HAZARDOUS WASTE

CIVIL ENFORCEMENT RESPONSE POLICY

March 15, 1996

The policies and procedures set forth in this document are intended solely for the guidance of employees of the Environmental Protection Agency and State Enforcement Agencies. They are not intended to, nor do they, constitute rulemaking by EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

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I. INTRODUCTION

The goal of the Resource Conservation and Recovery Act (RCRA) compliance monitoring and enforcement program is to attain and maintain a high rate of compliance within the regulated community. This goal is accomplished by establishing a comprehensive monitoring and inspection program, and addressing the most serious violators with timely, visible, and effective enforcement actions. A timely and appropriate enforcement action will return the facility to compliance as expeditiously as possible, as well as deter future or potential non-compliance.

In December of 1984, the U.S. Environmental Protection Agency's (EPA's) Office of Solid Waste and Emergency Response issued the first RCRA Enforcement Response Policy (ERP). **The ERP sets forth response guidance for violations occurring pursuant to RCRA where the State or EPA intends to pursue civil action, including administrative or judicial action.**

The 1984 ERP strengthened the RCRA enforcement program by establishing guidance on timely and appropriate enforcement response, and delineating conditions for EPA enforcement actions in authorized States. The policy promoted the concept of prompt escalation of an action when compliance was not achieved. In addition, the policy directed enforcement efforts to the most serious violators. The 1984 ERP was modified in December 1987.

The 1987 Revised ERP addressed changes in the program resulting from the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA. The HSWA Amendments necessitated modifications to the 1984 ERP in order to incorporate the broadening programmatic responsibilities, including among other things corrective action requirements, land disposal restrictions and an emphasis on hazardous waste generators, treatment and storage facilities, as well as land disposal facilities.

Since the development of the 1987 ERP, the RCRA enforcement program has evolved. The RCRA regulated universe has expanded due to the promulgation of new regulations. With the expansion of previous enforcement authorities related to federal facilities (i.e., 1992 Federal Facilities Compliance Act), the 1996 ERP will now address all violating facilities including federal facilities, in accordance with the criteria set forth in this document. In addition, EPA continues to develop a multi-media approach to facility compliance and encourages the use of national, Regional and State enforcement initiatives to address areas of non-compliance. Finally, EPA and State agencies are working together to authorize States for significant portions of the RCRA program. State primacy in implementing RCRA

necessitates that the ERP accommodate the individual enforcement processes utilized by State agencies in achieving compliance with RCRA. The previous ERPs primarily reflected EPA's federal enforcement process. The 1996 ERP will address the need for increased flexibility, as well as incorporate program developments from recent years.

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The revised Hazardous Waste Enforcement Response Policy will be effective on April 15, 1996.

II. RELATIONSHIP TO OTHER AGENCY POLICY AND GUIDANCE

The ERP is one of several documents that, together, define the national RCRA Enforcement Program. The ERP provides a general framework for identifying violations and violators of concern and describing timely and appropriate enforcement responses to non-compliance. The ERP should be read in conjunction with the Office of Enforcement and Compliance Assurance (OECA) Memorandum of Agreement (MOA). The MOA establishes annual priorities for compliance monitoring and enforcement actions as identified by EPA Headquarters media programs, Regions and States. The MOA encourages use of the full range of tools to achieve compliance while emphasizing vigorous, timely, and high quality enforcement against violators of environmental statutes.

Other basic guidance utilized in the RCRA Enforcement Program include the Policy Framework for State/Federal Enforcement Agreements (revised August 1986, May 1992, February 1993, and July 1993) and the National Criteria for a Quality Hazardous Waste Management Program Under RCRA (July 1986). The Policy Framework document is an Agency-wide guidance that calls for enforcement agreements between EPA and States. It describes what the State/EPA enforcement agreements should address, including oversight criteria and measures, information needs, procedures for notification and consultation, and criteria for direct federal enforcement. The requirements of the MOA, RCRA Implementation Plan, and other RCRA guidance are made applicable to the States through the enforcement agreements.

