
PLANNING AND EXECUTING STRATEGIC ENVIRONMENTAL ENFORCEMENT INITIATIVES: MAXIMIZING ENFORCEMENT IMPACT

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SUMMARY

The environmental enforcement program of the United States Environmental Protection Agency (EPA) increasingly strives to maximize the environmental results and deterrence impacts of enforcement actions through strategically targeted environmental enforcement initiatives. Special environmental law enforcement initiatives can be designed to address patterns of noncompliance demonstrated by discrete industries, processes or multi-facility corporations. Enforcement case initiatives have also been used to encourage sources of a specific individual pollutant to reduce their discharges and emissions which may present common, discrete or widespread human health and environmental problems. Critical and sensitive geographic areas or ecosystems that are burdened by loadings from industrial sources of pollution are also possible focuses for special enforcement initiatives. This paper describes several recent EPA enforcement initiatives and explains in detail the elements necessary to successfully plan and execute these enforcement strategies.

1 INTRODUCTION

In the U.S., protection of the public health, welfare, and the natural environment from risks posed by industrial pollutants, commercial chemicals and pesticides is primarily the responsibility of EPA. To fulfill its mission, EPA develops, implements, and enforces pollution control standards authorized by national environmental laws passed by the U.S. Congress. EPA has a variety of administrative enforcement tools available to respond to environmental violations, including the authority to issue orders, notices of violation and administrative complaints assessing monetary penalties. In cases of more serious environmental violations, EPA has the authority to refer enforcement actions to the U.S. Department of Justice (DOJ) which can file civil or criminal complaints in the various U.S. District Courts across the country. The development, filing and resolution of federal environmental enforcement actions require the teamwork of literally dozens of individuals, ranging from data analysts who study industry compliance and emissions patterns, to field inspectors who initially identify facility-specific violations, to engineers who review the sufficiency of existing control technology and prescribe technology improvements, to EPA lawyers who develop and assemble the evidence necessary to prove violations, to DOJ lawyers who work with EPA to file actions for adjudication in federal courts.

Nearly all federal environmental laws also give significant environmental protection responsibilities to the fifty individual states and five territorial jurisdictions comprising the United States of America. Under most of the American federal environmental laws, states can promulgate their own environmental laws and standards, which may operate in lieu of the federal standards, provided state standards are at least as protective as those promulgated by EPA. (1) Therefore, protection of the environment in the United States is a responsibility shared by EPA and the individual states.

Recent data compiled in the U.S. suggest that very large American sources of pollution, as well as large corporate entities which own or operate polluting sources in the U.S., have made enormous strides in terms of compliance with U.S. federal and state environmental requirements. (2) Nonetheless, both because more effort is needed to comply with old regulations and because new

regulatory standards are coming into place, many national health and environmental standards have yet to be attained. As a result, the U.S. Congress has asked EPA to focus on the control of ever smaller sources of pollution in order to achieve national environmental protection goals. This has resulted in a vast expansion in the number of environmentally regulated facilities in the U.S. Although the exact number of such facilities is unknown, estimates range upwards of 500,000 to 1,000,000 facilities.

The burden placed on EPA and the states to monitor compliance with the increasing number of state and federal environmental regulations and regulated facilities is magnified by reductions in the amount of federal resources available for environmental protection. Since 1979, EPA's operating budget has remained essentially frozen, despite the passage and implementation of a large number of new environmental laws, and the promulgation of a large number of new enforceable regulations. (3) Maximizing the effectiveness of expenditures on environmental programs has become an increasingly significant EPA priority as the agency strives to "do more with less."

As is the case with standard setting, responsibility to enforce environmental standards is shared with the fifty American states, territories and Indian Tribes. In fact, many state regulatory and enforcement programs have both the resources, the skill, and the knowledge to monitor the compliance of facilities located within their borders often with more efficiency than EPA, which is centrally organized around a headquarters office and ten regional offices. Although EPA maintains a staff of inspectors and investigators, this is a smaller force than the collective state resources and EPA generally defers to the states the responsibility to conduct the day-to-day environmental compliance monitoring and enforcement work. For example, in fiscal year 1993, the states took approximately 10,000 enforcement actions compared to approximately 4,000 actions taken by EPA. (4)

Notwithstanding the states' role as the primary day-to-day front-line enforcers of environmental standards, EPA is better positioned to detect, and respond to, patterns of environmental violations and environmental problems which are national and regional in scope. Many ecological problems caused by environmental pollution, such as habitat loss and ecosystem destruction, cannot even be identified, let alone solved, by individual states. Moreover, responding to pervasive environmental noncompliance by large national corporations or industry sectors likewise exceeds the capacity of any single state. Solutions to these broader environmental and regulatory noncompliance problems may require a coordinated enforcement response that only EPA is capable of undertaking in partnership with the myriad state environmental agencies.

