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MEMORANDUM FOR MEMBERS OF THE GOVERNMENT REFORM SUBCOMMITTEE ON ENERGY POLICY, NATURAL RESOURCES AND REGULATORY AFFAIRS

FROM: Doug Ose 

SUBJECT: Briefing Memorandum for October 14 Field Hearing: "EPA Water Enforcement, Are We On The Right Track?"

On Tuesday, October 14, 2003, at 11:00 a.m., in the Ipswich Town Hall, 30 South Main Street in Ipswich, Massachusetts, the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs will hold an oversight hearing on efforts by the Environmental Protection Agency (EPA) to enforce the Clean Water Act (CWA). The hearing is entitled "EPA Water Enforcement, Are We On The Right Track?"

The primary law governing pollution of surface waters is the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA) (33 U.S.C. 1251-1387). Originally enacted in 1948, Congress completely revised the CWA in 1972 and provided further revisions in 1977, 1981, and 1987. One of the CWA's principal enforcement and compliance tools is the National Pollutant Discharge Elimination System (NPDES) program whereby facilities that discharge wastewater from a point source directly into surface waters must obtain a NPDES permit from a State environmental agency. Forty-five States issue and enforce NPDES permits for renewable 5-year terms, specifying the control technology applicable to each pollutant, the effluent limitations a discharger must meet, and the deadline for compliance. Importantly, the CWA also requires a permit holder to maintain records, monitor effluent discharges, and automatically report monitoring data to EPA and the State. While EPA maintains a general oversight role, it has the discretion to step in when it deems necessary or at a State's request. EPA also retains jurisdiction over Federal criminal enforcement actions.

At any given time, approximately 52,000 facilities hold NPDES permits. According to EPA, 28 percent of all NPDES permitted facilities are industrial, 64 percent are municipal (various wastewater and drinking water facilities), and 2 percent are

Federal.¹ Within the NPDES program, EPA maintains the NPDES “majors universe,” which categorizes a permitted facility based on the design of its wastewater flow or a permit rating score, but excludes discharging facilities related to wet weather events. A “major” facility must meet EPA’s reporting requirements that enable EPA to monitor compliance levels.

When a facility violates its NPDES permit, there are often conflicting views on EPA’s or a State’s appropriate course of action. Since its inception in 1970, EPA has employed shifting enforcement strategies with varied degrees of success. More traditional strategies include enforcement activities, such as penalty assessment, administrative relief, civil actions, and criminal prosecutions. Traditional enforcement activities still maintain a prominent role in EPA’s enforcement strategy. However, in the early 1990’s, former President Clinton stated in his 1995 “Reinventing Environmental Regulation” report that the adversarial approach that has often characterized our environmental system precludes opportunities for creative solutions that a more collaborative system might encourage. To that effect, the Clinton Administration reorganized EPA’s Office of Enforcement for the purpose of augmenting traditional deterrent-based enforcement approaches with a complementary emphasis on compliance assistance.

With coordinated assistance from EPA and the States, compliance assistance helps the regulated community understand and meet their environmental obligations before the need for formal enforcement actions. Sector-oriented assistance addresses compliance issues or needs across particular business and industry sectors (e.g., dry cleaning, metal finishers, furniture manufacturers) or government sectors (e.g., local governments and tribal governments). Region I, where the Subcommittee will hold its hearing, utilizes a sector approach to educate marinas on how to improve environmental compliance and to promote best management practices. Also, to help facilities comply with the new stormwater Phase II program, Region I is maximizing its outreach efforts to help the large number of facilities and sites affected for the first time by EPA’s stormwater regulations. Region I also works with States to test and implement innovative regulatory approaches to deliver superior environmental protection, such as the Environmental Results Programs and regional innovations workgroups.

One of the important examples of successful compliance assistance can be found in Massachusetts. In the mid 1990’s, EPA Region I Administrator John DeVillars and his staff announced EPA’s goal to eliminate unlawful discharges into Massachusetts’ lower Charles River. EPA set a goal that the river would be clean enough to swim in by 2005. EPA used a combination of compliance assistance and limited enforcement actions to achieve its goal, while monitoring the river to determine whether water quality gains were met. EPA used several innovative tools, including hiring a consultant to help local governments, negotiating memoranda of agreement with localities, distributing names of suspected violators to consultants who then sold their services to localities, as well as

¹ In the mid 1990’s, EPA’s efforts to control pollution caused by wet weather events prompted EPA to greatly expand the universe of NPDES regulated facilities. EPA now requires facilities to obtain NPDES permits for stormwater runoff, sanitary sewer overflows and combined sewage overflows.

initiating several enforcement actions. Rather than imposing monetary penalties on communities, EPA negotiated agreements to eliminate the problem discharge connections that caused the unlawful and environmentally hazardous discharges. EPA's approach moved the Charles River project further, using fewer resources than solely taking enforcement actions against all violators. In this case, as with other compliance assistance success stories, one cannot evaluate the program's success by measuring traditional enforcement actions. Only by using meaningful outcome performance data, such as changes in actual river water quality, can the benefits of compliance assistance be measured.

