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

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

November 25, 2020

MEMORANDUM

SUBJECT: Implementation of Executive Order 13924

FROM: Susan Parker Bodine SUSAN BODINE Digitally signed by SUSAN BODINE Date: 2020.11.25 10:47:24 -05'00'

TO: Regional Administrators
Regional Enforcement and Compliance Assurance Division Directors
Regional Counsels
OECA Office Directors

On May 19, 2020, the President issued Executive Order 13924, Regulatory Relief to Support Economic Recovery, which directed federal agencies to provide regulatory relief to promote economic recovery in the wake of the COVID-19 outbreak. Section 6 of the Order addresses fairness in administrative enforcement and adjudication and directs agencies to "consider the principles of fairness in administrative enforcement … and revise their procedures and practices …" in light of ten specific principles. The Order also authorized the Director of the Office of Management and Budget (OMB) to issue memoranda providing guidance for implementing the order. OMB did so in a memorandum dated August 31, 2020 that identifies best practices for agency consideration.

The purpose of this memorandum is to ensure that the U.S. Environmental Protection Agency is implementing the directives in the Executive Order and following the best practices identified in OMB's implementation memorandum. EPA's consolidated rules of practice governing the administrative assessment of civil penalties are found at 40 C.F.R. Part 22. As explained below, those rules, as well as our statutes and implementing regulations, policies, and procedures already expressly address many of the directives and best practices in the Executive Order and OMB memorandum. This memorandum serves as a reminder of those existing requirements and provides further guidance to implement the Executive Order and OMB memorandum.[1]

A. Burden of Proof and the Rule of Lenity

Executive Order Section 6(a) states that the Government should bear the burden of proving an alleged violation of law and the subject of enforcement should not bear the burden of proving compliance.

[1] This memorandum is issued under the authority of the Assistant Administrator of the Office of Enforcement and Compliance Assurance (OECA) to provide the principal direction and review of civil enforcement activities under 40 C.F.R. 1.35. It does not create any rights or benefits enforceable against the United States.

OMB Implementation Memorandum paragraph (a)(1) states that agencies should review their procedures to ensure that members of the regulated public are not required to prove a negative to prevent liability and enforcement consequences in the absence of statutory standards requiring otherwise. This general principle should not be applied to prevent placing the burden of proof on the potential recipients of government benefits, including in benefit termination actions.

EPA implementation: This legal standard is stated in EPA's administrative practice rules at 40 C.F.R. 22.24: "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate."

OMB Implementation Memorandum paragraph (a)(2) states that agencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication by reading genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted party in enforcement.

EPA implementation: Consideration of statutory and regulatory ambiguities is inherent in the fact that the government bears the burdens of proof and persuasion. Accordingly, Enforcement and Compliance Assurance Division (ECAD) Directors and Regional Counsels shall consider whether a statute or regulation is ambiguous when initially deciding whether to pursue an action and shall consider providing compliance assistance in lieu of a penalty action in the case of genuine statutory or regulatory ambiguities. In addition, when considering penalties, federal environmental statutes and EPA policies generally require agency staff to consider good faith and "other factors as justice may require" as penalty factors.[2] Any consideration of good faith and justice must include consideration of regulatory ambiguities. The Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA) and the EPA General Counsel have directed Regional Counsels to consult with the Office of General Counsel (OGC) and OECA on novel and significant legal interpretation issues.[3] Finally, any briefing material for the OECA Assistant Administrator on a specific case must include information about regulatory ambiguity and other potential litigation risks to enable senior decisionmakers to weigh those factors.

B. Prompt and Fair Administrative Enforcement

Executive Order Section 6(b) requires that administrative enforcement should be prompt and fair. OMB Implementation Memorandum paragraph (b)(1) states that agencies should seek approval of an Officer of the United States, or if necessitated by good cause, his or her designee, before entering into a tolling agreement that would have the effect of extending the statute of limitations for an infraction.