The growing number of regulated pollution sources, limited federal resources, and the broad scope of some environmental problems have all given rise to the critical need to deploy more strategically federal enforcement resources. Special enforcement initiatives are, in simple terms, an attempt to maximize the deterrence impact, efficiency, and environmental results of enforcement activity by coordinating the development, filing, and resolution of enforcement responses to identified environmental problems. Enforcement initiatives essentially coordinate the timing of individual enforcement actions which share some common characteristic. By bundling separate enforcement actions into a coordinated enforcement response, EPA is able to focus the attention of the public and the regulated community on an identified problem which is illustrated by the collective action.

EPA enforcement initiatives have been used to address: (i) a specific industry sector that demonstrated pervasive noncompliance; (ii) a large corporation that showed a pattern of violations; (iii) an industrial process that presented increased health risks from noncompliance with environmental standards; (iv) a pervasive toxic pollutant that poses serious health risks; and, (v) a geographic area that is burdened by heavy industrialization. (5)

The following sections discuss five different enforcement initiatives undertaken by EPA in the past several years. Later sections will explain important ingredients to successfully plan and execute enforcement initiatives.

1.1 Industry-specific initiative: pulp & paper

A 1991 U.S. EPA study of historic rates of violations within nineteen separate industries concluded that pulp and paper manufacturers violated water and air pollution standards more frequently than many other industries and were among the largest American contributors of toxic pollutants to the environment. Research by EPA's Pulp and Paper Cluster Committee (6) also indicated that despite feasible engineering options for preventing and reducing pollution in the manufacturing process, large numbers of pulp and paper facilities continued to employ outdated manufacturing processes which were less effective in preventing pollution. (7)

In response to these findings, EPA developed a targeted enforcement initiative designed to heighten the awareness of the industry to the importance of complying with environmental standards and to promote pollution prevention options. Under the initiative, EPA simultaneously filed twelve enforcement actions against pulp and paper facilities. In anticipation of the filing, a handbook on pollution prevention opportunities in the pulp and paper process, which included cost, feasibility, and effectiveness information, was also developed for the use of federal and state enforcement personnel in resolving outstanding violations.

The filing of the enforcement initiative prompted the pulp and paper trade association to request a meeting with EPA enforcement officials to discuss ways of improving the compliance record of their members. Only eighteen months after filing the initiative, the industry's trade association asserted that annual environmental violations were decreasing at a rate 50% better than other industries. (8) Furthermore, one pulp and paper facility that was subject to the enforcement initiative subsequently installed a new process which completely eliminated the use of chlorine, a source of dioxin and other toxic chlorinated compounds.(9) The facility is the first of its kind in the U.S. to move toward producing 100% of its pulp with a chlorine-free bleaching process.

1.2 Company-specific initiative: Louisiana Pacific Corporation

At a yearly meeting in the spring of 1991, EPA regional enforcement officials realized that Louisiana Pacific Corporation (LP), a large corporation with fiber board manufacturing facilities located in the Southeast (Region IV) and Rocky Mountain (Region VIII) regions, appeared to have systematically understated the magnitude of air pollutants emitted by company-owned facilities to avoid Clean Air Act permitting requirements. A subsequent comprehensive nationwide analysis of LP's facilities showed that in fact fourteen facilities located in eleven states had not accurately reported the magnitude of volatile organic compound (VOC) emissions. As a result of the underestimation, LP avoided classification as a "major stationary source" of air pollution. Consequently, the company avoided the need to obtain air pollution permits that would have required the installation of the "best available control technology", the capital and maintenance costs of which were in the tens of millions of dollars. (10)

In contrast to the traditional piecemeal enforcement approach, in which enforcement actions against the fourteen different LP facilities would be pursued independently, EPA, in concert with the DOJ, decided to combine individual actions into a single large enforcement initiative against LP. In this way, LP's pattern of corporate-wide noncompliance could be addressed in a single nationally-managed or coordinated action. In addition, a single action against LP was thought to be a more effective method of bringing the company into compliance, and thereby preserving the integrity of the underlying regulations.

As a result of the combined enforcement action, LP agreed on the eve of the filing to install state-of-the-art pollution control equipment at most of the facilities that captures 90% of volatile organic compounds (VOCs) and 95% of particulate matter (PM) air pollution. LP also was forced to pay a civil penalty of \$11.1 million, which in part represented the disgorgement of economic benefit obtained by LP from its violations. The penalty was the largest ever recovered under the Clean Air Act as well as the second largest civil penalty ever recovered by EPA under any environmental statute.

