

June 1988

# HAZARDOUS WASTE

## Many Enforcement Actions Do Not Meet EPA Standards



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**Resources, Community, and  
Economic Development Division**

B-226799

June 8, 1988

The Honorable Thomas A. Luken  
Chairman, Subcommittee on  
Transportation, Tourism and  
Hazardous Materials  
Committee on Energy and Commerce  
House of Representatives

The Honorable James J. Florio  
House of Representatives

In accordance with your request, attached is our report on EPA and the states' progress in implementing the timely and appropriate enforcement goals as specified in EPA's Enforcement Response Policy under the Resource Conservation and Recovery Act. This report completes our work on this assignment.

As arranged with your offices, unless you publicly release its contents earlier, we plan no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to interested parties and make copies available to others upon request.

This work was performed under the general direction of Hugh J. Wessinger, Senior Associate Director. Major contributors are listed in appendix I.

A handwritten signature in cursive script that reads 'J. Dexter Peach'.

J. Dexter Peach  
Assistant Comptroller General

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# Executive Summary

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## Purpose

Millions of tons of hazardous wastes are generated annually, which, if not properly managed, may threaten human health and the environment. The Environmental Protection Agency (EPA) is responsible for enforcing regulations designed to control and manage hazardous wastes from the time they are generated until ultimate disposal. To enhance the enforcement of regulatory requirements—and to bring uniformity to EPA and state enforcement efforts—EPA, in December 1984, adopted a policy designed to ensure that timely enforcement actions are taken against violators and that the actions taken are appropriate, given the regulatory violation.

The Chairman, Subcommittee on Transportation, Tourism and Hazardous Materials, asked GAO to review the implementation of EPA's Enforcement Response Policy. Among other things, the Chairman asked GAO to determine (1) if EPA and the states are meeting the timeliness and appropriateness requirements of the enforcement policy and (2) if EPA is overseeing state enforcement actions to ensure that the policy is being adequately implemented.

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## Background

Hazardous waste handlers are inspected at periodic intervals, either by EPA or EPA-authorized states, to determine if they are in compliance with regulatory requirements promulgated under the Resource Conservation and Recovery Act (RCRA). If violations are found, timely and appropriate enforcement action is to be taken to bring the handler into compliance. For example, enforcement action must be taken within 135 days of an inspection for "high-priority" violators, such as handlers with inadequate groundwater monitoring systems. The appropriate action for these violators, according to EPA's policy, is an enforcement order and a monetary penalty. Less stringent enforcement responses are prescribed for violators not requiring priority attention.

Forty-two states have been delegated inspection and enforcement responsibilities. EPA regions are to oversee state actions and, when states fail to meet EPA's enforcement criteria, are to step in and take an enforcement action.

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## Results in Brief

EPA and state enforcement actions were both timely and appropriate in only 37 percent of the 836 cases GAO reviewed. Limited resources, lack of penalty authority at the state regulatory agency level, and a number of other reasons were given by the regions and states for the poor performance. Although the EPA regions appear to be overseeing state

enforcement efforts, they are not taking action against violators when the states fail to do so primarily because, according to EPA officials, they fear impairing state relationships and they have limited resources.

EPA has recently taken a number of actions designed to achieve more timely and appropriate enforcement actions. However, GAO believes additional steps are needed. Until performance is improved, there is no assurance that potentially threatening environmental conditions are being dealt with in a timely, consistent, and equitable manner. In addition, the deterrent effect of enforcement actions could be weakened. Other questions asked by the Chairman are addressed in the body of the report.

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## Principal Findings

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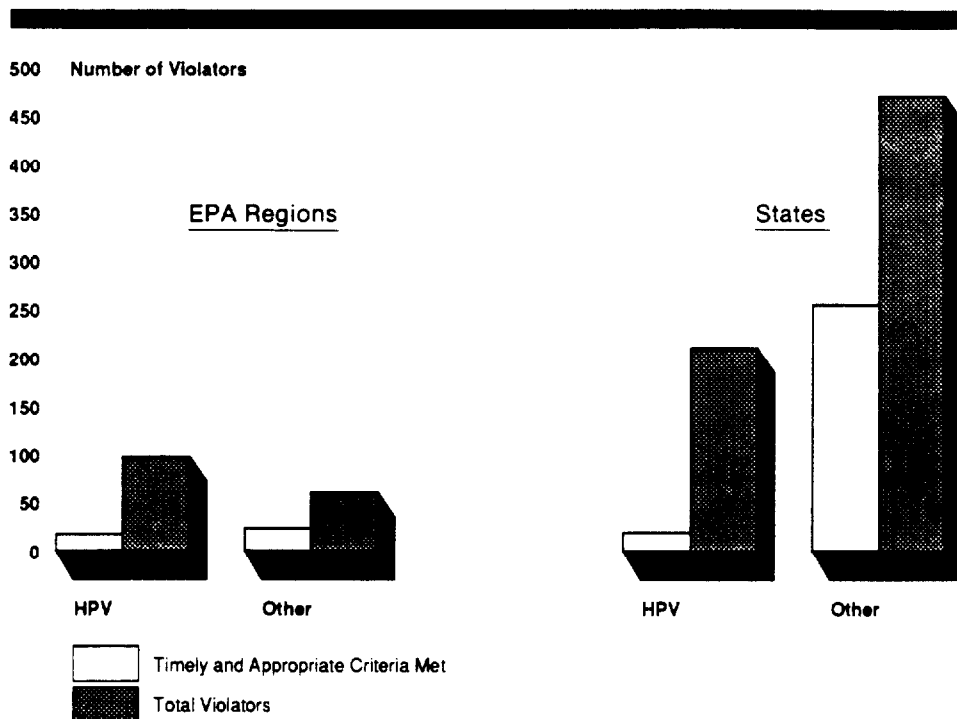
### EPA and State Enforcement Performance

As indicated in the following chart, states met both the timely and appropriate criteria in 19 of 208 high-priority cases (9 percent) and in 254 of 471 other cases (54 percent) in GAO's review. The EPA regions met the criteria in 17 of 97 high-priority cases (18 percent) and 23 of 60 other cases (38 percent). Although not yet in effect, a revised Enforcement Response Policy requires that no less than 90 percent of enforcement cases be handled in a timely manner.

The reasons for the poor performance varied widely and included limited resources, lack of state environmental agency penalty authority, and legal problems that affected EPA's enforcement authority.

GAO also found that the EPA regions did not take enforcement action in any of the cases in which the states did not meet enforcement criteria. In 50 percent of the high-priority violator cases, over 270 days had passed (more than twice the allotted time) without an enforcement action being taken. Among the reasons cited by the regions for not taking action were fears of impairing state/region relationships, resource limitations, and the belief in some cases that the states were making reasonable progress in bringing facilities into compliance. GAO believes, however, that the regions should have demonstrated in at least some of these cases that they are willing to step in when states fail to adhere to the timely and appropriate criteria.

**Figure 1: Number of EPA Region and State Timely and Appropriate Actions**



HPV: High-Priority Violators

### Headquarters' Monitoring of Enforcement Actions

EPA headquarters' Strategic Planning and Management System, which is used to track and assess regional and state performance against RCRA program objectives, includes a requirement for reporting on enforcement performance. The enforcement performance measures to be reported—and for which the regions are held accountable—are inconsistent with the timeliness and appropriateness measures contained in the enforcement policy. For example, under the reporting system the regions are not held accountable for whether penalties have been assessed against high-priority violators. Furthermore, the reporting system requires reporting on only certain types of high-priority violators and does not require reporting on violators not in the high-priority category.

### EPA Actions to Improve Performance

EPA has taken several steps it believes will improve enforcement performance. For example, EPA plans to propose rules requiring authorized states to adopt administrative penalty authority and to codify in federal regulations all state RCRA regulations, thus removing any legal barriers

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to EPA enforcement in such states. Another action EPA has taken is to revise the Enforcement Response Policy to, among other things, focus on fewer high-priority violators beginning in fiscal year 1989. EPA maintains that the current policy does not accurately identify high-priority violators and that more violators than should be are being targeted for resource intensive priority enforcement actions—which in turn results in enforcement backlogs. While these actions may help, GAO believes additional measures are needed.

