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MEMORANDUM

TO: **Lisa Lund, U.S. EPA OECA**

THRU: **Lisa Rector, NESCAUM**

FROM: **NESCAUM's Enforcement Committee**

RE: **Concerns with EPA's Federally Reportable Violations Approach**

DATE: **May 2, 2012**

Background

The U.S. Environmental Protection Agency (EPA) has indicated that it will require state and local air pollution control agencies to report all Federally Reportable Violations (FRV) identified by enforcement agencies into the national Air Facility System (AFS). EPA' reasoning behind this effort is its goal of increasing transparency of the activities of state enforcement programs. The NESCAUM states do not believe the FRV reporting effort, as currently structured, will achieve EPA's goal. Rather the NESCAUM states believe that this effort will only yield more inaccurate data rather than better information.

In order to make meaningful information available to the public, EPA would be better served by having states report a data set that is accurate and truly represents the real work of the delegated enforcement programs. The NESCAUM states therefore recommend that EPA switch from reporting FRV's in the air program to reporting federally reportable actions. This memo from NESCAUM's Enforcement Committee highlights its concerns with EPA's approach, offers some solutions, and requests a meeting to further discuss these issues.

The Issues

1. States and federal legal citation processes do not match

In order to create a crosswalk between state and federal air enforcement reporting programs, EPA would need to develop individualized "citation converters" for each reporting agency. This approach fails to recognize that states' legal citations for their air programs do not match federal citations because they were incorporated into their State Implementation Plans (SIPs) as state-specific regulations.

In other reporting programs, most notably the Resource Conservation and Recovery Act Information (RCRAInfo) database, states can easily provide EPA with FRV data by identifying the associated federal regulation with each enforcement document, flag the individual citations related to the violations alleged in the issued document, and report this to EPA via the media-specific data system. This program works because most state RCRA regulations are in a

common format, with little state-specific variation. The reporting is therefore a simple crosswalk between state and federal regulatory citations.

By contrast, due to the unique nature of the air program, there is no overarching unified program, and state regulations do not directly correlate to the federal program. State and local air programs are developed to address attainment and non-attainment issues within the framework of the Clean Air Act, but each governing entity has a degree of latitude to tailor emission control programs to local conditions and state-specific priorities. Because there is no federal "master regulation" to which states can index their regulations, EPA would need to develop individualized "citation converters" for every reporting agency. In the NESCAUM region, a formal enforcement action typically includes from 3 to 20 citations. To populate a regulatory citation library to which violations would be indexed would be an overwhelming undertaking for states. It would require listing the individual citations of every state, local and federal air regulation. It would also require updating, because SIPs change when states revise programs to attain and maintain new national air quality standards.

2. Requires states to redesign their reporting systems

Under EPA's current plans, its reporting system would necessitate a complete redesign of state reporting systems in order to allow for federal violation reporting and linking. This would be a very expensive task. Many states maintain only a single system for tracking and reporting actions, and would not be able to separate federal or SIP actions from state-only actions without redesigning their systems. State systems would also need to be redesigned to track additional data.

Moreover, tracking issues would occur when enforcement actions and penalties are handled by state programs other than those that report air compliance and enforcement data to EPA. In states, air enforcement actions often occur in different divisions, and sometimes in different agencies. In addition, state data systems are frequently not under the direct control of the air agency. Any required system modifications may need higher level policy support in addition to funding support.

3. Places undue burden on states

The NESCAUM states are very concerned that EPA's move to reporting all FRVs will create an undue burden on the reporting agencies, focus already scarce state resources on data quantity rather than quality, and continue the reporting problems that air programs already face with the current AFS.

Suggested Remedies

The NESCAUM states have tried to identify solutions that focus on the key question, "What does the public want to know or need to know to understand the performance of a facility?" The approach used in the RCRA program provides metrics that count the number of activities but provides no real substantive information on the violations found. We believe that the public is

interested in seeing the facts of a case in addition to the violations or at a minimum key aspects of the case.

1. Full document approach

The full document approach would provide the actual enforcement document through a web portal. This pathway would provide the greatest transparency to EPA and the public, and would have the added benefit of allowing outside parties to link the actual enforcement documents to the performed action in the AFS. This approach would require states to provide an electronic copy of the enforcement document (in PDF format) to a point-of-contact at EPA, and would require EPA to set up the links between EPA's Online Tracking Information System/Environmental and Compliance History Online (OTIS/ECHO) systems and the pdf document. The key disadvantage to this approach is that the information from the enforcement document would require moderately sophisticated data mining software and it would take some effort to read the documents and cull out key metrics to respond to questions or requests from the Office of Management and Budget, the Inspector General, or Congress. Having the full document available, however, would be helpful for agencies looking for similar enforcement actions to ones they are undertaking. Enforcement documents could be retrieved through an internet application similar to the one employed by EPA's Applicability Determination Index.

