

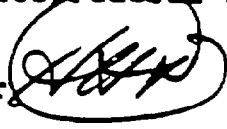


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Final Addendum on Multi-Media Enforcement to the
Policy Framework on State/Federal Enforcement Agreements

FROM: Herbert H. Tate, Jr. 
Assistant Administrator

TO: Assistant Administrators
Associate Administrators
Regional Administrators
Inspector General
General Counsel
Enforcement Task Force, State/EPA Operations Committee
Steering Committee on the State/Federal
Enforcement Relationship
National Environmental Enforcement Council
Enforcement Management Council

The Policy Framework on State/Federal Enforcement Agreements (revised 4/86) is the Agency's blueprint for defining State/EPA Enforcement Relationship. We are updating it this year by adding addenda on Multi-Media Enforcement and Criminal Enforcement and by enhancing the criteria for oversight of state penalties. The first of these changes, the final Addendum on Multi-Media Enforcement, is attached. Once the Criminal Enforcement Addendum and changes in the criteria for oversight of penalties are completed, Deputy Administrator Habicht will re-issue the Policy Framework in its entirety later this year.

The Multi-Media Enforcement Addendum is key to achieving EPA's enforcement goals over the next several years by clarifying state/federal relations in the context of multi-media enforcement. Within this framework, EPA and the States can work to integrate a cross-program and multi-media perspective into all stages of enforcement planning, decision-making and implementation in order to increase compliance with all environmental laws and regulations.

The final Multi-Media Addendum reflects extensive comments that the Office of Enforcement received from within EPA, and from State and local officials on earlier drafts in two rounds of formal review and comment. It also benefitted from detailed

discussions with the Steering Committee on the State/Federal Enforcement Relationship, particularly at the last meeting in November 1991.

EPA is committed to multi-media enforcement and will work with States to build the capacity for and remove barriers to its implementation. As EPA and the States gain experience, OE will periodically review with the Steering Committee lessons learned from integrating a multi-media perspective and capability into all stages of enforcement planning, decision-making and implementation.

In addition to the Addendum several other important planning documents that bear on multi-media priorities and their implementation will be forthcoming shortly. These include the following:

- 1) Enforcement Operating Year Guidance (FY 1993)
- 2) State/EPA Enforcement Agreements Guidance (FY 1993); and
- 3) Enforcement 4-Year Strategic Plan (FY 1994-1997).

Taken together they establish a clear direction for multi-media environmental enforcement over the next several years.

If you have any questions or comments, please contact Cheryl Wasserman, Chief, Compliance Policy and Planning Branch, on FTS/(202) 260-8869, USEPA, (LE-133) 401 M Street, S.W. Washington, D.C. 20460.

Attachment

cc: Scott Fulton (OE)
OE Enforcement Counsels
OCAPO Managers

Policy Framework for State/EPA Enforcement Agreements
Appendix D

MULTI-MEDIA ENFORCEMENT

I. Introduction

The Policy Framework for State/EPA Enforcement Agreements (revised August, 1986) is EPA's blueprint for effective working relationships between federal and state or local enforcement under delegated or approved programs.¹ The Policy Framework was developed primarily in the context of single-media and single-program concerns. Cross-program and multi-media enforcement approaches pose new challenges to the state/federal enforcement relationship.² This Addendum addresses issues that will arise as EPA and the States increasingly adopt a cross-program and multi-media perspective in their enforcement programs.

Multi-media enforcement approaches were highlighted in EPA's Enforcement Four-Year Strategic Plan (February 1991) and in The Enforcement in the 1990's Project (October 1991), which outline the future course for enforcement. These documents reflected a consensus among federal, state and local environmental officials, about the need for more sophisticated approaches, including multi-media approaches, to enforcement given the growing universe of sources for which compliance must be achieved. Multi-media enforcement approaches are intended to supplement where appropriate rather than supplant single program approaches. Priorities must remain the protection of public health and the environment, whether this is best accomplished through single or multi-media enforcement activities.

