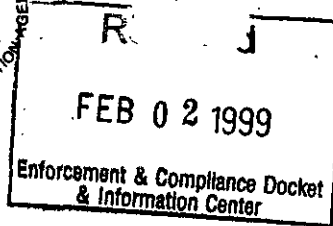




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460



DEC 22 1998

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of Policy on Timely and Appropriate Enforcement Response to High Priority Violations

FROM: Eric Schaeffer, Director  
Office of Regulatory Enforcement

TO: See Addressees

Attached you will find revisions to EPA's definition of significant violations under the Clean Air Act, and the timely and appropriate response that is required when such violations are identified. It reflects the hard work of representatives from ORE's Air Enforcement Division, EPA's Regional Air and Enforcement Divisions and STAPPA/ALAPCO.

This policy applies to all "major" (as defined by the CAA) stationary sources of air pollution which are in violation of a Federally-enforceable regulation. The policy supersedes and consolidates previous Clean Air Act guidance related to Significant Violators (SVs), Timely and Appropriate (T&A), and Federally Reportable Violations (FRV). Specifically, this document supersedes all previous guidances on the three subjects.

This policy is being revised largely to encourage a greater degree of team-building and cooperative resolution of High Priority Violators by all responsible agencies, to encourage agencies to give priority attention to those violators which they believe are most environmentally important, and to permit an increased degree of agency flexibility in identifying and resolving HPVs.

Further, this policy has been revised to more accurately reflect the time and resources necessary to bring major sources into a state of continuous compliance. To that end, the timeline for addressing an HPV has been lengthened by 120 days (to 270 days). The Agency recognizes that some of the highest priority violators may require substantially more time and resources to resolve than a routine HPV. Situations where this guidance will not be met should be noted qualitatively in the routine reports to EPA Headquarters.

This policy, by agreement of the parties, will be implemented starting at the beginning of the third quarter of FY 1999. During the remainder of the first and second quarters, each agency should compare all of the currently outstanding SVs (not including any SVs for which the agency has already initiated action) with this revised guidance. On the basis of this review, each agency should report a "revised HPV list" to AED, and revise its AFS database accordingly.

I particularly want to recognize three individuals who played a leading role in guiding this document to a successful conclusion: Rich Biondi of the Air Enforcement Division, Felicia George of the Indiana Department of Environmental Management, and Curt Marshall of the Dayton Air Pollution Control Office. Please feel free to contact Bruce Buckheit or Rich Biondi of the Air Enforcement Division if you have any questions or comments on this document. Bruce may be reached at (202) 564-1308. Rich may be reached at (202) 564-7008.

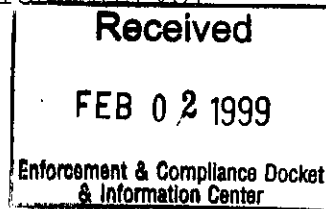
Attachment

Addressees:

Director, Office of Ecosystem Protection, Region I  
 Director, Division of Environmental Planning and Protection, Region II  
 Director, Division of Air Quality, Region III  
 Director, Air, Pesticides, and Toxics Management Division, Region IV  
 Director, Air and Radiation Division, Region V  
 Director, Multimedia Planning and Permitting Division, Region VI  
 Director, Air, RCRA, and TSCA Division, Region VII  
 Assistant Regional Administrator, Office of Pollution Prevention, State, and Tribal Assistance, Region VIII  
 Director, Air and Toxics Division, Region IX  
 Director, Office of Air, Region X  
 Regional Counsels, Regions I-X  
 Director, Office of Environmental Stewardship, Region I  
 Director, Division of Enforcement and Compliance Assurance, Region II  
 Director, Enforcement Coordination Office, Region III  
 Director, Compliance Assurance and Enforcement Division, Region VI  
 Director, Enforcement Coordination Office, Region VII  
 Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII  
 Enforcement Coordinator, Office of Regional Enforcement Coordination, Region IX

cc: S. William Becker, Executive Director STAPPA/ALAPCO  
 Air Enforcement Managers, Regions I-X

THE TIMELY AND APPROPRIATE (T&A) ENFORCEMENT RESPONSE  
TO HIGH PRIORITY VIOLATIONS (HPVs)



I. SCOPE OF POLICY

A. Introduction

This policy is designed to help prioritize federal, state and local agency enforcement efforts with respect to sources of air pollution in their jurisdictions. This policy supersedes previous policy documents related to Significant Violators (SV), and Timely and Appropriate (T&A) policy. Specifically, this document supersedes the following policy documents: (1) "Clarification Package: Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", dated April 17, 1995; (2) "Clarification Package for the Guidance on the Timely and Appropriate Enforcement Response to Significant Air Pollution Violators", dated June 14, 1994; and (3) "Issuance of Guidance on the 'Timely and Appropriate Enforcement Response to Significant Air Pollution Violators'", dated February 7, 1992. Nothing in this policy is intended to change the underlying applicable requirements or somehow imply that compliance must be achieved on a less than continuous basis.

