

Session 807

Environmental Enforcement Issues

Nancy J. Marvel
Regional Counsel, Region IX
U.S. Environmental Protection Agency

James W. Conrad, Jr.
Senior Counsel
Chemical Manufacturers Association

William E. Cosden
Chair
ACCA's Environmental Law Committee

ACCA Annual Meeting
San Diego, CA
November 5, 1999

ENVIRONMENTAL ENFORCEMENT ISSUES

James W. Conrad, Jr.
Senior Counsel
Chemical Manufacturers Association
1300 Wilson Blvd.
Arlington, VA 22209
703-741-5166
703-741-6094 (fax)
james_conrad@cmahq.com

I. Compliance Assistance Comes of Age

- A. Excerpts from Carol Browner's announcement of the reorganized Office of Enforcement and Compliance Assurance:
- "Traditional enforcement should be seen as a tool for achieving the broader goal of compliance and not as an end unto itself."
 - "'Compliance assistance' activities should complement traditional enforcement and program efforts."
 - *New Strategic Enforcement Organization*, at 1-2 (Oct. 13, 1993).
- B. Plain language compliance guides?
1. Section 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA), Pub. L. No. 104-121, 110 Stat. 847, 5 U.S.C. § 601 note (1996; eff. 6/27/96), requires federal agencies to prepare plain language "small entity compliance guides" for each rule that triggers the Regulatory Flexibility Act (i.e., >\$100 million total costs). Agencies "may cooperate with associations of small entities to develop and distribute such guides."
 2. CMA/EPA refrigerant leak repair tools
(<http://es.epa.gov/oeca/ccsmd/profile.html#cprepsec>)
- C. EPA's virtual compliance assistance centers (described at <http://es.epa.gov/oeca/mfcac.html>):
- | | |
|-----------------|-----------------------|
| Chemicals | Auto Maintenance |
| Metal Finishing | Agriculture |
| Printing | Printed Wiring Boards |
| Transportation | Local Governments |

See generally <http://www.epa.gov/sectors/national.htm> for a central listing of EPA CA activities and tools, organized by industry sector.

- D. EPA/CMA Root Cause Analysis Pilot Project
(<http://es.epa.gov/oeca/ccsmd/rootcause/html>)

Most important root & contributing cause of noncompliance: "regulations & permits"; i.e.,

- "facility unaware of applicability of regulation"
- "ambiguous/inconsistent/contradictory federal & state regulations"

- E. "Aiming for Excellence" -- July 1999 final report of EPA's Innovations Task Force
(<http://www.epa.gov/reinvent/taskforce>):

EPA "commit[s] to provide timely and accessible compliance assistance," including:

- "Support[ing] a network of public and private organizations that provide assistance on environmental compliance"; and
- "Deliver[ing] compliance assistance information for new, 'economically significant' rules when and where it's needed." This will include "giv[ing] people the tools, assistance, and resources they need to comply with those requirements *before* those rules take effect."

Id. at 15-17 (emphasis in original).

II. Audit Developments

- A. EPA's second, revised Audit Policy: "Incentives for Self-Policing: Discovery, Disclosure, Correction & Prevention of Violations," 60 Fed. Reg. 66706 (Dec. 22, 1995).

- B. "Public accountability" promise to reevaluate within three years:

1. "Customer satisfaction survey," 63 Fed. Reg. 25855 (May 11, 1998).
2. "Policy Statement, Proposed Revisions and Request for Public Comment," 64 Fed. Reg. 26745 (May 17, 1999).

a. Statistics:

- Disclosures as of 3/1/99: 455 orgs., c. 1850 facilities
- EPA action taken as of 4/1/99: 166 orgs., 936 facilities
(note: GTE represents 314 facilities)
- Of the 166 orgs, 131: no penalty
 - 9: 75% gravity mitigation
 - 6: economic benefit only paid
 - 2: benefit and gravity paid
- 84% of disclosures: reporting, monitoring/sampling, labeling/manifasting, recordkeeping, testing, training, production

- 16%: unauthorized releases, violations of storage/disposal/container management, permit application, remediation

- b. Proposals:
 - i. Time to disclose extended from 10 - 21 days
 - But flexibility to extend limited to multi-facility audits
 - "Any employee or agent" with knowledge triggers clock
 - ii. EPA inquiry regarding one facility doesn't disqualify other facilities in that company unless EPA "plans" to go there
 - iii. Won't seek audit reports unless info. therein is "necessary to [applicability] determination and is not readily available otherwise."
 - iv. "Full cooperation . . . require[s] . . . all information relevant to the violation(s) disclosed, whether or not such information might otherwise be protected by legal privilege.
 - v. Nothing re Clean Air Act
- C. Continued stalemate with Colorado
 - 1. June 30, 1999: EPA expresses "concern" re ability to finally approve CO's CAA Title V program by June 2000
 - 2. July 14, 1999: Colorado expresses continued confidence
- D. "Integrated Initiatives" or "Audit or Else"?
 - 1. "[S]ector-based enforcement initiatives involving the Audit Policy . . . figure prominently in the future of EPA's enforcement and compliance program." 64 Fed. Reg. 26746 (May 17, 1999).
 - 2. Organic chemical industry "Compliance Incentive Program" (<http://es.epa.gov/oeca/ore/red/iocsred>)
 - 3. Region 7 "Continuous Release Reporting Initiative." See letter from J. Conrad to S. Herman (August 26, 1998).
 - 4. Region 6 "TRI Enforcement Initiative." See letter from J. Conrad to E. Schaeffer (June 8, 1999).

III. Regulation by Enforcement

- A. The problem: the federal government promulgating a new interpretation of a statute or existing rule, for the first time, in the context of an enforcement action.
- B. Legal analysis. Two legal concepts or questions are tied up in this issue:

1. Administrative Procedure Act. When an agency promulgates a new interpretation of an existing rule, *the first question arises under the APA: Is this new position a reasonable interpretation of the existing rules?*
 - If the answer is NO, then the case gets dismissed and nobody has to comply with the new interpretation. If the government wants to enforce the interpretation in the future, it will first to comply with the APA. That means (i) it will have to subject the new interpretation to notice and comment rulemaking; and (ii) people will then have the chance to challenge the new rule.
 - If the answer is YES, go to 2 below.