1.3 Process-specific initiative: hazardous waste combustion in boilers & industrial furnaces

The land disposal of hazardous waste has declined significantly in the last decade in large part due to the implementation of stringent Federal regulations restricting the land disposal of untreated hazardous waste. The costs associated with such treatment have probably led many hazardous waste generators to turn increasingly to combustion as a means of disposing of such waste.

Some hazardous waste is readily combusted in boilers and industrial furnaces (BIFs) commonly found in manufacturing industries, which makes it an attractive source for energy production and a means to recover useful materials. EPA is obviously concerned that such activity be conducted in a safe and responsible manner. To minimize risks presented by the burning of hazardous wastes, EPA issued regulations in 1989 which established feed rate limits, performance and operating standards, and emission limits for boilers and industrial furnaces that combust hazardous waste (BIF rule.)

In 1990, concern that a large number of BIFs were burning hazardous waste in violation of EPA's BIF rule prompted EPA's Region IV office (Southeast U.S.) to inspect a number of BIFs to determine the overall state of compliance with the new rule. This pilot investigation revealed that the BIF industry in the Southeast U.S. was experiencing widespread noncompliance with the standards. When confronted with Region IV's findings of pervasive noncompliance, EPA Headquarters in Washington, D.C. decided to undertake a nationwide initiative to enforce the BIF rules. The goals of the initiative were to: (i) penalize and return to compliance violators of the BIF rules, (ii) to emphasize to the regulated community the importance of complying with the rules, and (iii) to address the public's legitimate interest in ensuring that facilities which burn hazardous waste do so properly.

In September 1993, EPA Administrator Carol Browner held a press conference at which she announced that the Agency had filed, or assisted in the filing of, federal and state actions against thirty-six boilers, industrial furnaces, and incinerators. The actions sought over \$18 million for violations of RCRA hazardous waste combustion rules. In addition to these enforcement actions, settlements announced as part of the initiative recovered over a half a million dollars in penalties and provided for significant injunctive relief and over \$1.6 million in additional environmentally beneficial projects. As a result of the initiative, the hazardous waste combustion industry, and the public, were made aware that violations of our hazardous waste combustion requirements will not be tolerated.

1.4 Pollutant-specific initiative: lead

EPA has embraced pollution prevention, focusing specifically on toxic pollutants. Toxic pollutants that can be reduced more effectively by means of a coordinated enforcement approach are another potential focus of enforcement initiatives. Contaminants that readily transfer across regulatory program boundaries (e.g., air to water) may not be addressed adequately by the enforcement of media-specific regulations. Coordinated enforcement initiatives, which focus all enforcement authorities on an individual toxic pollutant, have the potential to close "loop-holes" between regulatory programs which can encourage the transfer of pollution from one medium of the environment to another.

Increasing concern among the medical profession and by EPA with the problem of lead contamination convinced EPA to undertake an enforcement initiative directed toward reducing levels of lead in the environment. Lead exposures can produce a range of acute and chronic health effects, particularly in children and fetuses, including disorders of the nervous and reproductive systems, delays in neurological and physical development, changes in cognition and behavior, and hypertension. Lead, which is ubiquitous, is found in soil (from combustion of leaded automobile fuel and from stationary source lead emissions), drinking water (from the leaching of lead service lines, pipes, and fixtures), paint, and surface water (from the discharge of lead by electroplaters and other metal-intensive industries.)

EPA's lead enforcement initiative was launched in July 1991, with the simultaneous filing of twenty-four judicial enforcement actions in federal courts around the U.S. and twelve administrative actions. The actions were filed under a number of environmental laws, including the: (i) Resource Conservation and Recovery Act (RCRA); (ii) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund Law); (iii) Clean Water Act (CWA); (iv) Safe Drinking Water Act (SDWA); (v) Clean Air Act (CAA); and, (vi) Emergency Planning and Community Right to Know Act (EPCRA). The coordinated cross-media enforcement initiative was designed to improve compliance with EPA regulations governing lead emissions and to place EPA's regulated community on notice that the Agency insists on nothing less than full compliance with lead standards.

1.5 Geographic initiative: S.E. Chicago/N.W. Indiana

Special enforcement initiatives have also been brought to bear to reduce the risks to human health or ecosystems in specific geographic areas. Geographically focussed enforcement initiatives are usually strategies to more vigorously enforce environmental requirements at industrial sources in a defined area that has become environmentally degraded by pollution. A series of individual enforcement actions are then used as vehicles to implement a broader comprehensive environmental remediation strategy for improving the environment in the area. Comprehensive settlement agreements, pursuant to which individual defendants to the enforcement actions agree to conduct environmentally beneficial activities, contribute to overall environmental improvement. These initiatives can also focus on enhancing protection of sensitive and pristine ecosystems and resources, such as estuaries, tidal water bodies, and groundwater basins.

