



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Determining and Tracking Substantial Noncompliance with Superfund Enforcement Instruments in the Superfund Enterprise Management System

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TO: Regional Superfund Division Directors, Regions I - X
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The U.S. Environmental Protection Agency (EPA) tracks substantial noncompliance (SNC) with Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enforcement instruments using the Superfund Enterprise Management System (SEMS). This memorandum (1) describes how to categorize CERCLA enforcement instruments by SNC status, (2) details the scope of compliance tracking in SEMS, (3) describes the associated compliance monitoring measure, and (4) discusses the resulting compliance monitoring process. Appendices to this memorandum provide examples of SNC (Appendix A) and a summary of SEMS compliance status values (Appendix B).

This memorandum updates and supersedes the August 2009 *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS*.

I. Introduction

The EPA uses the CERCLA compliance tracking module in SEMS to track instances of substantial noncompliance with CERCLA enforcement instruments.¹ This tracking system helps the EPA prioritize the most serious violations and ensure timely and appropriate enforcement

¹ The term “enforcement instrument,” as used in this document, encompasses settlements (e.g., consent decrees and administrative settlement agreements and orders on consent), unilateral administrative orders, and federal facility agreements.

responses to them. In addition, the compliance tracking system helps the EPA identify and analyze regional and national trends in addressing SNC.

This document is intended solely as internal direction for EPA personnel concerning compliance tracking for work planning purposes. Nothing in this memorandum, or any determination of compliance status made consistent with this memorandum, limits the EPA's ability to respond to violations of enforcement instruments or to take enforcement action under CERCLA or any other statute. The compliance tracking process described in this memorandum does not change what constitutes a violation of an enforcement instrument and does not alter available or expected EPA responses to violations. What constitutes a violation of an enforcement instrument and the EPA's options for responding to violations are determined by the CERCLA statute and the terms of the enforcement instrument that has been violated. Violations that are not serious enough to constitute SNC may still require an enforcement response. The EPA Regions are expected to document violations of enforcement instruments and work with the violators to ensure a return to compliance without regard to whether the violations constitute SNC.

II. Categorizing CERCLA Enforcement Instruments by SNC Status

The purpose of categorizing CERCLA enforcement instruments by SNC status is to separate them into two categories for purposes of the CERCLA compliance tracking process:

1. Those that have only less significant violations or no violations at all ("Not in SNC"); and
2. Those that have more significant violations that rise above the threshold described below in Table 1 ("In SNC").

The resulting compliance tracking process serves as an internal management tool for both the EPA Regions and Headquarters and provides an understanding of how frequently SNC occurs and how it is addressed. The term "*substantial* noncompliance" as used in this memorandum in the CERCLA context should not be confused with the term "*significant* noncompliance," which is used in the context of several regulatory enforcement programs under other environmental statutes. Although both terms are abbreviated "SNC," they have different meanings and apply to enforcement programs under statutes with different designs and purposes.

Substantial noncompliance determinations are made with respect to enforcement instruments rather than with respect to the parties subject to those enforcement instruments. The tracking system does not track whether every party to an enforcement instrument is individually compliant, as such individual tracking would impose a much greater resource burden on the EPA Regions.² Consequently, the existence of noncompliant parties (e.g., some recalcitrant unilateral administrative order (UAO) recipients or recalcitrant settling defendants) will not result in a finding of SNC where there are compliant parties performing all the work contemplated in the instrument. While the CERCLA compliance tracking process makes SNC determinations at the instrument level, rather than for each party subject to the instrument, it should not be inferred

² The EPA Regions may wish to identify noncompliant parties in the comment field for the enforcement instrument in the SEMS compliance monitoring module.

that the Agency is willing to overlook a party's noncompliance. The EPA Regions are encouraged to pursue enforcement action against such noncompliant parties as appropriate.

Substantial noncompliance determinations are based on the significance of the noncompliance without regard to the remedies that are available to address the noncompliance. In particular, it is not relevant to a SNC determination whether the noncompliance can be cured.

Several EPA documents address expectations and techniques for addressing noncompliance with CERCLA enforcement instruments. These include:

- [*Transmittal of Sample Documents for Compliance Monitoring*](#) (July 1, 1996).
- [*Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees*](#) (Sept. 21, 1987).
- [*Issuance of the Interim Policy on Settlement of CERCLA Section 106\(b\)\(1\) Penalty Claims and Section 107\(c\)\(3\) Punitive Damages Claims for Noncompliance with Administrative Orders*](#) (Sept. 30, 1997).
- [*Options for Responding to Deficient Deliverables from PRPs*](#) (June 30, 2011).
- [*Principles for Reinforcing Federal Facility Agreement Informal and Formal Dispute Timelines*](#) (Sept. 18, 2018).
- [*Transmittal of Revised Policy Towards Landowners and Transferees of Federal Facilities to Encourage Cleanup and Reuse at Federal Facilities on the National Priorities List*](#) (May 17, 2019).

