



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

118234

April 1, 1982

RELEASED

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

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The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

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Dear Mr. Chairman:

Subject: Information on the Environmental Protection Agency's Enforcement Activities (CED-82-62)

In your letters of October 14 and November 23, 1981, you requested that we review the impact of fiscal years 1982 and 1983 budget proposals on the Environmental Protection Agency's (EPA's) programs and activities. In addition, on March 18, 1982, you requested that we provide you with information obtained to date on EPA's enforcement activities for use during planned April 2 hearings on hazardous waste enforcement activities. You specifically requested that we provide information on (1) the change in EPA's enforcement policy under the current administration, (2) potential enforcement organizational problems, (3) problems in issuing enforcement guidance and policies to the regions, and (4) the elimination of funding for subtitle D (solid waste management) activities under the Resource Conservation and Recovery Act.

Pursuant to your requests of October 14 and November 23, 1981, we plan to brief you on the overall results of our review on the impact of fiscal years 1982 and 1983 budget reductions on EPA's programs in early April 1982.

During our review of EPA's enforcement activities we found that:

- EPA's current enforcement philosophy emphasizes voluntary compliance with environmental statutes and regulations. Legal action against violators is initiated only if voluntary compliance fails.
- EPA's enforcement organization has changed twice in the 14 months of the present administration and questions have been raised as to whether the new enforcement structure might not result in accountability and/or coordination problems.

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--EPA has only recently begun issuing guidance on enforcement policy and procedures.

In addition, funding for subtitle D activities under the Resource Conservation and Recovery Act has been eliminated and, according to State solid waste officials, will result in greatly reduced State solid waste efforts.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our review of enforcement activities was to obtain a general description and understanding of changes in EPA's enforcement philosophy and organization. To accomplish this objective, we interviewed EPA and Department of Justice enforcement and program personnel, including the Enforcement Counsel and the Acting Assistant Administrator for Solid Waste and Emergency Response; and the Assistant Attorney General for Land and Natural Resources, Department of Justice.

In addition, we interviewed enforcement and program personnel concerning, among other things, enforcement activities in EPA's Region IV, Atlanta. We also interviewed air and hazardous waste personnel in Maryland, Mississippi, and Tennessee, including the Maryland Assistant Secretary for Environmental Programs and the Tennessee Assistant Director of Solid Waste Management for the Department of Health. We selected EPA Region IV because it has the largest hazardous waste program. We also randomly selected two States, Tennessee and Mississippi, within region IV. In addition, we visited the State of Maryland because of known problems in funding its local air programs.

In addition, we met with representatives of environmental organizations and organizations representing State and Territorial pollution control administrators to obtain their views on EPA's enforcement efforts. These organizations included:

- State and Territorial Air Pollution Program Administrators,
- Association of Local Air Pollution Control Officials,
- Association of State and Territorial Solid Waste Management Officials, and
- American Environmental Safety Council (Save EPA).

Our basic methodology was to interview the appropriate officials concerning their views of EPA's philosophy and organization. Wherever possible, we also obtained documentation on enforcement guidance, policy, and organizational structure. We believe the results of our work provide representative viewpoints concerning the questions raised about EPA's current enforcement activities.

Our work was done in accordance with our "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

EPA's ENFORCEMENT PHILOSOPHY

EPA's current enforcement philosophy emphasizes voluntary compliance with environmental statutes and regulations. Legal action against violators is initiated only if voluntary compliance fails. According to EPA's Enforcement Counsel, previous administrations emphasized formal legal actions against polluters and allowed negotiations for compliance only after legal action had been initiated.

Under the voluntary compliance philosophy, EPA negotiates with violators to obtain compliance before initiating legal action. EPA's Enforcement Counsel stated that this system emphasized cleanup of the environment. The Assistant Attorney General for Land and Natural Resources, Department of Justice, endorsed the concept of voluntary compliance and stated that she would not initiate court action against any violators with which EPA has not worked to resolve the problems and obtain voluntary compliance.

On February 22, 1982, EPA issued a draft Civil Penalty Settlement Policy which describes theoretically how voluntary compliance will work. The policy applies to all future civil penalty enforcement actions, except liability payments under section 107 of Superfund, noncompliance penalties under the Clean Air Act, and criminal enforcement actions referred to the Department of Justice. The policy is to be finalized in April 1982 and the results of its implementation should be evident 90 days thereafter, according to the Enforcement Counsel.