By adopting multi-media approaches to environmental enforcement, EPA and the States will be treating facilities and/or companies in a more holistic and integrated way for the following purposes: assessing environmental harm; monitoring compliance; penalizing noncompliance; fashioning remedies; and making enforcement choices. A flexible approach that uses both coordinated (state and federal) single-media actions, as well as consolidated multi-media cases or activities can offer any or all of the following benefits: greater environmental results; pollution prevention and/or risk reduction; greater deterrence; and/or greater resource efficiencies by using a single case to accomplish broader enforcement and environmental results.

¹ The reference to "State" in the remainder of this document includes, as appropriate local government entities, and other independent jurisdictions, e.g., the District of Columbia, Indian Tribes, U.S. Protectorates, etc., with delegated or approved enforcement programs.

² The reference to multi-media in the remainder of this document should be read to include cross-program approaches.

Although EPA strongly encourages States to move in the direction of multi-media enforcement, this Addendum does not require States to adopt multi-media approaches to enforcement. It is not intended to alter current program delegations or approvals under which States have the primary enforcement responsibility. The Addendum does not change existing criteria for what constitutes a timely and appropriate enforcement response, nor does it alter existing criteria under the Policy Framework for determining the lead on enforcement cases.

II. Multi-Media Enforcement Defined

Multi-media enforcement means the integration of a cross-program and multi-media perspective and capability into all stages of enforcement planning, decision-making and implementation, in order to increase compliance with all environmental laws and regulations, and to maximize risk reduction across all media.

EPA and the States broadly define multi-media enforcement to include the following activities:

1. Multi-media or cross-program targeting of enforcement resources to address specific geographic areas, pollutants of concern, industries, companies or facilities with poor compliance histories across programs;
2. Multi-media or cross-program inspections;
3. Multi-media cases, i.e., those with multi-media or cross-program counts; and
4. Settlements with multi-media or cross-program conditions.

Multi-media or cross-program targeting of enforcement can more readily focus the enforcement effort to achieve greater environmental or compliance results and reduction of risks by targeting enforcement on geographic, pollutant, industry, company or facility-specific environmental and compliance concerns which transcend those of any single program or medium.

Multi-media inspections may better ensure that significant environment problems are not overlooked, that senior management focuses greater attention on problem facilities, and/or that scarce federal and state inspection resources are used more efficiently--even if violations are found and pursued in only one program area.

Where appropriate, multi-media cases with multiple counts can offer greater deterrence through the size of the penalty and the more imposing character of the case, greater environmental benefits from coordinated solutions to the non-compliance, and greater efficiencies in prosecuting the case.

Further, enforcement actions resulting in multi-media and cross-program settlement conditions can use individual enforcement cases to do the following: leverage broader environmental

protection; achieve risk reduction and pollution prevention goals; enhance correction of underlying compliance management problems which transcend specific violations in any one program area (through, e.g., environmental auditing provisions); prevent shifting pollution from one medium to another; and/or address other media problems in a more efficient manner than prosecuting separate cases.

III. Encouraging States' Multi-Media Enforcement Approaches

EPA and many States agree that multi-media enforcement offers important benefits. EPA will endeavor to build States' capacity for and remove barriers to multi-media enforcement as described below, recognizing that the specific manner of organization and approach may vary among States.

EPA will not require State agencies to have a multi-media enforcement program as a prerequisite to delegation or approval of a program. However, EPA will encourage States to use multi-media enforcement approaches through its working relationships and through the oversight of States' enforcement programs.

A. Building State Capacity

1. Encouraging Multi-Media Strategic Planning and Pilots

The Policy Framework calls for an annual process of priority setting with the States in which both national and state priorities are discussed and reviewed to achieve a mutual understanding of the broad context for oversight of States' operations. (See Policy Framework, oversight criterion #1, pages 8-9). States' priorities are to reflect and balance both national and state-specific priorities. States are encouraged to do their own strategic planning to identify environmental and noncompliance problems toward which the State might better target environmental enforcement activities. EPA and the States will discuss and review national and regional, single and multi-program priorities as well as States' priorities to achieve an integrated set of program priorities with the States. Ideally, federal and state multi-media planning efforts should be conducted together from the outset of the planning cycle. Multi-media strategic planning is discussed more fully in Section IV below.

