

CEEC

Corporate Environmental Enforcement Council

July 30, 2010

Submitted Electronically

Ms. Vivian Daub
Director, Planning Staff
Office of Planning, Analysis, and Accountability
Office of the Chief Financial Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments of the Corporate Environmental Enforcement Council
Proposed “*EPA Strategic Plan for Fiscal Years 2011-2015*”
75 FR 34736 (Jun. 18, 2010), Docket No. No. EPA-HQ-OA-2010-0486

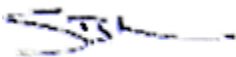
Dear Ms. Daub:

The Corporate Environmental Enforcement Council (CEEC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (EPA) proposed Strategic Plan for Fiscal Years 2011-2015, 75 FR 34736 (Jun. 18, 2010). We also appreciate the ongoing, constructive dialogues that have taken place over the past several years with respect to EPA's interest in identifying emerging issues and developments that may have implications for the future of environmental compliance and enforcement policy.

Founded in 1995, CEEC is the only cross-industry business coalition where legal, environmental and governmental affairs professionals work together and benchmark environmental enforcement issues and policies that impact each of us on a daily basis. CEEC has 26 company members and currently is addressing a number of regulatory, legislative and judicial activities relating to civil and criminal environmental compliance and enforcement policy matters.

I enclose CEEC’s comments on the proposed Strategic Plan. We thank you again for the opportunity to participate in this process and look forward to continuing the dialogue with the Agency on these important issues.

Sincerely,



Steven B. Hellem
Executive Director

Enclosure

CEEC

Corporate Environmental Enforcement Council

Comments of the Corporate Environmental Enforcement Council on
EPA's Draft "Strategic Plan for Fiscal Years 2011-2015"
75 FR 34736 (Jun. 18, 2010); Docket No. No. EPA-HQ-OA-2010-0486

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The Corporate Environmental Enforcement Council (CEEC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency's (EPA) proposed Strategic Plan for Fiscal Years 2011-2015, 75 FR 34736 (Jun. 18, 2010). We also appreciate the ongoing, constructive dialogues that have taken place over the past several years with respect to EPA's interest in identifying emerging issues and developments that may have implications for the future of environmental compliance and enforcement matters.

CEEC has consistently recognized the need for, and specific value of, effective environmental enforcement and compliance assistance as a component of the Agency's mission. We have historically supported and participated in EPA's efforts to develop and refine enforcement and compliance priorities, and enforcement elements of the Agency's Strategic Plan, to set clear policy goals and to generate measurable environmental results. Most recently, CEEC submitted comments on the Agency's enforcement priorities to the National Enforcement and Compliance Assurance Priorities Discussion Forum on September 30, 2009 and on EPA's Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013 on January 19, 2010. Given CEEC's policy focus on environmental enforcement issues, its comments here are concentrated on EPA's draft Goal No. 5: "*Enforcing Environmental Laws. Protect human health and the environment through vigorous and targeted civil and criminal enforcement. Assure compliance with environmental laws,*" and associated strategic objectives.

CEEC is disappointed to see that EPA's only proposed strategic enforcement goal is "vigorous civil and criminal enforcement" coupled with a mandate to increase the number of enforcement actions commenced in a variety of particular areas by 500%. As a general matter, CEEC strongly supports the premise that improved environmental performance can be achieved through greater compliance with environmental regulatory requirements. At the same time, CEEC believes that enforcement always should serve the broader mission of the Agency – protection of human health and the environment. To achieve this goal the Agency's enforcement program must focus not only on enforcing environmental laws fairly and effectively in relation to broader Agency goals, but also on developing effective compliance assistance programs and tools, and ensuring that sufficient resources are devoted to all components of the enforcement regime, including compliance assistance.

The rationale for the uniform strategic enforcement goal within each of the several sub-categories (i.e., 500% unit increase over the planning period) is not stated. Given that uniform-

ity, it appears that these individual goals are not tied to any concerns, understandings or policy particular to the individual categories. Rather, it appears the new policy is simply to be more “vigorous” and to count more enforcement actions. We view this as a step backward. The draft suggests this approach is to provide a more strategic, more meaningful set of indicators (draft at 36), but neither the meaning nor strategy are apparent. CEEC believes the Agency’s broader goals should be selected to describe a successful (in this case) environmental enforcement program, and the corresponding particular strategic goals selected should be benchmarks, the achievement of which should indicate that the program has been successfully implemented. Here, the Agency has not stated how simply initiating five times as many cases will advance Agency’s broader goals or why managers or the public should view that as successful program implementation or a wise use of resources. Indeed, this approach does not appear to meet the basic requirements of the planning requirements of the Government Performance Results Act.¹ CEEC encourages the Agency to revisit its goal setting and return to a more thoughtful approach to setting performance measures.

A. Performance Measures

CEEC has consistently supported the Agency's efforts in the past to develop alternative ways to measure the "success" of its enforcement program. In that regard we encourage the Agency to return to efforts, working with interested parties, to develop statistically valid compliance rate methodologies as part of its review of performance measures. This has been an EPA goal in the past. CEEC would strongly support such efforts and provide input to and work with the Agency as part of such a process. Compliance rates could provide a very useful benchmark for measuring program success and would allow more principled targeting of enforcement and compliance assistance resources.

Conversely, we have long encouraged the Agency to move away from looking solely at low value enforcement program output metrics, such as number of civil cases initiated, as the barometer of the success of the Agency’s enforcement program. CEEC has suggested that the success of the environmental program should be evaluated on outcomes, performance measures and environmental improvements, and not on program “outputs.” CEEC is disappointed that this draft Strategic Plan seems to signal Agency’s shift back to low value enforcement indicators. 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. As indicated earlier in these comments, CEEC has supported 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.

