



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
230 SOUTH DEARBORN ST.
CHICAGO, ILLINOIS 60604

AUG 15 1991

MEMORANDUM

REPLY TO ATTENTION C

Subject: Procedures for Monitoring and Enforcing CERCLA
Administrative and Judicial Orders/Decrees

From: Lynn Peterson, Chief, Solid Waste and Emergency Response Branch
Office of Regional Counsel

Jodi Traub, Acting Associate Director
Office of Superfund

To: All SWERB Attorneys and Office of Superfund Enforcement Personnel.

This memorandum sets forth procedures for monitoring CERCLA administrative and judicial orders and decrees, and determining and documenting appropriate enforcement response to violations and their requirements. The purpose of this memorandum is to ensure that expeditious, effective and consistent enforcement action is taken when PRPs are not meeting time schedules and other conditions of these documents.

This memorandum was prepared in response to recommendations in Office of Inspector General audit report that the Region develop clearer guidance and procedures for ensuring that more effective use is made of statutory authorities and enforcement mechanisms in settlement documents in responding to violations of terms and schedules in orders and decrees.

The elements necessary to ensure timely, effective and consistent enforcement response are: routine monitoring of the compliance status of PRPs with decree/order requirements; prompt review of this information by the case attorney and RPM/OSC; management review and concurrence in the selection of the Agency response to a violation; and adequate documentation of the decision-making process. Each and every instance of PRP-non-compliance with schedules established in an administrative order or consent decree must result in an appropriate action, and written documentation of that action.

Monitoring of PRP compliance status. After a final administrative order or judicial consent decree has been issued, the RPM/OSC has the primary responsibility for monitoring compliance with the order/decree. To fulfill this

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responsibility, the RPM/OSC will report on a monthly basis the compliance status of the respondents/defendants (hereafter referred to as PRPs) to his/her first line supervisor and to the Assistant Regional Counsel assigned to the matter. A standard reporting form will be used for this monthly reporting.

Selection and Documentation of Enforcement Response. In the event the RPM/OSC determines that a violation of the decree/order has occurred, he/she shall immediately consult with the assigned assistant regional counsel (case attorney) for the purpose of formulating an appropriate enforcement response. The following steps should be taken:

1. If the case attorney and RPM/OSC agree that a violation has occurred, the RPM/OSC will immediately send a letter to the PRPs, describing the non-compliance and requesting that the PRPs take expeditious action to remedy the non-compliance. This letter is not a formal notice of violation and will not discuss any potential enforcement response. Its purpose is to alert the PRPs to the RPM/OSC's concerns as soon as possible to allow them the opportunity to quickly remedy the problem, as well as to forestall PRPs' raising, in a future enforcement action, an equitable "defense" to the imposition of substantial multi-day penalties for the violation. Also, the PRPs' response to this letter may impact the selection of an appropriate enforcement response and magnitude of penalties sought.

2. Within twenty-one (21) days of the RPM/OSC's and case attorney's determination that a violation has occurred, the RPM/OSC and case attorney will formulate a joint Recommendation of Action in response to Violation (RAV). This memorandum shall be directed to and contain concurrence signature lines for the RPM/OSC's first and second line supervisors and the ORC attorney's section and branch chiefs. The RAV shall document the facts supporting the determination of violation, and the rationale for choosing the selected enforcement response, including consideration of the criteria listed below.

"Appropriate enforcement response" may include a 1) a determination to merely ensure documentation of the violation and notice thereof in the file with the prospect for future enforcement action if additional violations are documented; 2) informal actions such as issuing a warning letter or engaging in discussions with the PRPs; 3) formal enforcement activity such as issuing a demand for stipulated penalties, or filing a judicial

Disagreement between the RPM/OSC and the case attorney as to whether a violation of an order/decreed has occurred shall be elevated to their first line supervisors and, if necessary, to the OSF Associate Division Director/ORC SWERB Branch Chief for resolution.

action; or a combination of formal and informal responses. Depending on the circumstances, one or more of the following be selected:

- Warning letter, meeting to discuss violation
- Letter granting a time extension;
- invocation of dispute resolution provisions of order/decrees;
- Issuance of Demand for stipulated penalties under an administrative order or consent decree (referral to DOJ required if CD);
- Take-over of the Work from the PRPs pursuant to the terms of the order/decrees;
- Judicial action to enforce a unilateral order and for civil penalties pursuant to Section 106(b) of CERCLA (referral to DOJ required);
- Administrative assessment of a civil penalty pursuant to Section 109(a) or (b) of CERCLA;
- Judicial action to enforce an administrative order or consent decree, seeking stipulated penalties and/or civil penalties pursuant to Section 109(c) of CERCLA (referral to DOJ required).
- Judicial action for civil or criminal contempt (referral to DOJ required);