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## Recommendations

GAO makes a number of recommendations in chapter 3 to improve EPA's enforcement of its hazardous waste program. Among these are that the EPA Administrator reinforce to the regions, through annual program implementation guidance and periodic headquarters directives, their responsibility to monitor state enforcement actions and to take direct enforcement action against hazardous waste handlers when states fail to do so in a timely and appropriate manner. Also, the Administrator should direct the regions to take steps to ensure that they themselves meet the timeliness and appropriateness criteria for enforcement actions they take in order to set an example for the states to follow.

In order to closely monitor regional and state performance in meeting the timely and appropriate criteria, GAO also recommends that the Administrator direct that EPA's Strategic Planning and Management System be revised to incorporate enforcement performance reporting requirements that are consistent with the timeliness and appropriateness criteria in the Enforcement Response Policy and hold the regions accountable for meeting these criteria.

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## Agency Comments

GAO discussed the information presented in this report with responsible EPA and state regulatory officials, and their comments have been included in the report where appropriate. However, as requested by the Chairman's office, GAO did not obtain official agency comments on the report.

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**Abbreviations**

DOJ	Department of Justice
EPA	Environmental Protection Agency
GAO	General Accounting Office
HPV	high-priority violator
RCRA	Resource Conservation and Recovery Act
RCPP	RCRA Civil Penalty Policy
SPMS	Strategic Planning and Management System

# Introduction

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Proper management of hazardous wastes has become a national issue on which the Congress, the executive branch, environmental groups, private industry, and the public have focused major attention in recent years. Concerned that human health and the environment were being unnecessarily threatened by poor hazardous waste management practices, the Congress, in 1976, enacted the Resource Conservation and Recovery Act (RCRA) to, among other things, establish a framework for promulgating a system of regulatory controls over hazardous waste handlers. Implementation of RCRA, however, has taken much longer than originally envisioned, with one of the more significant problems being that of assuring that handlers comply with hazardous waste regulatory requirements.

To enhance enforcement of RCRA regulatory requirements, EPA issued an Enforcement Response Policy in 1984 that was designed to bring uniformity to RCRA enforcement efforts. The policy seeks to differentiate between the types of regulatory violators and, depending on the nature of the violation, which handlers should be targeted for priority enforcement action. Moreover, the policy specifies time frames by which enforcement action should be taken and the appropriate enforcement action that should be taken for various types of regulatory violators.

EPA has overall responsibility for implementing RCRA, including promulgating regulations, inspecting handlers to assure compliance with regulatory requirements,<sup>1</sup> and taking necessary enforcement action against handlers not in compliance with regulations. Nationwide, there are over 120,000 hazardous waste handlers. Most of these, about 100,000, are companies that generate hazardous wastes. In addition, about 5,700 facilities treat, store, or dispose of hazardous wastes and over 16,500 companies transport hazardous wastes. Hazardous waste handlers are often involved in more than one waste management activity. For example, generators may also operate treatment, storage, or disposal activities at their facilities.

RCRA also provides that EPA may authorize a state to administer the RCRA program within its boundaries if the state's RCRA regulatory program is at least as stringent as the federal program promulgated by EPA. Once a state is authorized, EPA is responsible for continually overseeing and

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<sup>1</sup>In our November 1987 report, Hazardous Waste: Facility Inspections Are Not Thorough and Complete, we assessed the quality of EPA's and the authorized states' inspection programs.

reviewing the state's administration of the program to assure that federal requirements are met. As of October 1987, EPA had authorized 42 states to enforce the RCRA regulations.

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## Enforcement Authorities Under RCRA

Section 3008 of RCRA provides EPA with the authority to take three types of enforcement actions against handlers with regulatory violations: civil, administrative, and criminal. Civil actions are formal law suits filed in court by the U.S. government (Department of Justice) against a handler who either has failed to comply with some statutory or regulatory requirement or has contributed to a release of hazardous waste or constituents. These actions may include temporary or permanent injunctions and/or an assessment of penalties (up to \$25,000 per day per violation). Administrative actions, the most common type of enforcement action, are nonjudicial actions taken by EPA. Administrative actions can range from informal notices of noncompliance, such as warning letters or notices of violation, to issuance of administrative or compliance orders that are accompanied by a formal hearing and are enforceable through the courts. Penalties may also be administratively assessed up to \$25,000 per day. Criminal enforcement actions are formal, prosecutorial actions taken by the U.S. government. EPA can initiate criminal enforcement actions that can result in the imposition of a fine of up to \$50,000 per day and/or imprisonment of up to 5 years. When a hazardous waste handler knowingly commits a violation that seriously endangers the public health, he is subject to a fine of up to \$250,000 (\$1 million for organizations) and/or imprisonment of up to 15 years. Although the law provides for all three types of actions, most enforcement actions are civil or administrative. Authorized states can take similar enforcement actions under their own authorities.

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## Violation Classifications and Violator Categories

Under RCRA, a hazardous waste handler must comply with numerous technical and administrative requirements. EPA classifies regulatory violations as either class I or class II violations. A class I violation is a serious violation in that it involves a release, or represents a serious potential for release, of hazardous waste into the environment. Examples of class I violations include failure to install and operate an adequate groundwater monitoring system; failure to assure that funds will be available to properly close a facility and provide postclosure care for 30 years; failure to analyze and identify the actual hazardous wastes being managed at a facility; and failure to install controls to ensure that hazardous wastes are safely transported and accounted for when moved between waste management facilities.

A class II violation is any violation of RCRA requirements that does not meet the definition of a class I violation. Generally, class II violations are less serious than class I violations. Examples include failure to maintain a copy of a closure plan at the facility or submit required biennial reports on waste management activities.

EPA further classifies handlers with class I violations as either “high-priority” or “class I” violators in order to more effectively prioritize enforcement actions on the most serious violators. High-priority violators are hazardous waste handlers that EPA believes have the most serious violations and, therefore, warrant a stronger enforcement response. Under EPA’s December 1984 Enforcement Response Policy,<sup>2</sup> high-priority violators are those handlers that

- have one or more class I groundwater, closure/postclosure, and/or financial responsibility<sup>3</sup> violations;
- pose a substantial likelihood of exposure to hazardous waste or have caused actual exposure;
- have realized a substantial economic benefit as a result of noncompliance; or
- are recalcitrant or chronic violators.

Violators who have class I violations other than groundwater, closure/postclosure, or financial responsibility violations—and do not meet any of the other criteria noted above—are categorized as class I violators. Class II violators are handlers who have committed only class II violations.

The Enforcement Response Policy provides a framework for EPA and the states to follow to take timely and appropriate enforcement actions against violators. The policy specifies time frames and the appropriate enforcement action (i.e., formal or informal) to take, depending on the type of violator identified. For example, if EPA or the state deems that a handler is a high-priority violator, the policy requires that a formal enforcement action, such as an administrative order, be issued within 135 days of the inspection. A penalty must also be assessed. This policy,

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<sup>2</sup>In December 1987 EPA revised its Enforcement Response Policy. For the purposes of this report, we used the December 1984 policy, which will be in effect until September 30, 1988. We do, however, discuss in chapters 2 and 3 some of the potential impacts of the changes contained in the new policy.

<sup>3</sup>Financial responsibility requirements require owner/operators to (1) provide financial assurances that funds will be available to properly close a facility at a later point in time and (2) obtain liability coverage to compensate third parties for bodily injury and property damage caused by any accidental releases of hazardous wastes arising from facility operations.

and the timely and appropriate enforcement criteria, are discussed in detail in chapter 2.

## Objectives, Scope, and Methodology

In a letter dated October 27, 1986, the Chairman, Subcommittee on Transportation, Tourism and Hazardous Materials, House Committee on Energy and Commerce,<sup>4</sup> requested that we evaluate the extent to which EPA and authorized states have implemented EPA's Enforcement Response Policy. In subsequent discussions with the Chairman's office, we agreed to address the following questions:

- To what extent are EPA and authorized states taking timely and appropriate enforcement actions against high-priority and class I violators?
- Is EPA overseeing state enforcement actions, particularly the appropriateness of those actions?
- Do the EPA criteria for timely and appropriate enforcement action produce sufficient and uniform enforcement across EPA regions and the states?
- Are EPA and the states following up on enforcement actions to ensure that handlers correct violations?

