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A Fresh Start for EPA Enforcement

by Eric Schaeffer

Editors' Summary: EPA's enforcement effort is starting to recover after a recent ebb in activity. In this Article, Eric Schaeffer examines how appointees under the next Administration can take advantage of the new momentum to build an even stronger enforcement program.

As the George W. Bush Administration draws to a close, the U.S. Environmental Protection Agency (EPA) enforcement shows encouraging signs of regaining its strength. If that trend continues until the next president is elected, the Agency's new leaders can spend less time shaking off the hangover from the Bush era and focus instead on some of the longer term institutional barriers to effective environmental enforcement; these barriers include an enforcement process that is too slow and irregular to reach most violations, and a "see-no-evil" approach to emissions monitoring that makes it too easy to hide from the law.

Until at least 2004, EPA enforcement seemed at death's door, as the White House targeted the program for budget cuts, detailed criminal investigators to hold restaurant reservations for EPA's Administrator[1] and, most seriously, ordered EPA to stop investigating violations of Clean Air Act (CAA) new source review (NSR) requirements by large power companies.[2] An infamous memo by EPA Deputy Administrator Tom Peacock, still in effect, instructed EPA enforcement staff to stop enforcing violations of existing law, and instead, "focus on those that would violate our NSR reform rules and our latest utility proposal . . . ."[3]

The budget cuts were ultimately rejected by Congress, federal courts said no to most of the Bush Administration's industry-friendly attempts to weaken the CAA,[4] and the White House became distracted by foreign policy. While EPA enforcement began a slow recovery, the program had to scramble to replace the cases it had been forced to deep-six and continue to fend off political attacks from inside and outside the Agency.

EPA continued to obtain settlements with big dollar commitments to cleanup,[5] but civil and criminal penalties declined, and the U.S. Department of Justice (DOJ) all but stopped filing civil lawsuits against recalcitrant polluters. For example, civil penalties declined an average of 24% between fiscal years (FYs) 2002 and 2006, compared to FYs 1996 through 2000. Criminal penalties declined 38% over the same period, while the number of complaints filed by the DOJ against defendants refusing to settle dropped an astonishing 70%.[6]

But in recent months, the Agency has obtained record-breaking penalties from large corporations like Massey Energy Company, which agreed to pay $20 million in a Clean Water Act (CWA) civil case.[7] Big CAA cases, like the recent

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1. John Heilprin, *Criminal Agents Diverted to Drive Boss*, WASH. POST, Apr. 27, 2003, at A5.
2. Christopher Drew & Richard Oppel, *Lawyers at EPA Say It Will Drop Pollution Cases*, N.Y. TIMES, Nov. 6, 2003, at 1.
3. Memorandum from Marcus Peacock, Deputy Administrator to Regional Administrators and State Environmental Commissioners, "Fiscal Year (FY) 2005-2007 National Program Managers Guidance—Supplement" (undated) (on file with the Environmental Integrity Project).
4. *See, e.g.*, New Jersey v. EPA, No. 05-1097, 38 ELR 20046 (D.C. Cir. Feb. 8, 2008), which overturned EPA's emissions trading scheme for mercury; Natural Resources Defense Council v. EPA, 489 F.3d 1364, 37 ELR 20146 (D.C. Cir. 2007), rejecting the Agency's attempt to create "low-risk" exemptions from hazardous air emission standards; New York v. EPA, 413 F.3d 880, 890 (D.C. Cir. 2006), rejecting the "Humpty Dumpty" logic of EPA's expansion of NSR "routine maintenance" exemptions; New York v. EPA, 413 F.3d 3, 35-36 (D.C. Cir. 2005), remanding EPA NSR reforms for lack of enforceability; and Environmental Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005), remanding EPA rollbacks in Title V emission monitoring requirements for failure to meet rulemaking requirements.
5. For example, EPA estimated that Ohio Edison Company would spend $1.1 billion, and Illinois Power Company $500 million, to clean up their power plants under NSR settlements announced in March 2005. Cases involving both companies had initially been filed in November 1999, by the Clinton Administration under NSR rules that the Bush Administration has tried hard to repeal. The estimated value of the Ohio Edison and Illinois Power settlements, as well as other cases, may be found on the Office of Enforcement and Compliance Assurance website at http://cfpub.epa.gov/compliance/cases/.
6. Environmental Integrity Project, *Paying Less to Pollute: Environmental Enforcement Under the Bush Administration*, http://www.environmentalintegrity.org/pub443.cfm (last visited Mar. 24, 2008).
7. United States v. Massey Energy Co., Civ. No. 2:07-0299 (S.D. W. Va. Jan. 17, 2008) (consent decree), *available at* http://www.epa.gov/compliance/resources/cases/civil/cwa/massey.html.

United States v. American Electric Power Service Corp.[8] settlement, have finally crossed the finish line, as federal courts slowly but surely choke off the industry's last arguments against NSR. These settlements were aided by the U.S. Supreme Court's unanimous decision in April 2007, to reject Duke Energy Corporation's claim that NSR applied only to hourly, not annual, emission increases.[9] Ironically, the Bush Administration had declined to petition for review, citing its plans to adopt the industry's narrow interpretation by rule. Fortunately, environmental groups and states petitioned instead, and EPA enforcement can reap the rewards from a decision that the White House would have preferred to avoid.