This revision eliminates use of the terms "Significant Violator" and "Significant Violation" and substitutes the term "High Priority Violation" (HPV) in describing violations. This term better conveys the intent of the policy as a tool for prioritizing which violations receive the highest scrutiny and oversight. This change is reflected in both the title of the revised policy and the list on which high priority violations are placed i.e., the High Priority Violation List (HPVL).

The policies set forth in this document are intended solely for government personnel to use to prioritize enforcement efforts. They cannot be used to establish new standards or limits, are not binding on any party, and cannot be relied upon to create any rights enforceable by any party. The EPA reserves the right to change this policy at any time without public notice.

B. Applicability

This policy applies to all States, Locals, Territories, and Tribes (hereafter described as State or State and local) within the United States and any "major" (as defined by the Clean Air Act Amendments of 1990 (CAAA) or subsequent revisions, or as clarified in national guidance) stationary sources of air pollution which are in violation of a Federally-enforceable

regulation. This policy also applies to "synthetic minor" sources as described in the general criteria. A "synthetic minor" source is any source that avoids Title V or New Source Review (NSR) permitting by means of a minor source permit limiting its potential to emit below major source thresholds. Additional violations, whether at major or minor sources, may rise to the level of a high priority violation at the mutual agreement of the Region and the delegated agency on a case-by-case basis. For example, regions and state and/or local air agencies may, on a case by case basis, mutually decide to add a violation to the HPVL based on criteria and factors other than those contained in this policy, such as for certain significant exceedances that otherwise are not captured by the application of this policy.

### C. General Process Summary

EPA expects that all violations of air pollution regulations, whether meeting the HPV criteria or not, will be addressed by States, local agencies, or EPA. EPA further expects that state and local agencies will use this policy to focus appropriate and adequate enforcement and compliance activities on those violations identified by this policy. EPA will also use the policy to focus its ongoing oversight role on HPVs and the timely and appropriate enforcement response to violations on the HPVL. This policy is also intended to foster and develop a more complete and accurate compliance picture and to enhance the responsibility of the state and local agencies, as well as EPA, to track and address all violations. An essential part of this tracking process is assuring that all HPVs are promptly entered into shared EPA-State databases such as AIRS. Any facility which falls within the definition of an HPV should be promptly entered into the databases. This entry should occur even for "atypical" cases, such as where: the violations are immediately or quickly remedied; there are no penalties; the potential violations are remedied by a permit modification; no enforcement action is deemed appropriate; etc.

Agency High Priority Violation activities shall be designed to identify and to expeditiously return to compliance those violating sources that the agency believes are environmentally most important, namely the HPVs. Although this policy requires agencies to address all High Priority Violations, EPA recognizes that agencies may be unable to address all of them immediately. Each agency shall return all HPVs to compliance with applicable requirements by addressing the violations in accordance with the Timely and Appropriate Section of this policy.

### D. General Information about the Policy

1. While EPA expects that States will address violations of air pollution regulations within their jurisdictions, except for non-delegated Federal standards, by focusing on a limited group of violators (e.g., those targeted by this policy), this policy is not intended to detract from the importance of addressing other violators and the right and responsibilities of the States and EPA for doing so.

2. This policy articulates the mutual expectations of the respective parties of the Federal - State partnership in the enforcement of air pollution control requirements for stationary sources. It is fully expected that this policy will be modified and expanded in future years to reflect experiences in its implementation and the evolution of the air program itself.

3. In accordance with the revised Policy Framework for State/EPA Enforcement Agreements issued by the Deputy Administrator on August 25, 1986 (and its three addenda), this national policy will serve as the framework for State specific agreements reflecting the parties' mutual expectations. As that policy states, "...Regions and States should adapt national timely and appropriate enforcement response criteria to State-specific circumstances to fit State authorities and procedures..." In addition, this HPV policy is consistent with the development of EPA/State performance partnership agreements as described in their joint statement on the National Environmental Performance Partnership System issued on May 17, 1995. That statement provides for joint planning and priority-setting in dialogue between EPA and the states which will be "...informed by the analysis and strategic directions being set by EPA national and regional program managers and the states."

## II. Definition of High Priority Violations

When a violation is detected, the violation's characteristics shall be compared with the Definition of High Priority Violation given in Parts A and B below. To the extent that the violation fits one or more of the elements of the General High Priority Violation Criteria given in Part A or the High Priority Violation Matrix given in Part B, it shall be designated as a high priority violation and is subject to the Timely and Appropriate Section of this policy.

