EC-G-1998-145

III.A.5.

"REFERENCE DOCUMENT ON GUIDANCE AND PROCEDURES FOR ADMINISTRATIVE ORDERS ISSUED UNDER SECTION 309 OF THE CLEAN WATER ACT" dated September 26, 1986, Cover Memorandum, Table of Contents and Section I only.

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

SEP 29 1986

OFFICE OF WATER

MEMORANDUM

SUBJECT: Reference Document on Guidance and Procedures for Administrative Orders Issued under Section 309 of the Clean Water Act

FROM: James R. Elder, Director
Office of Water Enforcement and Permits (EN-338)

TO: Water Management Division Directors
Regions I-X

The attached Reference Document on Administrative Orders was recently completed by the Enforcement Division, Office of Water Enforcement and Permits, to address varied questions that may arise on Administrative Orders (AOs) authorized under the Clean Water Act. It is designed to provide, in one location, all pertinent information on the preparation and implementation of AOs. The attached Reference Document we believe, contains all pertinent guidance and procedures needed for day to day operations and for compliance activities relating to administrative orders.

This project continues our effort to produce manuals and centralized reference material for all personnel involved in the development and tracking of enforcement actions. It should be noted that the contents such as the descriptions of procedures relating to tracking and processing of AOs may change over the next few years, and will therefore need to be updated. We will notify you as changes are made.

We would like to thank all those parties from the Regional Offices and the Office of Enforcement and Compliance Monitoring for their comments and the extensive reviews they provided. In addition if you have questions or comments on the content, or if you believe we have missed some information that would make this a more comprehensive document, please contact Bill Jordan, Director, Enforcement Division (FTS/475-8304) or Virginia Lathrop, on his staff (EN-338), (FTS/475-8299).

Attachment

cc: Glenn Unterburger, OECM

REFERENCE DOCUMENT

Guidance and Procedures for

ADMINISTRATIVE ORDERS

Issued under Section 309

of the Clean Water Act

September 29, 1986

REFERENCE DOCUMENT - Guidance and Procedures for Administrative Orders Issued Under Section 309 of the Clean Water Act

I. Guidance

A. Recommended Format for Administrative Orders (AO's) - Memorandum from Rebecca Hanmer to Regional Directors, Water Management Division, 7/30/85. (Includes an AO evaluation checklist in addition to format and model order)

B. Guidance on Selected Topics Related to Limitations and Use of AO's - Topics as AOs on Consent; Refraining from use of AOs instead of issuing permits.

C. List of Guidances on Administrative Orders that are of historical value.

II. Specific Questions and Answers

III. Results of Studies/Assessments Completed by Contract

A. Proper Formatting and Content of AO's - Phase I - Dec. 31, 1984.

B. Timeliness and Effectiveness of AO's Including close out and continued compliance after close out - Phase II, October 11, 1985.

C. Assessment of AO's Which Were Not Closed Out and for Closed Out AOs, Analysis of Sustained Compliance Thereafter. (To be completed September 30, 1986)

IV. Key Steps in Preparing and Tracking AO's

A. Tracking Compliance Dates in PCS and reporting requirements of ONCR.

B. Office of Water tracking.

C. Close out procedures

SECTION I

GUIDANCE

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

JUL 30 1985

OFFICE OF WATER

I.A.

MEMORANDUM

SUBJECT: Recommended Format for Clean Water Act Section 309 Administrative Orders

FROM: Rebecca Hanmer
Rebecca W. Hanmer, Director
Office of Water Enforcement and Permits (EN-335)

TO: Water Management Division Directors
Regions I - X

One of the most frequently used Environmental Protection Agency mechanisms in the formal enforcement process is the Administrative Order (AO) issued under Section 309 of the Clean Water Act. It is our belief that AO's should be used in a consistent and effective manner since they are a major part of the enforcement scheme. For this reason, the Office of Water Enforcement and Permits has undertaken an effort to assess AO content and format during the past year. The outcome of that assessment was the draft Recommended Format for Administrative Orders forwarded to you on May 9, 1985. We have received comments and suggestions from several Regions which were utilized in preparing the final documents. Attached you will find the final Recommended Format for Clean Water Act Section 309 Administrative Orders (Attachment 1).

The Recommended Format was developed with the cooperation and assistance of the Office of Enforcement and Compliance Monitoring. The purpose of the Recommended Format is to provide a general guide which delineates (1) the specific statutory requirements (such as the requirements of Section 309(a)(4) on opportunity for a recipient to confer with the Administrator on violations based on failure to submit information); and (2) options and suggestions on format for Administrative Orders (such as the option of including violations in a separate section after Findings of Fact). The Recommended Format, as utilized by the Regions, should result in more effective and even-handed national enforcement through Administrative Orders.

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In addition to the Recommended Format, we are forwarding the Checklist on Administrative Orders (Attachment 2). The Checklist should be used for reviewing EPA and State-issued AO's. There will obviously be some variation among States with regard to AO's; however, the use of a Checklist should assure that the State-issued AO's are complete and enforceable.

The new guidance replaces a document dated April 18, 1975 that was developed by the Office of Water Enforcement. It should be noted that the statute was revised twice since 1975. In particular, the new guidance: discourages use of successive AO's for the same violation; clarifies which legal authority (e.g., Sections 308 and 309) EPA should cite as the basis for certain requirements imposed through an AO; clarifies the scope of requirements which EPA may impose through AO's; identifies sanctions available for AO violations; and sets out sample provisions which AO's should include to clarify the legal effect of the Order.

