

“Running on Fumes”: The Development of New EPA Regulations in an Era of Scarcity

by Joel A. Mintz

Joel A. Mintz is Professor of Law at Nova Southeastern University, Shepard Broad College of Law.

Summary

EPA's operating budgets and staff size are at historically low levels, and the volume of its facility inspections and civil enforcement cases has dropped. The enforcement resources available to state environmental agencies have also declined considerably. At the same time, the regulatory and enforcement responsibilities of both EPA and state agencies have expanded significantly. In addition, too many of EPA's new regulations have been rejected by reviewing courts on the ground that they fail to provide regulated parties with fair notice; beyond this, ambiguous regulations may preclude enforcement actions altogether or weaken the hand of Agency personnel in negotiating individual settlements. To correct these problems, EPA's top managers need to promote an Agency culture in which enforcement and regulatory enforceability are given added importance. OECA should cultivate allies in DOJ and EPA's 10 regional offices, fight for more resources, and train new members of the Agency's enforcement staff in regulatory development. From the standpoint of environmental protection, the enforceability of new EPA regulations is absolutely critical.

Diligent and effective enforcement has long been recognized as a crucial component of effective governmental regulation.¹ To succeed, government enforcement programs must combine several elements,² including (1) a sufficient number of skilled, disciplined enforcement personnel with appropriate expertise and good judgment, and (2) a set of regulations drafted so as to be understandable to all regulated parties, the agency's own staff, and the public at large.³

This Article focuses on those two prerequisites to administrative agency enforcement success in the context of enforcement and regulation at the U.S. Environmental Protection Agency (EPA). In Part I, I consider the extent and consequences of EPA's current staffing levels as they impact the day-to-day enforcement of federal pollution control requirements. In Part II, I describe the “action development process,” the standard set of procedures that EPA follows to compose and finalize new Agency regulations. Part III provides some illustrations of a problem that continues to plague certain EPA regulations: the absence of fair notice to regulated parties as to what conduct is expected of them. In Part IV, I explore the organizational roots of this problem by describing the roles typically played by various EPA offices in developing new regulations, and I assess ways in which the Agency's internal procedures and organizational arrangements inhibit the promulgation of clear, enforceable EPA regulations. I also offer suggestions for better ensuring clarity in the Agency's final rules. Part V briefly concludes.

Author's Note: Joel A. Mintz is also an Elected Member of the American Law Institute, a Member-Scholar at the Center for Progressive Reform, and a Fellow of the American Bar Foundation. The author thanks former EPA attorney Jon Jacobs, EPA employees Enesta Jones and Sandra Gerrman, his able student research assistant Alison Barbiero (NSU College of Law, 2017), and several present and former knowledgeable EPA officials, who requested that they not be identified by name, for their very helpful assistance.

1. See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 224 (Greenwood Press 1977):
The attitude of a commission towards its enforcement responsibilities affects its entire regulatory program. Unless it demonstrates a capacity to enforce its regulations, they will be honored more in the breach than in the observance. Those [regulated firms] who discover that violations go undetected and unpunished will have little respect for the commission and will violate regulations with impunity if it is to their financial or commercial advantage.
2. For a discussion of the components of effective enforcement programs, see Joel A. Mintz, *Assessing National Environmental Enforcement: Some Lessons From the United States' Experience*, 26 GEO. INT'L ENV'T'L L. REV. 1 (Fall 2013); and Joel A. Mintz, *Measuring Environmental Enforcement Success: The Elusive Search for Objectivity*, 44 ELR 10751 (Sept. 2014).
3. BERNSTEIN, *supra* note 1, at 220.

I. Staffing Shortfalls and Routine EPA Enforcement Work

Over the past several years, the human resources available to EPA have precipitously declined. When adjusted for inflation, the Agency's overall operating budget for 2014 was below the level of funding provided in 1977⁴; and from a historical high level of 18,110 full-time employees in fiscal year (FY) 1999, full-time staff has now dwindled to fewer than 15,000 people, as budget cuts, hiring freezes, and staff attrition have taken their toll.⁵ Moreover, EPA was not adequately staffed even when its human resources were at or near their apex.

As early as 1980, John Quarles, the first general counsel and deputy administrator, observed that "in the nine years of EPA's existence, its manpower has roughly doubled while its program responsibilities have been multiplied by a factor of twenty."⁶ Eleven years later, in an independent analysis presented in testimony to the U.S. Senate Committee on Environment and Public Works, Richard L. Hembra, then-Director of Environmental Protection Issues at the U.S. General Accounting Office (now the U.S. Government Accountability Office (GAO)), Office of Resources, Community and Economic Development, stated that during the decade of the 1980s, EPA's budget had been "essentially capped," despite considerable further growth in the Agency's responsibilities. Hembra observed that in constant (1982) dollars, EPA's operating budget, which covers all programs except the Superfund and sewage treatment plant construction grants, "went from \$1.7 billion in 1979 down to \$1.0 billion in 1983, and rose back up to \$1.7 billion again in 1981. Yet during this same period, EPA's responsibilities grew enormously."⁷

Regrettably, the insights of Quarles and Hembra went unheeded and EPA's budget crunch actually worsened during the 1990s-2000s. During much of that 20-year period, the U.S. Congress mandated governmentwide cost-of-living adjustment raises for federal employees while failing to increase EPA's overall budget allocations. This congressional approach, which attracted almost no public or news media attention, resulted in cutbacks in several

EPA programs including enforcement. Moreover, during most of the same 20-year period, the number of Agency employees remained relatively stable though the economy of the United States—and the number of new, regulated sources of environmental pollution—further expanded dramatically.⁸ EPA was thus repeatedly forced to do more with less. In important respects, it was caught in a perpetual game of catch up. In its enforcement efforts, the Agency experienced chronic declines in funding for such non-salary-related needs as travel money to support facility inspections, up-to-date computer systems and laboratory equipment, skilled contractor assistance, training of criminal enforcement agents, case development and litigation, and other important needs.