### A. General HPV Criteria

The following criteria trigger HPV status. The criteria

apply to the pollutant(s) of concern at major sources, (i.e., pollutant for which source is major) except where the criterion itself indicates otherwise (e.g., applies to a synthetic minor source). The determination of what is substantive/substantial shall be part of a case-by-case analysis/discussion by the EPA and the delegated agency.

1. Failure to obtain a PSD permit (and/or to install BACT), an NSR permit (and/or to install LAER or obtain offsets) and/or a permit for a major modification of either.
2. Violation of an air toxics requirement (i.e., NESHAP, MACT) that either results in excess emissions or violates operating parameter restrictions.
3. Violation by a synthetic minor of an emission limit or permit condition that affects the source's PSD, NSR or Title V status (i.e., fails to comply with permit restrictions that limit the source's potential emissions below the appropriate thresholds; refers only to pollutants for which the source is a synthetic minor. It is not necessary for a source's actual emissions to exceed the NSR/PSD/Title V thresholds.)
4. Violation of any substantive term of any local, state or federal order, consent decree or administrative order.
5. Substantial violation of the source's Title V certification obligations, e.g., failure to submit a certification.
6. Substantial violation of the source's obligation to submit a Title V permit application. (i.e., failure to submit a permit application within sixty (60) days of the applicable deadline)
7. Violations that involve testing, monitoring, record keeping or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits.
8. A violation of an allowable emission limit detected during a reference method stack test.
9. Clean Air Act (CAA) violations by chronic or recalcitrant\* violators.
10. Substantial violation of Clean Air Act Section 112(r) requirements (for permitting authorities that are not implementing agencies under Section 112(r) program, limited to source's failure to submit Section 112(r) risk management plan).

\*Chronic or recalcitrant violator refers to a source that may

stay below the HPV threshold but continually violates requirements to the extent that it is mutually agreed by the Region and the delegated agency that the source should be bumped up into HPV status.

### B. High Priority Violation Matrix

The matrix below contains specific criteria for assessing whether violations are high priority. The matrix is set out in six columns that identify: the violation, the means by which the violation was identified (method of detection), the applicable standard, the supplemental significance threshold, percentage in excess of the reference limit or standard and the time in excess of the reference limit or standard. A discussion of each of these elements of the matrix is set out below. Violations not on the High Priority Violation List may nonetheless be serious, but may not be initially subject to the provisions of this policy.

#### Violations and Method of Detection

The first column lists four types of violations addressed by the matrix. The second column identifies six methodologies for detecting the four types of violations listed in the first column. The following shows the four types of violations and the associated method(s) of detecting violations that are reflected in the first two columns of the matrix. Although the matrix provides specific detection methods for violations, nothing in this policy is intended to limit the agency in using other credible evidence to document a violation.

- I. Violation of Allowable Emissions Limitations
  - A. Reference Method Stack Testing or
  - B. Coatings Analysis, Fuel Samples or Other Process Material Sampling
- II. Violation of Parameter Emissions Limitations
  - A. Continuous/Periodic Parameter Monitoring
- III. Violation of Applicable Standards (non-opacity)
  - A. Continuous Emissions Monitoring (where the CEM is certified under federal performance specifications)
- IV. Violation of Applicable Standards (opacity)
  - A. Continuous Opacity Monitoring or
  - B. Method 9 Visual Emissions Readings

#### Standards

This column identifies the standard(s) for which a violation is being assessed.

#### Supplemental Significance Threshold

This column provides a supplemental significance threshold (SST) that is to be considered along with the other matrix factors to determine high priority violations. The SST is intended only as a surrogate threshold against which a violation can be judged and obviates the situation that would occur if an emissions limitation was high enough that a less than 15% excursion of the applicable requirement would result in significant environmental impact. The SST is consistent with the level at which a source would be required to obtain a PSD permit for a major modification for the applicable criteria pollutant(s), expressed as an hourly emission rate. The use of an SST is not intended in and of itself to imply that a facility must obtain a PSD permit.)

Percent in Excess of Limit/Parameter

This column is the yardstick by which a violation is judged to be a high priority violation. In some cases (i.e., where the word "FOR" connects this column with the last column), the percent in excess of the limit is paired with a time element. To determine the level of excess emissions for which a violation is considered high priority, multiply the applicable standard by the applicable percentage from this column.

Percent of Time in Excess of the Applicable Standard

The percent of time in excess of the applicable standard is based on the operating time of the facility during the reporting period in which the violation was discovered.