EPA implementation: All administrative tolling agreements for enforcement actions initiated by the Regions must be signed by Regional Administrators, or Acting Regional Administrators, unless they determine there is good cause to designate that authority to the ECAD Director or the Regional Counsel. All administrative tolling agreements for enforcement actions initiated by Headquarters must be signed

[2] *See* CAA §§ 113(a)(4) & (e); CWA §§ 309(a)(5)(A), (d), and (g)(3); FIFRA § 14(a)(4); RCRA § 3008(a)(3)(E); SDWA § 1423(c)(4)(B); TSCA § 16)). EPA's corresponding Civil Penalty Policies reflect those statutory requirements (*see* CAA Stationary Source Civil Penalty Policy (10/25/1991); CWA Section 404 Settlement Penalty Policy (12/21/2001); FIFRA (12/2009); RCRA Civil Penalty Policy (2003); UIC Program Judicial and Administrative Order Settlement Penalty Policy (09/1993); Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy (09/10/1980)).

[3] Matthew Z. Leopold, General Counsel, and Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, *Regional/Headquarters Roles Regarding the Offices of Regional Counsel* (June 1, 2020).

by the OECA Assistant Administrator, or Acting Assistant Administrator, unless they determine there is good cause to designate that authority to an Office Director. In deciding whether to sign a tolling agreement, the Regional Administrator, OECA Assistant Administrator, or his or her designee should consider the length of time already expended in negotiations, the extent to which a tolling agreement would mutually benefit all parties, and the likelihood that a limited extension of time would facilitate a settlement.

OMB Implementation Memorandum paragraph (b)(2) states that agency regulations should apply limiting principles to the duration of investigations; regulations should require investigating staff to either recommend or bring an enforcement action, or instead cease the investigation within a defined time period after its commencement absent a showing of unusual circumstances that is endorsed by an Officer of the United States, or if necessitated by good cause, by his or her designee.

EPA implementation: Pursuant to OECA's *Interim Policy on Inspection Report Timeliness* (June 29, 2018), 75% of inspection reports (reflecting all but the most complex reports) are to be provided to the facility within 70 days after the inspection. As stated in the policy, "EPA expects there will be prompt movement from finalizing of an inspection report to making a determination of compliance and a decision about whether to pursue enforcement." This 70-day timeline is a performance metric that is monitored by senior managers on a monthly basis.

To ensure that enforcement decisions are made in a timely manner, ECAD Directors must track the timeliness of regulatory investigations. Enforcement staff must brief the Regional Administrator (for regional cases) or the OECA Assistant Administrator (for Headquarters cases) on investigations that are not completed within two years and recommend either bringing an enforcement action, ceasing the investigation, or proposing a schedule that is not longer than reasonably necessary to complete the investigation to be approved by such officials. The length of such a schedule shall be based on factors such as the complexity of the matter, precedential nature, extent of cooperation from the party or parties involved, existence of a parallel criminal investigation, or other good cause.

OMB Implementation Memorandum paragraph (b)(3) states that if a party has been informed by an agency that it is under investigation, the agency should inform the party when the investigation is closed and, when the agency has made no finding of violation, so state.

EPA implementation: The *Interim Policy on Inspection Report Timeliness* states that: "EPA expects there will be prompt movement from finalizing of an inspection report to making a determination of compliance and a decision about whether to pursue enforcement."

Upon making an agency determination that no violations were identified as a result of an investigation and closing an investigation, EPA enforcement staff must promptly notify the investigated facility.[4]

[4] This direction is consistent with and does not supersede the agency's 1984 *Policy Against "No Action" Assurances*, which prohibits providing definitive assurances outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement. This direction requires notice that an investigation is closed, and when appropriate, that the agency did not identify any violation. It does not suggest a representation that the agency will not proceed with enforcement where a violation is identified. The caveats described in this direction also reserve the agency's right to proceed with enforcement in the event that additional facts or circumstances come to light. Enforcement staff should consult with counsel on the wording of any notification issued pursuant to this memorandum.

OMB Implementation Memorandum paragraph (b)(4) states that agencies should consider and appropriately adopt estoppel and res judicata principles to eliminate multiple enforcement actions for a single body of operative facts. Simply put, an agency should have only one bite at the apple to investigate and seek enforcement against a regulated entity for a static factual predicate that is not a continuing or expanding violation.

EPA implementation: Under EPA's rules of administrative practice the payment of a penalty resolves liability for the facts alleged in a complaint. *See* 40 C.F.R. 22.18(c) ("Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint."). EPA interprets this regulation to apply both estoppel and res judicata to EPA's administrative enforcement actions.

