

THE FOLLOWING TRANSMITTAL LETTER AND THE *REPORT OF THE IG AUDIT WORKGROUP* WAS SENT TO DEP SECRETARY SEIF, EPA REGION 3 ADMINISTRATOR MCCABE, AND REGION 3 INSPECTOR GENERAL GANDOLFO

February 11, 1997

This letter conveys the Report of the Inspector General Audit Workgroup convened by the Citizens Advisory Council to the Pennsylvania Department of Environmental Protection. DEP Secretary Jim Seif requested the CAC to convene a Workgroup to investigate the circumstances generating the IG Audit, the timing of its inappropriate and inflammatory release and, most importantly, the validity and impact of the IG's findings.

The Workgroup participants exhibited a remarkable esprit de corps in tackling the predicament begun when an unofficial preliminary draft of the EPA Inspector General's "Draft Report of Audit on EPA Region 3's Oversight of Pennsylvania's Air Enforcement Data" became public, in conflict with standard procedures that should have been followed, allowing DEP and EPA to comment on the official draft IG report before its public release.

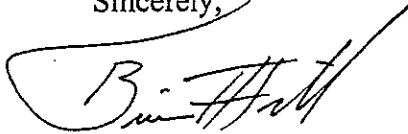
Unquestionably, we accepted a formidable challenge. The IG Audit, on its face, shook public confidence in DEP's Air Program, and compromised the credibility of that program. It did bring to light internal and long-standing problems troubling DEP's and EPA's partnership to protect Pennsylvania's air quality.

The Workgroup conducted its affairs fairly, openly, with diligence, and kept a firm focus on developing recommendations to heal and strengthen that vitally essential partnership and its ultimate responsibility to the public's expectation of DEP/EPA cooperative environmental protection.

To reflect the sentiments of several Council members in the discussion to approve the Workgroup report, we must acknowledge continuing disapproval over the motivation for and manner of releasing the preliminary draft of the IG Audit. The Council recommends that Region 3 EPA investigate how and why this occurred and revisit the ramifications of such sensationalizing techniques so that similar incidents will not occur in the future.

As co-chairs of the IG Audit Workgoup we remain impressed with the thoughtfulness and labor intensity of the Workgroup's members. This report is submitted with hope that it will be given full and due consideration. Council is available to discuss our findings and mediate implementation of our recommendations, and will in any event, revisit this issue within two years.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian Hill".

Brian Hill
Workgroup Co-chair

A handwritten signature in cursive script, appearing to read "Gail Rockwood".

Gail Rockwood
Workgroup Co-chair

Enclosure

Report of the Inspector General Audit Workgroup

Introduction

In late October 1996, a "preliminary draft" of an audit report by EPA Region III's Inspector General ("IG") of the Region's oversight of Pennsylvania's air enforcement data was obtained by newspapers in Pittsburgh and Philadelphia. The preliminary draft reported that, among other things, DEP had deliberately withheld information from EPA.

This preliminary report was an unofficial, early draft that would normally have gone through further internal review by the IG with a revised draft released only to DEP and EPA for comment. The final report incorporating those comments would then have been released publicly. Instead, the unofficial preliminary draft became public, without any opportunity for either DEP or EPA to comment on the validity of the findings contained in the report.

In mid-November, the IG issued its official *Draft Report of Audit on EPA Region 3's Oversight of Pennsylvania's Air Enforcement Data*. The allegations contained in both the preliminary and official draft raised public concerns about the effectiveness of DEP's air quality program, and added to an already growing rift between DEP and EPA. On November 12, 1996, DEP Secretary Seif asked the Citizens Advisory Council (CAC) to convene a group to independently review the issues raised by the IG. The CAC agreed to accept this request and organized an IG Audit Workgroup consisting of the following:

CAC Members:

Brian Hill, Workgroup Co-chair	Walter Heine
Gail Rockwood, Workgroup Co-chair	Pat Lupo
Jolene Chinchilli	Maurice Sampson
John Ford	Dave Strong
Paul Hess	

Non CAC-members:

- Douglas Blazey, Esq., Elliott Reihner Siedzikowski and Egan, PC
- Phil Coleman, Chair, Sierra Club Pennsylvania Chapter
- John Dernbach, Esq., Associate Professor, Widener University
- William M. George, President, AFL-CIO
- Caren E. Glotfelty, Goddard Professor of Forestry and Environmental Resource Conservation, Penn State University
- Walter Goldberg, Group Against Smog and Pollution (GASP) (Pittsburgh)
- Joseph M. Manko, Esq. and Timothy F. Malloy, Esq., Manko, Gold and Katcher
- Joe Minott, Esq. and Jason Rash, Esq., Clean Air Council (Philadelphia)
- Ed Shoener, National Institute for Environmental Renewal
- Keith Welks, Esq., Phoenix Land Recycling Co.
- Roger Westman, Air Quality Program, Allegheny County Health Department

All members of the Workgroup served as volunteers and were compensated only for travel-related expenses.

