

CEEC

Corporate Environmental Enforcement Council

Roadmap Toward A More Effective and Efficient Environmental Compliance and Enforcement Program

The Corporate Environmental Enforcement Council (CEEC), an organization of 29 diverse companies that focuses exclusively on civil and criminal environmental compliance and enforcement issues, offers the following recommendations to President-elect Obama's transition team on four key compliance and enforcement-related principles. CEEC has for a number of years examined all aspects of environmental compliance and enforcement, often in close cooperation with EPA, state environmental agencies and other stakeholders. CEEC recognizes the need for, and specific value of, environmental enforcement. CEEC also recognizes that, if not carefully considered, enforcement will actually serve to undermine environmental protection goals and often disadvantage those in the regulated community who have demonstrated their commitment to compliance.

To address these tensions, CEEC developed a set of principles to overlay and improve the federal approach to enforcement of environmental laws. Our principles will be shared with senior EPA and state officials, congressional leaders, as well as other stakeholders.

Significant improvement has been made in the nation's environmental quality and in the capability of EPA and the states to address environmental issues. A key component has been the dedication and commitment of the majority of the regulated community to addressing environmental concerns and to achieving environmentally beneficial results, much of which has occurred outside of the four corners of our regulatory system. Almost all stakeholders agree that this progress has itself highlighted certain inadequacies in our current system, and a need for change, so that the system will foster and enhance the successes we have achieved to date.

Similarly apparent today are the inadequacies of traditional environmental enforcement premised entirely on the requirements of command and control and measured by program outputs rather than outcomes. In a number of respects, such enforcement serves to undermine environmental performance and our ability to achieve environmental goals. It is equally clear that many of the traditional enforcement program indicators, such as numbers of enforcement cases brought or the amounts of penalties assessed, are no longer appropriate measures of the success of an enforcement program. In reality, consistently high enforcement numbers should signal systemic failures that must be addressed outside of the enforcement context.

As technological advancements are made in the availability of tools to monitor and measure actual emissions from facilities, enforcement must adapt to the availability of this technology. Technology has advanced, and will continue to advance, such that monitoring actual emissions is becoming more and more prevalent. Where monitoring actual emissions is possible, compliance with applicable requirements should be measured using the actual emission results, and not be evaluated using out-of-date, stale tools such as emission factors or modeled results. In order for this to occur, enforcement programs and policies must be subject to periodic review and revision to allow ongoing adaptation of enforcement tools to current technology.

It is critically important that the federal environmental enforcement programs – both at EPA and at DOJ - be brought up to date. As an initial step in that direction, CEEC recommends utilization of the following set of federal environmental enforcement principles:

Principle #1

EPA should reexamine how it measures the success of its enforcement program and more fully integrate its enforcement resources with its program offices.

EPA is strongly encouraged to move away from looking solely at traditional enforcement program indicators such as number of inspections/cases brought as the barometer of the success of the Agency's enforcement program. Instead, the success of the environmental program should be evaluated on outcomes, performance measures and environmental improvements, and not on program "outputs."

Tracking information such as the percentage of cases that result in environmental improvements and the volume of pollution reduction achieved, while clearly appropriate, is not in and of itself sufficient. CEEC recommends efforts to implement measures that track the success of the enforcement program in terms of whether compliance rates increase (or non-compliance rates decrease). Obviously, an enforcement program that does not increase the compliance rate (however that is measured) is not a successful program. EPA's enforcement programs should be structured to achieve the desired performance results – increased compliance rates and environmental improvement - and utilize environmental performance metrics that will allow a meaningful assessment of their success.

The importance of the ability of the regulated entity to understand its compliance obligations cannot be overstated; compliance with regulatory requirements is fundamentally dependent on the degree to which compliance obligations are clearly understood. In that regard, it is critical that enforcement programs (including compliance assistance mechanisms) must be developed in concert with underlying programmatic requirements such that the regulatory requirements are clear and compliance obligations are clearly delineated and communicated to the regulated community. Upfront involvement of and interaction with enforcement authorities improves regulatory programs and requirements, and ultimately makes enforcement more efficient.

To that end, federal environmental enforcement should not be isolated from EPA's regulatory program offices nor should enforcement be evaluated separately given the necessity of enforcement fostering program office goals. They should be directed to work jointly, and cooperatively, with appropriate incentives as necessary to foster such activities. They should also work jointly to achieve greater clarity in communicating regulatory requirements and ensuring that those requirements are not inflexibly applied.

