

**STAPPA and ALAPCO Final Comments on EPA's FY
2000/2001 MOA Enforcement and Compliance Guidance**

March 25, 1999

Frederick Stiehl
Director
Enforcement Planning, Targeting, and Data Division
MC 222A
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Fred:

On behalf of the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO), thank you for the opportunity to comment on EPA's *Draft FY 2000/2001 OECA Memorandum of Agreement (MOA) Guidance*, which provides the agency's proposed enforcement and compliance priorities and activities for the next two fiscal years. On December 7, 1998, the associations commented on EPA's draft list of national enforcement and compliance priorities that were considered for inclusion in the current draft guidance.

STAPPA and ALAPCO commend EPA for its efforts to engage the associations and state and local air agencies in the development of the MOA guidance, and we generally support the guidance and believe that it contains major improvements. The associations believe, however, that the draft MOA guidance fails to address several concerns of state and local air agencies, for which we provide the following comments and recommendations.

Number of National Priorities

STAPPA and ALAPCO commend EPA for significantly reducing the overall number of national enforcement and compliance priorities in its FY 2000/2001 MOA guidance. For example, the MOA guidance proposes targeting only two major air enforcement priorities: New Source Review/Prevention of Significant Deterioration (NSR/PSD) permitting and air toxics. The guidance includes a few additional industry-sector priorities with air enforcement and compliance aspects. The associations support this approach, because limiting the overall number of national priorities better ensures that state and local air agencies are able to stretch their limited resources to address local, state and national enforcement and compliance priorities. Reducing the overall number of national priorities is particularly important because EPA requires that national priorities receive precedence over state and local program priorities.

State and Local Involvement in Developing Implementation Strategies for Priorities

STAPPA and ALAPCO recommend that EPA include language in the MOA guidance that expressly provides for state and local agency involvement in the process of defining and developing implementation strategies for each of the national priorities. The associations appreciate EPA's efforts over the last few years to involve state and local agencies in defining and developing appropriate national air enforcement and compliance priorities. We note, however, that although EPA included language in the draft guidance calling for ongoing consultation among the regions and their state and local agencies to discuss enforcement and compliance initiatives, *implementation efforts* and project status, the guidance does not provide for state and local agencies to be involved in the process of defining and developing implementation strategies for the national priorities. By providing state and local agencies with this opportunity, EPA reaps significant benefits, primarily having these agencies more invested in pursuing the national priorities. Moreover, state and local agencies benefit by having the opportunity to better ensure that practical approaches are adopted for addressing the national priorities.

Guidance Should Reflect State/Local Agencies' Leadership Role

The associations recommend that EPA revise the tone and language of the draft MOA guidance to adequately reflect the fact that state and local agencies are the primary regulators enforcing environmental laws and ensuring compliance by sources. STAPPA and ALAPCO understand that the guidance is for EPA and its regions, and serves as the basis for the Office of Enforcement and Compliance Assurance (OECA) and each region to develop individual agreements identifying overall program direction, specific activities and expected results. However, these regional agreements will serve as the basis for the regions and their state and local agencies to develop annual enforcement and compliance workplans. Thus, the tone and language of the MOA guidance applies equally to both the development of regional agreements and state and local workplans.

An example of language in the MOA guidance (Attachment 4) that does not accurately reflect state and local agencies' primary role is the recurring use of the phrase, "[r]egions, with the assistance of state agencies," which gives the impression that the regions are the primary providers of compliance assistance and related information to regulated sources. Another example of language from the same guidance, however, appropriately acknowledges state and local agencies' primary enforcement and compliance assistance role. The language is contained in Attachment 4, under the section on "Air Program – Compliance Monitoring," which describes how regional, state and local agencies should strive to maintain an adequate compliance monitoring presence. In that section, EPA provides that "[s]tates will have primary responsibility for the delegated programs and EPA will be responsible for the non-delegated programs..." The associations believe that much good will and partnering among EPA and state and local agencies is possible merely by ensuring that the tone and language of the guidance accurately reflects the respective roles of each co-regulator. STAPPA and ALAPCO urge EPA to use similar language to the example above throughout the MOA guidance.

