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MANAGING ENFORCEMENT OF ENVIRONMENTAL LAWS - A REGIONAL VIEW

Thomas A. Speicher*

INTRODUCTION

The purpose of this paper is to discuss the legal tools provided by our statutes to implement the broad enforcement authorities of the U.S. Environmental Protection Agency (EPA). I wish to share with you the key considerations which guide our choices of cases to be pursued and define the types of settlements we seek to achieve. Most importantly, I will focus on these issues from the perspective of managing a regional legal office which is responsible for enforcing seven major statutes which encompass dozens of distinct programs and subprograms under which violations may occur.**

The task of developing the knowledge, expertise, and teamwork necessary to successfully enforce the wide range of environmental requirements cannot be underestimated. EPA has a limited number of legal resources. In order to maximize the benefit from our enforcement cases it is of critical importance that we concentrate our legal efforts in those areas of highest priority to the Agency as a whole. This requires a sensitivity to the overall priority-setting process conducted at the national level. However, environmental problems can vary from one region of the country to another. We must often make local decisions to concentrate our efforts on the most severe problems in our region while maintaining an "enforcement presence" in other, less severe problem areas. This balancing of priorities on a regional level is subject to the same pressures that operate nationally; i.e., the requirements of individual

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** EPA has a national headquarters in Washington, D.C., which sets national policy and promulgates regulations to implement our statutory authorities. It also manages and dispenses our resources and responds to Congress. There are ten regional offices throughout the country which are responsible for implementing and enforcing the laws and regulations in the States which make up the region. Region VIII in Denver is responsible for six States in the Rocky Mountain area of the West. Since we have no ocean coastline, I will not discuss marine protection laws.

statutes, the wishes of the local public, and the technical evaluations of our scientific experts. Hopefully, when all things are considered, the regional enforcement program will be consistent with both national and regional priorities.

GENERAL ENFORCEMENT AUTHORITIES

The bulk of our enforcement cases arise under the following statutes: the Clear Air Act; the Clean Water Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Federal Insecticide, Fungicide, and Rodenticide Act; the Resource Conservation and Recovery Act; and Superfund. Each of these statutes provides three basic mechanisms or levels of enforcement response: administrative, civil judicial, and criminal. The type of response chosen in any given situation depends on a number of considerations which I will discuss later. For now, let me say that generally the choice is based on the severity of the violation, the quality of our evidence, the type of relief we are seeking, and the resources available to prosecute the case.

Administrative actions are adversarial but they are the least formal enforcement cases. They can usually be handled entirely by the regional office staff and are more quickly resolved than cases which are brought in Federal courts. These cases are governed procedurally by our internal Rules of Practice (40 CFR, Part 22) and the Administrative Procedures Act. Recent amendments to several of our statutes have required the creation of specialized administrative processes which are quite different from our rules of practice and allow increased participation by interested members of the public. The majority of our administrative cases seek only to recover monetary penalties and an agreement to comply with environmental requirements. If not settled between EPA and the violator, these cases are heard by an administrative law judge employed by EPA. Decisions can be appealed to the Administrator of EPA, and then to the Federal courts.

Civil judicial cases are more formal actions and involve EPA headquarters and the Department of Justice. We generally choose this forum when we are seeking a mandatory injunction to perform cleanup actions and we require the power of a Federal court order to ensure that the defendant will comply. We also choose this action when we wish to establish a legal precedent which will then be followed in other civil and administrative proceedings. The Federal court actions allow us to compel more information from the violators and often result in higher penalties. These cases are time consuming, often taking from two to four years to complete.

Criminal cases are the most severe type of enforcement action. Convictions can result in corporate officials going to jail and paying large penalties. Unlike our civil authorities which generally operate under the doctrine of strict liability, criminal law requires that we also prove that the defendant knew that the violating conduct was illegal. EPA now has more than thirty-five criminal investigators throughout the country. We are establishing the legal principle that environmental crime is as serious to our society as the traditional violent crimes and that convictions deserve sentences to jail for the violators. Criminal cases provide a great deterrence to violating environmental laws.

When we take any enforcement action, we must be prepared to prove our case. We must establish the jurisdiction of the forum chosen and the elements of the violation. We accomplish this with our own witnesses and with documentary evidence. Much of our proof is secured from the defendant in the form of company records and required reports such as monitoring and sampling data.

Under some statutes, we need only prove that a violation occurred. For example, we must show that an applicable standard or permit condition was violated. Harm to the public or environment is not required. Other statutes require that we make a determination that conduct of the defendant constitutes an imminent and substantial endangerment to public health. This standard requires expert testimony and the use of more scientific data.