2. Core violation data approach

An alternative to the RCRAinfo method of reporting FRV or the proposed method of document linking is an approach that tracks a common set of core violation types for a set of specified facilities that are subject to listed federal programs. This more user friendly approach takes out the need to link to regulatory citations and replaces it with plain English metrics that, regardless of the regulatory citation, can be tracked if AFS is designed to accommodate a simple code scheme.

Under this approach, we envision three parameters that need to be defined to identify the bounds of the FRV reporting system: (1) the source activities, (2) the programs, and (3) the violations. Below are our recommended criteria for each.

1. Which universe of sources should be subject to FRV reporting?

- Any major source or SM80[1] facility where there is a violation of a federal program or federally enforceable program (SIP).
- Minor source reporting should be an option to be decided by a state if it chooses to report minor source data into AFS, and not subject to the FRV reporting system. Some states might include minor sources to simplify batch upload, but others should not be compelled to do such reporting.

[1] SM80 is a synthetic minor facility whose actual emissions are greater than 80% of major source status. The purpose of this delineation is to segment facilities whose emission levels are approaching those of a major source.

2. What programs should be reported?
Violations of federal or federally enforceable programs including:

- A PSD/NSR permit;
- A conditions of an NSPS subpart;
- A condition of a NESHAP subpart;
- A condition of a MACT subpart;
- A condition of a SIP.

3. What and how should violations be reported?
NESCAUM suggests that violations be divided into five core violation types:

- Excess emissions violation;
- Failure to keep records or report as required by permit or regulation;
- Failure to test or conduct monitoring as required by permit or regulation;
- Failure to construct or operate facility/equipment in accordance with permit or regulation;
- Failure to obtain or maintain a current permit.

Understanding that there may be a single violation type with multiple program applicability, the system would need to be able to accept a one-to-many relationship. For example, if we had a company with air program codes (APCs) for SIP (0) and NSPS (8) that had a performed enforcement action loaded into AFS, then the action would have an associated matrix listing the five violation types and the air program codes. The state could either enter by hand an X in the appropriate boxes or configure the user interface to map the state data system equivalent over to this field in the AFS. The matrix for this example would look like:

Violation Type	*APC = 0*	*APC = 8*
Excess emissions	*X*	
Failure to keep records/ report		
Failure to test or conduct valid monitoring		*X*
Failure to construct or operate facility		
Failure to obtain permit		
Other: Must describe in comment		

Comment:

This approach is an alternative to our preferred approach to provide actual enforcement documents and linking performed actions to the documents, and does not provide detailed information to the public about any particular case. It does, however, provide information that

could be useful for mining enforcement data from which broad statements could be deduced about the types of violations found through state enforcement programs.

3. Hybrid approach

Yet another alternative combines the two solutions proposed above. This approach sends the full text document to EPA. As part of the document submission, the reporting agency would generate HTML tags that incorporate the major data elements listed in the approach above. The benefit of this option is that it provides all the relevant data to EPA and the public, and allows for data mining. The significant drawback of this system is that it would be resource intensive to develop and implement. This is the least preferred approach of the NESCAUM Enforcement Committee. It would, however, still require fewer resources than the full FRV approach. In order to put forward such a system, EPA would need to provide resources and guidelines to the states to ensure data quality.

Conclusion

EPA's current approach for reporting violations will require creating an expensive and elaborate state-specific crosswalk to every state regulatory citation that may be federally enforceable. A more simplified system than EPA is currently considering would provide EPA the desired descriptive information and public transparency while not placing an undue burden on the states. Key to implementing any of these strategies is ensuring that reporting agencies have resources and clear guidance from EPA to implement a common national system.

A reporting scheme that is too complex will lead to inaccurate data and confusion, which in turn reduces the value and credibility of the information. An example is EPA's current system for reporting HPVs, where the matrix is too complicated to easily identify violation types. The difficulty in recording and linking HPV actions within the AFS results in an excessive amount of time spent compared to recording other types of data. As a remedy, OECA's Air Enforcement Division is leading a workgroup to improve the entire HPV process. Much like HPV's, if the FRV reporting system is complicated or requires significant data manipulation by multiple users, the quality and consistency of the information will suffer. NESCAUM's preferred solution would accommodate the needs of EPA and the public while not imposing an undue burden on states.

As EPA moves forward to modernize reporting of air enforcement data, it is important to ensure that this new system will yield accurate information to EPA and the public. We would be happy to discuss our concerns and proposed approaches with you at your convenience. If you have any questions, please contact Lisa Rector of NESCAUM at 802-899-5306.