According to EPA's Enforcement Counsel the policy will use "traffic tickets" to deal with polluters by classifying violations into three categories--lower risks, significant risks, and flagrant risks. One of the agency's goals is to encourage industry to agree to quick out-of-court settlements, with cleanup, or face stiffer penalties once litigation is initiated.

Regional enforcement officials will be provided with broad discretionary authority to negotiate settlements within a set of general guidelines. For example, if the violation is classified as lower risk, the guidelines state that, in general, the regional enforcement officials should accept \$50 per violation as settlement for each lower risk violation at issue in an enforcement action; however, they are further instructed that normally they should not accept a total settlement payment amount of less than \$300 (even if fewer than six lower risk violations are at issue) or more than \$3,500. For subsequent violations, if they find that the same regulated party committed lower risk violations with respect to the same legal requirement which it previously had

violated within the same 3-year period, they should accept \$150 per violation as settlement for each lower risk violation at issue. For these enforcement actions, however, they are instructed not to accept a total settlement of less than \$1,500 or more than \$7,000.

The settlement guidelines set minimum penalties payments for EPA to accept prior to the initiation of litigation. For example, in certain cases, EPA may allow violators to pay lower than usual penalties in exchange for extra pollution control efforts or because of mitigating factors, such as constructing new, safe dump sites for others to use or cleaning up existing polluted areas for which the violator is not otherwise responsible. The regional offices are also responsible for establishing a schedule for settlement negotiations which includes a deadline after which EPA will no longer be willing to settle for the chosen prelitigation amount. If the deadline passes without settlement, the regional offices are instructed to begin formal administrative or judicial litigation.

During our review several State and environmental organization officials agreed that voluntary compliance is a viable approach but cautioned that for this approach to be effective, EPA must maintain a visible and credible enforcement program. For example:

- The State and Territorial Air Pollution Program Administrators in an October 19, 1981, letter stated, "Without strong EPA programs in air quality planning, research and enforcement, state programs will be largely ineffective."
- An official of the Association of State and Territorial Solid Waste Management Officials stated that the States follow the lead of Federal Government in enforcement, and therefore a strong, visible Federal enforcement program is necessary to assure industry compliance.
- A State of Tennessee solid waste management official stated that he would rather educate than litigate.
- The Maryland Assistant Secretary for Environmental Programs stated that there are not enough resources to go after every violator but that the Federal Government must have a "stick" so that enforcement will be easier for the States to carry out.

ORGANIZATION OF ENFORCEMENT EFFORTS

EPA's enforcement organization has changed twice in the 14 months of the present administration. Critics of EPA's new enforcement organization structure have stated that it could result in accountability and/or coordination problems.

Under the previous administration, EPA's enforcement efforts were under an Assistant Administrator for Enforcement, with three deputy assistant administrators--one for water enforcement; one for general enforcement, including stationary air sources, pesticides, and toxic substances enforcement; and one for mobile sources, noise, and radiation enforcement. Individual enforcement offices included both attorneys and technical personnel (inspectors, scientists, etc.) who helped develop the technical aspects of a case for litigation. This organizational structure was basically duplicated in the EPA regions.

On June 12, 1981, the Administrator announced a reorganization of the enforcement function and the establishment of the Office of Legal Counsel and Enforcement to combine the activities of the General Counsel with the development of agencywide enforcement policy. Enforcement functions relating to the various media areas--water, air, pesticides and toxic substances, solid waste, and hazardous waste--were established in the respective offices for those programs. Thus, attorneys and technical personnel who had previously been under the Assistant Administrator for Enforcement were now placed in the program offices, except for a core enforcement group of attorneys in the Office of Legal Counsel and Enforcement.

On December 2, 1981, a second enforcement function reorganization was announced. This reorganization centralized enforcement legal activities for the majority of the media programs in the Office of Enforcement Counsel, within the Office of Legal and Enforcement Counsel. Technical compliance functions, remained with the media offices, thus separating the legal enforcement staff from the technical staff. The Administrator justified this change by stating that it would

"achieve more efficient use of Agency legal resources and skills, consistent development and application of enforcement policy, and overall a strengthened enforcement program by clarifying responsibilities for legal enforcement versus technical compliance activities."

