

ENSURING DAY-TO-DAY COMPLIANCE BY FEDERAL AGENCIES: EPA'S FEDERAL FACILITIES COMPLIANCE PROGRAM

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ABSTRACT

There is an entire menu of environmental statutes, with the accompanying regulations which make up the simmering "alphabet soup" that Federal agencies must digest in order to ensure compliance in the daily operation and management of their various facilities.

These include the Clean Air Act, the Clean Water Act and the Resource Conservation and Recovery Act, as well as each of the other environmental statutes that EPA administers and is responsible for compliance oversight and enforcement. Each contains specific provisions which require facilities of the U.S. Government to comply with environmental requirements the same as all other regulated Parties.

In addition, Executive Order 12088 promulgated during the Carter years, requires that each Executive Branch agency to be "responsible for compliance with applicable pollution control standards" which are defined in the executive order as "the same substantive, procedural and other requirement that would apply to a private person." As a result, both the Executive Branch and the Congress have made clear their intent to waive the Federal government's "sovereign immunity" with respect to their compliance with Federal environmental statutes.

Given these clear-cut requirements, one might ask why continued citations appear in the press about environmental violations at various Federal facilities and why there have been an increasing number of Congressional oversight hearings focusing on compliance problems at Federal facilities? While there are no simple answers to the continued disclosures, there are a number of contributing factors which this paper will discuss with highlights of some of the efforts being undertaken by both EPA and other Federal agencies to address them.

SCOPE OF THE PROBLEM

When the major environmental statutes were first enacted in the early 1970's, most did not contain specific provisions which clearly waived the "sovereign immunity" of the Federal government to comply with these laws. This led to a perception held by some Federal officials that they were not required to comply with environmental requirements. As a result, operations at certain Federal installations continued to take place without appropriate advance consideration of the potential adverse environmental impact or health effects of their actions. Following two significant Supreme Court decisions and subsequent reauthorizations of the environmental statutes which contained sovereign immunity waiver provisions, it is now widely recognized and accepted that Federal agencies must comply the same as other regulated parties. The disclosures of today are the price many Federal agencies are paying to clean-up the "sins of the past" even though they have now discontinued most unacceptable environmental management practices.

Although Federal agencies are increasingly devoting substantial additional appropriations to their environmental programs the Federal budget and appropriations process has not kept abreast of all of the new environmental requirements and remedying past environmental problems. The Anti-Deficiency Act prohibits Federal officials from

committing funds beyond those which Congress has authorized them to spend. While this generally is not viewed as an acceptable excuse for non-compliance, it becomes a harsh reality which both EPA and other Federal agencies must face.

Historically our data show that Federal agency compliance rates "catch up" with new requirements within 2-3 years. It is also appropriate to point out that Federal installations are visible and well-recognized facilities in most communities. They usually are the recipients of considerable press coverage whenever significant environmental problems are identified at facilities which they own or operate.

Federal Agencies' Efforts

The genesis for most Federal agencies environmental compliance began in the early 1980's following the Passage of the new hazardous waste laws (i.e. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Resource Conservation Recovery Act (RCRA) which required the clean-up at abandoned hazardous waste sites at Federal facilities and on public lands. The high costs associated with such cleanups also leads agencies to the realization that they needed to improve their current management practices to ensure that similar problems did not occur in the future.

* See Executive Order 12008, 43 Federal Register 47707 (1978).

** Hancock v. Train, 426 U.S. 167 (1976), and EPA v. California, (State Water Resources Control Board), 426 U.S. 200 (1976).

Many agencies quickly discovered that in the "pay me now or pay me later" world of environmental compliance, it is much more cost effective as well as environmentally sound practice to pay up-front compliance costs than to pay for after-the-fact clean-ups when the environmental damage has already taken place. As a result, most Federal agencies have established environmental management programs to help ensure day-to-day compliance with environmental requirements at their facilities.

The scope and extent of Federal agencies' environmental management programs vary as much as the differing nature of their missions. While many smaller agencies have only a few people dedicated to environmental compliance at their agency Headquarters, some large agencies may have 40-50 people on the environmental staff at a single installation. Again our data show that Federal agencies are allocating increased portions of their annual budgets to environmental compliance activities.

For example, the Department of Defense has established a separate "fenced account for the clean-up of its inactive hazardous waste sites. In Fiscal Year 1989, this account contained over \$500 million dollars to be used solely for this purpose and other Federal agencies are considering the creation of similar accounts. This amount is in addition to funds used for pollution abatement in DOD's other environmental programs (i.e., air water, etc.).

