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NOTICE

The procedures set forth in this document are intended solely for the guidance of U.S. EPA Regional enforcement staff. They are not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The U.S. EPA reserves its right act at variance with this guidance and to change it at any time without public notice.

CHAPTER 1. OVERVIEW OF THE UST/LUST ENFORCEMENT PROGRAM

The Hazardous and Solid Waste Amendments (HSWA) of 1984 added Subtitle I to the Resource Conservation and Recovery Act (RCRA). Subtitle I established a national regulatory program for the control of underground storage tank (UST) systems used to store liquid petroleum or chemicals defined as hazardous substances.[1]

In addition, the Superfund Amendments and Reauthorization Act of 1986 (SARA) established a response program for releases of petroleum from USTs and created the leaking underground storage tank (LUST) Trust Fund. In both the regulatory and release response programs, the U.S. Environmental Protection Agency (the U.S. EPA, or the Agency) is encouraging States to develop and implement their own programs in lieu of the Federal program, provided that a State has regulations that are no less stringent than the Federal regulations and can take adequate enforcement actions. States that have fulfilled the State program approval criteria will have primary responsibility for enforcing against owner/operators suspected of violating UST requirements (although, prior to approval, States may already be taking actions against violators of the existing State regulations). Furthermore, States may respond to releases and may access the LUST Trust Fund provided they have demonstrated sufficient capability and have negotiated Cooperative Agreements with the U.S. EPA. In some cases, however, States may require assistance from the U.S. EPA in taking enforcement actions.

1.1 PURPOSE OF THE MANUAL

The purpose of this manual is to provide guidance for enforcement personnel on undertaking actions in response to violations of UST technical regulations and corrective action requirements. It is intended to accompany the draft **U.S. EPA Penalty Guidance for Violations of UST Regulations**, which provides guidance for U.S. EPA Regional enforcement staff on calculating administrative penalties to be assessed against violators of the UST regulations.

This manual is intended primarily for use by U.S. EPA Regional offices that need to take enforcement actions in States with or without approved programs. However, it may also be used by State program officials who wish to develop State enforcement programs similar to the Federal program. The manual generally deals with violations and releases involving USTs containing petroleum, although USTs containing hazardous substances are briefly addressed in Chapter 2. It is organized as follows:

- **Chapter 1, Overview of the UST/LUST Enforcement Program**, provides background information on the UST/LUST program philosophy, including the franchise management approach. It also provides summaries of the UST regulations under Subtitle I and describes the LUST response program.
- **Chapter 2, Situations Appropriate to Regional Enforcement Actions**, discusses situations in which U.S. EPA Regional enforcement response would be warranted, including actions in States

[1] Section 9001(1) of RCRA defines underground storage tanks as "any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volumes of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground." Regulated substances include CERCLA hazardous substances (other than RCRA hazardous wastes regulated under Subtitle C) plus petroleum, including crude oil and used oil.

without necessary enforcement authority and on Indian Lands. The chapter also addresses the issue of program overlap.

- **Chapter 3, Enforcement Case Development**, discusses the factors to be considered in determining the appropriate level of enforcement action, identifies the different levels of action that enforcement personnel may take in response to a violation, and describes the procedures for various initial enforcement actions that may be taken in response to a violation or a release.
- **Chapter 4, Procedures for Section 9006 Compliance Orders**, discusses in detail the enforcement process for issuing Section 9006 administrative compliance orders, and provides guidance on complaint preparation, processing answers, and elements of the pre-hearing, hearing, and post-hearing stages of the administrative litigation/adjudicatory process.
- **Chapter 5, Procedures for Section 9003(h) Corrective Action Orders**, discusses in detail the process for issuing Section 9003(h) corrective action orders, provides guidance on order preparation, and describes elements of the pre-hearing stage, settlement conference, and hearing stage of the administrative litigation/adjudicatory process.
- **Chapter 6, Procedures for Judicial Enforcement,** discusses the judicial enforcement process and explains the judicial actions that may be used for violations of UST requirements, including temporary restraining orders, injunctions, and judicial penalties.

1.2 OVERVIEW OF THE UST/LUST ENFORCEMENT PROGRAM

Because of the size and nature of the regulated community, the U.S. EPA has developed a non-traditional regulatory approach in which the national UST program is implemented primarily at the State and local levels. Presently, there are about two million regulated UST systems in the country at over 700,000 facilities. Owners and operators of these facilities include large oil companies; independent marketers and gasoline stations; Federal, State, and local governments; and other entities such as trucking fleets and bus companies that use petroleum in their businesses. A significant portion of this diverse regulated community includes the small, independently-operated service stations and convenience stores that are accustomed to operating with minimal environmental regulation. Unlike the larger businesses, these smaller businesses may have difficulty with compliance because of their limited resources and knowledge of the Federal regulations. Furthermore, the regulation of the UST population is complicated by the wide array of regulations that address the life cycle of a tank from installation to closure.

To handle the environmental threat posed by this large and diverse community, the Agency has adopted the "franchise" management approach, in which U.S. EPA Headquarters and the Regions, as "franchisers," support State and local programs, the "franchisees." The Agency believes that because State and local agencies have greater interaction with the regulated UST facilities, they are best able to provide the UST population with the technical assistance and attention necessary to ensure compliance. In addition, State and local agencies are better situated to assess the needs of the regulated community, respond to owner/operators, and create a visible presence in the regulated community. Furthermore, States have at their disposal a number of effective regulatory mechanisms (such as building permits, fire codes, and some informal enforcement tools) that are not readily available to the Agency.

To implement the "franchise approach," U.S. EPA's Office of Underground Storage Tanks (OUST) is encouraging States to seek approval for administering their own UST/LUST programs in lieu of the Federal program. The Agency's regulations for State program approval set forth at 40 CFR 281 specify

the requirements that a State must fulfill for approval to administer its UST program (see also the **State Program Approval Handbook**).[2] In addition, States are authorized to respond to releases under Section 9003(h)(7) of RCRA provided that they demonstrate capabilities to carry out these actions and enter into Cooperative Agreements with the U.S. EPA.

An important component of an approved UST program is the State's ability to take "adequate enforcement" responses against owner/operators found to be out of compliance with the regulations. Many State and local programs have already developed enforcement programs and have achieved high levels of compliance by providing information and technical assistance to owner/operators in order to prevent violations, and by carrying out informal enforcement responses when violations do occur. Even though they may not yet have program approval, some States already have regulations similar to the Federal regulations (or may have broader pollution control statutes), and are taking formal enforcement actions against violations of these regulations (or statutes). Furthermore, States that do not have their own regulations may have transition agreements that allow them to assist the Agency in taking actions against violators of the Federal regulations.

Enforcement actions taken by States, however, will not always be sufficient to compel compliance. Thus, although the U.S. EPA encourages States to develop and undertake their own formal enforcement programs, there will be some situations in which it may be necessary to transfer the case to the U.S. EPA Regional office. In general, these situations fall into two program areas: (1) release response, and (2) regulatory. The specific situations under which this may occur are discussed in Chapter 2, "Situations Appropriate to Regional Enforcement Actions."

In responding to releases, Federal enforcement actions will be governed by the Agency's **Guidance for Conducting Federal-Lead UST Corrective Actions** (OSWER Directive 9360.0-16A, June 1988).[3] This guidance specifies three conditions that must be present in an UST release situation in order for Federal enforcement actions to be appropriate: (1) the release poses a major public health or environmental emergency; (2) the State or the owner/operator is unable to respond; and (3) the State has requested assistance from the U.S. EPA.

In the regulatory program, it may also be necessary at times for the Agency to take enforcement actions in States. For example, in the early stages of the franchise program, States will be in the process of developing authorities and regulations that are no less extensive and stringent than the Federal regulations. During this developmental period, however, a State may discover a violation for which it does not yet have the appropriate enforcement authority. In such a situation, the State, perhaps after taking steps to encourage the owner/operator to come into compliance, may wish to refer the case to the U.S. EPA. The Agency may also get involved in a State enforcement case if it appears that the case could establish a national legal precedent. In addition, a State may refer a case to the U.S. EPA because the case is politically sensitive in that State (e.g., if the owner/operator is a major business in that State or is a Federal facility). Because the U.S. EPA has limited resources for taking enforcement actions, however, the Agency will use discretion in taking over cases referred from States. Furthermore, when the Agency

[2] State Program Approval Regulations, 40 CFR Part 281 (promulgated at 53 FR 37212-47, September 23, 1988) and State Program Approval Handbook OSWER Directive 9650.8, March 1989.

[3] On Indian Lands, however, Federal actions will be governed by Interim Guidance for Conducting Federal-Lead UST Corrective Actions for Releases of Petroleum on Indian Lands (OSWER Directive 9610.9, July 1989).

does take enforcement action in a State, it must coordinate activities with the State in order to avoid possible duplication, to present a uniform approach to UST owner/operators, and to maintain State cooperation.

The specific procedures for initiating and accepting a referral will vary from State to State. Each State/Federal enforcement agreement should specify the process for case referral (see U.S EPA's "Policy Framework for State/EPA Enforcement Agreements," Office of Enforcement, August 1986). Once a case is referred, however, Regional enforcement personnel should keep the State informed of the status of the case. The U.S. EPA's "Policy Framework for State/EPA Enforcement Agreements" identifies several ways in which the Agency can maintain State presence in a case, including:

- Taking joint State/Federal action, particularly where a State has referred a case because it lacks the necessary authorities;
- Using State inspection or other data in developing the case;
- Arranging for division of penalties with the State (if legally permissible);
- Involving the State in creative settlements and in case development;
- Issuing joint press releases and sharing credit with the State; and
- Keeping States continually apprised of events.

1.3 REGULATIONS OF USTS UNDER SUBTITLE I

Pursuant to Section 9003 of Subtitle I, the U.S. EPA established requirements for leak detection, leak prevention, corrective action, and financial responsibility for USTs.[4] These requirements were finalized in two separate U.S. EPA rules: the UST technical standards and financial responsibility rules. The discussions that follow summarize each rule. The purpose of these two rules is to reduce the number of releases of petroleum and hazardous substances from USTs, minimize the contamination of soil and ground water caused by such releases, and ensure adequate cleanup of contamination. The requirements in these rules replaced the Interim Prohibition requirements for non-deferred tanks, which prohibited the installation of new unprotected or bare steel tanks. However, Interim Prohibition requirements will remain in effect for those tanks that have been deferred from coverage under the technical standards rule (deferred tanks are listed in the preamble of the final rule).

1.3.1 Summary of the Technical Standards Rule

The regulations establishing technical standards for USTs emphasize leak prevention, detection, and corrective action. The rule covers the following five areas:

- UST design, construction, installation, and notification;
- UST system operation and maintenance;
- Release detection and recordkeeping;
- Release reporting, investigation, and corrective action; and
- Out-of-service UST systems operation, maintenance, and closure.

[4] The UST Technical Standards Rule, 40 CFR Part 280, Subparts A through G, was promulgated September 23, 1988 (at 53 FR 37082). The UST Financial Responsibility Rule, 40 CFR Part 280, Subpart H, was promulgated October 26, 1988 (at 53 FR 43326).

For the reader's convenience, the following discussions provide a brief overview of the specific requirements that an UST owner/operator must follow to be in compliance with the regulations. However, it should be noted that the following summary is not exhaustive, and many exceptions apply. Specific requirements are detailed in the regulations.

UST Design, Construction, Installation, and Notification (Subpart B). In the technical standards rule, specific requirements for both new and existing USTs are addressed separately. For new UST systems, the design, construction, and performance standards must meet approved industry practices. New USTs are also required to have corrosion protection for tanks and piping (unless the site is approved for noncorrosivity), or be constructed of a non-corrodible material. In addition, tanks must be equipped to prevent spills and overfills. Finally, all new tank installations must be performed according to approved industry practices and manufacturer's instructions, and certified by one of the methods listed in the rule.

The requirements for existing USTs emphasize tank upgrading. Existing USTs must be either closed, replaced with new tanks, or upgraded to new tank standards by December 22, 1998. Upgrading requirements for existing USTs include the following:

- Retrofitting tanks with corrosion protection or installing interior liners, or both;
- Retrofitting metal piping with corrosion protection; and
- Installing spill and overfill prevention equipment.

Notification requirements apply to both new and existing USTs. Under the rule, the UST owner/operator is required to report the following information to the implementing agency: tank type, location, age, use, and methods of compliance with requirements for installation certification, corrosion protection, release detection, and financial responsibility. In addition, the owner/operator must notify the implementing agency if a tank is removed from service or has a change in use.

UST System Operation and Maintenance and Repairs (Subpart C). Operation and maintenance requirements ensure the proper performance of all USTs and auxiliary equipment through testing and recordkeeping practices. Requirements under the technical standards rule include proper operation, maintenance, and inspection of spill and overfill and corrosion protection equipment, as well as recordkeeping of performance of the equipment listed above. The owner/operator must also be sure the tank material or lining is compatible with the substance stored in the tank. To ensure that repaired USTs are operating properly, all UST system repairs must be made according to approved industry practices. Repairs are prohibited, however, for all metal pipe sections and fittings from which product has been released; these parts must be replaced. All USTs with repaired or replaced parts are required to be tightness tested to ensure that the UST system is operating properly.

Release Detection and Recordkeeping (Subpart D). An approved method of release detection is required for all new petroleum tanks and piping at installation, and for all existing tanks and piping, phased in over a 1- to 5-year period according to the tank's age. New USTs containing hazardous substances are required to have double-walled tanks and piping with interstitial monitoring for tanks and piping. Release detection equipment for all UST systems must be installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions. Recordkeeping regulations require the UST owner/operator to maintain records demonstrating the methods of compliance with requirements for

installation, corrosion protection, release detection, maintenance, and repairs. Records must also be maintained on the performance of release detection and spill and overfill equipment.

Release Reporting, Investigation, and Corrective Action (Subparts E and F). Release reporting, investigation, and corrective action requirements are designed to ensure a fast and appropriate response to all suspected and confirmed releases from USTs. Under the technical standards rule, an UST owner/operator must report to the implementing agency within 24 hours of any release of regulated substances at the site or in the surrounding areas, unusual operating condition of the tank or equipment, monitoring results indicating that a release may have occurred, or spills or overfill. Suspected releases must be immediately investigated, and the owner/operator is required to begin corrective action as soon as a release has been confirmed.

