Susan Parker Bodine, Assistant Administrator
Office of Enforcement and Compliance Assurance
Environmental Protection Agency
Washington, DC
Filed online at: www.regulations.gov

March 7, 2019

Re: National Compliance Initiatives - FYs 2020-2023; Docket No. EPA-HQ-OECA-2018-0843

Dear Ms. Bodine,

Public Employees for Environmental Responsibility (PEER) is a non-profit group that works nationwide with government scientists, land managers, law enforcement agents, field specialists and other leading environmental professionals. Many PEER members are current and former enforcement specialists within the U.S. Environmental Protection Agency (EPA). Guided by their involvement, we have a long history of analyzing and "watchdogging" EPA enforcement efforts.

We are pleased to submit this comment on the agency's proposed National Compliance Initiatives (NCIs) to be undertaken in fiscal years 2020-2023. Prior to making comments on the specific components of the NCIs, we have three overview observations:

I. Deemphasis of Enforcement Undermines Compliance

The decision to rename National Enforcement Initiatives to Compliance Initiatives denotes a myopic notion about the centrality of enforcement. It is the credible threat of enforcement that helps motivate corporate compliance.

Effective enforcement needs to go beyond just "fixing the problem" (i.e., achieving compliance). Otherwise, unscrupulous violators can routinely violate pollution laws knowing that EPA only acts to ensure that violators cease violating until they are caught again, effectively a "no harm no foul" approach to enforcement.

Disincentives are needed to prevent repeat violations. Economically, the fair way is to ensure that violators disgorge all the increased revenues or profits they received from their illegal behavior. For a company, an auto maker for example, that could be profits that came as a result of increased market share that the company gained because its cars were cheaper than its competitors due to not complying with pollution prevention regulations under the Clean Air Act. When they are caught they should be compelled to pay back at least the full value of their illicit benefits.

EPA has sophisticated "Penalty and Financial Models" to account for illicit gains under these rubrics: General Civil Enforcement Penalty Policies, Penalty Inflation Rules and Penalty Policy Amendments.[1]

The proposed NCIs admit this problem in discussing Hazardous Air Pollutants (HAP) when it states that "monitoring shows that facilities will often emit more HAP emissions than they actually report." However, there is no mention that EPA has taken enforcement actions for this misreporting. Without enforcement, these industries have no incentive to accurately report their emissions as required. Nor is there any reference to the profits gained from illegal emissions and avoiding the costs of proper emissions control.

In short, EPA must restore enforcement as the bedrock for achieving compliance assurance. This will not only help deter future violations, but it will ensure that companies that violate the law do not have an economic advantage over those companies that comply with the law.

II. NCIs Ignore the Collapse of EPA Enforcement Program

Like the proverbial elephant in the room that is not discussed, EPA's proposal does not mention the fact that its enforcement efforts are in a sharp and steady decline in virtually all major enforcement parameters. For example, as PEER and several other NGOs, and Members of Congress now have documented, in 2018 EPA generated fewer new criminal enforcement case referrals for prosecution than for any year since 1988.[2] EPA is also exhibiting similar and disturbingly deep drop-offs in the agency's civil and administrative enforcement efforts, as well.[3]

The nation's bedrock environmental laws, such as the Clean Water Act; Safe Drinking Water Act; Clean Air Act; Federal Insecticide, Fungicide, and Rodenticide Act; and Resource Conservation and Recovery Act, have close to no beneficial effects if they are not rigorously enforced.[4]

The agency should "return to basics" and devote far more resources, personnel, and attention to enforcement efforts targeted to protect the public and the environment from harm. In addition, EPA should begin to publicly and consistently display and analyze key metrics of enforcement, such as criminal referrals made, civil suits filed, the number of inspections, the total enforcement personnel by category, as well as key outcome data. This will facilitate apples-to-apples comparisons over time so that the rigor of agency enforcement efforts can be publicly monitored.

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[1] See: https://www.epa.gov/enforcement/enforcement-policy-guidance-publications Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action; and https://www.epa.gov/enforcement/guide-calculating-environmental-benefits-epa-enforcement-cases .