Finally, recognizing the tremendous environmental improvement and efforts of the regulated community over the years, enforcement resources need to be sufficiently directed towards those who have chosen to operate outside the system. Where appropriate, such intentional conduct should be addressed by EPA's and DOJ's criminal enforcement programs.

Principle #2

States should be the focus for implementation and enforcement of environmental programs.

When the U.S. Environmental Protection Agency was created in 1970, some of the states did not have the resources or the expertise to fully implement their own environmental programs. All of that has dramatically changed. Today many states are the leaders of our nation's environmental protection efforts. They are also at the forefront of compliance assistance and enforcement.

Although EPA often refers to the states as "partners," experience suggests that this is often in name only. In fact, EPA frequently imposes its will, and just as often ties states' hands. CEEC believes that states with authorized or delegated programs should have responsibility for implementation and enforcement, and their decisions should be respected. As a partner with significantly greater resources, EPA needs to fulfill its critically important supporting role. In close cooperation with the states, the Agency should also develop reasoned programs and policies with respect to the handful of environmental issues that need to be addressed nationally, including those programs with no state counterparts. EPA should also actively support those states not yet ready to take primary responsibility for any program. On the other hand, where EPA's efforts have been extensive, and where a state has demonstrated over time that it will not or cannot properly implement or enforce the overall requirements of a program, EPA should take appropriate action to withdraw the program, until such time as the state demonstrates that it's willing and able to implement the program.

Principle #3

EPA needs to enhance its compliance-related activities and ensure that enforcement resources address meaningful violations.

CEEC has long advocated the importance of compliance assistance as a tool to promote improved environmental performance. Effective compliance assistance programs and tools must be an integral part of any successful environmental enforcement program; equally as important, however, is ensuring that sufficient resources are devoted to those programs and tools. These programs must include effective dissemination of regulatory requirements.

In CEEC's view, one of biggest success stories in EPA's enforcement program has been the development, implementation and refinement of the so-called audit policy ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations"). The audit policy provides significant incentives for regulated entities to voluntarily come into compliance with federal environmental laws and regulations by developing and implementing voluntary compliance auditing procedures and implementing environmental management systems. To qualify for the incentives of the audit policy, which include significant penalty reductions, the noncompliance discovered in the course of these audits or through the implementation of an environmental management system must be promptly disclosed to EPA and expeditiously corrected. If the audit policy preconditions are satisfied, the Agency will significantly, if not entirely, reduce penalties for the noncompliance, subject to certain exceptions (e.g., economic benefit).

While this program has been very successful, EPA recognizes that it can be improved to encourage even more audits and the implementation of environmental management systems by more companies, and EPA has been very proactive in engaging the regulated community (including CEEC) in ongoing efforts to make the audit policy even more effective. To the extent that a program like EPA's audit policy brings more companies into compliance without the need for formal enforcement actions, scarce resources can again be reserved for those cases meriting enforcement responses.

CEEC recognizes that improved compliance can be achieved through a combination of compliance assistance, compliance incentives and traditional enforcement. Enforcement must always serve the broader mission of the Agency – protection of human health and the environment.

Principle #4

With the globalization of environmental issues and the development of cooperative and multi-lateral efforts to address environmental issues around the world, EPA can and should provide valuable input and impart lessons that it has learned with respect to environmental compliance and enforcement over the past three and a half decades.

There are increasing global efforts to inform and educate environmental enforcement entities around the world about ways to construct and enforce environmental laws and policies.

For example, the OECD recently completed a study of environmental compliance activities in a number of countries around the world, China is increasing its environmental enforcement activities and has made its leader of their country's environmental activities a Ministry, the Commission for Environmental Cooperation (CEC) is actively pursuing ways that those in both the public and private sector can more effectively enforce environmental laws in between the United States, Mexico and Canada and emerging economies are searching for examples of how they can develop their environmental laws and enforcement them. There are a number of creative ways that EPA and the private sector can work in collaborative efforts to find more efficient and effective ways of enforcing environmental laws around the world.

Conclusion

In this era of dwindling resources at every level, CEEC believes that it is imperative that environmental enforcement be both effective and efficient. Enforcement must be directed at priority areas that are identified and developed by enforcement authorities taking into account the clarity of the applicable requirements and the implementation of appropriate non-enforcement compliance assistance efforts.

CEEC appreciates the opportunity to outline these principles, which we hope will help serve as a useful guide as the new administration develops smarter and more efficient enforcement of our environmental laws and regulations. CEEC looks forward to working with the new administration, and to continuing our work with other stakeholders on this critically important effort.