"Guidance Regarding Regional and headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent under New Enforcement Authorities of the Water Quality Act of distributed August 28, 1987.

GUIDANCE REGARDING REGIONAL AND HEADQUARTERS COORDINATION ON PROPOSED AND FINAL ADMINISTRATIVE PENALTY ORDERS ON CONSENT UNDER NEW ENFORCEMENT AUTHORITIES OF THE WATER QUALITY ACT OF 1987

Guidance Regarding Regional and Headquarters Coordination on Proposed and Final Administrative Penalty Orders on Consent Under New Enforcement Authorities of the Water Quality Act of 1987.

I. Purpose

The purpose of this guidance is to explain the interaction required between Headquarters (HQ) and the Regions for administrative penalty actions taken by Regions under Section 314 of the Water Quality Act (WQA).

II. Background

On February 4, 1987, the WQA amendments of 1987 were enacted. Section 314 gives the Administrator new enforcement authority to issue administrative penalty orders against alleged violators of the WQA. The Administrator is delegating these new authorities to the Regional Administrators and the Assistant Administrator for Water, who may then redelegate many of these new authorities. The Office of General Counsel (OGC) and the Office of Enforcement and Compliance Monitoring (OECM) also will have certain prescribed roles.

The following guidance covers roles and responsibilities for Regional and HQ offices in EPA's use of these new enforcement authorities, including coordination responsibilities. The guidance is intended to promote consistent and sound development and use of these authorities, effective national management of the new enforcement program, and helpful information exchange, while a significant flexibility for the Regions to implement the authorities most efficiently as seen fit in individual cases.

III. HQ CONCURRENCE ON INITIAL PROPOSED AND CONSENT PENALTY AO's

A. WQA Class I and II Penalties Other than §404

Each Regional office shall submit to Anne Lassiter, Chief, Policy Development Branch, Office of Water Enforcement and Permits (OWEP) copies of the following prior to issuance:

1. The first three Class I and the first three Class II combined complaints and penalty orders (and accompanying cover letters) proposing the assessment of penalties prior to issuance under §314 of the WQA.

2. The first three Class I and first three Class II final penalty orders on consent prior to issuance under §314 of the WQA.

B. WQA Class I and II §404 Penalties

Each Regional office shall submit to Suzanne Schwartz, Chief, Policy and Regulations Branch, Office of Wetlands Protection (OWP), copies of the following prior to issuance:

1. The first three Class I and the first three Class II combined complaints and penalty orders with accompanying letters proposing the assessment of penalties prior to issuance under §314 of the WQA.

2. The first three Class I and first three Class II final penalty orders on consent prior to issuance under §314 of the WQA.

C. Implementation

The Office of Water Enforcement and Permits or the Office of Wetlands Protection, as appropriate, will distribute copies of the orders to the Office of Enforcement and Compliance Monitoring. EPA Regions must obtain comments and concurrence from OECM - Water, and OWEP or OWP, as appropriate, on initial proposed penalty orders/complaints and final orders on consent before signing or issuing these documents to the respondent or to any other party outside of EPA. OECM and OW offices will provide one joint response to the Regions to minimize coordination burdens on the Regions.

In order to expedite Headquarters review of proposed and final orders, the Regions must include an action memo or a fact sheet explaining the factual basis, rationale, and significant issues associated with each proposed and final order. This material should show the basis for using the procedures chosen, and show application of penalty assessment criteria. We hope that in many cases the Regions will be able to use the same action memo already developed for their own internal use. The package also should designate a contact person in the Region with whom Headquarters should communicate on the package.

The Region may, at its discretion, submit in the package any other relevant materials which may be of assistance to Headquarters during the review process.

OWEP, OWP, and OECM review for purposes of deciding on concurrence will focus on whether the submitted documents are consistent with national law and policy in the area of WQA programs, WQA enforcement and enforcement generally. The review focus will be on the legal and technical soundness of the administrative documents submitted by the Region. The review typically will not focus on whether an administrative

penalty action is the best alternative enforcement response, although particular attention will be given to this issue on administrative cases that raise precedential national issues. The Headquarters concurrence memorandum may require document changes needed to protect the Agency's enforcement position, or may merely suggest changes preferred by Headquarters reviewers for the Region to consider implementing.