EPA enforcement staff are directed to provide an opportunity to confer before taking any action with respect to a particular person that has legal consequence for that person as provided in the memorandum dated September 18, 2020 from the OECA Assistant Administrator and the General Counsel.[5] In doing so, EPA enforcement personnel should make the regulated party aware of all allegations arising from a single set of facts. It can be appropriate to take separate actions under separate authorities if some claims may be resolved more quickly and some take a longer period of time to resolve due to the complexity of the injunctive relief or negotiations over an appropriate penalty. In addition, it can be appropriate to resolve some violations arising from a single incident administratively while other violations are referred to the Department of Justice. Finally, it may be appropriate for EPA enforcement personnel to take multiple actions against the same Respondent for different statutory or regulatory violations arising from multiple incidents even if those violations occurred close in time.

OMB Implementation Memorandum paragraph (b)(5) states that agency employees' performance metrics and compensation structures should incentivize excellence, accuracy, integrity, efficiency, and fairness in the application and execution of the law. Performance metrics should not detract from the aim of reaching fact-based, unbiased decisions with respect to all aspects of enforcement; employees should not be rewarded on any basis that incentivizes them to bring cases or seek penalties or settlements that are meritless or unwarranted.

EPA implementation: Performance metrics for EPA enforcement staff shall not include metrics for numbers of cases or amounts of penalties.

OMB Implementation Memorandum paragraph (b)(6) states that if they have not done so already, agencies must publish a rule of agency procedure governing civil administrative inspections. *See* Executive Order 13892 Section 7.

EPA implementation: EPA enforcement staff must follow EPA's On-Site Civil Inspection Procedures Rule, 85 Fed. Reg. 12,224 (Mar. 2, 2020).

C. Independent Adjudication

Executive Order Section 6(c) requires that administrative adjudicators should operate independently of enforcement staff on matters.

[5] Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, and Matthew Z. Leopold, General Counsel, *Implementation of Executive Order 13892 Section 6* (Sept. 18, 2020)

OMB Implementation Memorandum paragraph (c)(1) states that agency adjudicators should not engage in ex parte communications with, and should operate independently from, investigators and enforcement staff, as the Administrative Procedure Act requires for formal adjudications under 5 U.S.C. §§ 554(d) and 557(d). Agency line adjudicators should not engage in ex parte communications with, and should operate independently from, administrative appellate entities. Agencies should develop reporting and disclosure structures for violations of such requirements and should establish command structures for these offices that are independent of each other.

EPA implementation: EPA regulations incorporate Administrative Procedure Act standards for adjudicator independence, as well as prohibitions on ex parte communications. 40 C.F.R. 22.8 prohibits ex parte communications ("At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board (EAB), the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person"). That rule further provides a disclosure structure for when such prohibition is violated ("Any ex parte memorandum or other communication addressed to the Administrator, the Regional Administrator, the EAB, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties.") EPA's regulations also provide safeguards to insulate Regional Judicial Officers (RJOs) from prosecutorial and investigative functions. *See* 40 C.F.R. 22.4. RJOs are prohibited from presiding over cases and parties that they investigated or prosecuted within the prior two years, and they are prohibited from prosecuting enforcement cases. The Environmental Appeals Board Judges function separate and apart from the Office of Administrative Law Judges and the Office of Enforcement and Compliance Assurance. *See* 40 C.F.R. §§ 1.25, 1.35, and 22.4.

OMB Implementation Memorandum paragraph (c)(2) states that agency Adjudicators' performance metrics and compensation structures should incentivize fact-based, unbiased adjudication decisions. Adjudicators should not be rewarded based on the penalties they award or in any other way that misaligns incentives.

EPA implementation: Administrative Law Judge (ALJ) compensation is set by Congress (5 U.S.C. § 5372) and ALJs are not entitled to recruitment, relocation, or retention incentives (5 U.S.C. §§ 5753 and 5754). The Office of Personnel Management has issued regulations governing ALJs (5 C.F.R. 930, subpart B), which include a prohibition on agencies rating an ALJ's job performance. *See* 5 C.F.R. 930.206.

EAB performance measures are based on the Board's Strategic Plan, which focuses on resolving disputed matters in a fair and just manner, and expeditiously, by issuing a reasoned, well-written decision. These performance measures do not reward EAB Judges based on the penalties they award.

D. Providing Exculpatory Evidence

Executive Order Section 6(d) requires that, consistent with any executive branch confidentiality interests, the Government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.