As problematic as EPA's past staff shortages have been, however, the Agency's resource predicament, both generally and in its enforcement program, has gone from bad to worse in recent years. As noted previously, EPA's overall staffing level has now plunged to its lowest point in recent years. Along with the rest of the Agency, combined headquarters and regional enforcement staff has declined significantly. According to EPA's internal records, from a historical high point of 3,646 full-time enforcement-focused employees, the number of full-time employees who do enforcement work fell to 2,880 in FY 2015—approximately a 20% reduction overall.⁹ This recent decrease in enforcement personnel, in turn, has resulted in a major fall-off in the overall volume of enforcement and compliance activities.

Several EPA documents manifest the troubling trend. For example, EPA's 2014-2018 Strategic Plan projected major cutbacks in the volume of facility inspections, and in both new enforcement cases and the conclusion of pending enforcement cases—particularly when one compares this plan's projections with the Strategic Plan for 2005-2009. Specifically, the Agency's current five-year plan indicates that it expects to conduct an average of 6,200 fewer facility inspections per year than it had pledged to do during 2005-2009, and to initiate and conclude an average of 1,100 fewer civil cases annually. EPA's most recent Strategic Plan also projected that during 2014-2018, the Agency's enforcement work will result in an annual average reduction of 64 million fewer pounds of water pollution than it had projected it would annually reduce through its enforcement efforts during 2005-2009.¹⁰

4. ROBERT ESORTHY & DAVID M. BEARDEN, U.S. EPA, Appropriations for FY2014 in Pub. L. No. 113-76, at 28 (2014), available at <https://www.fas.org/sgp/cvs/misc/R42520.pdf>.

5. See U.S. EPA, *Budget and Spending*, available at <http://www2.epa.gov/plandbudget/budget>; Robin Bravender, *Workforce Shrinks to Level Last Seen in Late 1980s*, GREENWIRE, Mar. 2, 2015.

6. Steven Cohen, *EPA: A Qualified Success*, in *CONTROVERSIES IN ENVIRONMENTAL POLICY* (Sheldon Kaminiecki et al. eds., 1986).

7. Observations on the Environmental Protection Agency's Budget Request for Fiscal Year 1992, Statement of Richard L. Hembra Before the Senate Comm. on Environment & Public Works, GAO/T-RCED-9-14, Mar. 7, 1991. See also *Funding for Environmental Protection: Comparing Congressional and Executive Influences*, 26 Soc. Sci. J. 289-301 (1989).

8. See JOEL A. MINTZ, *ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES* 130-31 (2012).

9. Internal records of Office of Enforcement and Compliance Assurance (OECA) and EPA regional enforcement staffing levels (on file with the author).

10. U.S. EPA, *Fiscal Year 2014-2018 EPA Strategic Plan* 38 (2014), available at http://www2.epa.gov/sites/production/files/2014-09/documents/epa_stra-

EPA's most recent annual Enforcement Accomplishment Report provides further evidence of enforcement output decline. According to that report, EPA conducted 15,400 inspections of regulated facilities in FY 2015, well below the nearly 20,000 inspections conducted in FY 2012.¹¹ Moreover, in 2015, the Agency initiated 2,380 civil enforcement cases and concluded 2,380 such cases, a sharp drop-off from the approximately 3,300 civil enforcement cases initiated and 3,300 civil enforcement matters concluded in FY 2011.¹²

Beyond inspections, case initiations, and case conclusions, other important aspects of EPA's work have also been adversely affected by its acute resource limitations. These include hiring qualified contractors to assist in the technical aspects of enforcement case development, providing compliance assistance to small businesses, redressing noncompliance by smaller sources of pollution (whose cumulative harm to the environment may be substantial), upgrading EPA's antiquated computer system, overseeing state enforcement efforts, and having the resources to treat regulated entities on an equal basis.

The numerous disruptive impacts of EPA's loss of enforcement personnel can also be gleaned from off-the-record comments that I received from private conversations with experienced EPA enforcement officials who asked to remain anonymous. One enforcement manager candidly told me: "We are running on fumes." A technical expert declared: "We simply need more people here to get the job done." And a long-time enforcement attorney stated: "We are now woefully understaffed in enforcement. It is frustrating and depressing."¹³

Unfortunately, the decline in EPA's enforcement resources has taken place simultaneously with large cutbacks in the budgetary resources and enforcement capabilities of a number of state environmental agencies. The Environmental Council of States (ECOS)—a nonprofit association that includes the leading environmental officials in most states—reported that in 2011-2012, some 24 states reduced funding for their environmental agencies. This overall decline in funding averaged \$357,015 per state.¹⁴ State resource constraints have led to hiring freezes, staff attrition, and layoffs, cutbacks in state outreach and technical assistance programs that enhance private compliance, and reductions in state facility

inspections, environmental monitoring, and the issuance of environmental permits.¹⁵

Notwithstanding increased need at the state level, EPA's own budgetary woes have considerably reduced the Agency's ability to help individual states fund the operation of their environmental programs. From 2010 to 2014, aggregate federal environmental assistance grants to states and tribes declined 29% from \$4.9 billion to \$3.5 billion.¹⁶ And during 2008-2014, annual appropriations for EPA categorical grants to state environmental programs were reduced by \$24 million,¹⁷ cutbacks that have rubbed salt into the fiscal open wounds sustained by state environmental agencies.

Despite these notable funding decreases, the regulatory responsibilities of environmental agencies at both the state and federal levels have steadily grown. EPA's Office of Inspector General noted that the number of pollution sources covered by six programs created under federal pollution control statutes increased by 35% during 2001-2005 alone.¹⁸ The number of point sources required to obtain national pollutant discharge elimination system (NPDES) permits under the Clean Water Act (CWA)¹⁹ doubled over a 10-year period²⁰; and EPA's Office of Water recently reported that the NPDES-permitted universe "has grown and diversified without comparable increases in resources."²¹ This conclusion is consistent with GAO's finding in 2009 that the CWA "has significantly increased EPA's and the States' enforcement responsibilities [yet] available resources have not kept pace with these increased needs and actions are needed to further strengthen the enforcement program."²²

Beyond this, the number of regulated entities covered by the Toxic Substances Control Act (TSCA)²³ increased 61% in the early 2000s²⁴; and rapid increases in pesticide permit applications under the Federal Insecticide, Fungicide,

tegic_plan_fy14-18.pdf. The average annual figures were calculated by dividing the Agency's five-year projection by five.

