

February 16, 2011

Ms. Cynthia Giles, Assistant Administrator
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Ariel Rios Building, *Mail Code: 2201A*
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Air Facility Subsystem (AFS) Redesign

Dear Ms. Giles:

On behalf of the Northeast States for Coordinated Air Use Management (NESCAUM),¹ we would like to express our support for the U.S. Environmental Protection Agency's (EPA's) long overdue effort to revise the Air Facility Subsystem (AFS) in a manner that provides accurate and timely data reflecting environmental compliance and enforcement actions in the states. While we share EPA's goals in this endeavor and have worked closely with the Agency in the past to develop a needs analysis for a modernized AFS, we have some serious concerns regarding EPA's current overall direction for modernizing the AFS.

During a November 2010 meeting of the NESCAUM Enforcement Committee and on subsequent calls, Betsy Metcalf of EPA's Office of Enforcement and Compliance Assurance presented a set of proposed revisions to the AFS. The NESCAUM states greatly appreciated the opportunity to learn about the proposed changes and provide feedback. However, based on EPA's presentation, we have significant concerns that: (1) the information EPA would require states to report is neither manageable, nor feasible; (2) as a result of such impractical requirements, the resulting data would neither provide the public a clear understanding of the status of state and federal environmental compliance and enforcement (C & E) programs, nor a practical sense of the C & E issues at facilities; and (3) data reporting will drive the compliance and enforcement policies, rather than programmatic activities driving the data reporting.

While your office has reached out to some state data management staff prior to developing the current proposal, it is critical that you also consult with staff with appropriate programmatic and legal expertise in state air C & E programs. Engaging with these experts would help to ensure that any system EPA proposes would work within the structure of state air programs. As currently written, the proposed AFS modernization plan does not accomplish this goal. The proposed system appears to follow a structure that is compatible with RCRA and water programs, but is incompatible with air programs, especially where state regulations are made federally enforceable through State Implementation Plans (SIPs).

¹ NESCAUM is the regional association of state air pollution control agencies representing Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

Moreover, the NESCAUM states believe the proposed changes would require significant modifications to the types and amount of data that many states currently collect. For example, states that maintain their own data tracking systems would need significant additional resources to revise those systems to track proposed new elements. Such revisions and new tracking requirements would further deplete already dwindling resources for C & E efforts, and may have the effect of reducing or even eliminating state quality assurance or quality control efforts. Lastly, we believe that the increased reporting burden on the states would require EPA to publish a new Information Collection Request in accordance with the Paperwork Reduction Act (44 U.S.C. §§ 3501 et seq.).

Attachment A provides a more detailed discussion of additional issues and recommendations regarding EPA's proposed changes to the AFS. We urge EPA to consider these comments and work with state air program staff in developing a revised system that will provide accurate and timely data that reflect the reality of compliance and enforcement actions. This system is a critical part of the state-federal partnership that allows us to achieve our shared public health and environmental goals under the Clean Air Act.

NESCAUM staff and state members of NESCAUM's Enforcement Committee stand ready to work with you to foster a constructive dialogue. Lisa Rector at NESCAUM will contact your office in the hopes of arranging a meeting with to further discuss our concerns and chart a path forward for achieving our mutual interests. Ms. Rector may be reached at 802-899-5306 or lrector@nescaum.org.

