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Federal Environmental Enforcement in EPA Region 2

By Walter E. Mugdan
(Part two of a two-part article)

Author's Note: Part two of this article continues the discussion of the government's enforcement strategy of environmental regulations to create a climate in which widespread voluntary compliance is the norm, despite the natural, fiscally driven disinclination of some businesses to comply with costly regulations.

- **Formal administrative enforcement.** EPA can issue an administrative order to compel compliance, and in many cases EPA can administratively impose a monetary penalty for past infractions.

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V. ENFORCEMENT RESPONSE

A good compliance monitoring effort will provide information about who is violating the law. An enforcement response policy will instruct government personnel on how to respond to detected violations in a *timely* and *appropriate* manner.

Timeliness is very important. A prompt enforcement response, even of modest severity, can often be more effective in providing a deterrent to future violations than a long delayed response of greater severity.

In determining what is an appropriate response to a violation, it is first necessary to assess the range of sanctions which the legislature has made available. For most of the environmental programs administered by the Environmental Protection Agency (EPA or the Agency), a wide range of enforcement tools is at EPA's disposal:

- **Informal response.** EPA can simply notify the source about its violation and request that it come into compliance, without taking any further formal legal action. EPA may request that the source operator certify in writing that it has come into compliance.

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largely unprotected from terrorism, pollution, and vandalism because of lapses in oversight and obstruction by the City. The report notes that the City's special watershed police force has only 47 officers, down from a high of 451 officers and 711 guards. The groups contend that this force is inadequate to cover even gatehouse security, and cannot protect the 21 reservoirs, three controlled lakes and hundreds of miles of aqueducts in the watershed. The groups charge that City officials actively discourage officers from arresting polluters and that officers are underpaid and poorly trained. This inadequate policing jeopardizes the success of the 1997 watershed agreement, which allows the City to avoid a costly federal requirement to build massive filtration facilities. The report is entitled "DEP's Watershed Police: Cops in Cuffs," and is available from the Pace Environmental Litigation Clinic at (914) 422-4343. *Daily Env't Rep. (BNA)*, Mar. 4, 1999.

Former Attorney General Vacco Accepts Position with Waste Management, Inc.

Former New York Attorney General Vacco has taken a position with Waste Management, Inc. Mr. Vacco will be vice president for government affairs for the company's Atlantic region, which covers New York and New England, and for its Canadian unit. *2/19/99 N.Y.L.J.* 1:1.

Shania Twain Reaches Settlement with New York Over Recording Studio in Adirondack Park

Country music singer Shania Twain and her husband have reached a settlement with New York concerning a recording studio they built on their Adirondack estate on Dexter Lake. The Adirondack Park Agency alleged that the couple failed to get the proper permits and damaged wetlands when they built the studio. The settlement requires the couple to restore the wetlands, pay a \$20,000 penalty, and make a \$25,000 payment to an environmental project devoted to wetland protection. *Associated Press* (Dec. 1998).

UPCOMING EVENTS

May 4-5, 1999

"Practical Skills Environmental Law," sponsored by the New York State Bar Association. Locations: Albany, Buffalo, New York City, Syracuse, Tarrytown, Uniondale. Information: 1-800-582-2452.

May 18-19, 1999

"Remediation of Ground Water by Natural Attenuation at Petroleum Release Sites," sponsored by ASTM, New York City. Information: Eileen Finn, (610) 832-9686.

May 18-19, 1999

"Environmental Site Assessment Practices For Commercial Real Estate: Transaction Screen & Phase I Site Assessment,"

sponsored by ASTM, New York City. Information: Eileen Finn, (610) 832-9686.

May 25-26, 1999

"Risk-Based Corrective Action (RCBA) Applied at Petroleum Release Sites," sponsored by ASTM, New York City. Information: Eileen Finn, (610) 832-9686.

June 20-24, 1999

"International Symposium on Coastal Engineering and Science of Coastal Sediment Processes," sponsored by Coastal Sediments, Hauppauge, New York. Information: <<http://www.coastalsediments.org>>.

August 19, 1999

"Environmental Assessments for Real Property Transfers," sponsored by Environmental Resource Center, Buffalo, New York. Information: 1-800-5ERC ext. 222.