Observations:

- The government typically wins at this stage – courts generally defer to agencies' interpretations of their own rules. (A whole separate problem is how this 'deference' standard has become so toothless that it basically means not "nonsensical." See *United States v. Hoechst-Celanese Corp*, 128 F.3d 216, 221 (4th Cir. 1997).)
 - Sometimes the new interpretation is of a statute, rather than a rule. This was the case in EPA Region 7's recent "Continuous Release Reporting Initiative," which largely involved the meaning of "federally permitted release" under CERCLA. In this setting, a prior legal question comes up: is the new rule a "legislative rule" (in which case the Agency loses because it should have complied with the APA), or an "interpretive rule" (in which case you ask whether the rule was a reasonable interpretation of the statute, and the possible answers are no (case dismissed) or yes (go to 2 below)).
 - If the agency's position is really a *change* of a *prior* position (rather than filling in a regulatory gap), then the agency HAS to go through notice and comment rulemaking before it can enforce the new interpretation. See, e.g., *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90 (D.C. Cir. 1997); *PVA v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997); *AMC v. Mine Safety & Health Admin.*, 995 F.2d 1106 (D.C. Cir. 1992).
2. Fair Notice. Even if a new position is a reasonable interpretation of existing rules or statutes, general principles of fairness mandate that *a defendant in an enforcement case must be given fair notice of the interpretation before penalties can be assessed.*
 - If the defendant received fair notice, penalties can be imposed from time notice was actually received. *Hoechst-Celanese, supra*, 128 F.3d at 227-229 (starting in 1989, defendant had fair notice of EPA's interpretation of "use" in the Benzene NESHAPS), *cert. denied*, 141 L. Ed. 2d 736, 118 S. Ct. 2367 (1998).

- If the defendant did not, the case gets dismissed (or at least no penalties can be imposed for the time fair notice was not provided). *Hoechst-Celanese, supra*, 128 F.3d at 224-227 (from 1984 to 1989, defendant did not have fair notice of EPA's interpretation of "use" in the Benzene NESHAPS); *General Electric Co. v. EPA*, 53 F. 3d 1324, 1328-34 (D.C. Cir. 1995)("[EPA's] interpretation is so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the Agency's perspective."); *CWM Chemical Svcs, Inc.*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (E.A.B. May 15, 1995) ("[One] cannot have 'notice' of a non-existent rule."); *In re Phibro Energy USA, Inc.*, EPA Docket No. CAA-R6-P-9-LA-92002 (E.A.B. Oct. 5, 1994); *DEP v. Gentek Building Products, Inc.*, EEQ 4044 et al. (DEP May 4, 1998).

Observations:

- Judge Patricia Wald, former Chief Judge of the D.C. Circuit and a fairly liberal (i.e., pro-EPA) jurist, was among the three judges on the unanimous panel in the *General Electric* case cited above. Shortly afterward, she wrote an article that included a section about "regulatory fairness," in which she discussed the *GE* case and concluded:

I believe legislators and rulemakers would do well to proceed in the immediate future with even greater caution than in the past in insuring that their rules give fair notice about what is expected of the regulated and fair procedures for disputing alleged violations. I predict courts will be increasingly sensitive to problems of regulatory fairness for some time to come.

"Environmental Postcards from the Edge: The Year that Was and the Year that Might Be," 26 *Env't'l L. Rep.* 10182, 10187 (April 1996).

- What happens when one EPA region is telling one facility one thing and another EPA region is telling another facility (same company) another? This was the problem in the *Hoechst-Celanese* case above; the dissent argues that a company does not have fair notice until EPA is saying the same thing nationwide. See 128 F.3d at 233.
- Regardless of whether a defendant had fair notice in the past, once a person is given fair notice, he or she is expected to comply with the new interpretation in the future (and could be fined for future violations). Some wrinkles under this point involve:
 - How much time should people have to come in to compliance - are they entitled to as much time as people who got fair notice originally were given, or is something less OK?

- A recent D.C. Circuit case held that lack of fair notice not only bars penalty actions, but also injunctions that require the expenditure of money (because that's the equivalent of receiving a penalty). *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998). The decision barred NHTSA from issuing a recall of cars with a particular seat belt anchor (although cars made in the future had to employ an improved seat belt anchor). This case has interesting implications for environmental cases. Possibly the government cannot require cleanups or other corrective action to mitigate the past consequences of compliance with an old interpretation. A more aggressive interpretation would be that the government could not require installation of control equipment as a remedy for a past (but ongoing) violation of new source review requirements.
- Regulatory Fair Warning Act, H.R. 881.

C. Latest venues

1. Region 7 Continuous Release Reporting Initiative
2. Antimicrobials
3. Recent Toyota case
4. Clean Air Act NSR/PSD

D. Enforcement Alert

OECA explains what constitutes a major modification -- now you have notice.
See www.epa.gov/oeca/ore/enfalert/psd1.html

August 26, 1998

Steven A. Herman
Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency (2201A)
401 M Street S.W.
Washington, D.C. 20460

Re: Region VII "Continuous Release Reporting Initiative"

Dear Mr. Herman:

We are writing to express our grave reservations about a regional initiative that we believe is ill-founded and not in the Agency's long-term best interest. We would like to meet with you to discuss our concerns as soon as possible.

As you may know, Region VII last month sent a form letter to over 150 facilities, including many of our members' plants. The letter contends, based on the facility's TRI release reports, that the facility has likely exceeded the CERCLA/EPCRA reportable quantities for one or more substances. It also notes that the facility did not file either immediate or continuous release notifications. The letter does not specifically refer to other possible justifications for nonreporting, most notably the "federally permitted release" exemption. It urges the facility to review its CERCLA/EPCRA reporting compliance status, and invites it to resolve any identified noncompliance by entering into an enclosed "Enforcement Agreement for Continuous Release Reporting." The agreement requires filing of continuous release reports in the future and payment of \$11,000.¹ Facilities that believe they are in compliance are instructed to complete an enclosed "Continuous Release Certification Statement," although Regional staff advise that these facilities will receive CERCLA Section 104(e) information requests.² Facilities were required to respond by mid-August, although we understand Region VII is offering extensions until September 1. Facilities that do not respond will be targeted for inspection.

This initiative raises a host of very serious issues that Region VII has evidently failed to appreciate. Some of these issues apply to the sizable number of letters that address air releases, while others apply to the entire initiative. Each is very significant and deserves your attention.

¹ Astonishingly enough, the Enforcement Agreement also obligates the facility to sign, sight unseen, a Consent Agreement and Consent Order that is not enclosed, and which to our knowledge has not yet been provided to anyone.

² Nowhere does the Region state the source of its authority to extract these compliance certifications.

I. Air Release Cases.

A great number of the letters involve air releases. Most if not all of these cases turn on whether the releases in question are covered by the statutory "federally permitted release" exemption to CERCLA/EPCRA reporting.³ As discussed below, the position Region VII is taking on this issue is erroneous and exposes EPA to significant litigation risk under several statutes.

By way of background, the Agency has repeatedly proposed to define the scope of the "federally permitted release" exemption by rulemaking, but none of these proposed rules has ever been finalized. The Agency's last comprehensive statement on the issue was a proposed rule published in 1988.⁴ That proposal laid out three options for addressing air releases. Briefly summarized:

Option 1. A release would only be exempted if the substance in question was specifically limited in a federally-enforceable permit or control regulation and the release was in compliance with this limit.⁵

Option 2. A release would be exempted if the substance was "a constituent of" a criteria pollutant and the release was in compliance with a permit limit or control regulation on that pollutant (e.g., a release of a particulate would be encompassed within a permit limit on total suspended particulates), except that individual VOCs would not be regarded as covered by a limit on total VOCs.⁶

Option 3. A release would be exempted if it was in compliance with a permit limit or control regulation for that substance, or if the release was "the 'routine' emissions for which the permit or control regulation was designed."⁷

The Agency published a notice in 1989 "clarifying Option one,"⁸ but otherwise has never taken any action on this proposal. Thus, the proposal remains the Agency's latest formal discussion of the issue.

