Office of Inspector General
Audit Report

ENFORCEMENT

Compliance with Enforcement Instruments

Report No. 2001-P-00006

March 29, 2001

Inspector General Divisions Conducting the Audit:	**Northern Audit Division Chicago, IL** **Eastern Audit Division New York, NY** **Central Audit Division Dallas, TX**
Regions Covered:	**Regions 2, 5, and 6**
Program Offices Involved:	**Office of Enforcement and Compliance Assurance** **Regional Air Divisions** **Regional Water Divisions** **Regional Waste, Pesticides, and Toxics Divisions**

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OFFICE OF THE INSPECTOR GENERAL
NORTHERN DIVISION
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March 29, 2001

ELECTRONIC MEMORANDUM

SUBJECT: Audit Report No. 2001-P-00006
Compliance with Enforcement Instruments

FROM: Robert Bronstrup
Divisional Inspector General
Northern Audit Division

TO: Sylvia Lowrance
Acting Assistant Administrator for
Enforcement and Compliance Assurance

Attached is our final report titled Compliance with Enforcement Instruments. This audit report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. This audit report represents the opinion of the OIG and the findings contained in this audit report do not necessarily represent the final EPA position. Final determinations on matters in this audit report will be made by EPA managers in accordance with established audit resolution procedures.

Changes were made in the final report, as deemed appropriate, to address any concerns or comments raised during the exit conference or your and Region 2's response to the draft report. Both responses have been included as appendices.

ACTION REQUIRED

In accordance with EPA Order 2750, you, as the action official, are required to provide this office with a written response within 90 days of the date of the final audit report date. The response should address all recommendations. For corrective actions planned but not completed by the response date, please describe the actions that are ongoing and provide a timetable for completion. This information will assist us in deciding whether to close this report.

We have no objection to the release of this report to the public. We appreciate the efforts of your staff, and the staff in each region, in working with us to develop this report. Should you or your staff have any questions, please contact me at 312-353-2486.

Attachment

ecc: William Muszynski
Acting Regional Administrator, Region 2
David Ullrich
Acting Regional Administrator, Region 5
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Regional Administrator, Region 6
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Ernie Ragland, OIG

EXECUTIVE SUMMARY

The Office of Inspector General (OIG) audited facilities' compliance with enforcement instruments nationwide. Our objectives were to determine whether (1) regions adequately monitored facilities' compliance with enforcement instruments and considered further enforcement actions if companies did not comply and (2) OECA oversaw regional enforcement activities to ensure compliance. To accomplish these objectives, we reviewed randomly sampled cases in the United States Environmental Protection Agency's (EPA) Clean Air, Resource Conservation and Recovery, Drinking Water, and Clean Water Programs. During our review, we also identified problems with the Office of Enforcement and Compliance Assurance's (OECA) reporting of environmental benefits resulting from enforcement activities.

We found that:

- OECA's annual accomplishment reports did not accurately represent the actual environmental benefits resulting from enforcement activities. For example, an OECA report stated that fiscal 1999 enforcement actions resulted in the reduction of more than 6.8 billion pounds of pollutants. However, this may have been an understatement or overstatement since: (1) violators did not always comply with the enforcement instruments and (2) data was not comprehensive. Also, OECA's performance measures were not sufficient to determine the program's actual accomplishments. Consequently, Congress has less useful performance data upon which to base its decision making.

- Regions did not always adequately monitor compliance with enforcement instruments nor did they always consider further enforcement actions. Ineffective monitoring was due primarily to the lack of: (1) guidance detailing how or when to monitor enforcement instruments and (2) emphasis OECA placed on monitoring. Ineffective monitoring may have contributed to the regions not considering further enforcement actions for noncompliance with enforcement instruments. Consequently, there is a risk that violations continued and contributed to environmental harm or increased health risks and EPA's effectiveness through deterrence was adversely impacted. For example, we found instances where EPA had no evidence that significant violations had been corrected.

We recommend that the Acting Assistant Administrator for Enforcement and Compliance Assurance: (1) establish a performance measure for ensuring that facilities under a formal enforcement action return to compliance and (2) identify a more accurate method for reporting actual, rather than estimated, accomplishments resulting from EPA's enforcement activities. We also recommend that OECA issue baseline guidance for (1) monitoring violators' efforts to comply with enforcement instruments and (2) considering further enforcement actions when violators fail to comply with instrument requirements. Chapter 3 includes those elements which,

at a minimum, we believe the guidance should include. We recommend that all Regional Administrators (1) ensure that the program offices take steps, until OECA issues guidance, to adequately monitor violators' actions and consider further enforcement actions when appropriate and (2) determine the status of those cases where our review showed no evidence of violator compliance.

In responding to recommendation 2-1 in the February 20, 2001, draft report, the Acting Assistant Administrator stated that it is not desirable or realistic for EPA's enforcement program to adopt a performance measure aimed at perfection. OECA agreed that efforts to ensure the terms of compliance with judicial instruments should be tracked as a performance measure. Beginning in fiscal year 2002, OECA intends to have the regions update tracking systems for judicial cases to reflect compliance schedules and EPA actions to verify violators' compliance. OECA did not propose tracking administrative actions in the same manner. We agree that a performance measure aimed at perfection is unrealistic. However, we continue to recommend that a performance measure for ensuring return to compliance with enforcement instruments be established. While OECA currently does not intend to track compliance with administrative instruments in the same manner as judicial instruments, we think OECA should revisit this issue in the future.

In responding to recommendation 2-2, the Acting Assistant Administrator concurred with the recommendations that OECA more accurately represent enforcement activities in reporting accomplishments. OECA intends to clarify language in its future reports. These proposed actions, when implemented, will resolve this recommendation.

In response to recommendations 3-1 and 3-2, OECA concurred that it and the regions can and should improve tracking and enforcing compliance with requirements in enforcement instruments. OECA has already taken steps in this regard. We concluded that OECA's response to the recommendations was adequate for resolution.

In response to the draft report, Region 2 indicated that they have begun the process of addressing recommendation 3-3 and completion is expected by September 30, 2001. Regions 5 and 6 need to provide specific corrective actions and milestone dates for addressing the recommendation.

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APPENDICES

Abbreviations

CAA	Clean Air Act
CWA	Clean Water Act
DOJ	Department of Justice
EPA	United States Environmental Protection Agency
Directive	Judicial Consent Decree Tracking and Followup Directive
Manual	Manual on Monitoring and Enforcing Administrative and Judicial Orders
OECA	Office of Enforcement and Compliance Assurance
OIG	Office of Inspector General
RCRA	Resource Conservation and Recovery Act
RECAP	Reporting for Enforcement and Compliance Assurance Priorities
Results Act	Government Performance and Results Act
SDWA	Safe Drinking Water Act
Strategy	National Performance Measures Strategy

Definitions

Enforcement Instruments - Any type of enforcement action that EPA issued which included actions a facility was required to take. These enforcement actions included: administrative orders, compliance orders, consent agreement consent orders, and consent decrees.

Further Enforcement Actions - Instances where EPA either assessed a penalty or referred a case to the Department of Justice (DOJ) for a violator's noncompliance with the enforcement instrument.

Late compliance - Those instances where a facility did not meet the milestone due dates contained in the enforcement instruments. In cases where EPA approved an extension on the due date, we did not consider the facility's actions as late if they met the new date. If a facility submitted a document which subsequently called for revisions based on EPA's review, we did not consider the facility to be late unless it missed the due date for the submission of the revised document.

Monitoring - We accepted a case as monitored based on any documented instance of EPA actions, such as review of submitted documents, inspections, phone calls, or meetings with the violator, to follow-up on their compliance.

No monitoring - Those instances where there was no evidence of EPA action to follow-up on a facility's efforts to comply with the enforcement instruments.

Significant Violation - A violation that was considered significant by EPA policy or regulations, identified as significant in an EPA database, or determined to be significant by regional staff.

Timely compliance - Determined through comparison of the schedule, or milestone due dates, established in the enforcement instrument and documentation of a facility's efforts to comply.

CHAPTER 1
Introduction

PURPOSE

The OIG conducted this audit to determine whether (1) regions adequately monitored facilities' compliance with enforcement instruments and considered further enforcement actions if companies did not comply with the instruments and (2) OECA oversaw regional enforcement activities. During our review, we also identified problems with OECA's reporting of environmental benefits resulting from enforcement activities.

BACKGROUND

Enforcement of the laws EPA administers plays an important role in EPA achieving its mission of improving and preserving the environment. A primary goal of enforcement is to bring violators into compliance with laws and regulations. One tool EPA uses to achieve this goal is administrative and judicial enforcement instruments. These instruments serve four purposes: (1) return violators to compliance, (2) ensure continued compliance, (3) remedy environmental harm, and (4) prevent new harm from occurring.

Enforcement instruments may contain injunctions. An injunction is an order to do, or refrain from doing, a particular act and is limited to measures necessary to achieve and maintain compliance and reduce adverse effects the violation caused. Instruments that include injunctions can be effective in bringing violators into compliance and ensuring their future compliance, especially if facilities achieve compliance by implementing a compliance schedule or similar milestones. EPA uses "injunctive relief" to refer to these types of required activities. Injunctive relief yields tangible benefits such as human health, ecosystem, and worker protection.

SCOPE AND METHODOLOGY

We performed fieldwork in Regions 2, 5, and 6 in the Clean Air, Resource Conservation and Recovery, Drinking Water, and Clean Water Programs. We also interviewed OECA officials. For details, see exhibit 1.

CHAPTER 2
Accomplishment Reports Not Representative of Enforcement Efforts

OECA's annual accomplishment reports did not accurately represent the environmental benefits resulting from enforcement activities. In passing the Government Performance and Results Act (Results Act), Congress expected that agencies would develop processes to verify and validate performance data. Report inaccuracies occurred because: (1) violators may not have complied with the enforcement instruments thereby not achieving expected benefits and (2) data was not comprehensive. Also, OECA's performance measures were not sufficient to determine the program's actual accomplishments since it had not completed efforts to develop more comprehensive measures. As a result, OECA could not ensure it had accurately stated the actual environmental improvements resulting from the Agency's enforcement activities.

BACKGROUND

In passing the Results Act, Congress emphasized that the usefulness of agencies' performance data for its decision making ultimately depends on the degree of confidence that Congress has in that data. For Congress to know whether the intended performance has truly occurred, agencies should produce performance data that is verified and valid. The Results Act requires that agencies describe in their annual performance plans how they intend to verify and validate performance data. The procedures should be credible and specific to ensure that performance information is sufficiently complete, accurate, and consistent to document performance and support decision making.[1]

[1] An Assessment Guide to Facilitate Congressional Decisionmaking, U. S. General Accounting Office, February 1998, GAO/GGD/AIMD-10.1.18.

ANNUAL REPORTING

Report Based On Anticipated Effects

EPA's Fiscal Year 1999 Annual Performance Report stated that fiscal 1999 enforcement actions resulted in the reduction of more than 6.8 billion pounds of pollutants and that about 21 percent of actions resulted in improvements to the environment, such as hazardous material removal. The report also stated that 47 percent of actions resulted directly in changes to facility management practices, which should lead to environmental improvements. However, EPA cannot ensure that these accomplishments occurred since it did not always verify that facilities took the required actions. For example, as discussed in chapter 3, we found no evidence that facilities complied with 30 of 122 randomly sampled enforcement agreements. EPA could verify facilities' actions through activities such as inspections, document reviews, or phone calls. Without verification, EPA can not be sure that the required actions resulted in the desired environmental benefits. Likewise, OECA indicated that there are instances where it is not possible to estimate the environmental benefits that will result from enforcement activities. As a result, OECA may have understated or overstated the actual environmental improvements resulting from EPA's enforcement activities. In either case, the reports did not accurately portray EPA's enforcement achievements.

In response to our June 15, 2000, draft report, OECA stated that "There is a general understanding within OECA (and among many external consumers) that the environmental benefits claimed in [various reports] publicize intended effects" required by the enforcement instruments. The response further states that the reports:

> ... do not intend to suggest subsequent verification through actual measurement-and logically, it is correct that if no one monitors and/or enforces compliance with agreements, one cannot say with comfort that the required effects have been achieved.

While OECA stated that it had not intentionally implied that the environmental impacts have happened, OECA also acknowledged that it would have been more accurate if OECA had stated that

actions reported were those required to result in pollutant reductions. Likewise, we spoke to Congressional staff members who suggested OECA include information on both intended results, that are clearly defined as "intended", while also including any information measured on actual results achieved.

Reports Based On System That Does Not Include All Data

OECA annually prepares a Reporting for Enforcement and Compliance Assurance Priorities (RECAP) report and an Annual Accomplishment Report. The data for both reports primarily comes from DOCKET, the official EPA database for tracking and reporting information on civil judicial and administrative enforcement cases issued. However, DOCKET data is not comprehensive[2] since the system tracks violators' compliance with consent decrees but does not track violators' compliance with administrative instruments. Yet, administrative instruments comprised almost 90% of all instruments issued in fiscal 1998.[3] Just like consent decrees, these instruments may also contain injunctive relief requirements which, if implemented, would yield tangible benefits such as human health, ecosystem, and worker protection.