[2] : https://www.peer.org/news/press-releases/criminal-enforcemencollapse-at-epa.html .

[3] https://www.peer.org/news/press-releases/epa-pollution-enforcement-shrivels-across-the-board.html

[4] See new PEER's new web-center *Pollution Enforcement Legal Resource Center*, at: https://www.peer.org/campaigns/eco-enforcement/pollution-enforcement/

Without a recommitment to enforcement, the agency's compliance efforts will be merely rhetorical.

III. NCIs Are Hopelessly Vague

The total of 12 pages outlining the proposed NCIs fail to explain the significance of being a designated initiative. There is no discussion of resources devoted, protocols to be implemented, or descriptions of any concrete step that will be taken for a compliance initiative.

Given the protean and evanescent nature of these initiatives, EPA should explain why these specific initiatives are the only ones needed to meet the agency's strategic plan.

In addition to these general issues, we raise these specific concerns with the proposed NCIs for the next four fiscal years:

1. Elimination of the CAFO Initiative Not Justified

From a footnote in the proposed NCIs we learn that a major initiative in the FY2017-19 cycle disappeared: "The Initiative to 'Prevent Animal Waste from Contaminating Surface and Ground Water' was moved to the core program" via a memo issued in August 2018.

The rationale behind this deemphasis is not included in the proposed NCIs. However, it should be underscored that Concentrated Animal Feeding Operations (CAFOs) remain a huge clean water challenge – a challenge that EPA is still failing to address.

CAFO spills and overflows create surface runoff of contaminants. Stormwater then mixes with manure wastes and flows offsite. In some areas of the country, CAFOs are the principal source of water pollution. In 2018, PEER analyzed 31 CAFO permits that the Florida Department of Environmental Protection (DEP) had issued in the seven-county area south of Orlando, with most in Okeechobee County directly to the north of Lake Okeechobee. These facilities hold approximately 90,000 dairy cows producing nearly two billion pounds of manure per year and more than 10 million gallons of wastewater each day carrying more than 20 million pounds of nitrogen and 7.5 million pounds of phosphorous available for discharge into the environment.[5]

Unfortunately, the DEP permit system (which EPA oversees) merely asks CAFOs to follow management practices and to report the amount of waste applied but does not look at where the wastes ultimately go. In addition, the state permits –

- Allow CAFOs to build and operate waste management systems that fail in major storm events, e.g. hurricanes and floods, knowing that they will not be held liable for pollution during these events;

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[5] https://www.peer.org/news/press-releases/south-florida-awash-in-cow-manure.html

- Contain few safeguards against groundwater contamination. None of the permits set specific limits on the amount of fecal coliform, nitrogen, phosphorus, ortho phosphate, or turbidity that may enter the groundwater; and

- Rely on CAFO best management practices that are often "suggested" rather than mandatory. These BMPs are typically written by industry consultants and consequently words such as "should" are frequently used, leaving pollution control as largely aspirational in nature. In Florida, the permit conditions simply incorporate these same unenforceable "suggestions" into the permits, thus resulting in permit conditions that are typically unenforceable.

Nor do the Florida CAFO permits tell the DEP, or the public, the volume of contaminates each facility is discharging each month. Significantly, there have been only 5 enforcement actions taken by the DEP against these facilities and all but one of them were over a decade old.

PEER maintains that the cumulative effects of this ongoing, unabated pollution burden on Florida's waters is now taking an undeniable toll, prompting state of emergency declarations. With the severity of storms increasing due to climate change we can only expect this problem to worsen. This, in turn, argues for retaining CAFO water pollution as an EPA enforcement/compliance priority.

2. Hazardous Air Pollution (HAP) Strategy Dubious

In describing this initiative, EPA states that "facilities still often emit more HAP emissions than they actually report." It does not pledge more (or any) enforcement actions to remedy these presumptively willful and serious pollution violations.

Instead, EPA states that application of "EPA expertise will help improve compliance and facilitate a timely return to compliance when noncompliance is found." This expertise is being provided to facilities that, in most cases, already draw upon the expertise of their own environmental consultants and attorneys and thus should already have the necessary tools at their disposal to enable them to comply with their legal requirements.

