

CEEC

Corporate Environmental Enforcement Council, Inc.

Submitted Electronically

January 19, 2010

Docket ID No. EPA-HQ-OECA-2009-0986
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments of the Corporate Environmental Enforcement Council – “Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013”

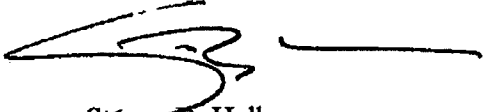
Dear Docket Clerk:

The Corporate Environmental Enforcement Council (CEEC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA”) Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013 (75 Fed.Reg. 146 (Jan. 4, 2010)). We also appreciate the ongoing, constructive dialogues that have taken place over the past several years with respect to EPA's interest in identifying emerging issues and developments that may have implications for the future of environmental compliance and enforcement matters.

Founded in 1995, CEEC is the only cross-industry business coalition where legal, environmental and governmental affairs professionals work together and benchmark environmental enforcement issues and policies that impact each of us on a daily basis. CEEC has 26 company members and is currently addressing a number of regulatory, legislative and judicial activities relating to civil and criminal environmental compliance and enforcement matters.

I have enclosed CEEC’s comments on the Candidate list. We thank you again for the opportunity to participate in this process and look forward to continuing the dialogue with the Agency on these important issues.

Sincerely,



Steven B. Hellem
Executive Director

Enclosure

1155 Fifteenth Street, NW Suite 500 Washington, DC 20005
phone (202) 289-1365 fax (202) 530-0659

**Comments of the Corporate Environmental Enforcement Council
on EPA's Candidate National Enforcement and Compliance Assurance Priorities for Fiscal
Years 2011-2013**

January 19, 2010

The members of the Corporate Environmental Enforcement Council (CEEC) appreciate the opportunity to present CEEC's views on the U.S. Environmental Protection Agency's (EPA or the Agency) Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013 ("Enforcement Priorities") as published (75 Fed.Reg. 146 (Jan. 4, 2010)). CEEC is a coalition of 26 major companies that focuses exclusively on civil and criminal environmental enforcement policies and activities.

CEEC has consistently recognized the need for, and specific value of, effective environmental enforcement and compliance assistance as a component of the Agency's mission. We have historically supported and participated in EPA's efforts to develop and refine enforcement and compliance priorities, and enforcement elements of the Agency's Strategic Plan, to set clear policy goals and to generate measurable environmental results. Most recently, CEEC submitted comments on the Agency's enforcement priorities to the National Enforcement and Compliance Assurance Priorities Discussion Forum electronically on September 30, 2009.

As an initial matter, CEEC believes that enforcement should always serve the broader mission of the Agency – protection of human health and the environment. To achieve this goal the Agency's enforcement program must focus not only on enforcing environmental laws fairly and effectively, but also on developing effective compliance assistance programs and tools, and ensuring that sufficient resources are devoted to all components of the enforcement regime, including compliance assistance programs and tools.

Criteria for Selecting Enforcement and Compliance Assurance Priorities.

The Agency has identified three criteria for selecting enforcement and compliance assurance priorities: (1) Environmental impact; (2) Significant noncompliance; and (3) Appropriate federal role. CEEC generally agrees with these enforcement priority selection criteria, and encourages EPA to consistently apply all of these criteria when selecting the final priorities. It is important that the Agency use this process to identify an appropriate set of strategically targeted priorities, ensuring that adequate resources can be made available for each of the priorities. Targeting too many priorities could diminish the ability of the Agency to devote sufficient resources to meaningfully address each of the priority targets. In that regard, CEEC encourages the Agency to fully evaluate, throughout the Agency, each priority for inclusion by applying all three criteria to each of the issues.

CEEC also has the following comments/suggestions regarding the criteria and application of the criteria to the set of candidates for 2011-2013.

"Environmental Impact." In the broad context of limited resources and declining budgets, it is more important than ever to ensure that enforcement resources are focused on addressing noncompliance that, when corrected, can be expected to result in real environmental benefits and significantly reduced risk to human health and the environment.