11. U.S. EPA, OECA, *Fiscal Year 2015, EPA Enforcement and Compliance: Annual Results* 11 (2015), available at http://www.epa.gov/sites/production/files/2015-12/documents/fy-2015-enforcement-annualresults-charts_O.pdf#page=3.
12. *Id.* EPA has not reported how many of these cases were the result of voluntary disclosure of violations by regulated parties, as opposed to violations discovered by EPA personnel during on-site facility inspections.
13. Each of these statements was made in private conversations with the author on the understanding that the identity of the declarants would not be mentioned in this Article.
14. R. STEVEN BROWN, ENVT'L COUNCIL OF STATES, STATUS OF STATE ENVIRONMENTAL AGENCY BUDGETS, 2011-2013 (2012), available at <http://dl.dropboxusercontent.com/u/41680992/September%202012%20Green%20Report.pdf>.

15. U.S. GAO, FUNDING FOR 10 STATES' PROGRAMS SUPPORTED BY ENVIRONMENTAL PROTECTION AGENCY CATEGORICAL GRANTS, GAO-13-504R, at 4, 9-10 (2013), available at <http://www.gao.gov/products/gao-13-504r>.

16. ESWORTHY & BEARDEN, *supra* note 4, at 26-27.

17. *Id.* at 4-5.

18. U.S. EPA, OFFICE OF INSPECTOR GENERAL, LIMITED KNOWLEDGE OF THE UNIVERSE OF REGULATED ENTITIES IMPEDES EPA'S ABILITY TO DEMONSTRATE CHANGES IN REGULATORY COMPLIANCE, Rep. No. 2005-P-00024, at 7 (2005), available at <http://www.epa.gov/oig/reports/2005/20050919-2005-P-00024.pdf> [hereinafter U.S. EPA, LIMITED KNOWLEDGE].

19. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

20. See Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1, 21-22 (2012). Beyond NPDES permits, from 2001-2005, there was a 45% increase in the universe of sources requiring CWA stormwater permits. See U.S. EPA, LIMITED KNOWLEDGE, *supra* note 18.

21. U.S. EPA, OFFICE OF WATER, FY 2016-2017 NATIONAL WATER PROGRAM GUIDANCE, EPA 420-R-15-008, at 48 (2015), available at http://www2.epa.gov/sites/production/files/2015-04/documents/2016-2017_nwpg_final.pdf.

22. U.S. GAO, CLEAN WATER ACT: LONGSTANDING ISSUES IMPACT EPA'S AND STATES' ENFORCEMENT EFFORTS, Statement of Anu K. Mittal, Natural Resources and Environmental Team, GHO-10-165T, at 14 (2009), available at <http://www.gao.gov/assets/130/123559.pdf>.

23. 15 U.S.C. §§2601-2692, ELR STAT. §TSCA 2-412.

24. U.S. EPA, OECA, CLEAN WATER ACT ACTION PLAN, EXECUTIVE SUMMARY (2009), available at <http://www2.epa.gov/sites/production/files/documents/actionplan101409.pdf>.

and Rodenticide Act (FIFRA)²⁵ have further strained EPA's declining staff.²⁶ Moreover, future regulation of hydraulic fracturing (fracking)²⁷ and, eventually, greenhouse gas emissions may well add still more burdensome responsibilities on EPA's under-resourced enforcement program—responsibilities that many individual state environmental agencies remain poorly positioned to ease or assume.²⁸

II. Overview of EPA's Action Development Process

EPA does a great deal of rulemaking. According to the Agency's Office of Inspector General, on average, the Agency issues over 122 administrator-signed regulations each year. From 2005-2010, EPA published 735 major or administrator-signed rules, of which approximately 40% were final rules.²⁹ To implement its rulemaking activities, EPA has developed a relatively complicated approach to rule development, the action development process (ADP), which is designed to be collaborative and reach across professional disciplines, environmental media, and EPA offices.³⁰

The ADP begins with a request by a headquarters office or regional office (referred to inside the Agency as "the lead office") to the assistant administrator for EPA's Office of Policy for permission to initiate a regulatory action. This request is accompanied by a "tiering form" that is used to assign the action to a specific tier, based upon the nature of the anticipated issues and the level of interagency actions that will be needed to develop the regulation.³¹

All proposed regulatory actions must be placed into one of three tiers. Tier One actions, referred to as "Administrator's Priority Actions," are top-priority actions that demand the ongoing involvement of the administrator's office and extensive cross-agency involvement. Tier Two "Cross-Media and/or Actions With Significant Issues" are either actions targeted for

extensive cross-media or cross-agency involvement, single-media actions with significant issues, or actions that involve significant issues of science, economics, policy, and/or implementation. In addition to the lead office, actions that are designated Tier One or Tier Two must (at least) involve four other offices ("the core offices"): the Office of General Counsel, the Office of Enforcement and Compliance Assurance, the Office of Policy, and the Office of Research and Development.³²

Tier Three "Lead Office Delegation Actions" are actions for which there is little or no need for cross-agency participation. In this category, lead offices have the flexibility to design their own processes. However, where needed, lead offices are responsible for bringing other EPA offices into the development of the regulation and for involving external stakeholders in the process.³³

