

May 25, 2000

Mr. Steven A. Herman  
Assistant Administrator  
Office of Enforcement and Compliance Assurance (2201A)  
U.S. Environmental Protection Agency  
Ariel Rios Federal Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

**Subject:**        *Nitrates Enforcement Initiative Under TRI*

Dear Mr. Herman:

The Office of the Chief Counsel for Advocacy of the Small Business Administration was created in 1976 to represent the views and interests of small businesses in Federal policymaking activities. The Chief Counsel participates in agency regulatory actions when he deems it necessary to ensure proper representation of small business interests.

The National Ombudsman was created by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") to report to Congress annually on how Federal regulatory enforcement activity affects small firms. The National Ombudsman works with small business regulatory fairness boards, in each of the Small Business Administration's ten regions, to track and receive comment on the regulatory enforcement activity of Federal agencies and how it affects small businesses.

As you know, the President's Memorandum of April 1995 and SBREFA both encourage agencies to create a more cooperative regulatory environment among agencies and small businesses that is less punitive and more solution-oriented. Agency compliance officials have been given more flexibility in dealing with small businesses and the authority to waive penalties and the use of enforcement discretion to help bring entities into compliance.

Recently, approximately 600 businesses, including many small businesses, received letters from the Environmental Protection Agency regarding potential noncompliance with Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), also known as the Toxic Release Inventory ("TRI") reporting requirements. The Agency alleges that these facilities may have failed to report nitrate compounds that were "coincidentally manufactured" in the process of using nitric acid in their wastewater treatment process. However, it appears that this enforcement initiative improperly subjects hundreds of firms that are among the most environmentally responsible TRI reporters to penalties as large as \$20,000 (4 reports at \$5,000 per report).

The Office of Advocacy sponsored an Environmental Roundtable last Friday that prominently featured this enforcement initiative. It was the most widely attended roundtable in

many years. Staff in your office participated in the Roundtable discussions. We applaud the courage of your staff that faced the critical audience that day. Firms in a wide variety of industries, including the chemical, metal finishing, dairy, aerospace, bakers, and food processors industries, did not report nitrate compounds. The small business representatives protested that their members were improperly targeted for enforcement, despite the considerable efforts these members have been making to comply with all environmental regulations, including TRI reporting of other applicable compounds.

According to figures provided by EPA, approximately 50 percent of the 1996 and 1997 nitric acid reporters did not report nitrate compounds, allegedly in violation of the TRI requirements, despite several admirable attempts by EPA to educate the TRI community. It is most telling that the largest group of alleged noncompliers is metal finishers, who are widely known for their exemplary environmental commitment and their participation in the Agency's noteworthy CSI efforts. One can only conclude, with this unusually large amount of noncompliance among the current TRI reporters, that these facilities were not deliberately evading their TRI responsibilities. It is clear that this relatively obscure requirement escaped a large proportion of both large and small firms, including firms that retained experienced environmental consultants to complete their TRI reports.

Under these circumstances, it is much more appropriate to directly notify the facilities of the apparent technical error, and provide them a penalty-free period of two months to examine their data and submit their report(s) if warranted under the regulations. This situation is little different than other recent enforcement initiatives where large numbers of facilities were in violation, and the Agency settled for either no penalty or a limited \$2,000 penalty (involving failures to report petroleum fugitive emissions, failures to apply for a storm water permit, and failures to file a chemical inventory update report for natural gas).

Furthermore, we should note that the "small business" relief of reducing the penalty to \$1,000 per report addresses only very few entities that are small businesses. Such relief is available, according to your staff, to only approximately 10 percent of the affected entities. Many small businesses cannot take advantage of the relief because of the very restrictive conditions in your office's enforcement policy. It is more appropriate in this case, however, to allow penalty-free reporting for all firms, large or small; therefore, the differential small business policy is unnecessary.

We encourage you to reconsider the proposed enforcement action, and work with the companies in a more solution-oriented, and less punitive manner. In the spirit of the President's April 1995 Memorandum and of SBREFA, when EPA detects a large number of errors, as it has here, it is generally more appropriate to educate, and not penalize facilities who were apparently acting in good faith. If those facilities fail to respond after reasonable notice, EPA may act, just as it does with other TRI "Notices of Technical Error" (NOTE).

Both of our offices have worked with you in the past on enforcement issues and have been impressed with the sensitivity and responsiveness of your office to small business issues. We stand ready to work with you in this instance again. We look forward to an extension of the Friday deadline for facility responses, while EPA reconsiders its position. We welcome the

opportunity to meet with your office to address this issue. Please contact Kevin Bromberg of the Office of Advocacy at 202/205-6964 to arrange such a meeting.

Sincerely,

Jere W. Glover  
Chief Counsel for Advocacy

Gail McDonald  
National Ombudsman

cc: Eric Schaeffer  
Jesse Baskerville  
Richard Farrell