OMB Implementation Memorandum paragraph (d)(1) states that administrative agencies should conform their civil adjudicatory evidence disclosure practices to those described by the Supreme Court in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), *Giglio v. United States,* 405 U.S. 150, 154 (1972), and *Kyles v. Whitley,* 514 U.S. 419, 432-33 (1995). Agency officials should timely disclose exculpatory evidence to the target party of enforcement using similar procedures as those laid out in the *Justice Manual* of the U.S. Department of Justice (previously known as the *U.S. Attorney's Manual).* Likewise, agencies should automatically disclose evidence material to the mitigation of damages or penalties, consistent with *Brady,* 373 U.S. at 87.

EPA implementation: ECAD Directors and Regional Counsels shall affirmatively and timely produce exculpatory evidence, including evidence relevant to penalty mitigation, in the context of administrative proceedings.[6] Evidence is exculpatory when it is material to liability or penalty, i.e., where there is a reasonable probability that its effective use would result in either a finding that the Respondent is not liable, or would affect any penalty that is assessed. Any such evidence should be provided to a Respondent during the opportunity to confer provided under Section 6 of Executive Order 13892, if feasible, but not later than at the information exchange stage of an administrative proceeding under 40 C.F.R. 22.19, and it should be provided whether or not it is specifically requested by the Respondent. Enforcement personnel have a continuing obligation to provide exculpatory evidence to a Respondent promptly after it is discovered.[7]

There are certain types of information that would not be considered "exculpatory evidence" and that should not be disclosed. Disclosable exculpatory evidence consists of facts, not documentation or other information pertaining to internal agency deliberations or legal analysis about what might or might not constitute a violation, whether to seek a penalty, or what any such penalty might be. That kind of information goes beyond what might be a disclosable exculpatory fact and usually implicates one or more protections, such as Executive Privilege, the deliberative process exemption under the Freedom of Information Act, the Attorney-Client Privilege, and the Attorney Work Product Doctrine, and disclosure of such information presents subject matter waiver issues well beyond the disclosed information itself. As such, this direction should not be interpreted to require the disclosure of any privileged material. There are also limited exceptions to the general requirement to disclose exculpatory information, such as concerns about national security or information that the Agency is prohibited from disclosing by statute or regulation. Enforcement personnel should raise any such issues to the attention of supervisors, so that competing interests can be properly weighed.

E. Rules of Evidence

Executive Order Section 6(e) requires that all rules of evidence and procedure should be public, clear, and effective.

OMB Implementation Memorandum paragraph (e)(1) states that in addition to ensuring compliance with 5 U.S.C. § 556(d), agencies should adopt or amend regulations regarding evidence and adjudicatory procedure to eliminate any unfair prejudice, reduce undue delay, avoid

[6] As with the other directives in this memorandum, this directive applies only to administrative actions. Discovery in judicially-referred civil and criminal matters is subject to the Federal Rules of Civil Procedure and Criminal Procedure, and related caselaw, and would be undertaken by the Department of Justice.

[7] The Executive Order (Section 9(d)) is not intended to and does not create any right or benefit enforceable against the United States. This memorandum does not create any such right or benefit.

the needless presentation of cumulative evidence, and promote efficiency. Agencies should seek to reduce the use of hearsay evidence with limited exceptions *(Richardson v. Perales,* 402 U.S. 389 (1971)). They should generally require the application of the framework in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), to determine the veracity of scientific evidence. Based on the nature of the statute administered, agencies should consider incorporating other standards under the Federal Rules of Evidence, including Rule 403. Agencies should make their rules of evidence and procedure easily accessible on their websites.

EPA implementation: EPA's administrative practice rules include evidentiary and procedural rules. *See* 40 C.F.R. 22.22. The evidentiary rule instructs the Presiding Officer to admit evidence that is not "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." Where these terms are undefined in EPA's Consolidated Rules of Procedure (40 C.F.R. Part 22), EPA's administrative law judges look to the Federal Rules of Evidence and federal court practice for guidance. *See Euclid of Virginia, Inc*., 13 E.A.D. 616, 657 (EAB, 2008); *In the Matter of BP Products NA*, 2018 WL 2289288, *7 (May 8, 2018). EPA interprets 40 C.F.R. 22.22 to preclude hearsay evidence that is not reliable, consistent with *Richardson v. Perales*, 402 U.S. 389 (1971). *See In the Matter of Great Lakes Division of Nat'l Steel Corp.*, 1993 WL 302343 (Jul. 13, 1993) (explaining application of *Perales* standard to EPA administrative proceeding). The rule permits written testimony but allows for cross-examination, and it allows affidavits of witnesses who are "unavailable," again subject to the rule's general requirement that such evidence be material and reliable. EPA's administrative rules at section 22.19 require discovery of experts, evidence to be admitted, and a brief summary of their testimony. EPA interprets section 22.22 to preclude expert testimony that is unreliable, which would include consideration of the factors weighing on the scientific validity of expert testimony, as enumerated in analogous Federal Rule of Evidence 702 and *Daubert*. *See In the Matter of Liphatech,* 2011 WL 2626549 (EAB 2011) (allowing exclusion of unreliable testimony using *Daubert* factors). As with a bench trial in the context of judicial enforcement proceedings, ALJs assign appropriate weight to evidence.