September 14-15, 1999

"Phase II Environmental Site Assessment Process," sponsored by ASTM, New York City. Information: Eileen Finn, (610) 832-9686.

WORTH READING

Michael B. Gerrard, "Duty of Consultants, Lawyers to Report Contamination," *New York Law Journal*, Mar. 26, 1999 at 3:1.

Natural Resources Defense Council & Federated Conservationists of Westchester County, "Under Attack: New York's Kenisco and West Branch Reservoirs Confront Intensified Development" (Feb. 1999).

Jonathan P. Whalen, "The Qualitative vs. Quantitative Approach to Nonconforming Uses Under Section 52-61 of the New York City Zoning Resolution: The *Toys Case*," *62 Albany L. Rev.* 323 (1998).

Federal Environmental Enforcement in EPA Region 2

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- Formal civil/judicial enforcement. EPA, through the U.S. Department of Justice, can initiate a civil lawsuit in the federal courts against a violator. Such a lawsuit may seek a court order compelling compliance and imposing a monetary penalty. Civil lawsuits are more cumbersome than formal administrative enforcement proceedings, but carry greater weight since the courts can enforce their own orders more effectively than can EPA.
- Criminal enforcement. In egregious cases, such as a knowing and wilful violation, a criminal enforcement

action can be initiated. The violator here runs the risk of being imprisoned.

From 1970 until 1990, Congress steadily increased the severity of legal sanctions available for environmental violators. For example, in the 1970 Clean Air Act amendments, the first major piece of modern federal environmental regulatory legislation, neither judicial nor administrative penalties were available at all and criminal acts could be punished only as misdemeanors (i.e., less than one year maximum jail sentence). In subsequent legislation, including later amendments to the Clean Air Act, Congress provided for civil penalties up to \$25,000 per day of violation, first for judicial and later for administrative cases, and increased many criminal acts to the level of felonies providing up to two or even five years jail time for convicts. These changes reflect society's growing concern about environmental compliance.

A. Enforcement Response Selection

In selecting among the several enforcement options listed above, EPA will evaluate the severity and duration of the violation, and the past compliance history of the violator. For example, an informal response may be deemed appropriate for one who, for the first time, commits a relatively minor or non-substantive violation, particularly if the regulatory requirement is new. Most violations will, however, be the subject of administrative enforcement proceedings (where the law makes these available). A repeat violator will likely be dealt with through a civil judicial lawsuit. And the most serious violations (including serious repeat violations) will be handled as criminal prosecutions.

For many of its programs, EPA has issued guidance which assists Regional offices in determining the appropriate enforcement response to a given violation.

B. Settlement of Enforcement Cases

As is true in other areas of the law, most EPA enforcement cases are settled before trial or hearing. Indeed, were this not so, the number of cases EPA could pursue would be greatly reduced. However, the ability to settle any case favorably depends—ironically—upon the Agency's willingness to litigate all cases fully. When opposing parties recognize such willingness they are more likely to negotiate a compromise in order to reach a settlement.

EPA uses comparatively elaborate penalty policies to determine what penalty it should seek in settling a case, and also what its "bottom line" will be in settlement discussions with a violator. EPA also uses these policies during trial to demonstrate to a court why the penalty they seek is appropriate. To further induce settlement, however, EPA will seek a higher penalty from a court in litigation than that for which they would be willing to settle.

An EPA policy, discussed below, allows prospective settlers to offset a portion of the penalty EPA would otherwise seek by committing to perform "supplemental environmental projects."

EPA also has policies, described further below, which allow for additional mitigation or even elimination of penalties, under specified circumstances, to encourage regulated entities to engage in self-policing, and to promptly report and correct violations when they are thus detected.

C. Identifying the Appropriate Penalty

EPA believes that most violations serious enough to warrant a formal enforcement response action should result in the imposition of a monetary penalty. Such penalties are among the most effective deterrents to future violations, and can eliminate the economic benefit which may accrue to a violator as a result of his noncompliance.

EPA's penalty policies help to decide how large a monetary fine should be. The same considerations which inform the selection of an enforcement mechanism are applied to the question of penalty size: severity and duration of the violation, and past compliance record.