Background

Protection of air quality in Pennsylvania is a collaborative mission carried out by both EPA and DEP. As the federal agency, EPA is responsible for setting national air standards and requirements designed to protect health and the environment, for providing oversight on many aspects of state programs, and ultimately, for initiating such enforcement actions as it believes are appropriate. DEP is responsible for developing a State Implementation Plan and other programs which will ensure that the air in Pennsylvania meets the applicable national standards. Most importantly for the subject of this report, DEP is also responsible for carrying out the vast majority of the permitting, inspections and enforcement under the relevant laws and regulations. EPA has a substantially more limited operational role, focusing on oversight of DEP regulatory efforts and direct participation in a select number of individual cases.

EPA awards grants under Section 105 of the Clean Air Act to state and local agencies to carry out their responsibilities for preventing and controlling air pollution. These grants are one of the mechanisms which EPA uses to maintain oversight of each state's air program. Before EPA awards each grant, it negotiates a work program with the state, containing specific work commitments the state agrees to perform. The work program encompasses activities such as inspections, monitoring, permitting and enforcement.

One of EPA's enforcement priorities in implementing the Clean Air Act has been to identify and focus on "Significant Violators." This term has been defined through various versions of the national Timely and Appropriate Enforcement Guidance ("T&A Guidance"). The current version of the T&A Guidance¹ defines a "Significant Violator" (sometimes herein referred to as "SV") as any major stationary source of air pollution (with some technical exceptions²) which is violating a federally-enforceable regulation or permit. The T&A Guidance prescribes timeframes for reporting and enforcement and delineates the relevant factors to be considered in appropriate penalty actions.

Pennsylvania's Section 105 grant agreement³ specifies that DEP will identify and report Significant Violators to EPA pursuant to the T&A Guidance. While the grant agreement actually cites an earlier version of the policy (1986), the grant application⁴ clearly states that DEP is to identify and report significant violators to EPA on the AIRS computer data base⁵. Therefore the grant agreement obligates DEP to report Significant Violators to EPA pursuant to the T&A Guidance.

¹ February 7, 1992, clarified by the June 14, 1994 clarification.

² Pages 6-7, 2/7/92 T&A Guidance Package.

³ Transmitted by letter dated 1/19/96.

⁴ Transmitted by letter dated 7/31/95.

⁵ AIRS is the Aerometric Information Retrieval System, a computer based repository of information about airborne pollution in the US and various World Health Organization member countries. The system is administered by the EPA. Any organization or individual with access to the EPA computer system may use AIRS to retrieve air pollution data. AIRS contains air quality, emissions, compliance and enforcement information that EPA and state agencies compile to carry out their respective programs for improving and maintaining air quality. It eliminates the need for individual states to maintain their own databases of air pollution information and to reformat or reorganize data for submission to the EPA database.

Pennsylvania has long disagreed with EPA over when a facility should be considered a significant violator⁶, and has not officially reported all Significant Violators meeting EPA's literal definition for many years. Up until last year, DEP and EPA have managed to work through their disagreements. However, in November 1995, EPA requested that the IG conduct a review of SV reporting by Region III states. Pennsylvania was selected for the initial review because of its size, number of inspections, and number of violators.

As previously indicated, the IG Report was released to DEP and EPA in mid-November, several weeks after the preliminary draft became public. The IG Report claimed that, while EPA set priorities for implementation of the Clean Air Act and awarded grants to DEP to carry them out, DEP did not:

- report Significant Violators to EPA;
- carry out adequate inspections in all cases; or
- take aggressive enforcement action to bring violating facilities into compliance.

The IG determined that DEP's failure to notify EPA of all violations as SVs hindered EPA's ability to oversee Pennsylvania's enforcement program. The audit also concluded that DEP's inspection program needed to be improved, since not all inspections were detailed enough to determine whether a facility was complying with state and federal regulations.