In other words, misreporting violators are rewarded by receiving tax-subsidized free technical assistance from EPA. This scenario suggests that the subject industries have no incentive to accurately report their emissions and that these reporting violations carry no negative consequences for them.

3. Hazardous Waste Facility Monitoring Actions Required by Law

In the initiative for "Reducing Toxic Air Emissions from Hazardous Waste Facilities", the proposed NCIs state: "EPA has found that air emission violations associated with the improper

management of hazardous waste remain widespread." Yet the proposal does not lay out what strategies will be employed to reduce the number and amount of violations.

The proposed NCIs also concede that: "The Resource Conservation and Recovery Act requires effective monitoring to identify and repair leaks from certain hazardous waste storage tanks, containers, pipes, valves, and other equipment." (Emphasis added)

This, therefore, is a mandatory duty, not a discretionary initiative. This monitoring should be a core function with an added enforcement emphasis whenever violations are found.

4. Priority for Reducing Chemical Facility Risks Belied by EPA Action

It is difficult to take EPA seriously in its claim that it prioritizes the reduction of risks from chemical facility accidents, given its current regulatory agenda.

In 2016, the agency adopted revisions to its Accidental Release Prevention Regulations under the Clean Air Act. These changes were modest and limited in scope. For example, they did not cover fertilizer plants handling ammonium nitrate (even though the impetus was an Executive Order from President Obama following the catastrophic explosion at the fertilizer plant in West, Texas). The regulations also exempt utilities and water treatment facilities and most manufacturers that use covered hazardous substances from its safer technology requirements.

The regulation's requirements for petroleum refineries and chemical and paper plants are salutary but –

- Rely heavily on unfunded local voluntary committees for implementation;
- Industry analyses of inherently safer technology that prevent accidents are kept closeted and thus may remain academic exercises; and
- EPA has devoted pathetically little enforcement muscle to enforce even the current requirements.

A key component is the first federal recognition of the potential for inherently safer technology and practices to avert chemical explosions and other disasters. Although the revisions require certain facilities to draw up safer alternatives, they do not require the facilities actually adopt those improvements.[6]

These very modest steps were the first major change to EPA's Risk Management Program in 20 years. Yet, this administration has acted to delay implementation of these regulations and is

[6] For a fuller discussion, see https://www.peer.org/news/press-releases/obamas-timid-chemical-safety-legacy.html

considered actions to repeal key components. These actions are at odds with the NCIs retention of this initiative as a priority.

5. Modification of Industrial Water Pollution Initiative Questionable

While PEER supports the proposed transition to and strengthening of the NCI labelled as National Pollutant Discharge Elimination System (NPDES) Significant Non-Compliance (SNC) Reduction, PEER is dismayed at the state of Clean Water Act (CWA) enforcement and the high number of facilities in SNC.

In Florida, for example, PEER has documented at least ten wastewater discharge facilities that have violated the terms of their NPDES permits.[7] PEER analyzed the Quarterly Noncompliance Reports from 1999 through 2013 for all major wastewater dischargers (more than a million gallons per day) submitted by the Florida DEP to EPA and found:

- As many as 46 facilities have been in noncompliance for more than 7 years with some for more than a decade. While many of these chronic violators are municipal sewage treatment plants, others are corporate operations of DuPont, Georgia-Pacific, Tropicana and Coronet Industries;

- Despite a requirement that there must be prompt enforcement action against facilities on the noncompliance lists, 113 facilities have been listed at least 11 times in the past 14 years for effluent violations without any record of an enforcement action taken. Besides municipalities this list includes nuclear power plants, phosphate mines, fertilizer and chemical factories; and

- Enforcement actions are taken in less than half (49%) of instances in which violations are reported; however even those numbers are inflated, with the same enforcement action reported multiple times. Moreover, many of the enforcement actions are slaps on the wrists consisting of an agreement to resume or increase reporting of discharges with no payment of any penalties.