Initial release response actions required by the rule include preventing further release of the regulated substance into the environment, and identifying and mitigating any fire, explosion, and acute vapor hazards. Within 20 days of release confirmation, the responsible owner/operator is required to report to the implementing agency on initial abatements steps taken and any resulting data. Within 45 days, the owner/operator must report on the initial site characterization and the free product removal efforts. If remediation is necessary, the owner/operator will also be required to submit a corrective action plan for approval by the implementing agency.

Out-of-Service UST System Operation and Maintenance and Closure (Subpart G). An owner/operator of an UST taken out of service for less than 3 months must continue all operation and maintenance procedures. If a tank is taken out of service temporarily (i.e., for 3 to 12 months), the owner/operator must also secure and cap all ancillary equipment and leave vent lines open and functioning. Any tank that is taken out of service permanently (i.e., for more than 12 months) and does not meet new tank standards (for example, leak detection, corrosion protection, spill and overfill protection requirements, etc.) must be upgraded to meet these new tank standards or be permanently closed. For permanent tank closure, the owner/operator is required to:

- Notify the implementing agency 30 days prior to tank closure;
- Empty and clean the tank;
- Conduct a site assessment to determine if there has been a release contaminating the surrounding area, and perform corrective action if necessary;
- Either remove the tank from the ground or fill it with an inert substance; and
- Close the tank to all future outside access.

Prior to a change in service (e.g., continued use of an UST system to store a non-regulated substance), the tank must be emptied and cleaned, and a site assessment must be conducted.

1.3.2 Summary of the Financial Responsibility Rule

The financial responsibility rule requires owner/operators of petroleum USTs to demonstrate financial assurance of their abilities to undertake corrective action and compensate third parties for bodily injury and property damage in the event of a petroleum UST release. The final rule covers the following three areas: (1) level of financial responsibility; (2) financial responsibility mechanisms; and (3) reporting and recordkeeping. The financial responsibility requirements will be phased in over a 36-month period, based on the number of tanks and ownership classification (e.g., marketer, non-marketer, or municipality).

Level of Financial Responsibility. Under the final rule, the owner/operator of an UST containing petroleum is required to demonstrate the following types and amounts of financial assurance:

- Per-occurrence coverage (the potential cost of one leak) - at least $1 million for retail USTs and $500,000 for non-retail USTs (i.e., USTs not engaged in petroleum marketing, production, or refining, and that handle less than 10,000 gallons per month).
- Annual aggregate coverage (for all potential releases, depending on the number of tanks at the site) - $1 million annual coverage for facilities with up to 100 tanks or $2 million annual coverage for facilities with more than 100 tanks.

Owner/operators are required to demonstrate both types of financial assurance. Financial assurance must be reviewed by the owner/operator, and must be increased, if necessary, whenever new or additional USTs are acquired or installed.

Financial Responsibility Mechanisms. An UST owner/operator may demonstrate financial responsibility through use of one, or a combination, of the following mechanisms:[5]

- Third-Party Assurance Mechanisms - Insurance (including risk-retention group coverage), guarantee, surety bond, letter of credit, and trust fund;
- Financial Test of Self-Insurance - A financial test that proves the owner/operator (1) has a tangible net worth of at least $10 million and at least ten times the annual aggregate coverage required, or (2) can pass the financial test for liability coverage in Subtitle C, Subpart H of RCRA (40 CFR Part 264); and
- State Mechanisms - State fund, State assurance program, or other State-approved mechanism that is at least as stringent and equivalent to mechanisms listed above.

Reporting and Recordkeeping. The owner/operator of an UST must maintain copies of the financial assurance mechanism(s) used to comply with financial responsibility regulations at the UST site or their place of business. The owner/operator must report evidence of financial responsibility to the implementing agency in the following situations:

- When new tanks are installed;
- Within 30 days of detecting a known or suspected release;
- If the provider becomes incapable of providing financial assurance, and the owner/operator is unable to obtain alternative coverage in 30 days;
- If the financial assurance mechanism is cancelled or not renewed by the provider, and the owner/operator is unable to obtain alternate coverage within 60 days;
- If the owner/operator using a financial test finds that he or she no longer passes the test, or if the implementing agency makes such a finding; and
- At the explicit request of the implementing agency.

[5] On Indian Lands, however, Federal actions will be governed by Interim Guidance for Conducting Federal-Lead UST Corrective Actions for Releases of Petroleum on Indian Lands (OSWER Directive 9610.9, July 1989).

The provider of financial assurance is required to notify the UST owner/operator and implementing agency of plans to cancel the assurance in order to allow time for the owner/operator to secure alternate coverage.

1.4 RELEASE RESPONSE PROGRAM UNDER SUBTITLE I

The 1984 HSWA amendments to RCRA, while creating a national regulatory program for USTs under Subtitle I, did not provide the U.S. EPA with the authority to respond to UST leaks or spills. To address this need, SARA added RCRA Section 9003(h), which established a program for responding to petroleum releases from USTs. In addition, Section 522 of SARA amended the Internal Revenue Code to create the LUST Trust Fund to be used to finance cleanups of releases from petroleum USTs. The release response program and the LUST Trust Fund are different in nature from the regulatory program established under Subtitle I. The initial UST program was established and currently operates primarily as a preventive program, while the LUST program is a response program designed to facilitate the cleanup of petroleum leaks and spills from USTs.

1.4.1 Release Response Authorities

A fundamental element of the cleanup program established by SARA is the provision of authority to the Agency, under Section 9003(h), to respond to releases from USTs through enforcement activities, corrective actions, and cost recovery. These activities may be financed by the LUST Trust Fund, which was created through a 1/10 of one cent per gallon excise tax on motor fuels that is expected to generate $500 million in the first 5 years. Specifically, Section 9003(h)(4) enables the Agency (or States, under Cooperative Agreements with the U.S. EPA) to issue corrective action orders requiring owner/operators of leaking USTs to carry out corrective action or closure activities. In addition, Section 9003(h)(2) allows the Agency to take corrective action in response to a petroleum release from an UST. Activities such as exposure assessment, the provision of alternative water supplies, and the relocation of affected residents, are considered allowable corrective action activities under Section 9003(h)(5). The U.S. EPA or the State may undertake such corrective action activities using the LUST Trust Fund when one or more of the following situations exist:

- No person can be found within 90 days (or shorter period as may be necessary to protect human health and the environment) who is the owner/operator of the leaking UST and who is capable of carrying out the corrective action properly;
- A situation exists that requires prompt action to protect human health and the environment;
- Corrective action costs at a facility exceed the required level of financial responsibility and expenditures from the LUST Trust Fund are necessary to ensure an effective corrective action; or
- The owner/operator has failed or refused to comply with a corrective action or compliance order under Section 9003 or Section 9006 or with an order of a State.

The U.S. EPA or the State may also undertake corrective action if the owner/operator has failed to comply with financial responsibility requirements, provided that the site warrants action according to the

U.S. EPA's or the State's priority system for LUST Trust Fund corrective actions.[6] According to Section 9003(h)(11), U.S. EPA and State priority systems must reflect the use of funds at sites where:

- Releases pose the greatest threat to human health and the environment; and
- The State cannot identify a solvent owner or operator of the UST who will undertake corrective action properly.

Section 9003(h)(6) provides the Agency with the authority to take action against responsible owner/operators to recover costs incurred by the U.S. EPA or the State while carrying out corrective action and enforcement activities. In determining the level of cost recovery, the Agency or State may consider the liability level set forth in the financial responsibility regulations (except where the owner/operator failed to maintain the required levels of financial responsibility), as well as other factors. The U.S. EPA's **Cost Recovery Policy for the Leaking Underground Storage Tank Trust Fund** (OSWER Directive 9610.10, October 1988) addresses this issue in detail.

1.4.2 State Role in the LUST Trust Program

As with the UST regulatory program, States will play the primary role in implementing the LUST program in all areas, including enforcement. Under Section 9003(h)(7), States may undertake corrective action, issue corrective action orders, and recover costs provided that the State has entered into a Cooperative Agreement with the U.S. EPA. The Agency has issued guidelines governing LUST Trust Fund Cooperative Agreements (**LUST Trust Fund Cooperative Agreement Guidelines**, OSWER Directive 9650.10, February 1989). Through these Cooperative Agreements, States are responsible for establishing site priorities; investigating sites and conducting assessments; pursuing and ordering corrective actions by responsible parties; determining appropriate technologies for effective action; conducting cleanups; and pursuing cost recovery. Because most States have Cooperative Agreements at this time, the U.S. EPA's involvement in enforcement actions in release situations will occur mainly when States request the Agency's assistance with difficult cases. Since the effective date of the financial responsibility regulations (January 24, 1989), States that enter into Cooperative Agreements must begin cost sharing with the Federal government. Under the Cooperative Agreement guidelines, States are expected to pay 10 percent of the total program budget of Cooperative Agreements.

[6] "Use of the LUST Trust Fund at Facilities Without Financial Responsibility," Memorandum from Ron Brand, OUST, January 24, 1990.

CHAPTER 2. SITUATIONS APPROPRIATE TO REGIONAL ENFORCEMENT ACTIONS

Under the national UST program, the U.S. EPA is encouraging States to take primary responsibility for enforcing their own UST/LUST programs in lieu of the Federal program. The Agency anticipates that as States continue to expand their enforcement programs, its primary role will be to provide leadership and assistance to States. However, the Agency has identified several scenarios where Federal involvement in State enforcement cases may be necessary **(FY 1989-FY 1990 Compliance and Enforcement Strategy for the Underground Storage Tank Program**, OSWER Directive 9610.8, January 1989). This chapter discusses those situations.

2.1 ACTIONS TAKEN IN STATES WITH INADEQUATE ENFORCEMENT AUTHORITY

While many States already have active, comprehensive UST programs, other States may still be in the process of setting up programs or obtaining new legislation. If a State lacks UST-specific enforcement authority, it may be necessary at times for the U.S. EPA Regional office to carry out an enforcement action in that State. For example, the U.S. EPA Regional office and the State may decide together that the Agency's involvement is necessary to achieve the desired response from the noncomplying owner/operator. Upon referral from the State, the U.S. EPA will assume enforcement responsibility when a State requests such assistance from the Agency.

In taking enforcement actions in a State, the Region's level of response will vary depending upon the State program's level of development and the severity of the violation. For example, if a State is at the initial stages of program development, the Region may focus its resources on helping the State develop a State-specific compliance and enforcement program that includes communication and outreach to educate owner/operators about the Federal regulations (OSWER Directive 9610.8). However, the Region will maintain the option to take direct enforcement actions in the State, and have the option of establishing a Federal presence in the State through both informal and formal enforcement actions. Informal actions (e.g., requests for information) would serve to deter potential violators, and may provide an example to the State as it builds and improves its UST program.

Regional involvement may also be necessary in a State that has a more developed UST program but still lacks the enforcement authority applicable to a given violation of the Federal regulations (OSWER Directive 9610.8). For example, a State may have taken informal responses to compel compliance (e.g., through warning letters) but may have found that these actions were ineffective. If the State lacks the authority to undertake more formal enforcement actions, it may then request assistance from the Agency. In such a case, the Agency may wish to implement the necessary formal enforcement measures to deter potential violators while encouraging the State to acquire the necessary enforcement authorities. The Agency may choose, for example, to take over a case where the violation threatens human health and the environment (e.g., in the case of a release, or a violation of leak detection requirements). In addition, the Agency will continue to work with the State to build its program capabilities and resolve enforcement issues.

2.2 ACTIONS TAKEN IN APPROVED STATES

A State that has an approved program may still encounter certain enforcement situations in which U.S. EPA involvement would be beneficial. OUST's compliance and enforcement strategy (OSWER Directive

9610.8) describes a number of situations in which the U.S. EPA may become involved in an enforcement case in a State with an approved program. In general, the U.S. EPA may become involved because: (1) the State lacks the authority to assess an administrative penalty; (2) the State requests Federal assistance in an enforcement case that involves a Federal facility or other politically sensitive entity; and (3) the situation involves a major public health or environmental emergency.

2.2.1 Actions Taken in States Without Administrative Penalty Authority

One reason that a State may request the Agency's involvement in an enforcement case is to assess administrative penalties. The State Program Approval regulations (40 CFR Part 281) require States to have the authorities necessary to assess civil penalties (up to $5,000 or more per tank per day for each violation), but do not require States to have authority to issue administrative compliance orders and assess administrative penalties. Nevertheless, a number of States do have the authority to issue administrative orders, and have found such orders to be an effective tool for achieving compliance. Although a State may use administrative orders primarily to compel compliance, it may encounter violation cases in which it would be appropriate to assess a penalty in conjunction with the order. If the State UST implementing agency does not have administrative penalty authority, it must petition the Attorney General's office to assess such administrative penalties. Because this process can be time consuming, a State may request that the U.S. EPA Regional office assess administrative penalties.

2.2.2 Cooperative Actions Against Violators

Even if a State has sufficient authorities for taking enforcement actions in most of its cases, it still might request the U.S. EPA to assist the State in enforcing certain cases. For example, a State might prefer that the Agency become involved in an enforcement action against an owner/operator that is considered to be economically or politically vital to the State, such as a corporation that employs a large number of State residents or in multi-state actions.

A State may also request Agency involvement in an enforcement action against a Federal facility. Should the U.S. EPA be called upon to undertake enforcement action at a Federal facility, the appropriate guidance may be found in the **Federal Facilities Compliance Strategy** (also known as the "Yellow Book"), rather than this manual.[7] The "Yellow Book" establishes the current Agency-wide approach for handling violations at Federal facilities. According to that document, Federal facilities must comply with the Federal requirements under most environmental statutes, and also with all applicable State and local laws and regulations to the same extent as non-Federal entities. If a Federal facility within a certain State violates environmental statutes or regulations, the State and the Agency may share certain responsibilities for carrying out enforcement activities.

In the UST program in particular, a State that has received program approval may take the lead in responding to violations at Federal facilities. However, the U.S. EPA retains the legal authority and responsibility to enforce Federal law at a Federal facility. The **FY 1989-FY 1990 Compliance and Enforcement Strategy for the Underground Storage Tank Program** (OSWER Directive 9610.8) sets forth three situations in which the U.S. EPA may take enforcement actions against a Federal facility: (1) the State lacks adequate enforcement authorities and capabilities; (2) the State requests the Agency to take the lead role or cooperate in a joint action; or (3) there are other appropriate circumstances consistent with the "Yellow Book." Arrangements for State and/or U.S. EPA involvement and cooperation in

[7] Federal Facilities Compliance Strategy, U.S. EPA, Office of Federal Activities, EPA/00 88-001, November 1988.

enforcement efforts at a Federal facility should be clearly outlined in State/Federal enforcement agreements that can be incorporated into the Cooperative Agreement, or, if the State has an approved program, in the Memorandum of Agreement between the State and the Agency.