OMB Implementation Memorandum paragraph (e)(2) states that in furtherance of the requirement contained in 5 U.S.C. § 555(b), agencies should explicitly authorize the representation of regulated parties by legal counsel and in appropriate cases, by qualified representatives. Agencies should also take steps to avoid disadvantaging parties who are not represented by counsel, including by writing rules of evidence and procedure in plain language.

EPA implementation: EPA's administrative practice rules at 40 C.F.R. 22.10 authorize representation "by counsel or other representative." EPA's website has links to the ALJ's Practice Manual and to English and Spanish versions ot the Citizen's Guide that provides an overview and procedural guide to proceedings before ALJs. The EAB has also published a *Citizen's Guide* that assists self-represented parties to understand and comply with agency procedures.

F. Proportionate, transparent, and Consistent Penalties

Executive Order Section 6(f) requires that penalties should be proportionate, transparent, and imposed in adherence to consistent standards and only as authorized by law.

OMB Implementation Memorandum paragraph (f)(1) states that agencies should establish policies of enforcement discretion that decline enforcement or the imposition of a penalty, as appropriate,

in the course of enforcement when the agency determines that the regulated party attempted in good faith to comply with the law.

EPA implementation: EPA enforcement officials shall take a good faith attempt to comply into account in administrative enforcement actions. Many of the statutes that EPA enforces require this (*see* CAA §§ 113(a)(4) & (e); CWA §§ 309(a)(5)(A), (d), and (g)(3); FIFRA § 14(a)(4); RCRA § 3008(a)(3)(E); SDWA § 1423(c)(4)(B); TSCA § 16)). EPA's corresponding Civil Penalty Policies also require it (*see* CAA Stationary Source Civil Penalty Policy (10/25/1991); CWA Section 404 Settlement Penalty Policy (12/21/2001); FIFRA (12/2009); RCRA Civil Penalty Policy (2003); UIC Program Judicial and Administrative Order Settlement Penalty Policy (09/1993); Guidelines for Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy (09/10/1980)). Finally, EPA's Audit Policies, listed below, provide for leniency where a party acted in good faith by finding, disclosing, and remedying environmental violations and by cooperating with the agency's investigation.

Further, the Presiding Officer in an administrative hearing is required to take these considerations into account in setting a penalty amount. *See* 40 C.F.R. 22.27(b) (requiring that the Presiding Officer "determine the amount of the recommended civil penalty in accordance with any penalty criteria set forth in the Act" and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act").

OMB Implementation Memorandum paragraph (f)(2) states that agencies should make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions.

EPA implementation: EPA publishes in the Federal Register National Compliance Initiatives that provide public notice of where the agency plans to focus enforcement and compliance resources. EPA's penalty policies are publicly available. EPA also issues compliance advisories to assist the regulated community to understand and comply with specific regulatory requirements, and enforcement alerts that highlight completed enforcement actions. Finally, EPA provides public access to Consent Agreements and Final Orders, and it publicizes enforcement actions and penalty information on its website, in press releases, and in other public statements.

OMB Implementation Memorandum paragraph (f)(3) states that agencies should adopt expiration dates and/or termination criteria for consent orders, consent decrees, and settlements that are proportionate to the violation of the law that is being remedied. Decade(s)-long settlement terms that are disproportionate to the violation(s) of law should be strongly disfavored absent a clear and convincing need for time to implement a remedy such as, e.g., infrastructure improvements or long-term remedial actions.