This is a joint federal-state regulatory breakdown, as EPA is supposed to ensure that the DEP takes timely enforcement action against 95% of the facilities in "Significant Noncompliance." If the state does not act, EPA has the authority to intervene and take enforcement itself. The official records reveal, however, that neither the state nor federal agency comes anywhere close to meeting these legal obligations.

[7] See *Lake O's Gateway City Spewing Illegal Wastewater,* at: https://www.peer.org/news/press-releases/lake-o%E2%80%99s-gateway-city-spewing-illegal-wastewater.html; for addition violating water treatment plants, see link at bottom thereof, "See other major wastewater violators", and the listing of other plants at *Mega-Pollution Violations Befoul St. Johns River*, at: https://www.peer.org/news/press-releases/mega-pollution-violations-befoul-st.-johns-river.html

Perhaps even more disturbingly, this permit system is premised upon prompt and accurate discharge self-reporting by the facilities themselves. Yet, more than half (58%) of all violations consist of reporting violations with more than a quarter (29%) consisting of effluent violations in excess of permit limits.[8]

Without accurate discharge reports we have no idea what and how many chemicals are being pumped into Florida waters. Florida DEP does not even regard failure to submit reports as noncompliance, categorizing them as only technical "paperwork" violations.

As PEER has argued in its many "overfile" request letters to EPA, it is long past time for the federal government to step in and ensure CWA compliance when the states have failed. The agency should publicly announce its intent to do overfile enforcement against any wastewater discharger that has a pattern of violations, such as in Florida.

One result of the many violations in Florida was a boost to the extremely noxious red-tide pollution that devastated waterways and shorelines there for much of 2018, killing wildlife, destroying beach recreation and causing hundreds of millions of dollars in economic damages. Yet, the polluter did not pay, contrary to EPA's enforcement policies.

6. Declaration of Victory over Sewage and Stormwater Overflows Premature

Sanitary Sewer Overflows (SSO) from separate sanitary sewer systems are prevalent in communities throughout the U.S. especially because of collection system deterioration due to aging and notable changes in precipitation patterns, including the prevalence of higher intensity rainfall. PEER believes that the assertion that EPA has "largely achieved" compliance in this area does not withstand scrutiny.

EPA's statistics on past and expected future compliance rates appear vastly over-optimistic. For example, in many of the documented Florida CWA violations the problem is contaminated stormwater, most notably and recently in Tampa.[9] There have been 288 sanitary sewer overflows in Tampa since January of 2012 and 95 overflows just since its latest permit was issued in 2015. However, the Florida DEP has taken no action on these violations even though raw sewage contains disease-causing pathogens that imperil anyone exposed.

Many other states are in comparable situations, with more violations expected due to EPA's overall lessening of its CWA enforcement efforts. Further, with increased hurricanes and flooding associated with climate change (another major threat for which EPA must step up, not down), even more harmful discharges are foreseeable. The agency should increase, not lessen, its vigilance to protect human health and the environment from this common scourge.

[8] See https://www.peer.org/news/press-releases/major-florida-wastewater-violators-go-unpunished.html
[9] See https://www.peer.org/news/press-releases/tampa-sewage-meltdown-early-eco-test-for-desantis.html)

It appears that EPA has based its evaluation of success by considering only enforcement actions against large sewer systems with daily flows of 10 MGD or more. Yet, EPA does not identify the total population or the extent in river miles or acres impacted by SSO discharges from these large systems. Nor does EPA offer information about the status of SSO enforcement actions for smaller systems.

It would be more informative for EPA to provide the context of the entire universes of receiving waters impacted by CSOs, SSOs and illicit discharges. EPA's self-assessment for success should be based on receiving water improvements (or pending improvements) of all impacted waters and not on unclear percentages of EAs for arbitrary subgroups that do not clearly define remaining work to be done to eliminate raw sewage from surface waters.

EPA indicates that approximately 80% of the US population falls within the jurisdiction of Phase I and II MS4 permits. However, the assessment of success of this NCI only accounted for the Phase I MS4s with no mention of Phase II MS4s. According to EPA's website, there are 855 Phase I MS4s covered under 250 permits while there are 6695 Phase II MS4s. EPA does not identify the respective populations covered by the Phase I and II MS4 permits programs nor does it disclose the status of EPA and state actions for adequately addressing illicit discharges of sanitary sewage in Phase II MS4 systems. Nor do we know the extent of surface waters impacted by illicit discharges from Phase I MS4 discharges versus Phase II MS4 discharges.