In the coming fiscal year, the Office of Water Enforcement and Permits, with extensive coordination with the Office of Enforcement and Compliance Monitoring (OECM), will develop further information on the use of Section 309 Administrative Orders. Some of those documents will cover: use of AOs on consent (bilateral and joint signature); principles for negotiation of bilateral orders especially for National Municipal Policy; use of multiple AO's and alternatives to AO's for the same facility when an AO is violated; and increased use of Section 308 to require information (including use of show cause proceedings).

If you have any specific questions on the above, please call me (FTS-475-8488) or Bill Jordan, Director, Enforcement Division (FTS-475-8304). The staff contact is Virginia Lathrop (FTS-475-8299).

Attachments

ATTACHMENT 1

Recommended Format for Clean Water Act Section 309 Administrative Orders

The following is the recommended format and content for an Administrative Order (AO). Examples and suggested wording are included at various points in the discussion and in the sample AO (Attachment 1-D). Adherence to the Recommended Format should result in more effective and evenhanded national enforcement through Administrative Orders.

Introduction

The following should be followed for the venue, title, docket identification and preamble paragraph.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION ____

IN THE MATTER OF

DOCKET NO. XI-84-06

Wastewater Treatment Works #4
Sludge River Pollution Control District
Sludge Falls, Columbia

PROCEEDING UNDER SECTION 309(a) of the Clean Water Act, 33 U.S.C. Section 1319(a); in re NPDES PERMIT No. _____

FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

"The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309 of the Clean Water Act, 33 U.S.C. §1319, (hereinafter the Act) and by him delegated to the Regional Administrator of EPA, Region XI (and redelegated by the Regional Administrator of Region XI to the Director, Water Management Division, Region XI)."

Venue and Title

The Region identification is included to establish the specific venue of the issuing authority. The full address of the Region is to be in the letterhead or under the Regional Administrator's (or his designee's) signature to the Order and on the blue back cover (which is optional).

Docket Number

To identify the proceeding, a docket number is required. To avoid confusion, the NPDES number should not be used as the Docket Number. However, the NPDES number, if any, should be referred to under the proceedings identification in the title. The docket number "XI-84-06" identifies the Order as being the 6th Order issued in 1984 in Region XI. An Administrative Order docket should be kept separate from any other docket. However, if a common docket is kept then a prefix should be added to the docket number, e.g., "XI-AO-84-06".

Preamble Paragraph

The preamble paragraph is important not only to establish the Administrator's authority to issue the Order but also to establish the delegation of authority to the Regional Administrator. If the Regional Administrator has redelegated his authority to the Director of the Regional Water Management Division, this redelegation should also be stated here or in the preamble to the Order portion of this document. It should be noted that there is no authority to redelegate this authority to other EPA Regional staff below the Division Director level. If the redelegation is asserted here, the paragraph should be amended by adding:

"... and redelegated by the Regional Administrator of Region XI to the (undersigned) Director, Water Management Division, Region XI".

The Administrative Order can be signed by a duly authorized Acting Regional Administrator or Director. However, the Agency should be prepared to show that the person signing as Acting Regional Administrator or Director has the requisite authority to sign the Order.

FINDINGS OF FACT

The Findings should adequately set forth the specific permit, statutory (and regulatory)* requirements violated and the specific nature and dates of the violations. In order to avoid difficulty in determining from the face of the Findings whether the order was necessary and timely, and the remedy was appropriate, the Findings and Order should be able to stand without reference to extraneous facts. The Findings should speak to all the pertinent facts and law much as a complaint in a civil action does. With these observations in mind, the following recommendations are made as to the specific facts to be alleged in the Findings.

Status of Violator

Findings of Fact should first identify fully the entity to whom the order is to be issued and define its legal status (i.e., corporation, partnership, association, state, municipality, commission or political subdivision of a state). Clearly identifying the orderee limits the possibility of challenges to jurisdiction or venue and establishes a record upon which subsequent enforcement actions may rely. The Findings should next establish the orderee's status under the Clean Water Act, (i.e., permittee, industrial user, control authority, etc.) and, in the case of permittees, the permit number, date issued, and current permit status. The Findings should name the receiving stream into which the violator discharges and should establish the violator discharges to "navigable waters" under Section 502(7) of the Act through a specific point source as defined in Section 502.

Basis of Violations

Section 309(a)(5)(A) requires that all orders ". . . should state with reasonable specificity the nature of the violation . . . ." It is imperative that the Findings contain the specific permit provision or statutory or regulatory requirement which has been violated and the authority by which it was imposed on the orderee. Next, the evidence or basis for the specific violation (such as DMR, inspection report, BMR) and dates of violation should be set forth concisely. In cases of more than one violation, identify what the documentation is for each and give the specific dates of violation. [In instances where only approximate dates are known or where there is a continuing violation say "on or about" or "beginning on or about".] Alternatively the violations may be set off in a separate section entitled "Violations" which can follow the "Findings of Fact."

* An AO should not set out a regulatory requirement that was violated without setting out the underlying statutory requirement. The Section 309(a)(3) authorizes AO's for violations of permit and statutory provisions.

Where the violation is based on a failure to provide required information, a finding can usually only state that the required information was not received by the agency. In those cases, the lack of receipt of the required information must serve as the basis of the violation. Section 308 violations have additional requirements as described below.

CWA Section 308 Violations

Administrative Orders issued for violations based on a failure to submit information requested under Section 308 of the Act do not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator (or his or her designee) concerning the alleged violation. (See CWA Section 309(a)(4)). It is essential that such person be provided with a reasonable opportunity to confer. Any order issued for a Section 308 violation either exclusively or in conjunction with other violations should provide for a period of time in which the orderee may confer with an authorized person designated in the Order. If an opportunity has been provided prior to the issuance of the order, the order should so state and set forth the documentation of the opportunity to confer and the outcome of the conference, if any.