EPA implementation: Long-term actions are usually undertaken pursuant to a settlement of a civil judicial action, not through administrative actions, as required by many federal environmental statutes. However, there are some situations where administrative agreements require long-term actions. In those situations, ECAD Directors and Regional Counsels must include a termination date and/or termination criteria in administrative agreements that are proportionate to the violation of law being remedied. A duration longer than five years is strongly disfavored unless a longer time period is needed to undertake infrastructure improvements or long-term remedial actions.

OMB Implementation Memorandum paragraph (f)(4) states that consent orders, consent decrees, and settlements should not bar private parties from disseminating information about their cases.

EPA implementation: EPA's consent decrees and administrative consent orders are public, and private parties are not prohibited from disseminating information about their cases.

OMB Implementation Memorandum paragraph (f)(5) states that if they have not already done so, agencies should establish procedures to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties, including grace periods to cure minor violations without fear of penalty in compliance with Executive Order 13892 Section 9.

EPA implementation: EPA has an Audit Policy to encourage voluntary self-reporting, and there are added incentives for new owners to find, disclose, and remedy environmental violations at facilities they have recently acquired. *See, e.g., Incentives for Self-Policing, Discovery, Disclosure, Correction, and Presentation of Violations*, 65 Fed. Reg. 19,618 (Apr. 11, 2000); *Small Business Compliance Policy*, 65 Fed. Reg. 19,630 (Apr. 11, 2000); *Interim Approach to Applying the Audit Policy to New Owners*, 73 Fed. Reg. 44,991 (Aug. 1, 2008). Similar policies were adopted in late 2019/early 2020 to provide incentives for owners of oil and gas facilities to identify, report, and fix environmental violations.[8]

G. Prohibiting Government Coercion

Executive Order Section 6(g) requires that administrative enforcement should be free of improper Government coercion.

OMB Implementation Memorandum paragraph (g)(1) states that retaliatory or punitive motives, or the desire to compel capitulation, should not form the basis for an agency's selection of targets for investigations or enforcement actions, or other investigation and enforcement decisions such as, e.g., rulings on discovery.

EPA implementation: ECAD Directors and Regional Counsel shall not use enforcement as retaliation. EPA published a *Reaffirmation of the EPA's Policy and Practice Against Using Enforcement as Retaliation* on May 10, 2019.

OMB Implementation Memorandum paragraph (g)(2) states that to prevent the above motives from playing a role, agencies should not initiate additional investigations of a party after commencing an enforcement action against that party absent an internal showing of good cause that is reviewed by an Officer of the United States, except when the additional investigation is prompted by facts uncovered in the initial investigation.

EPA implementation: Under federal environmental laws, EPA is responsible for assuring compliance with multiple regulatory programs. Accordingly, limiting EPA's inspection authority to one program or one inspection is inconsistent with applicable law. However, in no case shall EPA's inspection authority be used to retaliate or to coerce any member of the regulated community.

[8] *See* https://www.epa.gov/enforcement/new-owner-clean-air-act-audit-program-oil-and-natural-gas-exploration-and-production; https://www.epa.gov/enforcement/existing-owner-clean-air-act-audit-program-oil-and-natural-gas-exploration-and.

H. Notice and Opportunity to Respond

Executive Order Section 6(h) requires that liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.

OMB Implementation Memorandum paragraph (h)(1) states that agencies should review their procedures for adjudication to ensure that liability is imposed only after notice and an opportunity to respond.

EPA implementation: EPA's rules of administrative practice at 40 C.F.R 22 provide for administrative procedures and an opportunity to be heard.

OMB Implementation Memorandum paragraph (h)(2) states that in any document initiating an investigation or enforcement action, an agency should include a citation to the statute and regulation asserted to be violated, and an explanation as to how the asserted conduct is prohibited by the cited statute and regulation, in addition to complying with Executive Order 13892 Section 3.

EPA implementation: Enforcement documents, such as Notices of Violations, must provide citations and an explanation of violations. In addition, pursuant to 40 C.F.R 22.14 a complaint initiating an enforcement action must reference the statute or regulation alleged to have been violated and contain a "concise statement of the factual basis for each violation alleged."

OMB Implementation Memorandum paragraph (h)(3) states that information or materials obtained in an administrative investigation or enforcement action should only be referred to the U.S. Department of Justice or other relevant criminal investigation or enforcement authority for criminal investigation in a manner that is consistent with the law and with best practices as established by policies, procedures, and guidelines regarding parallel investigations.

