-faith consideration of a good-faith offer to perform or pay for Work required by this Order/Consent Decree.

Submission of Documentation - On request of EPA and subject to any applicable claims of privilege(s), Respondent/Settling Defendant(s) shall submit to EPA all documents in its possession, custody, or control relating to (1) any offer to perform or pay for, or (2) the performance of or payment for, Work required by this Order/Consent Decree by any party or non-party to this Order/Consent Decree.

Stipulated Penalties - Respondent/Settling Defendant(s) shall pay a stipulated penalty of ___ for Respondent's/Settling Defendant's failure to comply with any of the requirements in this Section __.

Language for UAO to be Issued to Parties Expected to Comply:

Efforts to Coordinate with Non-respondents to the UAO Respondent shall make best efforts to coordinate in the performance of the Work required by this Order by any person not a party to this Order who offers to perform or, in lieu of performance to pay for, in whole or in part, the Work required by this Order. Best efforts to coordinate shall include, at a minimum:

- (a) Replying in writing within a reasonable period of time to offers to perform or pay for Work required by this Order;
- (b) engaging in good-faith negotiations with any person not a party to this Order who offers to perform or to pay for, Work required by this Order; and
- (c) good-faith consideration of good-faith offers to perform or pay for Work required by this Order.

Submission of Documentation - On request of EPA and subject to any claims of applicable privilege(s), Respondent shall submit to EPA all documents in its possession, custody, or control relating to (1) any offer to perform or pay for, or (2) the performance of or payment for, Work required by this Order by any respondent or non-respondent to this Order.

* Civil Penalties and Punitive Damages - EPA may seek civil penalties for each failure of Respondent to comply with any of the requirements in this Section. EPA may also seek punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for any costs incurred by the Fund as a result of Respondent's non-compliance with this Section.

* If the UAO elsewhere contains a general statement regarding the imposition of civil penalties and punitive damages, it may not be necessary to have this provision in this section.

Language to be Inserted in Coordinate and Participate UAO (to be issued to parties not expected to comply) :

Work to be Performed

(A) Attachment _ to this Order is the Scope of Work (SOW) for the completion of (RI/FS or other work) at the Site. The SOW is incorporated into and made an enforceable part of this Order. Respondent shall perform each of the following response actions:

[List each Work component separately. Include any item to be performed that is already being performed by another entity pursuant to an AOC or another UAO. Include any item required to be performed in the future that has not yet been initiated. Be inclusive and specific.]

(B) To the extent that any other person or persons ("performing party(ies)") are performing or have stated an intent to perform any requirement of this Order, as identified in subparagraph (A) above, pursuant to any other order or agreement under Section 106 or 122 of CERCLA, 42 U.S.C. §§ 9606, 9622, Respondent shall make best efforts to coordinate with the performing party(ies). Best efforts to coordinate shall include, at a minimum:

(a) Communication in writing within _ days of the effective date of this Order to any performing party(ies) as to Respondent's desire to comply with this Order and to participate in the performance of the Work or in lieu of performance to pay for the performance of the Work;

(b) submission within _ days of the effective date of this Order of a good-faith offer to perform the Work, in whole or in part, or in lieu of performance to pay for the Work, in whole or in part; and

(c) engaging in good-faith negotiations with any performing party(ies) to perform or in lieu of performance to pay for the Work required by this Order if such performing party(ies) refuse(s) Respondent's first offer.

(C) To the extent that any other person or persons ("performing party(ies)") are performing or have stated an intent to perform any requirement of this Order, as identified in subparagraph (A) above, pursuant to any other order or agreement, Respondent shall make best efforts to participate in the performance of the Work with the performing party(ies). Best efforts to participate shall include, in addition to the requirements set out in paragraph (B) above, at a minimum:

(a) performance of Work as agreed by Respondent and the performing party(ies) to be undertaken by Respondent; and

(b) payment of all amounts as agreed by Respondent and the performing party(ies) to be paid by Respondent if, in lieu of performance, Respondent has offered to pay for the Work

required by this Order, in whole or in part.

(D) Respondent shall notify EPA in writing within _ days of receipt of this Order of its intent to comply with the Order and shall specify Respondent's proposed manner of compliance with the Order. In addition, Respondent shall notify EPA in writing within _ days of the rejection, if any, by any performing party(ies) of Respondent's offer to perform or, in lieu of performance, to pay for Work.

(E) The undertaking or completion of any requirement of this Order by any other person, with or without the participation of Respondent, shall not relieve Respondent of its obligation to perform each and every other requirement of this Order.

(F) Any failure to perform, in whole or in part, any requirement of this Order by any other person with whom Respondent is coordinating or participating in the performance of such requirement shall not relieve Respondent of its obligation to perform each and every requirement of this Order.

Submission of Documents - On request of EPA and subject to any claims of applicable privilege(s), Respondent shall submit to EPA all documents in its possession, custody, or control relating to (1) Respondent's offers to any performing party(ies) to perform or to pay for, or (2) Respondent's performance of or payment for, the Work required by this Order in conjunction with any performing party(ies).

* Civil Penalties and Punitive Damages - EPA may seek civil penalties for each failure of Respondent to comply with any of the requirements in this Section . EPA may also seek punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), for any costs incurred by the Fund as a result of Respondent's non-compliance with this Section.

* If the UAO elsewhere contains a general statement regarding the imposition of civil penalties and punitive damages, it may not be necessary to have this provision in this section.