Before declaring victory, EPA should also disclose what the percentage of receiving water river miles and/or acres that are impacted by CSO discharges from both small and large systems are now fully addressed by enforcement actions and in compliance with applicable water quality standards. Further, EPA should indicate whether the enforcement actions cited have resulted in complete elimination of discharges of raw sewage or do they represent phased or partial actions that begin the process of addressing raw sewage discharges. We are aware that phased enforcement actions have been taken to allow permittees to begin work on a portion of the total problem while putting additional work on future phases that require additional enforcement reviews, participation, negotiations and possibly actions. As such, more enforcement activity will be needed to fully address the raw sewage discharge problems in these cases and it should not be implied that all enforcement actions taken will eliminate raw sewage discharges.

In addition, it is our understanding that an enforcement action requiring the development of a plan to abate CSOs, and SSOs for example does not necessarily include the requirements to implement the plan as there is the critical step of EPA approving the level of control and the implementation schedule. The assessment of success of this NCI should only consider those enforcement actions that will result in complete elimination of raw sewage discharges.

7. **New Drinking Water Initiative Incomplete**

PEER supports the proposed new NCI to increase compliance with drinking water standards. There is a clear need for much greater active enforcement in this long-neglected area.

In Florida, for example, more than one in eight (nearly 700 of the roughly 5,300) public water systems is afflicted with pollution-related violations, many involving unsafe fecal or chemical contamination. However, enforcement is lacking. Despite nearly 2,000 individual safe drinking water violations, including 295 violations involving exceedances of maximum contamination limits for things such as total coliform, chemicals, radionuclides, and disinfection byproducts Florida DEP opened only five enforcement cases in 2015 and assessed relatively small fines in only two.

Both the number of enforcement cases and the amount of penalties assessed has plummeted since 2010, with the number of assessments in potable water cases dropping from 141 to only 2 (a 98% nosedive) and the total amount of fines assessed plunging from roughly a quarter-million dollars to a mere $12,000 (a more than 95% falloff) in 2015.[10]

Yet, EPA is making this problem worse. It authorized Florida to increase the level of carcinogens, such as benzene (from 1.18 ppb [parts per billion] to 2 ppb – the federal standard is 1.14 ppb), allowed in Florida's surface waters. This makes EPA complicit in increasing both organic and inorganic compounds making their way into Florida's potable water supply.

It should be highlighted, however, that the current biggest threat to America's drinking water is EPA itself and its proposals to dramatically reduce the scope of the Clean Water Act by shrinking the definition of Waters of the United States (WOTUS). EPA's plan to repeal the Obama Clean Water Rule will threaten the source for drinking water to one in three Americans. EPA's own figures show that 36% of the U.S. population, 117,447,743 people, drink water from public drinking water systems using surface water that relies on intermittent, ephemeral and headwater streams that would lose their legal protection against pollution, dredging, or filling.[11]

EPA's proposed redefinition of WOTUS would be even more deleterious. This radical move It will lead to elimination of jurisdiction over wetlands and waters to the tune of 60% or more – which will greatly exacerbate the drinking water problems, because the ephemeral streams and wetlands that will no longer be jurisdictional are critical to purifying drinking water.[12]

Beyond enforcing existing standards, EPA also needs to address the growing tide of unregulated contaminants found in the drinking water supplies of millions of Americans. Chemicals from over-the-counter and prescription medications and dietary supplements – most of which are not metabolized by the human body and therefore are excreted as waste – together with hormones, cleaning agents and other products are not screened in water treatment, and thus end up being

[10] See https://www.peer.org/news/press-releases/florida%E2%80%99s-drinking-problem-%E2%80%93-unsafe-water.html
[11] See https://www.peer.org/news/press-releases/drinking-water-for-third-of-u.s.-in-legal-tug-of-war.html
[12] https://www.peer.org/news/press-releases/trump-clean-water-rollback-threatens-u.s.-water-supply.html

discharged into rivers and lakes. They eventually reach our drinking water supplies. Many of these chemicals are also endocrine-disrupting compounds (EDCs) that either block or mimic natural hormones, thereby disrupting normal functioning of organs.