Current projections for clean-up of all DOD sites is estimated by DOD to be in the \$15-20 billion dollar range. The Department of Energy estimates its total clean-up costs at \$140-160 billion dollars and the Government Accounting Office (GAO) has projected it at upwards of \$180 billion dollars. With these types of figures, the timeframe for clean-up at Federal facilities appears to be a long-range expensive, management intensive, technically challenging prospect.

The Federal agencies also prepare annual pollution abatement plans which EPA reviews as directed by the Office of Management and Budget through OMB Circular A-106. EPA's Regional offices review proposed projects individually to determine their adequacy in terms of engineering, timing and cost. EPA then provides its assessment of these projects in an annual report to OMB for their use in preparing the President's budget submission to Congress each January.

The total number of projects proposed and funds required by Federal agencies through the A-106 process for pollution abatement has risen significantly since 1985. In Fiscal Year 1985 Federal agencies proposed 343 projects totaling approximately \$261 million dollars. In 1990, our data show some 1400 proposed projects with funding requirements of approximately \$1.5 billion dollars.

Much of this increase can be attributed to meeting the requirements of the recently-amended CERCLA/SARA hazardous waste statute as well as other environmental laws which are continuing to bring more and more small sources under the regulatory umbrella. This is happening as the environmental regulators have begun to turn their attention

to the regulation of facilities which may have underground storage tanks, be small quantity hazardous waste generators or have friable asbestos in their building materials. In many instances, smaller Federal facilities such as rural Post Offices, remote field stations or laboratories which had not concerned themselves with environmental regulations are now in a position of having to provide funding for compliance with these requirements.

EPA Federal Facilities Initiatives

Due in part to EPA's encouragement, Federal agencies are increasingly turning to the use of environmental auditing which the private sector has pioneered to help them achieve and maintain compliance at their facilities. In July 1986, EPA issued a formal agency policy statement in the Federal Register encouraging all regulated entities, including Federal facilities, to institute environmental auditing programs. Environmental auditing serves as an internal quality assurance check to verify compliance, evaluate management effectiveness and assess risks from facility operations and practices.

In its "Environmental Auditing Policy Statement," EPA further stated that EPA would provide technical assistance to help Federal agencies design and initiate audit programs at their facilities. As part of that assistance effort, EPA conducted a review of 36 Federal agencies to determine the nature and extent of environmental auditing undertaken at Federal facilities. Almost half of these agencies had either established an auditing program or were initiating a new program. While this represents substantial progress by Federal facilities in the environmental management arena, EPA believes that there were additional opportunities for Federal agencies to either initiate new audit programs or improve existing ones.

To verify that assumption, EPA sponsored a nationwide "Environmental Auditing Conference for Federal Agencies" in Atlanta in March, 1988. The purpose of this conference was to encourage the continuing establishment and improvement of Federal agency audit programs and to assist Federal personnel in developing and refining their individual auditing skills and techniques. As a result of this conference, EPA identified a need for and decided to develop two guidance documents to further assist Federal agencies in the development and implementation of audit programs. These are (1) Model Environmental Audit Program Design Guidelines for Federal agencies and (2) Model Environmental Auditing Protocol for Federal Facilities. These documents are scheduled for issuance in the Spring of 1989 and may be obtained through the Office of Federal Activities.

EPA has a dual mandate not only to provide "technical assistance" and advice to Federal agencies as required by Executive Order 12088, but also to take enforcement actions against Federal facilities as provided for in the various environmental statutes and regulations. On the technical assistance side, in addition to its environmental auditing efforts, EPA undertakes a number of other activities designed to reach out and promote compliance by Federal facilities before violations have even occurred.

One of the primary mechanisms EPA uses to provide such assistance is the Federal Agency Environmental Roundtable. Our Office of Federal Activities at EPA Headquarters conducts monthly meetings of the Roundtable, whose members consist of the environmental program managers of 35 other Federal Agencies. At the monthly meetings EPA disseminates and discusses up-to-date information on new and upcoming rules, regulations, or policies guidance and foreshadows program development in areas of interest to the agencies. This forum represents a valuable opportunity for communicating and explaining EPA's compliance priorities and policies and for receiving critical input from the Federal agency environmental staffs. In addition, it enables the Federal agencies to exchange ideas on how they are implementing EPA regulations as part of their own environmental Programs. EPA Headquarters and Regional offices also conduct training and other assistance activities for Federal agency environmental personnel on a selected basis.

The EPA Federal Facilities Compliance Strategy

The other side of EPA's Federal agency oversight responsibilities involves compliance and enforcement activities at Federal facilities. Over the past two years, EPA has undertaken a major agency-wide effort to revise and update its Federal Facilities Compliance Strategy document, better known as the "Yellow Book", which was issued in November, 1988.