PERFORMANCE MEASURES

OECA's performance measures were not sufficient for determining the environmental benefits resulting from enforcement activities. OECA has traditionally relied on counting enforcement actions initiated (outputs) as its means of measuring success. In the last few years, OECA recognized the need for a more comprehensive performance measure, including one for compliance with enforcement instruments. However, as explained below, OECA did not finalize performance measures to address this need.

OECA's November 1996 Operating Principles stated that in the development and implementation of a new approach to measuring performance, EPA would:

[2] We did not perform a detailed review of the system. The OIG is currently evaluating the quality of the data contained in the DOCKET system as part of another review.

[3] FY 1998 RECAP Measures of Success Management Report, April 13, 1999. We did not include penalty orders since our review only covered instruments that included injunctive relief.

- strive to measure accomplishments for all enforcement activities,
- continue to count activities but also measure the related actual results and environmental impact,
- collect, analyze, and report on violators' actions and benefits to human health and the environment, and
- continue to refine its measures of success to identify measures which are most meaningful for judging the effectiveness of EPA efforts and the performance of industry in achieving compliance.

In November 1997, OECA issued a draft Strategic Plan which included an objective to: "Achieve continuous improvement in compliance with environmental laws and regulations while maintaining a strong base program." A performance measure for this objective was to:

> Ensure that 100% of regulated facilities under a formal enforcement action return to compliance in accordance with the schedule contained in the final order or decree.

Because EPA's Results Act goals and EPA's Strategic Plan incorporated some of OECA's concepts, the draft OECA Plan was never finalized. The above performance measure was not incorporated into EPA's Strategic Plan. EPA's Plan contained more general goals which did not include a specific performance measure like the measure proposed in the draft OECA Plan. In our opinion, OECA need not adopt the 100% goal because it is unrealistic to assume all violators will comply or that EPA has the resources to verify that all enforcement actions are implemented. However, a performance measure similar to the above would help to provide a more accurate measure of EPA's enforcement accomplishments.

In December 1997, OECA also initiated the National Performance Measures Strategy (Strategy) to develop and implement an enhanced set of performance measures to better assess the results of national enforcement efforts. The Strategy stated that while output results, or number of enforcement actions taken, were important for assessing performance and providing accountability to

the public, they did not reveal the actual compliance among the regulated community. With the Strategy, OECA developed an enhanced set of performance measures to assess the effect and outcomes of enforcement activities. These performance measures include impact and improvements on environmental and human health problems. However, the data currently collected does not address these performance measures since it does not reflect *actual* human health or environmental improvements resulting from activities, it only reflects *anticipated* results. In addition to improving OECA's ability to report its accomplishments to the public, these measures were designed as a tool for strategically managing its enforcement program and for complying with the Results Act.

CONCLUSION

OECA cannot provide a completely accurate picture of EPA's enforcement achievements since OECA is not collecting comprehensive data or using appropriate performance measures. Also, OECA implies that all facilities comply with enforcement instruments in its reporting on the environmental benefits resulting from enforcement efforts. OECA needs to report accomplishments based on actions that violators have actually completed along with the benefits expected as a result of compliance with enforcement instruments. EPA's enforcement accomplishments, including environmental benefits, are not accurately reflected if the actual outcome of enforcement actions is not collected and measured. Accordingly, OECA is not providing Congress with sufficient or as accurate information as possible for decision making purposes.

RECOMMENDATIONS

We recommend that the Acting Assistant Administrator for Enforcement and Compliance Assurance:

2-1 Establish a performance measure for ensuring that facilities under a formal enforcement action return to compliance in accordance with the schedule contained in the final order or decree.

2-2 Identify a more accurate method for reporting, including verifying and validating, the actual accomplishments which result from EPA's enforcement activities.

To help implement recommendation 2-2 and ensure that performance data is more accurate and useful, chapter 3 discusses steps EPA can take to improve regional efforts to monitor violators' compliance with enforcement instruments. These steps will also help to ensure more accurate data for accomplishment reports.

AGENCY ACTIONS AND OIG EVALUATION

In responding to recommendation 2-1, the Acting Assistant Administrator stated that it is not desirable or realistic for EPA's enforcement program to adopt a performance measure along the lines of the draft measure cited on page 6. The response indicated that designing a system aimed at perfection (100%) in this area would require seriously overbuilding the system. However, OECA agreed that efforts to ensure the terms of compliance with judicial instruments should be tracked as a performance measure. Beginning in fiscal year 2002, OECA intends to have the regions update EPA's DOCKET system, or appropriate regional databases, for judicial cases to reflect compliance schedules and EPA actions to verify violators' compliance. If regional databases are used, OECA intends to stress the need for regions to ensure that DOCKET is also regularly updated. Also, EPA is in the process of developing a new tracking system which programs would use to track all aspects of enforcement activity. When finished, OECA will require regions to use the system to track enforcement instrument compliance. At this time, OECA did not propose tracking administrative actions in the same manner.

The OIG agrees that a performance measure need not adopt the 100% goal of the prior draft measure. However, we continue to recommend that a performance measure for measuring violators' return to compliance with enforcement instruments be established. While OECA currently does not intend to track compliance with administrative instruments in the same manner as judicial instruments, we think OECA should revisit this issue in the future. If EPA improves its monitoring efforts, EPA should be able to track

the number of facilities which have complied with both judicial and administrative enforcement instruments as a performance measure.

In responding to our draft report and recommendation 2-2, the Acting Assistant Administrator concurred with the recommendations that OECA more accurately represent accomplishments resulting from enforcement activities. OECA intends to clarify language in its future reports to ensure readers understand the context and limitation of the data presented.

We believe OECA's proposed action is appropriate and, when implemented, should help ensure more accurate reporting of enforcement activity accomplishments.

CHAPTER 3
Regions Need to Improve Monitoring Efforts

Regions did not always adequately monitor compliance with enforcement instruments, although they have the primary responsibility to perform this activity. Also, Regions did not always consider further enforcement actions for those cases where there was no evidence of compliance or facilities did not timely comply. Consequently, Regions did not know whether violations had continued and further contributed to environmental harm or increased health risks. Also, EPA's ability to deter others from similar illegal behavior may have been adversely impacted. Ineffective monitoring may also have contributed to the regions not considering further enforcement actions for noncompliance with instruments. Ineffective monitoring was due primarily to the lack of: (1) guidance detailing how or when to monitor and (2) emphasis OECA placed on monitoring.

BACKGROUND

The responsibility of the regions to monitor violators' compliance is identified in OECA's 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders (Manual). The Manual, in particular, states that regional program offices are responsible for routinely checking compliance with the non-penalty requirements. EPA must have effective monitoring procedures and regions must monitor instruments until the terms have been met. The Manual states that vigorous enforcement is essential to enable EPA to maintain its credibility with the courts, public, and regulated community and to achieve the desired environmental objective. The main goal of any enforcement action must be compliance with the law so public health and welfare is protected. According to the Manual, if enforcement instrument provisions are allowed to be violated for an extended period of time, serious environmental and health concerns may occur.

REGIONAL ACTIONS

While we found regional staff usually performed some type of monitoring of violators' efforts to comply with instrument requirements, only 48% showed evidence of monitoring around the due dates. We believe that regional efforts to monitor closer to due dates would have compelled some of the facilities to meet their compliance schedules. Our review showed there was no evidence that 30 of 122 (25%) violators had complied. In addition, another 36 (30%) violators either complied late or the timeliness of compliance was unknown. (For a summary of findings for the specific programs reviewed, see appendix 3.) To illustrate the adverse conditions found:

- A hazardous waste storage, blending, and recycling facility improperly stored and released hazardous waste. As of the date of our initial review, there was no evidence that the facility had complied with the June 1997 enforcement instrument. Our review five months later found that there was still no evidence that this facility had complied. Regional staff believe there were still additional areas of hazardous waste contamination to inspect and cleanup. The chemicals found at this site were toxic and corrosive and included known and suspected carcinogens. The human health effect of the chemicals included causing damage to internal organs and effecting the central nervous system. The chemicals could also be harmful to animals.

- A public water supplier was issued an enforcement instrument for exceeding its drinking water maximum contamination levels for radium and barium by about 1.2 to 2.2 times EPA's drinking water standards. Over 25 months had passed since the facility was due to comply, yet there was no evidence of compliance. During our followup over five months later, the facilities' compliance was still not evident. EPA's tracking system indicates that this facility has had seventeen health-based violations reported between January 1998 and March 2000. As a result, residents may continue to be exposed to contaminants which can damage the heart or cause cancer or high blood pressure.

- A stainless steel refinishing plant illegally discharged into a creek violation of its permit limits for toxicity levels. The facility was 21 months late in complying with the enforcement instrument. Continuing discharges above the toxicity levels can be harmful to aquatic life.

OECA officials advised us they did not rank monitoring for compliance as essential for program success. Instead, they indicated that compliance with enforcement instruments is of lower level importance, despite OECA documents which reflect its significance. For example, the Manual states that once an instrument is issued, it must be monitored until the terms are met. The Manual further states that verifying whether violators have actually accomplished the activities is an essential element in the overall success of the enforcement program. OECA's fiscal 2000/2001 Memorandum of Agreement guidance stated that to maintain a viable program necessary for a credible enforcement presence, programs should track compliance and take all necessary actions to ensure continued compliance.

As previously cited on page 5, EPA tracks violators' compliance with consent decrees which a court approves, but does not track violators' compliance with administrative instruments that EPA signs. EPA tracks violators' compliance with consent decrees because of its legal responsibility to the Courts for ensuring that the terms of each decree are properly met. Focusing solely on consent decrees, however, is not enough because the majority of EPA's enforcement actions are administrative. In fiscal 1998, 1,721 of the 1,974 actions were administrative, or almost 90%.[4]

Because the programs did not always monitor to ensure full compliance, violations continued for up to 36 months past the instrument deadlines for those facilities that complied late and potentially longer for those cases where information was lacking. For example, an apartment complex was 24 months late in taking and submitting acceptable samples results for its drinking water. As

[4] FY 1998 RECAP Measures of Success Management Report, April 13, 1999. We did not include penalty orders since our review only covered instruments that included injunctive relief.

a consequence of the untimely and inadequate sampling, residents may have been exposed to water contaminants.

In part, regions did not adequately monitor violators' compliance with instrument requirements because the Manual only provided general guidance to EPA staff on their roles and responsibilities for monitoring. The Manual did not establish basic procedures for regions to use in monitoring violators' efforts to comply with enforcement instrument requirements. Various media specific policies also show the need for monitoring but, like the Manual, did not provide any standard procedures.[5] Media policies provided timelines for when to take further enforcement actions for noncompliance. However, these timelines are not triggered if regions do not monitor and identify violations of instruments. As a result, further actions for noncompliance may not always have been taken when appropriate.

Our review also found that Regions 2, 5, and 6 only took further enforcement actions in 10 of 66 (15%) cases with no evidence of compliance, where violators did not timely comply, or where the timeliness of compliance with requirements was unknown.[6] In 86 of the 122 (70%) enforcement instruments we reviewed, Regions included warning language to describe penalties that violators may have to pay if they did not comply with instrument requirements. However, EPA only assessed penalties in 4 of the 66 cases. EPA may also refer violations of instruments to DOJ and used this process to escalate six cases. In some cases, EPA's threat of referral, or initial steps to refer, was incentive enough to compel violators to comply.

We recognize that program offices have discretion on when to take further enforcement actions and we do not believe these actions are necessary in every case. However, in accordance with the Manual, if programs determined further actions should not be taken, the case

[5] In June 2000, Region 5's Drinking Water Program issued guidance which took steps to improve following up on instruments and indicating when additional actions should be taken.

[6] Because the timeliness of compliance was unknown for four cases, EPA would not be able to judge whether or not further enforcement actions were needed.

files should reflect those decisions. Yet, case files typically did not show whether regional staff considered taking further actions or supporting why actions were not pursued in the other cases.

Significance of Cases

In 26 of the 30 instruments (87%) where files contained no evidence of compliance, we determined that EPA had issued the instruments for significant violations (Table 3.1). Also, of the 36 instruments in which compliance was late or timeliness was unknown, 23, or 64%, were issued for significant violations (Table 3.2). As the tables show, EPA did not take further actions in most cases.

Table 3.1: No Evidence of Compliance

	Number of Cases	
	Significant	Non-Significant
Further Action	4	2
No Further Action	22	2
Total	30	

Table 3.2: Complied Late or Timeliness of Compliance Unknown

	Number of Cases	
	Significant	Non-Significant
Further Action	2	2
No Further Action	21	11
Total	36	

Lack of monitoring in these cases may be the result of unclear EPA guidance on monitoring. For instance, while OECA told us that EPA prioritizes the monitoring and enforcement of the most important instruments, regional program managers and staff indicated that they try to monitor all cases equally and no cases are flagged for priority monitoring regardless of significance. We agree with OECA that EPA enforcement programs should prioritize their efforts. However, we believe that OECA officials should emphasize monitoring, as described in various documents, and supplement existing documents with the issuance of basic procedures that the regions should use.