In 1996, the U.S. Congress directed EPA to screen chemicals for hormonal effects on humans in the Food Quality Protection Act. During the intervening 23 years, EPA has done remarkably little, despite mounting evidence that thousands of chemical compounds are a spreading presence in drinking water:

- EPA is not listing known EDCs on its Contaminant Candidate List of priority contaminants which are anticipated to occur in public water systems. Even if EDCs made this list, however, Contaminant Candidates are still not regulated under federal drinking water regulations; and
- EPA has repeatedly missed statutory deadlines to begin testing and screening for EDCs.[13]

In regard to these emerging pollutants, EPA has been missing in action when it comes to protecting America's drinking water.

Similarly, EPA has yet to issue binding standards for the per-and polyfluoroalkyl substances (PFAS), synthetic compounds that have been linked to serious health problems. EPA's steps have been too slow and delayed. Many millions of Americans, most commonly those residing on or near military facilities, are exposed to harmful levels in their water supplies. The agency must expedite its identification of polluted sites. EPA should enact binding standards for PFAS and related chemical variants in drinking water (PFOA and PFOS and others) and then enforce them promptly and decisively to remedy this cascading clean water calamity.

8. New Lead Initiative Lacks Substance

EPA lays out this new initiative in a total of two sentences, providing no details on what actions will be undertaken. In addition, EPA has shied away from making a meaningful commitment to protecting children and pregnant women from exposure to lead dust.

In 2018, EPA issued new national enforcement guidance designed to help prevent exposure of children and pregnant women to lead dust during repairs or renovations in older housing, a primary cause of childhood lead poisoning. The actions came in response to a whistleblower disclosure from a now-retired EPA employee represented by PEER.[14]

While serving as a Lead Advisor at EPA's Southeastern Regional Office in Atlanta, Elizabeth Wilde reported inadequate and improper agency inspections of older homes, day-care centers, and other child-occupied buildings. The agency often failed to identify which inspected units

[13] See https://www.peer.org/news/press-releases/epa-dropped-ball-on-pharmaceuticals-in-drinking-water.html
[14] See https://www.peer.org/news/press-releases/epa-promises-steps-to-prevent-child-lead-dust-exposure.html

were child-occupied, allowed un-credentialed, poorly trained staff to conduct inspections, entered false inspection reports, and compromised enforcement by not collecting evidence or keeping files intact, among other problems.

PEER filed her disclosure with the Office of Special Counsel (OSC) on April 27, 2016. Nearly a year later, on April 5, 2017, the Special Counsel directed EPA to answer her charges within 60 days. After receiving extensions, EPA ultimately responded in December 2017. Under the federal whistleblower law, OSC invited Ms. Wilde to comment on the agency response. Her comments triggered an additional EPA response in February 2018. These first two responses primarily dealt with EPA promising improvements in keeping inspector credentialing and training current and maintaining enforcement files.

Ms. Wilde and PEER kept pressing EPA to accept an affirmative responsibility for ascertaining the presence of pregnant women and children. In a final response on March 19, 2018, EPA –

- Promised to "issue a national policy statement to all ten EPA regions" stressing the need to identify "occupants who are pregnant women or children under the age of 18" in older buildings undergoing repairs or renovations;

- Adopted a "documentation checklist for inspectors to assure proper documentation of attempts to check for evidence of the presence of pregnant women and children"; and

- Posted online guidance for inspectors on the topic.

Notably, EPA balked at fully embracing its duty to protect pregnant women and children from exposure to lead dust. These latest EPA actions say only that official attempts to "confirm occupancy is a helpful practice." Until EPA takes mandatory steps to identify the presence of children and pregnant women in these at-risk situations the effects of this new compliance initiative will be open to question.

PEER appreciates your consideration of our comments. Please contact me if you have any questions.

Sincerely,

/s/

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