Corporate Environmental Enforcement Council

Comments on “*Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013*”

Docket ID No. EPA-HQ-OECA-2009-0986

January 19, 2010

Page 2

“Significant Noncompliance.” CEEC agrees that “significant noncompliance” is an appropriate criteria, but we would go even further and suggest that it is a necessary criteria, and we urge the Agency to ensure that there is sufficient evidence of noncompliance in candidate sectors to warrant inclusion on the list of priorities.

CEEC does not believe, however, that the mere existence of “significant noncompliance¹” in a business sector is sufficient to warrant inclusion on the list of national enforcement priorities. EPA should undertake a deeper analysis and fully understand each business sector where “significant noncompliance” is identified, including the underlying causes of particular noncompliance trends. The most effective enforcement programs are those that tailor enforcement responses appropriately, based on the results of such an analysis.

As EPA evaluates specific sectors for “significant noncompliance,” CEEC urges that the Agency analyze, to the extent possible, the root cause(s) of identified non-compliance trends. Based on that analysis, EPA should determine, in the first instance, whether the requirement (or the Agency’s enforcement position concerning that requirement) is well understood or, in contrast, is widely misunderstood in important respects. Compliance with regulatory requirements is fundamentally dependent on the ability of the regulated entity to understand its compliance obligations.

Depending on the circumstances, such widespread compliance issues may indeed warrant a national response, but the response may more appropriately be a compliance education and correction program rather than widespread enforcement actions. Before selecting an area for enforcement priority, CEEC suggests that the Agency undertake sufficient analysis to make a final determination that formal enforcement actions are the most appropriate means to address and correct the identified non-compliance.

“Appropriate Federal Role.” CEEC has consistently taken the position that the States should be the focus for implementation and enforcement of most of the significant environmental programs, recognizing that states are at the forefront of inspection, compliance assistance and enforcement efforts. CEEC believes that states with authorized or delegated programs should have primary responsibility for implementation and enforcement. If they are performing their role, their decisions should be respected, and the Agency should be careful not to unnecessarily infringe upon that role by, for example, listing such programs as a national enforcement priority.

This is not to say that EPA does not have a role in those state-authorized or state-delegated programs. We agree that EPA can play a critically important supporting role for states, including those states not yet ready to take primary responsibility for any program. EPA should also be prepared to withdraw authorization or delegation where a state has demonstrated over time that it will not or cannot properly implement or enforce the overall requirements of a program, and upon

¹ CEEC does not address here what does or should constitute “significant noncompliance” or how such significance should be measured.

withdrawal of the program EPA should assume enforcement primacy until such time as the state demonstrates that it is willing and able to implement the program.

CEEC believes that the use of the term “appropriate” in this criterion is key. While EPA undoubtedly has a role in enforcing many of the applicable regulatory requirements flowing from federal environmental laws, in evaluating candidates for inclusion on the list of national enforcement priorities the Agency would be well served to include only those candidates where EPA’s enforcement role is “appropriate” in the context of the federal-state relationship.

Comments on the Application of the Criteria to Priority Candidates

Broadly, CEEC urges the Agency to look carefully at the candidate sectors vis a vis the “significant noncompliance” criterion, and specifically with respect to whether there is data (cited in EPA’s Background Documents or otherwise) supporting a conclusion that there is significant noncompliance in a specific candidate sector. This is in no way intended to diminish the appropriateness of bringing individual enforcement cases where the Agency identifies noncompliance with applicable requirements at individual facilities in a particular sector.

CEEC also suggests that the Agency closely review each candidate category with respect to the “appropriate federal role” criteria, paying special attention to candidate sectors where states have primary enforcement responsibility and ensuring that listing such sectors as a national enforcement priority is “appropriate” in the context of the federal-state enforcement construct.