The National Quality Criteria document establishes basic goals, objectives, and general performance expectations to assure that EPA and the States have a common understanding of what must be accomplished to effectively implement the RCRA program. The National Quality Criteria document also outlines how performance is to be measured and describes how EPA and the States should respond when criteria are not met. The enforcement program criteria modifications contained in the 1996 ERP supersede and replace all timely and appropriate criteria outlined in the Performance Expectations section of the National Quality Criteria document.[1] To the extent that a violator is deemed eligible for consideration under the Compliance Incentives for Small Businesses Policy, Small Communities Policy, the Voluntary Environmental Self-Policing and Self-Disclosure Policy, or the Audit Policy, the ERP will function as a supplement to these policies. The Audit Policy states that it "supersedes any inconsistent provisions in media-specific penalty or enforcement policies... To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy," provided that a regulated entity may not receive additional penalty mitigation for satisfying similar conditions under other policies for the same violations. "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (Dec. 22, 1995).

The ERP does not address the use of an order pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), to compel corrective action; the use of an order pursuant to Section 3013 of RCRA, 42 U.S.C. § 6934, to compel monitoring, testing and analysis; or the use of an order pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, to address situations that may present an imminent and substantial endangerment to human health or the environment. In addition, the ERP does not address violations determined to be potentially criminal in nature and investigated and prosecuted pursuant to Federal or State criminal authorities. Guidance on the use of these authorities is set forth in other policy documents except, and to the extent that, the ERP applies when RCRA orders, decrees, or judgments are violated.

III. DEFINITIONS

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[1] The 1986 National Criteria For A Quality RCRA Program permits adjustments to Regional/State Performance Expectations. The 1996 ERP modifies previous enforcement response criteria to encompass program developments, unique State authorities and individual State enforcement processes.

A. **Classifications of non-compliance:** Violators are classified based on an analysis of the facility's overall compliance with RCRA which includes prior recalcitrant behavior or a history of non-compliance. This ERP establishes two categories of violators: Significant Non-Compilers (SNC) and other Secondary Violators (SV).

1. **Significant Non-Compilers (SNCs)** are those facilities which have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements. The actual or substantial likelihood of exposure should be evaluated using facility specific environmental and exposure information whenever possible. This may include evaluating potential exposure pathways and the mobility and toxicity of the hazardous waste being managed. However, it should be noted that environmental impact alone is sufficient to cause a facility to be a SNC, particularly when the environmental media affected require special protection (e.g., wetlands or sources of underground drinking water). Facilities should be evaluated on a multi-media basis; however, a facility may be found to be a chronic or recalcitrant violator based solely on prior RCRA violations and behavior.

2. **Secondary Violators** are violators which do not meet the criteria listed above for SNCs. Secondary Violators (SV) are typically first time violators and/or violators which pose no actual threat or a low potential threat of exposure to hazardous waste or constituents. A facility classified as a SV should not have a history of recalcitrant or non-compliant conduct. Violations associated with a SV should be of a nature to permit prompt return to compliance with all applicable rules and regulations.

B. **Enforceable** means the instrument creates an independent, affirmative obligation to comply and imposes sanctions for the prior failure to comply.

C. **Evaluation Date** is the first day of the inspection or record review during which a violation is identified, regardless of the duration of the inspection or the stage in the inspection at which the violation is identified.

D. **Formal Enforcement** is an action which mandates compliance and initiates a civil, criminal, or administrative process which results in an enforceable agreement or order.

E. **Implementing Agency** is the agency with responsibility for undertaking the required enforcement response.

F. **Informal Enforcement** are those actions other than formal enforcement that notify the facility of its non-compliance and establish a date by which that non-compliance is to be corrected.

G. Facilities will be deemed to have **Returned to Compliance** when they are in full physical compliance with regulatory and/or statutory requirements or when they are in full compliance with a compliance schedule established in a formal enforcement action (either an order or an agreement).

H. **Sanctions** include penalties as well as other tangible obligations, beyond returning to compliance, that are imposed upon the owner/operator.

IV. APPROPRIATE ENFORCEMENT RESPONSE

The selection of an appropriate enforcement response is an integral component of the RCRA enforcement and compliance assurance program. An appropriate response will achieve a timely return to compliance and serve as a deterrent to future non-compliance by eliminating any economic advantage received by the violator. This section establishes the criteria for determining when formal and informal enforcement responses are appropriate.