Region VII staff have apparently taken the position that, at most, Option 1 is the only permissible interpretation of the statute, and that facilities relying on Options 2 or 3 are in

³ Immediate reporting under CERCLA Section 103 is not required for a "federally permitted release," 42 U.S.C. § 9603(a), a term that is defined in CERCLA Section 101(10), *id.* § 9601(10). The EPCRA emergency notification requirements incorporate the federally permitted release exemption, either directly (*id.* § 11004(a)(2)) or indirectly (*id.* § 11004(a)(1), (3)).

⁴ See 53 Fed. Reg. 27268 (July 19, 1988).

⁵ See 54 Fed. Reg. 29306-07 (July 12, 1989). Option 1 as actually proposed in 1988 applied to substances that either were named in a permit or control regulation or were "included in a specifically named group of substances." 53 Fed. Reg. 27281 (emphasis added). In the latter case, the substance had to be identified, reviewed and made a part of the public record of the permit. *Id.* at 27273-74. A year later, EPA "clarif[ied] Option one" by announcing that a release of a substance had to be in compliance with a permit or regulatory limit on that specific substance, not a group of substances. 54 Fed. Reg. 29306-07.

⁶ 53 Fed. Reg. 27273-74. The theory behind the distinction is that the national ambient air quality standards were based on analysis of the health effects of those pollutants, with the exception of ozone precursors, whose limits were based on smog formation. *Id.*

⁷ *Id.* at 27274.

⁸ 54 Fed. Reg. 29306.

violation of the law. For example, they have contended that emissions of NO₂ are not covered by permit limits on NO_x (repudiating Option 2) and that routine emissions of ethylbenzene are not covered by a permit limit on VOCs designed for those releases (repudiating Option 3). The Region's precise interpretation is unclear, however, as Regional staff have refused to provide answers to many interpretive questions raised by letter recipients.

This approach largely vitiates the exemption and is inconsistent with the way control regulations and permit programs have been written and administered by EPA and states. It is also contrary to widespread practice in complying with CERCLA/EPCRA, practice that the Agency has acquiesced in for over a decade.

More important, the Region's revisionist view is illegal, and will almost certainly lose in any judicial resolution of the issue, for at least two reasons:

Fair Notice. A substantial body of case law is developing that rejects agency attempts to promulgate new rules, or new interpretations of existing rules, for the first time through enforcement action. These cases implement the due process requirement that EPA provide 'fair notice' of its new rule or interpretation before penalties may be imposed for violating it. EPA has recently been on the losing end of fair notice cases in the D.C., First and Fourth Circuits, and even before its own Environmental Appeals Board.⁹ We are mystified as to why Region VII would launch an enforcement offensive that is highly vulnerable on fair notice grounds. A decade ago, Options 2 and 3 were "options" or "approaches" for interpreting the statute "that the Agency generally agrees with."¹⁰ The Agency has never given the public any notice that it now regards them as contrary to law. A court is not likely to find fair notice on these facts.¹¹

APA Noncompliance. EPA has issued four proposed rules on the scope of the "federally permitted release" exemption over the past fifteen years. Under these circumstances, one would expect the Agency to issue a final rule if and when it ever concludes

⁹ See *United States v. Hoechst-Celanese Corp.*, 128 F.3d 216, 224-227 (4th Cir. 1997) (from 1984 to 1989, defendant did not have fair notice of EPA's interpretation of "use" in the Benzene NESHAPS); *Commonwealth of Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 991 (1st Cir. 1995) (EPA never provided fair notice of its view that ferric ferrocyanide is a CERCLA hazardous substance); *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995) ("[EPA's] interpretation is so far from a reasonable person's understanding of the regulations that they could not have fairly informed GE of the Agency's perspective."); *CWM Chemical Svcs, Inc.*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (E.A.B. May 15, 1995) (rejecting EPA region's interpretation of PCB rules, stating that "[one] cannot have 'notice' of a non-existent rule.").

¹⁰ 53 Fed. Reg. 27273.

¹¹ The Region contends that Options 2 and 3 were foreclosed by a footnote in *In re Mobil Oil Corp.*, EPCRA Appeal No. 94-2, 5 E.A.D. 490 (E.A.B. Sept. 29 1994). This decision did not address any of these options, however. Rather, it concerned whether the statutory phrase "subject to" a permit or control regulation (see 42 U.S.C. § 9601(10)(H)) should be read to mean "in compliance with," an issue that is independent and arises regardless of which option EPA chooses. Footnote 19 of that decision recounts the series of proposed rules on the subject of "federally permitted release," and merely notes that the 1989 notice "clarified" that Option 1 required compliance with a permit or regulatory limit for the specific substance released. See footnote 5 above. The footnote says nothing about Options 2 or 3. Again, anything the *Mobil* decision might be interpreted to say regarding Options 2-3 would be dictum, since Option 1 clearly was satisfied in the case (the facility had a permit that specifically limited SO₂, the substance that was released).

what its interpretation of the law is. By mailing out over 150 letters in a single region, most of which apparently are premised on the view that only some variant of Option 1 is correct, the Agency is arguably adopting a rule of general applicability (and substantially changing existing policy) without complying with the Administrative Procedure Act. An enforcement case premised on one of these letters would be vulnerable to an APA challenge.

The low fine referenced in the Region VII letters may reflect significant discounting due to just these litigation risks. We understand that several facilities will not pay *any* amount to settle these matters, however, and so the Agency is still likely to face judicial review of the Region's position.

II. Programmatic Concerns.

Beyond the objections we have to the letters that involve air releases, we have serious concerns about the initiative as a whole. Examination of a few sample letters reveals that the Region has not carefully targeted the initiative. Indeed, it has not even completed basic case preparation. One letter, alleging failures to report releases of chlorine above the RQ, was sent to a hazardous waste incinerator whose emissions of chlorine were specifically limited by a RCRA permit issued by the Region itself. In the case of another facility, the releases in question were to a deep injection well and were authorized by a UIC permit issued by a federally-approved state program. These facts were obviously available to the Region, had it checked before sending out the letters. The implication is that the letters are really more of a fishing expedition than an enforcement effort. As such, the initiative is in conflict with two Agency principles and possibly a federal law:

Data Quality and Burdens. Earlier this month, the Administrator and Deputy Administrator reemphasized the importance of "enhanc[ing] data quality [and] reducing the burdens associated with reporting" across EPA's programs.¹² The Agency's efforts "to conform to these policies [were to] start[] with our major compliance and enforcement databases. We will establish firm guidelines to ensure that all EPA national systems . . . meet the expectations of our . . . stakeholders, especially for data quality . . ." ¹³ Given these clear statements, we are surprised to see an EPA region launching a major enforcement initiative that fails to take account of relevant EPA data and whose consequence is significant burdens on facilities, either to rebut the Agency or to comply with the letter.¹⁴ We would have expected that the controversy surrounding the Sector Facility Indexing Project would have led Region VII to consider these issues before commencing the initiative.

