

May 8, 2012

Ms. Lisa Lund, Director, Office of Compliance
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
Ariel Rios Building, *Mail Code: 2221A*
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Ms. Lund:

On behalf of the Northeast States for Coordinated Air Use Management (NESCAUM), we would like to express our concerns regarding Round 3 of the State Review Framework (SRF). The intent of the SRF process was to develop a standardized method for EPA to conduct reviews of states' compliance and enforcement programs. While the NESCAUM states support the need for EPA to provide oversight of state programs, the states are deeply concerned about the annual Data Metrics Analysis (DMA) process and the validity of some of the specific metrics to be used to evaluate state programs for both the DMA and the SRF. This is not a new concern. Many of these items of concern outlined below have been identified and detailed in a letter sent to EPA by NESCAUM on February 16, 2011 (attached). We are disappointed that EPA has failed to address these issues. Now the states have been asked to provide input into the SRF Round 3 metrics and process on a compressed schedule. The methods for gathering input from states merely appear to be a "check the box" exercise rather than a meaningful attempt to foster dialogue.¹ All of this aside, what follows here outlines our major concerns about the SRF Round 3 process.

The underlying premise of SRF Round 3 appears to be EPA's belief that it can gauge a program's performance by reviewing certain data metrics via an annual data metrics analysis (DMA). While the data verification process has been in place for a couple of years, the states never had an opportunity to review or provide feedback on this process. Now, EPA proposes to rest its review of a state's compliance and enforcement program on a confusing and misleading data analysis, instead of conducting a substantive and meaningful review of the adequacy of a state's inspection program and the appropriateness of its enforcement response. The NESCAUM states disagree with this approach, and object to EPA's attempt to characterize a program's performance by what amounts to a bean counting exercise devoid of substantive content.

Based on our review of the metrics provided for use in the Round 3 SRF documents, the proposed metrics will not provide an accurate representation of a state's compliance and enforcement program. For example, the DMA 8a8 creates a metric that analyzes the High

¹ For example, EPA's agenda for its May 7 call with the states had one hour for general issues and only 30 minutes to discuss media specific issues for all the media programs. EPA has failed to hold media specific calls to determine if metrics match activities.

Priority Violation (HPV) discovery rate per major facility universe. While states are and should be required to report HPVs to the federal system, it is hard to see how this metric is an indicator of how well a state compliance and enforcement program is functioning. Additionally, the size of the state and the diversity and size of its regulated universe can also have an impact on the metrics. Building on the example above, a state with a small number of major sources may have no or only a few HPVs identified during any given fiscal year. Using such empty metrics in the annual DMA may create the impression that a low percentage of HPVs identified as compared to a national average or goal represents a significant problem within an overall program when it is in fact not the case. The problem is further compounded by the use of this information in data dashboards that compare state programs in entirely inappropriate ways. States differ in enforcement and penalty authorities, initiatives, facility universes, and underlying directives that do not fit into EPA's metric schema.

With regard to the DMA/SRF metrics, some rely on data that are and have been identified as inaccurate for many years. For example, the "compliance status" element has been flawed since its inception. This issue has been well documented and has been discussed at length in the context of Air Facility Subsystem Modernization.² Much like the "compliance status" information, the violation information will also likely be flawed due to issues related to Federally Reportable Violations and compatibility with State Implementation Plans.³ Similarly, the High Priority Violator Policy schema for reporting resolving actions is often at odds with state processes and is difficult to accurately characterize. EPA is currently reviewing the HPV policy and work in this area will make a number of metrics in the Round 3 SRF outdated. The NESCAUM states question why EPA would continue to require the use of information that has already been identified as inaccurate, misleading, and of little value.

EPA has also asserted that SRF Round 3 represents a streamlining of the process. Our review of the documents provided indicates that this is not the case. As outlined, SRF Round 3 represents a process that is far more expansive than the previous SRF reviews and places a significantly larger burden on state air pollution control agencies. The DMA equates to doing a data-only SRF review for every state each year rather than one in four years. Equally problematic are the numerous air compliance and enforcement metrics that expand beyond the existing minimum data requirements (MDRs) and do not match the requirements of the negotiated Compliance Monitoring Strategy (CMS) agreements between the EPA regions and states. This is an expansion of data reporting and scope of analysis well beyond what EPA previously required that clearly does not streamline the existing process.

The SRF Round 3 data review is duplicative with a current, ongoing process of annual review of the states by EPA to measure fulfillment of CMS goals, which also requires an extensive data review. Currently, every state's compliance and enforcement program undergoes review by its EPA regional office as part of EPA's ongoing oversight activity. These activities typically

² We discussed this item in detail in our February 16, 2011 letter to EPA.

³ We discussed this issue in our February 16, 2011 letter to EPA and again in a memo sent to Lisa Lund on May 3, 2012.

include monthly discussions of HPVs, quarterly or semiannual grant meetings, compliance monitoring strategy reviews and discussions, and annual data verification. The existing processes are performed along well understood lines of oversight responsibility, i.e., from the national program managers down to the regional program and data managers and to the state program and data managers. The dialogue regarding issues that currently occur in these existing processes are sufficient for the interim, non-SRF review years. In this time of dwindling resources, it is unrealistic to add another duplicative data verification component through the SRF Round 3 without assessing the impact it will have on state resources.

We understand and support EPA's need to provide adequate oversight of state compliance and enforcement programs and to ensure that the minimum reportable data are accurate and readily available to the public. We object, however, to using data to drive enforcement and compliance policies, rather than programmatic activities driving the data reporting. The SRF Round 3 effort fails to address this need in a mutually constructive and respectful manner with the states. In this time of shrinking resources, EPA should not be looking to place additional and duplicative reporting burdens on states that will redirect resources from core program activities.

The NESCAUM states are ready and willing to support a streamlined process utilizing data that are already being reported and are reflective of actual program activity. We urge EPA to work with state media program staff to develop a significantly revised SRF Round 3 process that will result in a more substantive and thoughtful assessment process than the one currently put forward. We ask EPA to engage in a meaningful dialogue with state media program contacts to implement data review requirements that are acceptable to all and that enhance—rather than impede—compliance and enforcement activities aimed at achieving cleaner air and improved public health nationwide. If you have any questions regarding our comments, please feel free to contact Lisa Rector of NESCAUM at 802-899-5306.

Sincerely,

A handwritten signature in cursive script, appearing to read "Arthur Marin".

Arthur Marin, Executive Director
NESCAUM

Attachment: NESCAUM letter to EPA, February 16, 2011

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.