The Administrator also stated that the regions were to organize their enforcement function similarly.

Thus, the current organizational structure in both the regions and headquarters separates enforcement attorneys from the technical staff. In addition, the enforcement responsibilities in the regions are under the direction of the Regional Counsel, who reports to the General Counsel. It was not until March 2, 1982, that an Associate Administrator for Legal and Enforcement Counsel was named.

During a February 17, 1982, hearing before the Senate Committee on Environment and Public Works, the potential for enforcement coordination problems was raised and EPA was asked to provide information on whether the current enforcement organization might not present problems. EPA responded that:

"Coordination between headquarters and Regional legal offices on enforcement matters should be improved. For the first time, Regional attorneys will act as 'counsel to the situation,' instead of having two sets of attorneys working on different aspects of essentially the same set of problems. The Regions will speak with one legal voice. Since the Regional Counsels report to the General Counsel and coordinate their advice with OGC [Office of General Counsel], the Agency will speak with one legal voice despite the fact that many of its operations are decentralized in the Regions."

EPA did not specifically address how the Regional Counsel and Enforcement Counsel would coordinate their efforts.

EPA's Enforcement Counsel told us that accountability for enforcement actions lies more with the assistant administrators of the various media offices and the regional administrators than with his office. He stated that he was in the middle of the accountability chain, with the regional administrators and the assistant administrators in front, and the Department of Justice at the end of the chain. At March 16, 1982, hearings before the Subcommittee on Commerce, Transportation and Tourism, House Committee on Energy and Commerce, the Enforcement Counsel described his job as using

"the legal tools that are available to the Agency to remedy violations which are not amenable to informal resolution and to develop an Agency-wide policy to make our overall enforcement effort more effective."

In a February 23, 1982, statement before the Senate Committee on Environment and Public Works, the Administrator emphasized this point by stating that the current enforcement organization "provides a structure in which each assistant administrator can be held accountable for total environmental progress in his or her area," placing responsibility on the Enforcement Counsel for only the legal aspects of the case.

The Assistant Attorney General for Land and Natural Resources, the Department of Justice, told us she had questions about the effectiveness of EPA's current enforcement organization. She said that she believes the Enforcement Counsel should have the necessary resources to develop cases for litigation, which is difficult if the technical personnel and attorneys are

separated. However, she emphasized that as long as it worked, it did not matter how EPA's enforcement office was organized.

EPA's Enforcement Counsel told us he recognizes that the reorganizations of the enforcement function have disrupted the ordinary flow of cases at both headquarters and the regions, but he believes unfamiliarity with routines rather than accountability and/or coordination problems is the main reason. The new organizational structure is only 4 months old, and it is too early to determine whether the current enforcement organizational structure will result in effective enforcement efforts.

ISSUANCE OF ENFORCEMENT POLICY AND GUIDANCE

Although a new organization for the enforcement function was initially announced on June 12, 1981, it was not until December 29, 1981, that enforcement policy and procedure guidance was provided to the regions or headquarters. On December 29, 1981, a draft Enforcement Policy and Procedures memorandum was issued outlining how the new enforcement system would operate. This memorandum, which was revised on February 26, 1982, provides a narrative flowchart of the enforcement system from the time an inspector first identifies a violator until the case is resolved or referred to the Department of Justice. In addition, the enforcement guidance has only recently been issued. For example, the draft Civil Penalty Settlement Policy was not issued until February 22, 1982, and Hazardous Waste Compliance and Enforcement Program Guidance was issued on February 23, 1982. To date, no specific enforcement policy guidance has been issued for any other media areas.

EPA's Enforcement Counsel stated that EPA has been slow in developing enforcement guidance and policy, which has contributed to the reduction in the number of enforcement cases developed and processed by EPA, as well as the number of cases referred to the Department of Justice. However, he also points to the reorganization and the change in enforcement philosophy as contributing to the problem.

EPA provided the following statistics on the number of civil cases referred to the Department of Justice and cases forwarded to EPA headquarters from EPA's regions from 1977 through 1981.