Once a regulation has been identified as Tier One or Tier Two, three intraagency bodies are formed to implement its development. The first of those is a Senior Management Council that provides overarching ADP policy and direction, both initially and periodically thereafter, as the regulation is developed. Second, a Regulatory Steering Committee is established, comprising representatives from each assistant administrator and every EPA regional administrator, and the heads of certain other EPA advocacy offices. This mid-level group typically serves as a first-line information source for staff in the relevant offices who are working on developing the regulation, directs the flow of documents into and through the ADP's review systems, and performs a variety of other tasks.³⁴ Finally—and quite importantly—"workgroups" composed of staff members from across the Agency, presumably with relevant experience and expertise, are formed. The members of these workgroups are responsible for representing the positions of their assistant or regional administrators and are expected to contribute actively to the development of the regulation.³⁵

Following the formation of Senior Management Councils, Regulatory Steering Committees, and professional staff workgroups for Tier One and Tier Two actions, the development of EPA regulations proceeds through a series of prescribed steps. Early in the process, the workgroup prepares a "preliminary analytic blueprint" document that spells out the workgroup's plan for data collection and analysis, and describes how needed information will be collected, peer-reviewed, and used to craft the regulatory action.³⁶ The workgroup also prepares a project management outline that identifies the broad areas of analysis that the workgroup will address, plans for consulting with external stakeholders, and other matters.³⁷ Both the preliminary analytic blueprint and the project management outline are then submitted to the Senior Management Council, which

25. 7 U.S.C. §§136-136y, ELR STAT. FIFRA §§2-35.

26. Kara Cook, *The Middle Ground of Pesticide Regulation: Why EPA Should Use a Watershed-Based Permitting Scheme in Its New Aquatic Pesticides Rule*, 37 *ECOLOGY L.Q.* 451, 486 (2010).

27. See Robin Kundis Craig, *Hydraulic Fracturing (Fracking), Federalism, and the Water-Energy Nexus*, 49 *IDAHO L. REV.* 241, 249 (2013).

28. See Donald T. Hornstein, *Complexity Theory, Adaptation and Administrative Law*, 4 *DUKE L.J.* 913, 956 (2005) (noting "inadequate budgetary and manpower capability" among state environmental agencies). There are some signs that the Barack Obama Administration's emphasis on combating climate change has already constrained the availability of personnel resources for enforcement work in environmental media other than air. Thus, for example, within OECA, the Air Enforcement Division recently issued more enforcement attorney vacancy announcements than did other, non-air-related, components of OECA.

29. U.S. EPA, OFFICE OF INSPECTOR GENERAL, *EFFICIENCY OF EPA'S RULE DEVELOPMENT PROCESS CAN BE BETTER MEASURED THROUGH IMPROVED MANAGEMENT AND INFORMATION*, at 1 (2013), available at www.epa.gov/oig/reports/2013/2013022813-P-0167.pdf.

30. This process is described, in considerable detail, in U.S. EPA, OFFICE OF POLICY, *EPA'S ACTION DEVELOPMENT PROCESS: GUIDANCE FOR EPA STAFF ON DEVELOPING QUALITY ACTIONS* (2011), available at <https://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/5088B387890053E8525788E005EC808/adb03-00-11.pdf> [hereinafter ADP GUIDANCE].

31. *Id.* at 14, 22-25.

32. *Id.* at 25.

33. *Id.*

34. *Id.* at 18-20.

35. *Id.* at 28, 30-31.

36. *Id.* at 33-34.

37. *Id.* at 34.

will provide the workgroup with “early guidance” as to how the project should proceed.³⁸

Upon receipt of that early guidance, the workgroup writes a detailed analytic blueprint that incorporates the guidance and describes, in greater detail than was established preliminarily, the scope of the action, the analytic work that is necessary, and key milestones.³⁹ Following this, the workgroup gathers data and information regarding the problem they are addressing, and its members consult with a variety of external stakeholders who will potentially be affected by the action. These parties often include representatives of state, tribal, and local governments, industry, public interest groups, and others.⁴⁰ At this stage, the workgroup identifies, scopes out, and evaluates a range of regulatory options. Those options are presented to senior managers, who meet together, in an “options selection meeting,” to discuss the options presented to them by the workgroup and select the options that will best achieve the goals of the action.⁴¹

Once the final regulatory options are selected (or at least significantly narrowed down) by senior EPA managers, the workgroup is responsible for preparing a “final agency review package” that includes the regulatory action itself, a “draft action memorandum” transmitting the regulation for signature, and a communication strategy or plan regarding how the action should be communicated to stakeholders and the general public.⁴² After that, the Office of Policy convenes a final action review meeting at which all EPA headquarters and regional offices are required to indicate whether they concur without comment, concur with comment, or non-concur.⁴³ The regulation is then submitted to EPA’s Office of Policy, which makes the final decision as to whether the regulation will go forward for signature by the administrator (for Tier One rulemakings) or by an assistant administrator for the lead office (for Tier Two and Tier Three rulemakings).⁴⁴

Under the ADP, at least ostensibly, Agency participants attempt to make decisions regarding proposed regulatory actions that balance eight different qualities: comprehensiveness, cost-effectiveness, flexibility, soundness of analysis, simplicity and timeliness, legal defensibility, clarity and conciseness, and enforceability.⁴⁵ EPA’s guidance for staff regarding the ADP expressly recognizes that “tradeoffs are often necessary and frequently give rise to issues needing resolution,” and states that “[i]n cases where tradeoffs in the quality characteristics are necessary, lead Assistant Administrators/Regional Administrators are responsible for achieving a balance that results in quality actions.”⁴⁶

III. Clarity and Enforceability of EPA Regulations: The “Fair Notice” Problem

It has long been established that administrative agencies, including environmental agencies, must provide regulated parties with fair notice of the conduct that is expected of them. The absence of such notice in an agency regulation deprives regulated parties of their constitutional right to due process of law and renders the regulation unenforceable. Moreover—of equal or even greater practical importance—regulatory ambiguity tends to undercut the negotiating position of enforcement personnel in their settlement discussions with noncomplying entities.

Given this, it is critical that environmental regulations be drafted in a clear, unambiguous fashion so that regulated entities may understand, with “ascertainable certainty,” what steps they must take to comply.⁴⁷ Unfortunately, in developing and publishing its final regulations, EPA has too frequently failed to adhere to that legal standard. As a result, a significant number of regulations have been rejected when challenged through judicial review.