We recognize that some violations are more significant than others since there are risks to the environmental or human health. However, paperwork violations, such as a facility's failure to monitor for contaminants and report results to EPA, can be significant. As regional staff indicated, this type of violation can be significant because the potential health or environmental harm is not known without this information. A recent OECA report recognized that reporting is an integral component of environmental regulations and enables EPA to monitor facilities' compliance with those regulations.[7] The report stated that reporting requirements allow EPA to evaluate the level of health and environmental protection.

Impact on Goals

The main goal of an enforcement action is compliance with the law so public health and welfare is protected. EPA needs to use both monitoring and further enforcement actions to ensure a successful program that meets the Agency's goal of providing a credible deterrent to pollution while ensuring greater compliance with the law. If enforcement actions are not effective, this adversely impacts the:

- *Environment*. Without timely compliance, facilities' original violations may continue uncorrected, possibly adding to environmental or human health problems.

- *Deterrent effect of EPA's enforcement actions*. EPA must maximize its effectiveness through deterrence since it will never be able to bring about compliance at every regulated facility. If EPA more effectively monitors and takes further actions when facilities do not comply with instruments, they are more likely to voluntarily achieve and maintain compliance.

- *Level playing field*. Not following through on enforcement actions creates an unfair advantage for violators who gain economic benefits by avoiding the costs of compliance. OECA has stated that environmental laws must be fairly and consistently enforced throughout the nation.

[7] EPA/CMA Root Cause Analysis Pilot Project, May 1999, EPA-305-R-99-001.

- *The example EPA sets for states*. OECA has previously recognized that EPA must be held to at least the same accountability for performance that it expects of state authorized programs.

OECA ACTIONS

OECA's role is to provide overall leadership for the enforcement program, including effective implementation of the program.[8] OECA officials explained that, when making resource or priority decisions, it informally assesses unaddressed risks for the program. This informal assessment enables OECA to make decisions and determine those activities which are higher priority. OECA's response to our June 2000 draft report stated that we did not give consideration to how enforcement priorities are determined and the importance of following up on enforcement actions compared to other program components. Yet, in prior discussions, OECA officials advised us that they did not believe that enough information existed for us to perform a study of their priority setting process. However, we believe that OECA needs to emphasize monitoring compliance with both judicial and administrative enforcement instruments.

While OECA officials indicated that monitoring instruments is not a top priority, they will take steps to improve the implementation and oversight of both judicial and administrative instruments. In a memorandum dated February 8, 2001, OECA reminded regions of the need to follow the Manual and comply with the terms of the 1990 Judicial Consent Decree Tracking and Followup Directive (Directive). OECA also intends to discuss tracking during regularly scheduled regional visits.

Guidance Needed

Without more specific guidance and a more consistent process on how to monitor for compliance, regional employees generally developed their own monitoring methods. Accordingly, OECA needs to issue national guidance to improve the uniformity and effectiveness of its enforcement program. Guidance should address, at a minimum, the following five areas:

[8] Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases, July 11, 1994.

(1) *Monitoring for compliance with enforcement instrument requirements*. We recognize that it may be appropriate for monitoring efforts to vary among programs or cases due to the types of violations involved, but guidance should be used to establish some baseline monitoring steps for regions.

(2) *Changing due dates for instrument requirements*. While we understand that EPA has discretion for extending due dates, EPA needs to ensure that facilities do not use extensions to their advantage to avoid fines which may result from delayed compliance.

(3) *Documenting violators' receipt of enforcement instruments to prevent them from claiming non-receipt of the instrument as a means to delay compliance*. To prevent false claims in this regard, regions should make better use of certified mail cards. Regions already send the instruments by certified mail to establish a deadline. Regions should also use certified mail cards to dispute violators' claims of non-receipt and, thereby, prevent them from gaining additional time.

(4) *Issuing compliance letters to facilities which have adequately completed all actions required in enforcement instruments*. These letters are used in Region 5 and we believe this action would be a good practice to institute nationally. This action would help to more clearly indicate whether a facility had complied with an instrument and also ensure that cases were closed in the enforcement tracking system.

(5) *Improving file documentation*. Many of the files reviewed lacked documentation of violators' efforts to comply with instruments and EPA's efforts to verify compliance. If facilities fail to comply with instruments and EPA determined that further actions should not be taken, the files should also reflect those decisions. Documentation is especially important for maintaining a case history and enables EPA to effectively monitor cases, particularly during periods of staff turnover.

One good practice was identified in Region 6. Some case files included Technical Review Action Sheets to reflect that the Region reviewed violators' submitted documents. These sheets also indicated whether the Region determined that the violators' actions were acceptable and fulfilled instrument requirements. The review sheet also allowed for any comments regarding the document or the case. The technical review sheet should be used on a national basis to ensure that case files more accurately (1) portray regional monitoring actions and (2) reflect the history of the case.

We believe that the above activities would improve EPA's monitoring and documenting of violators' compliance with enforcement instruments. Preparing a technical review action sheet or issuing a compliance letter could easily be accomplished as monitoring is performed. Also, improved file documentation should reduce the learning curve in cases of staff turnover. These activities would also provide a basis for evaluating the quality and timeliness of regional monitoring efforts.

CONCLUSION

Although OECA documents reflect the importance of monitoring, OECA actions have not reflected its commitment to this activity. In particular, OECA has not placed sufficient emphasis on monitoring activities or provided sufficient baseline guidance to ensure regions monitor violators' compliance with all enforcement instruments, especially administrative. If instrument requirements are allowed to be violated for an extended period of time, serious environmental and health concerns may occur. Inconsistent and inadequate enforcement can lead to inequitable treatment of facilities, where some facilities pay to come into compliance up-front or through enforcement actions, while others are allowed to profit from avoiding requirements. Not following through on enforcement actions may also result in continuing risks to public health and the environment.

RECOMMENDATIONS

We recommend that the Acting Assistant Administrator for Enforcement and Compliance Assurance:

3-1 Issue basic guidance for (1) monitoring violators' efforts to comply with enforcement instruments and (2) considering further enforcement actions when violators fail to comply with instrument requirements. We recommend that this guidance includes those five elements previously discussed.

We recommend that all Regional Administrators:

3-2 Ensure that the regional program offices take steps, until OECA issues guidance, to adequately monitor violators' actions and consider further enforcement actions, when appropriate.

3-3 Determine the status of those cases where files showed no evidence of violator compliance.

AGENCY ACTIONS AND OIG EVALUATION

In response to the draft recommendations for 3-1 and 3-2, OECA concurred that it and the regions can and should improve tracking and enforcing compliance with requirements in enforcement instruments. OECA has already taken steps to remind the regions of the need to be familiar with, and follow, current guidance. OECA also intends to raise compliance with enforcement instruments at an upcoming National Enforcement Meeting and during its regularly scheduled regional visits. OECA is currently working with the regions to update regional plans which address the monitoring and enforcing issue for both judicial and administrative actions. While OECA agrees on the importance of having strategies in place, OECA does not intend to issue new national guidance at this time. However, at the end of the fiscal year, OECA intends to revisit the need to issue new national guidance depending on how well the regional plans are working to improve enforcement instrument monitoring and enforcement.

We concluded that OECA's response to the recommendations was adequate for resolution.

In response to recommendation 3-3, the Acting Assistant Administrator attached Region 2's response to the draft report. Region 2 indicated that they have begun the process of addressing this recommendation and completion is expected by September 30, 2001. We did not receive any written response to this recommendation from Regions 5 and 6. Regions 5 and 6 need to provide specific corrective actions and milestone dates for addressing the recommendation.

Exhibit 1
Page 1 of 5

Scope, Methodology, and Prior Audit Coverage

SCOPE AND METHODOLOGY

This is one of several audits of EPA's enforcement program. The OIG's Northern Audit Division led the fieldwork with assistance from the Eastern and Central Audit Divisions. The fieldwork was performed in Regions 2, 5, 6 and OECA from March 1, 1999 to April 25, 2000. We issued a draft report on June 15, 2000. To address issues OECA raised in response to the draft, we performed supplementary fieldwork from September 6, 2000 to November 30, 2000, and revised our draft report. Our work was conducted in accordance with generally accepted government auditing standards and included such tests as we determined necessary to complete the objectives.

We chose Regions 2, 5 and 6 since they accounted for about 55% of the universe of enforcement instruments issued in fiscal 1997 and 1998 which included injunctive relief such as installing a new air pollution control device.

Based on our survey conducted in Region 5, we selected the following programs for review:

- Clean Air and Clean Water Programs because they accounted for a large portion of injunctive relief efforts.

- Safe Drinking Water and Underground Injection Control (UIC) Programs for insight into how smaller programs monitor enforcement instruments and to obtain a more complete assessment of the Water Program. We included both programs since data obtained from DOCKET made it difficult to differentiate between the cases.

- Resource Conservation and Recovery Act (RCRA) Program because the OIG currently has a related Issue Area Plan.

Sample Selection

To evaluate enforcement activities, we reviewed randomly sampled case files. We used DOCKET data to determine the universe size for each program in each region.[9] We then generated an estimated sample size and identified a random sample for each regional program.

Our sampling process resulted in the following sample sizes:

	Number of Cases				
	Air	**Clean Water**	**Drinking Water and UIC**	**RCRA**	**Sample Size Total**
Region 2	12	20	6	4	42
Region 5	8	11	20	4	43
Region 6	4	30	5	5	44
TOTALS	24	61	31	13	129

During our fieldwork, we eliminated five Clean Air cases due to difficulties in identifying cases which met our criteria. We also eliminated one Region 5 Safe Drinking Water file lost in transit from the archives and one Underground Injection Control case since it was the only sample case for this program which met our criteria. Our final sample size was 122 cases, including 19 Clean Air, 61 Clean Water, 29 Drinking Water, and 13 RCRA cases.

We also had difficulty identifying Region 6 RCRA cases which met our criteria. Many of the Region 2 Air and Region 6 RCRA cases did not require facilities to perform injunctive relief. These facilities (1) only had to pay a penalty, (2) had complied prior to the instrument being issued, or (3) were only required to ensure future compliance with regulations. We used random sampling so

[9] The list of RCRA cases originally included Underground Storage Tank cases. Since this program was not included in our review because the cases mainly include penalties, we did not count them towards the RCRA universe. We also modified the universe of Clean Water cases to eliminate cases dealing with the Oil Pollution Act since they were not included in our audit.

that we could project results to the universe. However, because of problems meeting the criteria listed above for the Region 2 Air and Region 6 RCRA cases, we did not project the results as intended.

Determinations Regarding Monitoring, Timely Compliance, and Further Actions Needed

We considered a case as monitored if we saw any evidence of EPA actions, such as inspections, review of submitted documents, phone calls, or meetings with the violator. The only cases where we stated that there was no evidence of monitoring were those which did not show even one EPA action to follow-up on the facilities' efforts to comply with the instruments. We also set a basis of identifying whether EPA had monitored an instrument within a month before or a month after violators were due to take actions. In the absence of monitoring guidance, we felt this was a reasonable time frame for EPA to ensure violators were meeting instrument requirements.

In determining whether violators timely complied, we used the enforcement instrument's schedule, or milestone due dates, established for the required injunctive relief actions. We compared the due dates to the date the facility took the required action. We did not allow facilities a grace period before considering their compliance to be untimely since a Regional official stated that even one day of noncompliance could be harmful in some cases.

In cases where EPA approved an extension to the original due date, we used the revised date. We also did not consider a facility late in meeting a requirement if it was dependent upon a previous requirement which had not been completed. If EPA asked a facility to revise a document, we used the due date for the submission of the revised document.

In reviewing further enforcement actions, such as issuing penalties or referring cases to DOJ, we recognized that EPA has discretion. However, in the absence of evidence indicating that EPA decided against taking further actions, we stated that such action might have been called for against violators' of instrument requirements. We did not make a determination on whether EPA should have

escalated enforcement actions to issue penalties or refer cases to the DOJ for those violators where there was no evidence of compliance or where violators did not timely meet instrument requirements. Also, while Region 2 subsequently took further enforcement actions in five additional cases, the report focuses on those enforcement activities performed prior to our initial review.

Determinations Regarding Significance

In response to our June 2000 draft report, OECA's Assistant Administrator stated that the draft did not discuss the severity of violations, thereby making it impossible to determine if further actions were justified. To address this concern, we identified the significance of the underlying violations which originally resulted in EPA's issuance of the enforcement instrument in each of the 66 cases in which we found compliance problems. (For more information on the cases see appendix 1). To determine whether violations were significant, we (1) talked to program management and staff in all three regions, (2) reviewed national and regional program policies, and (3) used data obtained from EPA databases.

Cost Data Unavailable

During our review, we tried to compare the costs associated with issuing an enforcement instrument to the costs associated with monitoring violators' compliance with an instrument. However, we were not able to review OECA's activities from a cost-benefit standpoint since OECA currently does not track costs for enforcement activities. Program management and staff were not able to provide cost estimates and indicated that costs would vary according to each enforcement instrument. OECA acknowledged in response to a prior OIG report that while it currently did not track enforcement costs, it intends to pilot a tracking mechanism.[10] OECA intends to associate costs to enforcement actions by 2002.