A. Categorizing CERCLA Enforcement Instruments by SNC Status

Table 1 below describes how to categorize CERCLA enforcement instruments by SNC status. In addition, Appendix A provides detailed examples of violations (or sets of violations) that constitute SNC. The examples in Appendix A supplement the brief examples provided in Table 1. Neither set of examples is comprehensive. When site-specific questions arise about what constitutes SNC, appropriate Office of Site Remediation Enforcement (OSRE) or Federal Facility Enforcement Office (FFEO) personnel should be consulted.

Table 1. Categorizing CERCLA Enforcement Instruments by SNC Status

Substantial Noncompliance with a CERCLA settlement, order, or federal facility agreement is noncompliance that falls within any of the following categories:

1. Significant deviation from the terms of the enforcement instrument.

A determination of significant deviation may be based on one or more of the following factors:

- Importance of the requirement violated and the extent of the violation;
- Impact on site conditions or the affected community;
- Impact on the quality or timeliness of response activities;
- Harm to the integrity of the enforcement process; and
- Impact on site costs or the level of oversight required.

Examples include:

- Delayed or poor performance that has a substantial impact on the quality or timeliness of response activities.
- Missed deadline for a major deliverable (e.g., work plan, draft RI/FS, contractor on board).
- Failure to take appropriate action to prevent, abate, or minimize a release or threat of release occurring during work performance that presents an immediate threat to public health or welfare or the environment.
- Failure to respond to a UAO with a notice of intent to comply.
- Failure to provide adequate financial assurance.
- Denial or significant restriction of access required under a section 104(e)(5)(A) access order.
- Failure to comply with monitoring requirements.
- Providing to the EPA false, inaccurate, or incomplete reporting of information concerning the site or cleanup.
- Failure to cooperate with a five-year review process.
- Noncompliance with institutional controls that has a substantial impact on the protectiveness of the response action.

2. Chronic violations.

A determination that multiple violations cumulatively constitute a pattern of chronic violation may be based on one or more of the following factors:

- Importance of the requirements violated and the extent of the violations;
- Impact on site conditions or the affected community;
- Impact on the quality or timeliness of response activities;
- Harm to the integrity of the enforcement process; and
- Impact on site costs or the level of oversight required.

Examples include:

- Continual resistance to complying with the terms of the enforcement instrument.
- A pattern of violations of escalating frequency or significance.
- Multiple misses or delays in submitting reports or in performing work requirements.
- Submission of multiple incomplete or inaccurate deliverables.
- Repeated failure to effectively address EPA comments on inadequate deliverables.

3. Other.

Noncompliance not encompassed within the preceding criteria, but which the EPA Region deems substantial. A written description of the circumstances constituting substantial noncompliance should be prepared and included in the site file.

B. Circumstances That Should Not Constitute Substantial Noncompliance

Examples of circumstances that should not constitute SNC include:

- Violations that do not rise to the SNC threshold established in Table 1. Minor violations that can be timely addressed by a cooperative party should not result in a SNC determination. As described on page 2, violations that are not serious enough to constitute SNC may nevertheless still require an enforcement response, such as:
 - A late deliverable that has not yet had a significant effect on the cleanup process, where the party has communicated with the EPA about the delay and agreed to a delivery timeline.
 - A minor failure of work performance that the party agrees to remedy promptly.
- Failure of noncompliant parties (e.g., recalcitrant UAO recipients) to perform where there are compliant parties performing all the work contemplated in the instrument. SNC determinations are made at the level of the enforcement instrument, not for individual parties to the instrument, with a focus on whether work obligations are being performed. As noted on page 2, the EPA may pursue enforcement action against noncompliant parties as appropriate.
- A violation that was determined to be SNC has been remedied such that there are no longer violations that rise to the threshold established in Table 1. The SNC status value for that enforcement instrument should be returned to “Compliance Status Reviewed – Not in SNC” (SRNF). However, where the EPA Region takes formal action to address an instance of SNC, e.g., referral to the Department of Justice (DOJ) or an EPA fund takeover of work addressed by the enforcement instrument, but the violations have not yet been resolved, the enforcement instrument remains in SNC status.

III. Scope of Compliance Tracking in SEMS

The Superfund Enterprise Management System tracks compliance with CERCLA enforcement instruments that include work obligations³ such as remedial investigations, feasibility studies, remedial designs, remedial actions, and removals. The EPA Regions should review all such active instruments quarterly to determine whether they are in SNC. The CERCLA compliance tracking system addresses compliance with all work-related elements of these enforcement instruments, including, for example, reporting requirements, submission of adequate work plans, provision of financial assurance,⁴ implementation of institutional controls, and collection of data for five-year reviews. Administrative orders enforcing CERCLA § 104(e) information requests and requiring access are also tracked in the compliance tracking system.⁵ The CERCLA compliance tracking system is not used to track non-CERCLA enforcement instruments.

