STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT
NEW MEXICO ENVIRONMENT DEPARTMENT

IN THE MATTER OF THE
COMPLIANCE ORDER ISSUED TO
KIRTLAND AIR FORCE BASE
KAFB NM
ID NO. NM 95724423

NO. HRM 97-01 (CO)

STATUS REPORT REGARDING SETTLEMENT PROGRESS

The New Mexico Environment Department (NMED) hereby submits this status report regarding settlement progress in the above-entitled matter pursuant to the Hearing Officer's order dated June 17, 1997. NMED and Respondent has been unable to reach an agreement in principle. NMED has provided Respondent a proposed agreement in principle and requested to receive a response on or before August 29, 1997.

Therefore, to accommodate the parties' efforts to achieve a settlement, NMED hereby requests that the Hearing Officer set a hearing date in this matter unless, within thirty (30) days after entry of an order, he receives notice that the parties have reached an agreement in principle and intend to execute a Final Stipulated Order.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **STATUS REPORT REGARDING SETTLEMENT PROGRESS** was mailed on August 14th, 1997, to the following:

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SUSAN MCMICHAEL

EPA POLICY ON THE USE OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS IN ENFORCEMENT SETTLEMENTS

February 12, 1991

Supplemental Environmental Projects

A. Introduction

In settlement of environmental enforcement cases, the United States will insist upon terms which require defendants to achieve and maintain compliance with Federal environmental laws and regulations. In certain instances, additional relief in the form of projects remediating the adverse public health or environmental consequences of the violations at issue may be included in the settlement to offset the effects of the particular violation which prompted the suit. As part of the settlement, the size of the final assessed penalty may reflect the commitment of the defendant/respondent to undertake environmentally beneficial expenditures ("Supplemental Environmental Projects").

Even when such conditions serve as a basis for considering a Supplemental Environmental Project, the Agency's penalty policies will still require the assessment of a substantial monetary penalty according to criteria described in A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (GM-22), generally at a level which captures the defendant/respondent's economic benefit of noncompliance plus some appreciable portion of the gravity component of the penalty. Each administrative settlement in which a "horizontal" Supplemental Environmental Project or substitute performance is proposed (see below) must be approved by the Assistant Administrator for Enforcement, and, where required by the Agency's delegations policy, the media Assistant Administrator. Judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

EPA will expand its approach to Supplemental Environmental Projects while also maintaining a nexus (relationship) between the original violation and the supplemental project. EPA may approve a supplemental project so long as that project furthers the Agency's statutory mandates to clean up the environment and deter violations of the law.[1] Accordingly, supplemental projects

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[1] A supplemental project cannot be used to resolve violations at a facility other than the facility or facilities which are the subject of the enforcement action. This would run counter to deterrence objectives, since it would effectively give a company a penalty "break" for violations at one facility for undertaking what amounts to legally required compliance efforts at another facility. Such a scenario would operate to reward recalcitrance, poor-management practices, and non-compliance.

may be considered if: (1) violations are corrected through actions to ensure future compliance; (2) deterrence objectives are served by payment of a substantial monetary penalty as discussed above; and (3) there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the supplemental project.

All supplemental projects must improve the injured environment or reduce the total risk burden posed to public health or the environment by the identified violations. The five categories of permissible supplemental activities are pollution prevention, pollution reduction, environmental restoration, environmental auditing projects, and public awareness projects which are directly related to addressing compliance problems within the industry within which the violation took place. EPA negotiators should make it clear to a defendant/respondent interested in proposing a supplemental project that the Agency is looking only for these types of projects (cf. section F, below).

Under no circumstances will a defendant/respondent be given additional time to correct the violation and return to compliance in exchange for the conduct of a supplemental project.

B. Categories of Supplemental Environmental Projects

Five categories of projects will be considered as potential Supplemental Environmental Projects, subject to meeting the additional criteria described in succeeding sections.