2. State Access to Integrated Compliance Data Capability

EPA's Office of Enforcement (OE) has developed an automated capability (known as IDEA) to integrate compliance information from the air, water, toxics, pesticides and waste compliance data systems, the Toxic Release Inventory and the Facilities Index (FINDS). This capability, designed with use by Regions and States in mind, will be available to both Regions and States in FY 1992. The Office of Enforcement will train EPA Regions, and will work with Regions and other organizations as appropriate to train States. Also, OE will organize user advisory groups with Regional and State representatives.

EPA Regions should establish procedures (consistent with national guidance) with each State for providing information and access to the system when it is completed and ready for external use. These procedures will reflect the need for both States and EPA to restrict access to and preserve the confidentiality of some of the data.

Accurate and reliable data on source compliance are essential if this capability is to be useful nationally to screen cases and to help target enforcement to geographic, industry, company, facility, or pollutant-specific concerns based upon compliance status, compliance history and/or environmental or risk profile. Regions and States should routinely identify any deficiencies in data quality and agree upon steps needed to address them.

3. Multi-Media Enforcement Training

EPA is developing a multi-media training course for compliance inspectors, program and legal staff. This course and others will be offered under the umbrella of the National Enforcement Training Institute (NETI) created to develop, coordinate and provide enforcement training to EPA, State and local personnel concerned with environmental enforcement. Consistent with available resources, NETI will provide travel funds for State enforcement personnel to participate in this and other courses. State representatives serve on the Institute's Advisory Council and will participate actively in curriculum design and development. State personnel will also be asked to serve as faculty for NETI.

4. Innovative Enforcement Support Networks

To encourage the use of innovative enforcement tools, the Office of Enforcement has established staff networks to collect and disseminate information about lessons learned in the following areas: 1) pollution prevention conditions in enforcement settlements; 2) environmental auditing provisions in enforcement settlements; 3) contractor listing/suspension and debarment; 4) field citations; 5) creative use of legal tools, particularly information gathering authorities; and 6) alternative dispute resolution. Several of these networks are concerned with multi-media enforcement approaches.

EPA Regions will share lists of network members and information with the States. EPA will also solicit information on States' use of innovative enforcement approaches and results and will share these within EPA and among the States. Related to this, Regions should alert the States to limited EPA funds that are available to foster pollution prevention in enforcement case settlements.

B. Removing Barriers to Multi-Media Enforcement by States

1. Increasing Flexibility in Resources and Commitments

While generally effective in ensuring a coherent and consistent national environmental enforcement effort, the manner in which resources are allocated to States, grant commitments are negotiated and other commitments are tracked can serve as a barrier to multi-media enforcement approaches. In some instances more resources may be required to implement multi-media approaches; in other circumstances, a multi-media approach may alter single program priorities, commitments and/or resource allocations.

EPA programs and Regions should develop flexible, comprehensive compliance planning with States or localities as a basis for resource and output commitments. Such planning provides essential flexibility for multi-media approaches to be implemented and will be encouraged for all EPA programs. For example, EPA programs are generally prepared to adjust commitments to inspection outputs to accommodate multi-media inspections planned with the States through the grants process, and with Regions through national accountability systems.

2. Recognizing Multi-Media Approaches in State Oversight

a. Timely and Appropriate Enforcement Response (Criterion #3)

Multi-media enforcement will be a factor taken into account in assessing both Regions' and States' performance in individual cases as to whether timely and appropriate enforcement response is being pursued. This recognizes that multi-media enforcement may in some instances lengthen the time it takes to initiate formal enforcement actions. If multi-media enforcement action does take a longer time to develop than the program milestones, an individual, case-specific schedule should be used to establish management milestones for oversight purposes. These case-specific milestones will serve as the basis for mutual Regional and State assessments of performance and Headquarters assessments of Regional performance.

b. Recognition of Multi-Media Approaches as an Alternative for Resolving Significant Violations

Multi-media settlement conditions may be used successfully by a State to address outstanding violations in another medium. EPA Regions will work with each State and appropriate program offices to identify when such multi-media approaches are being used which would meet program requirements for resolving violations in non-traditional ways.