³ The term “work obligations” is used in this document to encompass all non-payment obligations contained in a CERCLA enforcement instrument.

⁴ Federal facilities are not required to provide financial assurance.

⁵ The compliance tracking system does not apply to EPA requests under CERCLA § 104(e)(2) for information, requests under sections 104(e)(3) or 104(e)(4) for access, or CERCLA access consent forms.

Payment obligations to EPA under CERCLA enforcement instruments are not tracked in SEMS. Payment obligations are tracked using the EPA's Compass financial management system. Enforcement instruments that contain only payment obligations are not tracked in the SEMS compliance monitoring module. Most *de minimis*, cost recovery, and cashout settlements are not tracked in the compliance monitoring system for this reason (however, they are tracked if they include work obligations).

Although payment obligations are tracked in Compass rather than SEMS, the EPA Regions are expected to take appropriate enforcement action in response to a party's failure to make payments. However, failure to make payments should not be considered when making SNC determinations for entry into the SEMS compliance tracking module, as SEMS covers only work obligations.

Some enforcement instruments include both work and payment obligations. When this occurs, the SEMS compliance tracking module is used to track the work obligations and the Compass accounts receivable module is used to track the payment obligations. Examples of enforcement instruments tracked in both systems include a remedial design/remedial action (RD/RA) consent decree that includes both work obligations and obligations to pay EPA oversight costs, and a cost recovery consent decree that includes obligations to provide access and implement institutional controls in addition to payment obligations.

All work required under CERCLA enforcement instruments should be considered in making SNC determinations. Many work obligations under such enforcement instruments are contained in documents that are incorporated into the enforcement instrument, such as records of decision (RODs), statements of work (SOW), and work plans for designing and implementing the remedy. When an EPA Region is reviewing an enforcement instrument to determine whether it is in SNC, the EPA Region should review both the enforcement instrument and these other documents in order to determine whether a party performing work is complying with its work obligations.

Parties performing work under CERCLA enforcement instruments are commonly obligated to perform tasks after construction of a remedy is complete. For example, parties may be required to provide reports to the EPA on the operation of the remedy, institute institutional controls, collect and provide data for five-year reviews, and retain records relating to their work. Such work obligations should be considered under this memorandum, and noncompliance with these obligations can be a basis for a SNC determination.

A. Instruments Tracked in the CERCLA Compliance Tracking System

Categories of CERCLA enforcement instruments for which compliance status should be tracked include:

Work Performed at Non-federal Facilities

The primary focus of the compliance tracking system is tracking enforcement instruments that require parties to perform work. Many, but not all, of these enforcement instruments are based on EPA model work agreements, including the following:⁶

- Remedial Investigation/Feasibility Study Administrative Settlement Agreement and Order on Consent (RI/FS ASAOC);⁷
- RI/FS Unilateral Administrative Order (RI/FS UAO);
- Remedial Design ASAOC (RD ASAOC);
- Remedial Design/Remedial Action Consent Decree (RD/RA CD);
- RD/RA Unilateral Administrative Order (RD/RA UAO);
- Removal Action ASAOC (Removal ASAOC);
- Removal Action UAO (Removal UAO); and
- Good Samaritan Removal Agreement.

Work Performed at Federal Facilities

The primary enforcement instrument used at federal facilities is an interagency agreement, otherwise known as a federal facility agreement (FFA), which generally addresses the cleanup process for an entire facility. At some federal facility National Priorities List sites, the EPA enters into enforceable agreements with non-federal parties to perform a portion of the cleanup. These are commonly known as “privatization agreements.” A privatization agreement is typically contained in an ASAOC. Privatization agreements may be among multiple parties, such as the EPA, the federal agency, and a non-federal party. This memorandum also applies to privatization agreements.

At some federal facilities, the EPA may also enter into additional types of agreements, such as an ASAOC and/or an environmental services cooperative agreement related to the early transfer of property through a finding of suitability for early transfer (FOSET). When there is more than one enforcement instrument in place at a federal facility, an independent SNC determination should be made for each enforcement instrument. For example, at a site with both an FFA and a privatization agreement, the EPA Region should make two independent SNC determinations, one relating to any violations of the FFA by the federal agency, and the other relating to any violations of the privatization agreement by parties to that agreement. All determinations of CERCLA SNC at federal facilities should be reported to FFE0 promptly.

⁶ As described above, this memorandum applies to all CERCLA enforcement instruments containing work obligations. Consequently, enforcement instruments that are not based on model agreements or language, but do contain work obligations, are also tracked in the compliance tracking system.