Prior Enforcement Contacts

Administrative Orders frequently set forth prior contacts with the orderee in an attempt to obtain compliance. Generally, this is a good practice since it helps to build a record and may provide additional support in any subsequent enforcement action. This can be done by cataloguing the meetings, letters, telephone calls, etc., made in an attempt to secure voluntary compliance or by stating that repeated attempts were made. The repeated attempts may be set out in an attached summary or log of meetings, notices, letters, and telephone calls and dates thereof, along with dates of responses from the orderee, if any (see Attachment 1-A).

Other Findings

In certain circumstances it may be necessary or useful to include other findings which are supportive to the specific requirements of the order (e.g., "the company's treatment works are currently capable of meeting the effluent limits contained in its permit" or "the POTW has adequate authority to enforce the categorical pretreatment standards"). Whether or not to include such statements must be determined on a case by case basis but, if included, should be incontrovertible facts.

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ORDER FOR COMPLIANCE

The format for the Order should be as follows:

Order

"Based on the foregoing FINDINGS and pursuant to the authority vested in the Administrator, Environmental Protection Agency, under Sections 308 and 309(a) of the Act, and by him delegated to the undersigned (or if the Regional Administrator redelegates his authority to the Division Director, add after "of the Act" - "and by him delegated to the Regional Administrator, and redelegated to the undersigned"), it is hereby ordered:".

If the delegation statement is stated in the Preamble, this statement may simply be: "Based on the foregoing Findings, and pursuant to the authority of Sections 308 and 309(a) of the Act, it is hereby ordered:"

Terms of the Order

Section 309(a)(1) and (a)(3) authorizes the Administrator to issue an order requiring compliance with enumerated sections of the Act or a condition, limitation or permit requirement implementing the enumerated sections of the Act. Any requirement contained in the order must be directly related to achieving that compliance with those legal requirements. The terms of the order must set forth what EPA specifically expects the Orderee to do in order to achieve and maintain compliance.

Section 309(a)(5)(A) sets forth the time periods by which the orderee must comply. In cases of an interim compliance schedule or an operation and maintenance requirement the time for compliance may not exceed thirty days. In cases of compliance with a final deadline, the time for compliance must be "reasonable" as determined by the Administrator, taking into consideration the seriousness of the violation and past efforts of the orderee. Every order must contain a specific final date by which the orderee must achieve compliance (i.e., cease its violation(s)) consistent with the statutory language.

Although some Orders have included a prescribed method by which an orderee is to achieve compliance, specific prescribed steps or methodologies (such as a treatment technology) may be difficult to enforce. Because Section 309 specifies in explicit terms only that AO's require compliance by a date certain the more closely a requirement in the AO is related to actually achieving compliance, the sounder the legal position to include that requirement. Section 308 of the Act can provide substantial support in this area by requiring reporting of the specific steps or methods.

The Orders containing interim milestones leading to final compliance should include reporting requirements under Section 308. The order should specify the manner and timeframe for reporting compliance with the terms of the order to the issuing authority. The order should contain requirements for reporting on the compliance progress and submitting suitable documentation to show the Orderee has taken action to meet the AO requirements. The attached sample AO sets forth sample language on order requirements (Attachment 1-D), as well as a sample blue back (Attachment 1-C) and cover letter (Attachment 1-B).

Additional Provisions

It has been the long term practice of many of the Regions to include standard provisions regarding additional remedies, nonwaiver of permit conditions, etc., in all administrative orders or as part of the cover letter accompanying the AO. This practice should be used by all the Regions for every order issued. In addition to promoting national consistency, it alerts the violator to the array of sanctions which could be used should additional enforcement be necessary and helps encourage compliance with the Order as issued.

The following are sample provisions which should be added to Administrative Orders singly or in combination and may be modified based on the particular facts of the case. They may also be included in the cover letter.

Non Waiver of Permit Conditions:

> "This ORDER does not constitute a waiver or a modification of the terms and conditions of the Orderee's permit which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Section 309(b) (c) or (d) of the Act for any violation cited in this ORDER."

Potential Sanctions for Administrative Order Violations (for Non-Municipals):

> "Failure to comply with this ORDER or the Act may result in civil penalties of up to $10,000 per day of violation, ineligibility for contracts, grants or loans (Clean Water Act, Section 508) and permit suspension."

General Disclaimers:

> "Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act."

"Compliance with the terms and conditions of this ORDER shall not be construed to relieve the orderee of its obligations to comply with any applicable federal, state or local law."

Administrative Action Resulting in Ineligibility for Federal Contracts, Grants or Loans:

"Violations of this order may result in initiation of Agency action to prohibit the facility from obtaining Federal contracts, grants, or loans pursuant to Clean Water Act, Section 508, E.O. 11738, and 40 CFR Part 15."

Effective Date of the Order

When the Order does not address a violation of a requirement to provide information under Section 308, the ORDER can merely recite that:

"this ORDER shall become effective upon its receipt by (or service upon) said COMPANY."

For Section 308 violations where an opportunity for conference before the ORDER can become effective is required by section 309 and this was not done prior to the issuing of the ORDER, the last paragraph should read:

"The COMPANY shall have the opportunity, for a period of (_____) days from receipt of this ORDER, to confer with the following designated Agency representative: Mr. N. Force, Director, Water Management Division, Environmental Protection Agency, Room 5013, Region XI, Old National Bank Building, 1414 Main Street, Brewsterville, Centralia, 11101, (555) 123-4567; unless the Agency official issuing the Order decides otherwise, this ORDER shall become effective at the expiration of said period for consultation; and, the COMPANY shall have _____ (_) days from and after said effective date to comply with the terms of this ORDER. To constitute compliance, material required to be submitted by the COMPANY to the Agency must be in the hands of the designated Agency representative prior to the expiration of said _____ (_) day period."