As a result of the reporting problems identified by the audit of Pennsylvania's program, EPA is evaluating whether similar problems exist in other states. Clearly, the premature release of the preliminary draft report has further contributed to a deteriorating relationship between DEP and EPA, but it has also opened the issue to a wider scrutiny than likely would have occurred otherwise.

Methodology

Based on the organization of the IG Report, the Workgroup agreed to form three task forces to review the issues identified in the audit report:

- Reporting Compliance Task Force
- Inspection Compliance Task Force
- Enforcement Compliance Task Force

Extensive data was collected through interviews and written reports from DEP, EPA and the IG. Each task force held two conference calls in addition to the three meetings and final conference call of the full Workgroup (12/16/96, 1/13/97, 1/30/97, 2/10/97). The intensive review was necessary to expeditiously address the seriousness of the issues raised by the report. The findings of each of the task forces and the full Workgroup's recommendations follow.

⁶ The technical definition of a Significant Violator is contained in the 1992 T&A Guidance. The dispute is not over the technical definition so much as the application, i.e., whether every source which meets the definition should be treated as "significant" in the everyday sense of the word.

Task Force Findings

1. Reporting Compliance Task Force

As stated earlier, a significant violator is essentially any major stationary source of air pollution which violates a federally-enforceable regulation or permit. EPA's T&A Guidance requires states to report an SV to EPA within one month of the violation and to maintain the facility on EPA's list until it is returned to compliance or is under an enforcement order.

DEP and EPA differ on what should be considered an SV and when it should appear on EPA's list. For many years, DEP has resisted routinely listing SVs as such because it believes that the very broad definition of SVs causes many violations that are not truly "significant" to be entered into the AIRS computer database⁷, thus becoming subject to EPA oversight.

Before 1991, DEP's Central Office collected inspection and violation information from the regional offices which it used to generate a list known to both DEP and EPA as "sources subject to the T&A policy." Although the sources on this list were not automatically entered by EPA into its system as SVs, the list formed the basis for monthly discussions between the agencies about roles and responsibilities. EPA also brought to the discussion information about air sources which its own investigations identified as potentially subject to the T&A policy. In general, the agencies' working relationship explicitly presumed that the agency which initially identified a source with violations would assume enforcement responsibility. As a result of the monthly discussion, however, EPA voluntarily turned over many of the sources which it initially identified in violation to DEP for the enforcement lead. The agencies also used this dialogue to determine which sources should be entered by EPA on the SV list, a process which EPA agrees is somewhat subjective and calls for a dialogue to identify cases requiring ongoing management while the source is returned to compliance.

In 1991, DEP decentralized its operations, making its regional offices more autonomous, which made coordination of reporting more difficult. Instead of one Central Office contact, EPA had to communicate with all 6 DEP regional offices (as well as Allegheny and Philadelphia counties, quasi-independent programs). Simultaneously, DEP continued to move toward the view that reporting SVs to EPA was not helpful in achieving compliance. Finally, the individual who had been the Central Office contact for the monthly discussions took a position outside of the Bureau of Air Quality, essentially ending the previous communication arrangement.

In 1994, at EPA's request, DEP recentralized the enforcement dialogue, using a conference call among EPA, DEP Central Office and all 6 regional offices. This approach did not work well, so EPA again communicated with each regional office directly. Finally, in May 1996, DEP indicated that it would only report as SVs those violations for which it desired EPA enforcement help. DEP contends that:

- DEP provides hard copies of Notices of Violations (NOVs) to EPA as well as entering the data in the AIRS system.

⁷ The AIRS database is reportedly archaic by today's standards. EPA is considering revamping this system. We recommend that EPA work with the states and state air organizations to outline refinements to the system and to the data entry process that would improve its effectiveness and usability by all.

- Listing all violators that meet the literal definition of SV trivializes the truly significant violators and extends the time needed to bring them into compliance.
- EPA's involvement can delay resolution of the violation.
- EPA retains facilities on its list for an excessive amount of time.
- EPA places too much emphasis on the number rather than the nature of SVs, which DEP considers unnecessary bean counting.
- DEP can often bring the facility into compliance without EPA involvement. DEP will request EPA assistance when needed.