Finally, in cases of severe threats to human health or the environment, EPA can exercise emergency authority to halt illegal conduct immediately. Our most effective forum in these cases is the Federal court where we can seek an injunction. An emergency administrative order can be issued by EPA in some situations.

CHOICES AVAILABLE TO EPA

CASES

Voluntary compliance with our laws, regulations, and pollution standards is our goal. Our Agency, and especially the Regional offices, has a limited number of resources devoted to enforcement of the environmental requirements. Therefore, we must make choices in the types and numbers of cases we pursue. Three overall principles guide our choices.

First, we initiate legal actions to abate threats to human health or the environment. We generally learn of these situations from complaints by health officials or the public, inspections of facilities by our inspectors, or media reports of

spills and accidents. We must act promptly in these cases to gather evidence and evaluate the most appropriate enforcement response.

Second, we initiate cases which will provide a high level of deterrence among those we regulate. We operate on the principle that if we successfully prosecute one case it will deter future violations by other facilities because of the threat of a similar action against them. Deterrence leads to an increase in voluntary compliance. We publicize our enforcement cases to ensure that we achieve the maximum deterrence value.

Third, we choose enforcement cases which will establish legal precedents. Many environmental requirements are capable of being interpreted in more than one way. Often we cannot achieve voluntary compliance until a court clarifies the meaning of the requirement. It is a legal principle in our system that the courts will give great consideration to EPA's interpretation of environmental requirements but we must often seek judicial confirmation of our opinions. Once established, judicial interpretations generally must be followed in other similar cases.

Within this framework of guiding principles, we engage in management activities that will lead to cases which fulfill our policy and legal objectives. Through management of our inspection and reporting functions we can target areas of greatest concern for enforcement actions.

Inspections of regulated facilities serve three major functions: 1) Inspections provide information on the general level of compliance with EPA programs and requirements; 2) Inspections show an enforcement presence which creates an incentive to be in compliance; and 3) Inspections point out problem areas that might be resolved by taking an enforcement case. Requiring industries and facilities to submit monitoring and sampling data is one form of inspection. We also use trained scientific personnel to go on-site and evaluate the status of compliance. Our inspectors then write reports which the program managers and lawyers evaluate for possible enforcement cases.

Another method we use to fulfill our guiding principles is called an enforcement initiative. Our national headquarters evaluates compliance with important environmental goals and objectives throughout the country and targets areas for a coordinated enforcement initiative. We have taken this step to enhance the deterrence impact of individual cases by filing a number of similar cases at one time. We use a nationally coordinated communications strategy to ensure a high level of publicity in the media and in industry association publications. Our experience with these initiatives indicates that handling a number of similar cases at one time is also more efficient since

many of the technical and legal issues are similar and can be resolved in a more consistent manner.

A third method of fulfilling our guiding principles is being open to public comment and opinion on which environmental problems deserve enforcement attention. From a management perspective we must work hard to balance public concerns about specific problems with our overall Agency policies and objectives. EPA is a very open and public agency. We seek and receive much information and opinion from the communities and people whose health and environment we protect. Therefore, we must manage our resources with enough flexibility to enable us to respond to unplanned situations which require enforcement actions that are brought to our attention by the public.

BUILDING OUR CASE

After our initial decision to pursue an enforcement case, we must choose the appropriate tools to build our case. Gathering and evaluating information is the next step. Our statutes provide us with broad authority to seek information from potential defendants by letters or orders. We can, in some cases, issue administrative subpoenas for testimony and documents. We can call informal meetings with company officials. In potential criminal cases we can use the grand jury process to gather evidence. Inspection or re-inspection of facilities and taking samples is also a common practice.

After gathering additional information we internally evaluate the strength of our case and its importance to our priorities. Here we apply our guiding principles and determine the availability of the necessary time and resources to successfully prosecute the case. We also make the choice of which enforcement authority is appropriate (administrative, civil judicial, or criminal). At this stage, it is of critical importance that a management decision be made to support the case by all necessary offices within EPA and other agencies (such as the Department of Justice). Once this decision is made we proceed to file the case and begin to negotiate a resolution.

SETTLEMENT OPTIONS

Since the goal of the Agency is to secure compliance with all environmental requirements, we are primarily concerned with two issues when we seek to settle an enforcement case. The first task is to determine the actions which are necessary to bring the facility or activity back into compliance and to ensure that it remains in compliance without further enforcement action. The second issue involves determining the appro-

appropriate penalty to be assessed against the violator for not complying with the necessary requirements. We must establish what the Agency desires with regard to both compliance and penalties, whether we are trying to settle with the violator or are asking the judge to impose the settlement.