⁷ ASAOCs were formerly referred to as Administrative Orders on Consent (AOCs).

Access and Information Gathering Obligations

For the purposes of this memorandum, all obligations under CERCLA enforcement instruments to provide site access or information about a site are considered work obligations. All access obligations that are provided for under UAOs, CDs, or ASAOCs are tracked in the CERCLA compliance tracking system, whether in enforcement instruments addressing access alone or broader enforcement instruments that address access along with other obligations.

Section 104(e)(2) information requests are not tracked as enforcement instruments in the CERCLA compliance tracking system. However, where information request recipients do not comply and the EPA issues an enforcement order pursuant to section 104(e)(5)(A), that enforcement instrument is tracked in the compliance tracking system. Similarly, when DOJ pursues a civil action that results in a CD requiring compliance with the information request, that enforcement instrument is tracked in the compliance tracking system.

Access and information requirements are often incorporated in other enforcement instruments or may be in separate enforcement instruments, which are often based on EPA model documents, including the following:

- Unilateral Administrative Order Directing Compliance with Request for Access; and
- Section 104(e) Unilateral Administrative Order for Information Requests.

B. Making SNC Determinations for Federal Facilities

The system for categorizing enforcement instruments by SNC status described in Table 1 applies equally to enforcement instruments at federal and non-federal facilities. However, because an FFA addresses the cleanup process for an entire facility, the scope of work obligations addressed by a SNC determination under an FFA is often much broader than the scope of a SNC determination under an enforcement instrument at a non-federal facility. Enforcement instruments at non-federal facility sites more often address work to be performed at a single operable unit (OU). Although FFAs typically address more than one OU within the facility, when making a SNC determination the EPA Region should focus on the nature of the noncompliance and not primarily on the question of how many OUs are involved. While a pattern of noncompliance may involve more than one OU, noncompliance relating to only one OU can be the basis for a SNC determination even if the majority of OUs are progressing satisfactorily. Conversely, where an EPA Region identifies only one OU out of several OUs at a federal facility as noncompliant, the EPA Region is advised to promptly confer with FFEO to make the determination whether the facility should be listed as “in SNC.”

When there is more than one enforcement instrument in place at a federal facility, an independent SNC determination should be made for each enforcement instrument. For example, when a federal agency enters into an early transfer/privatized cleanup agreement based on a transfer of real property owned by the United States pursuant to CERCLA § 120(h)(3)(C), the transferee may agree to accept primary responsibility for the cleanup of the real property under an ASAOC. The transferee's obligations under the ASAOC are enforceable and the ASAOC is subject to SNC determinations under this memorandum. If the transferee defaults, or if further

response actions are found to be necessary after the date of transfer or are beyond the scope of the privatization agreement, such response actions will be considered work obligations of the federal agency, subject to SNC determinations under this memorandum.

C. Description of the SNC Tracking Process

Nature and Frequency of Reporting

The EPA Regions should update the compliance status of all open enforcement instruments in SEMS on a quarterly basis. These updates should use the compliance status values described in Appendix B, which match the available selections in SEMS. The compliance status values indicate whether an enforcement instrument is in SNC and, if so, the status of the EPA's response to that SNC. The basis for SNC determinations and the EPA actions taken to address the noncompliance should be documented in the site file. The "SEMS Compliance Monitoring Data Entry Guide" (April 2019) provides detailed directions for entering compliance monitoring data into SEMS, including screen shots of the relevant data entry screens.

Once all actions addressed by an enforcement instrument are "Construction Complete" and the OUs at which those actions were completed is in either the operation and maintenance phase or the long-term response action phase, the frequency of compliance status reporting can be reduced to annually.

Once an EPA Region makes an initial "Not in SNC" determination for an access-only enforcement instrument, further routine compliance determinations are not required, as initial compliance with an access enforcement instrument typically continues throughout the Superfund evaluation and remediation process. If a subsequent limitation or denial of access occurs, the EPA Region should make an "In SNC" determination, after which regular compliance determinations for the access instrument will be required until the EPA Region once again determines that the instrument is "Not in SNC."

The EPA Regions should maintain in their SEMS data control plans provisions to ensure routine and consistent tracking of compliance with active enforcement instruments in a manner consistent with this memorandum.

Compliance status information for enforcement instruments will generally not be disclosed to the public, as compliance status determinations include information about planned enforcement actions that is enforcement confidential.

Closed Enforcement Instruments

This memorandum addresses compliance tracking of "open" CERCLA enforcement instruments. It does not address instruments that have been "closed" after all work obligations (i.e., all non-payment obligations) have been completed by the parties to the instrument. These "closed" instruments should be designated as such using the compliance status value "Work Under Order/Settlement Completed" (WOSC), indicating that all non-payment obligations are complete. Alternatively, where the parties have not completed all work obligations but the EPA

Region has decided not to pursue the violations and no further work obligations remain (e.g., because the EPA completed the work and will not be pursuing cost recovery or penalties), enforcement instruments should be closed using the status value “Decision Not to Pursue Violations” (DNPV). When appropriate, the “Closed Order or Settlement” sub-activity milestone in SEMS should also be used, indicating that all obligations under the enforcement instrument (i.e., both work obligations and payment obligations) are complete.