Internal Controls and Criteria

To assess internal controls, we reviewed the 1996 through 1998 Federal Managers' Financial Integrity Act reports for OECA and Regions 2, 5, and 6.

[10] EPA's Multimedia Enforcement Program, 2000-P-000018, June 30, 2000.

To accomplish our objectives, we reviewed applicable OECA and program policies and procedures and interviewed OECA and regional staff. The OIG liaison also spoke with Congressional staff members regarding OECA accomplishment reporting. We also assessed the Agency's compliance with laws and regulations that were specific to our audit and the programs reviewed.

Finally, we evaluated EPA's measures for the area of review as required under the Results Act. As criteria, we used the Clean Air Act, Clean Water Act, Safe Drinking Water Act, and RCRA, the Manual on Monitoring and Enforcing Administrative and Judicial Orders, the Guidance on Certification of Compliance with Enforcement Agreements, the Operating Principles for an Integrated Enforcement and Compliance Assurance Program, the Final FY 98/99 OECA Memorandum of Agreement Consolidated Technical Guidance, and the FY 1999 OECA Memorandum of Agreement Guidance Update.

PRIOR AUDIT COVERAGE

In March 1989, the OIG issued a Consolidated Report on Review of EPA Controls Over Compliance Monitoring of RCRA Enforcement Program Consent Agreement Provisions (Report No. E1g2*7-09-0110-9100215). The review, performed in Regions 2, 8, and 9, found that monitoring procedures were not adequate to ensure compliance with program requirements. Eighty percent of the facilities sampled were either not complying timely and adequately or there was no documented evidence of compliance.

Cases with No Evidence of Compliance

	Region	Program	Instrument Type	Facility Type	Types of Violations	Evidence of Monitoring	Significant Violations	Further Action (Penalty or Referral)	Approximate Time Past Due (Through date of first review)	Status of Compliance with Instrument (As of second review)
1	2	CAA	COM	College	Failed to maintain records; submit reports; meet monitoring and testing requirements for sulfur dioxide	No	Yes	No	19 months	No evidence of compliance
2	5	CAA	CD	Wood Finishing Plant	Required to design, construct, operate, and maintain pollution control equipment	Yes	No	Yes	32 months	No evidence of compliance
3	5	CAA	COM	Cement Barge Unloading and Storage Facility	Failed to submit annual report	No	Yes	No	36 months	No evidence of compliance
4	5	RCRA	CACO	Produces Circuit Boards	Failed to comply with hazardous waste handling requirements	Yes	Yes	No	12 months	No evidence of compliance
5	6	RCRA	AO	Hazardous Waste Storage, Blending, and Recycling Facility	Improper storage and release of Hazardous Waste	Yes	Yes	No	Unable to determine	No evidence of compliance
6	2	SDWA	AO	Public Water Supplier	Failed to install filtration equipment	Yes	Yes	Yes	38 months	No evidence of compliance
7	2	SDWA	AO	Public Water Supplier	Failed to install filtration equipment	Yes	Yes	Yes	17 months	No evidence of compliance
8	2	SDWA	AO	Public Water Supplier	Failed to install filtration equipment	No	Yes	No	40 months	No evidence of compliance
9	5	SDWA	AO	Restaurant	Failed to sample for coliform, lead, and copper	Yes	Yes	No	16 months	No evidence of compliance
10	5	SDWA	AO	Daycare Center	Failed to sample for lead and copper	No	Yes	No	17 months	No evidence of compliance
11	5	SDWA	AO	Public Water Supplier	Exceeded maximum contaminant levels for barium and radium	Yes	Yes	No	25 months	No evidence of compliance
12	5	SDWA	AO	Campground	Failed to sample for nitrates	No	Yes	No	36 months	Complied late
13	5	SDWA	AO	Apartment Complex	Failed to sample for lead and copper	Yes	Yes	No	29 months	Complied late
14	5	SDWA	AO	Mold, Pattern, and Die Welder	Failed to sample for nitrates, coliform, lead, and copper	Yes	Yes	No	17 months	Complied late
15	6	SDWA	AO	Public Water Supplier	Failed to collect required number of coliform samples	Yes	Yes	No	24 months	No evidence of compliance
	Region	Program	Instrument Type	Facility Type	Types of Violations	Evidence of Monitoring	Significant Violations	Further Action (Penalty or Referral)	Approximate Time Past Due (Through date of first review)	Status of Compliance with Instrument (As of second review)

16	2	CWA	AO	Wastewater Treatment Plant	Violated permit operation and maintenance requirements	Yes	Yes	No	19 months	No evidence of compliance
17	2	CWA	AO	Wastewater Treatment Plant	Exceeded discharge limits for nitrogen, turbidity, chlorine, and coliform	No	Yes	No	34 months	No evidence of compliance
18	5	CWA	ACO	Excavator	Illegal discharge of dredged or fill material	Yes	Yes	No	23 months	No evidence of compliance
19	5	CWA	COM	Copper Smelter	Illegal discharges of lead, zinc, and cadmium	Yes	Yes	Yes	32 months	No evidence of compliance
20	5	CWA	AO	Publically Owned Treatment Works	Illegal discharge exceeded permit limits	Yes	No	Yes	27 months	No evidence of compliance
21	5	CWA	COM	Battery Manufacturer	Exceeded permit discharge lead and copper limits	Yes	Yes	Yes	28 months	No evidence of compliance
22	5	CWA	CD	Stainless Steel Refinishing Plant	Illegal discharge violated permit limits	Yes	Yes	No	21 months	Complied late
23	6	CWA	AO	Produce oil and gas	Discharge in violation of permit	Yes	Yes	No	18 months	No evidence of compliance
24	6	CWA	AO	Produce oil and gas	Violated permit discharge requirements	Yes	Yes	No	18 months	No evidence of compliance
25	6	CWA	AO	Produce oil and gas	Violated permit discharge requirements	Yes	Yes	No	18 months	No evidence of compliance
26	6	CWA	AO	Sand and gravel operation	Operated without permit; no pollution prevention plan; no erosion controls	No	No	No	22 months	No evidence of compliance
27	6	CWA	CD	Metal Recycler	Illegally discharged without a permit	No	Yes	No	35 months	No evidence of compliance
28	6	CWA	AO	Publically Owned Treatment Works	Failed to meet permit pre-treatment requirements	Yes	Yes	No	26 months	No evidence of compliance
29	6	CWA	AO	Dairy	No pollution prevention plan	No	Yes	No	33 months	No evidence of compliance
30	6	CWA	AO	Quarry	Illegally discharged without permit; no pollution prevention plan	Yes	No	No	22 months	No evidence of compliance
TOTALS						**Yes = 21 No = 9**	**Yes = 26 No = 4**	**Yes = 6 No = 24**		**No evidence of compliance = 26 Complied Late = 4**

Key:

Programs:

- CAA - Clean Air Act
- RCRA - Resource Conservation and Recovery Act
- SDWA - Safe Drinking Water Act
- CWA -Clean Water Act

Instrument Types:

- COM - Compliance Order
- CD - Consent Decree
  - CACO - Consent Agreement Consent Order
- AO - Administrative Order
- ACO - Administrative Compliance Order

Cases with Late Compliance and Timeliness of Compliance Unknown

	Region	Program	Instrument Type	Facility Type	Types of Violations	Evidence of Monitoring	Significant Violations	Further Action (Penalty or Referral)	Approximate Time Past Due (Through date of first review)
1	2	CAA	COM	Wastewater Treatment Plant	Failed to submit reports and test results for mercury	No	No	No	1 month
2	5	CAA	AO	Produces Global Chemicals	Failed to Submit Section 114 Information Request	Yes	No	Yes	5 days
3	5	CAA	AO	Steel Mill	Exceeded emissions; failed to monitor and test for particulate matter	Yes	Yes	No	4 months
4	5	CAA	CD	Auto Painting Plant	Exceeded Volatile Organic Materials	Yes	No	No	1 month
5	6	CAA	AO	Hard Chrome Electroplating	Failed to report and test for chromium emissions; recordkeeping	Yes	Yes	No	6 months
6	6	CAA	ACO	Auto Repair	Failed to use required equipment	Yes	No	No	4 months
7	5	RCRA	AO	Chemical Manufacturer	Stored hazardous material without classification	Yes	No	No	7 days
8	6	RCRA	AOC	Ranch	Illegal disposal of hazardous materials; leaking drums	Yes	Yes	No	1 month
9	6	RCRA	AO	Air Force Base	Release of hazardous materials	Yes	Yes	No	10 days
10	6	RCRA	CACO	Brass Foundry	Failed to secure permit to treat hazardous materials	No	Yes	No	1 month
11	2	SDWA	AO	Public Water Supplier	Failed to monitor for waterborne diseases and report	Yes	Yes	Yes	20 months
12	2	SDWA	AO	Public Water Supplier	Failed to install filtration equipment	No	Yes	No	1 month
13	5	SDWA	AO	Restaurant	Failed to sample for nitrates	Yes	Yes	No	7 months
14	5	SDWA	AO	Airport	Failed to sample for nitrates	Yes	Yes	No	15 months
15	5	SDWA	AO	Car Dealer	Failed to sample for lead and copper	Yes	Yes	No	12 months
16	5	SDWA	AO	Mobile Home Park	Failed to sample for organic materials	Yes	Yes	No	3 months
17	5	SDWA	AO	Elementary School	Failed to sample for nitrates, coliform, lead, and copper	Yes	Yes	No	10 months
18	5	SDWA	AO	Elementary School	Failed to sample for nitrates, coliform, lead, and copper	Yes	Yes	No	12 months
19	5	SDWA	AO	Public School	Failed to sample for volatile and synthethic organic contaminants	Yes	Yes	No	22 months
20	6	SDWA	AO	Public Water Supplier	Inadequate filtration and disinfections treatment	No	Yes	No	Unable to Determine
21	2	CWA	AO	Vitamin Manufacturer	Violated pretreatment standards; failed to submit reports	Yes	No	Yes	2 months
22	2	CWA	AO	Wastewater Treatment Plant	Discharged raw sewage outside permitted area	Yes	Yes	No	1 month
23	2	CWA	O	Wastewater Treatment Plant	Unauthorized bypass of raw sewage; discharged outside outfalls; failed to maintain facility	Yes	Yes	No	6 months
24	2	CWA	AO	Wastewater Treatment Plant	Unauthorized bypass of raw sewage; failed to maintain facility	Yes	No	No	1 month

	Region	Program	Instrument Type	Facility Type	Types of Violations	Evidence of Monitoring	Significant Violations	Further Action (Penalty or Referral)	Approximate Time Past Due (Through date of first review)
25	2	CWA	O	Wastewater Treatment Plant	Unauthorized bypass of raw sewage; discharged outside outfalls; failed to maintain facility	Yes	Yes	No	6 months
26	2	CWA	O	Sand and Gravel Company	Failed to timely provide information and comply with permit	No	No	No	30 months
27	2	CWA	CO	Land Owner/ Developer	Cleared and filled wetlands without permit	Yes	No	No	9 months
28	5	CWA	AO	Steel Mill	Violated permit limits	Yes	Yes	Yes	Unable to Determine
29	6	CWA	AO	Copper Wire Drawing Facility	Discharges pollutants without permit; failed to submit pollution prevention plan	Yes	No	No	10 days
30	6	CWA	AO	Publically Owned Treatment Works	Exceeded discharge limits; inadequate operations	Yes	Yes	No	9 days
31	6	CWA	AO	Construction	Discharged eroded soil without permit	Yes	No	No	1 month
32	6	CWA	AO	Produces oil and gas	Failed to timely eliminate discharges	Yes	Yes	No	Unable to Determine
33	5	CWA	AO	Subdivision Developer	Illegal discharges	Yes	No	No	Timeliness Unknown
34	6	CWA	AO	Scrap Metal Facility	Discharge without permit; no pollution prevention plan	No	No	No	Timeliness Unknown
35	6	CAA	ACO	Auto Repair	Failed to use refrigerated recovery equipment	No	Yes	No	Timeliness Unknown
36	6	SDWA	AO	Public Water Supplier	Exceeded coliform limits; failed to collect all required coliform samples	No	Yes	No	Timeliness Unknown
					TOTALS	**Yes = 28 No = 8**	**Yes = 23 No = 13**	**Yes = 4 No = 32**	

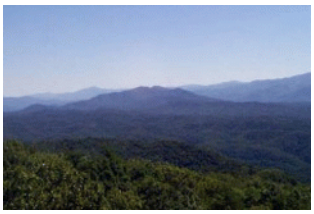
Key:

Programs:
- CAA - Clean Air Act
- RCRA - Resource Conservation and Recovery Act
- SDWA - Safe Drinking Water Act
- CWA -Clean Water Act

Instrument Types:
- COM - Compliance Order
- AO - Administrative Order
- CD - Consent Decree
- ACO - Administrative Compliance Order
- AOC - Administrative Order on Consent
- CACO - Consent Agreement Consent Order
- O - Order
- CO - Consent Order

Program Summaries

Clean Air



Under the 1990 Clean Air Act, as amended, the Office of Air and Radiation sets limits on how much of a pollutant can be in the air anywhere in the United States. Air pollution may damage trees, lakes, and the stratospheric ozone. Exposure to toxic air pollutants can increase risks of cancer, respiratory irritation, nervous system damage, and developmental problems in children.

