



Submitted to www.regulations.gov

February 27, 2013

Michele McKeever
Office of Enforcement and Compliance Assurance
Mail Code M2221A,
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington D.C. 20460

Re: Docket Id. No. EPA-HQ-OECA-2012-0956

Dear Ms. McKeever:

Attached please find the comments of the American Chemistry Council in response to "*Public Comment on EPA's National Enforcement Initiatives for Fiscal Years 2014-2016*", 78 Federal Register 5799, (January 28, 2013.) Thank you in advance for your consideration of our comments. If you have any questions please do not hesitate to contact me at (202) 249-6131 or at Leslie.Hulse@americanchemistry.com.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Hulse", written over a horizontal line.

Leslie A. Hulse
Assistant General Counsel





Comments of the American Chemistry Council

"EPA's National Enforcement Initiatives for Fiscal Years 2014–2016"

78 Fed. Reg. 5799 (Jan. 28, 2013); Docket ID No. EPA-HQ-OECA-2012-0956

February 27, 2013

The American Chemistry Council (ACC)¹ is pleased to submit the following comments in response to the U.S. Environmental Protection Agency's (EPA's) solicitation of public recommendations regarding potential national enforcement initiatives for fiscal years (FY) 2014–2016.² EPA is considering traditional "sector-based" enforcement and compliance initiatives—including the extension of its six current national initiatives—as well as non-sector-specific "strategic program areas" for potential inclusion in the FY 2014–2016 cycle. Designating the latter type of program as a national enforcement initiative would represent a departure from the Agency's traditional approach to its enforcement priorities. In particular, EPA is considering elevating its "Next Generation Compliance" initiative—a relatively new program described in only the most general terms in EPA's request for comments, and with respect to which publicly available information is scant—to the status of a priority national enforcement initiative.

Whether or not EPA decides to make Next Generation Compliance a national enforcement initiative—and given that ACC members do not know enough about the claimed need for or the details of the program, ACC does not take a formal position on the initiative at this time—we believe that its potential promotion to that status warrants the Agency's consideration of comments on the specifics of the program (to the extent they exist). Accordingly, these comments focus on our broad observations and concerns with Next Generation Compliance, based on what we understand to be the main components and goals of the initiative. Fundamentally, as explained in more detail below, we believe that many of the Agency's current and planned enforcement practices are inherently contradictory with the Next Generation Compliance program's stated objectives, and we believe that these concerns should

¹ ACC is a nonprofit trade association whose member companies represent the majority of the productive capacity of basic industrial chemicals within the United States. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$720 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies are among the largest investors in research and development. Safety and security have always been primary concerns of ACC members, and they have intensified their efforts, working closely with government agencies to improve security and to defend against any threat to the nation's critical infrastructure.

² 78 Fed. Reg. 5799 (Jan. 28, 2013) ("Public Comment on EPA's National Enforcement Initiatives for Fiscal Years 2014–2016"), Docket ID No. EPA-HQ-OECA-2012-0956.



be addressed in conjunction with increased stakeholder involvement by the regulated community as the initiative moves forward.

COMMENTS

A. Development of the Next Generation Compliance initiative requires increased transparency and stakeholder involvement.

In its solicitation of public comments, EPA provided very little information about the Next Generation Compliance initiative. The Agency's website is similarly devoid of details concerning why the program is necessary and how the Agency intends to implement it. The most thorough description of the initiative prepared by EPA and available to the public appears to be a slide presentation from the "2012 National Environmental Enforcement Information V-Meeting."³ While the initiative is described as "new and evolving," as a general matter, the program is apparently intended to capitalize on advanced information and emissions monitoring technologies to increase public availability of emissions data, with the theory of promoting transparency, accountability, and compliance by regulated entities.⁴

In a December 2012 report, the United States Government Accountability Office ("GAO") reviewed the actions EPA has taken to further the Next Generation Compliance program and its efforts to integrate the initiative into its enforcement and compliance program.⁵ GAO concluded that EPA has not developed a strategic plan to implement Next Generation Compliance into its enforcement and compliance program, and that without such a plan, EPA risks failing to achieve the initiative's long-term goals. GAO recommended that EPA develop a schedule for completing a strategic plan for Next Generation Compliance in a timely manner, and that in doing so, it follow leading practices in federal strategic planning, including: (1) clearly defining the goals of the initiative and steps needed to achieve these goals; (2) identifying and developing a strategy for including milestones for significant actions to be taken, as well as a description of the resources needed to accomplish them; and (3) ensuring that all key stakeholders are involved in both the planning and implementation of the initiative.⁶