IV. The SNC Measure

In 2011, the national workgroup that created the 2009 SNC tracking memorandum reconvened to review Superfund compliance monitoring data generated by the SNC tracking process and to create a Superfund compliance monitoring measure. The measure was finalized in September 2011 for inclusion in the FY2012 *Superfund Program Implementation Manual* (SPIM).⁸ The compliance monitoring measure remains in SPIM Chapter X (Enforcement) under the title “Total Active Response Enforcement Instruments in Substantial Noncompliance (SNC) and Not Addressed through Formal Enforcement.” The workgroup chose to create an assessment measure rather than an enforcement target. The purpose of the measure is to facilitate timely and appropriate enforcement responses to SNC by focusing attention, both in the EPA Regions and at Headquarters, on instances of SNC that the EPA has not yet addressed through formal action.

The compliance monitoring measure identifies “enforcement instruments that have been in SNC status for two or more quarters without being addressed through formal action or returned to non-SNC status.” Examples of formal action include referral to DOJ, fund takeover of work addressed by the enforcement instrument, assessment of stipulated penalties, and entry into dispute resolution. SNC status codes that do not reflect formal action are: (1) informal action planned; (2) informal action taken (e.g., emails, letters, or meetings addressing the issue); and (3) formal action planned (but not yet taken).

To facilitate understanding of the status of enforcement instruments “flagged” by the compliance monitoring measure and actions taken that change the status of instruments in SNC, the measure requires the EPA Regions to provide status comments in SEMS that describe the EPA’s action where: (1) an instrument is in SNC for two or more consecutive quarters and is flagged by the measure; (2) an instrument is addressed through formal action; and (3) a decision is made not to pursue violations.

V. The Superfund Compliance Monitoring Process

The Office of Site Remediation Enforcement runs Superfund compliance monitoring reports quarterly and distributes them to the EPA regional office and Headquarters personnel. The quarterly reports are pulled at mid-quarter (i.e., approximately February 15, May 15, August 15, and November 15) so that the regional data entry required each quarter does not overlap with the data entry demands of end-of-year program accomplishment reporting. Approximately three weeks before the quarterly data pull, OSRE sends a reminder to the EPA Regions to update Superfund compliance monitoring data. All enforcement instruments for which a compliance

⁸ See “Transmittal of ‘Superfund Compliance Monitoring Measure’ Definition Methodology for Incorporation into Superfund Program Implementation Manual (SPIM) for FY2012” (Sept. 16, 2011).

monitoring status is required should show up in the SEMS “Compliance by Site” data entry screen.

Office of Site Remediation Enforcement and FFEO personnel responsible for supporting and tracking each Region’s enforcement cases (i.e., regional liaisons in OSRE’s Regional Support Division (RSD) and FFEO, and regional analysts in OSRE’s Policy and Program Evaluation Division (PPED)) are routinely provided the Superfund compliance monitoring quarterly reports. These Headquarters staffers are asked to work with their EPA regional office counterparts to track and update the status of enforcement instruments that are in SNC status, with particular emphasis on those that have been flagged by the compliance monitoring measure, i.e., those that have been in SNC for two or more quarters and not addressed by formal action. In addition, the EPA regional office personnel are encouraged to consider contacting the designated subject matter contacts in OSRE’s RSD or FFEO with questions relating to noncompliance enforcement issues such as claims for statutory penalties for noncompliance with CERCLA §§ 106(a) or 104(e)(5)(A) UAOs, claims for stipulated penalties for noncompliance with settlements, FFAs, and settlement provisions for dispute resolution where there is a dispute as to whether noncompliance occurred.

Consistent with the SNC measure, the goal is for the EPA Region to either: (a) get the parties to take action that returns the instrument to “Not in SNC” status; or (b) take formal action in response to the SNC, e.g., referral to DOJ, an EPA fund takeover of work addressed by the enforcement instrument, or assessment of penalties (these actions leave the instrument in SNC, but remove it from the list of instruments flagged by the SNC measure). It may not always be possible to achieve that goal in a single quarter, in which case the SNC measure continues to flag that instrument, which keeps a focus on the unresolved or unaddressed SNC.

Historically, at non-federal facility sites, the majority of enforcement instruments in SNC status have been fund takeovers, which tend to remain in SNC until the cleanup is complete, or DOJ referrals, which typically remain in SNC until DOJ completes work on the referral. Fund takeovers and DOJ referrals count as “formal actions” taken to address the SNC, so these instruments are not flagged by the SNC measure. However, enforcement instruments with these SNC status values remain in SNC until the noncompliance is ultimately resolved.