Monitoring Actions

Of the 19 cases reviewed, we found no evidence of the Air Programs' monitoring efforts in five cases and seven cases did not show any evidence of monitoring around the due dates.[11] Because the monitoring efforts were not always sufficient to ensure full compliance, there was no evidence that 9 of 19 (47%) violators complied or timely complied with the enforcement instruments. For one additional case, we could not determine if milestone dates were missed. As a result, both violations of the instrument and the original violations potentially continued for up to six months for those violators who complied late and longer for those facilities where information was lacking.

Further Actions

Clean Air Programs in the three regions took further enforcement actions in two of nine cases (22%) where there was no evidence of compliance or violators did not timely comply with instrument requirements. Of the remaining seven cases, five violators continued in noncompliance for up to six months, and there was no evidence that two had complied at the time of our review. Of those seven cases, four included significant violations. In addition to those seven cases, we could not determine if milestone dates were missed in one case, therefore EPA would not be able to judge whether or not further actions were needed.

[11] In fiscal 1999, the Region 5 Air Program began using a Lotus Notes based system for tracking and monitoring compliance with instruments. This system, which reflects actions that are required for each case and those that are past due, should help Region 5 to better monitor instrument requirements.

Regions included warning language in 12 of 19 (63%) enforcement instruments reviewed to describe penalties violators may have to pay for failure to comply. However, EPA did not assess those penalties where there was no evidence of compliance or violators did not timely comply. EPA may also refer violations of instruments to DOJ. Region 5 used this process to take action against two facilities, one that complied late and one that had not complied. Case files did not show whether regional staff considered taking further actions or supporting why further actions were not pursued in the other seven cases.

Resource Conservation and Recovery

The 1976 Resource Conservation and Recovery Act gave EPA the authority to control hazardous waste, including its generation, transportation, treatment, storage, and disposal. RCRA also set forth a framework for managing non-hazardous waste. RCRA violations may harm water supplies, groundwater, aquatic life, and vegetation. Exposure to waste contaminants can increase the risks of cancer, nervous system damage, and internal organ damage.

Monitoring Actions

There was no evidence of RCRA Programs' monitoring in 2 of the 13 cases reviewed and 2 cases did not show monitoring around the due dates. Because the monitoring efforts were not always sufficient to ensure full compliance, there is no evidence that 6 of 13 (46%) violators complied or timely complied with the enforcement instruments. As a result, both violations of the instrument and the original violations potentially continued for up to one month for those violators who complied late and longer for those facilities where information was lacking.

Further Actions

Regions did not take further enforcement actions in the six cases where there was no evidence of compliance or where violators did not timely comply, even though five included significant violations. Of the six violators, four continued in noncompliance for up to one month and there was no evidence that two had complied at the time of our review.

Regions included penalty warning language in 10 of 13 (77%) enforcement instruments reviewed. However, EPA did not assess those penalties where there was no evidence of compliance or where violators did not timely comply. Regional RCRA Programs may also refer violations of instruments to DOJ, but did not use this process to escalate any of the cases. Case files did not show whether regional staff considered taking further actions or supporting why further actions were not pursued.

Safe Drinking Water

Under the Safe Drinking Water Act, the Office of Drinking Water sets national standards to protect the health of the 250 million people who get water from public water systems. These standards limit the levels of dangerous contaminants that are known or anticipated to occur in public water systems. Ingestion of contaminated drinking water can increase risks for kidney, intestine, or liver problems and may also delay the physical or mental development of infants and small children.

Monitoring Actions

Regional Drinking Water Programs' monitoring efforts were not evident in 6 of the 29 cases reviewed. Twenty-three cases did not show monitoring around the due dates. Because EPA did not always sufficiently monitor to ensure full compliance, there is no evidence that 20 of 29 (69%) violators complied or timely complied with the enforcement instruments. For one additional case, we could not determine if milestone dates were missed.[12] Of those 21, both violations of the instrument and the original violations continued for up to 36 months past the deadlines for cases where facilities complied late and potentially longer for cases where information was lacking.

[12] In addition to those 21 violators, 5 facilities' instruments were terminated since regions determined the instrument was not necessary.

Further Actions

Drinking Water Programs in the three regions took further enforcement actions in 3 of 20 cases (15%) where there was no evidence of compliance or violators did not timely comply with instrument requirements. Of the remaining 17 violators, 11 continued in noncompliance for up to 36 months. Another facility also complied late, but we were unable to determine the length of noncompliance due to limited file documentation. As of our review, there was no evidence that five other violators had taken the actions necessary to comply with the instruments. All 17 cases included significant violations. In addition to those 17 cases, EPA did not know if milestone dates were missed for one case, and therefore would not be able to judge whether or not further enforcement actions were needed.

Regions included warning language in all 29 instruments reviewed. However, of the 20 cases with compliance problems, EPA only pursued penalties in three cases, all in Region 2. EPA may also refer violations of instruments to DOJ. Region 2 used this process to escalate two of the three penalty cases. The case files did not document whether regional staff considered taking further actions or supporting why actions were not pursued in the other 17 cases.

Clean Water

Under the 1977 Clean Water Act, the Office of Water regulates pollutant discharges to United States waters. Continuing violations could be toxic to aquatic and human life; affect wildlife habitats and migratory paths for birds; and alter the flow characteristics of creeks, streams, and storm sewers.

Monitoring Actions

There was no evidence that Clean Water Program staff monitored 8 of the 61 instruments reviewed and 12 cases did not show monitoring around the due dates. Because the programs did not always sufficiently monitor to ensure full compliance with instruments, there is no evidence that 27 of 61 (44%) violators

complied or timely complied.[13] For two additional cases, we could not determine if milestone dates were missed. As a result, both violations of the instrument and the original violations continued for up to 30 months past the deadlines for cases where facilities complied late and potentially longer for those cases where information was lacking.

Further Actions

Clean Water Programs in the three regions took further enforcement actions in five cases, one in Region 2 and four in Region 5. Of the remaining 22 violators, 10 continued in noncompliance for up to 30 months. Another facility complied late, but we were unable to determine how long it was in noncompliance. At the time of our review, there was no evidence that 11 violators had taken the actions necessary to comply with the instruments. Of those 22 cases, 13 included significant violations. In addition to those 22 cases, we could not determine if milestone dates were missed in 2 cases, therefore EPA would not be able to judge whether or not further actions were needed.

Regions included warning language in 57% (35 of 61 cases) of the enforcement instruments. However, EPA only assessed penalties in one case, in Region 2. EPA may also refer violations of instruments to DOJ, which Region 5 did in four cases. In Region 2, EPA's threat of referral was incentive enough for one facility to comply. Case files did not show whether regional staff considered taking further actions or supporting why further actions were not pursued in the other 22 cases.

[13] In addition to those 27, two facilities did not have to comply since they never received the enforcement instrument.

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

MAR 23 2001

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: OECA Response to Office of Inspector General Draft Audit Report: "Compliance With Enforcement Instruments"

FROM: Sylvia K. Lowrance
Acting Assistant Administrator

TO: Kimberly O'Lone
Audit Manager, Northern Audit Division
Office of the Inspector General

The Office of Enforcement and Compliance Assurance (OECA) has reviewed the draft report entitled, "Compliance With Enforcement Instruments." OECA appreciates the effort expended by your office to develop the findings and suggestions in the report on a subject - the effective tracking and enforcement of compliance requirements in enforcement instruments - of mutual concern to the Inspector General (IG) and OECA. We appreciate the opportunities you provided to us to submit Assistant Administrator Steven Herman's July 17, 2000 comments on the initial version of the report, respond on November 29, 2000 to questions from your staff on those comments, and discuss the draft Report with your staff at the February 27, 2001 exit conference. It is apparent that you put considerable effort into developing your recommendations and made it a priority to promote effective communication between our offices throughout the process.

The attached document responds to the recommendations in the draft Report. It documents steps OECA and the Regions have already taken to address the IG's concerns, as well as planned future actions. As explained in the attachment, while OECA disagrees with some of the analysis and recommendations in the draft Report, we acknowledge that OECA and the Regions need to do more to improve how we track and enforce violations of compliance requirements in enforcement instruments. While the steps proposed in this response are not identical to the draft Report's recommendations in every respect, we believe they will

Note: The original response was signed by Michael M. Stahl for Sylvia K. Lowrance.

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successfully address the issues and concerns you have identified.

The comments OECA is submitting today incorporate the views of our Office of Regulatory Enforcement (ORE), Office of Compliance (OC), and Office of Planning, Policy Analysis, and Communications (OPPAC), and were developed with Regional input. OECA's comments are addressed primarily to the broader policy and management issues and recommendations in the report. We are also attaching thoughtful comments from Region 2 with which we concur. Regions 5 and 6 do not intend to submit separate comments. Please address any questions concerning our response to OECA's OIG Audit Liaison, Gregory Marion, at 202-564-2446.

Attachments

cc: Michael Stahl
Eric Schaeffer
Mary-Kay Lynch
Connie Musgrove
Bruce Weddle
Frederick Stiehl
Jon Silberman
Walter Mugdan (R2)
Gail Ginsberg (R5)
Lawrence Starfield (R6)
Jori Spolarich (OIG)

OECA RESPONSE TO OIG DRAFT REPORT:

"Compliance with Enforcement Instruments"

The OIG draft Report contains a number of recommendations and suggestions for action that OECA and the Regions could take to address the concerns raised in the body of the Report. In response to the draft Report, OECA and the Regions have taken, or will take, the following actions. The list is followed by a detailed response to each of the IG's recommendations.

Summary of OECA and Regional Actions in Response to OIG Draft Report:

1. For judicial settlements, beginning in FY 2002, OECA intends to have the Regions update the Consent Decree Enforcement Tracking Subsystem (CDETS) in DOCKET, or appropriate alternative Regional database(s), to reflect key schedules/milestones for terms of compliance and actions taken to ascertain continued compliance.

2. When the Integrated Compliance Information System (ICIS) is in place, OECA will expect the Regions to use this system to track enforcement instrument compliance.

3. OECA will clarify, in our Accomplishment Reports and other similar documents, that the information we provide on enforcement outcomes are estimates, made at the time of settlement, assuming the injunctive requirements in the underlying enforcement instruments are implemented.

4. OECA determined that the requirements in our 1990 *Judicial Consent Decree Tracking and Followup Directive* (*Directive*), *Manual on Monitoring and Enforcing Administrative and Judicial Orders* (*Manual*), enforcement response policies, and penalty policies provide sufficient and appropriate criteria for the Regions to use to track compliance milestones, analyze violations of judicial and enforcement instruments, and prioritize them for response. However, OECA also determined a need to improve familiarity with, and implementation of, the *Manual* and *Directive*.

5. In response to this determination, OECA asked the Regions to develop revised Region-specific enforcement instrument compliance tracking and enforcement plans, covering both judicial consent decrees *and* administrative orders, that address the need for effective tracking, enforcement, and documentation. The attachments to this response include all ten plans.

6. While OECA determined that new guidance is not needed at this time, we will reconsider this finding at the end of the fiscal year based on how well the revised Regional implementation plans are working. If new or additional guidance is needed, OECA, working closely with the Regions, will ascertain what is required, and develop and issue such guidance.

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7. In a February 8, 2001 memorandum, signed by the Directors of ORE and the Office of Site Remediation Enforcement (OSRE), to the Regional Counsel, Regional Enforcement Division Directors, and Regional Enforcement Coordinators (attached), OECA reminded the Regions of the need to be familiar with, and follow, the *Manual* and *Directive*.

8. OECA further stressed the importance of complying with the *Directive* and the *Manual* in the OECA-Regional Senior Management Conference Calls for January and March, 2001.

8. OECA will include the IG's Report, its findings, and EPA's responses to it as an agenda item in the upcoming April 5, 2001 National Enforcement Meeting. This meeting will be attended by senior legal enforcement managers from ORE, OC, the Regions, and the Department of Justice (DOJ).

9. The Acting Assistant Administrator, Acting Deputy Assistant Administrator, and other OECA program managers will raise compliance with enforcement instrument tracking and enforcement as a discussion issue during their regularly scheduled, frequent visits to each Region to review performance, address major policy issues, and identify needs for technical assistance.

Detailed Response to IG Recommendations in Draft Report:

Recommendations addressed to the Acting Assistant Administrator for Enforcement and Compliance Assurance:

1. Establish a performance measure for ensuring that facilities under a formal enforcement action return to compliance in accordance with the schedule contained in the final order or decree.

