

### **Oklahoma's Enforcement of Federal and State Water Laws**

My name is Steve Thompson. I have been the Executive Director of the Oklahoma Department of Environmental Quality (DEQ) since July 2002 and previously served as the Deputy Executive Director beginning in July 1993. I have experience in managing State environmental programs since 1985. I currently serve as the Secretary-Treasurer of the Environmental Council of the States, the national nonpartisan association of State environmental commissioners, and I served as the chair of its Compliance Committee in the past. I want to thank the Committee for inviting me to testify about Oklahoma's enforcement of Federal and State water laws.

The Federal Clean Water (CWA) and Safe Drinking Water (SDWA) Acts, as well as the Clean Air (CAA) and Resource Conservation and Recovery (RCRA) Acts anticipate the delegation or authorization of program operation for those Acts, including enforcement, to States that have demonstrated resource capacity, as well as companion State statutory and regulatory authority. Oklahoma was the first State in the nation to receive delegation of the Federal program for drinking water in 1977. In 1966, Oklahoma received delegation of the National Pollutant Discharge Elimination System (NPDES), the national water pollution control program, for industrial and municipal discharges. Oklahoma also has received authorization under the Clean Air Act (CAA) and the Resource Conservation and Recovery Act (RCRA).

Before I discuss Oklahoma's water enforcement effort, I would like to take a moment to explain my understanding of the delegation sections of the Federal environmental laws. It is my belief that the framers of these acts understood, even before it became popular, the phrase "think globally, act locally". These laws reflect that activities such as research and development, nationally consistent standards, rulemaking and program review could best be accomplished at the national level. The laws were designed so that implementation could best be accomplished by those closest to the problem, i.e., States and, in some cases, localities. In States familiar with the nature of their specific environmental problems and their cultures and, in States the size of Oklahoma, the people involved in the environmental effort - both citizens and representatives of regulated entities - could best develop individual solutions under the umbrella of Federal standards and rules. The Environmental Protection Agency's (EPA) structure of strong regional offices was established primarily to insure that those individual solutions could conform with Federal expectations. Justice Brandeis' metaphor that "States are the laboratories of policy development" proved true in relation to environmental programs. Ideas such as pollution prevention, waste minimization, environmental management systems, compliance and regulatory assistance and many other innovative programs all took root in State environmental agencies.

This is not to mention the explosion in resources available to the national environmental program effort that delegation of programs initiated. Citizens and regulated entities alike understood that access to program managers was facilitated at the State level. When my agency was seeking delegation for the NPDES program from the EPA prior to actual

delegation in 1996, we were supported by both citizen groups and regulated entities. Citizens lobbied our legislature in support of general revenue to help establish fiscal capacity. The regulated community supported rules that imposed fees upon them for program support. The legislative effort to adopt State statutes companion legislation to Federal statutes received wide-ranging support. It was understood by citizens, the regulated community and the legislature that if we chose not to adopt at least minimum Federal standards and rules and make a commitment to enforce them, that Oklahoma's delegation status would be at risk. Congress wisely retained EPA authority to take enforcement action only in instances where States could not or would not take action.

As enforcement programs matured, EPA and the States moved to further clarify their individual roles in enforcement. In 1986, the *Revised Policy Framework for State/EPA Enforcement Agreements* was developed. It may represent the last time States and EPA were in substantial alignment on the role both would play in enforcement. The 1986 Framework addresses the following key areas: (1) State and Federal enforcement agreements; (2) program review and key measures to define State performance; (3) EPA processes and duties; (4) direct Federal enforcement in States; and (5) open State/Federal dialogue. The pertinent parts of the Framework follow:

#### **1. State/Federal Enforcement Agreements**

State and Federal agreements are to be developed in coordination by Regions and States. Regions are to have substantial flexibility to tailor national guidance to State-specific

circumstances. Priorities are to have a national component as well as account for environmental concerns that are unique to a particular State, such as financial, technical and enforcement capacity. At a minimum, the agreements require the establishment of timeframes for State task completion that recognize State constraints but ensure consistency with national goals. Additionally, the Framework calls for an appropriateness component that includes enforcement response choices, enforcement consistency and adequate but flexible deterrence methods.

Agreements are to reflect mutual understandings. The 1986 Framework requires EPA Regions to “(1) be clear and ensure there are ‘no surprises’; (2) make arrangements with the State so that actions taken are constructive and supportive; and (3) tailor the application of the national program guidance to the States’ programs and authorities.”

## **2. Program Review Criteria**

Program review and key measures to define State performance are critical to determining a quality program. Most essential is a timely and appropriate enforcement response. Clearly defined benchmarks and milestones for determining what constitutes timely and appropriate actions are crucial. Also important is accurate recordkeeping and reporting. Reviewable and accessible records are essential to supporting effective program evaluation and goal-setting. Other quality State program components that are to be reviewed and measured include: (1) inventories of regulated sources that are complete, accurate and current for both national and State priority-setting efforts; (2) clear and

enforceable requirements for regulated entities that consider Federal as well as State provisions; (3) compliance monitoring that is accurate and reliable for determining potential violations, gathering evidence, establishing an enforcement presence and improving compliance; (4) methodologies for tracking and resolving significant noncompliance; (5) various methods of deterrence and their effectiveness; and (6) the soundness of a program's resources and management.

