

July 25, 2014

Mr. Rob Lischinsky
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Mr. Lischinsky:

Thank you for providing states an opportunity to comment on the latest version of the U.S. Environmental Protection Agency's (EPA's) Federally Reportable Violations (FRV) policy. State and federal agencies have invested many hours into this policy so that it can effectively meet the goals of the program, which are: (1) to provide EPA the information necessary to support proper oversight of state compliance and enforcement programs, and (2) to provide information necessary to show the public what is happening at sources of air emissions in their neighborhoods.

Over the past three years, NESCAUM has been raising concerns to EPA's Office of Enforcement and Compliance Assurance (OECA) on issues related to the FRV policy. These concerns have included ensuring that EPA: (1) understands that states have capacity limits in tracking and reporting deviations/violations; (2) recognizes that deviation/violation tracking does not accurately portray states' activities for EPA oversight; (3) understands that the new requirements in the FRV policy cannot legally be implemented in many states; (4) recognizes that lack of action on the FRV policy negatively affects states' capacity to address issues in the Compliance Monitoring Strategy (CMS), the State Review Framework (SRF), and the migration to the new air compliance and enforcement data system ICIS-Air; (5) recognizes that implementing the FRV policy will require states to invest a significant amount of resources to rework their state-based reporting systems; and (6) understands that reporting FRV data will require more state time and resources.

We support EPA's efforts to narrow the scope of the policy to be applicable only to Compliance Monitoring Strategy (CMS) entities. We also support EPA's recognizing that action-linking of violation data elements is not possible for this policy. These two changes will help states implement the policy for a more concisely defined set of facilities where they have the most influence in terms of compliance and enforcement.

Notwithstanding those important modifications, the NESCAUM states continue to have serious core concerns about the proposed revisions to the FRV policy. In the past, states tracked compliance using the compliance flag in Air Facility System (AFS). Issues with this data element have been well documented, and while states were told by EPA that this element would be removed from the minimum data reporting (MDR) list, this has not yet happened. Moreover, in its 2010 FRV memo and in its proposed revised policy, EPA appears to be promoting a policy

that provides a significantly different interpretation of what states are required to report. In fact, the subtle changes in language translate into a dramatic shift in tracking and reporting to AFS. The revised policy is structured in a way that still fails to recognize that states can track and report actions, but cannot report alleged violations or deviations.

The NESCAUM states continue to disagree with EPA's approach to the FRV policy and interpretation of reporting requirements, and have articulated and documented our concerns in previous discussions and comment letters. We wish to go on record with the following concerns:

- EPA's FRV policy is inconsistent with how states report air-related actions. They can report actions, but not deviations or "alleged violations."
- The revised policy lacks concrete guidance on what data fields in ICIS-Air will need to be updated by states to report FRV. We are aware of what ICIS-AIR contains, including mandatory fields for a Case File, but the lack of concrete guidance may lead to inconsistency in implementing the FRV policy. For example, are states required to identify the discovery action? Are states required to report the date that the alleged violator was notified? These and other things are unclear in the policy.
- Entering data elements into ICIS-AIR will require using multiple screens and additional data element requirements. States currently report through a single screen with only one data flag, and are not prepared for this new requirement.
- We strongly disagree with EPA's assertions that this policy does not result in an increased reporting burden for the states.
- Moreover, we feel that EPA should disclose the increased workload through a properly promulgated ICR, and to the OMB, prior to finalizing the policy.
- We would support EPA revisiting the MDR elements to eliminate items that are not important and identify new key data elements.
- The new reporting system only allows data to be submitted by hand or by batch, but not both; this makes real-time data submission impossible, and creates quality assurance challenges.
- Reporting allegations will require new state-level procedures, state data system modifications, and additional resources; this is a considerable expansion in workload and will require significant resources in some states.
- EPA believes that it can address cases where state regulations would be violated through reporting by creating a flag in the system that marks information as enforcement sensitive. This proposed fix not only creates additional work, but also makes sensitive data vulnerable to release. Moreover, it does not address the resulting legal issues that states will face.

As currently designed, EPA's FRV policy appears to assume that determining compliance with air regulations is a simple process whose status can be determined immediately, but this is not the case. Under the revised policy, EPA requires states to report every deviation and call it a violation, but states cannot do that. Deviations and excursions are not always violations; they are

events that require further investigation.¹ States have expressed serious concerns that what EPA is attempting to deliver in this policy cannot be done without serious legal and technical repercussions. Even in consent decrees and settlement agreements, respondents typically neither admit nor deny responsibility. Without going to trial, many states are hard pressed to identify a violation for a particular case. EPA seems to have failed to recognize this inherent flaw in developing its deviation/violation tracking system.

Even if states were able to overcome the legal and technical issues with implementing the FRV policy, both the current and revised policies have an expectation that agencies will be able to complete and provide real-time data entry without error. This assumption is unrealistic; states need time to review and quality assure their data prior to submitting it. EPA's policy fails to acknowledge the need for this critical step.

The proposed revised FRV policy includes a discussion of E-Enterprise and Next Gen. Such information does not belong in this policy. EPA must consider many issues with new data flows before making broad statements about their impacts on state systems. We recommend that EPA remove this section from the FRV policy, and limit the policy only to pertinent aspects of FRV.

The NESCAUM states share EPA's interest in compliance and enforcement data transparency. We hope that we can find a way to work together constructively to develop mutually acceptable solutions to the issues described in this letter and previous comments. For further information or to arrange additional discussions, please contact our enforcement and compliance lead, Lisa Rector, at 617-259-2095.

Sincerely,



Arthur N. Marin
Executive Director

Cc: NESCAUM Directors
Janet McCabe, US EPA OAR
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¹ For example, excess emissions found through activities such as fence line monitoring and LDAR (leak detection and repair) must be verified and validated with field inspection or undergo a data/ report review before they can be called violations.