EPA contends that without DEP's identification of all SVs as such, it is unable to ensure that timely compliance is achieved, and EPA's ability to oversee the state's enforcement program is hindered.

a. Significant Violators--According to the IG report, Pennsylvania has 2,053 major facilities; DEP performed 2,000 inspections during FY 1995, issued 556 NOV's statewide (including 225 to major facilities that violated state or federal regulations) but only reported 6 SVs to EPA. The IG also reviewed 45 inspection reports (from selected regions) for facilities for which no NOV was issued. In total, the IG reviewed NOV's or inspection reports for 270 major facilities (225 +45); from these 270 facilities, the IG identified 64 SVs that PA did not report as SVs to EPA. The Section 105 grant for 1996 requires DEP to report SVs on the AIRS system.

DEP and EPA agree that the 64 SVs identified by the IG meet the literal SV definition, but, according to EPA, this does not necessarily mean that each and every facility today would be placed on the SV list. This is particularly true if most of these violations have now been addressed. It is EPA's position that it must be advised of "every" significant violator. The dialogue envisioned by the T&A Guidance will help determine which sources need to be elevated to the SV list. The selection process is somewhat subjective, requiring dialogue, judgment and more information than is available on AIRS, in an inspection report or in an NOV.

b. Decentralization--DEP's 1991 decentralization coupled a few years later with a new administration with a different philosophical approach to environmental protection strained the DEP/EPA relationship. EPA raised concerns in the early 1990's that DEP's decentralization would result in decreased responsiveness to reporting requirements, making it more difficult for EPA to oversee programs. Reporting problems associated with decentralization have been alleged in programs other than the air program. A centralized coordination and reporting role is critical to the monthly dialogue and will also enhance regional consistency.

c. Data Entry--Until 1992, EPA performed all data entry into its AIRS database based on information reported by DEP. Thereafter, DEP entered the information directly. EPA is almost totally reliant on the quantity and quality of information in the database and has stated that it does not have full confidence in the information it is receiving from DEP.

The timing of information being sent to EPA is also critical. Depending on when an NOV is issued, there can be a significant backlog of information input on the database. This can also occur because the hard copies are sent from the district offices to the regional offices which are then sent to central office for compilation and transmission to EPA.

d. Compliance assistance --EPA asserts that any program that places strong emphasis on compliance assistance, and little on enforcement, will see a decline in compliance rates. On the

other hand, EPA talks about voluntary compliance initiatives but is constrained by a lack of federal laws which foster voluntary compliance. The task force is uncertain whether lower compliance has in fact resulted but is concerned that if industry perceives government to be less willing to enforce, then incentives for voluntary compliance may be weakened.

Confusion exists in both agencies over the roles of compliance assistance and enforcement. Both EPA and DEP need to develop performance criteria capable of measuring the effectiveness of compliance assistance vs. enforcement. Although environmental indicators are one possibility, the criteria must be sensitive enough to quickly identify adverse changes.

2. Inspection Compliance Task Force

According to EPA policy, states can perform 5 different levels of inspection at air pollution facilities. Level 0, a "drive by," is the most basic inspection and is not considered an acceptable compliance assurance method. To adequately evaluate a facility's compliance with the Clean Air Act, the EPA grant agreements require each state to perform annually at least one Level 2 inspection⁸ at major facilities. The relatively new Compliance Monitoring Strategy allows states the flexibility to focus on priority inspections rather than simply requiring a specific inspection frequency for all facilities.

a. Adequacy of Inspection Program--The IG Report stated that DEP's inspection program needs improvement because not all DEP inspections that the IG reviewed were Level 2 as required by the grant. IG staff interpreted the Section 105 grant agreement to require that all inspections be at least Level 2, even follow up inspections intended to check on a specific violation. DEP's interpretation of the grant agreement is that it must perform at least one Level 2 inspection on all major sources each year and may carry out less detailed inspections in response to a complaint, to follow-up a violation, or to review a specific source that may not operate at all times. It appears that the IG's criticism of DEP's inspection program may be based on differing interpretations of the Section 105 grant agreement and the Compliance Monitoring Strategy.

The IG report states that in 1995, DEP carried out 2,000 inspections of the 2,053 major facilities in Pennsylvania. Assuming that each of these 2,000 was on a different facility, this is a 97% inspection rate, reportedly one of the highest in the region. The inspection rate for FY 1996 was 94% (1,964 out of 2,090 scheduled for inspection), also a very high completion rate.