This portion of the Article summarizes three judicial cases that exemplify some of the shortcomings of EPA’s regulation-writing practices. The cases are by no means a complete catalogue of environmental regulations that courts have rejected on the ground that they are impermissibly vague and ambiguous.⁴⁸ Nonetheless, the three cases provide useful illustrations of what occurs when the Agency fails to draft binding regulations in clear and enforceable terms.⁴⁹

47. See, e.g., *General Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 25 ELR 20982 (D.C. Cir. 1995); and *Trinity Broad. of Florida, Inc. v. Federal Comm’n Comm’n*, 211 F.3d 618 (D.C. Cir. 2000). As alternatives to the “ascertainable certainty test” enunciated in these cases, courts have developed somewhat different standards for determining whether agency regulations provide fair notice to the regulated community, including whether the regulations are “reasonably clear,” “not incomprehensibly vague,” and whether “a reasonably prudent person” would receive “fair warning of what the regulations require.” See also Albert C. Lin, *Refining Fair Notice Doctrine: What Notice Is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991 (2004) (fair notice should be deemed satisfied where a reasonable person, familiar with the industry involved, acting prudently and in good faith, would have known or anticipated the agency’s interpretation).

48. See also, e.g., *State of Maryland v. EPA*, 530 F.2d 215, 5 ELR 20651 (4th Cir. 1975); *Rollins Envtl. Servs. (NJ) v. U.S. EPA*, 937 F.2d 649, 21 ELR 21353 (D.C. Cir. 1991); *United States v. Cinergy Corp.*, 623 F.3d 455, 40 ELR 20266 (7th Cir. 2010); *United States v. Wabash Valley Serv. Co.*, 426 F. Supp. 835 (S.D. Ill. 2006).

49. In discussing these cases and the shortcomings they exemplify, I wish to observe that at least one EPA regulation currently under development appears to reflect considerable OECA influence. In a recent Notice of Proposed Rulemaking (NPRM), EPA proposed to expand the industry sectors covered by accidental release prevention regulations established pursuant to the Toxics Release Inventory (TRI) and §313 of the Emergency Planning and Community Right-to Know Act (EPCRA), 42 U.S.C. §§11001-11050, ELR STAT. EPCRA §§301-330. The Agency’s proposal will—if finalized without substantial change from the proposed regulation described in the NPRM—amend the current version 40 C.F.R. Part 68 in a fashion that reflects at least three of the principles expressed in EPA’s Next Generation Enforcement Approach. See Cynthia Giles, *Next Generation Compliance*, 30 ENVTL. F. 22 (Sept.-Oct. 2013). Specifically, the proposal requires many regulated facilities to contract with an independent third party to perform a compliance audit after a facility has had an accidental, reportable release of a hazardous pollutant. It also requires regulated facilities to provide “certain

38. *Id.* at 34-36.

39. *Id.* at 36.

40. *Id.* at 37.

41. *Id.* at 38-39.

42. *Id.* at 41-42.

43. *Id.* at 42-44.

44. *Id.* at 44.

45. *Id.* at 12.

46. *Id.*

At issue in *General Electric Co. v. U.S. EPA*⁵⁰ was a regulation concerning the disposal of PCB-contaminated electric transformers. The regulation, promulgated under the authority of TSCA, required the disposal of these transformers either by incineration of the entire transformer or by placing it in a chemical waste landfill after all PCB-laden dielectric fluid had been drained and the transformer had been rinsed with a solvent. However, the regulation provided no direct guidance as to what was to be done to dispose of dirty solvent in the event that a regulated party chose the “drain-and-landfill option.”⁵¹

General Electric Co. (GE) chose the drain-and-landfill alternative to decommission large electric transformers on one of its properties in Chamblee, Georgia. To implement that approach, GE incinerated all drained PCBs. The company also used a process known as distillation, in which a portion of the contaminated solvent was recovered and recycled. The company took the position that EPA’s regulations, which merely required that dirty solvent be disposed of “in accordance with the requirements of [40 C.F.R. §761.60(a)(1)]” allowed GE to utilize the distillation method. EPA, in contrast, viewed the relevant regulation as requiring the company to dispose of all contaminated solvent materials by immediate incineration. The Agency imposed a penalty of \$25,000 on the company for violating the PCB regulations, and GE sought judicial review.

After reviewing the regulations and hearing the parties’ arguments, the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit vacated EPA’s finding of liability and set aside the penalty on the basis that the regulations did not provide GE with fair warning of the Agency’s interpretation.⁵² The court stated that, on their face, the regulations reveal no rule or combination of rules providing regulated parties notice, with ascertainable certainty, that predisposal processes were prohibited. Even though EPA’s construction of its own regulations was “permissible,” the court indicated that the Agency’s position was “by no means the most obvious interpretation of the regulation,”⁵³ and “a person of good faith would not reasonably expect distillation . . . to be barred as an unapproved means of disposal.”⁵⁴

Without question, EPA’s regulation in the *General Electric* case was ill-drafted. The Agency’s PCB regulation-writers may have mistakenly failed to anticipate that solvent distillation would be used by parties that employ a drain-

and-landfill approach to decommissioning electric transformers. Alternatively, they may have intentionally failed to clarify the legal status of distillation as a way of avoiding conflict with regulated entities. Either way, however, their failure to include regulatory language that clearly and specifically prohibited distillation resulted in a regulation that could not be enforced.

A similar problem arose in *Summit Petroleum Corp. v. U.S. EPA*,⁵⁵ regarding the language of a regulation that sought to define the meaning of a single stationary source for purposes of the Agency’s Clean Air Act (CAA)⁵⁶ Title V permitting program. The regulation in question provided, in relevant part, that multiple pollutant-emitting activities may be considered as a single stationary source under Title V only if they “are located on one or more contiguous or adjacent properties.”⁵⁷

The plaintiff in *Summit Petroleum* operated a natural gas “sweetening” plant in Michigan that removed hydrogen sulfide from natural gas that had been extracted at approximately 100 “sour gas” production wells in the general vicinity of its sweetening facility. These wells were located over an area of approximately 43 square miles. None of the well sites shared a common boundary with the plant, nor did any of them share a common boundary with one another. Moreover, Summit Petroleum did not own either the property between the wells and the plant or the properties that separated the individual well sites.