National Performance Measures Strategy. The purpose of CERCLA/EPCRA reporting is to ensure that federal, state and local governments are alerted to "potentially dangerous releases of hazardous substances to the environment *for which timely response may be*

¹² "Comprehensive Information Management," memorandum from Carol Browner and Fred Hansen to assistant and regional administrators, among others (Aug. 11, 1998).

¹³ "Using Common Sense to Reinvent Environmental Information," memorandum from Carol Browner and Fred Hansen to assistant and regional administrators, among others (July 21, 1997).

¹⁴ Given that initiative's goal is to compel many facilities to begin filing continuous release reports, we find it ironic that a draft press release for the initiative states that such reports were "designed to reduce the reporting obligations for industry."

necessary.”¹⁵ The permitted releases involved in the Region VII letters of which we are aware do not fit this description – rather, they are exactly the sort of “‘routine’ emissions for which the permit[s] w[ere] designed” that Option 3 was developed to cover.¹⁶ The letters do not suggest that any public hazard was created by either the releases or the fact that they were not immediately reported to response personnel. Rather, the principal goal of the Region’s initiative seems to be to exploit the ambiguities of existing law to encompass as many entities as possible, so that the Region can later publicize how many violating facilities were caught in its net and returned to compliance. (This is the natural inference to be drawn from the Region’s unwillingness to pursue a cooperative effort with Associated Industries of Missouri to educate facilities about the Region’s views on continuous release reporting.) While the \$11,000 fine may be heavily discounted, if two-thirds of the recipients relent, the Region will have grossed over a million dollars, another major “bean” for the Region.

Your office recently announced that it would begin implementing a new National Performance Measures Strategy for its compliance assurance function. While it noted that “output numbers remain an important measure of program performance,”¹⁷ we have hoped that the Agency would not appear to be generating numbers under the new system quite as actively as this initiative would suggest.¹⁸ The NPMS also states that outputs are measures of “accountability to the public.”¹⁹ The best way for the Agency to be accountable to the public on this issue would be for it to revitalize the rulemaking on the scope of the federally permitted release exemption, so that the Agency’s approach would be made plain to all and the public could comment on it.

Paperwork Reduction Act. The letters recite that they are not subject to the Paperwork Reduction Act. The PRA does not apply to a federal “administrative action or investigation involving an agency against specific individuals or entities.”²⁰ According to OMB’s own *Implementing Guidance* for that act, the exception “is a limited one [that] applies only after a case file or its equivalent is opened with respect to a particular party. It does not apply prior to the opening of such file”²¹ We urge you to determine whether, before the letters were sent, Region VII opened specific case files for each of the over 150 facilities that received them. If not, the letters are “bootleg” information requests and their recipients cannot be penalized for ignoring them.

III. Conclusion.

¹⁵ 53 Fed. Reg. 27273 (emphasis added). See also *Mobil Oil Corp.*, *supra* (citing “catastrophic air releases at Bhopal, India and Institute, West Virginia”).

¹⁶ 53 Fed. Reg. at 27274.

¹⁷ “Measuring the Performance of EPA’s Enforcement and Compliance Assurance Program,” at 1 (Dec. 22, 1997).

¹⁸ The GAO recently expressed its concern that “the actual measures the Agency has thus far developed, as reflected in the Results Act’s ‘Performance Plan,’ are overwhelmingly weighted toward numerical targets for inspections, enforcement actions, and other output measures.” Prepared testimony of Mike Gryzkowicz, GAO, before the House Commerce Committee’s Subcommittee on Oversight and Investigations, at 9 (June 23, 1998).

¹⁹ *Measuring the Performance*, *supra* note 17, at 1.

²⁰ 44 U.S.C. § 3518(c)(1)(B)(ii).

²¹ OMB, *The Paperwork Reduction Act of 1995: Implementing Guidance*, at 22 (Preliminary draft Feb. 3, 1997).

We have been told that one impetus of the "Continuous Release Reporting Initiative" is to generate a vastly increased number of continuous release reports that would enable the Agency to make broader use of new ambient air models. If that is in fact the Agency's goal, it should say so, and then all involved parties can openly discuss whether that goal could be met by monitoring data or other reports submitted under existing air permits, State Implementation Plans, emissions inventory requirements, Title V applications, or other means.

In any event, however, we submit that the Region VII initiative is likely to lead to enforcement cases that the Agency will lose, and is inconsistent with national EPA policy and possibly federal law. For all these reasons, we urge you to instruct Region VII to terminate the exercise and to ensure that other Regions do not attempt a similar undertaking.

We would like to meet with you as soon as possible to discuss these points. In the meantime, we ask you to see that the compliance date for responding to Region VII's letter is extended until a reasonable time after you have been able to review and consider these issues. Please contact me at 703-741-5166. Thank you.

Sincerely,

James W. Conrad, Jr.
Managing Counsel
Chemical Manufacturers Association

for
American Automobile Manufacturers Association
American Foundrymen's Society, Inc.
American Portland Cement Alliance
Associated Industries of Missouri
Chemical Manufacturers Association
Iowa Association of Business and Industry
Missouri Chamber of Commerce
National Association of Manufacturers
National Paint and Coatings Association, Inc.
U.S. Chamber of Commerce

cc: M. Stahl
J. Benfarado
D. Grams

June 8, 1999

Eric V. Schaeffer
Director, Office of Regulatory Enforcement
U.S. EPA (2241A)
401 M Street, S.W.
Washington, D.C. 20460

Re: Region 6 TRI Enforcement Initiative

Dear Eric:

Last August, I wrote Steve Herman on behalf of ten business associations to discuss our objections to Region 7's "Continuous Release Reporting Initiative." I am now writing to make sure you know about another regional initiative, this one arising from Region 6. If anything, this initiative seems less well-founded than the last one. CMA is especially concerned by regional statements that this initiative was conceived at the headquarters level. We are meeting on Thursday to discuss "federally-permitted release" issues growing out of the Region 7 effort. It might make sense to reserve some time to cover the Region 6 project as well.¹

On May 28, Region 6 sent an unknown number of form letters to facilities in the region. The letters say "EPA has reason to believe that your facility did not comply with the 1994 Toxic Release Inventory (TRI) reporting requirements and potentially did not comply with reporting requirements in subsequent years as well." The letter offers to settle these alleged violations for up to \$5,000 per chemical per year if facilities sign an "Enforcement Compliance Review Registration Agreement" (EDR) committing them to conducting TRI self-audits, disclosing any violations found and signing a Consent Agreement and Consent Order "consistent with the ECR." Otherwise, "EPA reserves the right to follow a standard investigatory path for the violation(s) alleged above," seeking "up to . . . \$27,500 per day for each violation."