EPA reportedly indicated in response to GAO's recommendations that it will prepare a strategic plan for Next Generation Compliance in FY 2013 and that integrating it into the enforcement and compliance program will be a primary component of that plan.⁷ However, EPA made no mention of the GAO recommendations or the Agency's intentions for developing the

³ Slides dated July 26, 2012, available at <http://www.epa.gov/compliance/data/systems/icis/vmeeting/vmeeting6a-panel.pdf> (hereafter, "EPA slides").

⁴ *Id.*; 78 Fed. Reg. at 5799-5800.

⁵ GAO-13-115, Report to the Chairman, Committee on Environment & Public Works, U.S. Senate, "Environmental Protection; EPA Should Develop a Strategic Plan for Its New Compliance Initiative" (Dec. 2012) (Attachment A hereto; hereafter, "GAO report").

⁶ *Id.* at 9-12.

⁷ *Id.* at 12.



strategic plan in the *Federal Register* notice requesting these comments. It would be premature to elevate Next Generation Compliance to the status of “national enforcement initiative” before even the basic goals, milestones and significant action plans for the program have been developed and publicly vetted. If EPA’s purpose in proposing Next Generation Compliance as a national enforcement initiative is to funnel resources it believes are necessary to develop the strategic plan, it should make this clear to the public. Currently, it is not clear what EPA intends to accomplish by making a “focus on a strategic area,” *i.e.*, Next Generation Compliance, a national enforcement initiative, as opposed to traditional sector-based initiatives.

ACC strongly supports GAO’s recommendations regarding the development of a strategic plan for Next Generation Compliance. In particular, we believe it is essential that members of the regulated community, who are obviously key stakeholders in the program, be involved in the planning of the goals and action plans associated with the initiative as soon as possible. ACC has reviewed EPA’s description of the alleged “noncompliance problem” which the Next Generation Compliance initiative is apparently supposed to correct, as well as each of the “five components” of the program, and has concerns with each of them. Some of those concerns are outlined below. By involving the regulated community in the strategic planning for Next Generation Compliance, these types of issues would appropriately be part of the dialogue from the outset of the strategic planning process.

B. ACC has specific concerns regarding the underlying premises and each of the “five components” of Next Generation Compliance.

As a threshold issue, ACC is troubled by the key assumption which apparently underlies the Next Generation Compliance program: the conclusory proposition that currently there is “high noncompliance” with environmental regulations.⁸ EPA should explain the basis for this assertion. What is the extent of the alleged “noncompliance” problem and how is it being measured? Is there widespread *significant* noncompliance? What percentage of the regulated community and which sectors does EPA assert to be in “high noncompliance,” and how will the Agency determine whether progress is being achieved toward alleviating the alleged noncompliance problem?

EPA also offers no bases for its assertions that (1) compliance data available to EPA is “incomplete,” (2) the Agency is not achieving the health and environmental benefits projected by its environmental regulations and permits, and (3) state and federal resources for implementing fully effective environmental programs are “inadequate.”⁹ The bases and metrics underlying these assertions should be clearly laid out and vetted by the public. How does EPA know whether and to what extent compliance data are incomplete? What specific health and environmental “projections” have not been met?

Unless and until EPA clearly articulates the bases for its assertions—and without further information, we believe they are questionable—it is not clear that the Next Generation Compliance program is even necessary, let alone what type of measurable benefits the program

⁸ EPA slides at 4.

⁹ *Id.* at 3-4.



can or should be expected to achieve. Before embarking on a new national enforcement initiative, the premises on which it is based deserve an informed and thorough public discussion.

EPA's July 2012 slide presentation outlines what it characterizes as the "five components" of Next Generation Compliance.¹⁰ Each of the five components are discussed below in turn.

Component 1: "Build Compliance into Regulations and Permits." EPA aims to "make compliance easier than noncompliance" in its design and structuring of rules. In particular, EPA desires to promote rules that include requirements for regulated entities to "regularly assess their compliance and take steps to prevent noncompliance."¹¹ Such requirements, however, are already broadly engrained in environmental regulations—most notably, the Clean Air Act Title V program, which requires permit holders to complete comprehensive semi-annual and annual deviation reports and compliance certifications, and the Clean Water Act's NPDES permit and Pretreatment programs, which require dischargers to self-monitor and report to the States and EPA. Moreover, this compliance information is already available to the public. EPA should not devote resources to establishing new regulatory programs that are duplicative of existing requirements.