Signing of the Order

When the Order is dated and signed, the name of the signing official (Regional Administrator, or Director, Water Management Division) should be typed below the signature, together with the address of the Regional office.

Other Considerations

The use of legal blue-back at least on the primary copy of the Findings and Order served, while not necessary, tends to impress upon the person served of the legal seriousness of the action being taken. Attachment 1-C provides a proposed format and content of the legal blue back. When a Order is issued to a Corporation, a copy of the Order shall be served on appropriate corporate officers.

As in court actions, the order should be retained and placed in a permanent file with the Docket Clerk, along with the affidavit or certification of service attached. If service is made by certified mail restricted delivery, a carbon copy of the letter of transmittal, together with the Post Office mailing receipt and the return receipt, when returned, should be stapled to the front of the original Order, just as a return of personal service would be.

Follow-up and File Closing

As good housekeeping practice, and more importantly, from the standpoint of possible reference for or evidence in future administrative or court actions, it is important that every file contain, at the minimum, a closing memo to the files delineating the final disposition of the matter. (The AO will only be closed out when the facility has returned to compliance or when appropria EPA action is taken, i.e., escalating the enforcement response.)

When a file is closed out, a brief letter should be sent to the orderee with a carbon copy to Headquarters advising that the action has been completed. Attachment 1-E is an example of what a close out letter might look like.

Prior Contacts with Orderee

Despite repeated written and telephone requests, as more fully set out in the log attached as Exhibit ___ and made a part hereof by reference, the COMPANY, in violation of Section 308 of the Act, has not supplied the requested information.

LOG SAMPLE

12/04/83	DMR data showed significant noncompliance (memo from X. Amin to file).
12/07/84	308 Letter sent to Company.
12/10/84	Plant Visit: Some data from inspection (by N. Spector).
04/23/84	Telephone - N. Force to Company. Follow-up requests for information on recent DMR from Company. No information sent.
04/24/84	Telephone - N. Force to Company. To request additional data by phone from Company. No information obtained.
05/06/84	Note filed by N. Force - No letter or further information from Company.

February 21, 1985

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Ms. Alice Smith, Director
Sludge River Pollution Control
District
13 Plain Street
Sludge Falls, Columbia 12345

RE: NPDES Permit No. CL0003456

Dear Ms. Smith:

Enclosed is an Administrative Order issued to the Sludge River Pollution Control District (SRPCD), by the Regional Administrator of the Environmental Protection Agency ("EPA"), Region XI, under Sections 308 and 309 of the Clean Water Act (the "Act"). The Regional Administrator has found that the SRPCD has violated Section 301 of the Act by failing to comply with certain requirements of its National Pollutant Discharge Elimination System permit. Specifically, during 1984 SRPCD consistently violated its effluent limitations on ammonia and phosphorus and intermittently violated effluent limitations for biochemical oxygen demand and total suspended solids.

The Order, which is effective upon receipt, seeks to remedy the violations by requiring SRPCD to submit a plan for meeting its effluent limitations and requiring SRPCD to then implement the plan and comply with its effluent limitations.

This Order does not modify your current NPDES permit; nor will compliance with the Order excuse any violation of the permit. Failure to comply with the enclosed Order may subject the District to further enforcement action. EPA may initiate a civil action in federal district court for violations of an Order seeking injunctive relief and civil penalties.

If you have any questions concerning this matter, please contact Mr. Jones, an engineer in the Permit Compliance Section, at 222-3922.

Sincerely yours,

Prudence Purewater
Regional Administrator

Enclosure

cc: State Division of Water Pollution Control
State Department of the Attorney General

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION _

IN THE MATTER OF

SLUDGE RIVER POLLUTION CONTROL DISTRICT
SLUDGE FALLS, COLUMBIA
PERMITTEE*

NPDES PERMIT NO. CL0003456*

PROCEEDINGS UNDER THE CLEAN WATER ACT
AS AMENDED (33 U.S.C. 1319(a)(3))**

FINDINGS OF VIOLATION
AND
ORDER OF COMPLIANCE

Issued by:

Prudence Purewater
Regional Administrator
Environmental Protection Agency
Region XI
Federal Building
Hokum, Centralia 12345

* Where Permit has been issued.

** May also have proceeding under 33 USC 1318.

ATTACHMENT 1-D

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION XI

IN THE MATTER OF Sludge River Pollution Control District Wastewater Treatment Works #4 NPDES Permit No CL003456 Proceedings under Section 309(a) of the Clean Water Act, 33 U.S.C. §1319(a)	)	DOCKET Number AO-85-13 FINDINGS OF VIOLATION AND ORDER FOR COMPLIANCE

STATUTORY AUTHORITY

The following FINDINGS are made and ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 309 of the Clean Water Act, 33 U.S.C. §1319, (the Act), and by the Administrator delegated to the Regional Administrator of EPA, Region XI.

FINDINGS

1. The Sludge River Pollution Control District (the "District") is a political subdivision of the state organized under the laws of the State of Columbia and as such is a "person" under Section 502 of the Act, 33 U.S.C. §1362.
2. The Sludge River Pollution Control District is the owner and operator of a wastewater treatment facility which provides advanced treatment to wastewater from the Towns of Locus and Sludge Falls. The facility discharges pollutants into the Sludge River, a navigable water of the United States as defined by Section 502 of the Act, 33 U.S.C. §1362.