In addition, to entice cooperation, EPA and the States work together to implement compliance incentives policies and programs that eliminate, reduce or waive penalties under certain conditions for business, industry, and government facilities that voluntarily discover, promptly disclose, and expeditiously correct environmental problems. Incentives include environmental self-audit protocols, Environmental Management Systems, Pollution Prevention, and other innovative projects and programs. Often, self-auditing renders unnecessary either formal EPA investigation or an enforcement action.

Despite EPA and the States' efforts, some facilities do not comply with the law. To address this problem, EPA recently established a "Watch List" as an internal management tool to help EPA and the States identify and bring into compliance those permit holders that are deemed by EPA to be in "significant noncompliance" with the CWA (and other environmental laws) for two consecutive quarters within the last year and have not faced formal enforcement actions (see Attachment A). The purpose of the Watch List is to reverse the trend over the last decade whereby 24-26 percent of "majors" facilities remained in significant noncompliance for a one-year period without a traditional enforcement action.²

The Charles River project taught EPA and the States several lessons. First, compliance assistance and formal enforcement are mutually reinforcing aspects of any regulatory program. Many facilities want to comply, given incentives, education and cooperation from government. Moreover, permitted facilities have a broad range of regulatory sophistication. Second, the success of compliance assistance, particularly in enforcing water quality programs, is best measured by outcome performance measures that measures changes in the affected waters rather than enforcement activities per se. It is very difficult to use the traditional enforcement numbers to establish trends to and away from environmental enforcement (see Attachment B). Third, environmental results can often be most efficiently achieved at the State level, where relationships between government and the regulated community is strongest and knowledge of the environmental challenges can be greatest.

The invited witnesses for this hearing are: J.P. Suarez, Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA; Steve Thompson, Executive

² According to EPA's 2003 NPDES "Majors" Performance Analysis, rates of significant noncompliance remained effectively stable since 1994. Data show an increase rate of 8 percent between 1994 and 1997, but EPA explains that definitional changes caused this increase.

Director, Oklahoma Department of Environmental Quality; Shelley H. Metzenbaum, Visiting Professor, University of Maryland School of Public Affairs and Director, Environmental Compliance Consortium; Roberta (Robbi) Savage, Executive Director, Association of State and Interstate Water Pollution Control Administrators; Scott H. Segal, partner at Bracewell & Patterson LLP; J. Charles Fox, Vice President of Public Affairs, Chesapeake Bay Foundation; Pam DiBona, Vice President for Policy, Environmental League of Massachusetts; and, Eric Shaeffer, Director, Environmental Integrity Project.

Attachments

U.S. EPA Office of Enforcement and Compliance Assurance (OECA) Facility Watch List Project Fact Sheet

I. What is the Facility Watch List?

- A management tool to enhance the enforcement program's ability to identify and track facilities with serious violations and no apparent formal enforcement response under the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act.
- A key component of OECA's *Smart Enforcement* initiative to help EPA and the States use data in national systems to better focus enforcement resources on the most significant noncompliance problems.

II. Purpose of the Watch List

- Ensure timely and appropriate response to significant noncompliers or longstanding violators through better data analysis and routine discussions between OECA, the Regions, and the States.
- Expand on tools already used by the Regions and States by providing a management framework to facilitate EPA-State dialogue.
- Demonstrate EPA's commitment to use the data to focus on facilities identified with serious violations, due to the public's access to the SNC/HPV data through the Enforcement and Compliance History Online (ECHO) Web site.

III. Watch List Development Process

- The Watch List concept was tested with draft criteria between September and November 2002 with the EPA Regions.
- Between January and March 2003, a coordinating workgroup and three subcommittees from OECA and the Regions developed and finalized the data criteria and guidelines.
- The criteria are consistent with the existing enforcement response policies and timely and appropriate guidelines.
- EPA requested comments on the criteria from the ECOS Compliance Subcommittee.
- EPA and ECOS agreed that prior to developing the first Watch List, a data quality review will be conducted with the Regions and States.