EPA also states that it intends to use "clear and objective regulatory requirements and applicability criteria" at the outset of rulemaking so as to enable regulated entities to easily identify requirements that are applicable to them.¹² This goal is laudable, but in ACC members' experience, the Agency frequently takes an opposite approach to compliance and enforcement. A prime example is EPA's enforcement of the Clean Air Act's General Duty Clause, which requires owners and operators of stationary sources to work to identify and prevent accidental releases of hazardous substances.¹³ EPA has not proposed any regulations setting forth the compliance requirements associated with the General Duty Clause; as a result, the obligations of regulated facilities under that provision are ambiguous and uncertain. Increasingly, however, EPA is relying on the General Duty Clause to second-guess the efforts of chemical facilities to comply with the Clean Air Act and impose substantial penalties.¹⁴ As a general matter, EPA

should strive to clarify obligations at the outset and be transparent with regard to what is required, rather than relying on ambiguous regulatory provisions like the General Duty Clause to penalize companies after a perceived "violation" has occurred.

¹⁰ EPA slides, *supra* note 3.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ 42 U.S.C. § 7412(r)(1).

¹⁴ EPA's Enforcement History and Compliance Online ("ECHO")'s online search tool lists 109 civil enforcement actions concerning the Clean Air Act General Duty Clause since 2001, more than half of which were initiated in 2010 or later. See http://www.epa-echo.gov/echo/compliance_report_icis.html.



Our members have similar concerns with EPA's enforcement initiative targeting flare efficiency at refineries and chemical plants (part of the "Air Toxics" national enforcement initiative). EPA's approach to this initiative appears focused on the inclusion of detailed operating and monitoring requirements in consent decrees, based on alleged violations of broadly applicable, ambiguous narrative standards requiring facilities to operate equipment in a manner consistent with "good air pollution practices."¹⁵ EPA, the regulated community, and the general public would be better served if the Agency shifted its focus to the development of clear, comprehensive standards that would provide certainty from the outset as to what is required, rather than waiting for settlement of individual enforcement actions to impose specific obligations regarding flare operations.

In contrast to its prioritization of enforcement proceeding settlements over transparent public rulemaking, EPA's environmental helpline programs, such as the Superfund, TRI, EPCRA, RMP & Oil Information Center is a valuable tool for achieving environmental compliance, and ACC strongly supports them. Assuming the Next Generation Compliance initiative moves forward, these programs should be promoted and expanded as part of it.

Component 2: "Use advanced emissions/pollutant detection technology." EPA intends to increase its utilization of advanced technologies, such as FLIR infrared cameras, to monitor emissions from facilities so that the government, regulated entities and the public can better "see" pollution.¹⁶ ACC will not address the merits or flaws of any particular emissions monitoring technology in these comments. We note, however, that EPA's use of such technologies is an area where stakeholder involvement from the regulated community is critically important. As GAO noted in its report, "without proper planning, EPA may pursue emissions monitoring technologies that not all regulated entities—especially the growing numbers of small facilities—can fully utilize..."¹⁷ In addition to technological shortcomings with certain advanced technologies, requiring their use at smaller facilities may pose significant economic hardships, which should also be taken into consideration by the Agency. More fundamentally, requiring the use of monitoring technologies with demonstrable flaws, and which may produce questionable data, would be inappropriate at all facilities, regardless of size.

Component 3: "Require electronic reporting by regulated entities." EPA expects most environmental reporting to transition from paper to electronic form and it is developing a policy to make electronic reporting the default requirement in new regulations. The Agency also apparently intends to develop new electronic "smart" forms and "web tools" to enhance electronic reporting requirements.¹⁸

Before devoting additional resources to the development of new "web tools," EPA should focus on maintaining and improving those that it already operates, such as the new electronic

¹⁵ 40 C.F.R. § 60.11(d).

¹⁶ EPA slides at 15-16.

¹⁷ GAO report at 11.