1. Pollution Prevention Projects

Consistent with the Agency's (forthcoming?) Pollution Prevention Policy Statement and Pollution Prevention Strategy, a pollution prevention project substantially reduces or prevents the generation or creation of pollutants through use reduction (i.e., by changing industrial processes, or by substituting different fuels or materials) or through application of closed-loop processes. A project which substantially reduces the discharge of generated pollutants through innovative recycling technologies may be considered a pollution prevention project if the pollutants are kept out of the environment in perpetuity.

2. Pollution Reduction Projects

A pollution reduction project is defined as a project which goes substantially beyond compliance with discharge limitations to further reduce the amount of pollution that would otherwise be discharged into the environment. Examples include a project that reduces the discharge of pollutants through more effective end-of-pipe or stack removal technologies; through improved operation

and maintenance; or recycling of residuals at the end of the pipe.[2]

Sometimes an acceptable pollution reduction project may encompass an "accelerated compliance project". For instance, assuming there is a statutory or regulatory schedule for pollution phaseout or reduction (or is likely to be proposed in the foreseeable future, e.g., an upcoming rulemaking), if a defendant/respondent proposes to complete a phaseout or reduction at least 24 months ahead of time, and such proposal for accelerated compliance can be demonstrated to result in significant pollution reduction (i.e., one can objectively quantify a substantial amount of pollution reduction due to the accelerated compliance) then such a proposal may proceed to be evaluated according to the rest of the appropriateness criteria below. In addition, if the defendant/respondent substitutes another substance for the one being phased out, he has the burden to demonstrate that the substance is non-polluting, otherwise no supplemental environmental project will be allowed and, indeed, additional liability may accrue.

3. Projects Remediating Adverse Public Health or Environmental Consequences (Environmental Restoration Projects)

An environmental restoration project is defined as a project that not only repairs the damage done to the environment because of the violation, but which goes beyond repair to enhance the environment in the vicinity of the violating facility.

4. Environmental Auditing Projects

Environmental Auditing that represents general good business practices are not acceptable supplemental projects under this policy (cf. Section E).[3] However, such a project may be considered by the Agency if the defendant/respondent undertakes additional auditing practices designed to seek corrections to

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[2] Where the obligation to reduce the pollution is already effective, or is subject to an "as soon as practicable" or comparable standard, a proposal to further reduce pollution would not fulfill the definition of a pollution reduction project, and would not be appropriate.

[3] It should be noted that the Agency has the authority to require an environmental audit as an element of injunctive relief when it deems it appropriate given the fact pattern surrounding the violation subject to the usual limits on the scope of injunctive relief.

existing management and/or environmental practices whose deficiencies appear to be contributing to recurring or potential violations. These other potential violations may encompass not only the violating facility, but other facilities owned and operated by the defendant/respondent, in order to identify, and correct as necessary, management or environmental practices that could lead to recurring or future violations of the type which are the basis for the enforcement action.*

Audit projects which fall within the scope of this policy can be justified as furthering the Agency's legitimate goal of encouraging compliance with and avoiding, as well as detecting, violation of federal environmental laws and regulations. Such audits will not, however, be approved as a supplemental project in order to deal with similar, obvious violations at other facilities.

5. Enforcement-Related Environmental Public Awareness Projects

These projects are defined as publications, broadcasts, or seminars which underscore for the regulated community the importance of complying with environmental laws or disseminate technical information about the means of complying with environmental laws. Permissible public awareness projects may included sponsoring industry-wide seminars directly related to correcting widespread or prevalent violations within an industry, e.g., a media campaign funded by the violator to discourage fuel switching and tampering with automobile pollution control equipment or one which calls for the defendant/respondent to organize a conference or sponsor a series of public service announcements describing how violations were corrected at a facility through the use of innovative technology and how similar facilities could also implement these production changes.

Public Awareness Projects directly serve Agency deterrence objectives and contribute indirectly to Agency enforcement efforts. Though they are not subject to the nexus requirement applicable to other supplemental environmental projects, they must be related to the type of violations which are/were the subject of the underlying lawsuit. Defendants/respondents who fund or implement a public awareness project must also agree to publicly state in a prominent manner that the project was undertaken as part of the settlement of a lawsuit brought by the Agency or a State. These projects will be closely scrutinized to ensure that they fulfill the legitimate objectives of this policy in all respects.