2.2.3 Actions Taken in Response to a Major Public Health or Environmental Emergency

A State may require U.S. EPA assistance in a case that involves a major public health or environmental threat or emergency. States, under Cooperative Agreements, will be expected to initiate and pursue enforcement actions as necessary to compel owner/operators to mitigate releases. However, as set forth in the **Guidance for Conducting Federal-Lead Underground Storage Tank Corrective Actions** (OSWER Directive 9360.0-16, June 1988), Federal-lead enforcement may be appropriate where: (1) a release from an UST poses a major public health or environmental emergency; (2) the State can demonstrate lack of capability or authority; and (3) the State requests Federal assistance for an eligible site.

2.3 ACTIONS TAKEN ON INDIAN LANDS

The Agency's policy for managing any environmental regulatory program on Indian lands is set forth in the "EPA Policy for the Administration of Environmental Programs on Indian Reservations" (November 1984) and the accompanying "Indian Policy Implementation Guidance." The fundamental principle of these documents is that the Agency will pursue the goal of Indian "self-government," and will work with Tribal governments on a one-to-one basis as sovereign entities.

Because they are not States, Indian Tribes cannot be approved to operate their programs in lieu of the Federal program, even though they may have parallel UST programs. Furthermore, States generally do not have jurisdiction over Indian lands unless the State and the Tribe have such an agreement. To address the issue of UST releases on Indian lands, the U.S. EPA has developed the **Interim Guidance for Conducting Federal-Lead UST Corrective Actions for Petroleum Releases on Indian Lands** (OSWER Directive 9610.9, July 1989), which discusses situations in which it is appropriate for the Agency to take action against UST releases on Indian lands. However, no guidance currently exists for taking enforcement actions on Indian lands in response to violation in the preventative program.

As set forth in the Agency guidance (OSWER Directive 9610.9), Federal-lead involvement in corrective actions on Indian lands is limited to cases in which (1) there is a serious "time critical" threat to human health and the environment; (2) the Tribe is unable to respond; and (3) the owner/operator is unable or unwilling to provide an adequate and timely response. It should be noted that the guidance set forth in the document is directed toward short-term remediation only. Long-term corrective action guidance will be developed (if necessary) once the Agency has determined the extent of the UST problem on Indian lands. To assist with this determination and provide Tribes with technical assistance, the Agency is funding compliance assistance and outreach activity pilot projects in several U.S. EPA Regions.

In general, the criteria for determining Federal-lead corrective action at a violating UST facility on Indian lands are broader than those specified for non-Indian facilities. National U.S. EPA policy encourages direct dialogue and the sharing of technical assistance with Tribal authorities to encourage the facility to achieve compliance.

2.4 ACTIONS RESULTING FROM PROGRAM OVERLAP

One final area in which Regional enforcement may be required is in response to releases of hazardous substances from USTs. SARA established a release response program under Section 9003(h) of RCRA and created the LUST Trust Fund for financing cleanups of petroleum UST releases. However, the response program and the Trust Fund may only be used for petroleum releases. Although the majority of regulated tanks contain petroleum, about 5 percent contain hazardous substances. For this small tank population, responsibility for leaks of hazardous substances and cleanup of these releases will be decided on a site-specific basis.

CHAPTER 3. ENFORCEMENT CASE DEVELOPMENT

Under the national UST program, States are encouraged to take the primary responsibility for responding to violations of the UST requirements. Because of the size and nature of the UST regulated community, the U.S. EPA is focusing its enforcement efforts on encouraging voluntary compliance through informal enforcement actions, and is working with States to strengthen their enforcement programs. However, the Agency does intend to take stricter, more resource-intensive actions when necessary. Subtitle I of RCRA provides U.S. EPA Regional enforcement personnel with an array of possible responses for carrying out this enforcement approach. This chapter provides guidance on determining the appropriate level of enforcement response and describes procedures for taking specific initial enforcement actions. The more traditional administrative and judicial enforcement actions are described in Chapters 4, 5, and 6.

3.1 OVERVIEW OF ENFORCEMENT TOOLS

The purpose of any enforcement response is to bring about compliance with the regulations and to deter future violations, or, in the case of a release, ensure proper corrective action. To encourage voluntary compliance in the UST community, the least resource-intensive action should be taken first. Enforcement personnel should then increase the severity of the enforcement action if the lower level of enforcement fails to achieve the desired response. The following section (Section 3.2) discusses the factors to be considered in determining the appropriate level of enforcement. Once this level is determined, the enforcement actions that may then be taken usually fall under one of the following separate, but often interrelated, tracks: (1) actions taken to achieve compliance (for violations of the technical regulations); and (2) actions taken to achieve corrective action (when the violation also involves a release). Sections 3.3, 3.4, and 3.5 describe various enforcement techniques that can be taken in each of these situations. In addition, Section 3.6 describes alternative enforcement tools that may be used to achieve quicker resolution of the violation or release situation.

The processes described in this chapter represent some of the enforcement techniques that are presently being used in the Regions, and should not be considered the only, or the most appropriate, means of addressing violations. Because the UST technical regulations have only been in effect for a relatively short period of time, UST enforcement staff have not had the opportunity to develop and experiment with different enforcement techniques. However, as the Regional experience in enforcing against UST violations increases, the enforcement processes are expected to be improved and refined over time. Furthermore, some Regional enforcement personnel may have already developed similar or more effective means of carrying out these initial enforcement activities. Therefore, this guidance will be reviewed each year and modified as appropriate, to keep it current with new information and changes to the program.

3.2 FACTORS TO CONSIDER IN DETERMINING RESPONSE LEVEL

In determining the appropriate enforcement action for any violation of environmental regulations, enforcement personnel should consider the goals of the "Agencywide Compliance and Enforcement Strategy" (U.S. EPA, Office of Enforcement, May 1984):

- Achieving compliance with the requirements;
- Equitable treatment of the regulated community;

- Deterrence of future noncompliance; and
- Effective use of Agency resources.

The level of enforcement required to achieve these goals will vary depending on the severity of the violation, priorities established between the Regions and the States, and other circumstances of the case. The selection of the appropriate enforcement response may also be affected by the penalty policy currently being developed.

The Agency has identified a number of factors to be considered in determining the appropriate level of response ("Working Principles Underlying EPA's National Compliance/Enforcement Programs," November 1983 and "Strategy Framework for EPA Compliance Programs," U.S. EPA, Office of Enforcement, May 1984). For cases involving noncompliance with the UST regulations, factors that should be considered are: (1) the seriousness of the violation; (2) the circumstances of the violation; and (3) information about the owner/operator. In addition, enforcement personnel should take into account the likelihood that a response may establish a good or bad precedent. Although not all of the information required to evaluate these factors will be available at the time that an enforcement response must be taken, enforcement personnel should attempt to consider these factors to the greatest extent possible when making their decision. These factors are discussed in more detail below.

3.2.1 Severity of the Violation

Considerations that should be made in determining the severity of the violation include:

- **Actual or possible harm** - whether the owner/operator's actions resulted in, or were likely to result in, an UST release;
- **Importance to the regulatory program** - whether the requirement that was violated is fundamental to achieving the goals of the UST program. For example, a violation of leak detection requirements would be considered serious because the requirements are fundamental to the goal of preventing releases.
- **Availability of data** - whether the action involved a violation of any requirement for recordkeeping or reporting for which the Agency has few other sources. For example, a violation of the notification requirements would be considered serious because the notification program is a primary source of information on UST locations.

In determining the appropriate response for a release that threatens human health or the environment, additional considerations include: (1) amount of petroleum or hazardous substance potentially or actually released; (2) toxicity of petroleum or hazardous substance released; (3) sensitivity of the environment in which the released occurred; and (4) duration of the release.

3.2.2 Circumstances of the Violation

In determining the appropriate level of action for other types of violations, enforcement personnel should take into account the culpability of the owner/operator (i.e., whether the violation could have been prevented or whether it was beyond the owner/operator's control). In addition, enforcement personnel should consider whether the owner/operator made any efforts to identify, report, and correct the violation, independent of the enforcement response. Such positive reinforcement of "self-monitoring" will help encourage voluntary compliance.

3.2.3 Information About the Owner/operator

Information about the owner/operator includes the economic benefit of noncompliance accrued by the owner/operator, the facility's compliance history, the owner/operator's ability to pay, and the size of the business. If information on these points is available, enforcement personnel should consider using it in choosing an enforcement response. For example, a history of noncompliance is considered a negative element, and an owner/operator that has a poor compliance record should be met with stronger enforcement actions. Certain considerations, such as the economic benefit of noncompliance and an owner/operator's ability to pay will require further research and are often taken into account when a penalty is assessed; however, this should not delay action taken by the Region. The burden to establish an inability to pay is on the owner/operator.

3.3 ENFORCEMENT ACTIONS FOR VIOLATIONS OF THE TECHNICAL REGULATIONS

Under the authorities in RCRA Section 9005 and Section 9006, Agency enforcement personnel may take the following actions in response to a violation of the technical regulations:[8]

- **Information request letters** - to verify an alleged violation;
- **Initial responses** - to notify the owner/operator and encourage voluntary compliance;
- **Administrative actions** - to compel compliance through administrative orders; and
- **Judicial actions** - to compel compliance through judicial orders.

Each of these is discussed below. As previously discussed, the appropriate level of this initial response will depend upon the circumstances of the case (for example, more serious cases may warrant skipping the less severe actions). Although most enforcement cases will go through the same general steps when enforcement responses increase in severity, the Agency's response in an individual case will depend on the actions already taken by the State (e.g., the Agency may begin directly with an administrative response if the State has determined that informal actions were ineffective).

3.3.1 Information Request

RCRA Section 9005 (42 U.S.C. §6991d) authorizes the U.S. EPA to require an UST owner or operator to furnish information in the context of enforcing the provisions of Subtitle I and its implementing regulations. Therefore, to obtain additional information on a potential violation of the technical regulations, the Agency may issue a Section 9005 information request letter to an owner/operator. In response to such a request, the UST owner/operator must provide U.S. EPA Regional enforcement personnel with any information that they have requested on the UST system. The UST owner/operator must also allow the Agency to conduct monitoring or testing, and must provide Agency personnel with access to all records relating to the tanks. (Thus, in view of the statutory authority behind these "requests," it may be more appropriate to view them as "demands.") Monitoring, testing, and record reviews typically provide the Agency with the information necessary to determine that a violation has, in fact, occurred. In general, collection and documentation of information may also be necessary to support the development of an enforcement case. The amount and type of data that must be collected, however, will vary depending on the data collected during the inspection and any previous follow-up work conducted by the State.

[8] Additional authorities for responding to violations may also be found in RCRA Subtitle C and other statutes, such as the Safe Drinking Water Act, the Toxic Substances Control Act, and the Federal Water Pollution Control Act.

A letter of request for information should be issued in cases where a violation is apparent but where substantially more evidence is required before an appropriate response can be determined (e.g., before deciding to draft an administrative order). A typical information request letter should include the following information:[9]

- Identification, citation, and explanation of the request for information;
- The name and telephone number of an Agency contact person;
- A deadline for achieving full compliance with the request (e.g., usually 10 to 15 days); and
- A statement indicating that refusal to provide the requested information beyond the deadline may result in the issuance of an administrative compliance order or initiation of a civil action, which may include an assessment of civil penalties of up to $10,000 per tank for each day of violation.

In general, the request for information may be sent by first class mail unless the owner/operator has not cooperated, in which case it should be sent by certified mail, return receipt requested. In addition, a copy of the letter should be placed in the case file.

3.3.2 Warning Letter/Notice of Violation (NOV)

Because of the large size of the UST regulated community and the number of owner/operators unaccustomed to being regulated, the Agency is promoting the use of initial enforcement mechanisms that encourage voluntary compliance. In particular, enforcement personnel should initially take actions that serve to notify the owner/operator of the violation, advise what actions are needed to correct the situation, provide a deadline for compliance, and indicate more stringent actions that may be taken if he or she does not respond. Notifications such as warning letters and NOVs are often used to achieve these objectives. Although these notifications are not required prior to taking more formal actions, they do serve as documented evidence of contact with the owner/operator and may be used later to support more severe enforcement actions.

Once enforcement personnel have obtained sufficient information to confirm a violation, the UST owner/operator should be notified that the Agency considers him or her to be in violation of a technical requirement. In general, a notification should contain the following information:

- Identification, citation, and explanation of the violation;
- A deadline for achieving compliance with the appropriate regulatory or statutory requirements (e.g., 30 to 45 days);
- A statement indicating that continued noncompliance beyond the deadline may result in the issuance of a Section 9006 compliance order or initiation of a civil action, which may include an assessment of civil penalties of up to $10,000 per tank for each day of violation; and
- The name and telephone number of an Agency contact person.

Unlike the information request letter, the notification must be sent by certified mail, return receipt requested. In addition, a copy should be placed in the case file.

[9] Information to be included in the information request letter and warning letter are based on procedures for RCRA Section 3008(a) warning letters, as set forth in the **RCRA Compliance/Enforcement Guidance Manual** (OSWER Directive 9837.0, August 1984).

The form of the notification may range from informal warning letters to the more authoritative NOVs.[10] Warning letters are often considered to be the more informal method of notifying an owner/operator of a potential violation, and may be issued by the inspector at the site or be issued with the inspector's signature. A warning letter typically serves to inform the owner/operator that the implementing agency has been made aware of the situation, and seeks voluntary compliance by indicating what actions should be taken to achieve compliance. A warning letter is generally issued when the violation is minor and cooperation is expected, or when a first-time violator is expected to comply promptly. The warning not only gives the owner/operator a chance to comply, but also provides evidence that informal actions were taken, should more serious enforcement actions be needed later.

The more formal NOVs may be issued if enforcement personnel believe that a stronger initial communication is required. NOVs often follow a more structured format than informal warning letters, and may be signed by an official from the implementing agency. While it still may be considered an informal response, issuing an NOV marks the beginning of the more formal enforcement process -- if the owner/operator fails to adhere to the schedule outlined in the NOV, enforcement personnel may respond with a Section 9006 compliance order or may initiate civil judicial proceedings.