The violator's ability to pay is also a factor to be considered in setting the size of a penalty. While a fine of several thousand dollars may be severe for a private citizen or a small business, it is pocket change to a large corporation. It is not EPA's intention to penalize a company so severely as to drive it out of business and into bankruptcy. However, in rare cases, the government may conclude, based upon the compliance history and other characteristics of a business, that it is incapable of operating in compliance with environmental rules. In such a case the government may attempt to shut the business down, and prevent the operator from reopening elsewhere. EPA has developed computerized economic models to evaluate a violator's ability to pay a given penalty (and/or a given expenditure associated with the costs of coming into compliance).

For many programs, EPA has developed penalty matrixes which specify the particular penalty amount for a particular violation. Sometimes the penalty matrix will specify an appropriate range for the fine associated with a given violation; from within this range, the penalty selected is based on the size of the business and the seriousness of the violation.

Penalty matrixes are typically used for violations where there is not a well defined cost associated with coming into compliance. Examples of such violations include failure to file required reports on chemical usage and discharges (under EPCRA, the Emergency Planning and Community Right to Know Act); failure to have approved emergency plans or closure plans for hazardous waste management areas (under RCRA, the Resource Conservation and Recovery Act); or failure to properly mark and keep records about polychlorinated biphenyl (PCB)-containing equipment (under TSCA, the Toxic Substances Control Act).

In cases where the costs of coming into compliance are calculable (and significant), EPA will typically not employ a penalty matrix. Instead, the Agency will impose a fine calculated to recover the economic benefit a violator enjoyed as a result of his violation, plus an additional "gravity component" based on the severity of the violation and other similar factors.

D. Calculating and Recovering the Economic Benefit of Noncompliance Through Penalties

Economic benefit accrues to a violator when a capital or operating expenditure associated with coming into compliance is delayed beyond the required compliance date.

For example: by delaying compliance, a company postpones for one year a capital expenditure of \$1 million for pollution control equipment. From an economic perspective the company has had \$1 million to use for that one year in some profit-making investment. The return on such a hypothetical investment can be estimated using accepted economic models. In addition, this company will also have avoided entirely the costs of operating the pollution control equipment during that one year period.

Both the return on the hypothetical investment and the avoided operating costs are economic benefits which have accrued to the violator as a result of his violation. They are benefits which have not accrued to his law-abiding competitors who complied on time with the environmental requirements.

EPA has developed computerized models for use by its enforcement staff to calculate such economic benefits. These models employ readily available data inputs such as the deferred capital and operating costs; the duration of the noncompliance; the current inflation, interest and discount rates; and the manner in which the violator will finance the compliance costs (e.g., through loans or from equity).

At a minimum, EPA will try to recover this economic benefit from the violator in determining the proper size of a penalty.

E. Determining the Gravity Component of the Penalty

Recovering the economic benefits from a violator is, however, usually not enough. If only the economic benefit is recovered, the violator is merely placed in the position he would have been had he complied on time. An additional penalty amount, called the "gravity component," is designed to provide the deterrence—that is, to "make it hurt." In determining the size of the gravity component, EPA will evaluate mitigating or aggravating circumstances such as the seriousness of the violation; its impact on the environment; the violator's cooperativeness upon detection; the speed with which he comes into compliance; and past compliance history.

Unless the violator is demonstrably unable to pay, the economic benefit portion represents the minimum penalty EPA will insist on recovering, with these other factors raising the demand to a greater or lesser extent.

F. Supplemental Environmental Projects (SEPs)

EPA has a policy which allows a violator to reduce the amount of penalty he will have to pay in exchange for a binding commitment to carry out a "supplemental environmental project" or SEP. This is an environmentally beneficial project,

related in some way to the underlying violation, which goes above and beyond what the law already requires.

Most SEPs involve pollution prevention projects, in which the violator reduces its discharge of pollutants beyond the required level. This may be done by adding more pollution control equipment or—preferably—changing the materials used in a manufacturing process or even the process itself so that less pollution is generated in the first place. Another type of SEP often used is a commitment to carrying out a corporate environmental auditing program. Such programs are important tools for the kind of self-policing EPA seeks to encourage on the part of the regulated community.

EPA calculates the after-tax cost to the violator of a proposed SEP. That cost can then be used to offset the gravity component of the penalty. (The economic benefit portion cannot usually be offset by SEPs.)