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* Of course, this requirement is subject to the qualifications of footnote 1.

6. Projects Not Allowed as Supplemental Projects

Several types of projects, which have been proposed in the past, would no longer be approveable Supplemental Environmental Projects. Examples of projects that would not be eligible include:

1. general educational or environmental awareness-raising projects (e.g., sponsoring public seminars about, or inviting local schools to tour, the environmental controls at a facility; promoting recycling in a community);

2. contribution to research at a college or university concerning the environmental area of noncompliance or concerning any other area of environmental study;

3. a project unrelated to the enforcement action, but otherwise beneficial to the community e.g., contribute to local charity).

C. "Nexus" (Relationship) of Supplemental Environmental Project to the Violation

The categories of Supplemental Environmental Projects described above (except for Public Awareness Projects) may be considered if there is an appropriate "nexus" or relationship between the nature of the violation and the environmental benefits to be derived from the type of supplemental project. For example, the "nexus" between the violation and an environmental restoration project exists when it remediates injury caused by the same pollutant at the same facility giving rise to the violation. Such projects must further the Agency's mission as defined by appropriate statutory mandates, including the purpose sections of the various statutes under which EPA operates. The Agency will evaluate whether the required "nexus" between the pollutant discharge violation and the project exists.

1. Requirements for Remediation Projects

Examples of circumstances presenting an appropriate nexus include:

a. A project requiring the purchase of wetlands which then act to purge pollutants unlawfully discharged in receiving waters. In this example, EPA will evaluate whether the required "nexus" between the pollutant discharge violations and the wetlands to be purchased can be established. EPA will evaluate the nexus between the project and the violation in terms of both

geography and the pollution treatment benefits of the wetlands.

b. A project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

c. A "restoration" project, such as a stream sediment characterization or remediation program to determine the extent and nature of pollution caused by the violation and to formulate and implement a plan for remediating sediment near the facility. Such a stream sediment characterization or restoration project, if obtainable as injunctive relief pursuant to the statutory provisions of the Clean Water Act in the particular case, would not be approveable as a supplemental project.

2. Nexus for Pollution Prevention/Pollution Reduction/ Environmental Restoration/Environmental Auditing Projects

The "nexus" for pollution prevention, pollution reduction, environmental restoration and environmental auditing projects may either be vertical or horizontal, as described below.

a. Vertical "Nexus"

A "vertical" nexus exists when the supplemental project operates to reduce pollutant loadings to a given environmental medium to offset earlier excess loadings of the same pollutant in the same medium which were created by the violation in question. Even if the violations are corrected by reducing pollutant loadings to the levels required by law, further reductions may be warranted in order to alleviate the risk to the environment or public health caused by past excess loadings. Typically, such projects follow a violation back into the manufacturing process to address the root cause of the pollution. Such reductions may be obtained from the source responsible for the violation or, in appropriate cases, may be obtained from another source, either upstream, up gradient or upwind of the responsible source.

For example, if pollutants were discharged in violation of the Clean Water Act from a facility at a certain point along a river, an acceptable pollution reduction project would be to reduce discharges of that same pollutant at an upstream facility on the same river. Another classic example of a "vertical" pollution prevention activity is the alteration of a production process at a facility which handles a portion of the manufacturing process antecedent to that which caused the

violation of the regulatory requirement in a way that yields reductions or total elimination of the residual pollutant discharges to the environmental media assaulted by the violation. Both of these examples present the necessary nexus between the violation and the supplemental project.

b. Horizontal "Nexus"

A "horizontal" nexus exists when the supplemental project involves either (a) relief for different media at a given facility or b) relief for the same medium at different facilities. The nexus between supplemental projects in this category and the violation must be carefully scrutinized. The nexus will be met only if the supplemental project would reduce the overall public health or environmental risk posed by the facility responsible for the violation or enhances the prospects for reducing or eliminating the likelihood of future violations substantially similar to those which are the basis for the enforcement action. Approval of such projects is appropriate only where the terms of the settlement insure that the defendant/respondent will be subject to required injunctive relief prescribed by the compliance and deterrence policies stated in the various Acts and their implementing regulations. In those circumstances, the Agency believes the required nexus to the statutory goals has been met.