	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
Civil actions sent to Department of Justice	204	363	254	252	78
Cases forwarded from regions to headquarters	242	412	257	313	66

One EPA regional program official told us that the lack of official enforcement guidance has resulted in regional attorneys needing to contact EPA headquarters for guidance on a case-by-case basis. He further stated that the attorneys often received confusing signals, thereby making them reluctant to take enforcement action.

FUNDING FOR SUBTITLE D OF THE RESOURCE
CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act of 1976 was enacted to, among other things, address the problem of improper and inadequate solid waste disposal practices. Subtitle D of the Resource Conservation and Recovery Act authorized EPA to undertake a program of technical and financial assistance to States for developing and implementing solid waste management plans for (1) recovering energy and other resources from discarded materials, (2) disposing of discarded materials safely, and (3) managing hazardous wastes. State solid waste management plans are required to, among other things, (1) contain requirements that all nonhazardous solid waste be used for resource recovery or be disposed of in a sanitary landfill or some other environmentally acceptable manner, (2) provide for closing or upgrading existing open dumps, (3) prohibit the establishment of new open dumps, and (4) provide for the establishment of such State regulatory powers as may be necessary to implement the plan. State participation in the subtitle D program is voluntary since EPA lacks the legislative authority to require participation.

Federal financial assistance to States for solid waste programs in fiscal years 1975 through 1977 totaled about \$3 million each year. From October 1977 to March 1981, EPA awarded grants of \$47.8 million to assist State solid waste programs under the Resource Conservation and Recovery Act. Although the Resource Conservation and Recovery Act authorized \$20 million for grants in fiscal year 1982 for developing and implementing State solid waste management plans, EPA did not request that such funds be appropriated.

Although Federal funding for State subtitle D activities was not envisioned to continue indefinitely, previous Federal budgets indicated that a phaseout was not to occur until fiscal year 1984. EPA's action in not requesting the appropriation of subtitle D funds for fiscal year 1982 has resulted in an accelerated phaseout of Federal financial assistance.

In a July 1981 report entitled "Solid Waste Disposal Practices:--Open Dumps Not Identified--States Face Funding Problems" (CED-81-131, July 23, 1981), we noted that the 11 States included in our review said that the phaseout of subtitle D funding would result in negative impacts on

- training provided by the State,
- implementing State solid waste plans,
- continuing the inventory of open dumps,
- closing or upgrading open dumps, and
- prohibiting new open dumps.

The report also noted that States generally lack adequate, long-term financial support to effectively and efficiently operate State solid waste programs; and despite EPA encouragement to explore alternative funding sources such as user charges, few States have done so.

During this review, we questioned solid waste officials in three States, none of which were included in our previous review discussed above, as to the effect of the accelerated phaseout of Federal subtitle D funding. The State solid waste officials interviewed told us that for the most part, solid waste programs, if continued at all, would be at a much reduced level. For example:

- A Maryland solid waste official said that the State would not continue to inventory open dumps because if funds are not available for site cleanup, little is to be served by knowing the extent of the problem.
- A Mississippi solid waste official stated that although overall Federal support for Resource Conservation and Recovery Act activities has been reduced only \$1,000 from fiscal year 1981 to 1982, the effect on subtitle D activities was great. He explained that in fiscal year 1981 the State received Federal funding of \$286,000 for Resource Conservation and Recovery Act activities--\$201,000 for subtitle C (hazardous waste management and regulation) and \$85,000 for subtitle D (solid waste). In fiscal year 1982 the State received Federal funds of \$285,000--all for subtitle C. To meet this elimination of subtitle D funding, the official said that the State will reduce the number of landfill inspections by half (from 200 to 100 annually) and do less work to inventory open dumps in the State. The official further said that as a result of the cutback in the State's solid waste activities, small generators may dump potentially hazardous waste in landfills and such dumping may go undetected.

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At your request, we did not obtain agency comments on the matters discussed in the report. Unless you publicly announce its contents earlier, we plan no further distribution of the report until 30 days from the date of its issuance. At that time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,

A handwritten signature in black ink that reads "Henry Eschwege". The signature is written in a cursive style with a large, prominent 'H' and 'E'.

Henry Eschwege
Director