In most situations we know what will be required to achieve compliance before we file the case. However, there are often several options available to the violator to achieve that goal. For instance, the facility can usually choose among such options as limiting its production, building additional treatment capacity, changing production methods, or contracting with other cleaner facilities for necessary parts of its end product. We do not direct the violator to choose any particular method as long as the choice it makes will lead to compliance with environmental requirements. Often a violation cannot be remedied immediately. In these situations we develop a compliance schedule which will lead to compliance by a certain date in the future. These schedules have interim dates which call for completion of the steps in a project by certain dates. These steps allow us to monitor progress toward achieving compliance. Lack of money to achieve compliance does not excuse violations. Companies often have to make difficult business decisions when negotiating with EPA. Therefore, resolution of cases is often a difficult process.

EPA believes that penalties are appropriate in almost all enforcement cases. Since we generally rely upon voluntary compliance to achieve environmental protection it is appropriate to penalize those who do not comply voluntarily. Paying money for a violation brings several desired results. It tells the violator that EPA is serious about its requirements. It also creates a great measure of deterrence since no one wants to spend money needlessly.

In order to ensure that it is easier and more economical to comply with the law than to violate it, we have national policies which specify the methods of calculating appropriate penalties. The general penalty policy is supplemented by specific policies for each statute and class of violations. The policies are national in order to ensure that they are applied equally across the country. We do not want to create "pollution havens" where it may be more advantageous to violate the requirement than elsewhere. Also, we believe it is important to treat all companies in a particular industry equally so there will be no economic advantages over their competitors.

One element of our penalty policies which is designed to ensure against unfair competition is the "economic benefit" calculation. The purpose here is to charge a penalty amount which represents the economic savings to a company which

did not spend the money necessary to be in compliance with the environmental requirements. By charging this amount of money saved as a penalty, we encourage all companies to install the appropriate equipment or utilize the correct methods to achieve compliance. This element of unfair competition often causes companies which are in compliance to complain about those which are not.

Our penalty policies are published so that the regulated community will understand that we intend to collect penalties for violations. This also promotes consistency nationwide and has led to increases in both the amounts of penalties per case as well as the number of cases where we collect penalties.

Many violators would rather trade off penalties for some beneficial project. These are called "credit projects." They often involve activities which provide some public benefit. Credit projects are very difficult for EPA to refuse. However, it is our policy to not make these trades. Credit projects improve the public image of violating companies and often result in tax benefits. We do not discourage public benefits, but we do not trade penalties for them.

A settlement option which EPA does encourage is an environmental audit of all facilities and operations of a company. Audits are multi-media investigations of company operations to determine the overall compliance status. Audits often lead to recommendations for changes in facilities or practices which can both save money and ensure against future violations. EPA believes that audits make good business sense and lead to increased voluntary compliance. Therefore, we encourage audits but we do not trade penalties for them.

When we achieve agreement with a violator on both compliance and penalties, we must then create an agreement or order to spell out all of the requirements. Consent Agreements and Final Orders are used in administrative cases. Consent Decrees are used in Federal court cases and they are ordered by the judge so that they are enforceable by the court if not complied with. Obviously if no settlement is reached by the parties, the court will order the relief deemed appropriate in the case. The court will also issue injunctions where necessary to stop activities which threaten public health or the environment.

Where consent settlements contain compliance schedules, EPA usually insists on including stipulated penalties for each milestone or step in the schedule. These penalties are defined as certain sums of money to be paid as a penalty for missing the important steps in the schedule. This tool both ensures more attention to achieving compliance and makes it easier for EPA to enforce the schedule. These stipulated penalties seem to be similar to the pollution fees used in China's system.

The purpose of both is to provide an incentive to achieve compliance as rapidly as possible.

After a case is settled, we enter the terms of the settlement in our computer system and periodically monitor a company's compliance with the terms of the agreement. This shows the violator that we are serious about our goals of compliance with environmental requirements. If the agreement is violated, we will initiate another enforcement case.