This document, originally issued in 1984, was substantially revised to reflect important changes and improvements in EPA's approach to compliance and enforcement response. It establishes a comprehensive and proactive compliance approach and provides the basic framework for all EPA media programs to follow in responding to Federal facility violations. The Strategy also clarifies that Federal agencies must comply with environmental laws in the same manner and degree as non-Federal entities and that EPA will utilize the full range of its available enforcement mechanisms to ensure compliance by Federal facilities. At the same time, it recognizes that there are some limitations and differences in the types of enforcement responses which EPA can take at Federal facilities (e.g., no judicial action).

EPA's mandate to provide technical assistance as well as the restrictions inherent in the Federal budget process both influenced EPA's decision that a separate strategy was needed for addressing compliance problems at Federal facilities.

The strategy establishes a process which requires EPA (and delegated States) to take "timely and appropriate" enforcement response actions for Federal facility violations in a manner similar to EPA actions against private parties. However, since EPA and most other Federal agencies are within the Executive Branch of the Federal Government, EPA's enforcement strategy for Federal facilities calls for the use of mutually negotiated compliance agreements or consent orders for addressing Federal violations. Where agreement cannot be reached within pre-established timeframes, EPA will formally escalate unresolved issues to the Headquarters of each involved agency for resolution. If

EPA and the involved agency are unable to expeditiously resolve their differences, Federal facility cases will be referred to either OMB or the Justice Department following steps outlined in Executive Orders 12088 and 12146, respectively. The significance of the revised dispute resolution process is that the strategy now establishes specific timeframes for each step similar to those which EPA uses for responding to violations at private facilities. This should greatly aid EPA in remedying violations at Federal facilities more quickly than traditionally has been the case in the past where "jawboning" with Federal agencies often lead to lengthy and protracted negotiations.

The strategy devotes separate chapter to the critical role which the States play in compliance and enforcement activities at Federal Facilities. Since many of EPA's programs are delegated to the States, Federal facilities are frequently subject to regulation by State enforcement authorities. It is important to note that States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, the Strategy confirms that States may exercise a broader range of their enforcement authorities to address Federal facilities' violations. States also are encouraged to pursue negotiated agreements or consent orders with Federal facilities or three-party agreements which include EPA.

The key provisions contained in the Federal Facilities Compliance Strategy include those which:

- Clarifies Federal agencies' obligations to comply with environmental laws to the same extent as non-Federal entities and EPA's commitment to use all its available enforcement mechanisms to ensure compliance by Federal facilities.
- Emphasizes negotiation of compliance agreements or consent orders with Federal facilities within established "timely, and appropriate" timeframes prior to EPA's taking any further action.
- Establishes a formal dispute resolution Process with specific escalation timeframes when mutual agreement cannot be reached at the Regional level.
- States that EPA can use the full range of its enforcement authorities against contractor operators of government-owned/contractor operated Federal facilities (GOCOs).
- Outlines selected initiatives for improving the identification, tracking, and compliance monitoring of the Federal facilities universe.
- Clarifies the important role of States in the Federal facilities compliance and enforcement process.
- Emphasizes the use of innovative compliance management techniques including environmental auditing and more effective use of the Federal Agency A-106 Pollution Abatement Planning Process.
- Promotes improved and more systematic EPA technical assistance for Federal agencies.
- Defines responsibilities for Federal facilities at both Headquarters and Regional levels within EPA.

In order to effectively implement this strategy and to carry out the other activities of its Federal Facilities Compliance program, EPA has designated Federal Facilities Coordinators in each of its ten Regional offices. Each of these individuals is devoted full-time to Federal facilities compliance and technical assistance activities and serves as the Region's primary point-of-contact for both Federal agencies and the public on Federal facilities issues. In addition, many of EPA's various media program offices also have specifically dedicated resources for addressing Federal facilities compliance problems and may develop their own follow-up media Federal facilities guidance consistent with this strategy.

CONCLUSION

In the final analysis, it is clear that while Federal facilities have made significant progress in improving their environmental compliance records, there remains a sig-

nificant, unremitting effort ahead. For EPA's part, it must continue to better target its inspections, enforcement and technical assistance activities towards those Federal facilities and agencies with the most significant compliance problems. It is only through EPA, the States and the other Federal agencies and EPA working together that the goal of making Federal facilities the "model of environmental compliance" which they truly have the obligation to become, is possible.

Copies of the Federal Facilities Compliance Strategy (the "Yellow Book") may be obtained by written request to EPA at the following address:

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