¹⁸ EPA slides at 17-18.

transparency tool associated with the Enforcement and Compliance History Online (“ECHO”) database.¹⁹ Serious questions have arisen with respect to data accuracy and quality in these programs. For example, a 2010 audit by EPA’s Office of Inspector General (“OIG”) found that 8.5% of key data elements in the two major ECHO databases were inaccurate.²⁰ Similarly, OIG acknowledged data quality problems in EPA’s national air database, the Air Facility System: “Regions did not always ensure that data in AFS were accurate even though reliable information is a basic element of oversight and management control.”²¹

EPA manages a wealth of environmental information that it makes publicly available on various online databases and websites. Before new reporting requirements and “web tools” are deployed, quality control concerns with these existing resources should be thoroughly evaluated and addressed.

Component 4: “Expand transparency.” As it increases the utilization of advanced monitoring technology and electronic reporting, EPA intends to make information obtained from these technologies more publicly available.²² This raises critical concerns about the way in which the data are presented to and interpreted for the public. For example, a color-coded map showing only emissions from a facility does not necessarily equate to any violations of environmental law. Where data are incomplete or erroneous (and as noted above, we know that data accuracy is a genuine problem with EPA’s public databases and web tools), any resulting “picture” of a facility’s emissions would be inaccurate. As EPA considers the public dissemination of more and more types of environmental information, quality control and assurance procedures must be thoroughly incorporated at all levels.

As electronic reporting requirements expand, it is also imperative that EPA remain cognizant of its legal obligation to protect the confidential business information (“CBI”) of regulated facilities.²³ Although emission data are required to be made public, facilities are entitled to confidential treatment of supporting data where legitimate CBI claims are made.²⁴ Such protections, including the opportunity to assert CBI claims and substantiate such claims, must be maintained in conjunction with any new electronic reporting requirements.

¹⁹ See EPA press release, “EPA Releases State Enforcement Performance Information and Comparative Maps / Agency to host webinar demonstrating new data features” (Feb. 7, 2013).

²⁰ U.S. EPA, Office of Inspector General, Audit Report, Project No. 10-P-0230, “ECHO Data Quality Audit - Phase 2 Results: EPA Could Achieve Data Quality Rate With Additional Improvements” (Sept. 22, 2010), at 5.

²¹ U.S. EPA, Office of Inspector General, Evaluation Report No. 10-P-0007, “EPA Oversight and Policy for High Priority Violations of Clean Air Act Need Improvement” (Oct. 14, 2009), at 6.

²² EPA slides at 19-21.

²³ See 40 C.F.R. Part 2, subpart G.

²⁴ Similar concerns were raised by the regulated community in conjunction with the development of EPA’s greenhouse gas reporting rules. See, e.g., ACC’s Comments on EPA’s Proposed Rule for Mandatory Reporting of Greenhouse Gases, 78 Fed. Reg. 16,448 (Apr. 10, 2009), Docket No. EPA-HQ-OAR-2008-0508, at 5-6 (June 9, 2009).



Component 5: “Innovative enforcement approaches.” To date, the primary “innovative enforcement approach” associated with the Next Generation Compliance program has been the integration of enhanced electronic monitoring and reporting requirements as part of enforcement consent decrees.²⁵ That is, as part of settlements of alleged environmental violations, facilities are required to do more than would otherwise be required by law in these areas. As discussed above, EPA’s enforcement of the Clean Air Act General Duty Clause and its refinery and chemical plant flaring initiative are examples of this “regulate by consent decree” approach. The Agency’s Leak Detection and Repair (“LDAR”) enforcement initiative follows a similar model.

Fundamentally, ACC does not believe it is appropriate for EPA to make the promotion of “super-regulatory” monitoring and reporting requirements in consent decrees a priority of its compliance and enforcement program. Focusing on the imposition of such requirements on a case-by-case basis at the tail end of the enforcement process is directly at odds with what should be considered the overarching goals of Next Generation Compliance: to deploy EPA resources in a manner that will promote compliance on a universal basis, and to make regulatory requirements more clear and objective at the front end of the process, thus maximizing the health and environmental benefits of our environmental laws.

CONCLUSION

ACC appreciates the opportunity to comment on EPA’s national enforcement initiatives and Next Generation Compliance program in particular. ACC’s members are key stakeholders in this program, and as such, we look forward to future opportunities for meaningful participation in EPA’s development of a strategic plan for the initiative.

²⁵ See EPA slides at 22.