As agreed with the Chairman's office, we performed our evaluation in 3 of EPA's 10 regional offices and in 2 states within each of these regions, as follows: region II, New Jersey and New York; region V, Illinois and Ohio; and region VI, Louisiana and Texas. We selected these three regions for geographic coverage and because they contain about 50 percent of the RCRA facilities that generate, treat, store, and dispose of hazardous waste in the nation. We selected the six states because, within the three EPA regions, they had the most handlers having one or more class I violations.

In performing our work we interviewed, among others, RCRA enforcement officials at EPA headquarters; at EPA regions II, V, and VI; and at the environmental agencies of the states included in our review. At these locations we reviewed and compared EPA and state RCRA enforcement policies and procedures and also reviewed related enforcement reports, facility inspection and enforcement files, and reports on EPA's oversight of state enforcement performance.

<sup>4</sup>Prior to the 100th Congress, the Subcommittee on Transportation, Tourism and Hazardous Materials was called the Subcommittee on Commerce, Transportation and Tourism. The name was changed—but not the jurisdiction for environmental affairs—by the 100th Congress. As agreed with the new subcommittee chairman's office, this report is also being addressed to Congressman James J. Florio, the prior subcommittee chairman.

With regard to our first objective—to determine whether EPA regional offices and authorized states are taking timely and appropriate enforcement actions against high-priority and class I violators—we determined the extent to which EPA's criteria for timely and appropriate enforcement action were met during the initial 15 months that the policy was fully implemented. To accomplish this, we established the universe of RCRA class I violations in the regions and states reviewed that were identified during the period between October 1985 and December 1986. Although EPA's Enforcement Response Policy was issued in December 1984, it was not fully implemented until October 1985. Therefore, we did not review any enforcement actions taken on inspections that occurred before October 1985. We established December 31, 1986, as the cutoff date for cases to be included in our review to allow time for enforcement actions to be taken on inspections prior to the end of our fieldwork, which was June 30, 1987.

We used EPA's Hazardous Waste Data Management System as an initial source to identify the universe of RCRA violations handled by each regional office and each state. We did not perform a reliability assessment of the controls over the data in the Hazardous Waste Data Management System; however, we did verify the data we eventually used from the system through discussions with EPA and state personnel, comparisons with other listings, and reviews of inspection and enforcement files. From each class I violation universe, we further separated the high-priority and class I violators into separate subuniverses for analyses. Depending on each subuniverse size, we reviewed all or a random sample of the high-priority and class I violators.

After we identified the universe of high-priority and class I violators, we applied the criteria in EPA's Enforcement Response Policy to our sample of violators to determine if timely and appropriate enforcement actions had been taken by EPA and/or the states. As explained in chapter 2, because the timeliness criteria do not cover the entire enforcement process, we developed additional criteria for follow-on enforcement actions that are provided for in the policy. We obtained the concurrence of EPA headquarters enforcement officials regarding the reasonableness of the criteria we established.

To evaluate the extent of EPA oversight of state enforcement actions—our second review objective—we identified both EPA headquarters and regional procedures for monitoring and tracking state progress in meeting the timely and appropriate enforcement criteria. To test these procedures, we reviewed enforcement files and data tracking systems and

interviewed enforcement personnel to determine what actions the regions had taken on cases where states failed to take timely or appropriate action.

To address our third objective—to evaluate the sufficiency and uniformity of enforcement response—we compared and contrasted the performance of each of the three EPA regions and six states in meeting the timely and appropriate enforcement criteria. We also compared the performance of the EPA regions as a group against the performance of the states as a group. Additionally, we developed information on the uniformity of EPA and state penalty policies and how each policy considers the economic benefit of noncompliance. We also determined any variances in how the EPA regions and states chose to implement the Enforcement Response Policy.

For our last objective—to evaluate EPA and state follow-up to ensure that hazardous waste handlers correct violations—we determined what procedures EPA and the states have to ensure that owner/operators come into compliance with regulatory requirements on schedule. To test those procedures, we reviewed enforcement files and interviewed enforcement personnel concerning owner/operators that should have returned to compliance during our review period to determine if handlers returned to compliance and, if not, what action was taken. We also reviewed the findings of a March 1987 EPA Inspector General report that addressed EPA region IX administrative controls for following up on administrative orders to ensure that violators are returning to compliance. Finally, we determined what sanctions are available to bring against facility owner/operators that do not correct violations and how often these sanctions were used.

In our review we did not conduct a comprehensive analysis of all the actions that EPA took to correct RCRA enforcement program internal control weaknesses identified by the EPA Administrator in the agency's fiscal year 1983 Federal Managers' Financial Integrity Act report to the President and the Congress. In the report, the Administrator stated that additional procedures and guidance were needed to ensure effective state hazardous waste programs and effective enforcement of RCRA regulatory requirements. The Administrator listed state implementation of RCRA, including effective enforcement, as a material internal control weakness in the RCRA program. In the fiscal year 1984 report, the Administrator indicated that appropriate corrective actions had been implemented. EPA also issued the Enforcement Response Policy in

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December 1984. In our review, where we found problems in the enforcement program with regard to EPA's implementation of the Enforcement Response Policy, we sought to identify the causes for the problems and the associated internal controls that should have prevented such problems from occurring. Our findings regarding applicable EPA internal controls are discussed in chapter 3.

As requested by the Chairman's office, we did not obtain official agency comments on a draft of this report. However, we discussed our findings with agency officials and incorporated their comments when appropriate. Our review was conducted from December 1986 through January 1988 in accordance with generally accepted government auditing standards.



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# EPA and State Enforcement Actions Are Not Meeting the Timeliness and Appropriateness Criteria

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EPA regional offices and state agencies responsible for enforcing RCRA regulations are not consistently meeting EPA's time frames for taking enforcement action against hazardous waste handlers having regulatory violations. Furthermore, when imposed, enforcement actions taken against handlers are not always the appropriate enforcement action prescribed in EPA's Enforcement Response Policy. Overall, we found that about 37 percent of the 836 enforcement actions we reviewed against handlers with class I RCRA regulatory violations met EPA's criteria for both timeliness and appropriateness. EPA and state performance against high-priority violators—those handlers with class I violations deemed to warrant priority enforcement attention—was worse than against other violators with class I violations. Specifically, EPA's enforcement response criteria were met in only about 12 percent of the high-priority violator cases and in about 52 percent of the non-high-priority cases.

The reasons for the poor performance varied widely and included limited resources, an improperly applied definition of high-priority violators, lack of state environmental agency penalty authority, temporary legal barriers, and inconsistent treatment of violations involving failure to meet liability insurance requirements.

The Enforcement Response Policy was developed to ensure that aggressive and consistent enforcement actions are taken against violators of RCRA regulations—regulations designed to reduce the potential threats against human health and the environment posed by these wastes—and that more serious violators are penalized as a deterrent to future violations. Until this policy is fully implemented, potentially threatening environmental conditions may not be dealt with in a timely and appropriate manner, and violators may not be equitably and consistently treated.

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## Timely and Appropriate Enforcement Response Requirements

The Enforcement Response Policy calls for formal enforcement action—i.e., administrative orders and penalties—against handlers with class I violations that are categorized as high-priority violators. It calls for informal enforcement action—i.e., notices of violation or warning letters—against handlers with class I violations that are not considered to be high-priority violators.

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## High-Priority Violators

For high-priority violators, the policy requires that within 135 days after an inspection either (1) an administrative order be issued to the owner/operator directing that specific actions be taken to correct the

regulatory violations or (2) the case be referred to the Department of Justice or a state attorney general for judicial (primarily civil) action.<sup>1</sup> The policy also requires that a penalty be assessed. If a case is referred for judicial action, the policy requires that the case be filed within 60 days. According to EPA officials, although it is not specifically stated in the Enforcement Response Policy, in order to deter future noncompliance, a high-priority violator that returns to compliance before an administrative order is issued should still be assessed a penalty. EPA-authorized states are also allowed to take enforcement action on the basis of their own inspections. The policy provides, however, that the states may refer their cases to EPA regions for enforcement action. Such referrals should also be made within 135 days after an inspection.