Following are examples of approveable projects demonstrating a "horizontal" nexus to the violation:

1. Violations of the Resource Conservation and Recovery Act (RCRA) or the Clean Water Act may have exposed the neighboring community to increased health risks because of drinking water contamination. In addition to correcting these violations, it may be appropriate to reduce toxic air emissions from the same facility in order to compensate for the excess health risk to the community which resulted from the RCRA or CWA violations.

2. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other facilities within the same air quality basin or water shed as at the facility which violated legal requirements applicable to releases of the same pollutant. In this case, the overall supplemental project would be designed to reduce the overall health or environmental risk posed by related operations to the environment or to the health of residents in the same geographic vicinity by reducing pollutant discharges to the air basin or watershed and to compensate for past excess discharges.

3. A supplemental project is proposed which reduces pollutant discharges at a defendant/respondent's other (non-violating) facility(ies). Such a project would be approveable where the violating and non-violating facilities are engaged in the same production activities and use the same production processes, where appreciable risks of violations and legal requirements applicable to releases of that same pollutant substantially similar to those at the violating facility are posed by the non-violating facility(ies), and where the defendant/respondent can establish that significant economies of scale would be achieved by incorporating pollution prevention process changes at both the violating and non-violating facilities. Alternatively, the settlement could call for the defendant/respondent to substitute input chemicals across all such facilities (e.g., replace higher toxic solvents with lower toxic solvents at all paint manufacturing plants) or to reduce the emissions loadings of particular emissions at all such facilities as part of a NESHAPS settlement. Such projects would, therefore, reduce the overall health or environmental risk posed by such operations to the environment or to the health of residents in the same geographic vicinity.

4. In settlement of a Toxic Substances Control Act (TSCA) PMN (premanufacture notification) violation for manufacturing a polymer without providing formal advance notice at a facility, the defendant/respondent could establish a closed loop recycling system to reduce the amount of that facility's product manufacturing waste which must be sent to a RCRA Subtitle C landfill. Operating the facility in violation of TSCA created a risk of unwarranted health or environmental injury. If TSCA penalty and injunction requirements have been met, then the supplemental project could be justified on the grounds that it would compensate for this unwarranted risk by reducing the overall health or environmental risk presented by the facility.

After the project category and "nexus" criteria have been met, a potential supplemental project must also meet the criteria described in the following sections, below. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before a supplemental project may be accepted.

D. <u>Status of the Enforcement Action/Compliance History of Defendant/Respondent</u>

Any defendant/respondent against whom the Agency has taken an enforcement action may propose to undertake a supplemental project at any time prior to resolution of the action, although

the Agency should consider both the status of the litigation/administrative action and the resources that have been committed to it before deciding whether to accept it. In addition, the respondent's enforcement history and capability to successfully complete the project must be examined during evaluation of a supplemental project proposal.

The Agency negotiators must also consider whether the defendant/respondent has the technical and economic resources needed to successfully implement the supplemental project. In addition, a respondent who is a repeat offender may be a less appropriate respondent from which to receive and evaluate a supplemental project proposal than a first time violator.

E. Main Beneficiary of a Supplemental Environmental Project

The Federal Government's sole interest in considering supplemental projects is to ameliorate the adverse public health and/or environmental impacts of violations. Projects are not intended to reward the defendant/respondent for undertaking activities which are obviously in his economic self-interest (e.g., update or modernize a plant to become more competitive). Therefore, as a general rule, these projects will usually not be approved when they represent a "sound business practice" , i.e., capital expenditures or management improvements for which the Federal negotiators may reasonably conclude that the regulated entity, rather than the public, is likely to receive the substantial share of the benefits which accrue from it.

