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Federal Environmental Enforcement in EPA Region 2

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(Part one of a two-part article)

I. INTRODUCTION

It is self-evident that regulation of any sort is meaningless without a program of enforcement. The United States Environmental Protection Agency (EPA) has a vigorous enforcement program. Region 2 of the EPA, with responsibility for New York, New Jersey, Puerto Rico and the U.S. Virgin Islands, is likewise committed to a strong federal enforcement presence. From year to year, the number of enforcement actions initiated may fluctuate considerably; however, the trend over time shows substantial increases in federal enforcement activity. At the same time, EPA generally, and Region 2 in particular, have become more careful and sophisticated in selecting the targets of those actions. This article describes the enforcement philosophy that EPA has developed during a quarter century of environmental enforcement, and how that philosophy has been implemented in Region 2.

Several axiomatic observations inform the Agency's enforcement philosophy:

- Compliance with environmental regulations is often costly, sometimes extremely so, and the investments required generally do not enhance the profitability of the affected industry. Therefore, business will not voluntarily elect to comply with such regulations without powerful incentives.
- Nevertheless, broad voluntary compliance by business is essential if the environmental programs are to be

effective. This is because the number of pollution sources subject to regulation vastly exceeds the government's capability for oversight. Stated simply, EPA cannot afford to have an environmental policeman on every corner, so EPA must rely upon business to police itself.

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- The government's enforcement strategy must therefore be crafted to create a climate in which the natural, fiscally driven disinclination of a business to comply with costly regulations is overcome by other incentives.
- Such a climate conducive to wide, voluntary compliance is fostered when the regulated community is:
 - (a) aware of the regulations applicable to it;
 - (b) believes there is a significant chance that violations will be detected; and
 - (c) believes that if a violation is detected there is a likelihood that meaningful sanctions—usually monetary penalties of an appropriate size—will be imposed.
- At the same time, an enforcement strategy must be designed to respond to the most serious violations, based on the severity of their environmental impact or their impact on the integrity of the regulatory scheme.

EPA has concluded that, in order to have the best chance of achieving these ambitious goals, an effective enforcement strategy should address five separate phases of the enforcement process:

- (1) identifying affected facilities;
- (2) educating the facility operators and providing compliance assistance;
- (3) monitoring their compliance;
- (4) selecting and carrying out a timely and appropriate enforcement response when violations are detected; and
- (5) following up to ensure subsequent compliance by former violators.

EPA's enforcement strategy should also encourage regulated entities to perform the kind of self-policing that is recognized by EPA as essential for the overall success of the program.

II. IDENTIFYING AFFECTED FACILITIES

The first step in a coherent enforcement strategy is to develop a comprehensive inventory of facilities subject to a given regulation, with a means to identify additional facilities on a continuing basis. For some programs this is relatively simple: for example, establishing an inventory of automobile manufacturers subject to new car emission standards, or an inventory of petroleum refineries subject to gasoline lead level restrictions. In both examples, there are comparatively few regulated facilities, which are likely to be well known to governmental authorities.

For other programs, development of a comprehensive inventory is extremely difficult—for example, an inventory of every site in the country where hazardous wastes have been deposited, or an inventory of every piece of equipment containing PCBs.

If a comprehensive inventory cannot easily be developed, then the strategy must at least provide means to continually locate likely candidates. Thus, in the example of a hazardous waste site inventory, EPA is continually gathering information about possible sites from many diverse sources including state and local government agencies, news media, citizens, etc. The inventory is constantly growing and may never be complete, but if the information gathering effort is well designed and implemented it may be presumed that most sites, and probably the worst sites, have been or will be identified.

Ideally, the inventory should contain as much information as possible about the pollution source, such as the chemical composition, quantity and rate of emissions, height of smoke stacks, location of discharge pipes, character of waters receiving effluent discharges, plant operating capacity and typical operating rates, etc. More information of this sort will allow development of a more effective compliance monitoring strategy.

Sophisticated, computerized national data bases are invaluable for efficient storage and retrieval of the information which will be gathered in compiling and updating the inventory, as well as in other phases of the enforcement program.

III. EDUCATING THE REGULATED COMMUNITY AND PROVIDING COMPLIANCE ASSISTANCE

It is a basic tenet of jurisprudence that ignorance of the law is no defense. Still, when the success of a regulatory program depends heavily on voluntary compliance, a vigorous effort to educate the regulated community is very worthwhile. Once an inventory has been compiled, information packages can be mailed to affected facilities, seminars at which government personnel would explain the requirements can be held, and the news media (especially the trade press for an affected industry) can be enlisted in the outreach effort.

When extensive environmental regulation began in the 1970s, the focus was often on major utility and manufacturing facilities which emitted large amounts of pollution. As those facilities were brought into compliance, however, the residual impact of smaller facilities became more important. Consequently, smaller facilities—often operated by small businesses—have increasingly been subjected to regulatory requirements. Such small businesses often lack the expertise and resources, available to larger corporations, that are required to understand and properly respond to complex environmental rules.