3. The discharge of pollutants by any person into the waters of the United States, except as authorized by an NPDES Permit, is unlawful under Section 301(a) of the Clean Water Act.

4. On January 22, 1981, the District was issued National Pollutant Discharge Elimination System (NPDES) Permit Number CL0003456 (the "Permit") by the Regional Administrator of EPA pursuant to the authority given the Administrator of EPA by Section 402 of the Clean Water Act, which authority has been delegated by the Administrator to the Regional Administrator. The Permit became effective on February 22, 1981, and will expire on February 22, 1986.

5. The permit authorizes the discharge of pollutants into the Sludge River, in accordance with effluent limitations and other conditions contained in the Permit. The limitations contained in Special Condition A1 of the Permit require the plant to achieve monthly average limits of 7 mg/l for BOD and TSS, 1 mg/l for total phosphorus (Total P) and 1 mg/l for ammonia nitrogen (NH_3-N).

6. Attached hereto and incorporated herein by reference is a summary of effluent data submitted by the District to EPA for the period from December, 1983 to November, 1984. The data shows that:

   a.) the District violated the monthly average limits for TSS during two of the twelve months and violated the maximum daily limits for BOD nine times and TSS twelve times over periods of three months and five months, respectively;

b.) The District violated the limits on daily maximum concentrations thirty times for NH_3-N and twenty times for Total P over a six month period;

c.) The District violated average monthly concentration limits for NH_3-N and Total P each month over a period of four months and six months, respectively.

7. EPA personnel performed a diagnostic audit inspection at the facility during 1984. The purpose of the inspection was to determine the cause of non-compliance with the effluent limitations for NH_3-N and Total P. The inspection report was completed on December 8, 1984 and is attached hereto and incorporated herein by reference as a part of these Findings.

8. Based on the inspection report, the facility is currently capable of meeting the concentration limits for NH_3-N and Total P if properly operated in accordance with Condition D2 of the permit which requires maximizing the removal of those pollutants.

9. Based on the above, I find that the District is in violation of Section 301 of the Act, 33 U.S.C. §1311, and permit conditions implementing that section contained in a permit issued under Section 402 of the Act, 33 U.S.C. §1342.

ORDER

Based on the foregoing FINDINGS and pursuant to the authority of Sections 308 and 309 of the Act, IT IS HEREBY ORDERED:

1. Within sixty days of receiving this ORDER, the District shall submit to EPA a plan for achieving compliance with the effluent limitations on NH_3-N, Total P, BOD, and TSS. The plan shall address the operational problems cited in EPA's December 8, 1984, diagnostic audit inspection report and identify any changes in plant operation, funding, and staffing necessary to meet the permit conditions.
2. The District shall immediately comply with all effluent limitations contained in Special Condition A1 of the Permit for BOD and TSS.
3. The District shall immediately achieve and comply with the interim effluent limitations specified in Attachment A for NH_3-N and Total P as an intermediate step toward achieving final compliance. These interim effluent limitations shall terminate on May 1, 1985. During the time period that the interim effluent limitations are in effect, all requirements and conditions of the Permit remain fully effective and enforceable.
4. By May 1, 1984, the District shall have implemented any operational changes necessary to meet the permit effluent limitations for NH_3-N and Total P. The District shall comply with all effluent limitations contained in the Permit by May 1, 1985.

5. Where this ORDER requires a specific action to be performed within a certain time frame, the District shall submit a written notice of compliance or non-compliance with each deadline. Notification shall be mailed within seven days after each required action.

6. If non-compliance is reported, notification shall include the following information:

   a) A description of the nature and dates of violations;
   b) A description of any actions taken or proposed by the District to comply with the requirements;
   c) A description of any factors which tend to explain or mitigate the non-compliance;
   d) The date by which the District will perform the required action.

All reports shall be in writing and addressed as follows:

Director
Water Management Division
U.S. Environmental Protection Agency
Federal Building - Room 13
Hokum, Centralia 12345

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7. This ORDER does not constitute a waiver or a modification of the terms and conditions of the District's permit, which remains in full force and effect. EPA reserves the right to seek any and all remedies available under Sections 309(b), (c) or (d) of the Act for any violation cited in this ORDER.

8. Issuance of an Administrative Order shall not be deemed an election by EPA to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act.

9. This Order shall become effective upon the date of receipt by the District.

Dated this _____ day of _____

Signed: _____

Prudence Purewater
Regional Administrator
U.S. EPA, Region XI
Federal Building
Hokum, Centralia 12345

Attachment 1-

Mr. Adams
Peerless Company
RR #3
Burning River, Centralia 12346

RE: Administrative Order #XI-AO-85-06
(NPDES Permit NO. 1111112)

Dear Mr. Adams:

This is to notify you that as of May 15, 1985 the above named permittee appears to have complied with Administrative Order #XI-AO-85-06 issued on February 24, 1985. This Administrative Order has been placed on inactive status, and the Agency intends no further enforcement action at this time based on presently available information.

Sincerely,

Director
Water Management Division

cc: Compliance Information and Support Branch
OWEP (EN-338)

SAMPLE EVALUATION CHECKLIST FOR EPA's CWA SECTION 309 ADMINISTRATIVE ORDERS or STATE EQUIVALENT

The purpose of this checklist is to serve as a guide for review of State AO's or EPA's AO's.