EPA's Region V office, which is located in Chicago, Illinois and covers the "industrial heartland" Northern Midwest Region of the U.S., has undertaken an enforcement initiative focused on more vigorous enforcement of environmental standards at facilities located in the geographic region comprising Southeast Chicago and Northwest Indiana. (11) The initiative has grown out of concerns that the large population and the Lake Michigan ecosystem contained within this heavily industrialized region are cumulatively affected by significant exposures to high levels of air, surface water, ground water, and soil contamination produced by manufacturing facilities.

The initiative began in October 1990 with the simultaneous filing by EPA and DOJ of three civil actions against several large facilities in the area found to be in violation of air, water, and hazardous waste standards. The goals of the initiative are to increase environmental compliance rates, to restore damaged ecological systems by leveraging industry commitments to cleanup the area, and to encourage industry to adopt pollution prevention measures. Several subsequent enforcement actions against facilities located in the area have been initiated since 1990. As a result of the initiative, several companies have agreed to remove contaminated sediments that are a continuing source of water contamination in the water basin, while additional agreements are expected to produce other environmentally beneficial projects to improve the health of people and the environment in the area.

2 ELEMENTS OF INITIATIVE PLANNING AND EXECUTION

The preceding sections discussed examples of successful EPA enforcement initiatives. The success of these coordinated enforcement actions was the product of careful planning by the various components of EPA and the participating states. Because responsibility for environmental enforcement in the U.S. is shared by numerous organizations within EPA, including its headquarters and ten regional offices, by DOJ, and by the numerous states enforcement agencies, careful initiative planning and coordination is absolutely essential. Ten elements of initiative planning include: (i) identifying initiative targets, (ii) pilot testing of initiatives; (iii) establishing reasonable goals; (iv) providing adequate lead time; (iv) generating sufficient numbers of enforcement actions to maximize impact, (v) identifying technology and other pollution reduction measures to be implemented; (vi)

formulating a strategy for treating individual companies which volunteer to disclose violations before enforcement initiated; (vii) formulating a communications plan; (viii) coordinating simultaneous filings; (ix) formulating a plan for communicating to the public and the regulated community; and, (x) measuring performance.

2.1 Identifying appropriate initiative targets

There is no universal process for identifying appropriate targets for coordinated enforcement responses. Targeting approaches employed by EPA in the past include the use of:

- (i) targeting committees comprised of enforcement personnel,
- (ii) computers which analyze compliance and pollution data, and,
- (iv) anecdotal information.

2.1.1 Targeting committee

The targeting committee approach relies on the collective experience of enforcement officials, often compliance inspectors and enforcement lawyers, to decide on what are appropriate initiative targets. For example, the hazardous waste combustion initiative, discussed above, was the product of an Agency hazardous waste targeting committee. The committee, which was established to identify yearly enforcement initiative targets, is comprised of various enforcement officials from the EPA headquarters and regional offices, as well as from several state environmental enforcement organizations. The committee meets several times a year to compare experiences in the enforcement of the nation's hazardous waste law and to identify common problem areas that appear to be national in scope. After analyzing compliance information in one region of the country, and exchanging EPA field experience from other regions of the country, the hazardous waste targeting committee decided that hazardous waste combustion conducted by boilers and industrial furnaces was a compliance and risk problem of national scope. Accordingly, boilers and industrial furnaces became the target of an EPA enforcement initiative.

2.1.2 Computer analysis of compliance and pollution data: the "Black Box"

EPA has also begun to utilize new computer capabilities to analyze compliance and pollution data for the purpose of identifying patterns of noncompliance or pollution trends among industry sectors, companies, and geographic areas.

The EPA's Integrated Data for Enforcement Analysis ("IDEA") system is one computer system that integrates compliance data managed by each of EPA's individual national programs. The system provides enforcement personnel instantaneous access to compliance data and toxic release data (12) on individual facilities. By integrating compliance data and toxic release data, EPA can identify priority industries, facilities, and geographic areas which are appropriate subjects for enforcement initiatives.

For example, the IDEA system was integral to identifying pulp and paper as an appropriate target for an enforcement initiative based on a finding that violations occurred more frequently in this industry. EPA analyzed the environmental compliance and toxic release data for nineteen different manufacturing industries over a two year period. By comparing the incidence of violations in each industry sector, EPA identified three industries, pulp and paper, industrial organic chemicals, and primary metals, that appeared to have particularly significant compliance problems. Analysis of toxic release data also revealed that these same industries released large quantities of toxic chemicals, both in terms of total releases per industry and average releases per facility. Based on this information, EPA decided that a coordinated enforcement initiative targeted at these three industry sectors would help garner public and industry attention, thereby raising compliance levels and encouraging toxic release reductions.