### **3. Program Review**

EPA processes and responsibilities regarding State efforts are critical to the national environmental compliance effort. Such processes are to include routine and nationally consistent audits of State programs. EPA should set timeframes for audits that apply consistently to all Regions, and audits of State programs should be required at least annually in all Regions. National consistency should be an overarching goal of audit review. The audits are to result in consistent consequences. State performance that meets or exceeds good program criteria and measures will result in less frequent EPA reviews, inspections and reporting requirements as well as allowing the State to decide on priorities of concern. Conversely, where a State fails to meet the criteria for good performance, EPA will take appropriate actions such as increased inspections and reporting requirements, and more frequent program audits.

### **4. Criteria for Direct Federal Enforcement**

Direct Federal enforcement criteria in States can only occur when:

- the State requests or refers an action to EPA.
- a State fails to take a timely and appropriate action based on known and agreed-to criteria.
- a national precedent is identified, or a violation of an existing EPA order or consent decree occurs.

In every instance, EPA cannot take direct enforcement until it establishes a need for Federal involvement based on: a designation of national significance; an identification of significant risk or damage to the environment or public health; a demonstration of significant economic benefit gained by noncompliance; a pattern of noncompliance; or an interstate issue. All direct enforcement by EPA should be conducted and managed in coordination with the State. Only issues of national precedence should be managed solely by EPA, but coordinated with the State.

## **5. No Surprises**

There can be no surprises to the States regarding enforcement efforts. EPA is to establish a policy of open dialogue that results in Region notification to and consultation with its States. In no case is an EPA inspection or enforcement action to occur in a State without advance notification and consultation. Regions are to establish procedures in coordination with the States that identify criteria for inspections and enforcement actions.

The process envisioned by the 1986 Framework was not without its problems. Any program review between EPA and the States will create tension. However, the 1986 Framework represents a mutual effort to define the expectations of State programs, outline consequences of failure to meet expectations, and more clearly define the role of both EPA and the States. In my view it is the document that is most respectful of limited resources because it allows both parties to do what they do best and most clearly defines the intent of the delegation provisions of our Federal environmental laws.

This process generally worked well although States sometimes chafed under EPA's oversight authority. States began in the mid 1990s to call for a more mature partnership with EPA. It is unfortunate that States did not make it clear that they were calling for a revamped enforcement process because their implementation experience had surpassed that of EPA. What States got instead was virtual abandonment of the established enforcement review process. At about the same time, EPA reorganized and created the Office of Enforcement and Compliance Assurance (OECA). Inherently, when environmental programs are organized by function the primary goal becomes the function. The best evidence of this axiom is OECA's actions. OECA severely limited the regional program review function in favor of applying resources to direct Federal enforcement despite the general effectiveness of enforcement efforts in States with delegated programs. It soon became evident that OECA intended to usurp the enforcement programs of States. Regional offices that had been the linchpin of a cooperative EPA/State effort now became little more than satellite enforcement offices for OECA.

The results of this change are increased acrimony between EPA and the States, inconsistent enforcement among regions and in a time of financial strain at the State level, duplication of effort and waste of valuable resources. Perhaps the most unfortunate consequence is that relationally and organizationally we are distracted from our primary goal: protection of our air, land and water.

While it is clear that I have strong feelings about this, this testimony is not intended to place blame. It is only intended to advise you of organizational issues that you should be aware of. As Congress considers elevation of EPA to cabinet level status, an organization that promotes partnership between EPA and the States, and focuses on protection of the media, in my view, is vital.

### **Oklahoma's Water Pollution Control Program**

The Oklahoma Department of Environmental Quality was delegated responsibility for the National Pollutant Discharge Elimination System (NPDES) program for industrial and municipal dischargers in 1996. We had operated the program for municipalities under a Memorandum of Understanding with Region 6 for many years prior to delegation.

It is one of the guiding principles of our agency and, I would suspect, many State environmental agencies that compliance with environmental statutes is our goal and that enforcement, while it is clearly the foundation tool, is only one tool. There are a number of reasons. First, the Clean Water Act through its delegation provisions anticipates that States,

because of proximity to problems, are better able to determine a range of possible compliance solutions. EPA regional offices should exist to insure that these solutions can be accomplished within the Federal regulatory framework. Second, many facilities and activities not regulated under Federal statute are regulated in Oklahoma under State statute so there exists a greater opportunity to explore an expanded range of options. Keep in mind that Oklahoma has only two cities with a population greater than 100,000. Thirty-six communities fall within the range of 10,000 and 100,000 population, and 551 of our communities have a population of less than 10,000, with 370 of those below a thousand people.

Federal statutes require the regulation of discharging facilities. Facilities that discharge in excess of one million gallons of water per day are considered "major sources" by EPA while those that discharge less than a million gallons are considered "minor sources". EPA's enforcement emphasis is typically on major sources. In Oklahoma, we have 68 major municipal sources and 31 major industrial sources. While important, these facilities represent only a portion of the total potential impact to water quality and of our total effort. We have 305 minor municipal sources and 261 minor industrial sources. But, our total universe of regulated facilities includes over 1600 municipal-type systems and over 700 industrial systems. Many of these are operated as total retention or land application systems. Obviously, small systems dominate our regulatory effort.