VIOLATION	METHOD OF DETECTION	STANDARD	SUPPLEMENTAL SIGNIFICANT THRESHOLD 1	% IN EXCESS OF REFERENCE LIMIT/PARAMETER
Violation of Allowable Emissions Limitations	Stack Testing	Any applicable requirement		Any violation of the applicable standard
	Coatings analysis, fuel samples, other process materials sampling or raw/process materials usage reports	Any applicable requirement	CO 23 lb/hr NOx 9 lb/hr SO2 9 lb/hr VOC 9 lb/hr PM 6 lb/hr PM10 3 lb/hr	>15% of the applicable emission limitation or the supplemental significant threshold (whichever is more stringent)
Violation of parameter limits where the parameter is a direct surrogate for an emissions limitation	Continuous/Periodic Parameter Monitoring (includes indicators of control device performance)	Any applicable requirement		>5% of the applicable parameter limit
Violation of applicable non-opacity standard	Continuous Emissions Monitoring (where the CEM is certified under federal performance specifications)	≤24 hour averaging period (for example, one hour or three hour blocks)	CO 23 lb/hr NOx 9 lb/hr SO2 9 lb/hr VOC 9 lb/hr	15% of the applicable standard or, the supplemental significant threshold, (whichever is more stringent)
	Continuous Emissions Monitoring (where the CEM is certified under federal performance specifications)	> 24 hour averaging period		Any violation of the applicable standard
Violation of applicable opacity standard 2	Continuous Opacity Monitoring	0-20% opacity		>5% opacity over the limit >10% opacity over the limit
		>20% opacity		
	Method 9 VE Readings	0-20% opacity		>50% over limit
		>20% opacity		>25% over limit

**Table Footnotes:**

1. Supplemental Significant Threshold is based on PSD significant levels. The significant threshold value is the lb/hr emission rate at 8760 hours which would result in PSD review.
2. Based on the applicable averaging period (e.g. 6-minute block averages).
3. For the first reporting period. If exceedances occur for more than 25 % of the operating time during the first reporting period evaluated, and if such exceedances continue during the subsequent consecutive reporting period, the exceedances will be considered

*high priority violations for both reporting periods if the percent of time in excess exceeds 25% of the operating time during the second reporting period.*

4. For the first reporting period. If exceedances occur for more than 3% of the operating time during the first reporting period evaluated, and if such exceedances continue during the subsequent consecutive reporting period, the exceedances will be considered high priority violations for both reporting periods if the percent of time in excess exceeds 3% of the operating time during the second reporting period.
5. Unless the state or local agency concludes that 1) the cause of the violation has been corrected within 30 days and the source has returned to compliance, or 2) the source was in compliance with an applicable mass limit at the time the Method 9 visual reading was taken.
6. This would not include any federally approved exempt period (e.g., startup/shutdown/malfunction 40 CFR 60.11), since these would not be violations.

### III. PROCESSING OF HIGH PRIORITY VIOLATORS

#### A. Agency Communications Concerning HPVs

As soon as possible (at least within one month) after an agency initially detects a potentially high priority violation, that agency shall communicate the compliance status of that source to all other agencies which are responsible for bringing and maintaining that source into continuous compliance (e.g., State to EPA, or EPA to State). Such communications shall be performed to:

1. Develop and maintain a common, agreed upon list of HPVs;
2. Determine, on a case by case basis, which agency is best suited to take the initial lead in addressing this HPV;
3. Ensure that the HPVs are returned to compliance, consistent with the T&A section of this policy; and
4. Foster a cooperative "team-building" spirit among all of the involved agencies.

#### B. Processing of High Priority Violators

Once a violation is detected, the agencies shall take the following five actions:

1. The "finding" agency shall compare the source's characteristics with the definition of HPV contained in this policy. To the extent that the violation fits one or more of the elements of the definition, it shall be designated as a "High Priority Violation" and therefore subject to the Timely and Appropriate section of this policy.
2. Within sixty (60) days after designation of the violation as an HPV, an NOV or FOV shall be issued to each source with an HPV, regardless of which agency has the lead.
3. The State agency and the EPA Regional Office shall jointly decide which agency has the necessary resources and will take the lead in resolving the HPV.
4. The lead agency shall routinely address each HPV as it is identified. Once the agency initiates any type of enforcement activity related to an HPV, it shall not interrupt this activity.
5. EPA (or delegated State) shall add the source to its HPV list (HPVL) for agency tracking and reporting.
6. The high priority violator shall remain an HPV (tracked in

enforcement action. When more than one air program or pollutant is listed under one day zero only the most serious air program and emission violation should be counted for purposes of Headquarters reporting.