Measured against traditional indicators, EPA's enforcement program should have a banner year in 2008. And although many factors account for the turnaround, much credit is due to EPA career managers and staff, and to Granta Nakayama, the Assistant Administrator for Enforcement and Compliance Assurance. Their success should leave next year's transition team with more room to tackle problems that have plagued enforcement through several different Administrations.

A good place to start would be restoring a sense of urgency to an enforcement process that is often glacially slow. After a serious violation has been identified, it can take five or six years for the government to complete its investigation, make a referral to the DOJ, and negotiate a settlement. The resulting consent decrees can stretch out 10 years or more, giving defendants long-term immunity while imposing token penalties for missed deadlines or emission violations. The few cases that go to trial can drag on and on, bedeviled by an out-of-control discovery process and judges who defer decisions because they are intimidated by the complexity of environmental lawsuits. To be sure, defendants are entitled to due process and EPA's ability to speed up judicial decisionmaking may be limited. Some settlements are so complex and expensive that extended compliance schedules are inevitable. EPA's emphasis on the most environmentally significant violations implicates complex programs like NSR, which can make cases harder to litigate or settle.

But there are some things the government can do to pick up the pace. Every EPA enforcement policy requires that enforcement actions be "timely" as well as "appropriate," and sets explicit deadlines for moving cases through at least the initial stages.[10] These documents ought to be dusted off and brought back to life at EPA, and the DOJ should establish similar timelines for either filing a complaint or settling the cases that it receives from EPA. These deadlines may need to be extended for more difficult cases, but would at least reinforce the presumption that justice delayed is justice denied. Corporations and their attorneys understand that time is money; unless an enforcement action threatens to interrupt an acquisition, most companies are happy to postpone resolution by trying to talk the government to death. EPA can change that calculus by raising the cost of delay, and making clearer distinctions between companies that settle quickly and those that drag their feet.

Environmental statutes give both EPA and the courts broad discretion to assess penalties based on, "such other factors as justice may require."[11] Why not factor in the cost of bringing and sustaining the government's enforcement action, which can run into the millions of dollars for complex cases? Faced with having to cover the government's legal bills as well as their own, defendants would have good reason to stop stalling and move things along. This approach might also encourage the government to keep closer tabs on the cost of individual cases, which could lead to more efficient enforcement strategies in the long run.[12]

That the capacity and political will to enforce environmental laws varies greatly from state to state is not surprising. That enforcement across EPA regions is so uneven is a little harder to justify, since federal agencies are supposed to assure citizens across the United States equal protection under federal laws. But because EPA and the states share responsibility for enforcement, there are practical political obstacles to the exercise of EPA's authority. Simply stated, most states do not like it when EPA takes an enforcement action within their boundaries, and wrangling with irate state officials trying to defend their turf is one of the least pleasant (and least productive) aspects of the Agency's day-to-day work.

In theory, EPA policies establish guidelines that are supposed to hold state agencies accountable for enforcing the federal laws they administer. The Agency could breathe some new life into those guidance documents through more rigorous and systematic audits of state performance. It may be difficult for EPA enforcement to conduct critical oversight while simultaneously trying to build partnerships with state agencies. To avoid these conflicts, these audits should probably be led by the Office of the Inspector General (OIG), assisted by program experts from enforcement. The OIG does occasionally audit individual states, but these ought to be routine, frequent, in-depth, and based on a more rigorous and consistent set of performance standards.

EPA has gone to great lengths to provide the public with easier access to enforcement information through online access to the Enforcement and Compliance and History Online (ECHO) database.[13] ECHO allows the user to look up significant violations, review basic information on inspection and compliance history, and examine other data that can be sorted by region and state. This kind of transparency can help to improve performance, but only if the data is accurate and complete. EPA should invest more in cleaning up errors, and in requiring states to fill in the blanks. (For example, ECHO data will tell you whether a facility passed or failed a stack test, but will not identify the pollutant.)

8. Civ. No. C2-99-1250 (S.D. Ohio Oct. 9, 2007) (consent decree), *available at* http://www.epa.gov/compliance/resources/cases/civil/caa/americanelectricpower1007.html.

9. Environmental Defense v. Duke Energy Corp., No. 05-848, 37 ELR 20076 (U.S. Apr. 2, 2007).

10. *See, e.g.*, Office of Regulatory Enforcement, U.S. EPA, Timely and Appropriate Enforcement Response to High Priority Violators (1998), *available at* http://www.epa.gov/compliance/resources/policies/civil/caa/stationary/issue-ta-rpt.pdf; U.S. EPA, Hazardous Waste Civil Enforcement Response Policy 10 (2003), *available at* http://www.epa.gov/compliance/resources/policies/civil/rcra/finalerp1203.pdf.

11. *See, e.g.*, CAA, 42 U.S.C. §7413(e), ELR Stat. CAA §113(e); CWA, 33 U.S.C. §1319(d), ELR Stat. FWPCA §309(d).