Attempting to apply its Title V regulations, EPA determined that notwithstanding the physical distance that separated them, Summit Petroleum’s plant and wells were a single stationary source, located on “contiguous or adjacent” properties. The Agency reasoned that industrial activities can be deemed “adjacent” so long as they are functionally related. As a consequence of this interpretation, the company’s properties were deemed a “major” source and thus required by EPA to obtain a Title V operating permit.

On judicial review, the U.S. Court of Appeals for the Sixth Circuit rejected EPA’s determination. Citing case law and dictionary definitions, the court concluded that the notion of adjacency relates only to physical proximity. In contrast, the court opined, EPA’s broad interpretation of the phrase contiguous or adjacent “undermines the plain meaning of the text” and was not entitled to deference.

Once again, EPA’s regulation suffered from drafting flaws that defeated its application. The Agency’s failure at the outset to make clear that it intended to consider groupings of industrial facilities to be single sources where they are functionally interrelated, regardless of whether those facilities are physically adjacent, led to judicial rejection of its interpretation.⁵⁸

EPA’s lack of foresight regarding implementation and enforceability of another of its regulations was displayed

basic information” to the public through “easily accessible means” such as a facility website; and it calls for greater “clarity or simplicity” in the forms that regulated entities are required to submit to regulators respecting their risk management programs so as “to reduce the compliance burden on facilities.” See <https://yosemite.epa.gov/opel/rulegate.nsf/byrin/2025-aa33>. Without question, this proposal appears to be an example of OECA influence in the ADP that has been all too lacking in many past rulemakings. It remains to be seen whether this proposed regulation will be formally proposed and ultimately promulgated as a final Agency action and, if so, what its contents will be. 81 Fed. Reg. 13638 (Mar. 14, 2016).

50. *General Elec. Co.*, 53 F.3d at 1324.

51. 40 C.F.R. §761.60.

52. *General Elec. Co.*, 53 F.3d at 1330-31.

53. *Id.* at 1331.

54. *Id.*

55. 690 F.3d 733, 42 ELR 20167 (6th Cir. 2012).

56. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

57. 40 C.F.R. §71.2.

58. *Summit Petroleum*, 690 F.3d at 744.

in *United States v. Hoechst Celanese Corp.*⁵⁹ This was a civil action brought by the U.S. Department of Justice (DOJ) against Hoechst Celanese Corp. (HCC) to enforce EPA regulations governing “fugitive” atmospheric emissions of the toxic compound benzene. The EPA regulations at issue imposed numerous preventive and reporting requirements on industrial plants emitting benzene. However, it exempted from those requirements plants designed to “use” less than 1,000 megagrams (2.2 million pounds) of benzene per year.⁶⁰

HCC’s Celriver plant leaked very substantial quantities of benzene from valves and pipes. HCC’s facility made use of this carcinogenic compound as a cooling agent to lower the temperature of hot ketene gases, and as a reflux agent to separate water and other compounds from acetic anhydride and acetic acid. After both of these applications, the benzene at the plant was cooled, purified, and reused for the same purposes.

Although its regulations did not indicate this directly, EPA officials defined the word “use” broadly to mean any utilization, employment, or putting in place. EPA thus counted each time benzene circulated through pipes and valves capable of leaking as a use of benzene. This fact was significant because, under the Agency’s definition, HCC’s plant was designed to use more than one million megagrams of benzene per year and therefore was not eligible for exemption from EPA’s regulation.

HCC, however, interpreted the exemption provision of EPA’s regulation quite differently. As the company saw it, the term “use” in the exemption language had a far narrower meaning. It only meant “consumption” of benzene; that is, the overall amount needed to keep the processes at the Celriver plant in operation. Under HCC’s interpretation, the total quantity of benzene that it used for continual recycling never exceeded 1,000 megagrams per year and, thus, the Celriver plant qualified for exemption from the regulatory requirements.

On judicial review, the U.S. Court of Appeals for the Fourth Circuit concluded that, over a five-year period, HCC was not liable for any regulatory violations because EPA had not provided the company with fair notice of EPA’s regulatory interpretation. In the court’s view, the Agency’s regulation had not clearly defined “use,” and it had not at all addressed how to measure benzene in a closed recirculation system.⁶¹ Accordingly, firms like HCC had not been fairly notified of whether the regulatory exemption applied to their plants.

Once again, EPA’s shortsighted regulatory drafting defeated the enforcement of an important regulation. For whatever reason, when the Agency wrote its fugitive benzene emission rule, it declined to make clear the meaning of a key term in its regulatory scheme. As a result, a major emitter of a toxic compound—an industrial plant whose benzene emissions ranked in the top 5% of all

plants reporting fugitive benzene emissions—was allowed to avoid any need to comply with regulatory requirements.

IV. “A Passion for Ambiguity”: Key Actors in Rule Development and Institutional Obstacles to Enforceability

As discussed above, in the most complex and important EPA rulemakings, five institutional actors, each with its own specific interests and goals, play crucial roles. The first such actor, the EPA program office with substantive responsibility for the contents of a proposed regulation, generally plays a dominant role in regulation development. The relevant program office first identifies the need for the regulation and plays a critical part in determining how the regulation will be tiered as well as its overall thrust and scope. Within the Agency, program offices typically have the lion’s share of the technical expertise that is required to develop their proposed regulations. They are also generally willing to devote enough and the right sort of personnel resources to the task of regulation development. Moreover, the representatives of program offices chair the workgroups in which the details of proposed regulations are ironed out, and they have the last word in determining how to balance the various (sometimes conflicting) factors that must be considered as new regulations are crafted.