3.3.3 Administrative Compliance Order

If the initial response actions described above appear to be ineffective, it may be necessary to initiate formal administrative or judicial actions. Under Section 9006(a) of RCRA, the U.S. EPA is authorized to issue administrative orders to compel compliance with any requirements of Subtitle I, including the regulations (at 40 CFR Part 280) promulgated pursuant to Section 9003. These compliance orders are usually issued in non-emergency situations where a return to compliance is expected, and where it appears that the more informal actions (e.g., a warning letter) would be or have been ineffective in bringing about compliance.

A typical compliance order will require that the owner/operator come into compliance immediately or within a reasonable, specified time period. In addition, under RCRA Section 9006(d), the order may also include a civil penalty not to exceed: (1) $10,000 per tank per day for each violation of a requirement or standard at 40 CFR Part 280 or any approved State program; and (2) $10,000 per tank for failure to comply with the notification requirements. Furthermore, the order should also indicate to the owner/operator that continued noncompliance will result in further legal action, including the assessment of additional penalties of up to $25,000 for each day of noncompliance with the compliance order.

The procedures for issuing Section 9006 administrative compliance orders and assessing administrative civil penalties are governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "CROP," 40 CFR Part 22). In addition to a compliance order, the Part 22 procedures can also be used for issuing a Section 9003 corrective action order if it is combined with a Section 9006 compliance order and penalty, and for issuing a Section 9006 order that only assesses a penalty. The specific processes for issuing

[10] Because "warning letters" and "notices of violation (noncompliance)" vary greatly in format, the terms are used here as common terms only. Indeed, warning letters and NOVs often serve the same purpose and may be considered by some to be indistinguishable. On the other hand, an NOV may also be considered to function as initial administrative order. As used here, the term "NOV" refers to an initial notification that provides the owner/operator an opportunity to comply prior to any formal enforcement action (i.e., administrative order).

administrative compliance orders are discussed in Chapter 4, "Procedures for Section 9006 Compliance Orders."

3.3.4 Judicial Actions

In addition to administrative responses, U.S. EPA Regional enforcement personnel may initiate civil judicial action under RCRA Section 9006(a). Judicial actions are more formal actions initiated in the U.S. Court system by the Department of Justice. To initiate the judicial action, the Agency must deliver a written referral to DOJ formally requesting that a suit be filed by DOJ on behalf of the U.S. EPA. The procedures for developing this referral are discussed in Section 6.1.2 of Chapter 6, "Procedures for Judicial Enforcement."

Because the litigative process can be both time-consuming and resource-intensive and because the issuance of an administrative order will increase the strength of a judicial case, judicial referral does not usually begin unless administrative responses have been found to be ineffective or inappropriate. Judicial actions may be taken without the prior issuance of an administrative order in emergency situations and cases where the owner/operator has a history of noncompliance. The judicial actions that U.S. EPA Regional enforcement personnel may take are:

- **Injunctive actions** - to prevent an owner/operator from continuing actions that endanger human health and the environment. Injunctive actions include temporary restraining orders, preliminary injunctions, and permanent injunctions.
- **Civil judicial enforcement actions** - to compel compliance and assess penalties when less severe responses (such as administrative orders) have been or would be ineffective in bringing about compliance.

There may also be circumstances in which a criminal action is appropriate.

3.4 ENFORCEMENT ACTIONS FOR RELEASES NOT REPORTED BY AN OWNER/OPERATOR

When it has been determined that a release from an UST has occurred, the primary goal of an enforcement response is to encourage an owner/operator to conduct corrective action. However, the specific enforcement response taken may differ depending on whether the owner/operator has reported the release (in which case a violation may not necessarily be involved) or whether the implementing agency has discovered the release by some other means. The discussion that follows describes enforcement tools used when the release is not reported by the owner/operator. Enforcement actions that should be taken when the release has been reported by the owner/operator are described in Section 3.5 below.

3.4.1 Information Request Letter/On-site Inspection

If the release was reported by someone other than the owner/operator, the implementing agency may have general information on the location and extent of the release, but may have to determine the source of the release as well as the identity of the owner/operator. As discussed in Section 3.3.1 above, RCRA Section 9005(a) authorizes U.S. EPA Regional enforcement personnel to issue an information request letter that requires an owner/operator to provide information on his or her tank system. Furthermore, Section 9005 provides the Agency with access to a site for the purpose of responding to a release. Activities authorized under this section include: (1) inspection of tanks and associated equipment; (2) inspection of soils, air,

surface water, and ground water; (3) tank tests; and (4) sampling. In addition, an owner/operator must provide Agency personnel with access to all records relating to such tanks. These activities will aid enforcement personnel in confirming the release and determining its source.

In determining the source of a release, proper procedures for documenting the investigation of a release must be followed to ensure that the data may be used in an administrative or judicial proceeding. In particular, the inspector must be prepared to give expert testimony, because if formal actions are taken, the owner/operator is likely to hire a contractor to provide testimony to dispute the Agency's findings and enforcement response. The U.S. EPA's guidance manual for inspectors, **Fundamentals of Environmental Compliance Inspections** (Office of Enforcement, February 1989), provides detailed guidance on collecting and documenting evidence for testimony.

3.4.2 Notice of Violation

Similar to the NOV for technical violations, once there is sufficient information to confirm a release, enforcement personnel should issue an NOV to notify the UST owner/operator that he or she is expected to comply with the requirements set forth in Subparts E and F of 40 CFR Part 280. The specific requirements under 40 CFR Part 280 are:

- **Release reporting** - under section 280.50, an owner/operator who discovers site conditions indicating a potential release must report to the implementing agency within 24 hours.
- **Investigation and Confirmation** - unless corrective action under Subpart F is initiated, section 280.51 and section 280.52 require that an owner/operator immediately investigate and confirm a suspected release within 7 days, or as required by the implementing agency.
- **Release Response** - under section 280.61, an owner/operator with a confirmed release is required to report the release to the implementing agency within 24 hours and take immediate action to prevent any further release.
- **Abatement Measures** - under section 280.62, the owner/operator must take initial abatement measures and submit a report summarizing initial abatement measures to the implementing agency within 20 days of release confirmation.
- **Investigation** - under sections 280.63 and 280.64, the owner/operator must conduct a site investigation and begin free product removal, and report results of both activities within 45 days.
- **Corrective action plan (CAP)** - under section 280.66, as directed by the implementing agency, an owner/operator may be required to develop and implement a corrective action plan for responding to the contaminated ground water and soil. In cases where ground water has been impacted or where soil contamination is severe, specific consideration should be given to requiring a CAP.

The purpose of an NOV is to notify the owner/operator that he or she is responsible for carrying out these actions. If the owner/operator fails to comply with any of these requirements during the course of the corrective action, enforcement personnel may respond with a Section 9003 corrective action order or may initiate civil judicial proceedings.

3.4.3 Corrective Action Order

Under Section 9003(h) of RCRA, the U.S. EPA is authorized to issue corrective action orders to compel an owner/operator of a leaking UST to carry out investigative studies and undertake corrective actions or

closure activities.[11] Corrective action orders should be used when an UST owner/operator has a confirmed release, and enforcement personnel believe that he or she will respond properly and promptly to the order.

A corrective action order will typically describe the actions that must be taken by the owner/operator (e.g., the release response requirements set forth in Subpart F of the Technical Regulations), provide a specific time period for taking these actions, and indicate the potential consequences of not doing so. As with the compliance order, the corrective action order should also indicate to the owner/operator that continued noncompliance will result in further legal action, including the assessment of additional penalties of up to $25,000 for each day of noncompliance with the corrective action order. As described in Section 3.3 above, enforcement personnel may need to initiate judicial proceedings if the owner/operator continues to be recalcitrant.

The procedures for issuing Section 9003(h) corrective action orders will be governed by the Rules Governing Issuance of and Administrative Hearings on Corrective Action Orders, codified at 40 CFR Part 24. The specific processes for issuing administrative corrective action orders are discussed in Chapter 5, "Procedures for Section 9003 Corrective Action Orders." A corrective action order may also be combined with a Section 9006 order to compel compliance with specific technical requirements or to include the assessment of administrative penalties. In such a case, the requirements at 40 CFR Part 22 would be used.

3.5 ENFORCEMENT ACTIONS FOR OWNER/OPERATOR-REPORTED RELEASES

If the release was reported by the owner/operator, he or she would have been required to follow the reporting procedures set forth in Subpart F (sections 280.60 - 280.66) of 40 CFR Part 280 (see Exhibit 3.1). Thus, the primary purpose of enforcement responses taken in a case where the release is self-reported is to ensure that the owner/operator carries out the corrective action activities required by the regulations. The enforcement techniques discussed below are typically used when the owner/operator has notified the implementing agency of the release.

3.5.1 Acknowledgement/Information Request Letter

Acknowledgement letters are sent to the owner/operator by the implementing agency to notify the owner/operator that the appropriate reports have been received. If the necessary reports are due from the owner/operator or incomplete information was received, the Agency may issue an information request letter, as described in Section 3.4.1. These letters may be used to monitor the progress of the site investigation and corrective action.

3.5.2 Corrective Action Letter

Under 40 CFR section 280.66, the Agency has discretion to require that an owner/operator adhere to a reasonable schedule for the completion of specific corrective action activities. The corrective action letter is a 1 to 2 page letter that notifies the owner/operator of time frames that he or she must use to schedule these corrective action activities. The letter is meant to be informal, and its purpose is to capture the attention of the owner/operator, convey the implementing agency's expected schedule for cleanup, and initiate negotiations.

[11] The U.S. EPA is currently evaluating the appropriate use of Section 9003(h) and Section 9006 authorities when a release has occurred to determine which is the most appropriate tool for encouraging owner/operators to undertake corrective actions.

3.5.3 Compliance Order

The compliance order is issued to an owner/operator who has failed to comply with the requirements of the corrective action regulations. The compliance order is an administrative order issued under Section 9006 with the intent of assessing penalties, rather than compelling compliance with specific requirements.

3.6 ALTERNATIVE ENFORCEMENT TOOLS

To create a successful, comprehensive enforcement program, the U.S. EPA must provide the enforcement staff with flexibility in implementing enforcement responses. As discussed above, not all of the techniques described in this manual will be appropriate in all circumstances, and enforcement personnel may wish to develop and implement some alternative enforcement tools to achieve the same objective of compliance. The sections that follow provide examples of some additional enforcement tools that may be used to supplement the basic tools for achieving both compliance with the technical rules and cleanup of a release. These tools may be used alone or in combination with the techniques described in Sections 3.3, 3.4, and 3.5.

3.6.1 Show Cause Meetings

Once the appropriate owner/operator has been notified of the violation or release, he or she may be provided with an opportunity to meet with enforcement personnel to negotiate a corrective action plan or present any factors related to a technical violation that may mitigate the enforcement response. One method for achieving this is to invite the owner/operator to a "show cause" meeting. The show cause meeting provides the owner/operator with an opportunity to present to the Agency any factors related to the case that might mitigate the Agency's enforcement response and to provide it with an opportunity to gather information and to clarify any factual and legal issues that may have arisen. The show cause meeting is particularly useful when the particulars of a case do not clearly indicate the proper course of action to be followed (i.e., an administrative order, a judicial referral, or no further action). An invitation to the show cause meeting may be included in the NOV or warning letter, but should be sent to the owner/operator as soon as possible after the decision has been made to have such a meeting.

The show cause meeting can be particularly useful in determining the most appropriate course to take in response to a release. Following the report of a release from an UST, the U.S. EPA may either send an information request letter to the owner/operator to confirm the release and seek compliance or, in the case of an emergency, initiate action itself to alleviate any immediate danger to human health and safety. Once the release is confirmed and the site is stabilized, enforcement personnel may decide that it is appropriate to meet with the owner/operator to negotiate an agreement to perform corrective action. This decision will depend upon the owner/operator's compliance with corrective action requirements and cooperation with the Agency during the negotiation process.

3.6.2 Informal Settlement Conference

Negotiated resolutions of enforcement actions are considered to be a cost-effective means of achieving compliance. The manner in which enforcement personnel negotiate with an owner/operator will vary depending on the type of violation, whether the situation is an emergency, and the willingness of the owner/operator to cooperate. In all cases, however, a limited time frame, whether publicized initially or conveyed to the owner/operator during negotiations, should be developed by the enforcement personnel. This increases the efficiency of the process. It should be noted that to be effective, however, any negotiated agreement must still hold the threat of further action if the owner/operator does not cooperate.

To formalize this understanding, informal negotiations may be developed into consent agreements that will be finalized in an administrative order on consent (see Chapter 4).

CHAPTER 4. PROCEDURES FOR SECTION 9006 COMPLIANCE ORDERS

U.S. EPA enforcement personnel are likely to take administrative actions in response to most violations of the UST requirements when a formal response is appropriate. The Agency is authorized by Subtitle I of RCRA to issue administrative compliance orders under RCRA Section 9006 (usually accompanied by administrative penalties) and administrative corrective action orders under RCRA Section 9003. This chapter discusses the U.S. EPA's authority to take Section 9006 administrative actions and provides guidance on the procedures for issuing administrative orders and assessing administrative penalties. Section 9003 orders are addressed in Chapter 5.

4.1 FRAMEWORK OF THE ADMINISTRATIVE PROCESS

The discussion that follows provides background on the U.S. EPA's authority to take administrative actions, and discusses the regulations that govern the administrative process. It also provides a brief overview of U.S. EPA administrative roles.

4.1.1 Statutory and Regulatory Framework

Section 9006(a) of RCRA authorizes the U.S. EPA to issue an administrative enforcement order when it is determined that an UST owner or operator is in violation of Subtitle I or any regulation promulgated pursuant to Section 9003. RCRA Section 9006(d) authorizes the Agency to assess civil penalties of up to $10,000 per tank per day of violation for violations of requirements promulgated under Section 9003. Section 9006(d) also authorizes the Agency to assess civil penalties of up to $10,000 per UST against owners and operators who fail to comply with the notification requirements or submit false information. Civil penalties will normally be assessed for UST violations and accompany a Section 9006(a) compliance order. The procedures for issuing Section 9006 administrative compliance orders and assessing administrative civil penalties are governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "CROP," 40 CFR Part 22).[12] The CROP was recently amended to include administrative actions conducted under Section 9006 for violations of Subtitle I.[13]

In general, these administrative actions are pursued when an owner/operator has not responded to informal actions or is not expected to comply with informal requests, and the situation does not pose an emergency. If administrative orders are not complied with or if compliance is needed immediately (i.e., in the case of an emergency), enforcement personnel should initiate a civil judicial action under Section 9006(a). The procedures for initiating judicial action are discussed in Chapter 6, "Procedures for Judicial Enforcement."