The only exception to the prohibition against acceptance of a supplemental project which represents a "sound business practice" is for a pollution prevention project. Although a pollution prevention project can be viewed as a "sound business practice" since (by definition) it is designed both to make production more efficient and reduce the likelihood of noncompliance, it also has the advantage of potentially providing significant long-term environmental and health benefits to the public. Therefore, the "sound business practice" limitation will be waived only for pollution prevention projects if the Federal negotiators decide, after due consideration and upon a clear demonstration by the defendant/respondent as to what the public health and/or environmental benefits would be, that those benefits are so substantial that the public interest would be best served by providing additional incentives to undertake the project.

F. Extent to Which the Final Assessed Penalty can Reflect a Supplemental Environmental Project

Although supplemental projects may directly fulfill EPA's

goal of protecting and restoring the environment, there is an important countervailing enforcement goal that penalties should have the strongest possible deterrent effect upon the regulated community. Moreover, the Agency's penalty policies require the assessment of a substantial monetary penalty according to criteria described in "Implementing EPA's Policy on Civil Penalties" GM-22, generally at a level which captures the defendant/respondent's economic benefit[5] of noncompliance plus some appreciable portion of the gravity component of the penalty.[6]

In addition, EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project. EPA should calculate the net present after tax value of the supplemental project at the time that the assessed penalty is being calculated. If a supplemental project is approved, a portion of the gravity component of the penalty may be mitigated by an amount up to the net present after-tax cost of the supplemental project, depending on the level of environmental benefits to the public.

G. Supplemental Environmental Projects for Studies

Supplemental Environmental Projects for studies will not be allowed without an accompanying commitment to implement the results. First, little or no environmental benefit may result in the absence of implementation. Second, it is also quite possible that this type of project is one which the violator could reasonably be expected to do as a "sound business practice".

Pollution prevention, pollution reduction and environmental restoration studies, as well as environmental audits, are defined narrowly for purposes of meeting Supplemental Environmental Project policy guidelines. They will only be eligible as supplemental projects if they are a part of an Agency-approved set of actions to reduce, prevent, or ameliorate the effects of pollution at the respondent's facility (e.g., a comprehensive

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[5] Where a violation is found which did not confer a significant economic benefit, e.g. a failure to notify, the settlement must still include payment of a penalty which at least captures a portion of the proposed gravity component.

[6] If a defendant/respondent can establish through use of documents and affidavits sworn under penalty of perjury that it cannot afford to pay the civil penalty derived from use of the appropriate civil penalty policy, the Agency will consider entering into an "ability to pay settlement" for less than the economic benefit of non-compliance.

waste minimization or emissions reduction program). The amount attributable to a supplemental project may include the costs of necessary studies. Nonetheless, a respondent's offer to conduct a study, without an accompanying commitment to implement the results, will not be eligible for penalty reduction. In considering the applicability of a proposed study, the Agency negotiators will consider the likelihood of success, i.e., substantial pollution reduction or prevention, in making a determination.

While studies are not by themselves eligible supplemental environmental projects, to encourage pollution prevention, EPA will make a limited exception to this general approach for pollution prevention studies. Such studies will be eligible for a penalty offset when they are part of an Agency-approved set of pollution prevention activities at a facility and are designed to correct the violation (e.g., a recycling feasibility study, waste minimization opportunity assessment, or waste reduction audit).

The size of the penalty offset may include the costs of the studies. The commitment to conduct the study also must be tangible (e.g., the project completed on schedule, etc.). The U.S. must have the authority to review the completed study to decide whether it is technologically and/or economically feasible to implement the results. Should the U.S. decide that the results can be implemented but the defendant/ respondent is unwilling to do so, the "offset" for the pollution prevention study will be rescinded and the final assessed penalty must be paid in full (cf. Section J. on payment assurance).