The December 1984 Enforcement Response Policy provides, however, no time frames or milestones for EPA to take action on cases that are referred to it from the states. For our analysis, we used 90 days as a reasonable time frame for taking action on such cases. We selected 90 days because it is the time allowed for the initial inspecting authority to take formal enforcement action after an inspection is conducted, the results are analyzed, and the violations are determined. EPA headquarters officials concurred that our 90-day criterion was reasonable. Furthermore, EPA's recently revised Enforcement Response Policy, which was finalized in December 1987 and is to be implemented in October 1988, adopts this 90-day criterion. Figure 2.1 illustrates the time frames for taking enforcement actions against high-priority violators and the appropriate and required enforcement actions.

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## Class I Violators

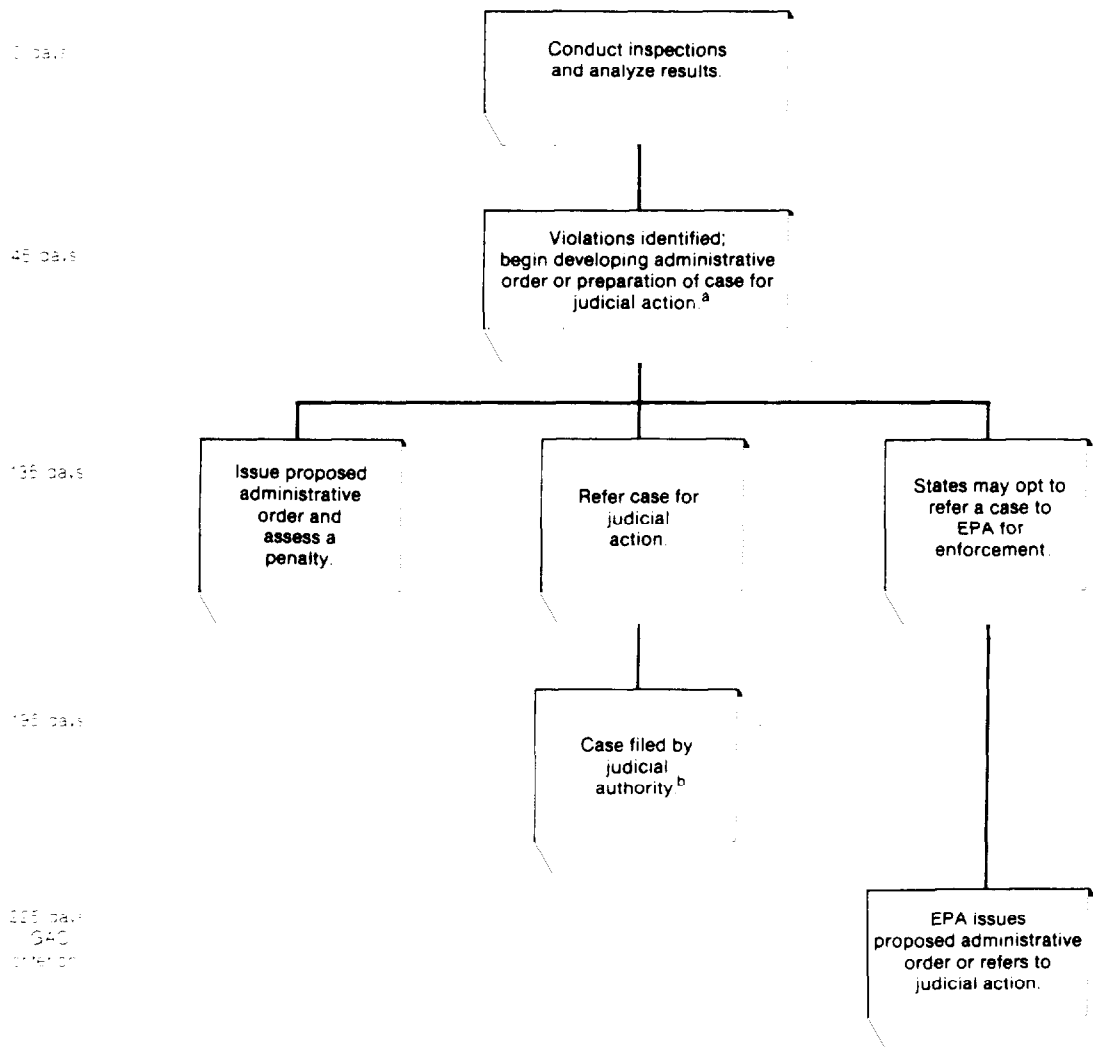
The Enforcement Response Policy also provides time frames for taking enforcement action against handlers with class I violations that are not categorized as high-priority violators. These violators are referred to as class I violators, and, under the policy, an informal rather than a formal enforcement response is allowed. An informal enforcement response is officially documented through a notice of violation, warning letter, or other equivalent written notice to the owner/operator and should be issued within 75 days of an inspection. In contrast to formal enforcement responses required for high-priority violators, no penalty is

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<sup>1</sup>EPA uses the term "judicial actions" when referring to court actions.

Chapter 2  
 EPA and State Enforcement Actions Are Not  
 Meeting the Timeliness and  
 Appropriateness Criteria

Figure 2.1: High-Priority Violator Enforcement Response Policy Timelines



<sup>a</sup>EPA uses the term "judicial action" when referring to court action

<sup>b</sup>EPA uses the term "judicial authority" when referring to the Department of Justice and state attorneys general

required when an informal enforcement response is taken. Less time is allotted for taking informal enforcement actions because, according to EPA officials, informal actions normally require less preparation and review than administrative orders or judicial referrals.

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**Chapter 2**  
**EPA and State Enforcement Actions Are Not**  
**Meeting the Timeliness and**  
**Appropriateness Criteria**