OWEP, OWP, and OECM will respond jointly in one written communication to the Regions no later than ten working days from receipt of the package unless there is good cause for a delayed decision. Headquarters may need to delay its response if, for example, additional information from the Region is essential before concurrence may be given. If good cause for delay exists, the appropriate OW Branch Chief must immediately notify the affected Region of the delay, and provide the reasons for the delay.

Upon resolution of the matter causing delay, OWEP, OWP, and OECM agree to respond to the Region as quickly as possible, but no longer than ten working days from receipt of all information requested.

If Headquarters does not respond to the Region within the appropriate time frame, the Region must notify OWEP or OWP, as appropriate, that a response has not been received. If the designated representatives for OWEP or OWP do not respond to the Region within one day, the Region may assume that OWEP or OWP, and OECM have no comment on the proposed or final order and concur in its issuance.

Where possible, the Regions are encouraged to forward diverse cases, involving a variety of WQA violations, to Headquarters for concurrence.

IV. Other Procedures to Facilitate National Management of the Administrative Penalty Program

A. Submission of Hard Copy of Penalty Orders

Currently, Regions are asked to submit copies of all administrative orders (§309) issued to OWEP. Through this guidance, we are also asking the Regions to submit hard copies of proposed and final penalty orders, either litigated or on consent, to OWEP or OWP as appropriate within 30 days of issuance of the order. These hard copies will be used as one mechanism for evaluating the effectiveness of implementation of administrative penalty authority and assessing national consistency in the use of the authority. Submission of hard copy should in no way delay or impede a Region's ability to use the administrative penalty authority.

B. Automated Tracking of Penalty Order Issuance

Headquarters will track the issuance of adminstrative penalty orders for other than Section 404 through the Permit Compliance System (PCS), an automated management information system for tracking permit, compliance, and enforcement status of NPDES permittees. This system is managed by the Office of Water Enforcment and Permits with data input at the Regional or State level. Regions are currently required to track all enforcement actions issued to major permittees and minor PL 92-500 municipal permittees. Regions and States will be given further guidance in the near future on the specific data to be entered for administrative penalty orders.

C. Compendium of Administrative Opinions

Headquarters will develop a compendium of decisions issued by Administrative Law Judges (ALJ) as well as any decisions handed down by courts on appeal. This compendium of decisions will be provided to Regions on a regular basis to assist in preparing cases to be heard by ALJs.

D. Circulation of Noteworthy Opinions/Orders

In addition to preparation of a compendium, Headquarters will distribute copies of noteworthy ALJ decisions as well as copies of final orders which are particularly well done or innovative, to all Regions. These will be distributed periodically, as they become available to Headquarters.

E. Coordination on Precedential Issues

From time to time, Regions will identify cases where the issues have national implications or are precedential in nature. In such circumstances, the Region will be responsible for notifying and working with Headquarters (OECM) to develop arguments to be used in pleadings to presiding officers/administrative law judges. Additionally, Regions should be aware that the concurrence of the Assistant Administrator for Enforcement and Compliance Monitoring is required before an appeal of an ALJ decision is initiated and that the same Assistant Administrator must be consulted when no appeal of an adverse decision is recommended. (See Delegations of Authority.)

F. Headquarters Oversight of Administrative Penalty Implementation

Headquarters will exercise oversight of Regional use of administrative penalty authority primarily through program reviews or audits (e.g., integrated into the annual mid-year evaluation), as opposed to case-by-case, real-time review. The audits will be supplemented by data from the automated tracking system and information developed through review of the hard copies of penalty orders submitted by the Regions. In assessing overall performance, Headquarters will examine the following areas:

- overall penalty levels obtained
- conformity with penalty policy as established through review of penalty worksheets
- efficiency and use of penalty orders--number of orders issued, timely response and completion, effective negotiation and advocacy
- conformity with national enforcement policy
- establishment of significant precedent.

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