Some examples of SEPs which Region 2 has negotiated include:

- E.I. DuPont settled a major RCRA enforcement action concerning its 78-year old Chambers Works in New Jersey. DuPont agreed to study ways to reduce hazardous wastes generated at the plant and share the resulting waste reduction technologies and methods with other companies and with universities. The results were spectacular. Fifteen major manufacturing processes were studied, each representing a significant environmental challenge in terms of volume and toxicity of the hazardous wastes generated. Half of the projects resulting from the study involved reduction of solvents; others included reductions in by-products and "tar" wastes. One project involved packaging: chemicals are now packaged in reusable containers instead of 55-gallon drums that become contaminated and must be discarded. The one-time capital cost for the fifteen processes totaled about \$6 million, yet DuPont is saving nearly \$15 million annually as a result of the changes. The environmental results are equally good. For the top seven projects (those with the greatest opportunities for waste reduction), process wastes were cut by an astounding 73%. Waste generation from all fifteen processes was reduced by 48%.
- Eastman Kodak's 104-year old Rochester, New York facility is the largest manufacturing plant in the Northeast, with more than 20,000 workers in over 400 buildings. Under a RCRA enforcement settlement with EPA, Kodak agreed to upgrade miles of industrial sewers and reduce the discharge of hazardous wastes. Kodak agreed to an \$8 million fine, but was permitted to reduce the fine by up to \$3 million by implementing six SEPs worth at least \$12 million. The SEPs will lead to reductions of hazardous wastes at the 2,200-acre facility. The aggregate reduction is expected to exceed 2.3 million pounds of pollutants by the year 2001, which should improve the water quality of the Genessee River and air quality in northwestern New York.

- In settling an EPCRA case, Chemical Waste Management, Inc. of New York agreed to purchase emergency response vehicles and other related equipment for Niagara County, NY, and to provide training in their use for County personnel. The company also implemented a County-wide household hazardous waste collection and disposal project, which included outreach to community groups, development and production of promotional and educational materials. The value of the SEP was estimated at \$730,000.
- Monsanto Corp. violated EPCRA reporting requirements for a hazardous chemical it discharged from its Bridgeport, New Jersey facility. In settlement, Monsanto agreed to install equipment that will completely destroy the chemical, thus eliminating the discharge entirely, at a cost of \$735,000.
- Agway Petroleum Corporation violated EPCRA reporting requirements for 164 facilities in New York and New Jersey. In settling the case, Agway agreed to install automated spill detection systems at its bulk storage facilities, including computer systems that automatically notify emergency authorities in case of a release. Together with another SEP this work will cost about \$500,000.

In each of these cases, the settlement also provided for a substantial cash penalty.

EPA's current SEP policy strongly encourages the use of SEPs in enforcement case settlements, particularly where SEPs involve actual pollution reductions. The policy also provides for community input and participation in the proposal or development of candidate SEPs for consideration by the parties to an enforcement action. Such community participation is deemed especially appropriate where the violation has had a direct and significant impact on the members of the community. Region 2 has negotiated one major consent decree in which the SEPs, valued at about \$4.5 million, were developed in large part based upon community input solicited by the government.⁵

Business has often taken a dim view of EPA's penalty policies. Violators often ask why penalties (or, in any event, "large" penalties) should be sought in the case of a "good faith" violation. Violators argue that compliance with environmental regulations should be the true goal of an enforcement program. Once a violator has agreed to comply, that goal has been achieved and, they assert, extraction of a fine is somehow unfair or inappropriate.

While acknowledging that some singular and purely unintentional violations ought to be excused, but without further discussion here of precisely what might constitute a "good faith" violation, it is EPA's view that a violator's commitment to come into compliance is a *sine qua non* of settlement, and—as noted earlier—is therefore neither negotiable nor deserving of particular praise.

EPA believes that for most violations a monetary penalty, with its magnitude based on the factors outlined above, is the best deterrent for future violations by the same or other sources.

G. Mitigation of Penalties to Encourage Self-Policing

Nevertheless, under some circumstances EPA will agree to reduce or even eliminate the penalty demand it would usually make, in order to create an incentive for regulated entities to engage in self-policing through environmental audits or environmental compliance management programs.

Environmental audits are a structured form of self-policing which, as noted earlier, is essential for the overall success of our environmental program. Through an environmental audit a regulated entity can periodically and systematically evaluate its own compliance with environmental rules. Analogous to an internal financial audit, it is a way for management to ensure that effective environmental compliance practices have been developed and implemented. Audits may be performed by specialized employees or by independent outside firms.