H. Substitute Performance of Supplemental Environmental Projects

A supplemental environmental project which meets the other criteria of this policy may consist in part or whole of substitute performance by an entity or entities other than the violator. Such a substitute must bear a reasonable geographical or media-specific relationship to the underlying violation. This substitute performance must be assured through agreements which are enforceable by EPA, and may consist of agreements for emissions limits, process design or input changes, natural resource preservation or conservation easements, or other means of achieving compliance with the terms of the proposed supplemental environmental project. In the event a violator proposes acceptable substitute performance, EPA will credit the violator with an amount up to the net after tax cost of the project as if it were being performed by the violator. The violator, will, however, remain responsible for the performance of the project or the payment of the penalty offset if substitute performance is not completed.

I. Level of Concurrence

There may be practical problems in administering cross-media and/or cross-regional projects. Staff allocations for oversight requirements will necessarily increase. So will the level of resources needed for tracking purposes since tracking a supplemental project is more complex than tracking whether a payment is made. In addition, the likelihood of new issues emerging due to noncompliance with the conditions of the project is significant.

The extent of coordination/concurrence for a supplemental project which involved more than one Region will vary according to the nature and complexity of the proposal. All affected Regions must be notified about a supplemental project which would have only a modest impact on facilities in those Regions (e.g., a commitment to undertake an environmental audit at all of the defendant/respondent's facilities across the country). However, all affected Regions would have to concur in a proposed supplemental project which would involve significant oversight resources or activities (e.g., a pollution prevention activity which required major construction or process changes). Also, all affected EPA parties must be consulted on their respective oversight responsibilities. As stated previously, judicial settlements, including any of the projects described herein, will continue to require the approval of the Assistant Administrator for Enforcement and also be approved by the Assistant Attorney General for the Environment and Natural Resources Division.

Each proposed administrative settlement which has a "horizontal" nexus to the violation or which involves substitute performance also must be approved by the Assistant Administrator for Enforcement and, where required by the Agency's delegations policy, the media Assistant Administrator.

J. Oversight/Tracking

Supplemental Environmental Projects may require third-party oversight. In such cases, these oversight costs should be borne by the respondent, and it must agree as a part of the settlement to pay for an independent, third-party auditor to monitor the status of the supplemental project. The auditor will be required by the settlement to submit specific periodic reports, including a final report evaluating the success or failure of the supplemental project, and the degree to which the project satisfied these guidelines. All reports must be submitted to EPA. Upon request, EPA may provide copies of the reports, or copies of portions of the reports, to the respondent. The timing and amount of reports released to the defendant/respondent shall be at EPA's sole discretion.

Obviously, a certain amount of government oversight will be required to monitor compliance with the terms of an agreement that contains a supplemental project. "Horizontal" pollution prevention or pollution reduction supplemental projects which involve more than one Region (e.g., production changes at more than one facility) may require additional oversight, and the estimated amount of time and resources required for effective oversight is another criteria which the negotiators should use to determine whether to include the project in the settlement agreement.

The consent order or decree shall specify overall timeliness and milestones to be met in implementing the supplemental project. If the defendant/respondent does not comply satisfactorily with the terms of the supplemental project, he shall be liable for the amount by which the assessed penalty was reduced (with applicable interest). The consent order or decree should contain a mechanism for assuring prompt payment, e.g., through stipulated penalties consistent with the other sections of this policy or, if appropriate, the posting of a bond (in the amount by which the assessed penalty was reduced) to be forfeited if the supplemental project is not fully implemented.

K. Documenting Approval Of Supplemental Environmental Project Proposals

In all cases where supplemental projects are approved as part of the settlement, the case file should contain documentation showing that each of the appropriateness criteria listed above have been met in that particular case. A copy of the evaluation and approval document shall be sent to the Office of Enforcement and the National Compliance Officer concurrent with the approval of the Regional Administrator, or other authorized approving official, and to the Assistant Attorney General for the Environment and Natural Resources Division.

L. Coverage of this Policy

This document revises and supercedes the appropriate sections of the Agency's general civil penalty policy (GM-22), and constitutes Agency policy relating to supplemental environmental projects. Media-specific penalty policies will be revised as soon as possible to be consistent with it. During this interim period, in the event of any conflict between this general policy and a media-specific policy, this policy is controlling.