2. Appropriate Use of Civil Judicial and Administrative Penalty and other Sanction Authorities to Create Deterrence (Criterion #6)

Multi-media enforcement calls for appropriate consideration of increased penalty assessments if a facility is a violator under more than one program or statute (and thus multiple penalty claims were aggregated), and/or if there has been a history of non-compliance across programs (that would result in an upward adjustment to the gravity component). EPA will encourage, but will not require, States to adopt a multi-media approach to penalty assessments. At a minimum, EPA would expect States to assess penalties appropriate to each of the violations covered in a multi-media case.

3. Encouraging Internal Coordination within States

Enforcement responsibilities which are fragmented among several organizations can be a major barrier to multi-media enforcement. Those States that are structured to implement environmental programs in an integrated manner should be readily able to work with EPA to plan multi-media enforcement. For other States structured along single program lines as is EPA, the relationships will be complex, demanding new institutional arrangements and changes in the planning of enforcement activities.

EPA will encourage, but not require, States to develop appropriate internal systems to screen cases and to coordinate inspection and case planning across State agencies and departments and within States at various local divisions.

EPA will request, however, that each State or locality with responsibilities for more than one environmental program have an internal system to coordinate planning with EPA on a multi-media basis and to facilitate discussion of individual cases, as needed. In the absence of such a mechanism, it will be very difficult for EPA to coordinate with the diverse State organizations that may be affected by any proposed multi-media priorities and approaches.

IV. Implementing Multi-Media Enforcement: Advance Notice and Consultation

Multi-media enforcement cannot be implemented without strong leadership, cooperation and support from both EPA and the States because of the structure of delegated or approved programs. Implementation of multi-media approaches will require closer state/federal working relationships, and decision-making procedures that permit deliberate choices to cooperate in targeting and executing enforcement actions at a given facility or group of facilities or, in some cases to consolidate the lead at one level of government. To facilitate communication and planning, each EPA Region will establish a point of contact for States on multi-media matters just as EPA will be requesting a single point of contact of its State counterparts for the same purposes.

(Discussion in this section presumes a continuation of the current mechanisms and criteria for establishing state and federal enforcement case leads as described in Section V below.)

A. Multi-Media Strategic Planning and Targeting

The process for multi-media strategic planning, beginning in Fiscal Year 1993, will ensure that States are directly involved in the formulation of national multi-media strategic priorities and are assured sufficient time to plan for their implementation. The purpose of strategic planning is to establish strategic priorities and subsequent implementation plans to better target inspections and enforcement actions on a multi-year basis on particular environmental, risk and/or compliance concerns. Each national program office now consults with States and Regions during the preparation of its Four-Year Strategic Plans, annual operating year and/or grant guidance. The multi-media process will utilize not only these established processes but similar processes with the Office of Enforcement.

The Office of Enforcement will solicit input from States, Regions and National Program Offices in the prior fiscal year regarding new multi-media priorities. EPA will review proposed national multi-media priorities with the States by working through the Steering Committee on the State/Federal Enforcement Relationship. These priorities will be communicated in general terms in the Enforcement Four-Year Strategic Plan and Operating Year Guidance, and more specifically in the State/EPA Enforcement Agreements Guidance for the following fiscal year. To limit competing priorities, multi-media geographic, pollutant and industry priorities will be restricted in number each year, and, where appropriate, will be multi-year priorities.

Regions and the individual States should be identifying any region or state-specific multi-media (or single-media) priorities derived from regional and/or state strategic planning. Subsequent to the selection of multi-media priorities, EPA Regions and their States will carry out any appropriate implementation planning, which may include not only traditional enforcement activities but also compliance promotion activities, coordinated training of state and federal personnel, and publicity to enhance compliance results.

B. Enforcement Cluster Planning

Presently, EPA and the States use enforcement clusters as a means of implementing national and state enforcement priorities within the single media programs. This approach will be useful to implementing national multi-media priorities as well. The purpose of an enforcement cluster is to package or group individual enforcement cases or filings, and/or publicity about the cases to gain the maximum deterrent message, economies of scale, and/or coordinated settlement provisions. Phasing filings or publicity within a well-defined time period is another way of implementing clusters.

EPA will encourage States to use clusters in multi-media enforcement. States will participate in planning and execution of national multi-media clusters. In most instances, States with the lead for a violation(s) or a case pertinent to the cluster will have the option of joining in a national enforcement cluster or not. Options for a State's action to be part of a cluster will include the following: pursuing its own enforcement action; referring a matter to EPA; cooperation on a case; etc.