Regular financial auditing has become a nearly universal corporate practice; it is hoped the same will become true for environmental auditing. Happily, many major corporations agree, and have already put environmental auditing programs in place. In a 1995 Price-Waterhouse survey more than 90% of the corporate respondents said that they conduct environmental audits to find and correct violations before they are discovered by government regulators.

In the same survey, more than 50% of the respondents said they would expand their environmental auditing programs in exchange for reduced penalties for violations they discovered and corrected.

In December 1995 EPA issued a policy that does just that. The policy, titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,"⁶ provides, *inter alia*, for significant reductions—or even complete elimination—of civil fines for violations that are self-identified and promptly reported to the government. Conditions are set out which must be met before a company will receive the benefits of the policy; most important among these is that the company must promptly correct the violation, and not allow the violation to recur repeatedly. The policy also provides that EPA will not refer for criminal prosecution the corporations that thus identify, report and correct their violations.

A companion policy, issued in May 1996, focused explicitly on the concerns of small businesses;⁷ another similar policy is focused on small communities.⁸ Both of these have the same underlying purpose—using the government's enforcement discretion (e.g., to mitigate penalties) when regulated entities undertake voluntary self-policing, reporting and correction of violations.

H. Audit Privilege

Some companies have expressed concern that if they perform environmental audits, and discover violations, they will become "easy prey" for government enforcement agencies. They fear that their own audit reports will be used against them to extract

large fines or even to support criminal prosecutions. They have therefore proposed that audit reports and the facts underlying those reports should be legally "privileged"—like the communications between an attorney and client—so that they may not be used as legal evidence in a law enforcement proceeding. EPA disagrees.

EPA does not support the creation of a new legal "privilege" for audit reports. EPA believes that creation of such a privilege by definition invites secrecy, rather than the openness needed to build public trust. Creation of a privilege is not necessary in order to encourage regulated entities to carry out audits; the proof is that many of the nation's largest and best run companies are already routinely doing them. The Agency believes that the penalty mitigation policy for self-reported violations creates another effective incentive, and eliminates any need for an audit privilege. Creation of such a privilege, on the other hand, will likely lead to over-inclusive claims and increased, costly litigation for both government and industry.

In the self-policing policy EPA further assured the regulated community that the Agency will not ordinarily request audit reports as a means of determining whether violations exist, although they reserve the right to seek such documents when appropriate.

Interestingly, the 1995 Price-Waterhouse survey mentioned above noted that among the companies that do not conduct audits, the lack of confidentiality was not one of the factors that influenced their decision not to perform audits.

Audit privileges are strongly opposed not only by EPA, but by the professional law enforcement community and many public interest and environmental groups. At least 16 state Attorney General's offices, including the Attorney General of New Jersey, and three state environmental agencies have already expressed specific support of EPA's policy, finding it to be a carefully constructed compromise that balances the legitimate interests of the public, regulated entities and federal and state enforcement agencies. Several Governors, included the Governor of New York, have also expressed opposition to audit privilege legislation.

I. Injunctive Relief in Enforcement Settlements

Achieving environmental compliance is, of course, a fundamental goal of an enforcement program. It is therefore also important that enforcement settlement agreements be drafted carefully and precisely. It is EPA's experience that detailed compliance plans and schedules should be worked out during the settlement negotiation process and incorporated into the agreement. Deadlines should be established for interim steps (e.g., development of engineering plans, awarding of contracts, commencement of construction, etc.) as well as for final achievement of compliance. Protocols for testing pollutant discharges for compliance determination purposes should be specified. For extended schedules, the violator may be required to provide regular written reports to the government agency. Finally, the government will usually seek a "stipulated penalty"

provision pursuant to which additional violations result in automatic liability for a further penalty of agreed upon size.

VI. ENFORCEMENT FOLLOW-UP

Once an enforcement lawsuit has been resolved, it is important for the government to ensure that violators come into compliance in accordance with the mandated schedule, and that they remain in compliance thereafter.

Non-compliance with a schedule contained in a settlement agreement can result in the violator being liable for payment of stipulated penalty amounts specified in that agreement. (The government has, of course, the discretion to waive such penalty payments if the delay is trivial.)