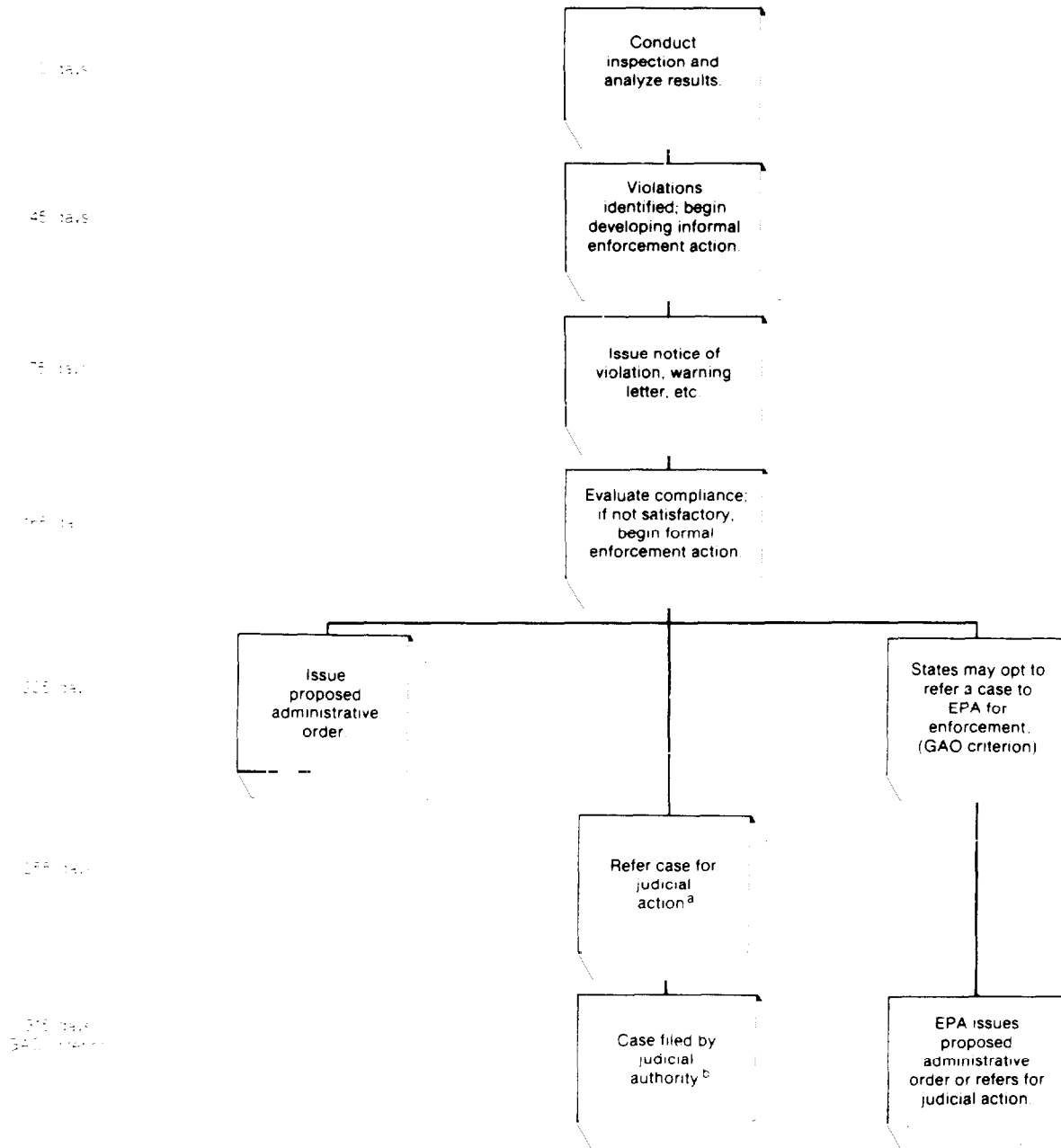
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The policy provides that if a class I violator is not in compliance with regulatory requirements within 90 days after an informal enforcement action (or 165 days after the inspection), or under an enforceable compliance schedule should the regulatory violations require more than 90 days to correct, the case should be escalated to a formal enforcement action. As shown in figure 2.2, an administrative order should be issued to facilities failing to comply with informal enforcement actions within 60 days (or 225 days after an inspection), or the case should be referred for judicial action within 90 days (or 255 days after an inspection). Although the policy does not address the option of a state's referring a case to EPA for enforcement action if compliance is not achieved within 90 days of an initial informal enforcement action, we used a 60-day time frame (or 225 days after an inspection) for completing a referral to EPA. We used a 60-day time frame for referral to EPA because this is the time frame allowed for escalating enforcement action. We also chose a 90-day criterion (or 315 days after an inspection) for the EPA regions to issue an administrative order in cases involving state referrals. As with the 90-day criterion that we asserted for EPA to take action against high-priority violator state referrals, EPA agreed with the 90-day criterion for taking action on class I violator state referrals.

The informal enforcement approach differs from the formal enforcement approach in two basic ways: (1) an owner/operator is allowed 90 days to correct deficiencies or enter into an enforceable compliance schedule to correct violations should they take longer than 90 days to correct, before stronger sanctions are taken, and (2) no monetary penalty is required for not meeting regulatory requirements.

Chapter 2  
 EPA and State Enforcement Actions Are Not  
 Meeting the Timeliness and  
 Appropriateness Criteria

Figure 2.2.: Class I Violator Enforcement Response Policy Timelines



<sup>a</sup>EPA uses the term "judicial action" when referring to court action.

<sup>b</sup>EPA uses the term "judicial authority" when referring to the Department of Justice and state attorneys general.

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## **Many Enforcement Actions Do Not Meet Timeliness and Appropriateness Criteria**

EPA's timeliness and appropriateness enforcement response criteria contained in its Enforcement Response Policy were both met in about 37 percent of the 836 enforcement cases we reviewed.<sup>2</sup> As shown in table 2.1, EPA and state performance was better against class I violators than against high-priority violators. Overall, about 52 percent of the 531 class I violator cases were handled in both a timely and appropriate manner; however, only about 12 percent of the 305 high-priority violator cases were handled in a timely and appropriate manner. As discussed later in this chapter, the reasons for the poor enforcement performance varied, and in some cases the reasons for not meeting the timeliness and appropriateness criteria seem justified. For example, the performance statistics for Illinois and Ohio were adversely affected because region V instructed the states in its region to use a high-priority violator definition that was inconsistent with the definition in the Enforcement Response Policy.

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<sup>2</sup>A total of 874 enforcement cases were included in our review. Of these, enforcement actions had been initiated but not completed in 38 cases. These 38 cases are not included in the table 2.1 analyses.

Chapter 2  
 EPA and State Enforcement Actions Are Not  
 Meeting the Timeliness and  
 Appropriateness Criteria

Table 2.1: Enforcement Actions in Which Both Timeliness and Appropriateness Criteria Were Met

	High-priority violators			Class I violators			Total violators		
	Number of actions	Timely and appropriate action	Percent proper action	Number of actions	Timely and appropriate action	Percent proper action	Number of actions	Timely and appropriate action	Percent proper action
<b>Regions</b>									
II	10	6	60	10	3	30	20	9	45
V	53	10	19	44	17	39	97	27	28
VI	34	1	3	6	3	50	40	4	10
<b>Total</b>	<b>97</b>	<b>17</b>	<b>18</b>	<b>60</b>	<b>23</b>	<b>38</b>	<b>157</b>	<b>40</b>	<b>25</b>
<b>States</b>									
New Jersey	48	4	8	105	34	32	153	38	25
New York	5	3	60	42	9	21	47	12	26
Illinois	64	0	0	66	48	73	130	48	37
Ohio	43	0	0	84	67	80	127	67	53
Louisiana	12	7	58	79	69	87	91	76	84
Texas	36	5	14	95	27	28	131	32	24
<b>Total</b>	<b>208</b>	<b>19</b>	<b>9</b>	<b>471</b>	<b>254</b>	<b>54</b>	<b>679</b>	<b>273</b>	<b>40</b>
<b>Total</b>	<b>305</b>	<b>36</b>	<b>12</b>	<b>531</b>	<b>277</b>	<b>52</b>	<b>836</b>	<b>313</b>	<b>37</b>

Note: At the close of our fieldwork—June 30, 1987—we determined that 6 high-priority actions and 32 class I actions were timely, but because the actions had not been completed (e.g., complaint issued but penalty not assessed), we could not make a determination regarding appropriateness. Therefore, these cases have been excluded from the above analysis.

As noted in table 2.1, our analysis includes only those enforcement actions that were completed as of June 30, 1987—the cutoff date for our case analysis—plus any pending actions that we determined were untimely. In practice, a high-priority violator is issued a proposed administrative order, which should include a proposed penalty, within 135 days—which constitutes a timely enforcement response. After the violator is afforded due process (an appeals process), the proposed order is finalized and a penalty is assessed.

### Timeliness Requirements Not Being Met

As shown in table 2.2, timely enforcement action was taken in 41 percent (or 360) of the 874 cases we reviewed. Overall, EPA and the states have a better record in meeting the Enforcement Response Policy timeliness requirements for class I violators (55 percent) than for high-priority violators (16 percent). The reason for this variance is explained to a large extent by the relative ease of issuing an informal enforcement action, such as a notice of violation to class I violators, as opposed to preparing an administrative order with a penalty, as required for high-

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priority violators. Administrative orders and penalties, because they are enforceable in the courts, normally require more staff resources and time to prepare than do notices of violation, which are not enforceable in the courts.