The letter says it identified the asserted "violations" by "compiling various data sources which included both EPA-compiled and commercially available data." Given the number of people who have contacted CMA to complain about factually erroneous letters addressed to them, we would suggest that EPA audit these "various data sources" more carefully before it uses them to send such threatening letters to others. I concede that I am less likely to hear from people who had indeed failed to file, but at present I have learned of no such facilities. I have, however, heard from the following facilities in the last seven days:

¹ I have discussed this initiative with API, and although the extent to which oil refineries in Region 6 have received similar letters is not yet clear, API shares the essential concerns and sentiments expressed in this letter.

Facility A. Eight chemicals involved. Six of these were not manufactured, processed or otherwise used in amounts triggering TRI reporting in 1994. Another, isopropyl alcohol, was manufactured there, but not by the strong acid process (the only form for which reporting is required). The eighth was in fact reported in 1994, as is reflected on EPA's TRI web site. This plant did have some TRI violations for 1994, but it self-identified them, reported them to Region 6 several years ago under the Audit Policy, and received 100% penalty mitigation.

Facility B: Four chemicals. Two were reported in 1994; the other two were not required to be reported.

Facility C. Two chemicals. The facility reported both of these chemicals in 1994, and still has the EPA QA/QC package it received to ensure the accuracy of EPA's reported data for that year.

Facility D. One chemical. The recipient did not own the plant at the time. The chemical was not made there then.

Facility E. One chemical. The plant does toll manufacturing, and used this chemical in prior years, but not in 1994 or subsequently.

Facility F. One chemical. Reported this chemical in 1994 and other years. Has EPA's QA/QC packages.

Facility G: One chemical. Another plant that makes isopropanol, but not by the strong acid process.

Each of these facilities plans to write Region 6 to explain why it does not intend to sign up for an Enforcement Compliance Review. While that will hopefully be the end of the story for these companies, some overall comments on the initiative are still worth making:

First, the threatening tone of the form letter has frightened or angered its recipients. The letter spends three pages asserting one or more violations, and only on page four does it allude to the prospect that it might be mistaken. Given the apparent prevalence of the latter, the result is resentment of and disrespect for EPA. This is not an outcome that benefits either you or us.

Second, the great number of wrongly asserted violations raises serious questions about the adequacy (or even the existence) of any sort of process to vet the Agency's data before the letters were mailed. Occurrences like this mailing cast doubt on the Agency's ability to deliver on its promises to "manage information as a strategic resource so that we can better provide integrated, timely and cost-effective access to accurate information to decision makers and the public."² It would be alarming if this level of QA/QC was employed in the "General Enforcement Management System," promised by EPA's FY2000 budget justification, through which facility-level enforcement data would be made public over the internet.

Third, but perhaps most important, this initiative raises further questions about the value of "sector-based enforcement initiatives involving the Audit Policy," which the Agency

² "Meeting the Information Challenge," memorandum from Administrator Browner (October 14, 1998).

says will "figure prominently in the future of EPA's enforcement and compliance program."³ At least one of the foregoing facilities participated in the recently-concluded "Compliance Incentive Program" for the organic chemical industry, and now it is already being invited to audit itself some more, or else. These facilities are rapidly coming to the conclusion that EPA does not trust facilities to audit themselves. It also appears increasingly to them that EPA views auditing not as a virtue in and of itself, but only as another enforcement "tool" to be used to increase the number of violations reported.

Last March, EPA asked how it should "best integrate . . . incentives and enforcement actions into one coherent strategy[.] Are incentive and assistance programs more effective when combined with the perceived risk of enforcement action?"⁴ CMA submits that the current approach of combining auditing and enforcement into a single package "deal" for facilities to accept or not at their peril is not the right answer. This approach breeds resentment and skepticism on the part of regulated facilities. It also creates "initiative fatigue," as facilities weary of being tapped for multiple "voluntary" audit initiatives. Instead, CMA urges EPA to promote auditing by expansive implementation of the Audit Policy, without threats of sanctions. Separately, EPA can continue to remind people that its enforcement mechanisms are aggressive and powerful. Such a two-track approach is likely to produce greater disclosure under the Policy and greater confidence that the Agency is truly attempting to help good actors and punish bad ones.

Again, we are troubled by reports from Region 6 that this initiative actually arose at EPA headquarters and thus could spread to other regions without major QA/QC. I would hope we could discuss this issue on Thursday, or at your next earliest opportunity.

Sincerely,

James W. Conrad, Jr.
Senior Counsel

ccs: S. Lowrance
J. Baskerville
R. Hanneschlager

³ 64 Fed. Reg. 26746 (May 17, 1999).

⁴ 64 Fed. Reg. 10145 (March 2, 1999).

**THE STATE-FEDERAL RELATIONSHIP IN CIVIL ENFORCEMENT
OF ENVIRONMENTAL LAWS**

Nancy J. Marvel
Regional Counsel
Environmental Protection Agency
Region 9

(Updated from a paper originally prepared for the
27th Annual ABA Conference on Environmental Law
at Keystone, Colorado, March 12, 1998)

As the national environmental protection agency, the Environmental Protection Agency (EPA) has a fundamental responsibility to protect the health and the environment of the American people. From the earliest days of environmental protection, it was recognized that pollution does not respect state boundaries, and that a joint effort of federal, state, and local agencies was necessary to effectively combat pollution.¹ To that end, the Agency has been charged with implementing and enforcing 14 major Federal environmental laws. While a number of these statutes provide only for direct federal enforcement of their provisions, the major environmental laws, such as the Clean Water Act and Clean Air Act, were conceived by Congress to be implemented through a construct of federal-state cooperation. They all direct EPA to develop national standards governing clean air, clean water, hazardous waste management or safe drinking water, although each statutory scheme is different. They further provide for EPA to delegate to the states or local governments the responsibility for developing and enforcing environmental protection programs to achieve those national standards.

Delegation Process

EPA has developed regulations governing the delegation of federal environmental programs to states and local agencies. See, e.g., 40 C.F.R. Part 123 (Clean Water Act); 40 C.F.R. Part 271 (Subtitle C of RCRA). Those regulations

¹As Senator Mike Mansfield said in 1962, "Individual communities are no longer able to cope with the problem [of water pollution] and are not equipped to undertake the large-scale planning necessary; to clean up the rivers and streams which have no regard for city or State lines. A concentrated effort by Federal, State, and local governments, ... is necessary if we are to stop pollution and prevent future pollution of this precious resource." 107 *Congressional Record* 4744 (1962).

generally set forth the minimum requirements a state program must have in order to receive federal delegation. Among other criteria, the regulations provide that a state must show that it has adequate legal authority and capacity to implement a minimum enforcement program. The Clean Water Act National Pollutant Discharge Elimination System (NPDES) and Resource Conservation and Recovery Act (RCRA) Subtitle C regulations both specifically provide that State civil penalties "shall be appropriate to the violation." 40 C.F.R. §123.27(c) and 40 C.F.R. §271.16(c).