Some DEP regions are reportedly completing two Level 2 inspections each year on some facilities, and at least one is beginning to do Level 3 inspections⁹ on certain categories of sources. Several regions also indicated that they carry out all inspections unannounced (they only announce an inspection if there is some reason that the facility needs to know, such as to be sure a specific source is operating.)

⁸ The Level 2 inspection is a comprehensive inspection of the facility that is centered around a plant walk-through. Control devices and sources are inspected for permitted operating parameters, compliance samples are taken, comprehensive records review is performed, etc. A field report describing what was seen and done is signed by both parties and a copy given to the company.

⁹ Level 3 includes all elements of a Level 2 and adds analytical testing on stack emissions.

b. Training and Guidance--Although not required by EPA, DEP requires air inspectors to take core courses offered by EPA. The required training focuses on inspection techniques and procedures for specific sources and types of emissions but does not highlight SVs.

The inspectors themselves do not determine SVs; this is done through consultation between the region's compliance specialist and air program manager. DEP does not provide written guidance to field staff on issuing NOV's or determining SVs. DEP says that since air sources vary greatly, generic guidance would be difficult. Therefore, it is up to the regional managers to determine whether to issue an NOV; some regions issue one whenever there is a violation while others might not document a violation, if they believe it will be addressed immediately.

3. Enforcement Compliance Task Force

a. Adequacy of DEP Enforcement--The IG Report alleges that when DEP identified violations, it did not always ensure that the facility took corrective action and therefore violations may have persisted longer than necessary. Given the time and resource limitations of the task force, we were not able to comprehensively review DEP's enforcement program although the task force did review a variety of information including DEP's case studies of the 64 SVs identified by the IG. Because we could not conduct a detailed statistical assessment of either DEP or EPA performance, we cannot draw firm conclusions about actual enforcement performance. However, it does appear from the DEP supplied data that DEP did apply relatively continuous enforcement or compliance efforts to those sources found in violation.

The summaries of data made available to the committee do not permit us to compare regions or examine individual trends; however, a review of the aggregate data indicates that inspections during FY95 and 96 increased while both the number of NOV's and the ratio of NOV's to inspections have declined. We cannot determine with certainty whether this is due to improved compliance by sources or a change in field policy towards the issuance of NOV's. The penalty data are less clear, although the number of penalty actions initiated in the last two years has declined. Although DEP has inspected regularly, its enforcement and penalty practices are apparently not guided by the T&A Guidance. Neither the IG nor DEP has supplied enough information to date to reach further conclusions about compliance effectiveness.

Further, based on information received from EPA and discussions with EPA staff, there is no evidence to date that EPA would have handled specific cases differently than DEP did. EPA may not always meet the enforcement requirements of the T&A Guidance either, but probably documents its actions more thoroughly.

b. Compliance Assistance vs. Penalty Forgiveness--EPA argues that it views compliance assistance and penalty forgiveness as two separate activities. EPA would be open to providing compliance assistance to a company in violation, even though regulations have been on the books for years, while still seeking a penalty for the economic advantage it enjoyed. EPA believes that DEP does not draw a clear distinction between compliance assistance and penalty forgiveness.

DEP defines compliance assistance as:

“providing information and educational opportunities to help individuals and businesses understand and comply with their environmental obligations. It may also involve

providing powerful incentives like more efficient permitting systems, market-based programs or recognition opportunities that perhaps give regulated communities more incentive and flexibility to meet all existing requirements and maintain good compliance records. Compliance assistance does not mean lessening environmental standards so it is easier to meet them.”¹⁰

Both EPA and DEP use penalty forgiveness, but how they apply it varies depending on their individual policies.

c. Interagency Communication-- Communication, which is a shared responsibility, has clearly broken down. The relationship has been increasingly strained over time, especially with the diverging philosophical approaches to environmental protection. DEP’s main focus is on compliance assistance; it would be useful to review the effectiveness of DEP’s approach vs. the EPA approach. There is a need for continual feedback about how the two philosophies/programs interact so neither is undermined nor undermines the other. A resolution of this issue is also necessary to allow better citizen understanding of and access to information regarding the overall enforcement and compliance programs of both DEP and EPA, thus engendering greater public confidence.

Responses to Initial Questions

In initiating this effort, the CAC posed several questions to the Workgroup. We were not able to answer all of the questions due to insufficient or inconclusive data, and due to the time constraints under which we operated. The following is a summary of the conclusions we were able to reach.

