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SURVEY OF STATE PENALTY AUTHORITY

May 2010

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BACKGROUND

State environmental agencies have a broad range of authorities for issuing penalties to permitted facilities during inspections. The Environmental Council of the States (ECOS) surveyed its membership to identify which states have authority to issue fines akin to a “traffic ticket” directly to facilities for their air, water, and waste programs. These fines are sometimes referred to as administrative penalties or field citations and are meant to include fines that the state agency can issue on its own, without referral to the state attorney general. Other authorities exist that require different levels of review before a penalty can be issued.

ECOS collected this information to help inform discussions with the U.S. Environmental Protection Agency’s (EPA’s) Office of Enforcement and Compliance Assurance on its recent Clean Water Act enforcement action plan. This action plan is intended to improve the protection of the nation’s water quality by targeting enforcement to the most significant pollution problems, improving transparency and accountability by providing the public with access to better data on the water quality in their communities, and strengthening enforcement performance at the state and federal levels. States have participated on many of the workgroups and senior management steering committees that are guiding development of the plan. The final plan’s recommendations are expected to be delivered to EPA Administrator Lisa Jackson in the early fall of 2010.

A better understanding of the nature of state penalty authority will provide a more accurate baseline when evaluating state enforcement program performance. This report is intended to help fill that data gap.

In addition, the first phase of the State Review Framework (SRF) pointed to the need for a better understanding of how states collect penalties in the evaluation of enforcement program results.

The SRF process was designed collaboratively in 2004 by EPA and ECOS as a method of consistently assessing EPA and state enforcement of the Clean Water Act, the Clean Air Act, and hazardous waste laws. These SRF reports allow EPA to identify recommendations for improvement to ensure fair and consistent enforcement and compliance programs across the states.

REPORT

During 2009-2010, ECOS surveyed its members with assistance from the Regional Environmental Enforcement Associations to identify the sources of state penalty authority. The Regional Environmental Enforcement Associations are alliances of regulatory and law enforcement agencies from 45 states; four Canadian provinces; and several municipal, regional and federal agencies. Members include state environmental regulatory agencies, attorneys general offices, law enforcement agencies, and local prosecutor organizations. The regional associations promote the effective enforcement of state and local environmental statutes and regulations, with a strong emphasis on criminal enforcement. Additionally, since the regional associations provide state and local environmental enforcement professionals with a forum for training and information exchange, they were well positioned to partner with ECOS to help administer this survey.

SURVEY DESIGN AND RESULTS

States were asked to identify what kinds of authority each state has for each of the major state delegated programs (water, air, waste management) with a “yes/no” response. Twenty-six states responded to the survey, and the results are compiled in the attached table. States also provided supplementary information on their programs in narrative statements following the table. This additional information was provided voluntarily for those respondents who wished to describe unique characteristics of their enforcement programs that were not captured in the response table.

Of the 26 responding states, seven reported that they have the authority to issue administrative penalties onsite at the time of inspection under the Clean Water Act. Eight states reported having this authority under the Clean Air Act, and six states reported having it under the Resource Conservation and Recovery Act.

More than 60% of the respondents reported that across all three programs (water, air, and waste), nearly all cases either required referral to the state agency’s attorneys, or directly to the state attorney general, to issue an order with penalties following a hearing and appeal process. Most of the responding states can issue consent orders and negotiate settlements up to certain dollar limits that vary across the states from \$10,000 to \$25,000 and higher in some cases.

Details on each response and additional information on particular state programs is provided in the attached table.

CONCLUSION

In any evaluation of state enforcement program results, particularly with regard to collection and documentation of penalties, close attention should be paid to the authority that a state agency has in place, and the processes it is required to use in order to issue a penalty.

Through the State Review Framework, EPA has identified the calculation, documentation, and collection of penalties as being insufficient. EPA acknowledges that state statutory authority to assess appropriate penalties is lacking or inadequate, due to such causes as sufficient resources to recover penalties.

The attached table can serve as a supplementary set of questions to any future evaluation of state enforcement programs to facilitate understanding of each state's unique circumstances and particular requirements for assessing and recovering penalties.

ADDITIONAL REFERENCES

ECOS testimony at the House Transportation and Infrastructure hearing on CWA enforcement:
http://www.ecos.org/files/3868_file_CWA_Enforcement_Press_Release.doc?PHPSESSID=0456ae3e010bb8381bc6e6328a72c0b8

Jay Shimshack with Michael Ward. *Journal of Environmental Economics and Management*. 50(3) (November 2005):519-540. "[Regulator Reputation, Enforcement, and Environmental Compliance](#),"

State Environmental Agency Contributions to Enforcement and Compliance, June 2006:
http://www.ecos.org/files/3895_file_ENF_Report_2006_Final_Doc.pdf