EPA is also developing the capability to array environmental data and facility-specific compliance data on a geographic basis. Maps produced by these computerized Geographic Information Systems (GIS) are expected to show where regulatory noncompliance and environmental degradation are most prevalent. One such model is currently under development by EPA that will help identify the geographic areas and component ecosystems which are most heavily burdened by pollution regulated by EPA. This ecosystem enforcement targeting model will allow EPA to identify appropriate enforcement targets within critical geographic areas with the goal of enhancing protection of component ecosystems through targeted enforcement.

2.1.3 Enforcement officials' experience

The third approach to initiative targeting is simply to rely on the experience and creativity of individual environmental enforcement officials. Individuals working in the field may encounter circumstances indicating a larger compliance or risk problem that can be addressed in some measure by a coordinated enforcement response. Excellent ideas for enforcement initiatives are often prompted by specific circumstances encountered while inspecting, or resolving outstanding violations, at a facility. For example, the company-specific initiative against the Louisiana Pacific Corporation was in large part the product of a single EPA enforcement official who, after conducting a probing inquiry of one facility, suspected that a single facility's violations were merely "the tip of the iceberg" of a corporate-wide compliance problem. This serious probe was obviously critical to a history-making environmental enforcement event.

2.2 Testing ideas through "pilot" initiatives

In some instances, there may be preliminary but incomplete information indicating a possible larger compliance or risk problem that may, with further research, be an appropriate initiative target. Where limited but promising data exists, in several instances EPA has implemented initiatives on a limited basis to test whether they are appropriate for full-scale implementation on a national basis. This makes good sense in instances where anecdotal, as opposed to empirical, information causes EPA to suspect there may be a problem which can be addressed by an enforcement initiative. For example, the hazardous waste combustion initiative was initially confined to EPA's Southeast region. Based on the wide-spread noncompliance detected among hazardous waste combustors, the initiative was extended the following year to the entire nation.

2.3 Establishing reasonable goals

As previously discussed, successful coordination of enforcement activity in the U.S. requires the involvement of numerous EPA and state organizations. Establishing and articulating realistic goals for the enforcement initiative should be done early in the planning process to facilitate a sense of common purpose among various participants. Establishing goals (both as to timing and accomplishments) early in the process also makes it easier to manage the communications strategy, which is essential to garnering publicity, and to measure the effectiveness of the initiative following implementation. EPA initiatives commonly seek to achieve a number of basic goals, such as returning violating facilities to compliance with environmental standards, deterring future noncompliance by similar members of the regulated community, and reducing aggregate levels of pollution as well as exposure risks to the public and environment from pollution.

2.4 Setting aside sufficient lead time

In the U.S. effective initiatives require a significant period of time to implement due to the timing of the budget cycle and the process by which EPA makes grants to state environmental programs. To the extent that an initiative focuses on a new enforcement priority (e.g., a manufacturing

process that was previously a low enforcement priority), a longer period of time will be necessary for implementation. This is particularly true when an initiative requires a significant number of new inspections. Frequently, an interval of at least eighteen months will be required between the identification of the national enforcement priority and the execution of the initiative.

Past experience has shown that failure to provide adequate lead time to implement significant new enforcement priorities through an enforcement initiative can diminish the overall impact and effectiveness of the initiative. Performing new regulatory compliance inspections and developing enforcement actions is a foundational event in developing an enforcement initiative. This requires planning, time and resources. Inadequate lead time can disrupt the ability to perform fundamental "baseline" or "core" enforcement activities. To the extent that new national enforcement initiatives divert resources that would otherwise be devoted to important local enforcement priorities, necessary partnership and cooperation cannot be achieved.

Certain initiatives are better implemented through a multi-year strategy, which allows EPA regional offices and states the lead time to allocate inspection resources to the areas identified. This is particularly true if the goals of an initiative are complex or ambitious, such as the reduction in industry rates of noncompliance as opposed to merely the drawing of attention to the need to comply with a new regulation. In contrast, initiatives that rely primarily on "packaging" enforcement actions already in the "enforcement case pipeline" require less lead time to implement. Generally, however, at least a year is needed simply to plan and conduct inspections, with an additional six months or more required to develop and file enforcement actions.

2.5 Generating critical mass

Careful enforcement initiative targeting is critical in ensuring that there are a sufficient number of enforcement actions to achieve "critical mass." Critical mass, in this instance, means a sufficient number of enforcement actions, penalties, and well-known corporate entities to focus the attention of the public and the regulated community on the particular problem at issue in the initiative. As a general rule, initiatives are successful only if they seize the attention of the target audience: the regulated community and the public. Simply stated, if an EPA enforcement initiative generates no publicity the expected synergies achieved by deterring other similarly-situated violators, or by focussing public attention on a particular risk problem, may not be realized.