12. To avoid conflict with the Anti-Deficiency Act and other statutes, the government's costs would be included in penalties paid directly to the U.S. Treasury, not recovered by EPA or the DOJ for their own use.

13. U.S. EPA, *Enforcement Compliance History Online*, http://www.epa.gov/compliance/data/systems/multimedia/echo.html (last visited Mar. 24, 2008).

EPA's new managers will also have to reallocate resources to shore up regions that lack the capacity for serious enforcement work. And while I realize I am tilting at windmills, I think it is time to do away with politically appointed regional administrators. Being accountable to multiple sets of political managers—as regional civil enforcement staffers are—makes it that much harder to navigate the bureaucracy and make consistent decisions. The criminal enforcement staff operates through field offices that report directly to headquarters, and that model ought to be examined for the civil program.

Environmental enforcement relies almost entirely on industry's own monitoring, but too much of that monitoring—especially under the CAA—is a sham. Compliance with hourly emission limits for some pollutants is tested every other year—and sometimes less often—through three-hour stack tests that are too easy to manipulate to obtain favorable results. Fugitive emissions from petrochemical plants and other industries are based on outdated emission factors that are woefully inaccurate. Remote-sensing technology deployed in a study of a refinery in Alberta, Canada, measured benzene emissions at more than 100 times the amount estimated using emission factors.[14] And it will be next to impossible to track compliance with NSR requirements after Bush Administration rule changes wiped out key reporting requirements.

EPA has moved steadily backwards in this area by, for example, prohibiting states from requiring more effective monitoring in federal Title V permits for major sources. My organization, the Environmental Integrity Project, has joined Sierra Club and others in challenging that rollback, and the U.S. Court of Appeals for the District of Columbia Circuit heard oral argument on February 8, 2007.[15] But environmental groups can only do so much, and we will expect the new Administration to restore some honesty to emissions accounting. Bad data is in no one's interest.

We are taught in law school that those who violate the CAA are strictly liable for their noncompliance. But that straightforward standard has been undermined by a welter of confusing "affirmative defenses"—which have gradually morphed into outright exemptions—for exceeding emission limits when units malfunction or are being repaired, and during startup and shutdown. These exemptions or defenses cannot be found in the statute, but have attached themselves like barnacles to the law, through a mish-mash of confusing and sometimes contradictory guidance documents and state implementation plans.[16]

The next Administrator should shut down these loopholes. The CAA is supposed to protect public health, and the emissions during such events can be outrageously high. For example, a refinery in Port Arthur, Texas, released nearly 500 *tons* of volatile organic compounds (VOCs) and hazardous air pollutants during a cooling tower leak, or more than one-third of the total *annual* emissions from the entire refinery during the preceding year.[17] Exempting these mishaps from the CAA makes it harder to achieve air quality standards, and thwarts enforcement action against the very facilities that deserve it the most.

Facilities with equipment that breaks down frequently, dumping noxious air pollutants on communities nearby, can shield themselves from penalties by reciting the "malfunction" defense, and often escape enforcement altogether. In theory, EPA or state agencies can overcome these defenses by proving lack of reasonable care in maintaining equipment, but establishing that proof is simply beyond the capacity of EPA and state agencies in most cases. Negligence standards may have their place in tort actions, but they are not part of the CAA, and EPA ought to enforce the law according to the strict liability standards enacted by Congress.

I appreciate that it is easier to diagnose than to cure, and if I had been able to solve these problems while at EPA, I would not be writing about them here. But at least EPA enforcement has recovered enough to give the next Administration a little room to tackle some of the more fundamental weaknesses described above. And that's good news, because enforcement breathes new life into environmental laws that would otherwise die from neglect.

14. Alberta Research Council, Refinery Demonstration of Optical Technologies for Measurement of Fugitive Emissions and for Leak Detection, Project No. CEM 9643-2006, at 18 (2006), *available at* http://www.arc.ab.ca/ARC-Admin/UploadedDocs/Dial%20Final%20Report%20Nov06.pdf.

15. Brief for Petitioners, Sierra Club v. EPA (D.C. Cir. Feb. 12, 2007) (No. 04-1243) (oral argument).

16. *See*, *e.g.*, Texas Natural Resource Conservation Comm'n, *Air Emission Event Report for Tracking Number 80341*, http://www2.tceq.State.tx.us/eer/main/index.cfm?fuseaction=getDetails&target=80341 (last visited Apr. 18, 2008), which contains the 26 pages of affirmative defenses outlined in Texas air quality regulations at 30 Tex. Admin. Code §101.201 through §101.224. Thankfully, these defenses no longer apply to federally enforceable emission limits in Texas pending EPA review.

17. Emission estimates for the cooling tower leak from Motiva's Port Arthur refinery in 2006 were reported to the Texas Commission on Environmental Quality (TCEQ), and can be found at the website in the above footnote. The same refinery reported total annual VOC emissions of 1,295 tons in 2005, according to TCEQ data available at http://www.tceq.state.tx.us/assets/public/implementation/air/ie/pseisums/sum_co.pdf.