1. Region: _____

2. State: _____

3. Date Issued: _____

4. [ ] Major [ ] Minor

5. [ ] Municipal [ ] Non-Municipal

		Yes	No
6.	Does the administrative order contain a title?	[ ]	[ ]
*7.	Does the order establish the venue of the issuing authority? (i.e., identification of EPA Region).	[ ]	[ ]
8.	Does the order provide the address of the issuing authority?	[ ]	[ ]
9.	Does the order contain a standard docket number? (i.e., X-AO-84-01: X=Region; AO=AO; 84=Year; 01=Serial Number).	[ ]	[ ]
10.	Does the order state the appropriate statutory authority for issuing the order? (i.e., CWA Section 309(a) and where reports or information are required, Section 308).	[ ]	[ ]
*11.	Does the order contain a suitable statement of delegation? (i.e., Delegation should correspond to signatory of order).	[ ]	[ ]
12.	Does the order identify the legal status of the violating party? (i.e., legal status as a corporation, municipality, etc.).	[ ]	[ ]

* These questions are of particular interest for EPA issued Administrative Orders.

	Yes	No
13. Does the order describe the legal authority/ instrument which is the subject of the violation? (e.g., statutory provision, regulatory provision, if applicable, statutory authority for permit issuance, name of permittee, permit number, date permit issued, permit modification or extension, date previous administrative order issued, etc.).	[ ]	[ ]

Examples

[ ] Statute

[ ] NPDES Permit

14. Does the order contain a specific finding that the discharger is in violation of a specific statutory or permit requirement?	[ ]	[ ]
15. Does the order describe or reproduce the specific terms of the legal authority/ instrument which are the subject of the violation? (e.g., effluent limitations, compliance schedules, etc.).	[ ]	[ ]
16. Does the order state, with reasonable specificity, the nature of the violation? (e.g., type of violation, date, evidence, etc.).	[ ]	[ ]

Examples

[ ] Reporting or monitoring violation

[ ] Effluent limitation violation

[ ] Violation of special permit condition

[ ] Pretreatment violation

[ ] Unpermitted or unauthorized discharge

[ ] Failure to meet O&M/construction schedule

[ ] Violation of a Section 308 letter

[ ] Improper O&M

[ ] Other _____

	Yes	No
17. Does the order specify the duration of violation, if known?	[ ]	[ ]
Estimated violation _____		
*18. Does the order document prior requests to the violating party for compliance with the legal authority/instrument? (e.g., telephone calls, letters, meeting, etc.).	[ ]	[ ]
*19. Where the order is issued for a CWA Section 308 violation does the order provide the violating party with an opportunity for prior consultation?	[ ]	[ ]
20. Does the order establish interim effluent limitations?	[ ]	[ ]
21. Does the order set out clearly any specific steps which EPA/State wants the violating party to take to achieve compliance?	[ ]	[ ]

Examples

[ ] Submission of monitoring reports

[ ] Compliance with existing effluent limitations

[ ] Submission of pretreatment program

[ ] Submission of correction/compliance plan or study evaluating compliance options

[ ] Compliance with existing O&M/construction schedule

[ ] Compliance with interim effluent limitation

[ ] Compliance with categorical or general pretreatment Standards

[ ] Other

22. Are the number of days reasonable for the type of relief sought?	[ ]	[ ]

	Yes	No
23. Does the order contain a specific requirement and date for final compliance?	[ ]	[ ]
24. Does the order specify a manner and time frame for reporting compliance with the terms of the order to the issuing authority?	[ ]	[ ]
25. Does the order specify the effective date of the order? (e.g., Date of receipt, date of consultation, etc.).	[ ]	[ ]

26. What is the elapsed time between the dates of violation and the date of issuance of the order? Is the elapsed time reasonable?

Number of days _____

*27. Who is the signatory of the order? (Choose <u>two</u> or less).

[ ] Regional Administrator

[ ] Regional Counsel

[ ] Water Division Director

[ ] State Water Pollution Control Officer

[ ] Other _____

Recommended Format - CWA - Administrative Orders

Summary of Changes from the April 18, 1975 Guidelines on Administrative Order Format

General Approach

The April 18, 1975 guidance entitled "Guidelines for issuing Administrative Compliance Orders Pursuant to Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as Amended," has been clarified and been brought up to date with the new July 1985 "Recommended Format for Clean Water Act Section 309 Administrative Orders."

Some examples of the modifications and additions are:

- The new guidance makes it clear that citations of the regulatory basis of violations must also include the underlying statutory basis of the regulation.
- The new guidance makes it clear that the basis of the violation may be set off in a separate section of the order if the Region so chooses.
- The Section on Terms of the Order has been expanded to explain in greater detail the need for a final date for time periods for coming into compliance. This section also deals with prescribed methods which may be imposed on Orderees through AO's (i.e., the closer the requirement to achieving compliance, the sounder the legal position to include the requirement in an AO).
- The discussion on using successive AO's has been eliminated since the current view, successive AO's for the same noncompliance problems should normally be avoided and the case should be escalated to the referral process.
- The discussion on personal service of AO's has been eliminated since this is extremely resource intensive and the accepted method of service is now by Certified Mail-Restricted Delivery with a return receipt.
- New attachments have been included such as the sample AO. Other attachments were updated.
- We have added a section on Additional Provisions, such as a commonly used statement that further violations of the requirements of the AO and the permit may result in civil action including a penalty of up to $10,000 per day, ineligibility for Federal contracts, grants and loans and suspension of the permit.
- The Order portion of the Guidance and the Sample AO indicate that Orders which include milestones should include reporting requirements under Section 308 of the Act.

