

# **Environmental Enforcement: An Overview**

Bertram C. Frey, Deputy Regional Counsel  
United States Environmental Protection Agency, Region 5  
Minnesota Bar Association  
November 17, 1999

## I. INTRODUCTION

Thank you for inviting me to speak to you today. I will discuss new developments in the United States Environmental Protection Agency's (EPA's) enforcement practices and initiatives, from a national as well as a regional perspective. I am here representing Region 5 of EPA, which consists of six states: Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Region 5 has the largest number of employees of any of EPA's ten regions. EPA allocates to our region between 16 and 18% of the Agency's regional enforcement resources, with which we currently maintain roughly 25% of the Agency's federal court enforcement actions. Region 5 presently has about 1430 active enforcement cases and matters (up over 500 matters from three years ago) of which about 280 represent civil judicial enforcement actions, about 1000 represent administrative actions at various stages, and roughly 150 represent criminal enforcement cases and matters at various stages of development or prosecution. Region 5 also continues to monitor whether a defendant or respondent is meeting the terms of over 280 judicial orders and consent decrees as well as roughly 665 administrative orders and settlements.

Given the inevitable and continuing scrutiny on environmental regulation in the coming years and new budget constraints, EPA is challenged with developing more efficient and more innovative components of its enforcement and compliance program.

I will focus on EPA's enforcement priorities and initiatives, incentive programs, and EPA's role in compliance assistance and partnering with states, tribes and local government.

## II. ENFORCEMENT PRIORITIES AND TRENDS

The people of this nation want protection from pollution, and demand enforcement of our environmental laws to ensure they receive that protection. The public's expectation of protection from environmental hazards drives our enforcement and compliance program. It gives clarity to our mission. Whether by strong criminal and civil cases, swift administrative actions, or policies and programs which provide incentives for companies to voluntarily step up to the mark and confront their environmental problems, enforcement and compliance assurance work.

### **A. Risk-Based Targeting and Management**

One factor that promotes the success of our enforcement program is the program's constant adaptation to emerging conceptions of environmental protection. Over the past several years, EPA has shifted its approach to environmental management from "command and control" to more emphasis on identifying and addressing *first* those environmental problems that present the greatest risk to human health and the environment. More concentration on risk-based priorities in enforcement does not mean that EPA has abandoned the principles that have driven its enforcement efforts over the past 20 years. Command and control will continue to be a very important regulatory and enforcement tool. But EPA's resources and attention are

now more focused on reducing risks of harm to the health of people and the environment as enforcement priorities. For example, EPA's new targeting strategies examine potential risk not just noncompliance data. We are trying to improve our ability to locate previously unknown violators. We are also targeting larger corporations doing business in more than one region and violating more than one environmental statute.

In keeping with risk-based environmental management, the Agency is beginning to measure its successes, not just in terms of the numbers of enforcement actions begun and penalty dollars assessed, but also in terms of *measurable environmental results*. The recently-passed Government Performance Results Act (or "GPRA" for short) has cast our enforcement practices and priorities in a new, results-oriented light. Under the Act, the Agency has developed ten goals (one for air, one for safe food, one for right-to-know, etc.) which will allow us to better direct our activities and measure our performance. Under GPRA, we've placed greater emphasis on analyzing the results of our enforcement actions, both to enable us to examine the effectiveness of our enforcement program as well as to better inform what we do in the future.

This new focus is also articulated in EPA's National Performance Measures Strategy, which will allow us to provide the public with an array of information about the performance of our enforcement and compliance assurance program, including compliance rates, pollutant reductions, and the impact of compliance assistance on the behavior and performance of regulated entities. The result: more measurable, more *meaningful* protection for people and the environment through enforcement and compliance assurance.

An excellent example of how our enforcement program is employing this results-oriented approach to environmental protection is Region 5's implementation of the Agency's Supplemental Environmental Projects (SEPs) policy. By agreeing to perform SEPs in exchange for partial penalty mitigation, regulated entities have provided impressive results in Region 5: for fiscal years 1995-98, 202 SEPs contributed more than \$57 million to direct environmental protection. This emphasis on direct investment in the environment has only been strengthened in EPA's new SEPs policy, which became effective May 1, 1998. While not substantially different from its predecessors, the new policy does provide for greater community input and expands the categories of acceptable projects. The policy's focus, however, remains the same -- encouraging meaningful, voluntary projects which directly benefit the environment and people. This focus plays an increasingly important role in underscoring the success, and influencing the direction, of our enforcement program. The reports and resources I have mentioned here and elsewhere are available at the Office of Regional Counsel's website, whose address is <[www.epa.gov/region5/orc](http://www.epa.gov/region5/orc)>.

## **B. Multi-Media Enforcement**

Until recently, the Agency approached most of its responsibilities on a single program basis. The Agency's organizational structure reflects this. Air, water, pesticides, and waste are all managed separately. Generally, each program office has dealt with the entities it regulated only from the perspective of a facility's compliance with the particular statute and regulations administered by that program.

