

Date Signed: November 22, 1995

MEMORANDUM

SUBJECT: Policy on Flexible State Enforcement Responses to Small Community Violations

FROM: Steven A. Herman
Assistant Administrator

TO : Assistant Administrators
General Counsel
Regional Administrators
Deputy Regional Administrators
Regional Counsel
Regional Enforcement Coordinators

The attached Policy on Flexible State Enforcement Responses to Small Community Violations (Small Communities Policy) implements parts of Reinventing Environmental Regulation Initiatives 13 and 21 announced by President Clinton on March 16, 1995. These two initiatives seek to enhance the environmental compliance of small communities and to promote alternative strategies for communities to achieve environmental and economic goals.

Specifically, the Small Communities Policy seeks to assure States that they have, within appropriate limits, the flexibility to design and use multimedia compliance assistance and compliance prioritization measures as alternatives to traditional enforcement responses when addressing a small community's environmental violations. The Small Community Policy establishes the parameters for State small community environmental compliance assistance programs that EPA will generally consider adequate and recommends options for States to follow

in developing and implementing their programs, but leaves many of the details to the discretion of States. EPA believes this approach will ensure adequate protection of public health and the environment while affording States flexibility to develop small community environmental compliance assistance programs tailored to local conditions and specific State needs.

Please note that this policy does not mandate action on the part of States. States are free to offer compliance assistance or not. Should States choose, however, to offer environmental compliance assistance to small communities, those doing so in a manner consistent with the framework provided in this policy can generally expect EPA to defer to their actions.

I wish to thank the many commenters who reviewed the June 30, 1995 draft policy and provided comments. The policy I issue today is a better document because of your efforts. If you have questions or further comments, please contact Kenneth Harmon of the Chemical, Commercial Services and Municipal Division at (202) 564-4079.

Attachments

cc: Small Community Coordinators, Regions I-X

This policy expresses EPA's support for States' use of enforcement flexibility to provide compliance incentives for small communities. EPA acknowledges that States and small communities can realize environmental benefits by negotiating, entering into, and implementing enforceable compliance agreements and schedules that require communities to correct all of their environmental violations expeditiously while allowing the community to prioritize among competing environmental mandates on the basis of comparative risk². States may provide small communities an incentive to request compliance assistance by waiving part or all of the penalty for a small community's violations if the criteria of this policy have been met. If a State acts in accordance with this policy and addresses small community environmental noncompliance with compliance assistance in a way that represents reasonable progress toward compliance, EPA generally will not pursue a separate Federal civil administrative or judicial action for penalties or additional injunctive relief.

This policy does not apply to any criminal conduct by small communities or their employees. To the extent that this policy may differ from the terms of other applicable enforcement response policies, this document supersedes those policies.

Flexible State Enforcement Responses

EPA's deference to a State's exercise of enforcement discretion in response to a small community's violations will be based on an assessment of the adequacy of the process the State establishes and follows in:

¹ This policy will also apply to the actions of territories and to the actions of Native American Tribes where conditions have been met for EPA to treat the Tribe as a State.

² EPA currently has a number of risk assessment resources available to the public, including its computer-based Information Risk Information System (IRIS). EPA comparative risk projects across the country have provided training and technical assistance to more than 45 State, local, tribal and watershed risk assessment efforts in an attempt to bring together stakeholders to reach consensus on which local environmental problems pose the most risk to human health, ecosystem health, and quality of life; and to develop consensus on an action plan to reduce those risks. EPA does not suggest that States and small communities need prepare a formal comparative risk assessment as part of the small community environmental compliance assistance process.

- responding expeditiously to a community's request for compliance assistance;
- selecting the communities to which it offers compliance assistance and a flexible enforcement response;
- assessing the community's good faith and compliance status;
- establishing priorities for addressing violations; and
- ensuring prompt correction of all environmental violations.

EPA will give its deference more readily to a State that has previously submitted a description of its small community environmental compliance assistance program to the Agency, thereby allowing EPA to familiarize itself with the adequacy of the State's processes.

Selecting communities

EPA intends this policy to apply only to small communities unable to satisfy all applicable environmental mandates without the State's compliance assistance. Such communities, generally comprised of fewer than 2,500 residents³, should be:

- non-profit
- governing entities (incorporated or unincorporated)
- that own facilities that supply municipal services.

EPA's evaluation of the appropriateness of a State's small community environmental compliance assistance program will depend in part on whether the State uses measures of administrative, technical, and financial capacity to limit provision of the benefits of this policy to those communities that truly need assistance. Such capacity measures could include, among other things, number of staff and their responsibilities, degree of isolation from other nearby communities, evaluation of existing infrastructure, average household income, the last decade's median housing values, employment opportunities, population projections, population age representation, revenue sources, revenue generating capacity, the level of government that operates the utility systems, current bond debt, and an assessment of the impact of other Federal mandates competing with environmental mandates for the community's resources.

³ EPA selected a population figure of 2,500 to be consistent with 42 U.S.C. 6908, which established the Small Town Environmental Planning Program, and which defined the term small town to mean "an incorporated or unincorporated community...with a population of less than 2,500."

Not less than quarterly, a State should provide EPA with a list of communities participating in its small community environmental compliance assistance program to ensure proper State and Federal coordination on enforcement activity.