I. B. GUIDANCE ON SELECTED TOPICS RELATED TO LIMITATIONS AND USE OF ADMINISTRATIVE ORDERS UNDER SECTION 309 of the CLEAN WATER ACT

Draft Guidance on Selected Topics Related to Limitations and Use of Administrative Orders Under Section 309 and Information Requirements under Section 308 of the Clean Water Act

I. Administrative Orders on Consent

Introduction

In recent months a few Regional Offices of EPA have discussed the possibility of issuing Administrative Orders on Consent (AOC): that is, an Administrative Order issued under Section 309 of the Clean Water Act, which is then signed not only by the Regional Administrator (or his designee) but also by the responsible party for the Orderee who acknowledges jurisdiction, truthfulness of the findings and appropriateness of the relief. The purpose of the AOC would typically be the same and contain the same provisions as any unilaterally issued Administrative Order dealing with violations of a permit or statutory requirements. The Administrative Order would be the product resulting from negotiations with the Orderee and would contain findings of fact, and a directive to achieve compliance with the permit and the Act by date certain. The AOC may contain a specified time table for compliance and consequences of noncompliance; the AO would set forth fully the violation and the requirements for the orderees to meet. The AOC should specify a final compliance date, which may not exceed a time limit that the Administrator determines to be reasonable for for any final deadline. It is against Agency policy for the AOC to waive EPA's authority to pursue other enforcement alternatives either for the violations serving as the basis of the order, or for future violations.

Advantages of AOC

The AOC can provide an additional approach to bring a violator into compliance in the following ways:

1. The AOC creates a record of the orderee's agreement to milestones and an enforceable schedule of compliance.

2. The AOC has educational value. If there are negotiations to develop the AOC, both EPA and the orderee may benefit from the exchange of information. Such information may be beneficial to EPA if a subsequent enforcement action is required.

3. There may be psychological advantage to having the orderee commit to compliance schedule milestones and a final compliance date (as long as the approach is not coercive to the degree that the orderee is obliged to do more than required by law).

4. If the AOC has to be enforced through judicial action, it might be used as an admission by the defendant of those violations covered in the findings.

Limitations of an AOC

Because an AOC might under some circumstances require additional time for negotiations, the AOC may not be appropriate for many cases where prompt response is required such as when violations would cause environmental harm or endangerment of health. However, where EPA is seeking commitment to a long-term and more complicated compliance schedule, an AOC might have more value, and EPA might pursue a separate AOC for that purpose.

The AOC should not result in unwarranted delay of action by EPA. EMS requires that noncompliance situations be responded to with prompt enforcement action. If the situation is appropriate for an AOC, developing the terms of an AOC should be prompt to ensure that noncompliance is not delayed by the process. Finally, in the case of a violation of an AOC, as with a unilateral AO, the presumption is that EPA will first consider pursuing a judicial enforcement response.

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Specific Uses of AOC

Some typical, though hypothetical, situations, where an AOC might be useful are the following:

Municipals

AOC could be useful for minor municipals. All minors and majors must be on enforceable schedules. Where States do not do this, EPA must. Because of the psychological value of the AOC, it may be useful to get commitments for municipal construction based on an acceptable compliance schedule. However, as in AO's, decisions on the exact techniques, construction etc., to come into compliance are in the end left to the orderee and not specified by EPA.

Industrials

The AOC could supplement general permits to set out an additional compliance requirement as in a study, or monitoring scheme to investigate appropriateness of additional limits, or to examine an environmental issue, where there have been violations or where other action is needed to bring an Orderee into compliance. These AOC should cite CWA §308 (instead of or) in addition to CWA §309, since the orders require monitoring or data gathering rather than actions intended to produce compliance with, e.g., effluent limits.

The AOC can be used to get an agreement on a compliance schedule (but not to modify a compliance schedule in a permit).

Legal Issues

The AOC does typically contain an agreement on the findings and a commitment to compliance, as indicated by the orderee's signature on the order.

The AOC should be prepared and negotiated with the participation of the Office of Regional Counsel to ensure appropriate language and that any litigation considerations that may subsequently arise are anticipated and dealt with.

OWEP and OECM will periodically provide updates of guidance on AOC. The AOC should be used to impose as strict a compliance deadline as possible and not to provide for a permissive deadline or requirement.

In level of response and escalation of enforcement response, an AOC is equivalent to an AO. For violation of an AO or an AOC, escalation to a referral presumably would be the first response considered.

II. Restricted Use of Administrative Orders for Unauthorized and Unpermitted Discharges

Summary

EPA may not rely on AOs as surrogate permits to address otherwise unpermitted discharges. For AO's which are issued addressing unauthorized, unpermitted discharges, the following criteria should be met:

- EPA should first consider whether to require immediate cessation of discharge.

- The AO should contain a date certain by which the discharger must apply or reapply for a permit. (No more than 60 days to apply is typically needed.) Interim limits should be set in the AO only for the briefest time possible leading up to final compliance and would probably be most defensible, for example, where health issues such as proper disposal of sewage require some discharge.

- The AO should have a reasonable final date for attaining compliance with final permit limits.

Discussion

The Environmental Protection Agency in the past has issued letters and Administrative Orders (AOs) to dischargers without a current NPDES Permit (especially in the case of minor dischargers or applicants for a general permit). These letters or AO's provided terms, conditions, and interim limits for the discharge. However in Nunan Kitlutsisti vs. Arco Alaska Inc. (an unreported case which was before the federal district court in Alaska) this practice was challenged by Kitlutsisti. The Court did not rule on the issue but the case narrative does show disapproval of such enforcement letters and AO's as an apparent substitute for permit issuance. An earlier EPA Guidance* has stated that in general a discharger who has filed a permit application should receive a decision on their permit before an AO is issued (except for exceptional situations such as a toxic discharge).

The issuance of an Administrative Order instead of following the permit issuance process means that EPA does not afford the public hearing and other procedural requirements normally associated with permit issuance such as opportunity for public comment, adversarial input and the creation of an administrative record. The Administrative Procedures Act (APA) requires that EPA act upon permit applications within a reasonable time, not delaying

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*Memorandum to Enforcement Divisions from Assistant Administrator for Enforcement, March 20, 1974.

the process with issuance of an AO or letter. The Court in the above case had the following objection to the "creative administrative techniques".