4.1.2 U.S. EPA Roles in the Administrative Process

Section 22.04 of the CROP presents the various authorities and duties of the key Agency officials in the administrative litigation process. Some of the roles and responsibilities of the Regional Administrator, the Regional Judicial Officer, and the Presiding Officer include:

[12] Consolidate Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR 22.01 et. seq. (promulgated at 45 FR 24363, April 9, 1980).
[13] The CROP was amended to include administrative actions under RCRA Section 9006 on February 24, 1988 (at 53 FR 5374).

- **Regional Administrator (RA)** - Pursuant to CROP section 22.04(a), the RA shall exercise all powers and duties prescribed and delegated under Subtitle I and the CROP. In addition, the RA has been delegated the authority to issue Section 9006 administrative complaints, evaluate the appropriateness of civil penalties, and negotiate and sign consent agreements. In every proceeding, the RA will rule on all motions filed or made before an answer to the complaint is filed, and on all motions filed or made after the initial decision has been made (unless the RA has delegated his or her authority to the Division Director).
- **Regional Judicial Officer** - Under section 22.04(b)(3) of the CROP, the RA may delegate all or part of his or her authority to act in a given proceeding to a Regional Judicial Officer. However, this delegation does not prevent the Regional Judicial Officer from referring any case or motion back to the RA, when appropriate.
- **Presiding Officer** - The role of the Presiding Officer is to conduct a fair and impartial proceeding, ensure that the facts are fully elicited, adjudicate all issues, and avoid delay. Under CROP section 22.04(c), the Presiding Officer's authorities include conducting administrative hearings under the CROP, ruling upon motions, issuing necessary orders, examining witnesses, and issuing subpoenas.

4.2 OVERVIEW OF THE ADMINISTRATIVE PROCESS

Under the procedures set forth in the CROP, the major steps in the litigation process of issuing a Section 9006(a) administrative order are:

- **Complaint preparation and filing stage.** In this stage, the Agency prepares and files a formal complaint with the owner/operator. The purpose of the complaint is to establish the allegations, assess a penalty (if applicable), and notify the owner/operator of his or her right to a hearing.
- **Pre-hearing stage.** During this stage, the owner/operator should answer the complaint (i.e., admit or deny the allegations, and request a hearing). Once the complaint is served, any pre-hearing motions may be made, default orders may be issued (if the owner/operator does not respond), and settlement or pre-hearing conferences may occur.
- **Settlement.** Settlement of the case may occur at any stage, but it is the Agency's desire that settlement negotiations take place before there is a need for a hearing.
- **Hearing stage.** During the hearing, an EPA Administrative Law Judge will hear the case, examine evidence, and make an initial decision.
- **Post-hearing stage.** After the hearing, appeals to the initial decision may be made and the final order is issued.

The rest of this chapter provides detailed guidance on each of these steps. Because the descriptions below summarize and frequently refer to requirements set forth in the CROP, the reader is advised to obtain a copy of the 40 CFR Part 22 procedures.

4.3 COMPLAINT PREPARATION AND FILING

Complaint preparation is the first step in the U.S. EPA's adjudicatory process and provides the basis for the initial hearing and any subsequent proceedings. A complaint generally describes the violation, indicates actions needed to come into compliance, and, if appropriate, specifies administrative penalties.

Because of the significance of the complaint, it is important to follow the guidance on format and filing of the complaint discussed here and presented in sections 22.05, 22.14, and 22.17 of the CROP.

In order to establish the fundamental case for issuing an administrative order or assessing a civil penalty under Section 9006 of RCRA, enforcement personnel must be able to substantiate in the complaint: (1) that the violation was committed, **and** (2) that the person charged with the violation is subject to the requirements of the UST regulations.[14] Because there are numerous UST requirements, it is important for enforcement personnel to introduce during the hearing any evidence that directly supports or proves each element of the violations charged.

In the written complaint, the Agency must establish each element of the violation, notify the owner/operator of his or her right to a hearing, and, if appropriate, assess a penalty. Pursuant to RCRA Section 9006(c), determination of penalties must take into account the seriousness of the violation and any good faith efforts to comply.[15] Under the CROP section 22.14(a), each complaint for the assessment of a civil penalty must include the following items:[16]

- Statement reciting the statutory authority for issuing the complaint;
- Specific reference to statutory and regulatory provisions alleged to have been violated;
- Concise statement of the factual basis for alleging the violation;
- Amount of civil penalty proposed and reasoning behind it;
- Notice of an owner/operator's right to request a hearing (within 30 days); and
- A copy of the CROP.

Because the information in the complaint sets the framework for the administrative process, the complaint must be as complete as possible. Failure to file a complaint that meets the standards and procedures outlined in this section may result in the following: (1) delay the proceedings and prevent the Agency from being granted a motion for default; (2) make the Agency subject to adverse motions by the owner/operator; and (3) negatively affect the Agency's ability to carry the burden of proof.

Section 22.05(b) of the CROP requires the Agency to serve the owner/operator with a copy of the complaint by (1) personal service, or (2) certified mail, return receipt requested.[17] The original and one copy of the complaint (with proof of service) must be filed with the Regional Hearing Clerk (section 22.05(a)(1) of the CROP).

4.4 PRE-HEARING STAGE

Subpart C of the CROP (sections 22.15 to 22.19) sets forth the requirements for the pre-hearing procedures. During the pre-hearing process, the owner/operator may file an answer to the complaint. In addition, the U.S. EPA and the owner/operator may initiate pre-hearing motions and conferences to settle the matter or prepare for an administrative hearing. Failure to follow the procedures within Subpart C of

[14] **RCRA Compliance/Enforcement Guidance Manual**, Chapter 7, page 7-5.
[15] For information on calculating administrative penalties to be assessed against violators of the UST regulations, see the **U.S. EPA Penalty Guidance for Violations of UST Regulations**.
[16] Chapter 7, Part 3, "Complaint Preparation and Filing" of the **RCRA Compliance/Enforcement Guidance Manual** provides additional guidance on the purpose of each element.
[17] For service on a U.S. Government, State, or local government official or entity, and other exceptions, see Section 22.05(b)(ii)-(iv) of the CROP.

the CROP could impair an otherwise entirely correct proceeding, and may cause the Presiding Officer to dismiss or overturn the action.

4.4.1 Procedural Requirements for the Pre-hearing Stage

Section 22.05 of the CROP establishes the formatting and filing requirements for any documents established during the pre-hearing stage. These requirements are summarized below.

Format Requirements (section 22.05(c)). A document is considered sufficient for filing if (1) the first page contains a "caption" that identifies the owner/operator and correct docket number; (2) it bears the signature of the filing party, counsel, or other representative; and (3) it bears the name, address, and telephone number of the person filing the document if it is the initial document filed by that person (for exceptions and changes see CROP section 22.05(c)(4)). If these requirements are not met, the Agency official receiving the filing may refuse to accept it until it is properly amended.

Filing Requirements (section 22.05(a)). The original complaint, the answer, and all other documents served in the proceedings are maintained by the Regional Hearing Clerk, with copies given to the Presiding Officer and other parties.[18] Any party filing a document after the complaint has been issued must certify that copies of the document have been sent to all other parties and the Presiding Officer (see CROP section 22.05(a)(2)). Subject to confidentiality requirements, the Regional Hearing Clerk must make all documents filed in the proceeding available for public inspection during business hours. The Agency enforcement official initiating the complaint should maintain a separate file containing duplicates of **all** documents filed in the proceeding, as well as other enforcement documents relating to the case, which include:

- Any internal U.S. EPA documents used in generating the enforcement action (e.g., concurrence documents, checklists, etc.);
- U.S. EPA investigative records such as laboratory reports and copies of business records;
- Original penalty assessment worksheet(s);
- All correspondence between the owner/operator and other U.S. EPA parties; and
- All correspondence between the U.S. EPA and other Federal or State agencies (e.g., DOJ).

This file should be retained in the Region for a minimum of 5 years after termination of the case, after which time it should be transferred to the Records Control Center (Source: **RCRA Compliance/Enforcement Guidance Manual** (1984), page 7-25).

***Ex Parte* Discussion.** After a complaint has been issued, certain Agency officials are prohibited from discussing ex parte (i.e., without notice to all parties) the merits of the proceeding with individuals or their representatives who have an interest in the proceeding (see CROP section 22.08). Although ex parte discussion is prohibited, if such communication occurs, it is regarded as argument, and a copy of the ex parte communication is served on all other parties in the proceeding. Those other parties are then afforded an opportunity to reply.

[18] Any file containing RCRA confidential information must be maintained in accordance with the procedures set forth in the **RCRA Confidential Business Information Security Manual**.

4.4.2 Answer to the Complaint

Procedures for answering a complaint are set forth in section 22.15 of the CROP. The owner/operator must file an answer within 30 days after the complaint has been filed (RCRA Section 9006(b)). Before an answer to the complaint is filed, the RA shall rule on all motions filed or made. After the answer is filed, the Presiding Officer (e.g., Administrative Law Judge) will rule on all motions.

If the owner/operator files the answer on time, the Agency may **not** seek a motion for default based on the failure to file a timely answer (see CROP section 22.17(a)(1)). Furthermore, the filing of a timely answer limits the U.S. EPA's opportunity to amend since, as a matter of right, the Agency may amend the complaint once before the answer is filed. After that, all motions for amending the complaint must be made to the Presiding Officer (see CROP section 22.14(d)). Before the answer has been filed, the Agency may withdraw the complaint, in its entirety or in part (see CROP section 22.14(e)). After one withdrawal before the filing of an answer, or after the answer has been filed, the complaint may be withdrawn only upon motion granted by the Presiding Officer or RA.

Section 22.05(b) of the CROP sets forth proper contents of an answer. The purpose of the answer may be to contest the material on which the complaint is based, contest the proposed penalty amount, or request a hearing. An insufficient answer may be regarded as an admission of charges not sufficiently discussed (see CROP section 22.15(b)). If the owner/operator fails to file any answer (i.e., to admit, deny, or explain the allegations in the complaint), the Agency will also consider this an admission of the charges and may seek a default order (see CROP section 22.15(d)).

4.4.3 Pre-hearing Motions

Section 22.16 of the CROP sets forth the procedures for motions in the hearing process. Either the Agency or the owner/operator may make a motion before a hearing is convened, and certain motions must be made during the pre-hearing stage. Motions are either filed with the RA (before the filing of an answer) or with the Presiding Officer (after the filing of an answer).

The following types of motions may be made during the pre-hearing stage of the proceeding:

- Motion for default for failure to file a timely answer (see CROP section 22.17(a)(1));
- Motion to intervene (see CROP section 22.11(a));
- Motion to file an amicus curiae brief (see CROP section 22.11(d));
- Motion for default for failure to comply with a pre-hearing order of the Presiding Officer (see CROP section 22.17(a)(2));
- Motion for default for failure to appear at a conference or hearing convened by the Presiding Officer pursuant to section 22.19 of the CROP (see section 22.17(a)(3));
- Motion for consolidation or severance (see CROP section 22.12(a), 22.12(b)); and
- Motion for postponement of hearing (see CROP section 22.21(c)).

Pursuant to section 22.16(b) of the CROP, a party's response to any written motion must be filed with the Regional Hearing Clerk within 10 days after the motion has been received, except in the case of a motion for a default order, which specifies a 20-day period for replies. If a response is not filed within the specified time, the motion will be considered waived and may be granted without further argument. Like all documents filed in the proceeding, both the motions and any reply to motions must comply with the filing and service requirements specified by the CROP section 22.05.

4.4.4 Default Orders

A default order is issued by the RA or Presiding Officer when one of the parties fails to perform a task or obligation of the proceedings. There are three circumstances under which default orders may be issued (see CROP section 22.17(a)):

- The owner/operator fails to file a timely answer to the complaint;
- The Agency or the owner/operator fails to obey a pre-hearing or hearing order that has been issued by the Presiding Officer; or
- The Agency or the owner/operator fails to attend a conference or hearing without showing good cause.

Motions for default are made either to the RA or Regional Judicial Officer in the first circumstance, or to the Presiding Officer in the second and third circumstances.

The procedures for default are set forth in section 22.17(b) of the CROP. Under these requirements, the party making the motion for default must include with the motion a proposed default order. The motion for default must be served on all parties and conform with the filing and service requirements specified by section 22.05 of the CROP. Under section 22.17(a), the party to whom the default has been served has 20 days to reply to the motion.

If the default order is issued by the Presiding Officer (or the RA or the Regional Judicial Officer, if a timely answer is not filed), it constitutes an "initial decision" of the proceeding. As an initial decision, the default order must meet the requirements of sections 22.17 (b) and (c) of the CROP (also see CROP section 22.27, "Initial Decision"). Section 4.6.5 of this chapter provides further detailed guidance on initial decisions.

The default order becomes the final order of the Administrator within 45 days after its service upon the parties unless: (1) the default order is appealed, or (2) the Administrator elects to review the default order (see CROP section 22.27(c)). The RA or Presiding Officer may motion to set aside the default order (see CROP section 22.17(d)). Any further appeal of the default order must be made directly to the Administrator pursuant to section 22.30 of the CROP.

When the Administrator issues a final order upon default against the owner/operator, he or she is subject to the following consequences:

- The owner/operator has essentially "admitted" to all facts alleged in the complaint and the right to a hearing is waived;
- The compliance order becomes final; and
- The penalty proposed in the complaint will become due and payable within 60 days after the final order is issued.

The admission of factual allegations and the waiver of hearing apply only to the immediate administrative enforcement proceedings and do not affect any other proceedings. When the Administrator issues a final order upon default against **the Agency**, the complaint is dismissed with prejudice. This means that the Agency cannot file another administrative complaint based on the allegations contained in the dismissed complaint.

4.4.5 Pre-hearing Conference

Section 22.19 of the CROP sets forth the procedures for the pre-hearing conference. When the hearing is ordered, the Presiding Officer will usually convene a pre-hearing conference to facilitate and expedite the hearing proceeding. These conferences encourage informal, frank discussions among the parties on any subjects that could delay or expedite the hearing. The pre-hearing conference may involve (CROP section 22.19(a)):

- Settling the case;
- Attempting to simplify the proceeding through consolidation of issues and stipulation by the parties;
- Amending the pleadings;
- Exchanging information concerning evidence to be presented (e.g., identities of expert witnesses and summaries of their testimony and exchange of exhibits, documents, and prepared testimony);
- Limiting the number of witnesses;
- Setting a time and place for the hearing; and
- Attending to any matter that may expedite the disposition of the proceeding.