¹ GPRA requires strategic plans to provide a description of how the performance goals included in the plan are related to the general goals and objectives in the strategic plan. 5 U.S.C. §306(a)(4). Why would a 500% increase in cases initiated indicate a successful enforcement program? Why not 600%? Or 50%? The problem with the goals set by the Agency is that they are untethered from any model of a successful enforcement program and seemingly arbitrary (beyond being more ‘vigorous’).

We encourage the Agency to develop statistically valid compliance rates, and, once developed, to use them to track such rates for all industry sectors, not just for key populations associated with the national priorities of EPA's enforcement and compliance program. In prior comments CEEC suggested that the Agency consider the following concepts:

- Develop a compliance rate calculation – for example, compliance with applicable requirements at the facility level could be measured in terms of the number of applicable compliance points – a facility that is in compliance with 97 of 100 applicable requirements has a compliance rate of 97%.²
- Measure success in the context of the number (or percentage) of facilities inspected where the compliance rate, as calculated above, is greater than XX%.
- Measure success in terms of the percentage of facilities that are inspected that are discovered to have no regulatory non-compliance.

Specific targets could in turn be set for each of these parameters.

B. Compliance Assistance

EPA's strategic enforcement goals should include measures directed at compliance assistance. In the past, the Agency has recognized that improved compliance can be achieved through a combination of compliance assistance, compliance incentives and traditional enforcement. To the extent that compliance assistance is designed to increase compliance rates (however measured), compliance assistance should not be viewed solely in the context of bringing more facilities into compliance with existing regulatory requirements. CEEC urges that EPA place an increased emphasis on ensuring that regulated facilities meet compliance obligations created by new regulatory programs in the first instance. CEEC has previously promoted the concept of restructuring the Agency's regulatory development process to ensure that adequate compliance assistance tools, including guidance, are built-in components of the process through which new regulatory programs are developed. Any increase in "up front" compliance will only serve to increase compliance rates, regardless of the methodology used to measure such rates.

CEEC suggests that EPA should consider ways to restructure its regulatory development process to ensure that compliance assistance guidance and tools are integral elements in the development of new regulatory requirements. Improving compliance rates "up front" can be achieved by ensuring that compliance obligations are understood and compliance options are made available in advance of a regulatory compliance date. The Agency's goal of improved compliance assurance would be advanced as well.

² Any compliance rate calculation must be developed and used carefully, given the large number of "compliance points" at most facilities. CEEC suggests that this target be used in conjunction with the other targets that measure compliance in the context of environmental risk.

With respect to compliance assistance for existing regulatory requirements, CEEC believes that EPA must not ignore the issue of unclear or inconsistent regulation. The Agency and the regulated community have frequently attempted to address complex and confusing requirements through a series of letters, interpretations and guidance; in many instances, however, those efforts ultimately do not lend clarity to the applicable compliance obligations. Initiating formal enforcement response actions against companies facing such uncertainty is neither the best use of Agency resources nor the best way to improve compliance. Rather, we would suggest that the Agency's goal of improved environmental enforcement would be better served by focusing resources on ways to make those regulatory requirements clearer, and to make the clarifications easily accessible in a user-friendly format. To address this, CEEC suggests that EPA consider implementing strategies to make additional compliance assistance tools available for the regulated community and, as importantly, to make sufficient resources available to Agency technical staff to assist them in developing the necessary tools. Information on compliance rates would provide valuable insight into areas where compliance assistance is most greatly needed and would provide the greatest return in environmental performance and results.

C. Compliance Incentives -- Auditing

CEEC has been actively engaged in the development of federal and state legislation and regulatory programs designed to encourage environmental auditing for many years. In addition, CEEC member companies have been on the front line in developing environmental auditing programs. The goal of any environmental audit is to identify areas where environmental performance (and compliance) can be improved, and we are disappointed that EPA's goals no longer recognize the important role that environmental audits can play in improving environmental performance.

In this proposal EPA has dropped its prior objectives focused on increasing the number of facilities that use EPA incentive policies to conduct environmental audits. CEEC suggests that the Agency should add goals and objectives directed at increasing the number of facilities that conduct environmental audits, regardless of whether such audits are conducted as a result of an Agency incentive policy. Audits result in actions that improve environmental management practices, improve compliance rates, and result in the reduction, treatment or elimination of pollution – without further governmental involvement.

D. Federal-State Partnership

CEEC encourages the Agency to more explicitly recognize the critical role of the states with respect to enforcement. EPA should include more specific information respecting the manner in which the federal-state partnership in the enforcement context can be managed and strengthened to achieve the broader goals of both the Agency and state and local environmental agencies. Unfortunately this draft contains no recognition of either the states' important enforcement role or the need for a strong federal-state partnership in the enforcement context.

CEEC is aware that the Agency continues to work cooperatively with the states on a number of fronts, and we suggest that EPA incorporate these efforts into the enforcement portion of the plan. In the spirit of that partnership EPA also must recognize the need to provide sufficient resources to states to ensure that they can carry out these important activities.

E. Conclusion

CEEC appreciates the efforts of EPA to include a wide variety of stakeholders, including CEEC, in the development of the next Strategic Plan. We believe that the planning process is an essential exercise that focuses EPA on its mission, and we look forward to continuing to work with the Agency in this effort.

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