**Table 2.2: Timeliness of EPA Regions' and States' Enforcement Actions**

Regions	High-priority violators			Class I violators			Total violators		
	Number of actions	Time frames for action met	Percent time frames met	Number of actions	Time frames for action met	Percent time frames met	Number of actions	Time frames for action met	Percent time frames met
II	10	6	60	11	4	36	21	10	48
V	58	15	26	45	18	40	103	33	32
VI	35	3	9	8	5	63	43	8	19
<b>Total</b>	<b>103</b>	<b>24</b>	<b>23</b>	<b>64</b>	<b>27</b>	<b>42</b>	<b>167</b>	<b>51</b>	<b>31</b>
<b>States</b>									
New Jersey	48	5	10	114	43	38	162	48	30
New York	5	3	60	42	9	21	47	12	26
Illinois	64	0	0	77	59	77	141	59	42
Ohio	43	2	5	89	72	81	132	74	56
Louisiana	12	11	92	79	69	87	91	80	88
Texas	36	6	17	98	30	31	134	36	27
<b>Total</b>	<b>208</b>	<b>27</b>	<b>13</b>	<b>499</b>	<b>282</b>	<b>57</b>	<b>707</b>	<b>309</b>	<b>44</b>
<b>Total</b>	<b>311</b>	<b>51</b>	<b>16</b>	<b>563</b>	<b>309</b>	<b>55</b>	<b>874</b>	<b>360</b>	<b>41</b>

Note. At the close of our fieldwork—June 30, 1987—all high-priority and class I actions, whether completed or pending, had been classified for timeliness. Therefore, all enforcement actions are included in the above analysis.

The best performance in meeting timeliness requirements was that of the states regarding class I violators. The states were able to meet the timeliness criteria for class I violators in about 57 percent (or 282) of the 499 state enforcement cases we reviewed. On the other hand, the poorest performance in meeting the timeliness criteria was that of the states in taking enforcement action against high-priority violators. The states responded in a timely manner to violations committed by high-priority violators in only 13 percent (or 27) of the 208 cases we reviewed. EPA regional performance in meeting timeliness criteria for high-priority violators was better than that of the states, but still weaker than EPA would judge acceptable according to its revised Enforcement Response Policy. The revised policy requires that the regions and states should meet enforcement time frames in at least 90



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percent of the enforcement cases. In only 23 percent of the 103 high-priority cases we reviewed in EPA regions II, V, and VI did the regions meet the timeliness criteria. In terms of timeliness against class I violators, the overall performance of the 3 EPA regions was better—about 42 percent (27) of the 64 cases were handled in a timely manner—but still far below EPA's expectations.

**Appropriate Enforcement**  
**Actions Not Being Taken**

As shown in table 2.3, the EPA regions and states were more effective in meeting the appropriate enforcement action criteria in the Enforcement Response Policy than in meeting timeliness criteria; however, performance still was worse than EPA believes should be expected. Overall, the regions and states took the appropriate enforcement action in about 68 percent (or 456) of the 669 cases we reviewed in which enforcement actions had been finalized. As indicated in table 2.3, enforcement actions had not been finalized in 205 of the 874 cases in our review.

**Table 2.3: Appropriateness of EPA Regions and States' Enforcement Actions**

Regions	High-priority violators			Class I violators			Total violators		
	Number of actions	Appropriate action taken	Percent appropriate action	Number of actions	Appropriate action taken	Percent appropriate action	Number of actions	Appropriate action taken	Percent appropriate action
II	8	6	75	9	4	44	17	10	59
V	41	19	46	39	34	87	80	53	66
VI	21	16	76	6	4	67	27	20	74
<b>Total</b>	<b>70</b>	<b>41</b>	<b>59</b>	<b>54</b>	<b>42</b>	<b>78</b>	<b>124</b>	<b>83</b>	<b>67</b>
<b>States</b>									
New Jersey	44	10	23	77	60	78	121	70	58
New York	5	3	60	31	19	61	36	22	61
Illinois	44	0	0	58	55	95	102	55	54
Ohio	31	1	3	69	68	99	100	69	69
Louisiana	12	8	67	77	76	99	89	84	94
Texas	24	15	63	73	58	79	97	73	75
<b>Total</b>	<b>160</b>	<b>37</b>	<b>23</b>	<b>385</b>	<b>336</b>	<b>87</b>	<b>545</b>	<b>373</b>	<b>68</b>
<b>Total</b>	<b>230</b>	<b>78</b>	<b>34</b>	<b>439</b>	<b>378</b>	<b>86</b>	<b>669</b>	<b>456</b>	<b>68</b>

Note: At the close of our fieldwork—June 30, 1987—enforcement actions had not been completed on 81 high-priority and 124 class I violators. Although we were able to make a determination regarding the timeliness of these actions, we were not able to make a determination regarding the appropriateness of the final action. Therefore, these cases have been excluded from the above analysis.

As with timeliness, EPA regional and state performance in taking appropriate enforcement actions was better for class I violators than for high-priority violators. In 86 percent (or 378) of the 439 class I violator cases, the regions and states took enforcement action that was consistent with the requirements of the Enforcement Response Policy. However, for high-priority violators, the regions' and states' performance was much worse in that they responded appropriately in only 34 percent (or 78) of the 230 cases. As noted earlier, better performance against class I violators is probably explained by the fact that informal enforcement actions are easier to take than formal enforcement actions.

The regions performed better than the states, taking the appropriate enforcement response in 59 percent of the high-priority cases. In contrast, the states met EPA's appropriate response criteria for high-priority violators in only 23 percent (or 37) of their 160 enforcement cases. In the section above on timeliness, we noted that the states also had the poorest performance record in taking timely enforcement action against high-priority violators: in only 13 percent of the high-priority cases did the states meet EPA's timeliness criteria.

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### EPA Report Also Documents Problems in Meeting Timely and Appropriate Criteria

EPA headquarters completed a nationwide report in January 1987 that focused on both EPA regional and state progress in meeting the timely and appropriate enforcement criteria. However, it focused only on one subset of the violator universe—land disposal facilities that were classified as high-priority violators as of October 1, 1985, and those identified through March 31, 1986. Overall, 923 land disposal facility violators were included in the review. The report found that the timely<sup>3</sup> criteria were met by EPA and the states in 32 percent of the 295 cases.

Specifically, the report found that the EPA regions were responsible for taking enforcement action in 334 cases, and the states, in 589 cases. Of the 334 cases for which EPA was responsible, 38 percent (or 127 cases) received a timely formal enforcement action; 50 percent (or 166 cases) took over 135 days to receive formal enforcement action; and 12 percent (or 41 cases) did not receive formal enforcement action. Of the 589 cases the states were responsible for, 29 percent (or 167 cases) received timely formal enforcement action; 34 percent (or 200 cases) took over

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<sup>3</sup>It should be noted that, while according to the Enforcement Response Policy all high-priority violators are subject to formal enforcement action (i.e., an administrative order and a penalty), the report counted an administrative order only (no penalty) as a formal enforcement action. During the first 6 months of fiscal year 1986, the EPA regions proposed penalties in about 90 percent of the cases that they filed; the states proposed penalties in about 40 percent of their filed cases.

135 days to receive formal enforcement action; and 38 percent (or 222 cases) did not receive formal enforcement action.

The report did not make specific recommendations as to how the regions and states could improve their performance in implementing the enforcement response criteria. Comments throughout the report included suggestions that (1) EPA headquarters may want to expand and revise its Strategic Planning and Management System (SPMS), a quarterly reporting system of regional RCRA activities, to better reflect the timely and appropriate measures included in the enforcement policy; (2) the time frames included in the timely and appropriate criteria may need to be expanded, given regional and state performance to date; and (3) EPA may want to consider requiring state environmental agencies to have administrative penalty authority as a condition of authorizing state programs. The actions EPA is taking in response to this report are discussed later in this chapter.

EPA updated this report, which was issued in March 1988. The updated report also focuses on land disposal facilities. The results indicate about the same level of progress in implementing the timely and appropriate criteria as demonstrated in the January 1987 report—that is, the timeliness criteria were met by EPA and the states in 30 percent of the cases.

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## Reasons for Not Meeting Timeliness and Appropriateness Criteria

The reasons for poor EPA regional and state enforcement performance in meeting the timeliness and appropriateness enforcement objectives varied widely. The more significant reasons for not meeting the objectives, by type of violator, are discussed below.

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### High-Priority Violators

As indicated in table 2.1, timely and appropriate enforcement action was taken in only about 12 percent of the high-priority cases we reviewed. Collectively, more than 20 different reasons were given by EPA regional and state officials for not meeting the Enforcement Response Policy criteria for these violators. Nearly two-thirds of the cases involved at least one of the following reasons.