A. FORMAL ENFORCEMENT RESPONSE

The designation of Significant Non-Complier (SNC) is intended to identify non-compliant facilities for which formal enforcement is appropriate. Specifically, SNCs are those facilities which have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.

The actual or substantial likelihood of exposure should be evaluated using facility specific environmental and exposure information whenever possible. This may include evaluating potential exposure pathways and the mobility and toxicity of the hazardous waste being managed. However, it should be noted that environmental impact alone is sufficient to categorize a facility as a SNC, particularly when the environmental media affected require special protection (e.g., wetlands or sources of underground drinking water).

Facilities should be evaluated on a multi-media basis to determine whether they are chronic violators or recalcitrant. However, facilities may also be found to be chronic or recalcitrant violators based solely on prior RCRA violations and behavior.

Due to the nature of their violations, a SNC should be addressed through a formal enforcement response. This response must mandate compliance and initiate a civil, criminal, or administrative process which results in an enforceable agreement or order. The formal enforcement response should also seek injunctive relief that ensures the non-compliant facility expeditiously returns to full physical compliance.

An enforcement response against a SNC by the implementing agency will be considered appropriate when economic sanctions in the form of penalties, or alternative punitive mechanisms, are incorporated in the formal enforcement response. Penalties incorporated in the formal enforcement response, or alternative punitive mechanisms that recover the economic benefit of non-compliance plus some appreciable amount reflecting the gravity of the violation will be considered appropriate. The portion of the penalty which does not account for the economic benefit of non-compliance may be addressed through the use of Supplemental Environmental Projects (SEPs) or Pollution Prevention Projects as deemed appropriate by the implementing agency.[2] The Agency recognizes, however, that recoupment of the full amount of economic benefit of non-compliance plus some appreciable portion of gravity may not be possible in every case. A lesser penalty amount may be appropriate where, for example, the violator demonstrates an inability to pay the full penalty. In addition, there may be circumstances where the nature of the violation(s) and the manner of correction advance important policy objectives such that substantial mitigation is warranted (e.g., where the violation was discovered by the violator during an audit or self-evaluation, and thereafter promptly and voluntarily disclosed to the government and corrected, or where the violation by a small business was disclosed and corrected pursuant to a government-approved compliance assistance program).

In addition to the injunctive relief discussed above, the implementing agency is encouraged to impose other measures

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[2] Federal enforcement actions that include a SEP or Pollution Prevention project should comply with the criteria set forth in the 1995 Interim Revised Supplemental Environmental Projects Policy.

against the non-compliant facility. Examples of non-penalty measures include, but are not limited to, SEPs, permit decisions, suspension and debarment proceedings, receivership or special masters.

B. INFORMAL ENFORCEMENT RESPONSE

If a facility is found to be in violation but is not designated a SNC it is designated a SV. An informal enforcement response is the minimally appropriate enforcement response for all SVs. An informal enforcement response consists of a recitation of the violations and a schedule for returning the facility to full compliance with all substantive and procedural requirements of applicable regulations, permits and statutes.[3] Facilities which fail to return to compliance following an informal enforcement response should be re-classified as a SNC in accordance with Section V. A. set forth below. The appropriate enforcement response for a re-classified facility is the immediate escalation to formal enforcement.

V. RESPONSE TIME GUIDELINES

This section establishes response time guidelines for formal and informal enforcement actions. The guidelines are designed to expeditiously return non-compliant facilities to compliance with all applicable requirements of the Federal RCRA program or the authorized State equivalent. Response times are divided into two categories, formal enforcement actions and those for informal enforcement actions. A timeline depicting these guidelines is attached. The timeline establishes response times for three types of formal enforcement. The timeline also establishes a 90 day deadline for the implementing agency to determine whether the appropriate enforcement response is a formal or informal enforcement action. Finally, the timeline establishes timeframes for the escalation from an informal response to a formal enforcement response due to the violator's failure to return to compliance.