#### A. Day Zero

The clock starts (i.e., day zero) no later than 45 days after the discovering agency first receives information concerning a Federally enforceable violation (e.g., date of inspection, stack test or continuous emission monitoring system report). If, during this 45-day period, the enforcement agency decides that additional monitoring or analysis is required to determine or confirm the violation, the clock does not start until the earlier of the date of receipt of such additional data or on the 90th day after the violation was initially discovered. This additional period (up to 45 days) provides sufficient time for agency evaluation of the data to determine if a Federally enforceable violation occurred.

#### B. Day 60 - Routine Issuance of NOV/FOV and EPA Tracking

Unless the State agency requests that EPA issue the notice, by Day 60 the State or local agency shall routinely issue an NOV (if required for SIP sources), or an FOV (for non SIP sources) to the source.

If the State has not taken such action, EPA shall immediately issue an appropriate notice.

Any EPA-issued NOV or FOV, in a case where the State has the lead, will indicate that EPA is still looking to the State to resolve the matter, and further EPA action will be required only in the absence of an acceptable, prompt resolution by the State.

The issuing office will transmit a copy of any NOVs or FOVs it issues to other agencies in whose jurisdiction the source is located. If the violation clearly impacts upon the air quality of an adjacent State, EPA will also transmit a copy of the NOV or FOV to that State as well.

Also, the EPA should add this source to its list of HPVs for Agency tracking and reporting purposes.

#### C. Day 150 - Case Progress Evaluation

If the State or local agency has the initial lead and the case has not been resolved/addressed by Day 150, the EPA and the State or local agency will have a focused, case-specific consultation concerning overall case strategy, including a

AFS) until all violations against it have been resolved.

#### C. EPA Maintains Enforcement Authority

The Clean Air Act vests responsibility for enforcement of the law in EPA. Therefore, EPA may move independently with respect to designation of a violation as a "High Priority Violation", and EPA shall assume the lead at any time in cases when it becomes apparent that the State is unable or unwilling to act in accordance with this policy to resolve a violation in a timely and appropriate manner.

#### IV. T&A TIMELINES FOR ENFORCEMENT ACTION

All HPVs, except emergency episodes and sources which construct without a valid PSD or Part D permit (where one is required), are subject to the following timelines and penalty requirements (see Section V below). The timeline for enforcement actions is generally the same for high priority violators discovered by EPA as for those discovered by a State or local agency, regardless of which agency takes the initial lead. The only exception is for the unusual situation in which EPA assumes the lead from a State. If EPA does take over the lead, it receives up to an additional 150 days to address the HPV. This policy provides EPA Regional Offices up to 150 additional days to address an HPV after it assumes the lead from a State. It should not need 270 days like it would in a normal situation. This is based upon the assumptions that EPA has closely tracked the State enforcement activity and data gathering, and will be able to rely upon the fact that the State's NOV started the penalty clock. (As stipulated in the CAAA of 1990, taking formal action, e.g., issuing an NOV/FOV, shifts the burden of proof of continuous compliance to the source, and "starts the penalty clock".)

A separate (new) timeline will be established for any additional violations discovered at an existing HPV before it has been fully resolved.

Violations discovered in records received from a source shall be assigned a day zero no later than thirty (30) days after the records were received by the enforcing agency.

A separate day zero can be created for any additional violations at a source that has unresolved violations. However, violations that were discovered during the same investigation, e.g., a series of inspections, a section 114 response, a record review or a quarterly report, that occurred within 30 days of each other, should be grouped under the same day zero, especially if the clustered violations will be addressed in the same

discussion of effective means for expeditiously addressing/resolving the case. Possible strategies could include continued deferral to the State or local agency, EPA assumption of the case, or continuation of the case in a work-sharing arrangement between EPA and the State or local agency.

#### D. EPA Responsibilities After It Assumes the Lead

After EPA assumes the lead in a case, it will have up to an additional 150 days to get the source into compliance; onto a schedule, issue a Section 113(a) administrative order (including administrative remedies), a Section 113(d) administrative enforcement action, or subject the source to a Section 120 action or judicial referral. EPA will encourage continued State participation even in situations where EPA takes over the lead. The possibility of a joint action should be considered as an alternative to a unilateral EPA action where feasible.

#### E. Day 270 (no lead change) or Day 300 (lead change)

By Day 270 (or 300 with lead change), the source shall either be RESOLVED or ADDRESSED i.e., on a legally-enforceable and expeditious administrative or judicial order, or be subject to a referral to the (State) attorney general or (Federal) Department of Justice for an adjudicatory enforcement hearing or judicial action. In some complex cases, more time may be required. The State should discuss with the Region that a case's complexity will require additional time as soon as those factors are determined.