This separate, "stove pipe" approach is changing. Under the current multi-

media approach, EPA attempts to integrate existing compliance data on a particular facility, conduct inspections that address all potential environmental violations, and, where appropriate, institute an enforcement action that addresses all instances of non-compliance at once.

While a single medium approach will continue to be used in many cases, the regulated community should no longer encounter a different EPA inspector knocking at the door every week - one for air, one for water, and so on.

### **C. Integrating Pollution Prevention into Enforcement**

Not producing and emitting pollutants in the first place, instead of regulating them once they have been produced and released, is our best hope for the future of environmental protection. Sources are encouraged to reformulate processes, recycle, reduce the production of toxics, minimize wastes and hopefully eliminate some environmental contaminants altogether. Many efforts in preventing pollution have been voluntary. Other cases present opportunities to encourage pollution prevention through creative use of enforcement settlements. Agency policy clearly supports use of pollution prevention provisions as conditions of enforcement settlement orders. In appropriate instances, pollution prevention projects as well as pollution reduction and environmental restoration projects (all types of "SEPs") may serve to mitigate penalties that would otherwise be sought by the Agency. For example, of 49 supplemental environmental projects negotiated in Fiscal Year 1998 in Region 5, thirty SEPs -- over 60 percent -- were pollution prevention projects.

Pollution prevention offers industries an opportunity to cooperate with EPA, to

further a positive corporate image, to make long-lasting environmental improvements, and, in many cases, to save money.

### III. ENFORCEMENT INITIATIVES AND INCENTIVES FOR COMPLIANCE

#### **A. Sector/Industry Initiative**

In addition to focusing on environmental results and pollution prevention, our enforcement efforts seek to emphasize places and industrial sectors that have pollution problems. For example, Administrator Browner's "Common Sense" initiative focuses on certain industrial sectors such as the iron and steel, oil and gas, and printing industries. In addition, the Office of Enforcement and Compliance Assurance in Washington recently released a new web site which organizes data by industry. The Sector Facility Index Project (SFIP) profiles 650 individual facilities in 5 industrial sectors: auto assembly, pulp manufacturing, petroleum refining, iron and steel production and smelting. In the index's first eight months, EPA's SFIP Internet site received over 265,000 hits. EPA has also published Sector Notebooks on 28 major industries. Over 300,000 paper copies of them have been distributed since 1995. The notebooks, too, are available on EPA's web site.

#### **B. Geographic Initiatives**

By concentrating on geographic areas, EPA can direct its efforts and resources toward the nation's most treasured and threatened ecological assets as well as other polluted areas. Within Region 5, geographic targeting has principally focused on the Great Lakes Basin. To some extent this effort has been driven by deadlines imposed by

Congress in the Great Lakes Critical Programs Act of 1990. Though not enforcement-oriented, the Act directs substantial Agency resources toward the problems of the Great Lakes Basin, particularly in achieving uniform water quality standards. Our efforts have been quite successful. For fiscal years 1992-1998, Region 5 has negotiated 218 SEPs and 502 compliance orders, whose combined investment in the Basin totals more than \$750 million.

Region 5 also has underway seven geographic or “community-based” initiatives (the first four of which are in the Basin), focusing on Northwest Indiana, metropolitan Chicago, metropolitan Cleveland, four river basins in southeast Michigan, the East St. Louis area (Gateway Initiative), the Upper Mississippi River, and Tri-State area near Louisville, Kentucky. During fiscal years 1994 through 1998, Region 5 negotiated 104 supplemental environmental projects and more than 275 compliance orders in these initiative areas.

### **C. Criminal Enforcement**

Most of the major environmental statutes contain provisions for criminal sanctions. Under more recent amendments, many violations, which formerly were misdemeanors, have been elevated to felonies. Although criminal enforcement has historically been only a small portion of EPA’s docket, it is expanding. Criminal cases now constitute over one-sixth of the federal court docket of environmental enforcement cases. Indictments have been, and will increasingly be sought not only against business and government entities, but also against principals. This means that partners and corporate officers, CEOs and plant managers will be held accountable for their

criminal conduct.

When does EPA consider a matter criminal? In the hazardous waste area, for example, where there has been a deception and a disposal. Instances of dry-labbing and submitting deceptively false tests results also catch the Agency's attention.

Furthermore, conviction under any of EPA's criminal authorities mandates that the convicted business entity or individual is placed on EPA's list of violating facilities and debarred from participation in federal grant, loans, and contracts for a period of years. Debarment may be corporation-wide as well as applicable to a particular facility. A finding of continuing or recurring non-compliance with either the Clean Air Act or the Clean Water Act constitutes grounds for discretionary listing. Delisting is a complex and difficult procedure that requires a demonstration of full compliance with all applicable environmental laws.

