

Proposed National Enforcement Priorities: 2011-2013

Comments Submitted on Behalf of:
Environmental Integrity Project, Earthjustice,
Environment America, and Appalachian Voices

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Thank you for the opportunity to submit the following comments on the Office of Compliance Assurance's (OECA's) proposed national priorities for enforcement for 2011-2013. We appreciate the careful thought that OECA has given to its proposal, and its efforts to focus scarce resources on those enforcement actions that will yield the greatest long-term benefits to the environment. Our comments are summarized below:

- Although it will be challenging, EPA must find a way to improve oversight of state programs while continuing to develop high profile federal cases. State agencies are chronically underfunded and frequently overmatched by powerful polluters with deep pockets. Federal environmental laws are enforced unevenly or not at all in too many jurisdictions.
- EPA should develop an integrated strategy for its national priorities that encompasses both enforcement and permitting. Enforcement of "New Source Review" (NSR) violations has produced major benefits for the environment, but that effort is undermined when EPA is unable or unwilling to object to illegal NSR permits issued by states.
- EPA needs a more coherent multi-media approach to address both the air and water pollution generated by the mining of coal, its combustion, and the discharge of wastewater and disposal of solid waste from utility boilers. In the absence of proper safeguards, the toxic residue from scrubbers and other necessary air pollution controls will leak into groundwater and surface water. Any settlements should seek opportunities to retire or repower the oldest and dirtiest plants.
- We support EPA's proposed emphasis on enforcement of air toxic standards; the agency will have to eliminate illegal loopholes that exempt emissions during malfunctions, maintenance, startups and shutdowns if enforcement of such standards is to be effective.
- We also support continuing to maintain CAFO's as a significant national enforcement priority, but encourage EPA to develop a more specific strategy to enforce the Clean Air Act, Clean Water Act and federal right to know standards that apply to factory farms. In particular, enforcement actions need to target the large corporations that either own or manage large numbers of factory farms. OECA priorities should include completing emission studies and ending the amnesty that shields CAFO's from enforcement of Clean Air Act or federal right to know laws.

Each of these points is addressed in more detail below.

Improve Oversight of State Enforcement

State environmental agencies issue and enforce permits under major federal environmental laws like the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act. In our experience, many states do not meet minimum national standards when carrying out these responsibilities, and EPA oversight of state performance is too often weak or nonexistent. As a result, the most blatant violations often persist without any meaningful response from either state agencies or EPA. For example, the attached list identifies coal-fired power plants that have repeatedly violated effluent limits, releasing pollutants in amounts up to twenty or thirty times greater than allowed under their permits. There is scant evidence, based on a review of information in EPA's "ECHO" database that state agencies have, or are planning to, take serious enforcement action in response to these violations. We understand that EPA established a "watch" list to identify the worst violators. The Agency should make this list public, and set clearer timetables for action.

Reconcile Enforcement and Permitting Programs

In addition, enforcement actions are consistently undermined because state agencies issue rules, policies or permits that frequently exempt polluters from some of the most significant requirements of federal law. For example, some state actions have authorized illegal netting actions that exempt facilities from New Source Review; air quality modeling methods designed to hide the impact of new sources of pollution; fast-track permit procedures that eliminate the public's right to review and comment on permits; emission control standards that do not meet "best available technology" requirements; and monitoring methods that do not actually measure compliance with emission limits. We have documented these and other problems in various petitions asking the Agency to investigate state implementation of the Clean Air Act in Texas and Maryland.

We appreciate that EPA has begun to address some of these issues by objecting to Title V permits, sometimes in response to petitions that citizen groups have filed. But the Title V process by itself is not enough to stop power plants and manufacturers from building or expanding facilities under state construction permits that authorize illegal emission increases. And some states have simply refused to issue Title V permits when confronted with objections from EPA or citizen groups. EPA clearly needs a more effective way to ensure that states administering authorized federal programs are actually complying with the law.

As a starting point, OECA should set national priorities not only to drive investigations and case development for federal enforcement staff, but also to guide oversight of authorized state programs. Enforcement actions for violations of NSR or CAFO permitting requirements can be fatally compromised by badly written permits, or

loopholes in state regulations. OECA's framework for state review ought to more explicitly examine whether state permit and regulatory decisions are consistent with laws that EPA is determined to enforce for national priorities, and include some mechanism for obtaining corrections where that is necessary. In the interim, OECA needs to find a way to stop illegal construction, or at least penalize those companies that continue to build or expand under permits that EPA has determined to be unlawful. If states refuse to revise Title V permit to which EPA has objected, then EPA should exercise its statutory authority to issue the revised permits instead.

Multi-media Targeting for Coal Industry

EPA has targeted New Source Review violations at coal-fired power plants for the past decade, with outstanding results. Enforcement actions that require grandfathered power plants to install scrubbers and other controls have reduced emissions of sulfur dioxide and other dangerous pollutants by well over a million tons per year, and will ultimately save thousands of lives by eliminating major sources of fine particulate matter that contribute to heart and lung diseases and premature death. We strongly support OECA's proposal to continue this important work.

But while coal combustion is the largest stationary source of air pollution in the U.S., the mining of coal and the disposal of combustion wastes has frequently led to serious pollution of groundwater and surface water, in violation of the Clean Water Act and other federal laws. OECA should target this illegal pollution for enforcement action, and ensure that emission control strategies don't end up transferring toxic metals from one media to another. More specifically:

Stop Illegal Discharges of Toxic Wastewater

Scrubbers and electrostatic precipitators remove thousands of pounds of arsenic, cadmium, lead, selenium and other toxins from the air, but monitoring data shows that the same pollutants leach from scrubber sludge or ash into groundwater, or are discharged into nearby rivers or creeks. The concentration of toxic metals in scrubber wastewater is especially high, according to data gathered and analyzed by the Office of Water (OW). (quote). Yet the same OW analysis also shows that some facilities have managed to completely eliminate discharges from scrubber operations. The solution is not to eliminate scrubbers or other needed controls, but to enforce the Clean Water Act to prevent toxic residues from being dumped in our waterways.