#### F. Resolved versus Addressed

Normally a violation is addressed first and then resolved. As indicated above, the term RESOLVED shall mean that the source is returned to COMPLIANCE. Thus after the case has been addressed as per Part E (above), EPA and the State will continue to track the source. Note that the source remains on the HPV list until it is returned to compliance (RESOLVED). Follow-up may be required in one of the following outcomes once the case has been addressed: if a schedule is established, the State will monitor compliance with that schedule and report on progress in accordance with established reporting requirements; if a referral is made, EPA will continue to monitor the progress of the case to and after filing; and if a case becomes unduly delayed, EPA will discuss this with the State and may choose to initiate a parallel Federal action. No formal timelines are being established for this stage of the enforcement process, however.

#### V. PENALTIES

EPA's national goal is to have all Federal, State and local enforcement actions for Clean Air Act violations assess a penalty sufficient to achieve effective deterrence for the source subject to enforcement and for the regulated community as a whole. EPA assesses penalties in Federal Clean Air Act actions pursuant to the Clean Air Act Stationary Source Civil Penalty Policy. Under the EPA penalty policy, both the economic benefit of noncompliance and a gravity component reflecting the seriousness of the violation are calculated. This calculated penalty may then be adjusted where appropriate for several factors including the risks involved in litigating the enforcement action and the violator's ability to pay a penalty.

All State and local agency enforcement actions should also assess civil penalties of sufficient magnitude to maintain a credible deterrent effect. To accomplish this goal, State and local enforcement agencies should calculate and assess the economic benefit of noncompliance (where possible and appropriate). State and local enforcement agencies are also encouraged but not required to use the BEN computer model developed by EPA to calculate the economic benefit of noncompliance. State and local enforcement agencies which use the BEN computer model or a similar model to calculate economic benefit will receive less intensive EPA case-specific oversight. In cases where penalty policies have been developed, the state and local agencies should provide these to the appropriate EPA Regional contacts for review and comment.

In some cases, the risks involved in litigating the case or the violator's inability to pay a penalty may justify not assessing a penalty which recaptures the full economic benefit. Legitimate litigation risks include adverse legal precedent and evidentiary problems. The inability of a violator to pay a penalty must be demonstrated by the violator through financial information analyzed by State or local environmental enforcement personnel. Additionally, penalties based on economic benefit for long term violations may be so large (e.g., tens of millions of dollars) that it may be unlikely that a judge would award such a large amount. In deciding to reduce the penalty on this basis, it is encouraged that the State/local agency confer with EPA prior to reducing the penalty. If it is not possible or appropriate to assess the economic benefit of noncompliance, the penalty which is assessed should be of such a magnitude to act as a deterrent.

An additional amount (i.e., beyond economic benefit) reflecting the seriousness of the violation should also be assessed. This is especially important for violations which may not have a readily calculated economic benefit but which are

critical to program integrity, such as monitoring, reporting, record keeping and testing violations. In some cases, this additional amount may be adjusted to reflect the violator's history of compliance with air pollution laws and regulations, and the source's good faith efforts to comply. All penalty calculations in State and local enforcement actions must be documented in the appropriate case file.

EPA will consider overfiling when State or local penalties fail to meet these criteria, taking into account available Federal resources and enforcement priorities. EPA will consult with applicable State or local agencies prior to overfiling to ensure agencies have notice of EPA's plans.

State and local enforcement agencies should increase the statutory maximum civil penalty authorized by State or local law to at least \$10,000 per day per violation as required by Title V of the Clean Air Act, as amended, for an approved operating permits program. States and municipalities with penalty authority of less than \$10,000 per day per violation will be subject to more intensive EPA oversight and potential overfiling.

State and local enforcement agencies are also strongly encouraged to develop a penalty policy implementing these general penalty criteria. EPA will then review and evaluate, but not formally approve, these penalty policies for consistency with the general penalty criteria. A State or local enforcement agency which adopts a sound penalty policy implementing these penalty criteria and demonstrates a pattern of adherence to it will receive less case specific EPA oversight than agencies that do not adopt and adhere to such penalty policies.

## VI. CONSULTATION AND DATA TRANSFER

### A. Informal Consultation

EPA and States should conduct frequent (at least monthly) informal consultations to discuss compliance efforts. During these discussions, information exchange relative to obtaining compliance and penalties should occur. This exchange should include at least the following items:

1. The State and EPA would each identify any newly-found violators subject to this policy.
2. The State and EPA would each identify sources notified of noncompliance during the month.
3. The State and EPA would each identify violators where action had been taken.



4. The State would discuss the status of other enforcement actions pending or in progress, if requested by EPA.
5. EPA would identify sources for which it had completed action and provide the status for other sources where action is pending or in progress.
6. EPA would identify any sources it had found in violation and confer with the State as required above.

