

# How to Respond to an EPA or State Enforcement Action

Three tips from a former EPA executive and state environmental director

by Henry R. Darwin



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► Environmental laws and regulations are numerous and complicated. They include the Clean Air Act; the Clean Water Act; the Resource Conservation and Recovery Act; and the Comprehensive Environmental Response, Compensation, and Liability Act (aka Superfund) — to name just a few. These laws and associated regulations are enforced by the Environmental Protection Agency and the state agency equivalents acting on behalf of EPA. While the states typically handle most enforcement actions, EPA usually initiates enforcement for only the most significant of violations.

Given the volume and complexity of environmental laws and regulations, it should be no surprise that even the most well-run, well-intentioned companies at times find themselves in trouble with the state or EPA. When that happens, there's a right way and wrong way to react. While responding to an EPA or state enforcement action is unpleasant, taking these three steps will greatly improve the experience — and a company's bottom line.

- **Correct the problem immediately.** As soon as a company receives notice from EPA or state agency that they intend to pursue an enforcement action, it's in the company's best interest to take immediate corrective action. Remember, EPA's top priority is to minimize the impact of the problem on the environment by getting the company back into compliance as quickly as possible.

In addition, every day the violation continues puts the company at risk for higher fines. As an example, the maximum fines for violating the Clean Air Act are between \$102,638 to \$109,024 *per day per violation*. So, arguing with EPA about whether there was a violation instead of first taking corrective action is foolish, even if the company is certain that EPA or the state is wrong. There will be plenty of time later to argue whether there was, in fact, a violation.

- **Implement measures to prevent the violation from happening again.** After correcting the problem, it's imperative that a company perform a root cause analysis and institute measures to prevent the problem from recurring. Being a repeat customer of EPA or a state's enforcement program is a bad idea. While they may take mercy on first-time offenders, they don't take kindly to those who fail to get the message the first time.

Companies finding themselves twice in the proverbial crosshairs of EPA or the state can fully expect higher fines



the second go round. Alternatively, EPA or the state will likely consider a company's preventive measures when determining the fine. Even though the maximum fines set in state and federal law seem outrageous, EPA and the states have discretion when determining the fine they are willing to accept without going to court. Demonstrating that they won't have to worry about future violations will go a long way in convincing EPA that a large fine is unnecessary.

- **Acknowledge wrongdoing.** While correcting the problem and putting preventive measures in place require little humility, this last step is often the most difficult. Regardless, a bit of humble pie will go a long way toward reducing the fine EPA or the state will accept to resolve an enforcement action. A company subject to an enforcement action does not need to admit that they committed a violation, but acknowledging that a problem occurred is important.

When EPA or a state initiates an enforcement action, they will seek assurances that the company will think twice before creating the problem again. This is not only intended to protect public health and the environment, but also to protect their limited enforcement resources. EPA and the states assume that those companies who refuse to admit they've done anything wrong must be convinced that a repeat of the problem is a bad idea. If the agency is not convinced that the company has taken the problem seriously through its reaction to the enforcement action, it will do so through the collection of a larger fine. So, it really boils down to whether the company is willing to assure EPA or the state that it got the message through its actions and acknowledgments, or through paying a large fine.

While dealing with an EPA or state equivalent enforcement action is certainly burdensome, following these three suggestions will likely reduce the impact of the situation on both a company's bottom line and its reputation. Who knows, if a company were to take all these actions quickly and with a bit of humility, EPA or the state may decide not to pursue fines at all. ■