PRESSURES FACED BY REGIONAL OFFICES IN ENFORCEMENT

EPA's overall planning and priority setting are done at the national level. Given the complexity of environmental problems and the diverse nature of the statutes we must implement, this is a difficult process at best. However, implementing national policy at the Regional level often creates tensions. The most notable example in the Rocky Mountain Region concerns the health of our economy. Our Region could be described as comparatively underdeveloped and of high natural environmental quality. Our economy is based primarily upon agriculture, tourism, and the extractive industries such as mining and oil and gas production. Heavy industry is largely not a problem. Agriculture and mining are suffering economic hard times. With money in short supply in these areas it is difficult to gain popular support for enforcement actions which are viewed by the business community as a further drain on scarce capital. Municipalities and service industries are also weakened economically when the base industries are in a downturn. Many states in our Region are attempting to stimulate economic development. There is always a tension between development and environmental protection. Since tourism is based on the natural beauty of the region, an additional tension is created when development is proposed that would affect the natural environment.

However, our national laws and policies require that they be applied uniformly across the country. Although environmental standards are usually based on a risk analysis of adverse health effects avoided, many companies and municipalities cannot appreciate that the standards should apply to them. EPA is often seen as a barrier to economic development.

When the costs of environmental protection are high and the benefits are not readily appreciated, we can only ease this tension through increased public understanding. This is especially true in the Superfund program where cleanup costs often reach millions of dollars. Only when the public understands the basis of our risk analyses can it understand the need for our enforcement action. And public support is needed for our

enforcement programs to be effective in fostering our goal of voluntary compliance.

A second area of tension in our Region concerns the national focus on protection of public health through risk based standards and our statutory obligations to protect and enhance the natural environment. Cost versus benefit analyses are very difficult when the benefit is to the natural environment. Since our Region does have a high quality environment our enforcement actions are often directed at activities which will lower that quality but not violate the minimum health levels. The Clean Air Act program for prevention of significant deterioration of ambient air quality and the Clean Water Act program for protection of wetlands are both good examples of where problems of public support can arise. We have to work hard to develop good enforcement cases in these areas because they do not fit very well in the national priorities of protecting public health. However, recent management system changes in headquarters have helped Regions concentrate on their unique problems without sacrificing the national priorities.

MANAGEMENT ASPECTS OF REGIONAL ENFORCEMENT

The concept of managing an enforcement program is not the same as initiating and resolving a series of enforcement cases. As I have discussed, EPA enforcement is guided by certain principles which help us make critical choices when we pursue violators of the environmental laws. We strive for a total program which can be described as fair, firm, consistent, and predictable. A key element in such a program is the ability to take timely and appropriate enforcement actions. In order to accomplish these goals the Agency must be able to attract good people and effectively communicate its policies and priorities to all of them.

THE NATIONAL LAW OFFICE

The legal enforcement work of EPA is accomplished by twelve legal offices. These offices are in the ten Regional office cities, EPA headquarters, and the Department of Justice. Within the eleven offices of EPA we operate under the concept of a national law office. Each Regional Counsel reports to headquarters to the Assistant Administrator for Enforcement on enforcement matters. The Assistant Administrator issues policy and guidance to ensure national consistency and to assist us in following the proper procedures to accomplish Agency enforcement goals.

THE OFFICE OF REGIONAL COUNSEL

Within our Regional offices, each Regional Counsel is responsible for hiring and managing a staff of attorneys to carry out these goals. We are also responsible for establishing the necessary close relationships with our clients in the Regional offices who administer the various programs under our statutes. These program offices are made up primarily of the administrators, scientists, engineers, inspectors, and technicians. The legal and program functions are organizationally separate and enforcement can only occur when the various offices work together to accomplish a common goal.

In order for the Office of Regional Counsel to play an effective enforcement role, we must start with bright and dedicated attorneys. We work within a highly adversarial legal system so our lawyers must be as smart as the legal counsel representing the targets of our enforcement. They must be dedicated to public service because we generally do not pay them as well as attorneys in private practice. They must also work well in team situations since they cannot successfully prosecute or settle their cases without the full participation of their technical and scientific counterparts. Finally, we must provide them the necessary Agency training so they understand EPA's policies, priorities, and goals. It is the Regional Counsel's highest management priority to develop this type of staff.

Our second management goal is to foster the close professional relationship with our client. We must be available to our client at all times to provide legal advice on the targeting and development of enforcement cases. In our Region, the attorneys participate in program planning meetings so they can appreciate the client's priorities. They participate in joint training with the inspectors and scientific people. One good example of joint training is a course on effective negotiations. Since EPA reaches negotiated settlements in over 90 percent of its enforcement cases, it is of critical importance that we take a team approach to these negotiations. Each negotiating team is comprised of an attorney and a scientific or technical expert. Other members are the program administrator, communications experts, and attorneys from the Department of Justice.

The Regional Counsel attorneys also foster good client relationships by giving training. They give courses on investigative techniques, enforcement or inspection reports, and expert witness training. These activities make the whole enforcement team more effective. Most importantly, it teaches the value of teamwork. When the team wins, we all win.