During the pre-hearing conference, the parties exchange witness lists, brief descriptions of witness testimony, and copies of all documents and physical evidence that will be introduced into evidence (see CROP section 22.19(b)). Information not exchanged at this conference cannot be introduced into evidence without permission of the Presiding Officer. In some circumstances (e.g., potential intimidation of witnesses), early information exchange should not be undertaken. Section 22.19(f) of the CROP sets forth requirements for further discovery.

Any record of the pre-hearing conference generally consists of a summary prepared by the Presiding Officer that incorporates all rulings or orders and any written stipulations or agreements of the parties. Except for those portions of a pre-hearing conference that relate to settlements, a transcript of the pre-hearing conference may be made (see CROP section 22.19(c)). The transcript or written summary of the pre-hearing conference must be filed with the Regional Hearing Clerk for inclusion in the Regional Hearing Clerk's file.

The Presiding Officer may present an accelerated decision at any time during the proceedings (see CROP section 22.20). If issued, an accelerated decision or dismissal order is treated as an initial decision and, therefore, may be appealed to the Administrator under section 22.30 of the CROP (see discussion in Section 4.6.5 of this chapter on initial decisions). An initial decision must comply with the requirements of section 22.27(a) of the CROP on content, filing, service, and transfer requirements. If a partial decision is rendered, the objecting party, before appealing, must wait for a final initial decision or obtain certification to appeal an interlocutory decision (see CROP section 22.29).

4.5 SETTLEMENT

As discussed previously, the U.S. EPA encourages settlement of an administrative proceeding provided that the settlement is consistent with the provisions and objectives of RCRA and the UST regulations. Therefore, the Agency's complaint should encourage the owner/operator to negotiate a settlement through informal conferences. An informal settlement conference can be requested at any time, whether or not the owner/operator has requested a hearing (see CROP section 22.18(a)). However, the request for an

informal conference does not extend the 30-day period during which the owner/operator must submit a request for a hearing.

4.5.1 Procedures for Negotiating a Settlement

Section 22.18 of the CROP sets forth the procedures and requirements for settlements. The Agency and the owner/operator can hold a settlement conference before an answer is filed and a Presiding Officer is appointed. After a Presiding Officer has been appointed, however, settlement conferences are subject to the jurisdiction of the Presiding Officer who may order a pre-hearing settlement conference.

4.5.2 Preparing a Consent Order

Pursuant to CROP section 22.15(b), if the Agency and the owner/operator reach a settlement, they must forward a written consent agreement and a proposed consent order to the RA. The consent agreement is a negotiated settlement agreement between the parties that will be final and binding once it has been incorporated into a consent order that is signed by the RA (see CROP section 22.18(c)). The consent agreement must state that the owner/operator:

- Admits the jurisdictional allegations of the complaint;
- Admits the facts in the consent agreement, or neither admits nor denies specific allegations in the complaint; and
- Consents to the stated penalty.

The consent agreement must also include any and all terms of the agreement among the parties. Consequently, any terms to which the parties have agreed in reaching a settlement must be reflected in the consent agreement (e.g., agreement by intervenor not to pursue private damage remedies). Partial settlement of the proceedings is permitted and, in many cases, is likely. The consent order eliminates those issues of the proceeding addressed by that order and the consent agreement. Although the consent order does not have to restate all the terms of the consent agreement, it should explicitly incorporate by reference the consent agreement as the basis for the consent order.

The consent agreement and the final consent order constitute important documents that affect the substantive and procedural rights of the parties. Consequently, the originals of these documents must be placed in the Regional Hearing Clerk's file, and copies must be served as required by section 22.06 of the CROP.

4.6 HEARING STAGE

The Presiding Officer will generally convene a hearing upon request by the owner/operator or if the matter has not yet been disposed of by a default order, accelerated decision, dismissal order, or consent order. If the owner/operator answers the complaint by requesting a hearing, or if the Presiding Officer orders a hearing, the Presiding Officer must issue a notice to all parties 20 days before the hearing (see CROP section 22.21(b)). The Presiding Officer will then hear arguments from both parties during the hearing.

The discussions below describe the key elements of the adjudicatory hearing including admissible evidence, objections, rulings, transcripts, proposed findings, conclusions, initial decisions, and appeals. Procedures for administrative hearings are set forth in Subpart D of the CROP (sections 22.21 to 22.26).

4.6.1 Admissible Evidence

The U.S. EPA will be the first party to submit evidence during the hearing. In so doing, the Agency must prove that the UST owner/operator was required to comply with UST regulations, that the violations in the complaint did occur, and that the proposed civil penalty is appropriate. After the Agency has submitted evidence, the owner/operator will present any defense to the allegations in the complaint. The Presiding Officer will admit or deny evidence presented by either party pursuant to section 22.22(a) of the CROP. Guidelines for submitting exhibits and physical evidence are found in section 22.22(e) of the CROP.

After both parties have presented their evidence, the Presiding Officer will make decisions on each matter of the complaint. Decisions will be judged upon preponderance of evidence; that is, each party must convince the Presiding Officer that his or her allegations appear more likely or probable than the other party's allegations (see CROP section 22.24).

Evidence Relating to Settlement. Any evidence relating to settlement that would be excluded under Rule 408 of the Federal Rules of Evidence is also excluded under the CROP. The Federal Rules of Evidence generally exclude any evidence of settlement or attempted settlement that it is offered as proof of an admission of liability. This evidence, however, may be admitted for another purpose, such as proving bias of a witness or disproving a contention of undue delay. When such evidence is offered for these purposes, it may still be excluded if the Presiding Officer determines that its substantiating value is outweighed by confusion of issues, undue delay, etc.

Testimony. Witnesses are generally examined orally upon oath or affirmation (except in certain cases as defined in CROP section 22.22(c)). Written statements may be appropriate when the testimony is too technical or academic to be clearly presented through direct questioning. An affidavit may be admitted into evidence when witnesses are unavailable (i.e., if they are exempt by a court order, claim lack of memory, are seriously ill or physically impaired, or are absent despite efforts to secure their attendance).

Subpoenas and Summoning Witnesses. The Presiding Officer may issue a subpoena to require certain witnesses to attend or to produce documentary evidence, or may grant a request for subpoena pursuant to section 22.37(f) of the CROP.

Offers of Proof. When the Presiding Officer rejects submitted evidence, the party seeking to introduce the evidence may not only object to its exclusion, but may also make an offer of proof. An offer of proof places the evidence into the official record, and the Administrator on appeal can use such evidence to reopen the hearing. This offer is subject to requirements under section 22.23 of the CROP.

4.6.2 Objections and Rulings

Pursuant to section 22.23 of the CROP, either party may object orally or in writing to the conduct of the hearing. The Presiding Officer must rule on all objections and provide reasons for the rulings, which will become part of the record. Copies of the ruling must be served in accordance with section 22.06 of the CROP. A party wishing to appeal the Presiding Officer's ruling on an objection must make a motion in writing within 6 days of notice of the ruling to the Presiding Officer to certify such ruling to the Administrator. (Also see CROP section 22.29(a), "Request for Interlocutory Appeal.")

4.6.3 Transcript of the Hearing

Pursuant to section 22.25 of the CROP, a hearing must be transcribed verbatim, and the reporter must send the original and copies of the transcript to the Regional Hearing Clerk for filing. The transcript of the hearing is an important document because many objections and motions made during the hearing are oral and are thus reflected only in the transcript. In addition, the transcript is used by the parties to draft the proposed findings of fact, conclusions of law, and orders, which are then submitted to the Presiding Officer for consideration in issuing the initial decision.

4.6.4 Proposed Findings, Conclusions, and Orders

At the conclusion of the hearing, parties may submit (within 20 days after service of the hearing transcript) proposed findings of fact, conclusions of law, and orders to the Presiding Officer for consideration in issuing the initial decision. The purpose of the proposals and supporting briefs is for each party to state its position and to persuade the Presiding Officer to adopt its proposal (see CROP section 22.26).

4.6.5 Initial Decision

The Presiding Officer must issue an initial decision as soon as is "practicable" after the period specified for filing reply briefs to the proposed findings, conclusions of law, and orders. The initial decision should contain the Presiding Officer's:

- Findings of fact and conclusions for all material issues of law or discretion;
- Reasons for those findings and conclusions;
- Recommended civil penalty; and
- Proposed final order.

An initial decision becomes a final order within 45 days after it is served unless a party files a motion to re-open the hearing or makes an appeal to the Administrator, or the Administrator decides to review the initial decision (see CROP sections 22.27 and 22.28).

Pursuant to section 22.28 of the CROP, a party has up to 20 days after the initial decision to file a motion to reopen a hearing in order to submit additional evidence. Other parties have 10 days after the motion is filed to make replies. The Presiding Officer will rule on the motion and replies as soon as practicable.

4.6.6 Appeals of Interlocutory Orders or Rulings

Under section 22.29 of the CROP, the only orders or rulings that parties may appeal to the Administrator as a matter of right are (1) accelerated decisions that decide the entire case; (2) dismissal orders; (3) default orders; and (4) initial decisions rendered after an evidentiary hearing. All other orders or rulings issued by an Agency official during the pre-hearing and hearing proceedings are considered provisional to the proceeding. Such interlocutory orders must await the issuance of an initial decision before they can be appealed.

4.7 POST-HEARING STAGE

Post-hearing proceedings usually consist of appeals of the final decision by the losing party. However, it is unlikely that an appellate court will overturn a Presiding Officer's decision unless the appealing party

can prove that the basis of the verdict is flawed. The procedures for appeals, final orders, and penalty payments are discussed below.

4.7.1 Appeal of Initial Decision

Jurisdiction of Administrator. As stated in section 22.27 of the CROP, the Administrator assumes full jurisdiction of the case immediately after the Presiding Officer issues an initial decision. The Administrator assumes jurisdiction regardless of whether or not a party appeals the initial decision. If, however, a party files a motion to reopen a hearing, the Presiding Officer may rule on that motion.

Notice of Appeal and Appellate Brief. The notice of appeal and appellate brief must be filed with the Hearing Clerk within 20 days after the initial decision is served on the parties. The notice of appeal must address the disputed findings of fact and conclusions of law contained in the initial decision and present the appellant's arguments as to why the appeal should be granted. Specifically, under section 22.20 of the CROP, the notice of appeal must contain:

- Alternative findings of fact;
- Alternative conclusions regarding issues of law or discretion;
- A proposed order that reflects the conclusions and findings desired by the appellant; and
- Relevant references to the record and the initial decision.

Any other party may file a reply brief with the Hearing Clerk within 15 days of service of a notice of appeal and appellate brief. The reply brief is specifically intended to address only the appellate brief and should be so limited (see CROP sections 22.27(c) and 22.30(b)).

Administrator's Actions. Even if the initial decision is not formally appealed, the Administrator may decide to review the initial decision. Otherwise, the initial decision of the Presiding Officer becomes the final order of the Administrator 45 days after service of the initial decision (see CROP sections 22.27(c) and 22.30(b)).

4.7.2 Final Order

The Administrator is required to issue a final order as soon as is practicable after the final action of the appeal process -- either after filing of appellate briefs, filing of subsequent briefs if ordered by the Administrator, or oral argument, whichever occurs last (see CROP section 22.31). In the final order, the Administrator may: (1) adopt, modify, or set aside all or some of the findings and conclusions contained in the initial decision or order; and (2) increase or decrease the recommended penalty unless the initial decision is a default order. The CROP requires the final order to contain the reasons for any decision that the Administrator makes.

Pursuant to section 22.32 of the CROP, a party may file a motion to reconsider a final order within 10 days after the final order is issued. This motion must explain and provide evidence for any matters that the party claims have been decided erroneously. The motion may also include a request that the final order be stayed until the matter is resolved. Unless such a request for a stay is granted, however, the effective date of the final order is the date it was issued, unless otherwise ordered by the Administrator. A party may appeal the findings of the final order to a U.S. Court of Appeals. The obligation to pay the civil penalty does not become due until the party has appealed or exhausted all appeals. The payment of a civil

penalty specified in a final order of the Administrator is due and payable in full within 60 days after the respondent receives the final order, unless otherwise agreed by the parties.

4.8 COST-RECOVERY ACTIONS

If an owner/operator fails to respond to Section 9003 corrective action orders, and immediate cleanup of the site is needed, it may be necessary to expend LUST Trust Fund monies for corrective action at the site. The specific situations in which LUST Trust Fund monies may be expended are discussed in Chapter 1, "Overview of the UST/LUST Enforcement Program." Under Section 9003(h), the owner/operator of a leaking UST is liable for any LUST Trust Fund monies used by the U.S. EPA (or a State under a Cooperative Agreement) for corrective action or enforcement. Thus, the Agency or the State should make efforts to recover such costs from the owner/operator. Consistent with the U.S. EPA's overall approach to the UST program, cost-recovery efforts will be made primarily by the States (C**ost Recovery Policy for the Leaking Underground Storage Tank Trust Fund**, OSWER Directive 9610.10, October 1988). Under the Agency's cost-recovery program, States with Cooperative Agreements will be able to litigate and settle recovery claims without the involvement of the U.S. EPA or DOJ. However, there may be circumstances in which U.S. EPA and/or DOJ involvement may be necessary, such as where the Agency responds directly to a release, and in rare cases of overfiling (OSWER Directive 9610.10).

Once a cleanup has been conducted, either by a State or by the Agency, cost-recovery procedures will typically include the following steps: (1) demand for payment; (2) negotiation for a settlement of the recovery claim; (3) litigation (when demand for payment and negotiations fail); and (4) collection and case closure. The first step in pursuing cost recovery from an owner/operator is to compile cost documentation for the demand for payment. The Agency has developed a number of documents to provide guidance for this process, including:

- **Guidelines for UST Trust Fund Cooperative Agreements**, OSWER Directive 9650.6, April 1987.
- "Interim Financial Policies and Procedures Governing Use of the Leaking Underground Storage Tank (LUST) Trust Fund," Comptroller Policy Announcement No. 87-13, June 3, 1987.
- **Supplemental Requirements for LUST Trust Fund Cooperative Agreements**, OSWER Directive 9650.6-1, August 1987.