Once a state has developed its state laws and regulations to implement a federal program, the appropriate EPA regional office evaluates that program to determine whether it is consistent with federal law.² If it is, then EPA approves that program to operate as federal law and the state (or local agency) assumes primary responsibility for enforcement of that program, subject to EPA oversight.³ Despite program delegation, however, EPA retains concurrent authority to enforce environmental laws. See, e.g., 33 U.S.C. §1319, subject to the limitations of §1319(g)(6)(A)(ii); 41 U.S.C. §7413; 42 U.S.C. §6928.

Once EPA approves a state's environmental program to operate in lieu of the federal program, EPA gives the state federal grants to operate the program - including the state's enforcement program. The federal dollars do not cover all the operating expenses of most state programs, but they do provide a significant portion of the environmental budget in many states.

State-EPA Management of Environmental Enforcement

EPA and the states manage the environmental enforcement programs by way of State-EPA Enforcement Agreements, which are negotiated on an annual basis to set forth EPA's expectations for the state's compliance and enforcement program for that year. This is part of the process by which

² The standard for federal approval of a state program varies from statute to statute. For example, under Subtitle C of RCRA, the state program must be "consistent with the Federal program". 40 C.F.R. §271.4. To receive Clean Water Act NPDES delegation, the state program must "conform" to federal requirements. 40 C.F.R. §123.1(c).

³ The process of delegating the federal environmental laws to the states is referred to with a different name under each statute. For example, under the Safe Drinking Water Act, a state will have "primacy". Under RCRA, a state is "authorized". Under the Clean Air Act, a State Implementation Plan is "approved."

EPA and the states plan for how the states will spend and account for the federal grant dollars. These agreements generally concern the number and targets of state inspections to be accomplished during the year, as well as agreements on follow-up enforcement actions. EPA also asks the states to keep up to date media-specific compliance data systems, in order to keep track of the compliance status of the major facilities in the states. The State-EPA Enforcement Agreements incorporate the requirements of EPA guidance governing "Timely and Appropriate Enforcement Responses" to significant violations of environmental laws. Generally, this guidance provides that EPA will defer to a state's enforcement action so long as it is both timely and appropriate. In evaluating whether a state's action is timely, the media-specific guidance documents set forth specific time lines governing when a state should issue a Notice of Violation (NOV) and either achieve compliance or address the violation through settlement or referring the matter to the State Attorney General.⁴ Most of the guidance documents provide that the state should resolve the matter within a maximum of 120-150 days. In addition, the guidance provides that the resolution of the matter should provide for appropriate injunctive relief, schedule for compliance and civil penalties. An "appropriate" civil penalty must be of sufficient magnitude to maintain a credible deterrent effect. While EPA does not insist that the penalties be equal in amount to that which EPA would recover in a similar case, EPA does believe to provide a deterrent effect, a penalty must recoup the economic benefit of non-compliance and must include an amount reflecting seriousness of violation. Steven A. Herman, Assistant Administrator, *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements, Excerpts from the Revised Policy on "Oversight of State Civil Penalties,"* at 5 (July 20, 1993).

Beyond these general parameters, the State-EPA Enforcement Agreements have varied a good deal among EPA Regions. Some agreements have required EPA to notify the state whenever it plans a federal inspection and allow the state a "right of first refusal" on any such inspection. Others have provided that EPA will have the lead on any case

⁴ See, e.g., John Seitz, Director, Office of Air Quality Planning and Standards, *Issuance of Guidance on the "Timely and Appropriate Enforcement Response to Significant Air Pollution Violators"*, (Feb. 7, 1992).

that results from a federal inspection, or from some other type of federal initiated action.

There has also been a good deal of variability in the amount and stringency of EPA's oversight of the states' enforcement programs. Generally, EPA regions have provided less scrutiny of state enforcement programs than is popularly believed.⁵ In practice, while EPA and the state have had quarterly meetings to assess the progress of a state's enforcement program, EPA has often given the States' a significant amount of extra time to resolve noncompliance problems, before stepping in with a federal action.

EPA's Strategic Approach to Enforcement

The process outlined above has governed the core state-EPA enforcement program since the early days of EPA and program delegation. During the early years, the federal environmental enforcement program focused on violations in states without program delegation, on large municipal sewage treatment plants in violation of secondary treatment requirements (which generally were brought jointly with the relevant state) and other enforcement cases against large sources of industrial pollution. See, e.g., *United States v. City of Lafayette*, 24 ERC 1226 (N.D. Ind., 1985); *United States v. Interlake Co.*, 429 F. Supp. 193 (N.D. Ill. 1977); *United States v. Public Service Co. of Indiana*, 12 ERC 1495 (S.D. Ind. 1977). Over the last decade, as more and more states have received program delegation for most federal environmental laws, EPA has been refocusing the federal environmental enforcement program into a strategic, risk-based, geographic approach.

Beginning in 1990, EPA developed a "Strategic Vision for Enforcement" built around several concepts. First, EPA sought to target its enforcement efforts for the greatest risk reduction, using multi-media and geographic approaches. This resulted in a number of "cluster" cases filed on the same day, for example, against pulp and paper companies across the country for violations of various environmental laws. Second, EPA advocated formal screening of violations to

⁵ Indeed, EPA has been criticized by its own Office of Inspector General for having failed to provide enough oversight of State environmental enforcement programs. See *Validation of Air Enforcement Data Reported to EPA by Pennsylvania*, EPA Office of Inspector General (OIG), Report #7100115; *Audit of Region 9's Administration of the California Air Compliance and Enforcement Program*, EPA OIG, Report #7100246; and Testimony of Nikki L. Tinsley, Acting EPA Inspector General, Committee on Environment and Public Works (June 10, 1997).

determine the most appropriate response, criminal, civil judicial or civil administrative, and whether the case was most appropriately addressed as a single media or multi-media case. Third, EPA sought to redouble its efforts to foster and improve relationships with other federal agencies, such as Customs and the Occupational Safety and Health Administration, as well as the states in advancing mutual compliance goals. Finally, to maximize the deterrent effect of the national enforcement program, EPA sought to more effectively publicize the results of its enforcement efforts, especially to the affected regulatory community. EPA also began an effort to communicate more effectively with the public, the media, Congress and the regulated community about the impact of its enforcement program on improving the environment.

Direct Federal Enforcement in Delegated States

EPA's national approach to enforcement, therefore, has focused less on oversight of the states and more on a strategic or geographic approach to non-compliance problems. This strategic approach, however, has not necessarily been welcomed by all states, many of which continue to believe that the federal government should not be taking any enforcement actions in their states. In addition, many states, and even some regions within EPA, have been confused about EPA's assertion of a federal enforcement role in delegated states.

To resolve some of this confusion, on February 26, 1996, EPA's Assistant Administrator for Enforcement Steven Herman issued a policy statement to clarify the federal role in environmental enforcement and to provide guidance to the Regions on the core responsibilities of the federal EPA to ensure compliance with environmental standards. Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, *Core EPA Compliance and Assurance Functions* (Feb. 21, 1996). The Herman statement identifies important responsibilities for the federal government as "Environmental Steward," to ensure that national standards are implemented and enforced consistently in all States. The paper also identifies a federal role to "Foster environmental justice by assuring that environmental pollution does not disproportionately affect minorities and low income groups." In addition, the policy statement provides guidelines for direct federal enforcement in delegated states.