In addition to achieving their policy objectives, EPA program offices often have a preference for satisfying stakeholders, including but not limited to regulated parties who will be subject to proposed regulations. Given this preference, the offices often communicate with those outside stakeholders as regulations are under development to ensure that, to the extent possible, stakeholder objections and concerns are assuaged in the final regulation. Two experienced former EPA officials suggested to the author that as the contents and language of proposed regulations are shaped, Agency program offices sometimes display a “passion for ambiguity.”⁶² Those sources also suggested that ambiguity within regulations may serve a program office’s goal of playing conflicting interests against one another and avoiding outside pressures and subsequent legal challenges.⁶³

To the same end, as regulations are developed, program office representatives often suggest sweeteners for regulated parties (and on occasion for other stakeholders) in order to make the incipient regulations more palatable to them.⁶⁴

62. Author’s conversations with two former EPA officials who expressed a desire that they not be identified as the source of the observations.

63. Ambiguity may also stem from an entirely legitimate desire on the part of the Agency to avoid creating regulations that over-reach, in the sense of being more stringent than necessary, or under-reach, i.e., that fail to provide adequate protection for public health and the environment. The same motivation for EPA’s regulation-writers may also lead to final regulations that are complex and convoluted.

64. A number of these pre-promulgation regulatory modifications are a result of comments submitted to EPA during the notice-and-comment period required for proposed regulations. While I am not suggesting that EPA is a captive Agency that always follows the wishes of the entities it regulates in developing its regulations, it seems worth noting that regulated firms often have more resources than do environmental public interest organizations in pressing their regulatory preferences on EPA. This mismatch of com-

59. 128 F.3d 216, 28 ELR 20236 (4th Cir. 1997).

60. 40 C.F.R. §61.110(c)(2).

61. *Hoechst Celanese*, 128 F.3d at 226-27, 232.

Where regulated firms are the beneficiaries, such sweeteners may include delays in the dates by which compliance with the regulation will be required, specific exemptions and exceptions for particular industries or industrial operations, and relief from self-reporting requirements.⁶⁵ While program offices sometimes do focus on considerations of enforceability, those concerns may take a back seat to other programmatic objectives and priorities.

The second critical actor in EPA regulation development is the Office of General Counsel (OGC). In most instances, OGC attorneys serve as close allies of program office personnel. At the same time, OGC lawyers often do not view the Office of Enforcement and Compliance Assurance (OECA) as a client or partner in the ADP.⁶⁶ Along with the program offices, OGC has a strong interest in avoiding legal challenges to regulations after they have become final. Thus, OGC only infrequently objects to the sweetener provisions favored by program offices, and it sometimes overlooks the inclusion of ambiguous provisions in incipient rules. In fairness, OGC attorneys do sometimes attempt to eliminate unenforceable language in proposed regulations. Nevertheless, the clarity and enforceability of the regulations seems too rarely a matter of high priority for them.⁶⁷

EPA's Office of Policy is involved in regulation development in a variety of ways. As noted, in instances where one or more of EPA headquarters and/or regional offices have declined to concur in a final action regulatory package, the Office of Policy's assistant administrator must approve initial proposals for regulatory actions before they may formally commence. This office has responsibility for overseeing the management of the ADP. Its representatives participate in all workgroups and its assistant administrator has the authority to decide whether final regulations may go forward for top management signature.

The Office of Research and Development assigns a workgroup member to all Tier One and Tier Two regulatory actions; however, its role is a limited technical one—ensuring that “sound science” is considered at all points in the regulatory process.

The final major actor in EPA regulation development is OECA. In its written policy pronouncements, OECA has recently placed a premium on simple, clearly written, enforceable regulations. In a 2013 article describing the Agency's Next Generation Compliance Strategy, Cynthia

Giles, EPA's Assistant Administrator for Enforcement and Compliance Assurance, expressed a preference for “rules and compliance built in.”⁶⁸ She wrote that “one of the principles we have learned over the years of hard experience is that compliance is better when the rules are simple and clear.”⁶⁹

Giles' words and attitudes toward regulation-building appear to have given OECA's staff unambiguous direction regarding her office's priorities in the design of regulations. Nonetheless, in practice—for a variety of reasons—OECA representatives often have relatively little leverage in action development workgroups, and attempts by OECA's top management to intervene late in the rulemaking process all too often fall short.

Regulation development is an intrinsically specialized and sophisticated function. For OECA to have substantial influence in the workgroup process, its representatives must be knowledgeable about the substantive area that a proposed regulation addresses, as well as skillful and persuasive in promoting OECA's regulatory enforceability goals. The latter must be done in the context of interoffice meetings in which OECA's goals are not shared by, and may be inimical to, other workgroup actors.

In addition, OECA's workgroup representatives must be willing to devote considerable time to their workgroup responsibilities. They must become actively involved in the process from the beginning, before their workgroup prepares preliminary and detailed analytic blueprints and project management outlines, as well as after those documents have been ratified by senior managers. They must attend all workgroup meetings punctually and diligently, and they must routinely seek and obtain guidance from top managers in OECA and EPA regional offices.⁷⁰

Unfortunately, given staff resource limitations, including the fact that a considerable number of experienced enforcement attorneys and technical experts within OECA have retired in recent years, the pool of attorneys and technically trained personnel with the knowledge and skill set needed to represent OECA successfully in the development of clear and enforceable regulations is quite small. Moreover, among those headquarters attorneys, engineers, and scientists who do have the requisite experience and qualifications, many have been given important, time-consuming enforcement assignments that effectively preclude them from participating in regulation development work.⁷¹

Another potential source of representatives in regulatory action development workgroups with a likely interest in ensuring the enforceability of regulations under development are attorneys and technical experts who work on substantively related enforcement matters in EPA's 10 regional

menting/lobbying capability can certainly affect the ultimate content of a number of the Agency's final regulations.