Assessing good faith and compliance status

In considering whether a State has established and is following an adequate process for assessing a small community's good faith, EPA generally will look at such factors as the participating communities' candor in contacts with State regulators and the communities' efforts to comply with applicable environmental requirements. Measures of a small community's efforts to comply include:

- attempts to comply or a request for compliance assistance prior to the initiation of an enforcement response;
- prompt correction of known violations;
- willingness to remediate harm to public health, welfare, or the environment;
- readiness to enter into a written and enforceable compliance agreement and schedule; and
- adherence to the schedule.

A State's assessment of a small community's compliance status should identify:

- every environmental requirement to which the community's municipal operations are subject;
- the community's current and anticipated future violations of those requirements;
- the comparative risk to public health, welfare, or the environment of each current and anticipated future violation; and
- the community's compliance options.

In addition, EPA recommends that the process developed by the State include consideration of regionalization and restructuring as compliance alternatives, and consideration of the impact of promulgated regulations scheduled to become effective in the future.

Priorities for addressing violations

States seeking EPA's deference should require small communities to correct any identified violations of environmental regulations as soon as possible, taking into consideration the community's administrative, technical, and financial capacities, and the State's ability to assist in strengthening those capacities. A small community should address all of its violations in order

of risk-based priority⁴. Any identified violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment is to be addressed immediately in a manner that abates the endangerment or harm and reduces the threat. Activities necessary to abate the endangerment or harm and reduce the threat posed by such violations or circumstances are not to be delayed while the State and small community establish and implement the process for assigning priorities for correcting other violations.

Ensuring prompt correction of violations

If the small community cannot correct all of its violations within 180 days of the State's commencement of compliance assistance to the community, the State and the community should, within 180 days of the State's commencement of compliance assistance to the community, enter into and begin implementing a written and enforceable compliance agreement and schedules that:

- establish a specified period for correcting all outstanding violations in order of risk-based priority ⁶;
- incorporate interim milestones that demonstrate reasonable progress toward compliance;
- contain provisions to ensure continued compliance with all environmental requirements with which the community is in compliance at the time the agreement is entered; and
- incorporate provisions, where they would be applicable to the small community, to ensure future compliance with any additional already promulgated environmental requirements that will become effective after the agreement is signed.

Consultation with EPA during the drafting of a compliance agreement and schedule and the forwarding of final compliance agreements and schedules to EPA are recommended to ensure appropriate coordination between the State and EPA.

⁴ EPA does not intend that establishment of risk-based priorities be viewed as mandating delay in addressing low priority violations that can be easily and quickly corrected without affecting progress toward addressing higher priority violations requiring long term compliance efforts.

⁵ Neither a State nor a community may unilaterally alter or supersede a community's obligations under existing Federal administrative orders or Federal judicial consent decrees.

⁶ States may allow weighing of unique local concerns and characteristics, but the process should be sufficiently standardized and objective that an impartial third person using the same process and the same facts would not reach significantly different results. Public notification and public participation are an important part of the priority setting process.

Limits on EPA Deference

EPA reserves all of its enforcement authorities. EPA will generally defer to a State's exercise of its enforcement discretion in accordance with this policy, except that EPA reserves its enforcement discretion with respect to any violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment ⁷.

The Policy on Flexible State Enforcement Responses to Small Community Violations does not apply if, in EPA's judgement:

- a State's small community environmental compliance assistance program process fails to satisfy the adequacy criteria stated above; or
- a State's application of its small community environmental compliance assistance program process fails in a specific case adequately to protect public health and the environment because it neither requires nor results in reasonable progress toward, and achievement of, environmental compliance by a date certain.

Where EPA determines that this policy does not apply, and where EPA has reserved its enforcement discretion, other existing EPA enforcement policies remain applicable. The State's and EPA's options in these circumstances include discretion to take or not take formal enforcement action in light of factual, equitable, or community capacity considerations with respect to violations that had been identified during compliance assistance and were not corrected. Neither the State's actions in providing, nor in failing to provide, compliance assistance shall constitute a legal defense in any enforcement action. However, a community's good faith efforts to correct violations during compliance assistance may be considered a mitigating factor in determining the appropriate enforcement response or penalty in subsequent enforcement actions.

Nothing in this policy is intended to release a State from any obligations to supply EPA with required routinely collected and reported information. As described above, States should provide EPA with lists of participating small communities and copies of final compliance agreements and schedules. States should also give EPA immediate notice upon discovery of a violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents serious threats to, public health, welfare, or the environment.

⁷ EPA will regard any unaddressed violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment in a small community participating in a State environmental compliance assistance program as a matter of national significance which requires consultation with or the concurrence of, as appropriate, the Assistant Administrator for Enforcement and Compliance Assurance or his or her delegatee before initiation of an EPA enforcement response.

This policy has no effect on the existing authority of citizens to initiate a legal action against a community alleging environmental violations.

This policy sets forth factors for consideration that will guide the Agency in its exercise of enforcement discretion. It states the Agency's views as to how the Agency intends to allocate and structure enforcement resources. The policy is not final agency action, and is intended as guidance. This policy is not intended for use in pleading, or at hearing or trial. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

Policy Assessment

Measuring the success of compliance assistance programs is a critical component of EPA's ability to assess the results of compliance and enforcement activities. EPA will work with States to evaluate the effectiveness of the Policy on Flexible State Enforcement Responses to Small Community Violations. Within three years following its issuance, EPA will consider whether the policy should be continued, modified, or discontinued.