The Herman statement emphasizes that it remains EPA policy that, in delegated states, primary enforcement authority rests with states or local agencies, with EPA taking action principally where a State is "unwilling or unable" to take "timely and appropriate" enforcement action, or where EPA has taken the lead to initiate the action, as described above. However, the statement goes on to clarify that EPA may also take action in circumstances in which the Agency may want to support the broad national interest in creating an effective deterrent to non-compliance beyond what a state may need to do to achieve compliance in an individual case or to support its own program. For example, federal enforcement against companies with significant company-wide violations occurring in several states is a high EPA priority.⁶ Similarly, the federal government is well suited to addressing violations in one state which may adversely impact the environment of another state or country. In addition, federal environmental enforcement is sometimes necessary to "prevent the creation of pollution havens" in states or localities that may hope to attract business from neighboring states or communities by relaxing their enforcement of environmental standards. Similarly, EPA seeks to assure through federal enforcement and civil penalties, that those who comply with the law on a timely basis are not placed at a competitive disadvantage with those who do not.

In considering whether to take direct enforcement in a delegated state, EPA looks to the following factors: 1) whether the case has been specifically designated as "nationally significant"; 2) whether there is significant environmental or public health damage or risk involved; 3) whether the violator has gained significant economic benefit from his violation; 4) whether the case has interstate or international implications; 5) whether there is a pattern of repeat violations by the company; and 6) whether there is a violation of federal law that a state action could not reach. *Policy Framework for State/EPA Enforcement Agreements*, Office of Enforcement and Compliance Monitoring (August 1986), at 21.

EPA is also seeking to be responsive to citizen complaints about environmental violations, especially those

⁶ In such cases, EPA will often invite the affected states to join in the enforcement action against that company. See discussion of joint enforcement, *infra* at 10.

complaints from communities which are bearing a disproportionate burden of environmental pollution. The environmental justice community looks to the federal government to play its traditional role of protecting the civil rights of the under represented. In addition to evaluating specific complaints under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1997), EPA places a high priority on ensuring that EPA and the States are enforcing environmental laws in a fair and equitable manner.

The fact that states and EPA generally have concurrent authority to enforce the major federal environmental laws has meant that enforcement has often been the most contentious area of EPA-State relationships. While both EPA and the states like to think of their relationship as one of partnership, it has not always worked as a perfect partnership in the area of enforcement. The reasons for the tension on this topic are many. First, the tension is a manifestation of the age-old constitutional debate about federalism and which level of government should be "in charge" of the affairs within a state.⁷ It is submitted that there is no "right" answer to that debate and that it is unlikely to be resolved for all time within the context of environmental enforcement. Second, there is a philosophical disagreement between EPA and many states as to the role of enforcement in environmental protection. EPA's view is that a deterrence-based (penalty) approach to enforcement is important because the Agency wants companies to comply before and whether or not they are inspected. Since neither EPA nor the States have enough resources to inspect all sources on a regular basis, EPA believes a deterrence-based system is essential to foster widespread compliance. Many states, on the other hand, believe that bringing individual violators into compliance is the overarching goal and if compliance can be achieved without enforcement, then enforcement is a waste of resources.⁸ Finally, on a purely human level, EPA oversight of state enforcement unavoidably entails a certain degree of second-guessing the decisions a state has made, which is always an uncomfortable position for both parties.

Impact on the Regulated Community

⁷ See Richard H. Leach, "Intergovernmental Cooperation and American Federalism", Essays on the American Constitution, Gottfried Dietze, ed., Prentice-Hall (1964).

⁸ Other states have no administrative penalty authority and are limited in bringing penalty actions by the high resource demands associated with civil judicial actions.

What is the impact of concurrent state-EPA enforcement jurisdiction upon the regulated community? Some violators like to portray themselves as caught in the middle of an intergovernmental dispute, not knowing where to turn to resolve their noncompliance. Experience has shown, however, that while a difference of opinion between the state and federal government can sometimes put a company in a legitimate quandary as to its compliance obligations, a company will often take advantage of a state's lack of resources, experienced staff, or political will to obtain an advantage. This can occur in both enforcement and the permitting context. In the permitting context a company may underestimate its potential emissions and thereby avoid installing expensive pollution control equipment, purchasing offsets, or a ban on new construction.⁹ The state agency may not become aware of the problem until much later, if at all. An even more troublesome situation arises where there appears to be some collusion between the potential violator and the state agency, and the state agency consciously gives the source a break in either permitting or enforcement in order to assure that the source remains an employer in the local jurisdiction.¹⁰ See *United States v. Smithfield Foods*, 965 F. Supp. 769 (E.D.Va. 1997).

⁹An example of this type of case is *United States v. Merck & Co. and Monsanto Co.*, No. 961537E CM (S.D. Cal). In that Clean Air Act case, Merck modified its sea kelp processing plant, responsible for 36% of all stationary source emissions of volatile organic compounds (VOC) in the San Diego air basin, without seeking a permit from the local permitting agency, even though the modifications resulted in emission increases that required permitting, offsets and installation of control technology to achieve the Lowest Achievable Emission Rate. At a result of EPA's enforcement action, the facility agreed to pay a \$1,857,395 civil penalty and to reduce the total VOC emissions from the facility by 1,840 tons per year. EPA worked closely with the local permitting agency in resolving this case and some of the emission reductions were ultimately achieved through changes to the State Implementation Plan regulations applicable to the facility.

¹⁰EPA recently settled a case of this type. In *United States v. California Almond Growers Exchange*, CIV-S-95-475 LKK GGH, the defendants constructed a cogeneration facility without installing equipment to control emissions of carbon dioxide in violation of a Clean Air Act moratorium on the construction of such sources. To avoid the ban, the permitting agency issued the defendant a permit purporting to limit the facility's emissions to 99 tons per year, one ton under the applicable limit for the moratorium. Subsequent tests showed that the facility was emitting carbon dioxide at a rate exceeding 6,000 tons per year. In response to the initiation of EPA's enforcement action, the local permitting agency issued a new permit which would have allowed the facility to emit 8,000 tons per year. EPA's settlement required a 96% reduction in carbon dioxide emissions and a \$675,000 civil penalty.

These are the types of situations that can lead EPA to take an enforcement action against a facility after the State has completed an enforcement action against the same facility. This practice, termed "overfiling," has been relatively rare.¹¹ Overfiling is a carefully considered step which receives a great deal of scrutiny at both EPA and the Department of Justice prior to the filing of a complaint. The main reasons for the federal government to pursue its own action after a completed state action are due to a state's failure to achieve an appropriate compliance schedule or due to a grossly deficient civil penalty. Sometimes the State resolves a significant environmental violation entirely without civil penalties. Such a resolution would increase the likelihood of EPA overfiling.