NSR/PSD Permitting

In the associations' December 7, 1998 comments on EPA's draft list of national enforcement and compliance priorities, STAPPA and ALAPCO stated that the inappropriate avoidance of NSR/PSD permitting is of significant concern to state and local agencies, because the permitting of major new and modified sources of air pollution is critical to attaining and maintaining the National Ambient Air Quality Standards. At that time, EPA noted that although it lacked sufficient information that a general level of NSR/PSD permitting noncompliance exists, the agency cited the fact that its investigation of targeted industries shows that over 75 percent are not complying with applicable NSR/PSD permitting requirements. The associations commented that no reporting system is in place to track NSR/PSD permitting nationwide and it was unclear if EPA's assessment of NSR/PSD permitting compliance levels took netting and synthetic minor permitting decisions into account. In our December 1998 comments, STAPPA and ALAPCO recommended that EPA initiate a project to create a comprehensive reporting system that ensures accurate tracking of NSR/PSD permitting, and expand the scope of the national priority on NSR/PSD permitting to include Title V permitting, which would enable state and local agencies with no NSR/PSD permitting problem to avoid being forced to expend scarce enforcement and compliance assistance resources on NSR/PSD permitting anyway.

EPA did not, unfortunately, accommodate these recommendations in the draft MOA guidance. Rather, the guidance provides that EPA's rationale for selecting NSR/PSD permitting as a national air enforcement priority is based on a review of permitting history over the past few years that indicates that permitting agencies are issuing very few NSR and PSD permits, "despite the fact that trade association journals and economic indicators show that industrial facilities have significantly increased their production and modified their processes to a degree that should have triggered many NSR and PSD actions."

STAPPA and ALAPCO are concerned with EPA's decision to make NSR/PSD permitting a national air enforcement priority for FY 2000/2001 without first working with state and local permitting authorities to accurately assess the issues and actual noncompliance by sources. Rather, EPA has, over the past year, pursued a course of investigating state and local permitting authorities' permitting records for evidence of failure to take appropriate NSR/PSD actions. Moreover, although STAPPA and ALAPCO have requested substantive information and the results of EPA's investigation into the problem, the agency has not shared any substantive information or the results of its investigations with STAPPA and ALAPCO. As such, the associations do not have anything beyond anecdotes on which to base support for making NSR/PSD permitting a national air enforcement priority. Absent such substantive evidence of a national NSR/PSD permitting problem, the associations believe that making NSR/PSD permitting a national air enforcement priority is inappropriate at this time. Rather, STAPPA and ALAPCO recommend that EPA work with the associations and state and local agencies to quantify the problem and jointly work together in partnership to design effective enforcement initiatives, where needed.

STAPPA and ALAPCO are also concerned by EPA's failure to design the national priority on NSR/PSD permitting as an opportunity to build partnerships with state and local air

agencies. As evidence, STAPPA and ALAPCO note the distinct difference in language and tone between the descriptions of the NSR/PSD permitting and air toxics priorities in the draft MOA guidance. The description of the NSR/PSD permitting priority contains no reference to EPA working with state and local agencies to implement the priority; rather, the guidance calls on only the regions to identify sources to be evaluated, initiate investigations, inspect plants and initiate enforcement actions. Although EPA staff have commented during various meetings, including the December 1998 MOA stakeholder meeting in Alexandria, Virginia, that making NSR/PSD permitting a national air enforcement priority is intended to focus attention on sources that are not complying with their NSR and PSD requirements, the absence of any reference or role for state and local agencies in the NSR/PSD permitting priority makes clear that EPA views state and local agencies as part of the problem, not the solution. The associations strongly urge EPA to revise its description of the priority to give state and local air agencies a primary role in activities related to identifying the extent of the problem and working cooperatively with EPA to resolve noncompliance.