Other documents that may be useful (check with the Regional financial management division or your Freedom of Information Act Officer) include:

- "Reporting and Recordkeeping Requirements for LUST Cooperative Agreements," Memorandum from David P. Ryan and Harvey G. Pippin, July 2, 1987.
- "Letter of Credit Drawdown Procedures for States Receiving LUST Trust Fund Cooperative Agreements," Memorandum from David P. Ryan, Comptroller, August 12, 1987.
- "LUST Cooperative Agreement Issues," Memorandum from Howard Corcoran, OGC, and Joe Retzer, OUST, August 26, 1987.
- "Development of LUST Cost Recovery Policy and Financial Management Guidance," Memorandum from David P. Ryan, Comptroller, and Ron Brand, OUST, March 25, 1988.

The following guidance documents prepared under the U.S. EPA Superfund program may also provide useful information on cost recovery: (1) "Procedures for Documenting Costs for CERCLA Section 107 Actions" (Office of Waste Program Enforcement, January 1985); (2) "Financial Management Procedures for Documenting Superfund Costs" (Financial Management Division, September 1986); (3) **State Participation in the Superfund Program Manual, Appendix U: Cost Documentation Requirements for Superfund Cooperative Agreements**, (OSWER Directive 9375.1-4-U, September 1986); (4) "Resource Management Directive 2550D - Financial Management of the Superfund Program" (Comptroller, July 25, 1988); and (5) **Superfund Cost Recovery Strategy**, (OSWER Directive 9832.13, July 1988).

Based on the cost documentation collected, enforcement personnel should prepare a demand letter to issue to the owner/operator. Once the demand letter has been issued, it may be appropriate to negotiate a settlement for the costs before any formal litigation has been pursued. Because they are more cost effective, negotiated settlements are generally preferred over litigation (OSWER Directive 9610.10). Several U.S. EPA documents provide guidance on the use of alternative dispute resolution techniques for settling claims: (1) "Final Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions," (August 14, 1987); and (2) "Arbitration Procedures for Small Superfund Cost Recovery Claims," 53 **FR** 29428, August 4, 1988. If negotiations are unsuccessful and the Agency has difficulty collecting payment, it may be necessary to refer the case to DOJ for judicial action.

Even where no administrative or judicial settlement is reached, a cost-recovery case must be formally closed. Factors justifying case closure include situations where costs of pursuing the case further will approach or exceed the potential recovery or will result in bankruptcy of the owner/operator. Some U.S. EPA Regional offices have already developed procedures for closing out Superfund cases that may also be appropriate for closing LUST cases.

CHAPTER 5. PROCEDURES FOR SECTION 9003(H) CORRECTIVE ACTION ORDERS

When an UST owner/operator fails to initiate or conduct appropriate corrective action for an UST release, it may be appropriate for enforcement personnel to issue a corrective action order. U.S. EPA enforcement personnel are authorized by Section 9003(h) of RCRA to issue administrative orders that compel owner/operators of leaking USTs to take specific corrective actions. This chapter discusses the U.S. EPA's authority to issue corrective action orders under Section 9003(h) and provides guidance on the procedures for issuing and conducting hearings under such orders.

5.1 FRAMEWORK OF THE ADMINISTRATIVE PROCESS

The discussion that follows provides statutory background on the U.S. EPA's authority to issue corrective action orders, and discusses the regulations that govern the administrative process for such orders. It also briefly describes the roles of various Agency personnel in the administrative process.

5.1.1 Statutory Background

Section 205 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) added Section 9003(h) to RCRA Subtitle I, establishing a program for cleanup of petroleum from leaking USTs. A fundamental element of the cleanup program is the Agency's authority under Section 9003(h) to respond to UST releases through corrective actions, enforcement activities, and cost recovery. Specifically, Section 9003(h)(4) enables the Agency to issue corrective action orders that require an owner/operator of a leaking UST to carry out investigative studies and undertake corrective actions or closure activities. These administrative actions are generally used in non-emergency situations to promote timely response to releases for which the owner or operator fails to initiate corrective action.

5.1.2 Regulations Governing Administrative Actions

The procedures for issuing Section 9003(h) corrective action orders will be governed by the Rules Governing Issuance of and Administrative Hearings on Corrective Action Orders, codified at 40 CFR Part 24. The procedures at Part 24 provide a streamlined and less formal approach for presenting arguments and evidence than 40 CFR Part 22. These streamlined procedures were initially developed for issuing RCRA section 3008(h) corrective action orders (53 FR 12256, April 13, 1988). However, the Agency intends to amend Part 24 to include administrative actions conducted under Section 9003(h) for issuing corrective action orders (the amended procedures are expected to be published in the **Federal Register** in summer 1990).

The uncomplicated and less formal nature of the administrative procedures under Part 24 make it more suitable for issuing Section 9003(h) corrective action orders than Part 22. In particular, the Part 24 procedures use a simplified process to determine the factual basis for the enforcement action, and provide a framework more suitable to the technical nature of decisions regarding corrective action orders. Unlike Section 9006 orders, which present specific violations and require compliance with specific requirements, Section 9003(h) orders seek to compel owner/operators to undertake studies to examine releases and to take measures necessary to remediate such releases. Thus, in Part 22 proceedings, EPA decision-makers are required to resolve specific facts relating to the **violation** (e.g., did the violation occur? how serious was the violation? what is the economic benefit to the violator?), while the jurisdictional prerequisite needed for a Section 9003(h) order is establishing that the **release** from an UST has occurred.

The Part 24 regulation uses a two-tiered set of procedures for conducting administrative hearings: (1) Subpart B, "Hearings on Orders Requiring Investigations or Studies" and (2) Subpart C, "Hearings on Orders Requiring Corrective Action." The Subpart C procedures are somewhat more formal than those under Subpart B, and require the owner/operator to implement more comprehensive (rather than interim) corrective action measures. Because Section 9003(h) corrective action orders will typically require the owner/operator to undertake corrective action measures, the Agency determined that the procedures for hearings requested by the recipients of such orders are more appropriately governed by Subpart C hearing procedures. Thus, owner/operators who request hearings for a Section 9003(h) corrective action order will be subject to the Subpart C procedures. The Subpart B procedures will not be employed for Section 9003(h) orders.

5.1.3 The Agency's Roles in the Administrative Process

Under Part 24, the "petitioner" issuing the initial order must be an authorized official of the U.S. EPA, other than the Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response (see section 24.02(b)). The Presiding Officer of the case must be either the Regional Judicial Officer (as described in section 22.04(b) of Part 22) or another U.S. EPA attorney who has had no prior connection with the case, including performing any investigative or prosecuting functions. Unlike the Part 22 procedures, the Part 24 procedures do not require that the Presiding Officer be an Administrative Law Judge (ALJ). For the more informal procedures under Part 24, an ALJ's experience in conducting formal adjudicatory hearings is not required and does not justify the added cost.

5.2 OVERVIEW OF THE ADMINISTRATIVE PROCESS

The procedures for hearings on corrective actions are set forth in Subpart C of 40 CFR Part 24. Under these procedures, the major steps in the litigation process of issuing a Section 9003(h) corrective action order are:

- **Order Preparation and Filing** - In this stage, the appropriate Agency Regional office will prepare and serve the initial order on the owner/operator. This order will establish the Region's determination that a release from an UST has occurred, prescribe appropriate corrective action, and notify the owner or operator of his or her right to a hearing.
- **Pre-hearing Stage** - After the owner/operator requests a hearing, the Regional office that issued the order will submit documents supporting the factual basis for issuing the order. Similarly, the owner/operator will submit documents supporting the basis for contesting the order.
- **Settlement Conference** - At any time during the proceedings, the owner/operator may request an informal settlement conference. If the conference results in an order agreed to by both parties, the order will be issued as the final administrative order on consent.
- **Hearing** - The hearing consists of oral presentations by both parties and questions from the Presiding Officer, with no direct- or cross-examination. After a hearing is concluded, the Presiding Officer will recommend a decision that will be passed on to the Regional Administrator, who will make a final decision.

Detailed guidance on each of these steps is provided in the sections that follow. Because the descriptions below summarize and frequently refer to requirements set forth in 40 CFR Part 24, the reader is advised to obtain a copy of the Part 24 procedures.

5.3 PREPARATION AND FILING OF THE INITIAL ORDER

Similar to the Part 22 procedures, preparation of the initial order is the first step in the Part 24 adjudicatory process, and provides the basis for the hearing. Under section 24.02(a), an order issued unilaterally will become a final order either after the Regional Administrator has made a final decision, or after 30 days from issuance of the order, if no hearing is requested. If an initial order is agreed to by both the Agency and the owner/operator, the final order will be a final administrative order on consent (also referred to as a consent order).

5.3.1 Elements of the Order

In order to establish the fundamental case for issuing the order, enforcement personnel must be able to substantiate that a release from an UST has occurred. In addition, the initial administrative corrective action order will also contain the following (see section 24.02(c)):

- Reference to RCRA Section 9003(h), the legal authority for issuing the order, and evidence that the owner/operator receiving the order is subject to these requirements;
- Concise statement of the factual basis upon which the order is issued (i.e., evidence that a release from an UST into the environment has occurred);
- Notification of owner/operator's right to request a hearing with respect to any issue of material fact or the appropriateness of the proposed corrective action (within 30 days); and
- Indication of which Part 24 hearing procedures are appropriate (i.e., the Subpart C procedures).

For most cases involving releases from USTs, the corrective action order issued under Section 9003(h) will also indicate the measures that the owner/operator must undertake in response to the UST release.

5.3.2 The Administrative Record

An important component of the Part 24 procedures is the requirement that the U.S. EPA make available to the owner/operator the entire administrative record underlying the initial order (see section 24.03). Thus, on, or before, the date that the initial order is issued, the Regional Office issuing the order must deliver to the Clerk a copy of the administrative record. This administrative record must contain all the information that the Agency considered in its decision to issue the order, regardless of whether the information supports that decision. This record must be available at the appropriate Agency office for inspection by the owner/operator (or the public) after the order is issued.

5.3.3 *Ex parte* Discussions

After an initial order is issued, the Presiding Officer, the Regional Administrator, and certain other Agency officials are prohibited from discussing ex parte (i.e., without notice to all parties) the merits of the proceeding with Agency staff involved in the case or other interested individuals (see section 24.13(b)). Although ex parte discussion is prohibited, if such communication does occur, and the information discussed is relevant to the case, a summary of the discussion must be served on all other parties in the proceeding. Those other parties are given 10 days to reply.

5.4 PRE-HEARING STAGE

Once issued, the initial order will become final within 30 days unless the owner/operator requests a hearing. If the owner/operator does request a hearing, the pre-hearing stage provides an opportunity for

both parties to obtain further information. Section 24.04 establishes the filing and service requirements for the initial order and any other documents established during the pre-hearing stage. These requirements should be followed to ensure that the hearing proceeds correctly.

5.4.1 Request for Hearing

Within 30 days of receiving the initial order, the owner/operator may respond in writing to the Clerk of the Regional Office and request a hearing. Upon receipt of the owner/operator's request for a hearing, the Regional Administrator designates a Presiding Officer to conduct the hearing and preside over the proceedings. Once appointed, the Presiding Officer establishes a schedule for:

- The owner/operator's submission of memorandum responding to the order;
- The Agency's submission of a response; and
- A public hearing, which must be scheduled within 45 days of the order (see section 24.14(a)).

5.4.2 Pre-hearing Submissions

In accordance with the Presiding Officer's schedule, the owner/operator must file a memorandum stating his or her position on the order. This response must specify each item in the order that the owner/operator wishes to dispute, and must provide the basis for that dispute (see section 24.05(c)). If the owner/operator wishes to modify the order, the response must include any such proposed modifications (see section 24.14(c)).

In addition, the Subpart C proceedings allow the owner/operator to request permission to submit up to 25 written questions to the U.S. EPA Regional Office issuing the order (see section 24.14(d)). Both the request and the questions themselves must be submitted to the Presiding Officer at least 21 days before the hearing. The purpose of allowing an owner/operator to ask questions is to provide protection against factual error. In making the decision of whether to respond to the questions, the Presiding Officer will consider whether answering the questions is necessary for adequately resolving the facts at issue (see section 24.14(d)). Any questions regarding privileged internal communication will be disallowed. If the Presiding Officer does decide to allow the questions, he or she may limit the number or scope of the questions, or may delete or revise specific questions if they are irrelevant or unnecessary. Once the Presiding Officer has submitted the questions to the Regional Office, they must be answered within 14 days. All filing and service of documents must follow the guidelines described in section 24.04.

The Agency's pre-hearing submissions include a response to the owner/operator's dispute of the initial order. The primary goal of the U.S. EPA response is to provide a full analysis of the applicability of the UST requirements to the owner/operator, and to demonstrate the need for the appropriate corrective action.

In addition, during the pre-hearing stage, the Presiding Officer has the discretion to order either party to submit additional information on any undeveloped factual, technical, or legal matter in the proceeding (this information may also be requested at or after the hearing, if appropriate). In addition, the Presiding Officer may also issue subpoenas requiring certain persons to attend the hearing and give testimony, or requiring the owner/operator to produce relevant papers, books, and documents. Since 40 CFR Part 24 hearing procedures do not allow direct- or cross-examination of witnesses, the subpoena power is to serve only as an adjunct to the Presiding Officer's authority to ask questions and otherwise take steps to clarify disputed factual matters.

5.5 SETTLEMENT CONFERENCE

At any time during the pre-hearing procedures, the owner/operator may request an informal settlement conference by contacting the U.S. EPA employee indicated in the order (see section 24.07). (The request for an informal conference does not, however, excuse the owner/operator from having to request a hearing within 30 days.) The purpose of such informal settlement conferences is to encourage informal, frank discussions among the parties on any subjects that could delay or expedite the hearing. In addition, informal conferences allow the owner/operator an opportunity to discuss with the appropriate Agency technical and legal personnel all aspects of the order. If, during an informal settlement conference, an order is agreed to by both parties through negotiations, the order will be called the final administrative order on consent.

5.6 HEARING STAGE

Part 24 hearings eliminate time-consuming hearing features (i.e., direct- or cross-examination) because issues concerning whether an UST release has occurred and appropriate corrective actions are likely to be complex and more susceptible to resolution through analysis of a full documentary record. In addition, these procedures promote timely selection and implementation of appropriate corrective action. In overseeing the hearings, the Presiding Officer is responsible for ensuring that the hearing process is fair and impartial manner, for avoiding unnecessary delay in the disposition of the proceedings, and for maintaining order.