#### B. Updating EPA's Compliance Databases

The HPV flag (SVI1 field in AFS) must be accurately maintained in order to ensure that these data, which are shared by other enforcement offices within EPA and the States, correctly reflect the HPV status for all sources subject to the HPV policy. Summary data that is incorporated in the quarterly report to the Office of Enforcement and Compliance Assurance shall be used as the archived summary data for trends analysis.

The AIRS Facility database will be updated by EPA and/or the State on a monthly basis to reflect the following: (See Part E below for additional guidance.)

1. Compliance status changes for newly-identified violators which are in violation on the last day of the month prior to the consultation, and which were (or are expected to be) in that status for 7 days or more.
2. Sources notified of noncompliance.
3. Sources with completed enforcement actions, including any schedules and incremental dates for returning to compliance.
4. Sources found to be in compliance with final limits.

#### C. Provide Inspection Results

Inspection results other than those affected by the above will be provided in accordance with current practices and EPA accountability system requirements.

#### D. Sharing of Data

EPA and the State will share inspection results and other monitoring reports (e.g., stack tests, CEMS) for use in enforcement proceedings to the extent practicable. State personnel should be encouraged to provide evidence, including testimony, for Federal proceedings. Federal personnel should similarly support State enforcement proceedings.

## E. HPV Accounting Guidelines

There are two major aspects of HPV accounting that need to be recognized. One is the SVI1 flag in the AIRS Facility Subsystem (AFS) that indicates whether or not a source is a high priority violator and it is critical for tracking HPVs and multimedia enforcement targeting. The second is the T&A accounting of how long the lead agency took to address the violation(s), which is based on the day zero. (Appendix A is a glossary of terms used in this policy and additional accounting guidance associated with those terms.)

1. Adding HPV's to AFS: The finding agency detects a violation and enters it into AFS or reports it manually if not yet a direct or upload user of AFS. EPA and the State discuss/examine violation(s) and if it is a high priority violation(s), EPA or the State enters the compliance status and the SVI1 flag in AFS indicating that the source is a high priority violator. From this time until resolution, the SVI1 flag is modified monthly to reflect the source's HPV status. For multiple violations, the SVI1 flag shall reflect the worst compliance status. The HPV is reported as "added" in the quarter the source is added to AFS. Violation(s) involving multiple pollutants or multiple air programs should not be counted more than once. Violations discovered during a single investigation should be counted for purposes of EPA Headquarters (HQ) T&A reporting as one high priority violator under a single day zero.

2. HPV's discovered by EPA after the end of the quarter: When a high priority violator is reported to EPA by a State or local agency after the end of the quarter in which it was discovered, it shall be reported to HQ as if it had occurred during the quarter that it was reported to the EPA Regional Office. Although this may distort the exact date that violations, addressing, or resolution occurred, it will simplify reporting while continuing to provide HQ with an indication of the level of HPV activity. The goal is to maintain a stable count for each quarter while allowing HPV's that are discovered after the quarter ended to be added.

3. Addressed: The High Priority Violator is maintained on HQ reports as unaddressed until the violations against it are addressed. Once an HPV has been addressed it remains on the HQ HPV Summary Report only until the end of the fiscal year. At the beginning of the fiscal year, only unaddressed HPV's from the previous FY will appear on the HQ Summary HPV Report. The Region continues to track addressed HPV's until they are resolved and reports them to HQ as such in AFS.

4. Unaddressed: Unaddressed HPV's are reported on the HPV Summary Report and are brought forward from the previous quarter to the next. Similarly, the unaddressed HPV's are brought forward from one fiscal year to the next.

5. Deletions from HPV list: If it is determined that an HPV has been incorrectly identified as an HPV, for instance, if upon further examination it is determined that no violation actually occurred, or if the source was not in fact subject to the requirement, then the appropriate action code "RV" is added to AFS by EPA and the HPV is reported in the HQ Summary Report as being deleted for cause, and the SVI1 flag is reset. For auditing purposes, a note to the file in the action comment field must be added that explains why the source is not being tracked as an HPV.

6. Resolved: The resolved HPV's should be reported in the quarter that EPA or the State discovers that the violation has been resolved, whether or not it is the actual quarter the violation was resolved. It is expected that the States and Regions will monitor addressed HPV's until they are resolved. Once resolved, the SVI1 flags in AFS are updated and the violation is no longer tracked.

7. Annual Reports: In order to accommodate the end of year reports, the Timely and Appropriate Report and the State by State Enforcement Data Summaries, the Regions need to ensure that the core data fields and the T&A fields in AFS are properly filled out, otherwise manual tabulations will be required.

APPENDIX A  
HPV GLOSSARY

## Appendix A. HPV Glossary

This glossary of terms is designed to clarify the terminology used by EPA in the HPV Policy and the associated compliance and enforcement reporting. Terms that originate with the policy have been underlined and those that are legal terms have been italicized. In addition, accounting guidance is provided for the terms, addressed and resolved.