IV. Proposed Plan for Data Review

- In September, OECA will distribute the information about the Watch List, along with draft data that can be examined for data quality problems.
- This data review period similar to that conducted for ECHO, but smaller in scope

and duration.

- Regions and States will be provided with the location of a Web site accessible from the Online Targeting Information System (OTIS) to be used to examine potential Watch List facilities for data quality evaluation.
- Explanations for the listed facilities are not required during the review period.
- Data corrections will be made by the data owner (State or EPA) and reflected in OTIS after the monthly refresh.

V. Watch List Implementation

- After the data review, OECA will produce the Watch List on a quarterly basis.
- OECA will require from the Regions, for each facility listed, a code indicating the status of enforcement activity and a short explanation of the case status or planned response.
- Each Region should discuss the facilities with the States and determine what action is necessary to resolve the violation.
- We expect that Regions will need to meet quarterly with their States to develop the response. (Some Regions already have such meetings.)
- OECA intends to enhance the Online Tracking Information System (OTIS) to provide Regions with flexible analytic and reporting capabilities in regard to facilities on the Watch List.
- In addition to responding to those facilities identified on the Watch List, OECA wants to continue to improve data quality by having the Regions closely evaluate the rate of SNC/HPV identification within their States to ensure data on violations, SNC/HPV, and enforcement actions are being timely and accurately entered into the national systems.

VI. How the Watch List Will Be Used

- OECA will discuss responses with the Regions, and look for reductions in the number of facilities on the list over time.
- Facilitate discussions between HQ, Regions, and States in regard to facilities that appear to be the worst problems.
- All facilities that appear on the Watch List may not require an immediate formal enforcement response.
- The Watch List is not intended to serve as a report card or a public document.

Draft Criteria to be Used During Watch List Data Quality Review Period - 7/22/03
For Distribution to EPA and State Enforcement Personnel

Clean Air Act Criteria

A. Unaddressed HPV. Current high priority violator (HPV) that has been in unaddressed (no action) status for greater than 270 days.

B. Repeat HPV without Deterrent. Current HPV with 3 or more findings of HPV (known as day zero's) within last 3 years without any penalty.

C. Lingering Addressed HPVs. Four consecutive years of "addressed" but unresolved HPV status with current compliance status as "violation" or "unknown."

Resource Conservation and Recovery Act Criteria

A. Chronic SNC with No Action. Current SNC facilities with 4 or more of the last 8 quarters in SNC and no enforcement actions in the last 2 years (all RCRA facilities).

B. Recent SNC with No Action. In SNC for the last two quarters with no enforcement action. Criterion B is an early warning system that will indicate when facilities have been on the SNC list without action longer than the 180 days specified in the Enforcement Response Policy as the mark of a timely action.

Clean Water Act Criteria

A. Consecutive Significant Noncompliance with No Action (Automation of Exceptions List).
A1. SNC effluent violations in consecutive quarters with no action. Facilities with 2 or more consecutive quarters of unaddressed SNC violations within the last year.
A2. Other SNC violations in consecutive quarters with no action. Facilities with two quarters in a row of the same non-effluent SNC facility-level code (e.g., compliance schedule violation, DMR non-receipt) within the last year, and no formal enforcement action.

Criteria B, C, and D are considered "pilot" criteria

B. Repeat SNC with no enforcement. Current SNC facilities with four or more of the last eight quarters in SNC and no formal actions taken in the last two years.

C. Repeat pattern of effluent violations with no enforcement. Any facility with 25 or more monthly effluent violations over the last two year period, and no enforcement action since the beginning of that period.

D. Violations with potential for serious environmental impact.

D1. Serious one-time release without enforcement. This is defined as any reported daily maximum measurement that is more than three times (200%) above the permitted level with no enforcement action taken at the facility following the violation.

D2. Serious one-time pH release without enforcement.

Attachment B

EPA Criminal Enforcement

	FY2002	FY 2001	FY2000	FY1999	FY1998	FY1997	FY1996	FY 1995
Referrals to DOJ	250	256	236	241	266	278	262	256
Monetary Penalties Assessed (millions)	\$62	\$95	\$122	\$62	\$93	\$169	\$77	\$23
Number of Defendants Charged	325	477	360	322	350	322	221	245
Total Jail Time (years)	215	256	146	208	173	196	93	74
Total Investigations/cases Initiated	674*	482	477	471	636	551	548	562

* FY02 Cases Initiated includes 190 counter terrorism investigations initiated.

Source: OECA Measures of Success Reports, FY 1997 to FY 2002