The third management priority is to ensure that each Office of Regional Counsel has sufficient expertise in all the com-

plex statutes we enforce. It is important that we retain our experts and place them in positions where they can teach our newer attorneys and supervise their work. We place a high value on this institutional memory and expertise. Since attorneys can move easily into and out of government service, it is important to develop subject matter experts. Our headquarters office also serves this function of providing expertise.

ASSISTING WITH STATE ENFORCEMENT

In our Federal system it is important to recognize that each of the fifty States has a full range of environmental protection statutes and regulations. Most EPA programs are designed to be implemented directly by the States, and in fact the majority of them are in our Region. When EPA delegates enforcement responsibility to a State we also provide the State with grant money to operate its program. In return, we require that State laws regarding environmental protection and the penalties that can be imposed must be as stringent as the national laws. This fulfills our policy of national consistency.

In order to maintain consistency between the Federal and State governments in enforcement, we have executed enforcement agreements with the States to clarify our enforcement expectations. These agreements serve as a blueprint for the State/EPA enforcement relationship. Since the States are our partners in environmental protection it is important that all parties continue to be committed to effective implementation and enforcement. The primary feature of the agreements is the timely and appropriate guidance.

The concept of timely enforcement leads to commitments by the States to initiate a formal enforcement action within a specified time period after discovery of a violation. We negotiate these time periods with the States for each regulatory program. For example, a typical expectation in the water discharge permit program is that an action will be initiated within 180 days. In the hazardous waste program a typical period is 90 days. Since States report their activities to us on a quarterly basis, EPA can monitor compliance with the agreement. If a timely action is not initiated, EPA may file its own case.

Appropriate enforcement responses are those which are consistent with EPA guidance on penalties. EPA is encouraging States to develop their own penalty policies which consider both deterrence and economic benefit recovery.

EPA generally has the ability to initiate its own enforcement actions for violations even where the State has been delegated primary enforcement responsibility. The timely and appropriate agreement limits EPA in filing such cases if the

agreement is met. However, if a State takes a timely action but does not collect an appropriate penalty, EPA will often step in and file its own case. Naturally these situations can strain our relationship with a State but the agreements put all parties on notice of our intentions and in some instances can help states with their enforcement programs.

From an enforcement management view, EPA attempts to strengthen State programs by providing legal and technical assistance. We conduct training similar to the internal Agency training and we meet regularly with our State counterparts to discuss problems and issues. Our national headquarters involves the States in the overall priority-setting and planning processes. We have worked to improve our ties with the National Association of Attorneys General and individual State Attorney General offices. In our Region we host a conference each year where attorneys from each State meet with Office of Regional Counsel attorneys to discuss enforcement cases and emerging issues. We also provide enforcement information to States and supply both expert and fact witnesses in State enforcement actions. We strive in all instances to strengthen the State technical and legal capabilities in an effort to develop a more cooperative and coordinated State/EPA enforcement program.

FEDERAL FACILITIES ENFORCEMENT

Until recently, it was assumed that the enforcement authority of EPA did not include the ability to take a formal action against facilities operated by other Federal departments and agencies. Our remedies were limited to negotiating with the responsible officials and seeking the necessary budget increases for pollution abatement equipment. However, under many of our statutes the States can take enforcement actions and require permits for polluting activities. This area of our law is slowly changing but EPA still may not sue another Federal agency in Federal court. We can, in some instances, issue administrative orders which can then be enforced by States or citizen groups. In a recent development, the Department of Justice has agreed with EPA that we can sue private companies which operate Federal enterprises. Previously, it was thought that suing these operating contractors was the same as suing the Federal agency. The majority of the private or commercial facilities are in compliance with the environmental requirements, and nearly the same percentage of Federal facilities are also. However, as we turn our attention to the remaining facilities, and as new requirements emerge, it is becoming more important that we clarify which of EPA's legal tools are available to enforce environmental requirements. EPA's Fed-

eral facility compliance manual, called the "Yellow Book," is currently under revision, and Congress has held hearings for the purpose of drafting new legislation to specify EPA's enforcement role. We should soon know the outcome of both of these efforts.

CONCLUSION

Enforcement of environmental laws requires more than just the ability to prosecute individual cases. We must choose our activities with a knowledge of overall Agency priorities and a recognition of the need to prevent threats to human health and the environment. Effective enforcement can only be accomplished by an effective organization. Planning and teamwork are essential. I will be pleased to discuss the ideas presented in this paper as well as other relevant topics at the conference in Beijing.