65. Author's conversations, *supra* note 62.

66. *Id.* Generally, OGC provides legal services for EPA's program offices on a regular basis. That is true with regard to matters that do not involve the development of new regulations as well as regarding regulatory development matters. The same program offices are generally the lead offices in the ADP. Simultaneously, OGC is only rarely involved in providing legal services to OECA. Thus, it seems unsurprising that OGC's attorneys tend to view program office personnel as their true clients, and that they have little or no institutional motivation to ally with OECA where disputes arise as the contents of incipient regulations.

67. Author's conversation with former EPA enforcement authority Jon Jacobs. During his 27 years as a civil and criminal enforcement attorney at EPA headquarters and in the field, Jacobs participated in more than 100 ADP workgroups as a representative of OECA.

68. Giles, *supra* note 49, at 22.

69. *Id.* at 22.

70. Author's conversations with Jon Jacobs and two former EPA officials who requested that the author not state their names or otherwise identify them in this Article.

71. *Id.*

offices.⁷² These individuals often have useful knowledge of how regulations are implemented in the field, a clear understanding of potential impediments to regulatory effectiveness, and an awareness of gaps in the Agency's existing regulatory structure that harm public health or the environment. However, like OECA, EPA's offices of regional counsel and its regional enforcement divisions contain a paucity of experienced attorneys and technical persons with sufficient knowledge, skills, and time to be effective participants in rule development.

Moreover, in many cases, mid- and top-level managers in regional offices resist committing regional resources to the development of new regulations, viewing regulation-writing as strictly a headquarters function and a potential drain on regional staff resources. As a result, knowledgeable regional office attorneys are too often discouraged by their managers and supervisors from becoming involved in a complex and geographically distant rule development process that threatens to consume their scarce time and attention.⁷³

How can the ADP be improved to better ensure the enforceability of final rules, and what steps can OECA take to give itself more influence in that process? First, EPA's guidance document must be altered so that the clarity and enforceability of regulations cannot be compromised in trade offs—ultimately determined by the lead office—with other regulatory characteristics. Although legal defensibility and flexibility are certainly hallmarks of effective regulations, as we saw in Part III, the absence of linguistic clarity and fair notice as to precisely what a regulation requires of regulated entities will make the regulations highly vulnerable to legal challenges—challenges that, in a practical sense, may render them a dead letter. It will also decrease the leverage of enforcement officials in their efforts to settle enforcement cases on favorable terms.

Additionally, EPA's top managers, including especially the administrator and deputy administrator, must emphasize—to other managers (at all levels) and staff members alike—the critical importance of enforcement and regulatory enforceability. All employees must be made to understand that enforceability is a vital part of regulatory development, as opposed to a minor consideration, mere afterthought, or luxury.

For its part, OECA can take some unilateral steps to enhance the clarity and future enforcement of new regulations. In the context of workgroups, its representatives can insist upon a review by attorneys at DOJ to identify and revise any language in a regulation under development that lacks clarity and enforceability. Since DOJ attorneys must enforce EPA regulations in court—both in civil judicial actions and criminal prosecutions—DOJ has a clear inter-

est in seeing to it that new regulations will not be written in ways that are problematic. DOJ's value as a potential ally in the ADP process should not be underestimated.⁷⁴

Second, where regional staff expertise will be helpful in the ADP, OECA's assistant administrator can insist that the regional offices make knowledgeable legal and technical staff members available to participate in developing regulatory actions. OECA's top manager evaluates the performance of regional managers. That official thus has considerable leverage in breaking down regional management resistance to parting with some of the services of regional enforcement staff members while they become involved in the rulemaking process.

Third, OECA can attempt to make alliances with regional administrators in Tier One and Tier Two rule-making where enforceability questions arise. Non-concurrences by the OECA assistant administrator will carry considerably more weight where OECA's refusal to concur is supported by non-concurrences from regional administrators. Finally, OECA can seek, and forcefully contend for, additional personnel resources, including staff training resources, so that its headquarters staff can develop the specialized expertise needed for them to participate more effectively in ADP workgroup activities.

V. Conclusion

EPA's resource base is at a low ebb. Its operating budgets and the size of its staff are at historically low levels. As a result, the productivity of the Agency's enforcement efforts has fallen off significantly. Although EPA is continuing to enforce federal pollution control requirements, the volume of its facility inspections and civil enforcement case initiations and case conclusions has dropped, and the Agency's enforcement work has been negatively affected in a number of other important respects.

Moreover, the resources available to state environmental agencies for enforcement work have also declined considerably as a result of state budget cuts combined with decreases in the amounts of grants-in-aid provided to state environmental agencies by EPA. At the same time, however, the regulatory and enforcement responsibilities of both EPA and state agencies have expanded significantly. More resources are clearly needed at both the federal and state levels if environmental regulation enforcement is to be restored to the levels necessary to protect public health and the environment.

In addition, too many of EPA's new regulations have been rejected by reviewing courts on the ground that they fail to provide regulated parties with fair notice of the specific steps that are required of them. Beyond this, ambiguous regulations may preclude enforcement actions altogether or weaken the hand of Agency personnel in negotiating settlements with noncomplying entities in individual enforcement cases.

72. In eight of the 10 EPA regional offices, these attorneys are housed in offices of regional counsel. In two regions, however, Region I (Boston) and Region VIII (Denver), enforcement attorneys are assigned to multidisciplinary enforcement divisions.

73. Author's conversations with two former EPA officials who asked not to be identified by name in this Article.

74. This tactical approach was suggested by Jon Jacobs in a conversation with the author.

These problems can and should be corrected. EPA's top managers need to promote an Agency culture in which enforcement is afforded priority and regulatory enforceability is given added importance in the ADP. This will require some modifications to that process. It will also require active steps by the top managers of OECA to cultivate allies in DOJ and EPA's 10 regional offices, to fight for

more resources, and to train new members of the Agency's enforcement staff in the intricacies of regulatory development. From the standpoint of environmental protection, the enforceability of new EPA regulations is absolutely critical. It is simply too important to be left to institutional inertia or random chance.