Regions should consult with OSRE or FFEO when they are uncertain whether current circumstances constitute SNC or which SNC status value is appropriate. Similarly, OSRE and FFEO should consult with the EPA Region when they become aware of an enforcement instrument that appears to be in SNC but does not have a SNC status value in SEMS. The EPA Regions are expected to adjust the SNC status in SEMS as appropriate after such consultations.

SEMS Compliance Monitoring Reports

The SEMS enforcement reports module includes several compliance monitoring reports that facilitate the process of reviewing and updating the status of enforcement instruments and provide summaries of the resulting SNC determinations. Most of these reports include both summary views that provide counts and detail views that list individual enforcement instruments.

For most users, the reports that provide (1) national overview charts, and (2) a list of all enforcement instruments currently in SNC status, are the most useful. They are:

- **National Summary Charts by Status (ENFR-23b)**. Includes two pie charts. The first divides all active CERCLA enforcement instruments by “Not in SNC” vs. “In SNC” status (e.g., 97% “Not in SNC” vs. 3% “In SNC”). The second breaks out the “In SNC” enforcement instruments by status (e.g., informal action planned, informal action taken, formal action planned, fund takeover, referred to DOJ). The SNC status code values available in SEMS are listed and described in Appendix B.
- **SNC Instruments Only – With Comments (ENFR-24c)**. Lists detailed information, sorted by the EPA Region, for every enforcement instrument currently in SNC status. The enforcement instruments for each EPA Region are arranged in three categories to mirror the compliance monitoring measure: (1) In SNC less than two quarters; (2) In SNC two or more quarters and addressed through formal action; and (3) In SNC two or more quarters and not addressed through formal action (i.e., flagged by the measure). If one of the categories is not shown, the EPA Region has no instruments in that category.

Other SEMS compliance monitoring reports provide national and regional measure results, showing how many instruments are in each SNC status category (ENFR-24b); and a list of every active CERCLA enforcement instrument that should have a SNC status, sorted by EPA Region (ENFR-23a) or by section within each EPA Region (ENFR-24a).

VI. Contact Information

If you have CERCLA compliance and noncompliance questions, please contact OSRE staff as follows: tracking of compliance in SEMS, Mary Bell (bell.mary@epa.gov, 202-564-2256); “substantial noncompliance” determinations, Steve Keim (keim.stephen@epa.gov, 202-564-6073); noncompliance enforcement issues (e.g., statutory penalties, stipulated penalties, or dispute resolution provisions in settlements), Mike Northridge (northridge.michael@epa.gov, 202-564-4263) or Doug Dixon (dixon.douglas@epa.gov, 202-564-4232), or access, Pamela Daugherty (daugherty.pamela@epa.gov, 202-564-7727). For federal facility specific questions, please contact Logan Senack (senack.logan@epa.gov, 202-564-3312) in FFEO.

Disclaimer: This memorandum is intended solely for the guidance of EPA employees. It is not a rule and does not alter liabilities or limit or expand obligation under any federal, state, tribal, or local law. It is not intended to and does not create any substantive or procedural rights for any person at law or equity. The extent to which the EPA applies the memorandum will depend on the facts of each case.

cc: Superfund Program Branch Chiefs, Regions I – X
Superfund ORC Branch Chiefs, Regions I – X
Information Management Coordinators, Regions I – X
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Appendix A

Substantial Noncompliance Examples

The following detailed examples of violations (or sets of violations) that constitute substantial noncompliance (SNC) supplement the brief examples provided in Table 1. Neither set of examples is meant to be comprehensive. When site-specific questions arise about what constitutes SNC, appropriate Office of Site Remediation Enforcement (OSRE) or Federal Facilities Enforcement Office (FFEO) personnel should be consulted.

Failure to Comply with Sampling and Planning Requirements

The XYZ Corp. removed several drums that were located in an abandoned warehouse on-site and were subject to an EPA unilateral administrative order (UAO). Based on its knowledge about past operations at the site, the EPA reasonably believed the drums may have contained hazardous substances. The order required that the drums be sampled and that the contents and the drums themselves be disposed of off-site in compliance with CERCLA § 121(d)(3). Prior to such sampling and removal, XYZ Corp. was also required to submit to the EPA for approval a removal action plan and a health and safety plan. XYZ Corp. arranged for the removal of the drums but did not comply with any of the order's sampling or planning requirements.

- XYZ Corp. significantly deviated from the terms of the order by failing to sample the contents of the drums and removing the drums without preparing a removal action plan or health and safety plan.
- These violations harmed the integrity of the enforcement process by (1) bypassing required EPA review of the cleanup process; and (2) detracting from the quality of response activities by failing to plan appropriately for the removal of the drums.