Inspection is the best way to confirm compliance, but other mechanisms are also available and are widely used. In settlement agreements EPA routinely requires that where there is an extended compliance schedule, periodic progress reports must be filed. At the end of the schedule a responsible, senior corporate officer must certify in writing that compliance has been achieved.

If a new or continued violation is subsequently detected, further enforcement action may be warranted and, if so, should be initiated promptly. In general, such a repeat violator would be subjected to an elevated enforcement response and more severe sanctions.

In some very complex cases, particularly where a violator has a poor compliance history, EPA may negotiate in a settlement for the creation of an independent compliance auditor, to be paid for by the violator. (In a litigated case, EPA may request an independent auditor as relief to be imposed by the court.) Such an auditing function—typically provided by an environmental auditing or consulting contractor—can provide oversight at a level of detail and frequency which the government alone simply can not afford. The auditor's reports typically flow to both the violator and the government, and are also available to the public.

VII. BUT DOES ENFORCEMENT WORK?

How does EPA know if enforcement actually works? Does it achieve its goals of general and specific deterrence? EPA believe it does (see, for example, the first sentence of this article in Part I), but can they demonstrate that it does?

And how does EPA know whether it is deploying limited governmental resources wisely? How can EPA determine that we need more enforcement, or that less is adequate?

These questions have bedeviled criminal and civil enforcement authorities for generations. Almost by definition, it is difficult to prove a deterrent effect: how do you demonstrate that somebody *didn't* commit a crime, or violate a civil law, because of the deterrent effect of governmental enforcement?

There are, however, many things EPA can do to assess the efficacy of an enforcement program. Under the Government Performance and Results Act (GPRA), all federal agencies have been directed by Congress to identify performance measures

against which the success of their efforts can be better judged. EPA has responded by developing a suite of National Performance Measures for the Enforcement Program.⁹ These include "output" and, perhaps more importantly, "outcome" measures, as well as broader indicators of success. Output measures gauge activity levels: how many inspections, how many enforcement actions initiated (and what kind), how many cases resolved, etc. Outcome measures are intended to describe the results of the enforcement cases: how many pounds of what sorts of pollutants were reduced because of these enforcement actions? What is the value of the injunctive relief secured? What kinds of SEPs have been included? And so on. EPA's National Performance Measures now address many of these questions.

A more powerful indicator to measure the success of an enforcement program is thought to be the *compliance rate*. If you can identify the regulated universe, and accurately describe

the overall rate of compliance within that universe at a given moment, and chart changes in that rate over a stretch of time, you may be able to draw some conclusions about the effect of more or less enforcement on that rate. (Even this is questionable, since there may be many other variables influencing the compliance rate.) Establishing a widely accepted and generally applicable methodology for determining compliance rates has, however, proven to be very difficult. The debate usually centers on what is a meaningful numerator and denominator for the compliance rate equation. Even assuming that this question can be satisfactorily answered, there is also an obvious need for complete, accurate and timely compliance data—something which EPA and the states cannot currently assure. EPA is committed, however, to development of compliance rate data as a performance measurement tool during the next several years, and the agency will be investing considerable energy in this and related efforts.

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⁵ The case is against the Puerto Rico Electric Power Authority. The SEPs include acquisition and permanent protection of sensitive wetlands; and the establishment of an Environmental Review Contractor to monitor compliance with the decree, and to serve as an information conduit among the affected communities, the government and the defendant.

⁶ Office of Enforcement and Compliance Assurance: Audit Policy: Incentives for Self-Policing (last modified February 11, 1998) <<http://es.epa.gov/oeca/auditpol.html>>.

⁷ Office of Enforcement and Compliance Assurance: Policy on Compliance Incentives For Small Businesses (last modified February 27, 1998) <<http://es.epa.gov/oeca/smbusi.html>>.

⁸ Office of Enforcement and Compliance Assurance: Policy on Flexible State Enforcement Responses to Small Community Violations (last modified February 27, 1998) <<http://es.epa.gov/oeca/scpolicy.html>>.

⁹ See Office of Enforcement and Compliance Assurance: National Performance Measures Strategy (last modified March 17, 1999) <<http://es.epa.gov/oeca/perfmeas/index.html>>.


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