In addition, the associations reiterate our comments from December 1998 wherein we recommended that EPA expand the scope of the NSR/PSD permitting national priority to include opportunities for state and local agencies to target appropriate enforcement and compliance assistance activities related to their Title V permitting programs. STAPPA and ALAPCO continue to believe that expanding the scope of this national priority to include Title V permitting will help ensure that state and local agencies without NSR/PSD permitting problems are not required to unnecessarily expend limited resources on this priority, while enabling them to focus those resources on assessing and ensuring compliance with Title V permit requirements. This approach is consistent with EPA's targeting of Title V activities for heightened enforcement scrutiny, particularly synthetic minor determinations, and reflects the fact that compliance with Title V permit requirements is an ongoing priority for local, state and federal regulators.

Finally, STAPPA and ALAPCO urge EPA to make training a priority in the NSR/PSD/Title V permitting and air toxics national priorities. Specifically, the associations recommend that EPA prioritize the agency's delivery of training to state and local agencies on how to investigate NSR and PSD permitting compliance, as well as on implementing the new MACT standards. This approach is consistent with previous EPA commitments to provide such training, and will help ensure that local, state and federal enforcement agencies work together to address NSR/PSD permitting and toxics problems where they exist.

Concentrated Agricultural Feeding Operations (CAFOs)

STAPPA and ALAPCO recommend that EPA include air quality impacts caused by CAFOs as an important element to assess in inspecting and enforcing compliance at these operations. This is particularly important because of the growth of corporate feedlot operations and the need to identify the nature of the air pollution caused by such operations. EPA's draft guidance makes CAFOs a priority for the national water program, and calls for the regions, working in close cooperation with their states, to target CAFO inspections and enforcement activities on priority watersheds, impaired waters and where CAFOs pose a threat to a surface water or ground water drinking water source. State and local agencies, however, are

finding increasing evidence of significant levels of particulate matter and ammonia emissions from CAFOs and STAPPA and ALAPCO believe that air quality impacts should be targeted for assessment as part of CAFO inspections and enforcement activities. This approach is consistent with EPA's efforts to promote multimedia enforcement and compliance activities and is important to enable regulators to identify the extent of the air pollution problem related to CAFOs.

Acknowledgement of Local Agencies' Contribution

The associations commend EPA for acknowledging the invaluable contribution of local air pollution control authorities by using the term "state/local" in Attachment 4 of the MOA guidance. We believe, however, that EPA should use the term "state/local" throughout all parts of the MOA guidance, not just in the attachments. For example, EPA's February 12, 1999 cover memorandum accompanying the draft guidance provides that "[b]y capturing enforcement and compliance priorities at the national, regional, tribal and state level, a complete picture of the national enforcement and compliance program will become available." STAPPA and ALAPCO recognize that EPA's MOA guidance reflects the priorities of all national environmental media programs, many of which are not delegated to local governments. We know, however, that local air pollution control agencies across the country are critical to the enforcement and compliance of the national air program and are on the front lines in dealing with industrial sources and the public. Acknowledging local agencies' significant role and contribution to the national air program by using the term "state/local" throughout the MOA guidance and attachments is appropriate and an important message for EPA to convey to interested stakeholders.

In conclusion, the associations support EPA's plan to dramatically reduce the overall number of national enforcement and compliance assistance priorities for FY 2000/2001, but recommend that EPA adopt the previously described recommendations to greatly improve the utility and success of the guidance. Please contact either of us or Dave Wallenberg of STAPPA/ALAPCO if you have any questions about these comments, or if you desire additional information.

Sincerely,

(original signed)
Felicia George
STAPPA Chair
Enforcement and Compliance Committee

(original signed)
Curt Marshall
ALAPCO Chair
Enforcement and Compliance Committee