#### **D. Incentives for Compliance - EPA's Self-Disclosure Policy**

In December 1995 the Agency issued a final policy which offers incentives to companies to self-police, self-monitor, self-report and self-correct. We have stood for the public's right to know and rejected secrecy in the form of an environmental audit privilege and immunity for certain violations. EPA has insisted on corporate accountability. Companies of all sizes have made disclosures under our policy; as of September 1999, over 525 companies at more than 2,100 facilities nationally had disclosed under EPA's policy. These disclosures have resulted, and will continue to result, in prompt resolutions of disputes, correction of environmental problems, and the prevention of others. EPA has reduced or waived penalties under the policy for

more than 200 companies at roughly 1000 facilities.

Recently, EPA has expanded the scope of the self-disclosure policy to provide a new incentive to disclose violations under the Clean Air Act. Under the audit policy, as clarified in U.S. EPA guidance effective September 30, 1999, certain Clean Air Act violations discovered and disclosed by a company prior to issuance of a Title V permit are now potentially eligible for penalty mitigation. Mitigation of penalty is available only for those violations which are self-disclosed during the period after the Title V permit application is made, but before the permit is issued. In order to qualify for the penalty mitigation, facilities are also expected to amend their application. Penalty mitigation only applies to gravity-based penalties and not to penalties based on the economic benefit gained from non-compliance. Upon issuance of a CAA Title V permit, however, the owner/operator must annually submit a certification signifying whether or not compliance with the permit was achieved. This policy has already been successfully used by one company with over 40 facilities.

#### **E. Small Business Policy**

In June 1996 EPA issued its policy on compliance incentives for small businesses. The policy provides relief under certain circumstances for small businesses that do not have a history of recurring violations, and that make a good faith effort to comply with environmental requirements by using on-site compliance assistance or by conducting an environmental audit and promptly disclosing and correcting violations that may be identified. More than 150 small entities have returned to compliance under the policy. EPA has waived or reduced penalties by

\$900,000 for nearly 100 entities.

### **F. Small Community Policy**

In November 1995 EPA issued its policy on flexible state enforcement responses to small community violations. The policy describes the circumstances in which EPA will defer to a state's decision to place a small community on an enforceable compliance agreement that provides for timely compliance with all applicable environmental mandates. States can allow small communities to set priorities among competing environmental mandates on the basis of comparative risk, and EPA will generally defer to the state's decision to waive all or part of the noncompliance penalty.

Together, these and other policies and initiatives recognize that environmental results are best achieved when violations and problems are revealed to the public and to regulators. Other new programs -- such as the Environmental Leadership Program, the Common Sense Initiative, Project Excel, the use of SEPs, and the opening of national compliance assistance centers for nine small business sectors -- all further the goals of open communication with the regulated community and of compliance with federal environmental laws. Moreover, these initiatives represent our efforts to effectively integrate enforcement, compliance assistance, and incentive policies with the ultimate goal of providing more direct and more meaningful environmental protection.

## **IV. FEDERAL/STATE PARTNERSHIP**

There is a tremendous wealth of resources to further environmental protection outside of EPA. We must build partnerships with states and local governments, Indian tribes, nonprofit organizations, and the business community. The legal basis for environmental regulation has multiplied at all levels of government. As I emphasized before, most of EPA's programs have counterparts at the state level. Most federal environmental statutes give primary enforcement authority and responsibility to an authorized, approved or delegated state. When a state desires to take the lead in an enforcement case, the Agency will almost always defer. We have limited resources; so do the states. But in the first instance, the states and EPA try hard to agree up front on who will take the lead in an enforcement case, so as not duplicate our enforcement efforts.

Having said that, I must still stress that Congress has enacted the substantial body of *federal* environmental laws to secure equal treatment for industries across the country, and to limit the states' ability to create havens for pollution, should they be economically motivated to do so. EPA is charged with assuring that, when states are delegated the responsibility to manage environmental programs, they conduct them in a manner consistent with federal law. Notwithstanding that most federal environmental laws allow states to enact more stringent requirements than federal law, where a state acts in derogation of federal law, EPA is obligated to intercede. That said, however, instances of EPA "overfiling" are very rare.

## V. AREAS OF FUTURE CONCERN AND CONCLUSION

I have presented a brief overview of EPA's priorities and initiatives, more from a

regional perspective and with an emphasis on EPA's enforcement program.

Enforcement of federal environmental laws remains a top priority for Region 5, and for EPA as a whole. Enforcement motivates regulated entities to comply with the law; it provides specific and general deterrence; and it ensures economic fairness among regulated entities.

While much of the base program enforcement work will continue along traditional media lines, the Agency will increasingly target geographic regions and industrial sectors for enforcement as well as compliance assurance and assistance. In a time of "reinventing government," a declining federal work force, and shrinking appropriations, EPA, along with other federal agencies, must find creative ways to fulfill its ever-expanding legislative mandates. Even though funding will diminish, the expectation that the Agency maintain and increase its high level of enforcement remains intact.

Integrating an emphasis on results, new compliance assistance initiatives, and traditional enforcement will pose a significant challenge for the Agency in the coming years -- but it will also provide remarkable new opportunities for furthering the approach underlying each of our initiatives and programs: to reduce risks to the health of humans and ecosystems. The measurement of EPA's success is how each of our activities furthers that approach.