Failure to Complete Remedy Implementation

ABC Co. was operating under a UAO that required it to implement the site remedy as set forth in the record of decision (ROD), which included operation of a soil vapor extraction (SVE) system. ABC Co. shut down the SVE system, failed to conduct a soil gas investigation following the shutdown of the system, and refused to resume operation of the SVE system after the EPA found high residual contaminant levels in the subsurface. ABC Co. also failed to conduct a supplemental groundwater investigation in the deeper aquifer of the source area as required by the order.

- ABC significantly deviated from the terms of the UAO by failing to conduct the soil gas investigation, refusing to resume SVE operation, and failing to conduct the supplemental groundwater investigation.
- These violations harmed both the quality and timeliness of response activities, and also harmed the integrity of the enforcement process by failing to gather data required to make plans to fully implement the ROD.

Failure to Implement ROD Addressing Uncontrolled Groundwater Plume

The Bronze facility is in a rural area surrounded by an agricultural community that relies on private wells for drinking water as well as irrigation of crops. The facility has contaminated soil and groundwater. Pursuant to a federal facility agreement (FFA), separate RODs are in place for the soil and groundwater. The soil remedy is well underway. However, the groundwater ROD, which required containment of the groundwater to prevent migration of the groundwater plume beyond the facility property, has not been implemented. Because the plume was not contained, it has migrated beyond the facility property and threatens private drinking water and irrigation wells in the local community.

- The facility has significantly deviated from the terms of the enforcement instrument by failing to implement the groundwater ROD.
- This violation has delayed the response, worsened site conditions by allowing further migration, and affected the community by putting both drinking water and irrigation water supplies at risk.

Failure to Fully Cooperate

The EPA ordered Anytown Municipal Landfill (AML) to conduct additional work under an existing UAO. AML undertook some of the work, including connecting nearby residents to the municipal water supply system, but did not do the work required to fully identify the source, nature, and extent of contamination in the area around the landfill and continued to argue that the additional work was not needed. This pattern continued over several years. To avoid further delay in fully understanding newly identified contamination, the EPA hired a contractor to test wells in the area and undertook an effort to summarize data for the site in an electronic repository after AML refused to perform this task.

- AML's incomplete compliance and continuing refusal to do the work necessary to determine the nature and extent of the contamination constituted a pattern of chronic violation.
- These violations harmed the timeliness of response activities by delaying investigations that were central to designing an appropriate cleanup and harmed the integrity of the enforcement process by failing to gather data required to make plans to fully implement the ROD.

Failure to Comply with Monitoring Requirements

The Teal facility is in a suburban location surrounded by homes and light commercial development. The facility failed to conduct long-term monitoring at several groundwater operable units as required under an FFA. This sampling is critical to determining whether the groundwater remedies are protective. Without the sampling, there is no way to determine whether contaminated groundwater may adversely affect the surrounding community.

- The facility significantly deviated from the terms of the FFA by failing to conduct required long-term monitoring at the groundwater operable units.

- These violations harmed the integrity of the enforcement process by failing to collect data needed to determine whether the remedy has been effective and whether further work is required under the enforcement instrument.

Denial of Access

An owner/operator potentially responsible party (PRP) subject to a CERCLA § 104(e)(5)(A) access order denied access to the EPA for sampling and remedial design activities. The EPA sent the PRP a warning letter and subsequent negotiations temporarily resolved the noncompliance. However, within a few months the PRP again denied the EPA access to the site.

- The owner/operator twice significantly deviated from the terms of the access UAO by denying the EPA access to the site. Each violation independently constituted a significant deviation as described in Table 1 and the two violations cumulatively also constituted a pattern of chronic violation as described in Table 1.
- These violations harmed the timeliness of response activities by preventing sampling and remedial design activities on the PRP's property.

Failure to Implement Institutional Controls

The Indigo facility is located in a remote, sparsely populated area. The facility, which is subject to an FFA, has soil contamination and a landfill with a soil cover. To prevent damage to the soil cap and exposure to contamination, the remedial design for the landfill required that the facility, within 90 days of finalization of the remedial design, complete the following actions: (1) install warning signs around the landfill; and (2) update its base master plan and geographic information system (GIS) mapping to include the location of the landfill and land use restrictions preventing digging or disturbance of the cap. These actions were not completed and as a result the environmental office approved plans to construct a storage building, a parking lot, and a road on the cap. These projects were completed by facility personnel.

- The facility has significantly deviated from the terms of the FFA by failing to implement the institutional controls.
- This lack of timeliness has resulted in a serious impact on the site and possibly exposed base personnel to hazardous substances.