- A definition of “high-priority” inconsistent with that contained in the Enforcement Response Policy was applied in EPA region V, which resulted in informal rather than formal enforcement action being taken against owner/operators with high-priority violations.

- A reorganization of the Texas RCRA program precluded region VI from taking enforcement action against Texas violators for approximately 8 months.
- One state decided to forego enforcement actions against facilities that were unable to meet financial responsibility requirements.
- A lack of administrative penalty authority by one state environmental regulatory agency delayed timely enforcement action.
- Adequate policies and procedures were not available for escalating compliance issues involving federally owned/operated hazardous waste facilities to higher agency levels for resolution.

Improper High-Priority Violator  
Definition Applied

An improper definition was used in determining high-priority violators in region V and the two region V states we reviewed, resulting in a stricter definition for which violators would be categorized as high-priority violators. One hundred and sixteen cases we reviewed that should have been categorized as high-priority violators were categorized in region V as class I violators. As a result, the enforcement actions taken were untimely, inappropriate, or both.

EPA's Enforcement Response Policy defines a high-priority violator as an owner/operator who has (1) class I groundwater monitoring, closure, postclosure, or financial responsibility violations; (2) released, or poses substantial likelihood of releasing, hazardous waste into the environment; (3) realized a substantial economic benefit from not being in compliance with regulatory requirements; or (4) is a recalcitrant or chronic violator. According to EPA's enforcement policy, an owner/operator can be categorized as a high-priority violator if any of the above conditions are met. Region V, however, modified the criteria to require that a non-land disposal facility with closure or financial responsibility violations would also have to meet one of the other three criteria above to be categorized as a high-priority violator. Consequently, for example, a handler treating or storing hazardous waste that had a class I financial responsibility regulatory violation would qualify as a high-priority violator under EPA's policy, but the same handler would not meet region V's criteria unless it could also be shown that (1) the violation actually resulted in, or posed a substantial likelihood of, exposure to hazardous waste, (2) the violator realized substantial economic gain from noncompliance, or (3) the violator was a recalcitrant or had a history of noncompliance with RCRA regulatory requirements. Under region V's definition, unless one of these three requirements was also met, the handler would be categorized as a class I violator and therefore subject only to informal enforcement action.

As previously stated, as a result of region V's change in the high-priority violator definition, 116 violators were categorized by region V and the 2 states we reviewed in that region as class I violators rather than high-priority violators. Of the 116 violators, 98 were incorrectly categorized by the 2 states, and 18 were incorrectly categorized by the region. Sixty-two of the 116 came into compliance following informal—rather than formal—enforcement action. Of the remaining 54 violators, 30 were pending formal enforcement action as of June 30, 1987, and 11 were issued formal enforcement action. Enforcement action should have been escalated at the remaining 13 facilities; however, no such action had been taken at these facilities at the close of our fieldwork, June 30, 1987.

A region V RCRA enforcement official told us that the region revised the high-priority violator definition because at that time five of the six states in the region did not authorize their state environmental regulatory agencies to issue administrative penalties. Without this authority, the state regulatory agencies must refer all high-priority violator cases requiring penalties to their state attorneys general or to the EPA region for action. Region V, concerned that this lack of administrative penalty authority would result in an unmanageable workload of referrals to EPA, elected to be more restrictive in the definition of a high-priority violator and thus reduced the number of enforcement cases requiring penalties.

We brought the region V definition change to the attention of EPA headquarters RCRA officials who told us that they were not aware of region V's more restrictive high-priority violator definition at the time that the region changed it. According to these officials, however, the definition of a high-priority violator contained in the recently revised Enforcement Response Policy is similar to that being used in region V, and thus they plan to take no action to require the region to revise its current practice in defining high-priority violators.

In addition to the above cases in region V in which the violators were incorrectly categorized, in 10 additional cases in Illinois, informal enforcement action was allowed to be taken against identified high-priority violators. In its 1986 grant agreement with the state, the region included a provision that required the state to refer high-priority violators to the state attorney general or the EPA region for enforcement action if they did not return to compliance. The state interpreted this requirement to mean that if a high-priority violator could be brought into compliance with an informal enforcement action, an enforcement referral would not be required. The region subsequently allowed the

state to forego referral of 10 high-priority violators that voluntarily returned to compliance after an initial informal enforcement action. Illinois has not authorized its state environmental regulatory agency to issue administrative penalties. According to an EPA region V official, the region was aware of these situations, but given the nature of the violations and staff resource constraints, and the fact that the facilities returned to compliance, it chose not to take action.

While it is important that facilities return to compliance as soon as possible, the Enforcement Response Policy requires that all high-priority violators be penalized as a deterrent to future violations. As such, the handlers in these 10 informally resolved high-priority violator cases should have been assessed penalties. Not assessing penalties, even when compliance is quickly attained, may lessen the deterrent effect that the threat of a penalty can have in getting handlers to comply with regulatory requirements. It also raises questions of fairness if some high-priority violators are being assessed penalties and others are not.

#### Texas RCRA Authorization Problems

The second most frequently occurring reason for improper enforcement actions against high-priority violators involves 31 cases in EPA region VI. In September 1985, the state of Texas combined RCRA state regulatory functions from two agencies into one agency. EPA allowed Texas to continue to administer the RCRA program under emergency regulations while it completed the reorganization, scheduled for March 1986, and also revised the state RCRA regulations. During our review period, region VI agreed to assist the state in its enforcement case backlog and took enforcement responsibility for 31 high-priority violator cases. However, region VI subsequently discovered that the revised state regulations did not meet RCRA authorization requirements and therefore EPA could not take formal enforcement action on the referred cases. EPA headquarters officials told us that EPA regions pursue enforcement actions in authorized states by citing state regulations, because the state environmental regulations replace federal regulations in an authorized state. According to EPA officials, EPA would have had to revoke Texas' authorization—which takes at least 18 months—in order to cite federal regulations in taking enforcement action against the 31 Texas waste handlers. Therefore, the region could not issue administrative compliance orders until EPA could approve the revised Texas regulations, which did not occur until February 1987. Five of the 31 cases were referred back to Texas for enforcement, but because of the authorization problem, all 31 cases were not handled in a timely manner.

We discussed the Texas RCRA authorization problem with EPA headquarters officials, who commented that such a problem will be avoided in the future by requiring that authorized states' RCRA regulations be codified through the federal regulatory process as federal regulations. As such, should EPA need to take enforcement action in a state in which it had not approved changes or revisions in state regulations, the regions would be able to cite prior EPA-approved state RCRA regulations through a federal regulation. In discussing this issue with EPA officials, we were told that this situation can also be avoided if the regions are more closely attuned to revisions in state regulatory requirements. By being aware of upcoming changes, the regions can start the approval process earlier and not wait until after states complete these actions.

## Financial Responsibility Requirements

A third reason for the improper enforcement actions taken against high-priority violators involves regions' and states' handling of cases in which owner/operators had not met RCRA financial responsibility requirements. EPA headquarters issued two guidance documents to the regions in October 1986 and April 1987 that required formal enforcement actions for all operating and closing facilities, respectively, with financial responsibility violations. Under RCRA regulations owner/operators are required to provide financial assurances that monies will be available for (1) closing treatment, storage, or disposal facilities and (2) liabilities that may occur as a result of accidental releases of hazardous wastes into the environment. Failure to provide such assurances would result in a handler's being categorized as a high-priority violator. Further, the October 1986 guidance advised that operating facilities may be placed on a compliance schedule to meet their financial responsibility obligations, and, if the owner/operator does not comply in the time frame allowed, the facility must close. The April 1987 guidance states that if a facility is closing and "economically marginal," strict enforcement of the regulations may result in bankruptcy and that it may be more feasible in these cases to allow the facilities more flexibility in meeting their closure and postclosure financial obligations.

We found that the regions and states we reviewed have not been consistent in their treatment of similar violations involving financial responsibility requirements. The following examples illustrate these inconsistencies.