- *Was there information EPA did not get that they should have? If so, was that information deliberately withheld by DEP?*

Yes. While DEP provided a significant amount of information to EPA through both AIRS and written monthly reports of NOVs, consent orders and consent assessments, DEP did not identify all sources for potential listing as required by its Section 105 grant. For years, EPA and DEP worked through this disagreement, but now must resolve this issue and have an agreed-upon reporting protocol.
- *Do DEP and EPA define significant violations differently and, if so, why?*

The term “Significant Violator” is formally defined in EPA’s T&A Guidance. Use of this formal definition is imposed upon DEP through the annual grant agreement, which obligates DEP to carry out certain reporting, inspection and enforcement activities in compliance with the T&A Guidance. DEP, however, has believed for many years that the EPA definition is mechanical and overly broad. In DEP’s view, the T&A Guidance calls for the inappropriate designation of many sources as “Significant Violators” even though violations at the sources may in fact be *insignificant* in the commonly understood meaning of the word, posing little substantive threat to air quality or the environment. As a result of its dissatisfaction with the definition imposed by the policy, DEP has resisted routinely offering sources for listing by EPA as Significant Violators where the violations meet the technical definition of the policy but are not likely to have a major adverse impact on air quality.

¹⁰ Source: DEP world wide web site.

There is continuing ambiguity and disagreement between the agencies about certain aspects of the T&A Guidance. Both DEP and EPA agree that meaningful dialogue is crucial in evaluating whether sources which initially appear to meet the criteria for listing as SVs actually do satisfy the criteria upon closer examination. Sources may not meet the threshold criteria for listing at the time of discussion between the agencies for any number of reasons, including a prompt return to compliance which obviates further management by either agency, an initial error about the kind or magnitude of a source's emissions, or a different judgment about the about the applicability of subjective criteria in the T&A Guidance defining SVs.

In practice, DEP and EPA differ on what should be considered an SV, when it should appear on EPA's list, and the value of the process itself. For many years, EPA accepted DEP's resistance to routinely listing SVs because the very broad definition of SVs results in reporting and listing violations which are not serious enough to warrant national tracking and management.

Placing facilities on the SV list is a complicated matter, requiring dialogue and judgment.

- *What proportion of violations were paperwork violations vs. actual pollution with potential health and/or environmental impacts?*
We don't know. The IG did not audit the program at this level, and we did not obtain sufficient information to reach a conclusion on this question.
- *Did DEP handle the violations effectively? Is there any indication that EPA would have handled these violations differently than DEP did? Did these differences have any material impact on the effectiveness of EPA's oversight function?*

Based on the information we obtained, it was very difficult to identify whether Pennsylvania's enforcement efforts are better or worse than in the past. DEP does not prepare closure documents to track what happened with violators, as EPA does. There is also a lack of clarity among field staff about when to issue NOV's, how to deal with significant violators and about the T&A policy, generally. DEP should develop and implement a consistent policy for the issuance of NOV's to major sources.

The IG Report does not document a definitive problem with enforcement by Pennsylvania, and no other external evidence gathered by the Workgroup (i.e., the mid-year reviews, EPA's overfiling or assumption of enforcement lead activity) supports the view that air enforcement effectiveness in Pennsylvania has actually declined. There is also no evidence that EPA would have handled these violations differently. In addition, it is not clear if penalties are consistent with T&A, but any inadequacies are not documented by the IG.

The IG Report's format emphasizes selective conclusions, not all of which are supported in the analysis in the report. In particular, the report makes generalizations about the effectiveness of the state air enforcement program based on a narrow group of cases. It is not clear from the report whether its authors obtained sufficient data from the cases which they did examine to support their conclusions.

Moreover, the limited enforcement data obtained by the IG is given disproportionate prominence in a report which is primarily directed at examining reporting practices by DEP. The report's enforcement conclusions may unfairly alarm Pennsylvanians, who may now fear that the entire air regulatory program is broken and fails to protect them. In fact, the report provides insufficient information to draw any conclusions about the adequacy of the current state enforcement program.

- *What is the status of and compliance schedule for significant violators identified by DEP or EPA in Pennsylvania?*

While we obtained a significant amount of information on the significant violators identified in Pennsylvania, much of the information was obtained too late in our review to allow us to reach any conclusions. DEP does not prepare closure documents to record what happened with violators and accordingly had to assemble a paper trail on the 64 facilities identified in the IG report in order to document progress made at those sites. EPA also apparently had problems generating the necessary information, and was unable to respond in time for us to review it.