"Noncompliance with the statute has meant that third parties, the companies... have been needlessly subjected to citizen suits which they are powerless to avoid. It has also denied other users of Norton Sound's water resources their statutory right to comment on and object to those proposed discharges."

Administrative Orders cannot be used as a discharge-authorizing mechanism to fill the gap between the time of AO issuance and some indeterminate future date when an individual permit or general permit might be issued. EPA may not rely on an AO to act in place of an NPDES permit.

Under certain circumstances it may be necessary to issue an AO even though a strict reading of the Act might require a ceasing of the discharge and no resumption of the discharge until a permit is in place. Discretion should be used in establishing interim limits through an AO as long as the AO is not issued as a convenient method for EPA to deal with an NPDES permit backlog, and there is a clear justification for allowing the discharge to continue until the permit is issued. When used, compliance schedule deadlines and interim limits must be reasonably stringent. The AO should also state that the EPA may initiate a civil or criminal enforcement action seeking penalties and other appropriate relief, if the discharge does not cease or a permit is not obtained within the required time.

It is worth noting that there has been a change from the early stages of implementation of the Act. In general when guidance was written in 1973, circumstances were different. Many AO's addressed problems such as discharge without a permit. When, in these cases, a facility could not be shut down for health reasons, interim limits were a way of dealing with the discharger. Since the NPDES program has been in existence now for thirteen years, these situations are less commonly encountered. But in certain cases AO's with interim limits are used to address discharges without a permit depending on health issues, type of facility, how much construction is needed, environmental effects of shut down and the final compliance schedule.

It is also worthwhile noting that where a discharger is required to apply for a permit, the application should be sent in within 60 days.

III. Broader Usage of Section 308 in the Administrative Order

Authority to Impose Reporting Requirements in AOs

AOs should cite Section 308 when imposing reporting requirements, including those associated with specific steps and milestones in a compliance schedule. The stronger legal authority for imposing these reporting requirements actually is Section 308 of the Clean Water Act, rather than Section 309. The Order should specify the manner and timeframe for reporting on compliance to the issuing authority. The most common format is to cite Section 308 and Section 309 as a basis in the introductory paragraph of the Order portion of the AO. (See "Recommended Format for Administrative Orders Under Section 309 of the Clean Water Act", pages 5 and 6).

Section 308 and "Show Cause Hearings"

In the past, §308 of the Act has been cited to require members of the regulated community to attend "show cause hearings" or "show cause meetings" to explain records or provide direct testimony by personal examination why U.S. EPA should not take enforcement action for alleged violations of the Act. Notice to the violator to attend such a meeting was provided by a document constructed similar to §309 AOs. The term "show cause" does not appear in the Act and therefore while formal meetings with the violator are important, a violator's attendance strictly speaking is voluntary at all times. Under Section 308 (or Section 309), there is no authority to require the physical presence of a specific person or representative at a specific place and time. EPA can require documents, data and materials etc. to be provided to EPA under Section 308, however. Implied § 309 sanctions solely for failure to attend a meeting should not be made.

The Agency is on strongest legal footing when it characterizes these "hearings" as an opportunity for the alleged violator to provide oral explanation of information relevant to a potential enforcement matter.

Use of Section 308 in Pretreatment Enforcement against Industrial Users

In pursuing an enforcement action (particularly a judicial enforcement action) against an industrial user for violations of pretreatment standards, EPA typically should use a Section 308 letter to obtain sufficient process description, wastewater monitoring results, and wastewater treatment information to establish a clear pattern of violations by the industrial user.

More active use of section 308 letters is particularly important for pretreatment cases because, unlike direct NPDES dischargers, EPA does not have a set of DMRs which can easily establish a clear track record of violating conduct. Where EPA can only introduce into evidence one or more isolated sampling reports, the government's case is much more vulnerable to factual challenges which a defendant might raise (e.g., the possibility of inaccurate sampling, upset, or isolated noncompliance). As a result, EPA should evaluate the need for obtaining additional wastewater monitoring data from an industrial user through a Section 308 letter before referring a pretreatment enforcement case to the Department of Justice.

I.C. LISTING OF OTHER EXISTING GUIDANCE ON ADMINISTRATIVE ORDERS

LIST OF OTHER GUIDANCE ON ADMINISTRATIVE ORDERS

The following documents and memoranda, among others, may be of interest to the reader, although they do not appear in full text within this reference document. They may also be of general interest and of historical value. Copies may be obtained by calling Enforcement Division, OWEP, (EN-338), EPA, Washington, D.C. (FTS/202/475-8310)

- Memo, "Compliance Monitoring, Administrative Orders, and Court Actions under Section 309 of the Federal Water Pollution Control Act Amendments of 1972," March 20, 1974
- Memo, "Guidelines for Issuing of Administrative Order Pursuant to Title III, Section 309(a)(3) and (a)(4) of the Federal Water Pollution Control Act, as Amended [33 U.S.C. 1319(a)(3) and (a)(4)]," April 18, 1975
- Memo, "Final Policy on Section 309(a)(5)(A) and (B) of the FWCPA, as Amended: Extension of the July 1, 1977, Deadline for Industrial Dischargers," March 30, 1978
- Report, "National Municipal Policy and Strategy; for Construction Grants, NPDES Permits, and Enforcement Under the Clean Water Act," October, 1979
- Memo, "Example Non-Judicial Enforcement Documents for Obtaining Compliance with National Municipal Policy," August 20, 1984.