In response to the changing universe of regulated entities, EPA has increased its efforts at providing compliance assistance, primarily to small businesses. One example of such a small business is the dry cleaner, ubiquitous in urban areas and now regulated because of the hazardous solvents that are used in dry cleaning. Region 2 has undertaken extensive efforts aimed at

informing dry cleaning establishments about these regulations, and helping them to comply. In New York City, many dry cleaners are owned by Korean immigrants, therefore EPA has published informational brochures in Korean as well as English. Printing establishments are another class of operations which have become regulated (primarily due to the use of solvents in inks and for cleaning equipment) in recent years. Though some printers are large companies, many are small and find it very difficult to respond to regulatory requirements. EPA has developed outreach programs for the printing industry, and has worked to establish special environmental resource centers for printers.

In the past, EPA technical staff would routinely provide suggestions to companies on how to come into compliance; however, this advice was usually given on an *ad hoc* basis when the occasion arose. Over the past several years EPA has begun to develop more structured programs for the provision of industry-specific, and even site-specific, technical compliance advice to companies who seek EPA's assistance. EPA is making extensive use of electronic information sharing technology. Agency-wide and regional Internet sites provide substantial compliance assistance information for a variety of industrial sectors. EPA's "virtual" compliance assistance centers for several different industries can be accessed through the Internet,¹ and receive a large number of "hits" annually.

In Region 2, a reorganization in the mid-1990s resulted in creation of a separate compliance assistance unit. Technical staff resources were shifted into this function from more traditional "hard" enforcement activities (such as compliance inspections and enforcement case support).

IV. COMPLIANCE MONITORING

There are many means of determining the compliance status of affected facilities, and all that are available should be incorporated into the enforcement strategy. Direct inspection and testing by government personnel (discussed further below) is often the best, but also may be among the most costly means. Other means include:

A. Routine Self-Reporting Requirements

Industries can be required to routinely monitor their own emissions or discharges, and report these to the government. The best known example of such a program is the requirement that all persons holding a National Pollutant Discharge Elimination System (NPDES) permit must file periodic Discharge Monitoring Reports (DMRs) with the federal or state government. A very substantial portion of all water pollution enforcement cases are based upon information reported in such DMRs. Under the Clean Air Act Amendments of 1990 and subsequent regulatory amendments, many types of facilities now have to install continuous emissions monitors to keep track of what is coming out of their smokestacks. They will be obliged to report the data from these monitors, in much the same way as NPDES permittees submit DMRs.

Failure to monitor, or reporting of inaccurate information, are

compliance problems which must themselves be the subject of the overall enforcement strategy. If sanctions for false reporting are severe, and the risk of detection is real, self-reporting is an effective compliance monitoring tool. A self-reporting program should therefore be combined with a program of field audits by government personnel.

B. Targeted Information Gathering

Instead of, or in addition to, routine self-monitoring obligations, EPA may require a business to carry out special self-testing, or to report other relevant information. EPA may request submission of operating logs and financial records to show when pollution control equipment was purchased or installed, how much and what type of fuel was used, what materials were utilized, etc. In most of the federal environmental laws, Congress has granted EPA broad information gathering authorities of this sort, which can be used whenever non-compliance is suspected. Increasingly, in an effort to get the most accurate information and minimize arguments about the facts, an enforcement case will not be commenced until an information letter has first been sent.

C. Citizen Tips

Tips from citizens living near a facility, or even workers in a facility, can be very valuable in identifying possible violators. The likelihood of receiving such tips is enhanced when government publicizes the existence of environmental regulatory requirements, and makes available telephone "hotlines" for anonymous calls. Some federal environmental statutes also provide legal job protection for "whistle-blowers," employees who report infractions by their employers.²

D. Remote Sensing

In today's high-tech age, a variety of technological resources are available which can "stretch" EPA's limited inspection resources. For example, aerial photography or geophysical satellite data can disclose potential hazardous waste sites through the presence of distressed vegetation. An aerial photo-history, showing changes over time, can disclose illegal filling of wetlands, or unauthorized landfills. Infrared photography can yield clues to the location of industrial discharges (including thermal discharges) into waterways. EPA even developed a mobile laser beam device for precise measurement of the opacity (density) of smoke plumes at night from afar.

E. Self-Policing

EPA has developed several policies intended to create incentives for regulated entities to identify and report their own violations. These are discussed further, in the second part of this article, under "Mitigation of Penalties to Encourage Self-Policing."

Nevertheless, the mainstay of any compliance monitoring effort will be government inspectors in the field. Intelligent targeting of limited inspection resources is therefore essential.

F. Targeting of Inspections

EPA uses a variety of targeting techniques. For most programs, EPA defines certain sources on the inventory as "major" or "significant," based upon their actual or total volume of pollutant discharges. The enforcement strategy (sometimes even the underlying statute) may call for a minimum number of inspections—*e.g.*, one per year—for all such sources.