- *Has decentralization of DEP made it more difficult for EPA to get information on significant violators?*

Yes. Decentralization and other factors have combined to decrease DEP's responsiveness to EPA reporting requirements. For some time, although DEP air program staff had objected to reporting requirements which they felt were counterproductive, DEP's Central Office staff did make attempts to satisfy EPA's desire for information on SVs. However, DEP's 1991 decentralization to more autonomous regional offices, combined a few years later with a new administration with a different philosophical approach to environmental protection led to a deteriorating relationship between DEP and EPA. Reporting problems associated with the regional offices have also been alleged to occur in programs other than the air program.

- *How can communication between DEP and EPA be improved so that this kind of controversy doesn't occur again?*

Regular discussion is one of the most critical components of the DEP/EPA relationship. Getting effective communication back on track should allow issues to be resolved as they arise. A regular, centralized reporting role is critical to the monthly dialogue and will also enhance regional consistency in enforcement.

Recommendations

For the sake of air quality in Pennsylvania, DEP and EPA must work together. The manner in which the Preliminary Draft Report of Audit of Pennsylvania's Air Enforcement Data was released is indicative of and contributed to a deteriorating relationship between DEP and EPA. Regardless of how the information was distributed, some of the problems identified in the audit report require resolution.

Reporting: We offer the following actions as a means to address the reporting issue, which underlies the other problems identified in the report. We recommend that DEP and EPA use a mediator to resolve these differences, and the CAC and Workgroup offer to provide members to serve as mediators in negotiating the details of implementation.

- 1) Although DEP has begun to re-centralize the reporting function at EPA's request, the effort needs to go further in order for it to work well. Monthly conferences between EPA and Bureau of Air Quality Central Office with appropriate regional office participation should be held so that EPA does not have to carry on 8 calls each month with Pennsylvania regions and counties.
- 2) DEP should develop and implement a consistent policy for the issuance of NOV's to major sources to be used by all of its regional offices.
- 3) Unless DEP and EPA are able to negotiate a change to the T&A Guidance, DEP must identify all sources which meet the literal definition of SV. If it is not willing to call them Significant Violators, it should call them "companies with potential to be included on the SV list" (or "companies subject to the T&A policy")¹¹
- 4) DEP should then use a mutually agreed-upon set of criteria to select those sources which will be the subject of further discussion with EPA. We suggest the following criteria be used as a starting point¹² :
 - Any violation that has produced or appears to have produced a significant environmental/human health threat, including but not limited to any situation involving an imminent and substantial endangerment
 - Sources causing a "National Ambient Air Quality Standards" (NAAQS) violation
 - Any violation that involves a significant or long-term release of pollutants in excess of permitted limits
 - Inspections/violations targeted for attention to address an identified regional/national priority
 - Any discharge or operation without a permit
 - Violations that result in significant economic benefit to the violator, particularly where the violations are serious, long standing or appear to be willful
 - Ongoing violations of state or federal enforcement agreements or orders.
 - Continuing or significant failures to monitor or report, where circumstantial evidence indicates a likelihood of emission/standards violations
- 5) DEP and EPA will determine at the time of notification or during subsequent T&A discussion whether a source included on the "companies with potential to be included on the SV list" should be designated as a Significant Violator Requiring Special Emphasis¹³.
- 6) DEP's ability to draw down the full amount of awarded grant money for FY1997 should be conditioned on reaching resolution of the significant violator reporting issue by September 30, 1997, the end of EPA's fiscal year.

¹¹ In 1996, DEP issued NOV's to approximately 225 major sources, which made those sources technically subject to the T&A policy, yet reported only 6 such violators with which it requested EPA's help.

¹² The suggested criteria are taken from the draft "Interim Air Guidance" proposed by EPA Region III to identify those to be classified as "Special Emphasis Significant Violator". We have made a few changes to improve the criteria as a screening tool and suggest these as a starting point for discussion.

¹³ If the above criteria do not reduce the number from 225 literal SV's to a lesser number that is manageable from a resource standpoint, then the criteria need to be revisited jointly by DEP and Region III.