Because of the possibility of EPA overfiling, there has been a recent trend in at least one state in Region 9 of defendants in state initiated enforcement actions refusing to settle with the State without some sort of release, no action assurance or other "blessing" from EPA. As a result, the Region has received requests from the state to grant the defendant some assurance that EPA will not pursue its own action against the defendant. These requests have been highly problematical. It is longstanding Agency policy that EPA is not in the business of giving such releases or "no action" assurances. See Courtney M. Price, *Policy Against "No Action" Assurances* (Nov. 16 1984).¹² The reason for this is

¹¹ EPA's authority to overfile is clear. See *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470, 494 n. 21 (D.S.C. 1995) (explaining that although a State may have primary responsibility for enforcing NPDES permits under its own program, EPA may take action where the State is unwilling or unable to take timely and appropriate enforcement action); *EPA v. Environmental Waste Control Inc.*, 710 F. Supp 1172, 1186 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) (holding that RCRA § 3008(a) authorizes EPA to bring an independent enforcement action, even in a RCRA authorized state); *United States v. SCM Corp.*, 615 F. Supp. 411, 418 (D. Md. 1985) (holding that notwithstanding the existence of a state enforcement action, EPA has the right to press its claims in federal court under the Clean Air Act); but see, *Harmon Industries, Inc. v. Browner*, 19 F. Supp.2d 988 (W.D. Mo, 1998), *appeal pending* (holding that RCRA, its legislative history, and the principle of *res judicata* precluded EPA from enforcing hazardous waste requirements in an authorized state where a state judicial authority approved a zero penalty settlement concerning the same violations, which the state and the company entered into 18 months after EPA filed its administrative complaint).

¹² This policy was recently reaffirmed by the current Assistant Administrator for Enforcement and Compliance Assurance. See Steven A. Herman, *Processing Requests for Use of Enforcement Discretion* (Mar. 3, 1995).

straightforward; such assurances "may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community." *Price Policy* at 1. The "No Action" Assurance Policy does provide for language EPA can give to a state to give comfort to a violator that EPA does not intend to file its own action. However, the language does reserve EPA's right to file its own enforcement action "in the event the State action does not satisfactorily resolve the violations at issue." *Id.* at 2. EPA has provided a number of letters of this type in state regulatory enforcement cases, although the cited language has not proved an attractive alternative to a "no action" assurance or release from liability to some states and defendants.¹³ The most effective guarantee that the federal government will not file its own action is for a state and the regulated entity to conclude a strong settlement that is also acceptable to the local community and other affected entities.

Joint Enforcement - A New Direction

In an effort to build state enforcement capacity and to further state-EPA partnerships in enforcement, EPA has increasingly been seeking opportunities to pursue joint enforcement with states in appropriate cases where we can get a better result by effectively pooling our resources and legal authorities. These joint efforts have a number of advantages, for both EPA and the relevant state. Joint enforcement can benefit a state because the federal government has a policy of sharing penalties with the state, based on the level of effort of each party.¹⁴ This means that in some instances, the state will receive a larger share; in some instances, the federal government will receive a larger share; and in some instances the penalties will be evenly divided between the governments. Both the state and EPA can benefit from penalty sharing because states often have more flexibility in the use of civil penalties than does the federal government. For example, in California, penalties

¹³ EPA has been quite active in providing "comfort letters" in the Superfund Brownfields context. See *Policy on the Issuance of Comfort/Status Letters*, 62 Fed. Reg. 4624 (Jan. 30, 1997).

¹⁴ These joint cases are brought in federal court. The state files a citizen suit pursuant to the citizen suit provision of the relevant federal law to enforce the provisions of that law. The state's claims are adjudicated as pendent state claims. While the state is not entitled to penalties for past violations pursuant to the citizen suit provision, the state can obtain penalties pursuant to state law. *Alabama ex rel. Graddick*, 648 F. Supp. 1208 (M.D. Ala. 1986).

recovered under the state water pollution law go into a pollution and abatement fund, which then can be used directly to benefit the State's environment. Both parties also benefit from joint enforcement because the state and EPA have the common goal of resolving the action appropriately and the violator cannot play the state and EPA off against each other. Furthermore, both parties benefit from the use of legal authorities of the other entity, which may not otherwise be available. For example, some states have groundwater protection statutes that may provide for a remedy not readily available to EPA under federal law. Conversely, states' hazardous waste clean up authorities are often less favorable to the government than the Federal Superfund law and states therefore often seek to use those federal authorities.

Joint Enforcement in Region 9

In Region 9, joint enforcement between EPA and its states has been pursued in appropriate cases for a number of years. In 1998, the Region achieved two significant settlements in state-EPA enforcement actions. In January 1998, the State of California, EPA, and the Department of Justice settled a Clean Water Act case against Pacific Gas & Electric (PG&E) for violations at its Diablo Canyon nuclear power plant in San Luis Obispo, California. *United States v. PG&E*, No. 961537 E CM (N.D. Cal., consent decree entered Jan. 13, 1998). Under the terms of the settlement, the utility will pay \$14 million, including \$7.1 million in civil penalties to the State of California and the United States and more than \$6 million in environmental enhancement and restoration projects. The case was originally investigated by the State of California, which requested EPA and the Department of Justice to join in the case to obtain a complete settlement. The case arose out of PG&E's incomplete and inaccurate reporting of data required to ensure that the cooling water intake system was in compliance with the Clean Water Act.

Another very successful joint venture between EPA and a state was the recent consent decree in *United States v. Asarco*, CIV 98-0137 PHX ROS (D. Ariz.1998). This decree was one of two decrees settling United States' claims for environmental violations at two Asarco facilities, one in Montana and the other in Arizona. The Arizona decree was negotiated jointly with the State of Arizona. As a result of the settlement, Asarco agreed to pay \$6.38 million in civil penalties, including \$1.5 million to the State of Arizona,

for its alleged violations and to spend \$50 million to clean up and restore the environment at facilities in both states. In addition, Asarco agreed, within four years, to fully implement a comprehensive environmental management system at all of its 38 facilities nationwide. At the Ray Mine complex in Arizona, Asarco will implement an extensive work plan to control illegal water discharges from its 6,100 acre open-pit copper mine and ore processing facility. The discharges were laden with heavy metals, which were contaminating Mineral Creek and endangering fisheries downstream in the Gila River. The joint action enabled the governments to achieve comprehensive water quality protections, based upon the United States' jurisdiction over surface waters and Arizona's jurisdiction over ground water.

Joint enforcement is obviously not an appropriate course in every case. For smaller or routine cases, joint enforcement is not likely to be a good use of resources. In larger, complicated cases, however, there can be a real advantage for the state and EPA to join forces in protecting the environment.

Conclusion

The state-federal relationship in environmental enforcement is a dynamic process and is continuing to evolve. EPA fully supports strong state enforcement programs. The Agency looks to a future relationship based on a full partnership concept, and less on an oversight concept, with equal respect for both partners in our federalist system.