Sources may also be targeted based on the environmental quality of the ecosystem into which their pollution is released. Thus, air pollution sources in an area which is not yet attaining the minimum public health-related ambient air quality standards established by EPA will be given a higher priority for inspections than those in attainment areas. Water pollution sources which discharge into a surface drinking water supply, or hazardous waste landfills which may leach into a groundwater drinking supply, will likewise be accorded higher priority.

In some programs, where it is harder to predict the environmental impacts of a given facility or a possible violation, or where the impact of any violation is potentially serious, inspections may be scheduled on a purely random basis from among all sources on the inventory.

Some inspections are announced to the facility in advance; some are unannounced. Announced inspections are satisfactory where possible violations cannot quickly be corrected in advance of the inspection visit; unannounced inspections are obviously more appropriate where a violating condition could be changed rapidly by the source.

Since so many of the environmental regulatory programs in the United States are, by law, state/federal partnerships, EPA and its state counterpart agencies expend considerable effort in coordinating inspection schedules so as not to duplicate effort. (Occasionally, inspections may be conducted jointly, either for purposes of federal oversight of a delegated or authorized state program, or because specialized expertise or additional manpower is needed.) It is important to recognize that the substantial majority of all government inspections for environmental compliance are carried out by states, rather than by EPA.

G. Multi-Media Focus

Historically, each of the programs administered by EPA (and, similarly, the states) tended to operate quite independently. Their inspection targeting strategies were tailored to the particular needs and interests of that program. Starting in about 1990, EPA began to actively promote a "multi-media" focus³ for a portion of its enforcement effort. Multi-media enforcement offers a coordinated and integrated focus on activities that are related to more than one environmental media (*e.g.*, air and water) or regulatory program (*e.g.*, Clean Air Act and Clean Water Act).⁴ Among the tools that Region 2 uses to achieve their objectives are major, consolidated multi-media inspections where many or all of the Agency's program offices are represented at the same time. Such a multi-media inspection gives a better snapshot of a facility's overall environmental compliance posture at a given moment. This can provide important information which a single

program inspection might not afford. For example, what might appear to be minor violations in several programs may, if taken together, be indicative of a general laxity in the environmental management; and a pattern of significant violations across several different programs may indicate a serious deficiency in corporate management. Where EPA documents such violations under multiple programs, the enforcement response may be adjusted accordingly. For example, higher penalties might be proposed; or commitment to a corporate environmental auditing program may be sought as part of the settlement of such a case.

Region 2 is working to even more carefully focus the available compliance monitoring resources of all its programs in strategically selected areas. Typically these are geographic areas, selected because of their environmental sensitivity, industrial concentrations, and/or concerns about environmental justice (EJ). Examples include the South Bronx area of New York City, the Long Island Sound; Middlesex County, New Jersey; and the Cataño and Barceloneta/Manati areas of Puerto Rico.

It is now generally recognized that poor and/or minority communities are often disproportionately burdened with environmentally undesirable uses, raising concerns over environmental justice. EPA has initiated programs to allow identification of such EJ communities and to help them recognize and address their concerns.

The Agency may also select a particular industrial sector which is believed to have widespread compliance problems, or which is regulated under a variety of environmental programs. Recent examples in Region 2 include such widely diverse sectors as dry cleaning, petroleum refining, industrial organic chemicals and automotive service and repair. The Agency sometimes identifies a pollutant of concern—for example, lead—which may be discharged by disparate types of facilities into the air or water or onto the ground. EPA may even select a particular company which has facilities in many different states, and which is thought to have potential compliance deficiencies, for inspections. In each case the strategy is to bring to bear, in a more focused way, the combined resources of the various EPA programs which have relevant regulatory authority.

H. Inspector Training

A final key element for an effective compliance monitoring strategy is the adequate training of inspectors. Environmental regulations are complex and voluminous. (EPA's regulations now occupy more than two linear feet of shelf space.) Detection of a violation requires a thorough understanding of the regulatory program involved and the industrial process under observation. In addition to their technical knowledge, inspectors will often be called upon to sift through business and financial records, making specialized training advisable.

In view of the rapidly increasing need for sophistication in their inspection personnel, EPA has instituted extensive, mandatory inspector training requirements and is providing the courses to its staff. These courses cover both legal and technical aspects of the enforcement program. EPA is also encouraging state agencies to adopt similar inspector training programs.

In the conclusion to this article, which will appear in the next issue of this newsletter, the focus will be on enforcement response policies.

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¹ See EPA Small Business Gateway: Assistance and Help (last modified Nov. 5, 1998) <<http://www.epa.gov/smallbusiness/help.htm>>.

² See, for example, the Clean Air Act, 42 U.S.C. § 7622.

³ See ORE's Multimedia Enforcement Division (last modified Sep. 22, 1998) <<http://es.epa.gov/oeca/med/med.html>>.

⁴ EPA Region 2 Multi-Media Activities (last modified April 21, 1998) <<http://www.epa.gov/r02earth/splitspm.htm>>.


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