In the U.S., an environmental enforcement initiative is generally more likely to receive publicity if it involves a significant number of enforcement actions, and if several of those actions seek relatively significant technology, remedial relief, and large monetary penalties from well-known companies. (13) Identifying enforcement actions that meet the criteria for inclusion in the initiative is therefore extremely important. This task can be difficult since so many different jurisdictions are responsible for enforcing environmental laws in the U.S. In addition to the ten EPA regional offices, from which the majority of EPA's enforcement actions originate, there are fifty states and five territories that undertake the "lions share" of environmental enforcement activity.

Generating enforcement actions generally requires EPA headquarters to issue, early in the process, a written memorandum to the ten regional offices discussing the national enforcement initiative and soliciting regional participation. EPA regional offices participate in initiatives by working with their state program enforcement counterparts, by generating enforcement actions with their own staff that meet specified criteria, and by coordinating the filing of enforcement actions to coincide with the national strategy. Since EPA also favors the participation of state environmental enforcement agencies, the memorandum may also be issued to individual states and territories.

After a list of candidate enforcement actions is compiled, it is important to maintain close communications with the particular individuals who are developing the cases in the regions and states to ensure that the cases will be ready for filing on the date of the initiative. Periodic telephone conference calls, case lists and summaries are all helpful in coordinating the development of the initiative.

2.6 Identifying appropriate injunctive relief

For those enforcement initiatives involving a common industrial process, pollutant, or violation, it is often appropriate to analyze in advance the type of injunctive relief, and supplemental relief, that should be sought in the enforcement actions. By "injunctive relief," we mean those actions which must be taken by a facility to reduce pollutant loadings to a level which achieves compliance with environmental standards. By "supplemental relief," we mean those actions that can be taken by a facility to further reduce pollutant discharges beyond existing standards. Advance planning concerning the type of pollution control equipment, process changes, raw materials substitutions, or housekeeping improvements that should be pursued as relief in the enforcement action increases the efficiency of case development and resolution.

2.7 Formulating a strategy for treatment of self-disclosures of violations

As previously discussed, enforcement initiatives maximize deterrence by capturing the attention of the regulated community with respect to the importance of complying with environmental standards. The synergistic benefits of enforcement initiatives are greatest when individual violators, which are not the subject of any enforcement action, voluntarily disclose their noncompliance to EPA. This form of "leveraged enforcement" is possible when the regulated community perceives that the risks associated with not disclosing violations exceed those associated with disclosure. The decision to voluntarily disclose violations is influenced by a number of factors, including the likelihood that EPA will detect the violations in the normal course, the swiftness and stringency of any sanctions that are anticipated once violations are detected, and the extent to which the violator perceives there to be some pecuniary or other benefit to voluntarily disclosing the violation. (14)

To encourage self-disclosure, virtually all EPA penalty policies authorize enforcement officials to reduce penalties in exchange for the self-disclosure of violations. Although such penalty policy provisions can be effective, in certain instances EPA has pursued more deliberate means to persuade companies to voluntarily reveal violations. Enforcement initiatives can be designed specifically to encourage the voluntary disclosure of violations by certain classes of violators which are specifically targeted for more vigorous enforcement by EPA.

In contrast to most initiatives in which the Government declares its intentions "after the fact" in a strategy designed to "surprise", this type of initiative hinges on publicizing enforcement intentions up front before actions are filed. Such initiatives generally notify the regulated community of a plan to increase the compliance monitoring and enforcement of specific standards and to treat more leniently companies that voluntarily disclose violations. By stipulating in advance to the penalty amount that will be assessed for specified violations, EPA eliminates much of the uncertainty that typically discourages voluntary disclosures.

For example, EPA recently implemented an initiative designed to encourage manufacturers of commercial chemicals to disclose failures to report, as required by regulations, any new information which indicates that such chemicals present unreasonable risks. The initiative has been successful in encouraging companies to implement internal programs to audit their compliance with the reporting requirements and to disclose violations when detected. To date, over 10,000 health effects and aquatic toxicity studies have been provided to EPA under the initiative. (15)

2.8 Formulating a communications plan

As discussed earlier, enforcement initiatives are primarily a technique to draw the attention of the regulated community and the public to some environmental compliance or risk problem. Developing a plan or blueprint for communicating what EPA is trying to accomplish through the initiative is therefore absolutely essential to ensuring ultimate success.

A communications plan, which should be written and distributed to the individuals who are working on the initiative, typically has several elements. The plan should identify, in a short and

succinct manner, the essential concept that is being advanced through the enforcement initiative. For example, the essential concept communicated through the September 1993 hazardous waste combustion initiative was that improper burning of hazardous waste presents serious public health risks the reduction of which was an important EPA priority.