In accordance with the memorandum by James M. Strock entitled, "Documenting Penalty Calculations and Justifications in EPA Settlement Agreements," when penalties are sought in either administrative or judicial enforcement actions, the determination as to the amount of the penalty to be sought and the bottom-line penalty acceptable in settlement must be documented in the case file. The RAV is the starting point of the enforcement decision-making process. It should include a recommendation as to the amount and the underlying rationale for stipulated or civil penalties to be sought as part of the enforcement response.

Criteria for Selection of Enforcement Response.

Formal versus informal action. Informal actions are those which do not invoke the Agency's enforcement authority (in an order or decree or in CERCLA) to seek to compel compliance or to impose a penalty. They include a letter granting an extension, warning letters, conferences, etc. Generally, a decision to take informal action will be appropriate for the first instance of noncompliance with a schedule in an order or decree if the PRPs provide a reasonable explanation for the non-compliance and take expeditious action to correct the problem. However, based on a consideration of the factors listed below, even a first violation that is expeditiously remedied may be cause for formal enforcement action. For example, the Agency may deem it appropriate to take formal enforcement action if the non-compliance has resulted in a significant delay in completing the

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RIFFS or clean-up, or serious environmental harm has or could have resulted from the violation.

Formal enforcement action should generally be recommended if the PRPs do not respond to the RPM/OSC's initial letter describing the non-compliance within 15 days, or respond inadequately (i.e. they do not provide a satisfactory explanation and demonstrate evidence of actions taken to achieve expeditious compliance), or if there has been a prior violation of the order/decrees. However, based upon consideration of the factors listed below a decision not to take a formal action might be appropriate in light of competing enforcement priorities. Situations where the Agency might exercise its discretion not to take formal action might include:

- Late reporting with no environmental consequence and no pattern of delay or noncompliance with reporting requirements;
- Missed revised deliverable deadline but period of non-compliance is short and revisions are approvable.

Priority of Formal Enforcement Response. The type of formal enforcement action which is appropriate will depend primarily on the seriousness of the violation, but should take into consideration all of the factors listed below. The following principles are applicable:

Where consent orders and decrees provide for imposition of stipulated penalties for specified violations, enforcement of these provisions is generally the most efficient and expeditious means of obtaining compliance. A new enforcement action is not required, and the procedures for assessing such penalties and resolving disputes concerning the propriety of the government's penalty demand are generally favorable to the Agency. Although most orders and decrees reserve the Agency's right to seek both stipulated and statutory penalties, stipulated penalties will be sought in lieu of statutory penalties unless the violations are not clearly covered by the stipulated penalty provision, or the stipulated penalty is considered insufficient in light of the egregiousness of the violation.

Generally, administrative action should be taken before instituting judicial enforcement unless: 1) past experience indicates that the violator does not take administrative action seriously; 2) substantial penalties above those ordinarily imposed in an administrative case are sought; 3) the violations are egregious, warranting a more public response.

The criteria to be considered by the RPM/OSC and case attorney, and the concurring supervisory personnel in determining the

appropriate action to be taken in response to an instance of non-compliance shall include:

- (i) Degree of deviation from expectation of compliance
- (ii) Degree of environmental harm expected to result from non-compliance
- (iii) Respondents/defendants' previous non-compliance record on the project and/or on the specific aspect of the project at issue.
- (iv) Extent to which non-compliance was avoidable by the respondents/defendants
- (v) Degree to which non-compliance jeopardizes meeting subsequent schedule
- (vi) Prompt action taken by respondents/defendants to remedy non-compliance
- (vii) Extent to which determination of violation is based on evidence and interpretation of order/decrees that would be clear and unequivocal to reasonable disinterested third party.

Implementation of Selected Enforcement Response

Immediately upon receipt of concurrence from OSF and ORC on the RAV, the RPM/OSC, case attorney and their first-line supervisors will establish a time-table for expeditiously implementing any enforcement response. The timetable may take into consideration any communication from the PRPs received in response to the RPM/OSC's letter to them describing the non-compliance if the communication indicates that the violation has been or will be immediately rectified.