Addressed means that one of the following actions that impose a compliance schedule or require immediate compliance have been taken: a notice of noncompliance that includes a penalty (section 120) issued (AFS code: 7A); an EPA civil action referred to DOJ (AFS code: 4B); a CAA Section 113(a) order issued (AFS code: 8A); EPA CAA Section 167 order issued (AFS code: 7E); a CAA Section 113(d) complaint filed (AFS code: 7F); EPA criminal referral to DOJ (AFS code: 5B); a consent decree or consent agreement filed (AFS code: 6B); a consent decree or consent agreement filed (AFS code: 2D); a State civil action has been referred to AG (AFS code: 9C); a State criminal action referral to the AG (AFS code: 1D); a State administrative order issued (AFS code: 8C); or the source will be subject to a proposed SIP or FIP provision which will lead to compliance upon approval (AFS code: 2M or 2L) and EPA staff-level review indicates that the provision is likely to be approved.

Two additional addressing codes are listed in AFS for tracking purposes. They are: source returned to compliance by EPA with no further action required (AFS code: 7G); and, source returned to compliance by State with no further action required (AFS code: 2K). For cases where penalties are required, penalties that conform to the "Clean Air Act Stationary Source Civil Penalty Policy" must also be assessed.

Addressed with Penalties means appropriate penalties were collected or are likely to be collected because the action or complaint stipulates that a penalty be paid. Penalties must be calculated in accordance with the EPA civil penalty policy.

*Administrative Order* means a CAA Section 113(a) or Section 167 order that requires the source to comply with the CAA or a permit

promulgated thereunder but does not stipulate penalties; a State administrative action (not civil or criminal) against a source pursuant to the State authority.

*Administrative Penalty Order (APO)* means a CAA Section 113(d) order issued by EPA that has stipulated penalties.

*Civil Judicial Referral* means a Federal or State case that has been referred to the Department of Justice or the State Attorney General for resolution in the civil judicial forum.

*Complaint* means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person.

*Confirming a Violation/Compliance* may include the following: an on site inspection, a review of an appropriate self monitoring report, a stack test, a reference method compliance test, or a response to a CAA Section 114 letter.

*Consent Agreement (or Consent Decree)* means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

*Consent Agreement/Consent Order (CACO)* means a signed document settling a CAA Section 113(d) administrative penalty order.

In Compliance means all Federal and State administrative and judicial action against the source is complete and the source has been confirmed to be complying with the CAA. This term, as it is used in the HPV Policy, refers to a source being in compliance with all aspects of CAA requirements, not simply their emission limit.

Investigation includes, but is not limited to, a series of inspections, review of CAA Section 114 responses, record reviews, or review of quarterly reports that were discovered within 30 days of each other and that pertain to the same source.

Lead Change means the lead changes from the State to EPA because either the State did not address the violation by day 150 or the State asked EPA to assume the lead. In the case of asbestos

NESHAP D&R violators and non-transitory NESHAP violators "Lead Change" means: the lead changes from the State because the State did not address the violation within two months or the State asked EPA to assume the lead. This does not include a change from EPA to the State.

Major Source means a stationary source(s) located on one or more contiguous or adjacent properties that have the same standard industrial classification and are under the control of one person or persons and that emits or has the potential to emit 100 tons per year of VOC, SO<sub>2</sub>, NO<sub>2</sub>, CO, or PM-10; or a source, regardless of its attainment status, that emits or has the potential to emit 10 tons per year (tpy) of Hazardous Air Pollutants (HAP's) or 25 (tpy) of a combination of HAPs and other pollutants; or if the source is located in a nonattainment area and it emits or has the potential to emit quantities of VOC, NO<sub>2</sub>, CO, or PM-10 that equal or exceed the following nonattainment status thresholds.

	<u>Nonattainment</u> <u>Status</u>	<u>Major Source</u> (in tons per year)
OZONE (VOC / NO <sub>2</sub> )	Marginal/Moderate	100
	Serious	50
	(Ozone Transport Region)	50
	Severe	25
	Extreme	10
CARBON MONOXIDE	Moderate	100
	Serious	50
PM-10	Moderate	100
	Serious	70

For a detailed definition of Major Source see Part 70 - State Operating Permit Programs Federal Register vol. 57, No 140/ Tuesday, July 21, 1992 and the CAA sections 112 & 302.

Resolved means that once the violation is addressed and a

closeout memo has been issued, all penalties have been collected and the source is confirmed to be in compliance. Once these actions have been completed, AFS should be updated with the following: C7 (Closeout memo issued), C3 (CAA Section 113(d) penalty collected), WD (CAA Section 113(d) complaint withdrawn), VR (Violation Resolved).