The communications plan should also identify the audience to which communications will be directed. EPA's audience for enforcement initiatives generally consists of the particular segment of the regulated community, if any, that will be subject to the enforcement actions. Secondary audiences include the broader regulated community, trade associations, states, the U.S. Congress, and the general public, particularly in instances where public education and involvement can help to achieve environmental goals. The target audience for the initiative will also influence the type of informational medium or "vehicle" used to convey the desired message. EPA generally tries to convey its message through the popular press (i.e., newspapers, wire services) and industry trade publications.

The plan should anticipate possible negative reactions by the various target audiences for the purpose of preparing appropriate responses. Developing responses to anticipated negative reactions allows the EPA to readily answer questions from the media, the public, and the regulated community with the ultimate goal of delivering more effectively the central message embodied by the initiative.

The communications plan should designate the key individuals, and their respective responsibilities, who will execute the initiative. The plan should set forth the timeframe for executing the initiative, including appropriate planning milestones. The timeframe and milestones should set forth the "what, where, when, and how" for the cases to be filed under the initiative.

2.9 Coordinating simultaneous filings of enforcement actions to maximize impact

As a general rule, impact is maximized when a large number of related enforcement actions are filed on the same day, or over several days, and those actions assess substantial monetary penalties against violators. As previously discussed, the diffusion of environmental enforcement responsibility in the U.S. across the EPA regional offices, DOJ, and the states, compels close cooperation and coordination. This fragmentation, and the fact that the filing of any given environmental enforcement action may require the teamwork of dozens of individuals, makes extremely challenging the task of orchestrating a simultaneous filing of numerous enforcement actions in various EPA administrative, federal judicial, and state courts across the country. Careful planning and coordination early in the initiative development process is therefore an absolute necessity.

Probably the most critical factor in executing a simultaneous filing of enforcement actions is obtaining the support, or "buy-in", of each of the organizational participants in the initiative (i.e., the EPA regional offices, DOJ, and the states.) Buy-in is achieved early in the process by effectively explaining and communicating the rationale and need for the initiative (i.e., what is the problem and how will the initiative help to solve it.) Since significant resources managed by other offices and organizations must be devoted to supporting the development of enforcement actions, a commitment to support the initiative should be secured from each organization.

Candidate actions for inclusion in the initiative must also be identified early in the planning process and tracked throughout their development and referral to DOJ (for judicial actions.) The central organizers of the initiative should establish relationships with the numerous persons responsible for developing the individual actions to be included in the filing. These persons must view their individual role and contribution as integral to the eventual success of the initiative.

Finally, clear milestones and "firm" deadlines must be established for critical junctures leading up to the cluster filing of cases in order to manage the effort. Deadlines should be established for: (i) referring judicial cases to DOJ; (ii) submitting case summaries and descriptions; and, (iii) committing to the filing of actions.

3 MANAGING COMMUNICATIONS WITH THE PUBLIC

Execution of the communications plan requires the development of materials that are distributed to the various audiences which have been identified well in advance of implementation. Typical audiences include the regulated community, trade groups, states, the U.S. Congress, and citizen groups.

A fact sheet is developed which describes in detail what EPA is seeking to accomplish through the initiative. The fact sheet generally explains EPA's rationale and process for deciding on the particular initiative target (e.g., a noncompliant industry sector) which helps to persuade the audience that EPA's actions are reasonable and worthy of attention. The document also describes several of the most significant enforcement actions which illustrate the nature of the problem EPA is trying to address with the initiative.

A shorter description of EPA's action, in the form of a press release, is also developed for distribution to the popular press. The press release contains a short summary of the action and several quotations from high-ranking EPA officials, such as the Administrator and Assistant Administrator for Enforcement, which convey the appropriate message.

3.1 Measuring success

Enforcement initiatives should not end with the cluster filing of enforcement actions. In order to assess whether an environmental enforcement initiative has achieved desired results (e.g., increases in compliance rates, reductions in pollutant loadings, garnering of public attention) for purposes of improving upon future efforts follow-up analysis should be conducted. As previously discussed, parameters for assessing the success of enforcement initiatives should be established early in the planning process to help clarify the underlying purpose of the initiative. Traditionally, EPA has devoted relatively few resources to empirically analyzing whether enforcement initiatives achieved desired goals. Although there is a widely-held opinion that enforcement initiatives are effective strategies if properly targeted and effectively implemented little "hard" evidence has been assembled to definitively prove this assumption.

Measuring the success of enforcement initiatives can be done in a number of different ways. Effectiveness of industry-specific or company-specific initiatives can be measured by assessing any changes in compliance rates within the industry sector or company. Initiatives that target enforcement of discrete reporting requirements, such as the TSCA Section 8(e) initiative, can be measured easily by tracking any relative increases in the number of reports filed following the initiative.