Sincerely,



Arthur Marin, NESCAUM
Executive Director



Robert Scott, Air Director NH DES
NESCAUM Enforcement Committee Liaison

Attachment

cc: NESCAUM Directors
Bill Becker, NACAA
Jim Blizzard, ECOS
Beth Graves, ECOS
Ken Eng, EPA/Region 2
Lisa Lund, US EPA
Adam Kushner, US EPA
Karl Mangels, EPA/Region 2
Steven Rapp, EPA/Region 1
Christine Sansevero, EPA/Region 1

ATTACHMENT A

Concerns and Recommendations Regarding EPA's Proposed Changes to the Air Facility Subsystem

1. Compliance Status: EPA has indicated that they will be moving away from compliance status reporting in a modernized system. The NESCAUM states support this decision and commend EPA for listening to the requests of the system users on this issue. Currently, EPA requires state and local agencies to report on the "compliance status" of facilities in their jurisdictions. This requirement means that state and local agencies manually update their data systems to indicate whether facilities are "in compliance" or "in violation." This approach, however, assumes that we can know (and can tell the public) whether a facility is in compliance or in violation at all given points in time. Unfortunately, this is neither realistic nor practical, given that compliance status is constantly changing. Moreover, there are far too many facilities and too many regulations for agencies to maintain data on real-time compliance on an hourly, daily, weekly, or even monthly basis. As a result, compliance status data, as reported in AFS are currently inaccurate and often misleading.

Based on information supplied to the NESCAUM states, it appears that EPA is moving away from compliance status tracking to federally reportable violations (FRV) tracking as a replacement. EPA has also indicated that compliance status may in the future, be based on electronic reporting from the facilities, rather than on a state's determination that a condition of noncompliance exists. Implementation of this change must be considered carefully in light of some legal and technical issues.

States have significant concerns that EPA will automate updating the violation status based on a facility's submittal of electronic documents or other data submissions. While states fully support electronic submission of and easier public access to documents, EPA's AFS must not determine if a violation has occurred. Only the agency providing the legal and technical review of the reported data can make that determination.

Moreover, automatic flagging of a violation in AFS would create legal issues in many states. Some states have significant legal processes they must follow before an item can be called a violation. For example, in Massachusetts, a "violation" label cannot be used until a four-step process of review has been completed and notice to the facility in question has been provided. However, the AFS would require the state to use an action code in AFS to indicate that they have found a violation prior to the completion of this process. Data managers in these states could be held inappropriately liable in cases where an automatic flagging of "in violation" based on excess emission reports or stack test results occur. Massachusetts is not unique in this regard, and similar legal requirements exist in many of the NESCAUM states.

The NESCAUM states recommend that EPA move away from tracking compliance status ("in compliance" or "in violation"). Rather than creating automatic flagging of violations, NESCAUM recommends that EPA track specific inspection and enforcement activities, such

as Full Compliance Evaluations, Partial Compliance Evaluations, Notices of Non-Compliance or Violations, Administrative Orders, and Administrative Penalty Orders. The issuance of an enforcement document is a more appropriate point in the process to change a facility compliance status to “in violation.” Many of these actions are already reported into EPA’s data systems. This information is public, and communicates to the public that EPA and the states are in the field, conducting inspections, and taking enforcement action as necessary.

Eliminating the compliance status reporting would not result in any “relaxing” of reporting requirements. In fact, the NESCAUM states anticipate that by doing so, and moving towards more accurate activities tracking, would enhance the reporting system by focusing on reporting quality compliance monitoring and enforcement data. This would not create an additional reporting burden and would be a more accurate and transparent approach.

Importantly, before moving forward with any revisions to reporting requirements, OECA staff must consult with federal and state legal staff (i.e., Department of Justice and Attorneys General) to ensure that this reporting does not conflict with any legal requirements or circumstances.

2. Violation Reporting and Action Linking: EPA presentations to the NESCAUM states have indicated that compliance and enforcement programs should be required to report *all* state or federal violations and link those violations to the action that determined the violation. Such an approach does not reflect the reality that all state violations may not be actionable on a federal level.

Many states’ legal citations do not match federal citations because they were incorporated into their State Implementation Plans (SIPs) as state regulations. In order to automate this type of reporting, EPA would need to develop individualized “citation converters” for every reporting agency. In our region, citations in a formal enforcement action typically include three to twenty citations. One option would be to have EPA map the regulations for each state into the system. This would make it easier on the states, but would be a significant burden to EPA in initial set up and on-going maintenance. The other option would be to have the states map or flag to the EPA citations, which, because there is no one-to-one relationship between state and federal regulations, would be nearly unworkable.