5.6.1 Hearing Procedures

Under Subpart C of the Part 24 proceedings, the hearing process consists of oral presentations and rebuttals by both parties, and questions from the Presiding Officer. The hearing process begins with a representative of the U.S. EPA introducing the order and its supporting evidence, and summarizing the basis for the order. The owner/operator may then respond to the administrative record and offer any facts, statements, explanations, or documents that are relevant to the issues in the order. In this presentation, however, the owner/operator is not allowed to present any new documents unless he or she can demonstrate that such documents could not have been submitted to the Agency before the hearing. The Agency will then have an opportunity to present a rebuttal to the issues presented by the owner/operator. The Presiding Officer may allow the owner/operator to respond to any such rebuttal submitted. The Presiding Officer may also allow Agency representative to respond to any new information submitted by the owner/operator. In addition, the Presiding Officer may ask questions of either side during the hearing.

5.6.2 Presiding Officer's Recommendations

As soon as practicable after the hearing, the Presiding Officer will file a recommended decision with the Regional Administrator. This recommended decision should be based on the entire administrative record, which consists of the transcript or recording of the hearing and all written submittals filed with the Clerk by the parties, including post-hearing submissions. The recommended decision must address all factual or legal issues raised by the owner/operator and must indicate whether the order should be modified, withdrawn, or issued as is. If the Presiding Officer determines that the corrective action filed by the Agency and contested by the owner/operator is not clearly supported by evidence in the record, the Presiding Officer will recommend that the order be modified or withdrawn. Any decision recommended must include an explanation of the decision, and should cite any material contained in the record that is relevant to the decision.

5.6.3 Final Order

After the Presiding Officer has recommended the decision, the Regional Administrator assumes jurisdiction over the proceedings. The Part 24 procedures provide both the owner/operator and the Agency with the opportunity to file comments on the recommended decision within 21 days. The Clerk promptly transmits any such comments received to the Regional Administrator for his or her consideration in reaching a final decision (see section 24.17(b)).

Based on the Presiding Officer's recommended decision, any further comments, and the entire administrative record, the Regional Administrator will make the final decision. There are three possible outcomes for the final order:

- If the Regional Administrator disagrees with the initial order, based on the administrative record, and decides to modify the order, the official who signed the initial administrative order must modify the order in accordance with the terms of the final decision, and must file and serve a copy of the final administrative order. The final order must include the legal and factual basis for the modification.
- If the Regional Administrator has no changes to the order, the final decision will declare the initial administrative order to be a final order. Because the Presiding Officer's recommended decision will include the basis for his or her decision, the final order will also include that justification.
- If the Regional Administrator declares that the initial order must be withdrawn, the official who signed the initial administrative order must file and serve a withdrawal of the initial order.

All final orders are effective upon service of the final decision. The final decision and the final administrative order are final agency actions that are effective on filing and service. These actions are not appealable to the Administrator, appeals may only be sought through judicial channels (see Chapter 6).

CHAPTER 6. PROCEDURES FOR JUDICIAL ENFORCEMENT

In addition to administrative enforcement responses, the U.S. EPA may initiate civil judicial actions for violations of the UST requirements. Section 9006 of RCRA authorizes the Agency to commence a civil action in the U.S. District Court for appropriate relief, including a temporary or permanent injunction. At the request of the Agency, DOJ will file judicial actions in the U.S. District Court. The action must be filed in the U.S. District Court for the judicial district in which the violation occurred.

U.S. EPA enforcement personnel may initiate civil judicial actions to require an UST owner or operator to comply with regulatory requirements and to assess civil judicial penalties. This chapter provides guidance on choosing the types of judicial actions to be initiated under Subtitle I, describes the process for filing judicial actions, and discusses the role of settlement agreements.

6.1 CIVIL JUDICIAL ACTIONS

Enforcement personnel may initiate judicial actions to compel compliance (through use of a judicial compliance order) or to seek judicial penalties. For UST cases requiring immediate judicial relief (e.g., in cases of leaking USTs where immediate remedial action is needed), enforcement personnel should seek injunctive relief or a temporary restraining order to accompany the judicial order.

6.1.1 Use of Judicial Compliance Orders and Penalties

Judicial referrals are usually reserved for cases where an UST owner/operator has a history of noncompliance, or where judicial action is necessary to deter others from violating the requirements. Judicial enforcement should also be initiated when an UST owner/operator has not complied with a Section 9006 administrative compliance order or a Section 9003(h) corrective action order. Agency enforcement personnel should pursue judicial orders to compel compliance and to obtain judicial relief in the form of penalties. Section 9006(a)(3) provides that owner/operators that fail to comply with a Section 9006 order are liable for additional civil penalties of not more than $25,000 for each day of noncompliance with the order, in addition to the penalties assessed in the order. Such penalties may also be assessed for Section 9003(h) corrective action orders because these orders are to be enforced in the same manner as Section 9006 orders (see Section 9003(h)(4)).

In general, however, preparing civil judicial cases is resource-intensive because of the involvement of DOJ and the more formalized procedures needed for court actions. In addition, the litigative process is slow, with some cases taking several years to complete. Thus, Agency enforcement personnel should attempt to address violations through other mechanisms before pursuing judicial responses, unless it appears that the owner/operator is not likely to respond to administrative actions. The statute does not require that the Agency exhaust all potential administrative actions before pursuing judicial actions.

6.1.2 Procedures for Filing Judicial Actions

To support a judicial action, enforcement personnel must provide competent evidence to the court in accordance with the Federal Rules of Evidence. Thus, prior to filing the action, enforcement personnel should review each element of the offense to ensure that there is sufficient evidence to support each claim of the violation.

Requests for civil judicial actions from U.S. EPA Regional offices are usually referred to DOJ either directly or through U.S. EPA Headquarters, Office of Enforcement. In most cases, the Regional office will initiate the request by establishing a litigation team that prepares a referral package for Headquarters. The Regional office will also designate a lead attorney and lead technical representative for the case. The referral package demonstrates the need for litigation in the particular case and presents the Agency's technical and legal data on the situation. Contents of the package include:

- **Cover Letter** - letter to be signed by the AA for the Office of Enforcement that describes the incident and requests the litigation;
- **Referral Memorandum** - memorandum that summarizes the primary elements of the litigation, and includes the name of the defendant(s), brief summary of the case, identification of major issues, status of past Agency efforts, and names of U.S. EPA and DOJ attorneys involved in the case; and
- **Civil Litigation Report** - report prepared by the lead attorney that indicates the specific relief sought (e.g., injunctive relief or penalties), identifies specific sections of the regulations violated, and indicates the available supporting evidence. The report also identifies any expected defenses by the owner/operator and any pending administrative or judicial actions against the owner/operator.

The RA may either refer actions directly to DOJ, with notice to the Assistant Administrator for the Office of Enforcement, or may refer the action to the Office of Enforcement for their referral to DOJ. If the referral is through the Office of Enforcement, the RA sends the package to them with copies to the AAs of the Office of Solid Waste and Emergency Response (OSWER) and DOJ. Once the Office of Enforcement and OSWER have determined that the package is in order, the Office of Enforcement attorneys will transmit the package to DOJ or the U.S. Attorney's Office. The Office of Enforcement will notify the RA and OSWER when the referral is transmitted. After this point, the lead attorney will be responsible for providing supplemental information to DOJ or the Attorney's Office, and keeping U.S. EPA program officials and attorneys informed of case developments.

For detailed information on the investigation of judicial actions and the referral to DOJ, enforcement personnel should consult the following documents:

- **RCRA/CERCLA Case Management Handbook**, OSWER Directive 9837.0, August 1984;
- **Expanded Civil Judicial Referral Procedures**, OSWER Directive 9891.1, August 1986;
- Memorandum of Understanding between the Department of Justice and the Environmental Protection Agency (June 15, 1977);
- General Operating Procedures for the U.S. EPA's Civil Enforcement Program (July 1982);
- Case Referrals for Civil Litigation (September 1982);
- Headquarters Review and Tracking of Civil Referrals (March 8, 1984); and
- Revised Regional Referral Package Cover Letter and Data Sheet (May 30, 1985).

The list of reference documents provided in this guidance manual suggests sources for obtaining these documents.

6.2 INJUNCTIVE ACTIONS

In cases where immediate action is needed, e.g., in the case of an UST release that is threatening a public water supply, enforcement personnel should seek injunctive relief. As provided by the authority under Section 9006, U.S. EPA enforcement personnel may initiate judicial actions for injunctive relief in the form of temporary restraining orders, preliminary injunctions, or permanent injunctions. These actions are typically required in emergency situations where an order is needed quickly to cease owner/operator actions that threaten the environment.

6.2.1 Temporary Restraining Orders

A temporary restraining order (TRO), also known as a provisional injunction, is used for immediate temporary relief prior to issuing a preliminary injunction. The purpose of the TRO is to stabilize the situation until a motion for a preliminary injunction can be heard. Although the TRO is the most expedient injunctive relief that can be obtained, its authority is limited to a short period of time (10 days). The process for obtaining a TRO is governed by the Federal Rules of Civil Procedure. In a typical case, the owner/operator (or his or her attorney) will be given oral or written notice for the TRO. The facts that demonstrate the "immediate and irreparable injury, loss, or damage" should appear in either a complaint or a separate affidavit.

Enforcement personnel do not have to give notice if it can be shown that immediate and irreparable harm will occur before the owner/operator can be notified, and if the government attorney certifies in writing the efforts taken to give notice and the reasons why notice is not required. In these cases, the motion for the preliminary injunction must be filed as soon as possible. If the U.S. EPA does not proceed with the application for a preliminary injunction, the TRO will be dissolved by the court.

6.2.2 Preliminary Injunctions

The purpose of the preliminary injunction is to maintain the situation until final determination after a full hearing. The preliminary injunction requires advance warning to the owner/operator and can last longer than the 10-day TRO. The owner/operator has the right to contest the motion, and the U.S. EPA applicant bears the burden of proof.

Either a preliminary injunction or a TRO should be considered when:

- Immediate and irreparable injury, loss, or damage will result if relief is not granted; and
- There is a likelihood of success at trial based on the facts before the court.

If the court grants a motion for a preliminary injunction or TRO, the Regional attorney and the U.S. attorney must begin preparing for the next stage in the proceeding (e.g., a full trial, or a permanent injunction). If the court denies the injunction, the U.S. EPA may appeal the denial or pursue other legal remedies.

6.2.3 Permanent Injunctions

A permanent injunction is generally unlimited in length, and is granted only after a full trial on its merits. Consequently, the judgment granting the permanent injunction constitutes a final disposition of the suit, although it may be appealed to a circuit court. Permanent injunctions should be considered when:

- Irreparable injury, loss, or damage will result if relief is not granted; and

- The owner/operator is recalcitrant and has demonstrated a history of noncompliance with administrative orders.

In addition, courts have certain requirements that must be met before they will grant permanent injunctions. Traditionally, courts have required that: (1) the petitioner demonstrate that other enforcement actions (e.g., assessing penalties) will not be adequate to mitigate the environmental hazard caused by the owner/operator; (2) irreparable injury, loss, or damage will result if relief is not granted; and (3) that administrative remedies have been exhausted (although Section 9006 does not require that the Agency attempt administrative actions before initiating judicial actions). The criteria used and the emphasis placed on each criterion will vary from district to district.

6.3 SETTLEMENT AGREEMENTS

In many cases, the parties will settle judicial actions by consent before the trial begins. Such settlement agreements usually take the form of negotiated consent decrees. Although the content of consent decrees will vary depending on the circumstances of the case and the items agreed upon, most consent decrees have the following elements in common:

- **Preliminary Statement** - explanation of each party's purpose in the agreement and summary of important facts of the case;
- **Jurisdiction** - stipulation that the court has jurisdiction over both the subject matter and the parties;
- **Parties Subject to the Terms of the Consent Decree** - statement that the parties agree to be bound by the document and identification of the terms applicable to each party;
- **Injunctive Relief** - references to the regulatory requirements with which the owner/operator must comply and detailed information on how compliance will be achieved so that there will be no misunderstanding of what actions the owner/operator must take;
- **Schedule for Compliance** - an expeditious schedule for completing the terms of the agreement;
- **Stipulated Penalties** - penalties for noncompliance with the agreement;
- **Penalties for Past Violations**;
- **Approval of Completed Wor**k - procedure for the U.S. EPA's oversight of the owner/operator's activities;
- ***Force Majeure*** - reduction in penalty for economic hardship;
- **Reporting and Record Preservation Terms** - requirements for periodic reports submitted to the U.S. EPA in order to monitor the owner/operator's progress;
- **Access Agreement** - statement of the U.S. EPA's right to access to the facility if corrective actions must be monitored;
- **Preservation of Evidence** - procedures for retaining evidence gathered during corrective actions;
- **Compliance with Other Laws** - statement that the owner/operator is required to comply with other Federal, State, or local laws not addressed by the consent decree;
- **Extent of Release Given Under the Decree** - statement of any release from liability under the consent decree;

- **Good Faith Negotiation Clauses** - declaration that all parties negotiated in good faith and believe the settlement to be fair and equitable (useful in cases where the U.S. EPA has not settled with all parties); and
- **Termination and Effective Date Clauses**.

Further information on consent decrees can be found in the U.S. EPA's **Guidance on Drafting Consent Decrees in Hazardous Waste Cases** (OSWER Directive 9835.2, May 1985) and "Guidance for Drafting Judicial Consent Decrees" (October 1983) which is contained in the U.S. EPA's **General Policy Compendium**.

6.4 CRIMINAL ACTIONS

Criminal response mechanisms are usually taken when a person or entity has knowingly and willfully committed a violation of the law. In criminal cases, DOJ prosecutes the owner/operator in the U.S. Court system, seeking criminal sanctions such as fines or imprisonment. Criminal cases are generally difficult to pursue because they require special investigation and case development procedures. If the circumstances of a violation indicate that a criminal response would be appropriate, enforcement personnel should examine authorities under other environmental statutes (or Federal statutes) to determine if they may be applicable. Further information on procedures for the investigation and referral of criminal actions under RCRA can be found in Chapter 9 of the **RCRA Compliance/Enforcement Guidance Manual**. Further guidance can be found in "Policy and Procedures on Parallel Proceedings at the EPA," (January, 1984 and recent updates) which is contained in the U.S. EPA's **General Policy Compendium**.

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