



## **Recommendation 85-3**

### **Coordination of Public and Private Enforcement of Environmental Laws**

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(Adopted June 13, 1985)

Congress has incorporated into the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and other Federal environmental statutes provisions authorizing private parties to bring enforcement actions in the Federal courts. These "citizen suit" provisions generally permit any person or organization to seek injunctions abating activities that violate agency rules, standards, or permits. In addition, the Clean Water Act and the Hazardous and Solid Waste Amendments of 1984 permit plaintiffs to seek civil penalties in private enforcement actions.

As use of private enforcement actions has grown, issues related to coordinating public and private enforcement activities have arisen. Coordination in the development and use of criteria regarding the bringing of cases and maintaining basic consistency in the imposition of penalties is important for several reasons. Notwithstanding the different enforcement perspectives and goals of public and private plaintiffs, inconsistencies in case selection or penalty policy may create actual and perceived unfairness to regulated entities, as similarly situated parties receive varying treatment. Uncertainties about the likelihood or outcome of enforcement actions may increase litigation and decrease voluntary compliance. Lack of coordination may also make it difficult for the Environmental Protection Agency and cooperating state agencies to deploy their limited enforcement resources in the most efficient and effective manner. The recommendation that follows proposes administrative steps which the Environmental Protection Agency can take to provide better guidance to those involved in the enforcement process, and to achieve better coordination between public and private enforcement.

#### **Recommendation**

##### *1. Articulation of Enforcement Policy.*

In order to achieve better coordination between public and private enforcement efforts, the Environmental Protection Agency should, as feasible, enunciate its views concerning enforcement criteria, calculating penalties, and settling contested cases. When enunciated, the



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agency's views, or an announcement of their availability, should be published in the Federal Register.<sup>1</sup> Public knowledge of the means by which the EPA calculates penalties will be particularly helpful to courts performing similar calculations in private enforcement actions, and the agency should consider whether more detailed specification of its policies in this respect is feasible. EPA should offer opportunities, consistent with Recommendation 76-5, for public comment on statements of policy regarding calculation of penalties.<sup>2</sup>

### *2. Improvement of Information Systems*

The availability of accurate, complete, and current information about (a) the compliance status of regulated persons and firms, and (b) the outcome of public and private enforcement actions, is essential both for the formulation and implementation of agency enforcement strategies and for the effective use of private enforcement actions. When designing management information systems and reporting requirements, the Environmental Protection Agency should consider improving the quality of such information and its availability for private enforcement, subject to statutory limitations on disclosure of confidential information. The Office of Management and Budget should give similar consideration to the role of compliance information when reviewing EPA data-gathering proposals.

### *3. Notice of Private Actions*

When the Environmental Protection Agency receives from a private party notice of an alleged violation, the EPA should request from that party copies of all complaints<sup>3</sup> and other significant pleadings, settlement agreements, and judicial decrees in any action relating to the alleged violation, in which the EPA is not a party.<sup>4</sup>

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<sup>1</sup> In administering the Clean Water Act, for example, the EPA has begun this process by issuing a proposed rule to revise program reporting requirements for the assessment of permit noncompliance. See, e.g., 49 FR 29720 (July 23, 1984).

<sup>2</sup> See Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 4 ACUS Recommendations and Reports 62 (1979), 1 CFR 305.76-5. The Administrative Conference recommended that agencies adopting significant interpretive rules or policy statements normally should provide an opportunity for public comment.

<sup>3</sup> The Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, section 401 (to be codified at 42 U.S.C. 6972 (b)(2)(F)), provide that a plaintiff bringing an action under the citizen suit provision of the Resource Conservation and Recovery Act must serve a copy of the complaint on the Attorney General and the Administrator of the EPA.

<sup>4</sup> Nothing in this Recommendation is intended to suggest that a request for or receipt of any such notice or other information or document has or should have any preclusive effect upon the federal government's ability to take enforcement action against the alleged violator.



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### **Citations:**

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