A. EVALUATION DATE

The evaluation date will be defined as the first day of any inspection or record review during which a violation is identified, regardless of the duration of the inspection or the

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[3] As noted in section II, above, "Relationship to other Agency Policy and Guidance," compliance assistance efforts, such as those set forth in the Compliance Incentives for Small Business policy, may be applied in conjunction with this policy.

stage in the inspection at which the violation is identified. The first day of the inspection is the evaluation date, regardless of the duration of the inspection or the stage in the inspection which the violation is discovered. For violations detected through some method other than record reviews or inspection, the evaluation date will be the date upon which the information (e.g., self-reporting violators) becomes available to the implementing agency. In the case of a State referral to EPA pursuant to Section VI. below, the evaluation date will be considered the date of the referral to EPA. In the case of SV facilities which are reclassified for failure to return to full compliance (See Section IV. B. above), the evaluation date will be considered the first day of discovery of non-compliance with the compliance schedule established through the informal enforcement response.

B. FORMAL ENFORCEMENT RESPONSE TIME

The attached timeline depicts the target response times for enforcement pursuant to RCRA. The timeline establishes target response times for three types of formal enforcement: (1) final or consent orders; (2) unilateral orders; and (3) referrals to the Department of Justice or the Attorney General's Office. The timeline delineates separate response times for formal enforcement and the escalation to formal enforcement from informal enforcement.

(1) Final or consent orders are those documents for which no appeal remains before the trier of fact. These orders represent the agreement of the parties involved or the decision of a trier of fact.

(2) Unilateral or initial orders are issued by the implementing agency and assert the agency's position that violations have occurred. However, the respondent/defendant is afforded the opportunity to appeal the agency's determination of violations to a trier of fact.

(3) For purposes of the ERP, a referral to the Department of Justice or the State Attorney General's Office occurs when the matter is officially transmitted to those offices for action. A federal referral is considered to be initiated upon the signature of the referral package by the Regional Administrator or his/her designee, or the Assistant Administrator for OECA, as appropriate. With regard to the State's referral to the Attorney General's Office, each State agency should establish a formal process for requesting that the Attorney General's Office initiate

enforcement proceedings on behalf of the State.[4] Completion of that process would then constitute referral to the Attorney General's Office as set forth in the timeline.

C. EXCEEDANCE OF FORMAL ENFORCEMENT RESPONSE TIME

Response times articulated in the ERP should be adhered to by the Regions and States to the greatest extent possible. However, there are recognized circumstances (see discussion below) which may dictate an exceedance of the standard response times. In this revision to the ERP, a ceiling of **20%** per year is being established for consideration of cases involving unique factors which may preclude the implementing agency from meeting the standard response times. The **20%** exceedance figure should be calculated based on the total number of civil cases existing in the Region or State at any given time.

In cases where response times will be exceeded due to case specific circumstances, the implementing agency must prepare a brief justification for the delay and develop an alternative schedule for case resolution. In the event that the Region does not find adequate basis within the ERP guidelines for the State's delay in enforcement, EPA reserves the right to initiate federal action. EPA will conduct periodic evaluations of Regional and State enforcement response times for the purpose of determining appropriate ceiling levels. Authorized State programs will have response time reviews performed during evaluations conducted by the Region pursuant to 40 CFR Section 35.150.

The Regions and States should strive to comply with the standard response times contained in the ERP. However, when the following considerations exist, up to **20%** of the Regional/State enforcement cases may exceed the standard response times:

- Cases involving violations of two or more media; (e.g., environmental protection statutes)
- Cases involving more than one facility;
- Potential criminal conduct which is under investigation;
- National enforcement initiatives;

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[4] All references to the State Attorney General's Office in this document should be interpreted as including any State enforcement body that possesses the authority to initiate actions in State Court.

- Cases involving nationally significant issues;[5]
- Novel legal issues or defenses;
- Site abandonment;
- Additional sampling or information requests are required to confirm the violation(s); and
- Need for outside technical experts.

The Agency recognizes that circumstances may arise where the enforcement response times specified may be insufficient to prepare and initiate the appropriate enforcement response as set forth in this policy. It is also recognized that instances may occur where immediate action is appropriate. The Agency expects that the Region or State will take priority enforcement action in the following situations:

- Where a release or other violation poses an immediate threat to human health or the environment.
- Where activities of the owner/operator must be stopped or redirected, such as cases in which the Agency or the State seek to immediately halt improper construction or installation of a regulated unit.
- Where the threat of a dissipation of assets would undermine closure, post-closure, or corrective action activities.
- Where there is an imminent statute of limitations deadline or bankruptcy deadline.