On page 6, the auditors recommend that OECA establish a performance measure to ensure that facilities under a formal enforcement action return to compliance. We agree that efforts to ensure the terms of compliance with consent decrees should be tracked as a performance measure in connection with our handling of our judicial cases, which are already tracked in the OECA DOCKET. Therefore, for judicial cases, we intend, beginning in FY 2002, to have the Regions (and any Headquarters offices responsible for judicial cases) update the Consent Decree Enforcement Tracking Subsystem (CDETS) in DOCKET, or appropriate alternative Regional database(s), to reflect key schedules/milestones for terms of compliance and actions taken to ascertain continued compliance. If a Region elects to utilize a Regional database(s) for this purpose, we will stress the need for the Region to also ensure that the applicable case fields in DOCKET are updated regularly to summarize the status of the case with respect to consent decree tracking and enforcement. This approach should provide an acceptable level of uniformity, and Headquarters access to timely information on the status of Regional efforts to track and enforce consent decree requirements. Additionally, the Agency is presently

in the process of developing a multimedia compliance information system, the Integrated

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Compliance Information System (ICIS). This system is expected to provide a uniform Regional platform for recording all aspects of enforcement activity, from compliance monitoring to enforcement actions to return to compliance. At such time as ICIS is in place, the Regions will be expected to use this system to track enforcement instrument compliance.

We utilize this approach to tracking judicial actions because they tend to be highly significant due to the injunctive relief they require, and in view of the United States' obligation to the Courts to ensure that court orders are satisfied or referred for contempt proceedings and/or stipulated penalties collected where due. As a practical matter, we are able to do so, despite resource limitations, because the total number of such cases is a relatively small subset of our total case docket. Administrative actions, by contrast, are much more numerous, generally smaller in size, and on average require less complex injunctive relief. Balancing these factors together with our resource limitations is why, historically, we have not routinely tracked administrative actions identically to judicial cases and are not proposing to do so now.

In reviewing this and the other recommendations in the draft Report, an important general consideration for OECA - one that we have emphasized repeatedly to the IG in connection with this and other completed or ongoing audits - is OECA's obligation, as national program
managers for enforcement and compliance, to balance our numerous statutory obligations, GPRA requirements, and program goals and priorities so as to best protect human health and the environment from noncompliance with statutory and regulatory requirements. To put these obligations in perspective, consider that our latest efforts to update our numbers on the size of the environmental regulatory universe subject to the statutes and rules administered by EPA suggests that the enforcement and compliance assurance program has responsibility for assuring the compliance of approximately *41 million* entities. Compliance data is maintained for approximately 600,000 of these facilities. Inspecting, enforcing against, and following up on the compliance and performance of this large a universe necessarily requires us to make hard choices, on a daily basis, regarding our priorities for a wide range of activities, including tracking, monitoring, performance measurement, and database management and maintenance.

It is in this context that, in our view, it is not a desirable or realistic goal for EPA's enforcement program - either for measuring performance or allocating compliance and enforcement resources - to adopt a performance measure for judicial or administrative enforcement instruments along the lines of the draft objective cited in the draft Report at page 5, *viz*., "ensure that 100% of regulated facilities under a formal enforcement action return to compliance in accordance with the schedule contained in the final order or decree." Designing a system aimed at perfection in this area would require seriously overbuilding the system, with significant opportunity costs. While in theory OECA could perhaps generate such a system, this would not promote environmentally beneficial outcomes because it would require us to spend huge sums of money and time chasing small gains at the expense of other pressing priorities. This is why OECA rejected that draft performance measure when we finalized our Strategic Plan. Given this history, we question whether it is helpful even to reference the draft measure in the

draft Report.

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2. Identify a more accurate method for reporting, including verifying and validating, the actual accomplishments which result from EPA's enforcement activities.

OECA agrees with the Inspector General that OECA can more accurately represent and qualify expected outcomes from the enforcement actions reported in our Accomplishment Reports and other similar documents so as to better represent that the information we provide are estimates, made at the time of settlement, assuming the injunctive requirements in the underlying enforcement instruments are implemented. In response to the IG's recommendation in this area, OECA will clarify this point in future Accomplishments Reports so readers understand the context and limitations of the data we provide in such documents.

At the same time, however, we ask the auditors to amend the draft Report to clarify the IG's intent in offering the above recommendation. When ORE and OC staff met, on February 27, 2001, with their counterparts on the Inspector General's staff, staff from OC asked whether the IG's intent was to suggest that OECA and the Regions reprogram our resources to fund routine facility re-inspections, once enforcement actions are concluded, in order to make ambient measurements, examine industrial construction, or otherwise determine actual measured results in order to compare them to what presumably would need to be equally rigorous measurements undertaken at the time of settlement. It was our understanding, as a result of the February 27 meeting, that this is not the IG's intent. Rather, the intent is to ensure, in the context of enforcement instrument tracking and enforcement, that OECA and the Regions pay sufficient attention to enforcement instruments to assure compliance through appropriate means. These might range from site visits to document reviews, exchanges of letters, or phone calls to confirm that actions were taken. This understanding of the IG's intent is supported by the statement at page 19 of the draft Report, which describes how the auditors themselves determined whether cases were being adequately monitored for purposes of the audit:

> "We considered a case as monitored if we saw any evidence of EPA actions, such as inspections, review of submitted documents, phone calls, or meetings with the violator. The only cases where we stated that there was no evidence of monitoring were those which did not show even one EPA action to follow-up on the facilities' efforts to comply with the instruments."

We also request that the draft Report be amended to ensure that readers do not misconstrue or misuse the Report to suggest that the IG found in this matter that OECA routinely overstates the impacts of our compliance and enforcement programs. An example is the introductory language in page i. This language appears sufficiently imprecise to us to risk leaving readers with a misimpression that OECA knowingly or negligently misrepresents the environmental benefits resulting from enforcement activities. It could also be read as suggesting that the IG believes EPA should invest whatever resources are required to improve the accuracy of case impact projections made at the time of settlement and/or document actual results once the injunctive relief is in place. Our discussion with the auditors on February 27, however, led us to understand that the IG's intent is primarily to suggest that OECA needs to be clearer in our

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public statements (especially the Annual Performance Report under GPRA) that cited pollution improvements are estimates and projections which can be fully realized only if the underlying compliance actions are completed.

It has never been OECA's intent, in developing estimates of the outcomes of enforcement actions at the time of settlement, to implement unduly burdensome processes or require
perfection. OECA has devoted a great deal of effort to promoting the use of our Case Conclusion Data Sheets (CCDS) to generate and document this information, including the development of our new *Case Conclusion Data Sheet Training Booklet* (106 pages), *Quick Guide for Case Conclusion Data Sheet* (111 pages), and related CD Rom-based interactive training materials. Still, OECA's Enforcement Accomplishments Reports generally contain conservative assessments of the emission reductions that are likely to be achieved through compliance with both consent decrees and administrative orders. This is because, as our CCDS guidance recognizes, in many instances, even when the actions violators must undertake in settlement will produce real pollution reductions, if quantifying them would be impossible or unduly expensive for technical or resource reasons, the results need not be quantified and OECA will not include specific numbers in our reports. This results in accomplishment reporting that in many instances *understates* the results we are actually achieving.

A broad set of actions with results that are difficult to quantify fall in to the category of "work practices," as opposed to what are traditionally known as "end-of-pipe controls." Others involve injunctive relief that is primarily preventative. For example, consider the consent decrees that EPA has negotiated with some refineries pursuant to OECA's Petroleum Refinery Strategy. These decrees contain provisions intended to vastly improve the defendants' Leak Detection and Repair (LDAR) programs. Under LDAR programs, refinery operators are required to use monitoring instruments to detect gas leaks from process valves, flanges and pumps. If any of these parts is leaking above a set threshold, it must be repaired as soon as possible. EPA analyses have shown that these emissions can be very high, but every valve leaks at a different rate, so calculation of emission reduction benefits from this program ranges from difficult in some instances, to not possible in others.

Another example are our Clean Water Act (CWA) actions against large municipalities. These cases typically require major injunctive relief to eliminate sanitary sewer overflows (SSOs) and combined sewer overflows (CSOs). The City of Atlanta, a defendant in one such action, has an average of one SSO somewhere in their system every day with an average volume of 100 or more gallons per overflow. In addition, the City has approximately 240 CSOs annually. Atlanta's rivers and streams have very high pathogen counts. A recent EPA survey of waterways in Region 4 states, using six years of monitoring data, demonstrates that the urban streams in metro Atlanta are polluted with the highest levels of sewage-related bacteria in the Southeast. When the injunctive relief is completed, Atlanta will have eliminated nearly all SSOs and is expected to reduce CSOs per year to 24. Discharges from the CSOs are expected to receive primary treatment and disinfection and to meet Water Quality Standards. When one considers

that the population served in Atlanta is 421,000 people, it becomes apparent that this case will

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have dramatically positive environmental consequences, yet the results are extremely difficult to quantify for accomplishments reporting purposes.

When a reliable accounting of emission and release reductions from cases such as these cannot be generated, OECA does not believe it appropriate to include the reductions in the tally of benefits, despite the fact that the benefits are known to be substantial. Input data needed to develop a pollutant reduction calculation for CSOs, for example, include the amount of flow that bypasses treatment before the control action; the amount of flow that bypasses treatment after control action; and typical concentrations of the overflow; and concentrations of treated effluent from the municipal wastewater treatment plant. To generate numbers sufficiently rigorous for all cases, and enter them into our Accomplishments Reports would require, in some cases, technical efforts on a scale normally reserved for rulemakings of general applicability. OECA and the Regions simply do not have the budget or human resources to do this type of work at this time. While the auditors did indicate that some Congressional staffers wished for OECA implement a process to supply more rigorous after-the-fact measurements of actual environmental results achieved through enforcement, again, our understanding is that this is not the IG's recommendation in this audit.

3. Issue basic guidance for (1) monitoring violators' efforts to comply with enforcement instruments and (2) considering further enforcement actions when violators fail to comply with instrument requirements. Guidance should address, at a minimum: (1) Monitoring for compliance with enforcement instrument requirements; (2) Changing due dates for instrument requirements; (3) Documenting violators' receipt of enforcement instruments to prevent them from claiming non-receipt of the instrument as a means to delay compliance; (4) Issuing compliance letters to facilities which have adequately completed all actions required in enforcement instruments; (5) Improving file documentation.

Recommendations addressed to the Regional Administrators:

4. Ensure that the regional program offices take steps, until OECA issues guidance, to adequately monitor violators' actions and consider further enforcement actions, when appropriate.

Because recommendations #3 and #4, in our view, are closely related, OECA will respond to them together. OECA accepts the IG's findings that OECA and the Regions can and should do a better job of tracking and enforcing compliance with requirements in enforcement instruments. Consequently, we are working with the Regions to implement concrete actions that respond to the IG's concerns. These include developing and implementing formal, written, revised Regional enforcement instrument compliance tracking and enforcement plans that address both judicial *and* administrative orders pursuant to the IG's recommendation at page 13 of the draft report. While OECA is not proposing to issue new OECA guidance on enforcement instrument tracking and enforcement at this time, we are reviewing the need for new guidance

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with the Regions. ORE plans to reconsider whether such guidance is needed at the end of this fiscal year based on how well the revised Regional implementation plans are working to improve enforcement instrument tracking and enforcement.

In analyzing our processes and procedures in response to the audit, OECA separated our current strategy into three components:

> -1- substantive criteria for analyzing enforcement instrument violations and prioritizing them for response;
>
> -2- general requirements governing the tracking and enforcement of compliance with enforcement instruments by all of the Regions;
>
> -3- Region-specific processes and procedures to ensure that existing criteria and requirements for enforcement instrument tracking and enforcement are implemented.

Following are detailed descriptions of each component, and the steps we are taking, or proposing to take, to improve our performance.

Substantive criteria for analyzing enforcement instrument violations and prioritizing them for response:

These criteria are set forth in EPA's Enforcement Response Policies (ERPs), civil penalty policies, and Enforcement Directives and Manuals. As the IG is aware, OECA has, over the
years, issued numerous ERPS and civil penalty policies, both general, and for specific statutes, media, or programs. OECA's ERPs and civil penalty policies apply, in most cases, to judicial and administrative enforcement, and are developed carefully in consultation with the Regions, in some cases with additional input from other stakeholders such as the EPA program offices and our state enforcement partners. OECA's predecessor office, OECM, provided specific guidance on how to prioritize judicial Consent Decree violations for response in the January 1990 *Judicial Consent Decree Tracking and Followup Directive* (*Directive*). The *Directive* lists the following factors and criteria for selecting an appropriate enforcement response to CD violations:

> "Environmental Harm Caused By Violation; Duration of Violation; Good Faith/Bad Faith (Compliance history); Deterrence Value; Ability to Respond; and Economic Gain."

These factors are either identical to, or consistent with, those stressed in all of our ERPs and civil penalty policies, i.e., they are the factors EPA's statutes require us to consider in prioritizing for response all regulatory violations.

The decision whether to enforce against specific violations of enforcement instrument provisions requires case-specific analyses of the seriousness of the violations, whether they are ongoing, and whether they may result in significant environmental harm, as opposed to tracking

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administrative milestones determined to be less significant in terms of the potential for harm. In practice, this means that the Regions place a high priority on tracking and enforcing enforcement instrument provisions that require significant injunctive relief or provide for Supplemental Environmental Projects (SEPs). Tracking or reporting provisions that do not relate directly to significant injunctive relief or SEPs receive a relatively lower priority. This practice is consistent with our general and media-specific penalty policies, which provide guidance on how to prioritize violations - including violations of CDs and orders - for response.