Enforcement initiatives that are more difficult to measure are those which focus on a particular pollutant, environmental problem, or geographic area. Reductions in the annual pounds of a given pollutant released to the environment, increases in biological productivity (e.g., species diversity, fish & shellfish yields), and decreases in ambient pollution concentrations are all possible measures of success. Measuring success based on these parameters, however, will require longer periods of time and greater amounts of resources.

CONCLUSION

The expansion of the environmental regulatory net, the scarcity of resources, and the breadth of many environmental problems have all given rise to the critical need to deploy more strategically environmental enforcement resources. Special enforcement initiatives are, in simple terms, a means of maximizing deterrence, efficiency, and environmental results by coordinating the development, filing, and resolution of enforcement actions that share some common element or characteristic. EPA's experience in conducting enforcement initiatives over the past several years has yielded several valuable lessons which may inform the efforts of other nations and organizations who may wish to experiment with these approaches.

ENDNOTES AND REFERENCES

1. See, e.g., Resource Conservation and Recovery Act ("RCRA") § 3006, 42 U.S.C.A. § 6926, Federal Water Pollution Control Act ("FWPCA") § 402(b), 42 U.S.C.A. § 1342(b) (NPDES program), Safe Drinking Water Act ("SDWA") § 1425, 42 U.S.C.A. § 300h-4 (Underground Injection Control), Clean Air Act ("CAA") § 112(l), 42 U.S.C.A. § 7412(l) (Hazardous Air Pollutants), Comprehensive Emergency Response, Compensation and Liability Act ("CERCLA") § 121(d), 42 U.S.C.A. § 9621(d) (Clean-up Standards.)
2. See, Van Heuvelen, Robert and Rosenberg, Peter D., *Successful Compliance and Enforcement Approaches* (discussion of major source enforcement effort in early 1980's), appearing in these same Proceedings.
3. U.S. General Accounting Office, *Environmental Protection: Meeting Public Expectations With Limited Resources*, p. 16, (June 18, 1991).
4. U.S. EPA, *Fiscal Year 1993 Enforcement Accomplishments* (December 1993).
5. See Peterson, Lynn, *The Great Lakes Enforcement Strategy: Using Resources to Maximize Risk Reduction and Environmental Restoration in the Great Lakes Basin*, and Van Heuvelen & Rosenberg, *Successful Compliance and Enforcement Approaches*, appearing in these same Proceedings.
6. EPA's Cluster Committees are teams of staff and managers from relevant EPA program offices which meet on a regular basis to integrate formally separate activities with respect to specific industries, environmental resources, and other significant areas that are a concern of the EPA's regulatory programs. Sector-based clusters include the Oil and Gas Exploration and Production Cluster, Petroleum Refining Industry Cluster, Pulp and Paper Industry Cluster, Printing Industry Cluster, Transportation Cluster, and Small Communities Cluster. See U.S. EPA, *EPA's Clusters: A New Approach For Environmental Management* (July 1992).
7. For example, a recent EPA study found that many U.S. pulp mills continued to use elemental chlorine to bleach paper to the desired brightness when several less toxic alternatives, such as chlorine dioxide, were available at a reasonable cost. See U.S. EPA, *Pollution Prevention Technology for the Bleached Kraft Segment of the U.S. Pulp and Paper Industry* (Aug. 1993).
8. Letter from Josephine Cooper, Vice President, American Forest and Paper Association to Steven A. Herman, EPA Assistant Administrator for Enforcement (Nov. 17, 1993), p. 2.
9. See, United States v. Louisiana Pacific Corporation, C-78-0567-MHP (N.D. CA) (Jan. 15, 1993); see also Van Heuvelen & Rosenberg, *Successful Compliance and Enforcement Approaches*.
10. See, Van Heuvelen & Rosenberg, *Successful Compliance and Enforcement Approaches*.
11. See Peterson, *The Great Lakes Enforcement Strategy*.
12. Pursuant to Section 313 of the Emergency Planning and Community Right-To-Know Act, most U.S. manufacturing facilities must report to EPA the amount of releases and off-site transfers of some 302 toxic chemicals.
13. In 1992, EPA surveyed popular press and trade press journalists reporting on environmental matters to help identify what factors influence their decisions to cover a particular enforcement action. The survey revealed that among the most important factors is whether a given environmental enforcement action: (i) is judicial rather than administrative, (ii) involves a large monetary penalty, or (iii) is against a well-known company.
14. See generally, U.S. EPA, *Principles of Environmental Enforcement*, p. 2-3 (Feb. 1992) (discussing factors affecting compliance.)
15. See, Van Heuvelen & Rosenberg, *Successful Compliance and Enforcement Approaches*.