When it comes to linking the violations to an action, the workload concern is again an issue. With the current AFS system, many states do not have the capacity to link the actions of High Priority Violator (HPV) data. As a result, EPA regions have undertaken this effort. Expanding the linking of data to many more actions would require significant conversions within existing state systems and would require additional staff resources for states that do not maintain their own systems. A survey of the NESCAUM states indicated that they do not have the resources to perform this task, even if EPA were to automate many of the functions.

Another issue of concern is that under the current thinking, EPA's system would require a complete redesign of state systems to allow violation reporting and linking, which 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 redesign of their state systems and tracking of additional data in those systems. In addition, tracking issues would occur when enforcement actions and penalties are handled by programs separate than those that report compliance data. In states, enforcement actions often occur in different divisions, and sometimes in different agencies. Further, state data systems are frequently not under the direct control of the air division so modification of the system would need significant support both funding and political.

In sum, violation reporting and action linking would place a burden on states that is simply untenable, even in a modernized and automated system. The NESCAUM states believe that, if EPA continues down this path, the modernized AFS would suffer the same fate as HPV reporting, and provide inaccurate data to the public.

3. Reporting Duration of Violation. EPA has expressed interest in capturing the duration of violations through the modernized AFS. Duration of a violation is a difficult metric to capture and may not be possible because of a number of legal and technical factors. At best, determining duration of a violation would be an estimate. At worst, it can open states and EPA to litigation.

It may be important to determine which measure of "duration" is best to capture. EPA's HPV reporting requirements allow for agencies to capture duration from the initiating action to the final payment of penalty or implementation of a SEP. This is not useful information from an environmental perspective since it does not address the time period over which there were excess emissions to the air. This simple approach highlights the problem with measuring the duration of a violation; it is not possible to know the duration of every single violation from an environmental standpoint, just as it is not possible to know if a facility is in compliance or in violation at every point in time.

If EPA were to require states to report all violations as well as link their duration, the result will be an incomplete, inconsistent, and unusable data set (i.e., the same issues currently found with HPV and compliance status tracking). A likely consequence would be that these incomplete and inaccurate data would be used to measure environmental harm thus compounding the errors and provide misleading information to the public and Congress. NESCAUM recommends that EPA reconsider and withdraw this proposed requirement.

4. Electronic Data Submittal: Electronic submittal of compliance information has the potential to reduce the burden of data entry in the long-run but must be developed in a holistic manner. EPA must take a systems approach in converting to electronic submittals. This type of a change can be dramatic for a state compliance program and will require changes to the actual process of conducting compliance monitoring beyond the impact on data reporting. EPA

needs to proceed in partnership with the state program staffs that are actually collecting and reviewing information in order for this to be successful. Many states have experience in undertaking electronic data collection and submittal and can provide valuable insight to EPA.

Conclusion

While we urge EPA to continue moving forward with modernizing AFS, it is critical that the system match the programmatic structure of the state and federal air programs. EPA's current system has forced the states to report data in a certain manner for years, which has resulted in a less than efficient and not very useful system. Across the board and in large part because it is a moving target, compliance status data are at best incomplete, but more commonly inaccurate. As a result, states and EPA are likely providing inaccurate and potentially misleading information to the public and Congress. The U.S. Department of Justice has expressed concerns about compliance status data in litigation. At trial, violators have capitalized on the inaccuracies of the data by printing out years of "in compliance" records, compromising even strong enforcement cases. NESCAUM is deeply troubled that the proposed system, as presented to NESCAUM, continues many of the shortcomings of the current system. It is imperative that EPA work with state program staff when developing this system to ensure that it provides accurate and timely data that reflect the reality of compliance and enforcement program actions.