EPA implementation: Criminal referrals to the Department of Justice shall be made only where that is warranted by the facts of a particular matter and such a referral would be consistent with the policies of both EPA and the Department of Justice. ECAD Directors and Regional Counsels must follow EPA's *Parallel Proceedings Policy* (Sept. 24, 2007) to ensure that the lines between civil and criminal investigations are respected, and that evidence obtained in one type of investigation is not improperly communicated to or used by the other.[9]

I. No Surprises

Executive Order Section (6)(i) requires that administrative enforcement should be free of unfair surprise.

OMB Implementation Memorandum paragraph (i)(1) states that if they have not already done so, agencies should create procedures to make available pre-enforcement rulings as required by Executive Orders 13892 Section 9 and 13924 Section 5.

EPA implementation: ECAD Directors and Regional Counsels shall directly or working with program offices continue to provide pre-enforcement rulings to regulated parties, as described in EPA's June

[9] Available at https://www.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf.

2020 Report to the President Submitted under Section 9 of Executive Order 13892. These rulings include Applicability Determinations under the Clean Air Act, RCRA Online, and various hotlines, clearinghouses and web-based resources that EPA makes available to regulated entities. A list of 20 of the most well-known and frequently used EPA clearinghouses and hotlines is included as an attachment to EPA's June 2020 report.

OMB Implementation Memorandum paragraph (i)(2) states that agencies should ensure they have rules in place that provide parties with a reasonable period of time to respond to filings or charges brought by the agency. For example, agencies should provide parties with at least as much time to respond to an agency notice of charges as parties would have to respond to filings in civil complaints brought in federal court under the Federal Rules of Civil Procedure, unless the need for urgent action to protect the public warrants otherwise.

EPA implementation: EPA's rules of administrative practice at 40 C.F.R. 22.5 require the agency serve a Complaint on a Respondent. 40 C.F.R. 22.15 provides a Respondent with 30 days to respond to the Complaint. 40 C.F.R. 22.16 allows either party to file motions for relief, which would include an extension of time to respond to the Complaint where warranted.

J. Accountability

Executive Order Section 6(j) requires that agencies must be accountable for their administrative enforcement decisions.

OMB Implementation Memorandum paragraph (j)(1) states that in addition to the substantive mandates of 5 U.S.C. §§ 552(a)(l), 555(c) and other Administrative Procedure Act provisions, the initiation of investigations and enforcement actions should carry the structural protection of requiring approval of an agency official who is an Officer of the United States or, if necessitated by good cause, his or her designee. Such agency official should condition approval at the investigation and enforcement stages on the agency's compliance with Executive Order 13892 Sections 3 through 9 and Executive Order 13891 Sections 3 and 4 as they pertain to the matter, among other factors.

EPA implementation: EPA's enforcement authorities are subject to a series of delegations. Authorities are generally delegated from the Administrator to the Regional Administrators (Officers of the U.S.) or the Assistant Administrator for OECA (Officer of the U.S.). Certain authorities are further redelegated subject to specific limitations. EPA enforcement staff are directed to continue to address investigation categories and objectives in annual work plans (i.e., Regional Enforcement Plans, Regional-State Work Plans, National Enforcement Investigations Center Work Plans, National Compliance Initiative Implementation Plans) and brief the Regional Administrator or, as applicable, the OECA Assistant Administrator, on those work plans. For enforcement actions, Regional Counsels are directed to confer regularly with the Regional Administrator, OGC and OECA.[10]

OMB Implementation Memorandum paragraph (j)(2) states that agencies should identify, collect, and periodically make publicly available decisional quality and efficiency metrics regarding adjudications under bureaucratic, judicial, and split enforcement models (of adjudication), to include, e.g., the number of matters that have been pending with the agency over relevant time

[10] *Regional/Headquarters Roles Regarding the Offices of Regional Counsel*, *supra* note 3.

periods, the number of matters disposed by the agency annually, and data on the types of matters before and disposed of by the agency.

EPA implementation: EPA posts enforcement data through its public Enforcement and Compliance History Online (ECHO) database, including information on when inspections were conducted, and the date of any enforcement actions that resulted. Completed administrative settlements from the regions are automatically uploaded to the EPA administrative enforcement docket website, and the Office of Administrative Law Judges and Environmental Appeals Board also maintain publicly viewable dockets of current and past administrative cases. OECA's annual enforcement results also report on the numbers of cases initiated and completed.