Financial Assurance for Corrective Actions. While financial assurance mechanisms play an important role in ensuring that corrective action activities are funded and implemented pursuant to RCRA requirements, their direct role in reducing risk to human health and the environment is a little more removed. It appears from the background document that the rationale for listing this category is based on the Agency’s concern that financial assurance for corrective action has not been secured for approximately 2,500 facilities where the “...facilities have not selected specific remedies to clean-up contaminated sites, and are thus not yet required to have financial assurance.”²

There may a legitimate policy concern that there are significant unsecured corrective action obligations that will accrue in the future once the remedies are selected. Because the obligation to secure financial assurance has not yet ripened, we are not convinced that this concern justifies listing this as an enforcement priority, especially as we also fail to see any indications of concerns with regard to future compliance with these requirements.

Similarly, the Agency references the recent economic conditions, including the increase in bankruptcy filings, as part of the “non-compliance” discussion in the background document. Again, while there may be a legitimate policy reasons for looking closely at financial assurance mechanisms currently in place at companies that face or may face financial hardship (including requiring regular, more frequent

²<http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2011candidates/fy2011candidate-financial.pdf>

Corporate Environmental Enforcement Council

Comments on “*Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013*”

Docket ID No. EPA-HQ-OECA-2009-0986

January 19, 2010

Page 4

updates regarding eligibility and maintenance of all appropriate mechanisms), CEEC questions whether these circumstances serve to justify including RCRA corrective action as a national enforcement priority.

As we have discussed with the Agency in the past, we believe that the financial assurance program in general has actually been one of the programmatic success stories at EPA. If the Agency believes that the two issues of concern discussed above warrant EPA action, we suggest that the appropriate way to address them is through changes in the program, made through the appropriate program office, rather than through enforcement.

On a separate note, to the extent financial assurance remains a priority, the focus ought to be forward-looking. The Agency’s recent focus on financial assurance enforcement has prompted many States to review their own files for past years, and to request that companies supply missing documentation for previous years (thus enabling States’ files to be complete when EPA came to review). While there should be no objection to enforcement, if warranted, where documents are missing, the appropriate remedies ought to be focused on the future, not re-documenting financial assurance demonstrations for past years, providing that the required current mechanisms are in place.

Wetlands. CEEC believes that the current uncertainties with the wetlands program renders that program ill-suited for inclusion on the list of national enforcement priorities. EPA and the Army Corps of Engineers have been working to develop a consensus approach to “jurisdictional wetlands” in the aftermath of the Supreme Court’s decision in *Rapanos v. United States* and *Carabell v. United States*, and specifically the scope of the “significant nexus” concept set forth in the decision. While EPA issued a guidance document in December of 2008,³ the Agency’s Inspector General issued a report in April, 2009,⁴ concluding that the lack of clarity for determining whether wetlands or waterways fall within the jurisdiction of the Clean Water Act has led the Agency to drop or not pursue hundreds of enforcement cases. The IG’s Report also concluded that “...*Rapanos* has created a lot of uncertainty with regards to EPA’s compliance and enforcement activities.”

EPA’s background document for the wetlands category indicates that “...EPA compliance data indicates an identifiable pattern of noncompliance with permit violations and unpermitted discharge to wetlands, especially in coastal watersheds.”⁵ CEEC suggests that this category is one where the regulated community has legitimate questions regarding what qualifies as a wetland subject to EPA jurisdiction. Consistent with our comments above regarding the ability of the regulated community to understand its compliance obligations in the context of the “significant

³ http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf.

⁴ <http://www.epa.gov/oig/reports/2009/20090430-09-N-0149.pdf>.

⁵ <http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2011candidates/fy2011candidate-wetlands.pdf>

Corporate Environmental Enforcement Council

Comments on “*Candidate National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013*”

Docket ID No. EPA-HQ-OECA-2009-0986

January 19, 2010

Page 5

noncompliance” criterion, CEEC suggests that including “wetlands” on the list of national enforcement priorities may not be appropriate.

Conclusion

CEEC supports strong and effective environmental enforcement programs, and appreciates the opportunity to comment on EPA’s National Enforcement and Compliance Assurance Priorities for Fiscal Years 2011-2013. We look forward to continuing further discussions and working with the Agency to identify enforcement priorities that can be implemented effectively to meet EPA’s mission.