Failure to Notify the EPA of Plans to File Contribution Litigation

Five major PRPs were cleaning up a co-disposal landfill pursuant to a remedial design/remedial action consent decree (RD/RA CD). The CD obligated the PRPs to notify the United States at least 60 days prior to filing any suit for matters relating to the site. Without giving the EPA any prior notification, the PRPs filed contribution claims against hundreds of local businesses. As a result, these businesses collectively incurred significant legal fees in addressing these claims.

- The five major PRPs failed to give the EPA the required notice, thus depriving the EPA of the opportunity to negotiate *de minimis* settlements or take other appropriate action with these other parties.

- This violation harmed the integrity of the enforcement process by undercutting the EPA's prerogative to decide whether to pursue additional parties and, if so, when.

Failure to Retain Records

Generic Products Company (GPC) negotiated a settlement wherein it would receive special account monies from the EPA to conduct certain removal measures at a mining-contaminated site. Under the settlement agreement, GPC was required to preserve and retain any records relating to the performance of the work for 10 years after the EPA certified its completion. Notwithstanding this obligation, GPC discarded such records shortly after completion of the removal. Meanwhile, the EPA pursued several late-identified PRPs, seeking to recover the response costs incurred by GPC (but paid for by the EPA with special account monies). GPC's failure to preserve the necessary records hindered the EPA's enforcement efforts.

- GPC significantly deviated from the terms of the consent order by failing to preserve and retain the records documenting the performance of the work.
- This violation harmed the integrity of the enforcement process by undermining the EPA's attempts to pursue additional PRPs. It also potentially had the indirect effect of delaying response activities, as the cost recovery proceeds lost as a result of GPC's noncompliance were not available to spend on further work.

Appendix B
Summary of SEMS Compliance Status Values

SEMS Compliance Status Values	Example
Compliance Status Reviewed – Not in SNC (SRNF)	The EPA Region has completed its review of the parties’ compliance with work obligations under the enforcement instrument and has determined, based on available information, that it is not in substantial noncompliance (SNC). This value should also be used when an enforcement instrument was previously found to be in SNC and is no longer in SNC.
In SNC – Informal Action Planned (IIAP)	The enforcement instrument is in SNC as to work obligations and the EPA Region is planning to take an informal enforcement action such as a phone call, a warning letter, or a warning e-mail.
In SNC – Information Action Taken (IIAT)	The enforcement instrument is in SNC as to work obligations and the EPA Region has taken an informal enforcement action such as a phone call, a warning letter, or a warning e-mail
In SNC – Formal Action Planned (IFAP)	The enforcement instrument is in SNC as to work obligations and the EPA Region is planning to take a formal enforcement action by invoking the penalty or other formal mechanisms outlined in the enforcement instrument.
In SNC – Formal Action Taken (IFAT)	The enforcement instrument is in SNC as to work obligations and the EPA Region has taken a formal enforcement action by invoking the penalty or other formal mechanisms outlined in the enforcement instrument.
In SNC – Informal Action Taken and Compliance Accomplished (IIAC)	The enforcement instrument was in SNC as to work obligations and the EPA Region took informal enforcement action, with the result that the instrument was no longer in SNC by the end of the quarter. Use only where SNC was identified and resolved in a single quarter
In SNC – Formal Action Taken and Compliance Accomplished (IFAC)	The enforcement instrument was in SNC as to work obligations and the EPA Region took formal enforcement action, with the result that the instrument was no longer in SNC by the end of the quarter. Use only where SNC was identified and resolved in a single quarter.
In SNC – In Dispute Resolution (IIDR)	The EPA Region should use in lieu of “In SNC - Formal Action Taken” when the dispute resolution provisions of the enforcement instrument have been invoked with respect to work obligations.

SEMS Compliance Status Values	Example
In SNC – Referred to DOJ (IDOJ)	Noncompliance has been addressed by referral to the Department of Justice (DOJ). This also includes instances where a case is sent to DOJ to file a bankruptcy proof of claim when the party who was performing work has entered bankruptcy. This level of specificity is required to allow EPA Headquarters to track whether DOJ is taking action in accordance with the Interagency Agreement (IAG). The EPA Region should use this value in lieu of “In SNC – Formal Action Taken.”
In SNC – Fund Takeover (IFTO)	Noncompliance has been addressed by fund takeover of the work addressed by the enforcement instrument.
Decision Not to Pursue Violations (DNPV)	The EPA Region decided not to pursue violations. Primarily for use when no work remedy is available, and the EPA Region decides not to pursue penalties. Do not use this value when further work obligations remain (it closes out SNC tracking of the instrument). In that circumstance, revert to “Compliance Status Reviewed – Not in SNC” and describe the decision not to pursue violations in the comment field.
Work under Order/ Settlement Completed (WOSC)	All the work obligations under the enforcement instrument have been completed to the satisfaction of the EPA.