EPA will provide States with the necessary time to decide whether and how to participate and to prepare their cases should they choose to participate in that manner. If States want to join in a planned national cluster, EPA will ask them to agree to the EPA schedule, and where appropriate, to accept common settlement goals. Where clusters are used to implement Regional multi-media priorities, Regions and States will work together in their planning and execution.

Where nationally managed or coordinated cases are appropriate as part of a multi-media cluster, EPA will be guided by the Policy Framework, Appendix B, "Nationally Managed and Coordinated Cases," (pages 1-5) as to how and when to involve States in the planning and execution of these cases.

C. Case Screening

Enforcement case-screening is a process to link the characteristics of the violator or the violation in a particular case with the right response from among alternative courses of action at an early stage in the case development process. EPA will encourage States to screen cases for their multi-media potential and the use of innovative enforcement tools.

On a case-specific basis, EPA Regions will be screening violators already subject to federal enforcement (i.e., violators that the State has asked EPA to pursue, violators for which the State has failed to take timely and appropriate action, violators who are part of a nationally managed case, as described in Section V below). Case screening will include multi-media enforcement potential, such as the potential for consolidation of outstanding violations, national patterns of noncompliance, and the desirability of multi-media settlement conditions including pollution prevention and environmental audit provisions.

1. Multi-Media Enforcement Cases

When the State and/or EPA identify benefits from a multi-media enforcement approach at a particular facility, they can decide either to undertake parallel but coordinated enforcement action of separate facets of the multi-media case or to consolidate the case at the federal or state level, where legally possible. Such decisions should be made as early as possible in the case, and if multi-media inspections are being conducted, at the planning stage.

3. Multi-Media Enforcement Settlement Conditions

When settlement conditions are broadened by EPA to address a violation(s) other than those that were the subject of the initial enforcement action and for which a State's program(s) has been delegated or approved, the State will be consulted on settlement decisions, but will be asked to formally comment on the settlement only if the State is a party to the litigation. (See Policy Framework, Appendix B, page 5.)

If the settlement of a federal case can be broadened to cover the concerns of a State's outstanding case, and EPA and the State decide that it is more efficient to close the State's action and address the problem(s) in the federal action, then EPA will ask the State to concur in that portion of the settlement. Similarly, if a State proposes to address an outstanding violation for which there is a federal lead in a proposed settlement, and the State and EPA decide that it is more efficient to close EPA's action, then the State will ask EPA to concur in that portion of the settlement.

D. Multi-Media Inspections

EPA will encourage States to use multi-media inspections where appropriate. Where EPA is planning multi-media inspections, EPA will follow the groundrules for advance notification and consultation on inspections in the Policy Framework (page 29). EPA will share in advance with the States lists of facilities for which multi-media inspections have been identified as having potential benefit, with the exception of those infrequent investigative inspections which would be jeopardized by this process.

EPA will invite States to join in multi-media inspections and/or to form the multi-media team with State inspectors covering the State's areas of delegation or approval. States which wish to conduct multi-media inspections involving EPA staff in areas which are not delegated should also list such facilities for consideration in the inspection planning process.

Where multi-media inspections are planned with joint federal and state participation, EPA and the States should establish a general plan in advance as to who will write the inspection report(s) and how decisions will be made on the enforcement response to any violations that are detected.

V. Multi-media Enforcement by EPA in Delegated or Approved States

Multi-media enforcement is not intended to alter the basic framework for allocating roles and responsibilities under EPA's enforcement programs that establish a primary state or local role in delegated or approved programs. However, if multi-media enforcement is to be developed as an effective component of EPA's and States' enforcement programs, some mutually agreed shifting of roles in individual cases may be needed.

A. Relationship of Multi-media Considerations to Existing Criteria for Direct EPA Enforcement in an Approved State

The Policy Framework sets forth several criteria under which EPA may take enforcement actions in a delegated or approved State. These criteria are discussed in the Policy Framework (pages 21-24) and elaborated in Appendix B, "Nationally Managed and Coordinated Cases," (pages 1-2), including the following:

1. State requests EPA enforcement;
2. State enforcement response is not timely and appropriate;
3. National precedents (legal or program); and
4. Violation of EPA order or consent decree.