Power plants are required by law to meet best available technology standards, pending development of an effluent limitation guideline by OW, but few permits include this critical requirement. Nevertheless, there are multiple opportunities to enforce the Clean Water Act at power plants in the absence of rules or adequate permits:

- As noted previously, the handful of power plants that are subject to discharge limits for toxic metals appear to violate these limits frequently (see Attachment A), and these present ready targets for enforcement;

- Inspection records at other sites, e.g., TVA's Johnsonville plant, have documented seeps and other leaks from surface impoundments that release waste directly to creeks or other surface waters. The documented releases from these discharge points are not identified in either permits or permit applications, and are in clear violation of the law. We believe EPA inspections would uncover similar violations at many sites;
- In other cases, monitoring wells and other data show that aquifers contaminated by ash are discharging toxic metals and other pollutants to nearby creeks and wetlands. Federal courts in most circuits have found that unpermitted hydrogeological discharges are prohibited by the Clean Water Act;
- Finally, we have identified numerous instances in which the volume of toxic metals actually discharged is significantly higher than amounts reported on permit applications.

Each of these circumstances presents OECA with an opportunity to enforce the law to stop the discharge of toxic pollutants that, once released to the environment, are both deadly and very difficult to clean up.

Target Coal Combustion Waste Impoundments for Cleanup

EPA has proposed to focus on surface impoundments, but its draft notice makes no mention of the five hundred impoundments at power plants that are filled with ash and scrubber sludge. These ought to be a major focus of EPA's enforcement program. As noted above, some of these sites are leaking or discharging waste in violation of the Clean Water Act. Other sites could be targeted for enforcement because they violate the the Resource Conservation Act's prohibition on open dumps, or otherwise present an imminent and substantial endangerment to the environment.

Retire or Repower the Dirtiest Plants

Power plants account for about 35% of total U.S. releases of carbon dioxide, about a third of total mercury emissions, and nearly two thirds of total sulfur dioxide emissions. In past settlements, EPA has included provisions requiring that certain plants be retired or repowered with lower carbon technologies, and that defendants invest in renewable energy projects. We strongly encourage EPA to build on these efforts, and look for opportunities to retire or retrofit the dirtiest plants to make way for cleaner, low carbon sources of electricity.

Enforcement of Air Toxics (MACT) Standards

We support OECA's proposal to include enforcement of air toxics standards on the list of national priorities. As EPA already understands, the same control technologies used to reduce toxic emissions can also decrease dangerous levels of other pollutants,

such as fine particulate matter. OECA will make little progress in this area as long as industry can claim that emissions during malfunctions, startups and shutdowns are exempt. Fortunately, the DC Circuit Court of Appeals thoroughly repudiated this argument in its December, 2008 decision. We hope OECA will work closely with the Office of Air and Radiation to implement the court's decision, and to eliminate loopholes in other regulations not addressed in the court's ruling.

Target the True Owners of Factory Farms

We support including CAFO's on the national priority list, as large animal feeding operations are major sources of water pollution in the Chesapeake Bay and many other parts of the United States. But while CAFO's have been a national priority for enforcement before, relatively few cases have actually been filed by either EPA or states, according to a review of data on the ECHO website. OECA will need to step up enforcement activity, or the factory farms that now dominate the livestock and poultry industries in the U.S. will never take the Clean Water Act seriously.

Many factory farms now operate under contract to much larger corporations. At least one court has found that these companies effectively control the operation of contract farms, and for that reason are liable for environmental compliance at such facilities. OECA has demonstrated that corporate-wide settlements with power plants, refineries, wood product manufacturers and others can change the behavior of an entire industry, by requiring upgrades, better work practices, and new pollution controls across multiple plants.

OECA should extend that model to CAFO's. While individual contract farmers may be cash poor, the large companies that direct their operations have the deep pockets to invest in the environmental controls that are needed to keep manure out of our rivers and creeks.

As EPA has recognized, large CAFO's have the potential to discharge as much wastewater as a large American city, except that CAFO's are not subject to the treatment standards required of urban sewer systems. These factory farms should be regulated as major sources under the Clean Water Act, to ensure that they are inspected as frequently as other large polluters.

End Amnesty for CAFO Air Polluters

Factory farms can also be a major source of air pollution, in some cases releasing large volumes of particulate matter or noxious pollutants like ammonia. OECA has entered into agreements promising not to enforce such laws against thousands of these facilities until EPA has finished collecting and reviewing emissions data at a handful of farms that were selected for further study. Rural communities on the fenceline of large CAFO's have been denied the protection of the law, and have had to breathe foul air for nearly a decade while waiting for EPA to negotiate these agreements and complete these studies.

The Agency has promised to publish final emission factors based on these studies no later than 2011, at which time the amnesty agreements are supposed to expire. OECA should make clear that it takes this timetable seriously, and will enforce the law as it has promised no later than 2011, and that commitment should be reflected in its national priorities for 2011-2013.

Focus on Environmental Justice

We support OECA's proposal to include environmental injustice as an enforcement priority. EPA was established to protect every American's right to clean air and clean water, but that level playing field has not arrived for many working class or minority communities located near coal waste sites, factory farms, refineries or other large polluters. As noted previously, state agencies are frequently understaffed or constrained by powerful economic interests, leaving the victims of pollution unprotected. In those circumstances, only the federal government is strong enough to act on behalf of those who need it most.

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