D. INFORMAL ENFORCEMENT RESPONSE TIME

Once a determination is made to utilize an informal enforcement mechanism, a violator is given notice of its non-compliance and the implementing agency will establish a date by which all violations must be corrected. The objectives of an informal enforcement response are to compel the violator to cease

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[5] Requests for exceedance of the formal enforcement response times due to existence of nationally significant issues are generally reserved for EPA enforcement responses.

its non-compliant activities and ensure that full physical compliance is achieved in the shortest possible time frame.

At the time a violator is formally notified of the violation determination it is given a compliance date which establishes a deadline for the violatior to correct all known violations. A correction period during which a violator should correct all known violations should not exceed 90 days. For a violator to be considered a candidate for informal enforcement, violations must be of a nature that will permit such a prompt return to compliance with all applicable rules and regulations. Violators addressed through an informal enforcement response should not have a history of recalcitrant or non-compliant conduct.

Violators that will require an extended compliance schedule in order to achieve full physical compliance should be addressed through a formal enforcement response. The compliance date should reflect the minimum period of time necessary for the violator to return to full physical compliance. A violator that has corrected its violations on or before the assigned compliance date is officially deemed to have returned to compliance.

If a violator is unable to meet the assigned compliance deadline it must immediately notify the implementing agency and provide that agency with documentation supporting the inability to correct violations by the prescribed compliance date. A decision to extend the compliance date should be made only when supported by sufficient documentation. Failure to achieve full physical compliance by the compliance date or a failure to notify the implementing agency of the inability to correct violations should result in an escalation to formal enforcement. The first day in exceedance of compliance date is to be considered the evaluation date for the purpose of escalating the action to a formal enforcement response. For liability and penalty assessment purposes, however, nothing in this ERP should preclude the assessment of penalties for any violations which occur during the correction period.

VI. EPA ACTION IN AUTHORIZED STATES

States with authorized RCRA programs have the primary responsibility for ensuring compliance with the RCRA program requirements. However, EPA retains the authority to take independent enforcement action in authorized States in accordance with Section 3008(a)(2) of RCRA. Pursuant to this Section, EPA may take direct action after notice to the authorized State. EPA authority to initiate an independent enforcement action is not limited to the examples set forth, the Agency may take direct

action after consideration of all pertinent factors and consultation with the State.

Notwithstanding Section 3008(a)(2) of RCRA, EPA will generally take civil enforcement actions in authorized States only under the following circumstances:

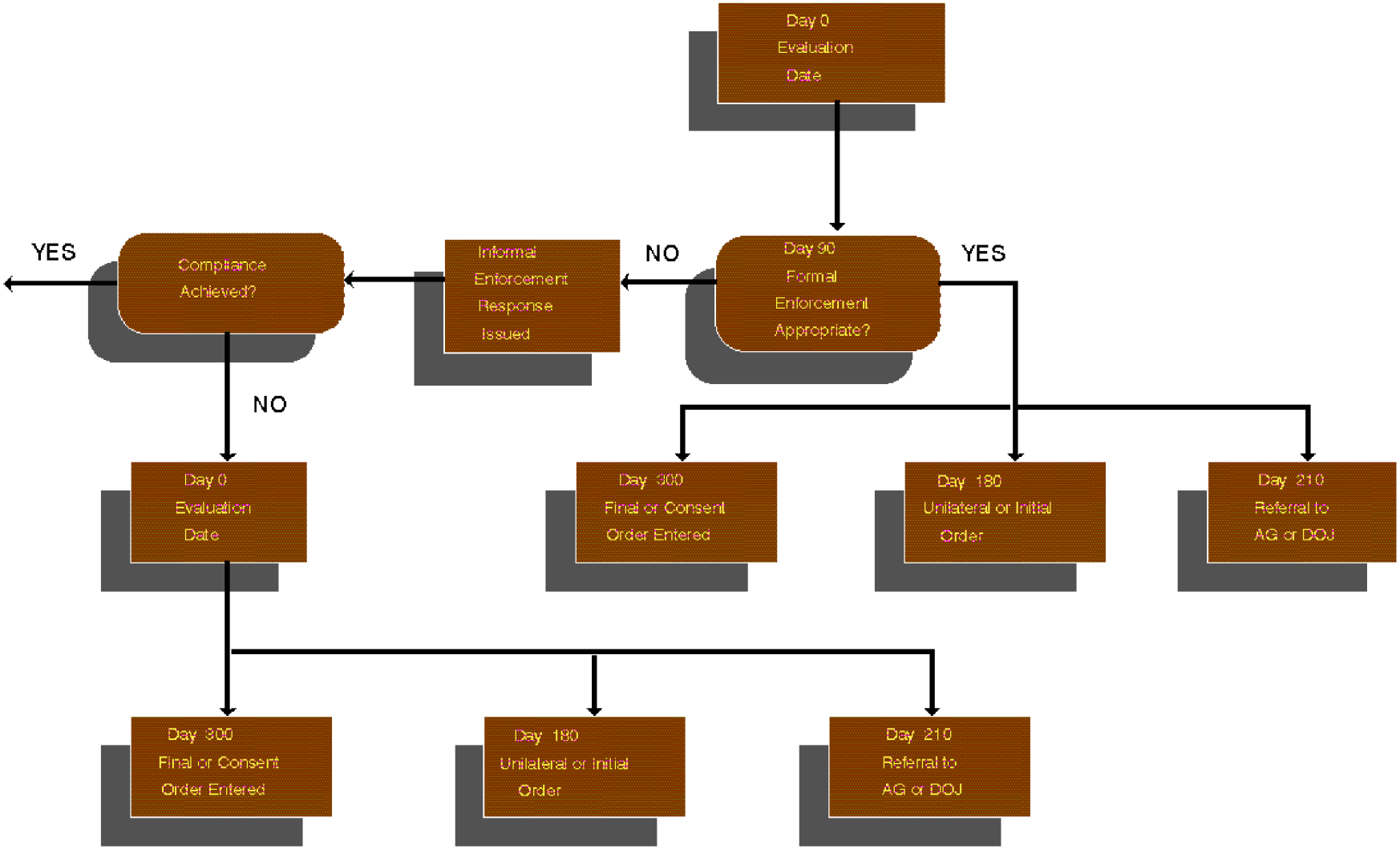
- The State requests that EPA pursue a federal action and provides justification based on unique, case specific information;
- The State is not authorized to take action or State authority is limited;
- The State fails to take timely and/or appropriate action;
- Cases involving issues that could establish a legal precedent or in which federal involvement is needed to ensure national consistency;
- Cases involving multi-state, multi-regional "national violators;"
- Cases involving interstate pollution problems associated with watersheds, air basins or other geographic units that cross state lines; or
- Cases brought to prevent non complying companies from obtaining an economic advantages over their competitors, thereby maintaining a "level playing field" for the regulated community.

The previous Sections described the criteria for timely and appropriate action in response to violators in two (2) distinct categories (SNC and SV). The response times set forth in Section V. B. establish clear guidelines for a Region or State to follow during a formal enforcement process. If a State fails to take formal enforcement action within the standard response time, the State must provide the Regional office with adequate justification for consideration of an alternative schedule.

The Memorandum of Agreement (MOA), Memorandum of Understanding (MOU), or other agreement between EPA and each State should detail a process for notifying the State of EPA intent to initiate an independent enforcement action. The Regional office may need to conduct its own case development inspection, and prepare additional documentation before proceeding to initiate an action.

A State may find it necessary and advantageous to refer specific cases to the Region for federal enforcement. If a State decides to refer a case to EPA for federal enforcement, this must be completed within **90** days of the original Evaluation Date. For the purposes of establishing a new Evaluation Date, the date of the referral to EPA is considered the Evaluation Date. The State should provide all case development information to the Region as part of the referral package. This should facilitate a reduction in the time needed for Regional case development.

Timeline For Enforcement Pursuant to The Resource Conservation and Recovery Act



Note: All days are calendar days measured from day 0.