- 7) The next EPA/DEP grant agreement (FY1998) should embody the agreed upon criteria for determining which SVs require "special emphasis". A centralized reporting role is critical and should also be incorporated into the next grant agreement. EPA Region III should work towards having the interim guidance (with changes to the criteria as negotiated with DEP) adopted.
- 8) This dialogue-based approach should be explored for use in other programs where similar communication and coordination breakdowns are apparent.
- 9) EPA should work with the states and state air organizations to outline refinements to the AIRS system and to the data entry process that would improve its effectiveness and usability by all.

Whether or not DEP and EPA accept any or all of our recommendations, the CAC will revisit this issue in no more than two years in order to determine whether the air enforcement program is operating effectively. As indicated earlier, we also offer to mediate resolution of the details of any of the above recommendations.

Inspections: It appears that the IG's criticism of DEP's inspection program may be based on differing interpretations of the Section 105 grant agreement and the Compliance Monitoring Strategy. In any case, DEP must determine if certain regions are not performing Level 2 inspections on all facilities and if they are not, take action to ensure that Level 2 inspections occur.

There is a lack of clarity among field staff as to how to deal with significant violators and the T&A policy generally. Training and guidance to regional offices should focus more specifically on these areas.

Enforcement: DEP needs to develop a better method to systematically track violations and subsequent enforcement activities and compliance results. This will assist in evaluating the performance and efficiency of compliance and enforcement efforts and will support a reasoned dialogue regarding the relative merits of DEP's Thoughtful & Thorough enforcement policy vs. EPA's Timely & Appropriate Guidance.

Both agencies need to continuously assess and refine the respective roles of compliance assistance and enforcement. This should be accomplished through an ongoing discussion to maintain the credibility of enforcement and compliance and to provide feedback about how the two philosophies interact so neither is undermined by or undermines the other.

DEP should prepare closure documents to record how and when a violator was brought into compliance. This will clarify and validate final decisions.

DEP needs to continue to clarify any internal misunderstandings regarding enforcement policies, including inspection protocols, issuance of NOVs, the circumstances justifying penalties and the circumstances to be considered in setting a compliance schedule. This will reaffirm its commitment to enforcement, increase the dialog among staff on enforcement principles, and increase the level of consistency of enforcement performance across the regions. In addition, DEP and EPA need to establish compliance and performance measures of the effectiveness of compliance assistance; indicators and measures should quickly identify any adverse changes that may occur.

Conclusion

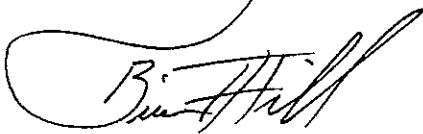
Our review of the issues raised in the IG Report found that they reflect a basic philosophical difference between the two agencies about which violations at air sources represent such serious threats to air quality that they warrant application of the prescribed enforcement responses pursuant to the T&A Guidance. The issues also reflect a profound disagreement about whether these enforcement responses are effective at any sources, regardless of the seriousness of the violation. These philosophical differences, in combination with major organizational changes at DEP (1991), have led to a breakdown in communications between the agencies about identifying and responding to the sources in violation. However, regardless of any philosophical differences, the two agencies must work together not only in protecting air quality, but in all aspects of environmental protection.

Given the timeframe and resource constraints of the Workgroup, we were unable to identify whether Pennsylvania's enforcement efforts are better or worse than in the past, or whether the philosophical differences between the agencies have resulted in delayed achievement of compliance by violators or significant pollution with health and environmental impacts. DEP must develop a better method to systematically track violations and subsequent compliance results.

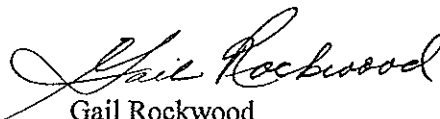
The Workgroup did not review the compliance assistance programs of both agencies nor the application of penalty forgiveness by DEP, but it is concerned that if industry perceives government to be less willing to enforce, then incentives for voluntary compliance may be weakened.

Since we understand that the debate about state/federal partnerships extends beyond Pennsylvania, we hope that our recommendations might serve as a model for other programs and states where similar communication and coordination issues exist. We are available to discuss with DEP, EPA and the IG our findings and recommendations.

Approved by the Citizens Advisory Council
February 11, 1997



Brian Hill
CAC Chair
Workgroup Co-chair



Gail Rockwood
CAC Vice-Chair
Workgroup Co-Chair