The granting of any time extension of a deadline in an order or decree must be in writing. In some cases the terms of an order or decree may require a formal modification to the document, in which case the modification must be drafted for signature by the official authorized to execute the original order and ORC concurrence as required for the original order; DOJ retains authority for approval of modifications to consent decrees. See Procedures for Modifying Judicial Decrees, Chapter 4, Manual on Monitoring and Enforcing Administrative and Judicial Orders, February 6, 1990. If a formal modification to the order or decree is not expressly required, the decision to grant an extension may be made by letter to the PRPs, signed by the Associate Director, OSF, and initialed by the case attorney and

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his/her section chief. As of the issuance of this Memorandum, no extension will be effective unless memorialized in writing.

If the recommended action involves a warning letter to the PRPs, the letter will be drafted by the RPM for the signature of the Associate Director, OSF, initialed by the case attorney.

If the action seeks administrative penalties pursuant to Section 109(a) or (b), the RPM/OSC will compile the administrative record and will prepare a draft complaint and administrative order for signature of the Associate Division Director, after concurrence of the Director, Waste Management Division and Regional Counsel, pursuant to EPA Headquarters and Region V CERCLA Delegations 14-31. The assessment of administrative penalties under Section 109 is governed by the Rules of Practice at 40 CFR Part 22. New guidance is being developed for preparation of Section 109 administrative penalty actions, including a model complaint and order. It is expected that the complaint and order can be drafted for sign-off within two weeks of receipt of concurrence on the RAV.

If the action involves preparation of a referral to DOJ, the case attorney will draft the referral package for sign-off in accordance with established procedures. It is expected that such a referral package can be generally drafted within 30 days of receipt of OSF and ORC concurrence on the RAV and all support information supplied by OSF to the case attorney.² (Letter

² The following existing guidance should be consulted in preparation of judicial referrals:

- 1) Memorandum, "Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003," June 21, 1989;
- 2) Memorandum, "Final Model Litigation Report and Complaint for CERCLA Section 104(e) Enforcement Initiative" January 31, 1990;
- 3) Memorandum, "OECM-Waste Procedures for Processing Oral and Expedited Referrals," April 15, 1988;
- 4) Memorandum, "Procedures for Transmittal of CERCLA and RCRA Civil Judicial Enforcement Case Packages to Headquarters, June 12, 1989;
- 5) Memorandum, "Expansion of Direct Referral of Cases to the Department of Justice," January 14, 1988;
- 6) Memorandum, "Preparation of Pre-Litigation and Litigation Referrals," May 16, 1991;

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referrals recommending enforcement of a consent decree for stipulated penalties will generally be prepared in two weeks following concurrence on the RAV--see following section of this memo concerning Actions for Stipulated Penalties.)

Actions for Stipulated Penalties. The Department of Justice has the authority and responsibility to enforce judicial decrees, including the collection of stipulated penalties. Justice must be notified of the violation and concur in the decision to seek the penalties and has plenary prosecutorial discretion to compromise stipulated penalties. Thus, a letter referral, describing the facts constituting the violation and the basis for the amount of penalties sought must be prepared and sent to DOJ prior to taking any action seeking stipulated penalties. Generally, DOJ notifies the defendants and requests payment of the penalties. See, Procedures for Notifying DOJ of Stipulated Penalties, Chapter 4, Manual on Monitoring and Enforcing Administrative and Judicial Orders. It is expected that the case attorney will draft the letter referral for sign-off of OSF/ORC and signature of the Regional Counsel within two weeks of receipt of OSF and ORC concurrence on the RAV and all supporting information supplied by OSF to the case attorney.

In administrative enforcement actions for stipulated penalties under Section 106 consent orders, the Associate Division Director, OSF, has authority to assess stipulated penalties with concurrence of the Regional Counsel. Penalties assessed in final administrative orders are considered debts under Chapter 31 of the United States Code. Thus Federal and EPA debt collection regulations and procedures must be followed in collecting penalties. U.S. EPA's Manual on Monitoring and Enforcing Administrative and Judicial Orders, February 6, 1990, should be followed, particularly Chapter 2, Collecting Administrative Penalties.

If at any time following concurrence on the RAV, the RPM/OSC and case attorney determine that the recommended enforcement action is no longer appropriate, due to changed factual circumstances, receipt of additional information, etc., a revised RAV should be immediately prepared and distributed as provided for above.

7) Memorandum of Understanding (MOU) between Office of Regional Counsel and Waste Management Division, Region V, September 24, 1990.

New guidance is being prepared for preparation of Section 109(c) penalty action referrals, which will include a model litigation report and complaint.

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cc: S. White, -
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