Any enforcement strategy must begin with the approach that the regulated facility is responsible for knowing the regulations to which it is subject. "I didn't know" is never an

appropriate legal reason for noncompliance. But from a practical standpoint many of our communities do not possess and cannot afford to employ the kind of technical expertise necessary to understand the multitude of Federal and State regulations. This is equally true of small businesses that are being swept into the inventory of regulated facilities, particularly as we have become more active in the area of stormwater. The traditional "closed book test" where government relies solely on the facility to understand regulation while legally defensible is no longer practically defensible. So we are trying to provide open book tests through a number of efforts. First, our local field staff and a portion of our water quality engineering staff are available to communities to provide technical and operational assistance. Until budget shortfalls forced us to abandon the project, we had contracted with several retired civil engineers as "circuit riders" to assist in this effort. On the industrial/commercial side we have provided targeted outreach to the ready-mixed concrete, asphalt batch plant, metal foundry and other sectors in an attempt to show what compliance "looks like". Our compliance inspectors are being trained in the same setting so that all involved will understand the same requirements in the same way at the same time. We have authorized compliance periods after the outreach to allow the facilities time to come into compliance. Then we inspect. Those who fail to take advantage of this opportunity face enforcement rather than a compliance assistance attitude by the agency. Does this reduce the potential for collecting penalties? We hope so. Does it increase compliance? We believe so.

Finally, the enforcement policy toward municipalities has traditionally been different than the policy toward for-profit entities. In my view, the notion of compliance as the goal finds its

firmest footing here. I am extremely reluctant to take financial resources away from a community, particularly a small community, in the form of a penalty when that funding is vital to meet planning and wastewater infrastructure needs.

Our typical compliance process begins when a violation is determined. If there is a release that is a substantial endangerment to human health or aquatic life, or in some cases where the issue is failure to appropriately operate the facility, we will go directly to an order that includes a penalty. Over the past three years the Oklahoma DEQ has assessed about \$630,000 in municipal penalties. Yet even here about two-thirds of the penalties assessed have been directed to needs in the community in the form of Supplemental Environmental Projects. In many if not most cases, the violation is caused by deteriorating infrastructure. In most of these cases, the department and the city agree in a consent order to a schedule which begins with the submittal of an engineering report, moves to the pursuit of necessary funding and ends with the construction and appropriate operation of the facility. Orders include stipulated penalties that are assessed only if a city fails to meet the schedule.

### **Oklahoma's Public Water Supply Program**

Our Public Water Supply Supervision Program, delegated to Oklahoma in 1977, faces much the same problems and is operated in much the same way. As with wastewater, the Oklahoma legislature has established drinking water protection requirements above and beyond the Federal standard. The most obvious example is that EPA set forth regulation for all systems that served more than a population of 25. In Oklahoma, these smallest of systems, known as

minors, are required to meet the same standards and are subject to permitting, monitoring and enforcement just as other systems. In Oklahoma, public health concerns do not cease at 25 people. The DEQ currently has 2,228 permitted public water supply systems. Only four systems serve a population of over 100,000, and a total of 56 serve a population of 10,000 or more. Enforcement of our drinking water program has been operated in cooperation with Region 6 much as described in the 1986 Framework document. Prior to this year, about 96% of all drinking water systems were in compliance with all standards, the only outlier being systems that were not in compliance with the nitrate standard. With the advent of the rules related to disinfection-by-products and enhanced surface water treatment, as well as the impending start-up dates for the arsenic rule, the groundwater implementation rule and the radiochemical rule, we can expect our noncompliance numbers to increase. We intend to try to use the same technical, operational and regulatory assistance process in addressing these new rules as we have traditionally used. But as State budget shortfalls have become greater, our legislature's ability to finance this assistance is questionable. We will make the argument to the legislature that this problem is somewhat akin to the oil filter commercials. Pay me now in the form of compliance assistance, or pay me more later in the form of enforcement. Failing both, Federal enforcement is on the horizon for large systems. Unregulated drinking water supply is in the future for small systems.

In conclusion, enforcement should not be a separate and independent enforcement effort and it was never intended to be more than a component of the total regulatory process. We must strive for enforcement consistency across the nation, but also tailor it to the uniqueness of

each State. We must reemploy the unique roles of States and EPA in protecting and improving the nation's environment, and we must recognize that States have an obligation to protect public health and the environment that extends beyond the scope of Federal programs. The 1986 *Revised Policy Framework for State/EPA Enforcement Agreements* remains the best model for the roles EPA and States should play in enforcement. By following this Framework, we can all utilize the most efficient methods, tools and expertise to protect the nation's environment. The wheel is there don't reinvent it just polish it.

I believe that the process outlined in this testimony is protective of human health and the environment, understanding of a world of limited resources and responsive to all our citizens.

I would be happy to answer any questions.