The *Directive*, at page 7, provides:

> "Violations for which a decision not to take a formal action based on competing priorities might be appropriate would generally find the party on the positive side of the factors above (i.e., no or limited environmental harm from the violation, good compliance record, etc). Situations where the Agency might exercise its discretion not to take an action might include:
>
> - Late reporting with no environmental consequence and without a past pattern of delay or noncompliance.
>
> - Missed milestone, not a major requirement, with expectation they will be in compliance with/by the next milestone.
>
> - Violation of an interim limit, magnitude of the exceedence is minor, with compliance now achieved or anticipated shortly."

Note that terms and phrases such as "pattern," "not a major requirement," "expectation," "exceedence is minor," etc., are not further defined in the *Directive*. This reflects Agency policy delegating to the Regions the responsibility for determining these issues on a case-specific basis, taking into account the totality of the circumstances and competing national and Regional compliance and enforcement priorities.

It is OECA's opinion that these existing criteria and policies provide sufficient and appropriate substantive criteria for the Regions to use to analyze violations of enforcement instruments and prioritize them for response. Consequently, OECA is not proposing to issue new criteria in this area.

<u>General requirements governing the tracking and enforcement of compliance with enforcement instruments by all of the Regions</u>:

These requirements are set forth primarily in two EPA guidances, the *Directive*, and the *Manual on Monitoring and Enforcing Administrative and Judicial Orders* (*Manual*), which OECM (now OECA) transmitted to the Regions by memorandum dated February 6, 1990. The two documents, among other things: divide tracking and followup responsibilities between the

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Offices of Regional Counsel and the Regional program divisions; emphasize the need for adequate documentation of violations; establish database management criteria which allow each Region flexibility to select an appropriate method based on its internal caseload and database capabilities; require all currently due and overdue consent decree milestones to be extracted from the Regional management system, and made available to staff and supervisors, on a not-less-than-quarterly schedule; delegate to the Regions the authority to decide what followup actions, if any, to take in response to violations; list factors and criteria to consider in prioritizing violations for response; and require a decision not to take formal action to be made jointly by the Office of Regional Counsel and appropriate Regional program division at the Branch Chief or higher level.

The *Directive* applies specifically to enforcement and tracking of judicial consent decrees. The lengthier and more detailed *Manual*, however, applies to both judicial and administrative enforcement. Assistant Administrator Steven Herman, in his July 17, 2000 memorandum to the Inspector General commenting on an earlier draft of the Report, noted, among other things, that many policies and procedures the enforcement program relies on have been in effect for some time, and that he did not see the need to update or reissue the *Directive* and *Manual* because they remained appropriate and applicable.

Both the *Directive* and *Manual* remain in effect today, and we are not proposing to update, reissue, or augment them now. However, as communicated previously to the IG's staff by ORE, we determined that it would be appropriate to remind the Regions of the need to be familiar with, and follow, the *Directive* and the *Manual*. We did so in a memo, signed by the Directors of ORE and the Office of Site Remediation Enforcement (OSRE), dated February 8, 2001, addressed to the Regional Counsel, Regional Enforcement Division Directors, and Regional Enforcement Coordinators (attached). The importance of complying with the *Directive* and the *Manual* was also stressed in the OECA-Regional Senior Management Conference Calls for January and March, 2001. The Acting Assistant Administrator, Acting Deputy Assistant Administrator, and other program managers have agreed to raise compliance with enforcement instrument tracking and enforcement as a discussion issue during their regularly scheduled, frequent visits to each Region to review performance, address major policy issues, and identify needs for technical assistance. Finally, OECA will identify the IG's Report, its findings, and EPA's responses to it as an agenda item for the upcoming April 5, 2001 National Enforcement Meeting, attended by ORE, OC, and DOJ senior legal enforcement managers.

On page 13 of the draft Report, the IG notes with approval ("a positive step") OECA's intent to remind the Regions of the need to comply with judicial consent decree tracking, but states that "we believe OECA also needs to improve the tracking of *administrative orders* since the majority of EPA's enforcement actions are administrative." Please note that the February 8 memorandum transmitted to the Regions does address both judicial and administrative tracking and enforcement. It does so by, among other things, referencing both the *Directive* and the *Manual*. Additionally, in response to the IG's concerns and as discussed further below, ORE

expanded its request for revised Regional tracking and enforcement implementation plans to expressly include administrative actions, using the IG's own definition of "enforcement

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instruments" in the draft Report as our guide in this endeavor: "Any type of enforcement action that EPA issued which included actions a facility was required to take. These enforcement actions include: administrative orders, compliance orders, consent agreement consent orders, and consent decrees." Thus, while we continue to believe it is not appropriate to require identical Regional procedures for tracking and enforcing requirements in judicial and administrative enforcement instruments, we agree with the IG on the importance of having strategies in place to address both and have acted accordingly.

In addition, in the February 8 memorandum, ORE and OSRE solicited input from the Regions as to whether modifications or updates to the *Manual* and/or *Directive* may be appropriate in the future. Again, while OECA's present intent is to address the issues and concerns raised by this audit by significantly upgrading our implementation of the *Manual* and *Directive* (because we believe the root cause of the IG's concerns to be the inconsistent implementation of already existing guidance), ORE intends to reconsider whether new or additional guidance is needed at the end of this fiscal year. If experience demonstrates this to be the case, OECA, working closely with the Regions, will ascertain what is required, develop and issue the guidance.

Region-specific processes and procedures to ensure that existing criteria and requirements for enforcement instrument tracking and enforcement are implemented:

As discussed above, OECM (now OECA) transmitted the *Directive* and *Manual* to the Regions in 1990. In the cover memorandum to the *Directive*, OECM directed each Region to submit "a memorandum detailing the steps they have taken to implement the *Directive*." Given that -1- over a decade has now passed since these memoranda were prepared, and -2- OECA's analysis points to inconsistent implementation of the already existing guidance, ORE and OSRE asked the Regions, in February 8, 2001 memorandum, to either resubmit their original *Directive* implementation plans or edit them to reflect changed circumstances. Upon further consideration of the IG's concerns - particularly in connection with administrative enforcement instruments - ORE re-contacted the Regions to ask for substantially revised implementation plans that include processes and procedures for addressing *administrative* consent agreements and orders, in addition to consent decrees. ORE further asked the Regions to ensure that the revised implementation plans address the case file documentation problems noted in the draft Report, i.e., the need to confirm, in the case files or elsewhere, whether and when requirements are tracked, followup actions taken by the Region to confirm or rebut compliance, and the bases for decisions not to respond formally to noncompliance where deemed inappropriate or unnecessary.

The Regions responded by submitting the revised Regional enforcement instrument tracking and enforcement plans attached to this response. Please note that the revised implementation plans you receive today will likely be edited further in the future. As of the date of this response, not all of the Regions had sufficient time to review and react to each others' plans in order to amend them to adopt or incorporate "best practices" from other Regions.

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OECA's initial review of the revised plans, however, suggests that they will be effective in addressing the tracking and enforcement problems identified in the draft Report.

When reviewing the revised implementation plans, please keep in mind that the *Manual* and the *Directive* intentionally provide the Regions with significant discretion in designing and implementing Region-specific enforcement instrument tracking and enforcement systems and databases, taking into account each Region's internal organization, procedures, and needs. As a result, the revised implementation plans differ. For example, some Regions employ similar approaches to enforcement instrument tracking throughout the Region, while in others, there is more program-to-program variation. This is not a shortcoming in the system or an overlooked matter, but rather reflects a conscious effort on OECA's part to empower each Region to select, develop, and implement the databases and systems it requires to best match and support its own internal organizational structure and needs. Finally, please note that OECA does not require or expect the Regions to use DOCKET to track the enforcement of administrative orders and agreements. The Regions typically use DOCKET for tracking judicial consent decrees, but not administrative actions, though the *Directive* itself provides each Region the flexibility to select the most appropriate method of maintaining its own databases even for judicial actions. When ICIS is implemented, it is expected that the Regions and OECA will be able to use this new system to track enforcement instrument compliance.

5. Determine the status of those cases where files showed no evidence of violator compliance.

Region 2's response to the draft Report is attached. OECA concurs with the views expressed in the Regional response. Regions 5 and 6 did not develop separate Regional responses, but will follow up on the Report's findings.

Attachments

Note: The attachments to this response are not included in the report.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

DATE: MAR 15 2001

SUBJECT: Region 2 Comments on OIG Draft Audit of
Compliance with Enforcement Agreements
Report No. XXXXXXX

FROM: Herbert Barrack
Assistant Regional Administrator for Policy and Management

TO: Sylvia Lowrance, Acting Assistant Administrator
Office of Enforcement and Compliance Assurance

Region 2 comments on the above-referenced draft report emailed to Region 2 on February 20, 2001, are provided as Attachment 1 to this memo.

If you have any questions, please let me know or have your staff contact Scott Opis, Policy, Planning and Evaluation Branch, at (212) 637-3699.

Attachments

cc: H. Maletz, OIG

Note: The original response was signed by Joann Brennan-McKee for Herbert Barrack.

Attachment 1

Region 2 Comments on OIG's Draft Report

Compliance with Enforcement Instruments

General Comments

Region 2 concurs with the need to remind regional managers, program staff and attorneys of the existing guidance concerning the monitoring of administrative and judicial consent decrees. Since existing guidance and regional implementation procedures were developed prior to the 1996 regional reorganization, periodic redistribution of such guidance is a sound measure to ensure consistent application across all Divisions with enforcement responsibilities. As noted in our response to the recommendations, Region 2 has done this.

The Region also agrees that the 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders offers a sound methodology for ensuring that all compliance obligations of administrative orders are tracked, that any non-compliance with the terms of such orders are appropriately evaluated for follow-up action, and that timely and appropriate follow-up action is taken. It is important to recognize, however, that the timing and extent of follow-up action for non-compliance with administrative orders is contingent upon the availability of both program and legal enforcement resources. Since the pool of violations is dynamic and generates the need for timely and appropriate enforcement actions, the number of formal actions requiring monitoring and follow-up may not match the resources available for same. As a result, for cases where adequate justification for delays is provided by the respondent and where compliance is likely to be achieved, the Region may choose to forego additional action in order to focus on more pressing program and regional priorities. In this vein, Region 2 strongly recommends that OECA carefully consider the resource implications of the OIG's recommendations when responding to this draft report and in the issuance of final guidance.

Specific Comments

- Page 3, end of the first ¶: Here OIG writes "we found no evidence that facilities complied with 30 of 122 randomly sampled enforcement agreements...." The same formulation (*i.e.*, "...we found no evidence that facilities complied...") is also used elsewhere in the document (*e.g.*, page 8, first bullet; page 11, ¶ 1; page 19, first full ¶; page 22, page 26, page 27, page 28, page 29). We have two concerns with respect to this formulation:
  - OIG categorized enforcement instruments as having had no EPA compliance monitoring if there was no written documentation in the case file of at least one activity such as inspection, review of submissions, phone calls or meetings. (See page 19, first full ¶.) Where this criterion yielded no evidence of EPA monitoring, and there was no other written documentation confirming a respondent's status of compliance with an instrument, OIG apparently categorized the instrument as having "no evidence of compliance."

1

This approach is appropriate to support one of the points in the Audit Report, namely that EPA enforcement staff should improve their written documentation of compliance monitoring activities. But the presentation in the draft Report seems to imply that all cases where there was "no evidence of compliance" were in fact instances of "non-compliance" with the terms of the instrument. For example, OIG's discussion of "Determinations of Significance" (*e.g.*, page 20; and the Tables starting on page 22) would likely be understood to mean that OIG (a) determined that the respondents named in these instruments were in fact in violation of the terms of the instrument, and (b) determined whether such violations were significant or not. The strong implication is that all 66 cases listed in the Tables on pages 22-25 were instances where there was, in fact, non-compliance by the respondent with the terms of the instrument.

We are not persuaded that this is a justifiable implication. For some of these cases there may be no evidence of non-compliance, just as there is no evidence of compliance. In other words, there may be no written documentation one way or the other. Thus, it is possible that the respondents in some of these cases were in fact in compliance with the terms of the instruments, but that there was no written documentation in the file to confirm that. Indeed, our review of the Region 2 cases included in the OIG data set indicates there were several such situations. And OIG itself makes a similar point when it challenges EPA's use, in end-of-year enforcement accomplishments summaries, of information about the benefits anticipated from case conclusion instruments, which *may or may not* be actually achieved during the life of the instrument. (See, *e.g.*, page 3, ¶ 1.)

- We appreciate and do not disagree with OIG's recommendation that all compliance monitoring activities be documented in writing. However, we note that in some of the cases identified by OIG as having "no evidence of EPA monitoring," although there may have been no written evidence in the case file, there is evidence (for example, oral evidence) that such monitoring activities did take place. For example, in a Clean Water Act case involving pump stations operated by the Puerto Rico Aqueduct and Sewer Authority (PRASA), there were conference calls and/or meetings with the respondent to discuss its non-compliance. Moreover, this particular instance of non-compliance (along with several others like it) was included in a major litigation referral sent to the Department of Justice (DOJ) in March 2000, a fact not reflected in the OIG Report.