Multi-media enforcement is not a new and distinct criterion for pursuing federal enforcement in delegated or approved States but might arise as noted in the examples below.

1. A State Request or Mutual Decision

The division of lead responsibility for resolving specific violations has been a dynamic process with EPA and States reviewing lists as to the progress of cases and which level of government is best able to handle the case. During these discussions, the advantages and disadvantages of pursuing a violation in a multi-media case or settlement shall be discussed. Where the State and EPA believe that a consolidated multi-media case is desirable, EPA may defer to the State, or the State to EPA, or cases may be coordinated in separate but parallel actions. All of these will be equally acceptable results.

2. If State Enforcement is not Timely and Appropriate

The timely and appropriate enforcement response criteria developed by each program are an important means of establishing a mutual commitment by EPA and the States to ensure that violations are adequately resolved in an expeditious manner by either level of government. The criteria help define when, following notice and consultation on the particular circumstances of a case, State or Federal enforcement may be appropriate.

EPA may be more likely to exercise its right to pursue its own enforcement action where EPA determines the benefits of consolidating a multi-media case outweigh awaiting further State action in its single-medium case (i.e. beyond target time frames pursuant to program-specific timely and appropriate enforcement response guidance). Consideration of the appropriateness of a potential State remedy may take into account the need to address recurring or repeat patterns of violation, particularly those affecting performance in several States and Regions.

B. Direct Federal Action and Continued Support for Strong State Programs

Where EPA is pursuing a multi-media case which includes counts for which the State has a delegated or approved program, EPA should be sensitive to supporting a State's enforcement program. The Policy Framework (pages 24-25) identifies the following actions that EPA can take for this purpose: 1) taking joint State/EPA enforcement action; 2) using State inspection or other data and witnesses; 3) involving States in creative settlements and in case development; 4) arranging for division of penalties with state and local governments consistent with the Policy Framework, Appendix C; 5) issuing joint press releases and sharing credit with the State; and 6) keeping States continually apprised of events and reasons for federal actions.

It is particularly important that if the lead responsibility shifts from the State to EPA for enforcement response in order to consolidate a multi-media case that EPA should promote the case as a cooperative venture and should share appropriate credit for the case with its State partner who willingly acceded control of the case. Credit would include the sharing of publicity about the case being a cooperative effort with the State and sharing of penalties with the State where appropriate.

As noted in Section III.B.2.a. above, EPA should establish case-specific milestones for reporting progress to the State. Where the State has already invested put resources in developing the case, and/or desires to be a more active partner, the State and EPA should agree up front on the level of participation and should arrange for any appropriate penalty sharing at that time, consistent with the Policy Framework, Appendix C.

VI. State and Federal Reporting of Accomplishments

To the extent possible, multi-media enforcement goals should be mutual and developed cooperatively. EPA and the States will seek reporting of common measures of success to Congress and the public to better convey the importance of the state/federal partnership in enforcement in the area of multi-media enforcement. At this time, there are new federal reporting requirements that result from the multi-media enforcement goal. Any such multi-media enforcement measures developed by EPA for its own use may be applicable to States at a later date, but only after due consideration of the value of such measures in oversight and any reporting burdens they may impose. EPA will work with its State counterparts to evaluate whether these measures can adequately capture success in multi-media enforcement.

VII. Enforcement Agreements Process

In the Enforcement Agreements process, Regions and States are encouraged to supplement, or to develop separate multi-media agreements where these may be needed to articulate roles, responsibilities and relationships beyond those set forth in program-specific agreements. Individual Regions and States may not have used a multi-media format for their State/EPA Enforcement Agreements or for their annual updates. Regions relying

upon single program agreements or single program annual updating process should explicitly discuss with the States whether there is a need for multi-media agreements and are specifically encouraged to develop separate multi-media agreements where these may be needed to articulate roles, responsibilities and relationships beyond those set forth in program-specific agreements.

Agreements should spell out protocols for coordination and communication on multi-media enforcement issues as a multi-year process. On an annual basis, the agreements should detail priorities, and plans for conducting multi-media inspections and coordinated enforcement clusters as appropriate.