- Page 4, ¶ 1. The draft Report says: "However, DOCKET data is incomplete" because it tracks compliance with judicial consent decrees, but not administrative instruments. The statement about the scope of DOCKET is accurate, but the word "incomplete" is misleading. It suggests that Regions have failed to use DOCKET properly. In fact, the

Regions have never been asked to use DOCKET for tracking compliance with administrative instruments, only judicial instruments.

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Most EPA guidance on monitoring compliance with enforcement instruments has focused primarily on two areas: judicial instruments specifically, and the tracking and collection of monetary penalties from both judicial and administrative instruments. For example, most of the 1990 Manual on Monitoring and Enforcing Administrative and Judicial Actions is devoted to the tracking of monetary penalties. With respect to documenting our compliance monitoring efforts, Region 2 has similarly concentrated on these two areas during the past years. This does not mean we have failed to monitor compliance with the injunctive elements of administrative instruments, but we have not focused on documenting those efforts as fully as we might have.

- The OIG Report suggests, on page 5, that an appropriate goal for EPA would be to ensure that "100% of regulated facilities under a formal enforcement action return to compliance in accordance with the schedule contained in the final order or decree." (This was a proposed performance measure in a 1997 draft OECA Strategic Plan, but it was never adopted.) We agree that this would be a desirable goal in the abstract, but it is probably unrealistic. We must have the latitude and flexibility to assign our scarce enforcement resources among many competing priorities – monitoring compliance among regulated entities, development of new enforcement cases where violations are identified, prosecution of ongoing cases, and monitoring compliance with enforcement instruments. A substantially increased focus on the last of these four objectives will translate directly to a reduced focus on the remaining three. Balancing among these competing objectives is best done at the regional level, by the managers most familiar with the case load and
the problems needing to be addressed.

- Page 7, ¶ 1: OIG should be asked to insert the word "always" after "did not" on the 3rd line. With respect to Region 2, at least, we did and we do "consider further enforcement actions when facilities did not comply or timely comply." OIG's own data tables confirm this: 16 of the 66 cases listed on the two tables are Region 2 cases. Of these, 9 (56%) are shown as having "Further Action (Penalty or Referral)."

  Later in the same paragraph OIG ascribes "ineffective monitoring" to a lack of guidance on how and when to monitor, and a lack of emphasis by OECA on monitoring. To the extent there have been instances of ineffective monitoring, we disagree that a cause has been a lack of guidance. The existing guidance is clear and complete. The same comment applies to the statement in the first sentence on Page 10 of the draft Report; and the first sentence after Table 3.2 on Page 11, which also ascribe inadequate monitoring by Regions to insufficient guidance. Again, we disagree; the guidance is sufficient.

  It is not clear whether OIG is suggesting that EPA's compliance monitoring work has usually or generally been "ineffective." If that is the suggestion, we disagree. The OIG's own data suggests that in over 75% of the cases reviewed there was some monitoring.

- Page 11, ¶ 1: Here, as on page 20, and in the Tables on pages 22-25, there is the implication that the violations characterized as "significant" are violations of the

enforcement instrument. However, it is our understanding that the characterization of "significant" refers to the underlying violation(s) which gave rise to the enforcement

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action in the first place, not to any potential violations of the enforcement instrument itself. If our understanding is correct, the Audit Report should be revised to make this clear.

- Page 13, Final ¶: As noted above, we disagree that additional guidance is necessary. We agree that regional staff should be reminded to comply with existing guidance, and that more emphasis should be placed on having staff document in writing the compliance monitoring activities they perform.

- Page 14, Item (4): In particular, we disagree with this recommendation. While such letters are sometimes appropriate (and are, in fact, often used in CERCLA cases in Region 2), we do not believe they should be used in all or even most regulatory cases. Even fairly extensive compliance monitoring activities (e.g., phone calls, review of submissions, or an inspection) may not reveal all instances of noncompliance by a respondent/defendant with the terms of an enforcement instrument. If a "compliance certification letter" is issued in such a case, and subsequently found to have been based on incomplete or even misleading information, the mere existence of the letter will complicate follow-up enforcement action.

  As noted above, requiring the issuance of compliance letters would create a significant resource burden as such letters would necessitate extensive compliance monitoring over some period of time. For example, if a facility were in violation of a record keeping requirement and the Administrative Order required the facility to keep the appropriate records required by the rule, additional reporting requirements would have to be imposed and then reviewed for some period of time so that the compliance letter could be issued. The additional expended resources thus used would cause a reduction in other enforcement activities or initiatives. Based on this, we do not believe that issuing compliance letters for these types of actions, would be the best use of the Agency's limited resources. We strongly counsel against making use of such letters mandatory. At most, any new guidance should allude to such letters as an available mechanism which regions may wish to adopt in appropriate cases.

- Page 15, ¶ 1: We do not have any specific information on Technical Review Action Sheets, such as, what type of information is required to fill one out or how long this task will take to complete, therefore, we cannot comment on the specific form. However, we do not believe that such a form is necessary or the most efficient means of documenting compliance with the enforcement instrument. As is indicated in the 1990 *Manual*, accurate records of compliance milestone accomplishment should be maintained in the programmatic data base. It is inefficient to maintain large paper files for all administrative cases. For example, last fiscal year, the Region issued over 500 Orders to individual public water supply systems for failure to publish the annual Consumer Confidence Report. An electronic record of responses was maintained and the data base was updated. To complete over 500 forms would have been both impractical and inefficient in terms of resource utilization and our paper reduction goal.
- Page 16, "Recommendation": As set forth above, we do not believe additional guidance is necessary as suggested in 3-1.

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- Page 17, 2nd bullet: We do not understand the statement that "DOCKET made it difficult to differentiate" between "Safe Drinking Water and Underground Injection Control (UIC)" programs. (We presume that OIG means the "Public Water Supply" program when it refers here to the "Safe Drinking Water" program.) DOCKET does distinguish between Public Water Supply and UIC programs.
- Page 19, first full ¶: The last two sentences of this paragraph indicate that OIG considers monitoring an instrument within a month before or after a milestone date to be a reasonable time frame. Existing EPA guidance for judicial Consent Decree tracking calls for monitoring to be done quarterly.
- Page 19, ¶ 2: The last line of this paragraph indicates that OIG considered lateness of even one day in meeting a milestone date to represent untimely compliance. This statement is obviously true, but may obscure the relative insignificance of most very short delays. We would usually not expect our staff to spend valuable time and effort pursuing a delay of, *e.g.*, a couple of days, especially in a case where major milestones are being met on time or very close to it.
- Pages 22 - 25, Appendices: Region 2 has three general comments on the data in these tables, case specific comments follow.
    - In general there are no Region 2 cases involving judicial consent decrees listed on these tables; this tends to confirm that we are carefully monitoring compliance with such instruments and documenting, in writing, such activities.
    - As noted above, of the 16 Region 2 cases listed on the two tables (24% of the total), we are shown as having taken "Further Action (Penalty or Referral)" in 9 of them, or 56%. In fact, others were also the subject of further action, but after OIG completed its data collection activities.
    - The tables distinguish between "Compliance Orders" (COM), "Administrative Orders" (AO), and "Orders" (O). (See listing of Instrument Types at the end of each Table.) We do not understand the difference between these categories. A
      Compliance Order is, by definition, an administrative order, and both are "orders." We recommend that OIG combine these three categories into one – either "COM" or "AO."

Region 2's Case-specific Comments

- **CWA: Cases with No Evidence of Compliance**

For Case No. 16, PRASA-Bayamon, Docket 98-0273, it is indicated that no further action has been taken. However, this is not the case. As noted in Region 2's comments of May 19, 2000 and July 13, 2000, the Region prepared and submitted to the DOJ on March 30, 2000, an Island-wide referral of PRASA pump stations. This Island-wide referral was consistent with the Region's strategy to handle a large number of pump station Sanitary Sewer Overflow cases in the most efficient manner available considering the need for penalties for past violations and the development of collection system maintenance programs for each sewer jurisdiction to prevent future overflows. The timing of the referral was dependent on the availability of both program and legal resources necessary to prepare same. Once referred to DOJ, EPA cannot take further enforcement action until a Court Order has been entered. This follow-up action should be noted in the chart in Appendix 1.

For Case No. 17, PRASA Isabella, Docket 97-0280, Region 2 advised the OIG that the plant was issued an order requiring a short-term return to compliance. PRASA responded that it did not have adequate capabilities to meet permit Nitrogen requirements. EPA agrees with PRASA. This issue should have been addressed at the time of the last permit reissuance and the limit may in fact not be necessary to maintain water quality. Based on this, Region 2 informed the OIG that it intends to evaluate the appropriateness of the limit during the permit renewal process currently underway. If necessary, a companion Order will be issued with the renewal permit to address the need for additional facilities. This follow-up activity should be noted in the chart.

- **CWA: Cases with Late Compliance**

For Case Nos. 22-25, PRASA pump stations cases, the OIG chart indicates that no further actions were taken and that compliance was achieved from one to six months late. As explained above and in the Region's prior responses, the Region is currently addressing pump station maintenance deficiencies via an Island-wide judicial action, initiated on March 30, 2000. Region 2 decided to take judicial action in 1999 as a result of PRASA's non-compliance or delayed compliance with the Region's pump station initiative. This initiative involved administrative actions issued in 1998. The chart in Appendix 2 should be revised to include these further actions taken for Case Nos. 22 - 25.

For Case No. 26, Manuel Monsignor, Docket, 97-047, no further enforcement action was necessary since the respondent submitted a storm water management plan which was revised based on EPA review comments until it met all regulations. Upon implementation of the plan, required controls were complete and the respondent was in compliance with the intent of the Order. Region 2 believes that existing guidance provides ample discretion to the Region in regard to whether to proceed formally or informally to obtain compliance.

- **SDWA: Cases with No Evidence of Compliance**

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For Cases No. 6 and No. 7, PRASA Vegas Arriba and PRASA Jaguas, Dockets 98-020 and 97-259, the OIG found no evidence of compliance. Although this is the case, the Region had informed the OIG in our response to the earlier draft report that appropriate follow-up action had been taken via a judicial referral in March 1999. As noted above, once referred to DOJ, EPA cannot take further enforcement action until a Court Order has been entered. The referral resulted in a judicial Consent Decree entered in January 2001.

For Case No. 8, Belleza - La Hoya, Docket 97-038, the OIG found no evidence of compliance. As previously explained, there are 125 active orders to "non-PRASA" drinking water systems in Puerto Rico. These orders involve small systems located in rural communities in need of substantial financial and technical assistance. As a result, traditional enforcement actions are ineffective in these cases, unless substantial compliance assistance and system financial sponsorship are developed. EPA works with the Puerto Rico Department of Health in a joint initiative to ensure such assistance is provided and attained in these cases. Where a commitment to eliminate the system or connect it to a PRASA supply can be obtained, follow up Orders are issued to establish the new compliance schedule.

- **SDWA: Cases of Delayed Compliance**

For Case No. 12, Servicio de Agua, Docket 89-350, see Case No. 8 above. For Case No.11, PRASA Humacao, Docket 98-345, see Case Nos. 6 and 7 above.

Region 2 Actions in Response to Draft OIG Report

The draft OIG Report recommends (page 16, 3-2) that regions ensure they are adequately monitoring violators' actions, and consider further enforcement actions when appropriate. In Region 2, we believe that we have been monitoring violators' actions adequately over the past decade, although we fully recognize there are always opportunities for improvement. For example, over just the last three fiscal years (FY-2000, -1999 and -1998) we had fourteen referrals to DOJ for enforcement of judicial consent decrees. During the same period we had nearly $6 million in stipulated penalty collections arising out of consent decree enforcement actions, plus another $700,000 in penalty assessments for violations of injunctive relief provisions of previous administrative orders. We also had four referrals for collection of penalties owed under administrative orders but unpaid. A number of our other DOJ referrals during this time period arose out of cases where Respondents had violated the injunctive relief provisions of earlier administrative orders. (An example is our massive FY-2000 PRASA Island-wide pump station referral, alluded to earlier.) These statistics reflect our continuing high level of attention to enforcement instrument tracking and enforcement, both for judicial as well as administrative actions.

Although the OIG Report addresses only CAA, CWA, RCRA and SDWA cases, and by extension other regulatory enforcement cases, we recognize that Superfund cases also require the same vigilant compliance monitoring.

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The draft OIG report recommends (page 16, 3-3) that regions determine the status of those cases where files showed no evidence of violator compliance. As indicated in our prior responses and in the case specific comments above, we have already initiated this process and have made compliance determinations in many cases. This process will be completed by September 30, 2001.

During the past several weeks, meetings have been held among Region 2 management and staff to discuss the tracking and enforcement of Judicial and Administrative Orders. On March 10, 2001, Region 2's Regional Counsel composed a memorandum which memorializes these discussions. This memo will also serve to initiate a reminder by management to all regional enforcement staff about the importance of carrying out and documenting (in writing) enforcement instrument compliance monitoring activities. A copy of that memorandum is provided as Attachment 2.

Attachment

Note: The attachment to this response is not included in the report.

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