The state of New Jersey did not take formal enforcement action in 24 of 26 high-priority cases in which the owner/operators had not closed and

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had not met RCRA financial responsibility requirements (i.e., either financial assurance and/or liability insurance requirements). New Jersey officials explained that financial responsibility coverage has been either cost prohibitive or unavailable, and thus formal enforcement for this violation is not practical. Ten of the 24 eventually met the requirements. We were told by New Jersey officials that the remaining 14 facilities are still out of compliance and that they plan no further enforcement action. According to EPA's Enforcement Response Policy, unless a state is making reasonable progress in processing a case, the regions should take direct enforcement actions when states fail to meet timely and appropriate enforcement action criteria. According to an EPA region II official, the region took no action in these cases because, until December 1987, it believed that the state was making reasonable progress in taking enforcement action against these violators. In December 1987, the region began initiating enforcement action against some of these violators.

In Louisiana, two high-priority violators who could not show proof of liability insurance were issued compliance orders that required the facilities to provide the state proof of temporary liability coverage and to report on a monthly basis their efforts to obtain liability insurance. The state also initially issued each facility a proposed penalty notice of \$28,000, based on the estimated amount of the deferred insurance premiums. Subsequently, the state issued compliance orders to two other high-priority violators who lacked liability insurance, but proposed no penalties on the basis of advice from EPA region VI concerning the industrywide problem of securing liability insurance. Then, in order to maintain consistency, the state rescinded the proposed penalties against the first two high-priority violators. All four violators obtained temporary corporate guarantees, an approved form of liability coverage, to meet the financial responsibility requirements. According to EPA region VI officials, the region did not take direct enforcement action in these cases because EPA headquarters guidance considered penalty-only orders for liability insurance cases a low priority. Regional enforcement personnel told us that they believed that their resources were better concentrated on those cases that posed a greater environmental threat.

In four other cases, however, region VI took action against violators with financial responsibility violations, but it was not consistent in its compliance requirements for the four violators. The four cases involved Texas facilities that did not have liability insurance and were referred by the state to region VI for enforcement. The region subsequently issued four administrative orders (all of which included penalties) with



four different actions required by the violator, as follows: (1) immediately cease hazardous waste storage operations, (2) obtain liability insurance in 1 month or close, (3) obtain liability coverage or alternative coverage (letter of credit or a trust fund) within 6 months or close, and (4) provide proof of alternative coverage (financial test) and annually update the coverage. The proposed and assessed penalties were about \$2,500 for each violator.

In region V, we found that Illinois and Ohio did not issue formal enforcement orders or penalties against high-priority violators who did not meet financial responsibility requirements if they returned to compliance. Nor did region V intervene in any of these cases and issue formal enforcement orders and/or penalties, as called for by the Enforcement Response Policy. We recognize that liability insurance has been a difficult requirement to meet; however, we also believe that a handler's inability to meet RCRA financial responsibility requirements is not a good reason for not taking enforcement action because it may allow the handler a competitive advantage over facilities that are able—and must incur the expense—to obtain the necessary financial coverage. It is also important for enforcement actions for similar violations to be consistent and thus provide equitable treatment.

Lack of Penalty and/or  
Administrative Order Authority  
at the State Regulatory Agency  
Level

As noted above, a major reason for region V's changing the definition of a high-priority violator was that five of the six states in its regional area had not authorized their state environmental regulatory agencies to assess penalties. State regulatory agencies without penalty order authority must refer their high-priority cases to their state attorneys general or to the EPA region for enforcement action—which, because of the workload that can develop from numerous referrals, can lead to delays in taking timely enforcement actions. We found 14 high-priority cases in 1 state in which the lack of timely enforcement action was attributed to delays that occurred when the state took longer than 90 days to refer cases to the state attorney general or to the EPA region for proper enforcement action. The cases were not referred in a more timely manner, according to state officials, because they attempted to negotiate a settlement with the violators and thus avoid referring the cases.

Under present requirements, authorized states are required by EPA to have either administrative or judicial penalty and order authority. Administrative enforcement authority rests with state environmental agencies or a third party, while authority to bring lawsuits is generally a function vested in the state attorneys general. As of October 1987, 42

states were authorized by EPA to, among other things, administer RCRA enforcement programs. Of these 42 states, 23 had some type of administrative penalty authority—but about half were not equivalent to EPA's. More than one-third of the states have preconditions that must be met before the authority is exercised, such as allowing a 30-day grace period for a violator to return to compliance before issuing a penalty. Also, some states require that a third party, such as an independent board, issue the penalty. The remaining 19 authorized states had no administrative penalty authority. EPA, as early as 1984, has considered changing RCRA regulations to require that state environmental agencies have the authority to issue administrative penalties and orders as a requirement for authorization. According to EPA headquarters RCRA enforcement officials, EPA plans to initiate action to propose this requirement through a notice of proposed rulemaking scheduled for June 1988.

According to a working draft of the rule, and discussions with EPA officials, EPA believes that state regulatory agencies should have administrative penalty and order authority to reduce their dependence on EPA and state attorneys general to take enforcement actions. The draft also noted that EPA believes that the state environmental agencies will be able to achieve a higher degree of compliance using limited resources if they have the ability to impose penalties. In our opinion, requiring state environmental agencies to have administrative penalty authority and order authority seems to be a reasonable course of action that could lead to improved state performance in meeting EPA's enforcement objectives and free up EPA and judicial resources to concentrate on the most serious violators. EPA officials told us that the rule is still under development and thus subject to change.

### Federally Owned/Operated Facilities

Our review of 311 high-priority violators included 21 enforcement cases against federal hazardous waste handler facilities. As shown in table 2.4, timely enforcement action was taken within 135 days in only 2 of the 21 cases.

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**Table 2.4: Timeliness of Enforcement  
 Actions Against Federal Facilities  
 Categorized as High-Priority Violators**

	Timely enforcement actions	Untimely enforcement actions	Total <sup>a</sup>
<b>EPA regions</b>			
Region II	0	1	1
Region V	0	10	10
Region VI	0	4	4
<b>Total</b>	<b>0</b>	<b>15</b>	<b>15</b>
<b>States</b>			
New Jersey	0	0	0
New York	1	0	1
Illinois	0	0	0
Ohio	0	2	2
Louisiana	1	0	1
Texas	0	2	2
<b>Total</b>	<b>2</b>	<b>4</b>	<b>6</b>
<b>Total</b>	<b>2</b>	<b>19</b>	<b>21</b>

<sup>a</sup>Of the 21 total actions, 2 were considered timely and appropriate, 4 were untimely, but appropriate, 9 were untimely and inappropriate, and 6 were untimely, and enforcement action was pending. For our analysis, enforcement actions were considered appropriate against federal violators if an administrative order or compliance agreement was issued, no penalty was required.

In January 1984, EPA issued a Federal Facilities Compliance Strategy that described EPA's approach to enforcement actions at federal facilities. The Federal Facilities Compliance Strategy was the first attempt by EPA to develop an overall enforcement strategy with respect to federal facilities. The strategy applies to enforcement actions taken against federal facility violators for all EPA regulatory programs such as violators of air or water pollution control requirements.

EPA issued its RCRA Enforcement Response Policy in December 1984—almost one year after the Federal Facilities Compliance Strategy. RCRA enforcement officials told us that, although not specifically stated in the policy, it was their intent that federal facility violators be subject to the same timely and appropriate criteria outlined in the policy as other violators.

As we noted in our May 1986 report on compliance problems at federal facilities, the enforcement response actions prescribed in the January 1984 Federal Facilities Compliance Strategy are not the same as those

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described for RCRA violators in the Enforcement Response Policy.<sup>4</sup> For example, under the Federal Facilities Compliance Strategy, federal facilities are to be immediately notified of violations, and negotiations with the facilities concerning compliance actions are to begin within 10 days. The strategy document, however, provides no time frames for achieving compliance or escalating enforcement action should the facility and the EPA or state regulatory officials not be able to agree on compliance actions. In addition, the strategy does not provide for administrative orders or penalties to be levied against federal facilities, either by EPA or the states.

In our May 1986 report we also stated that EPA was about to issue a revised Federal Facility Compliance Strategy that would have allowed the EPA regions and the states to issue administrative orders to federal facilities and would have established time frames for escalating unresolved enforcement cases from the regions and states to EPA headquarters. The time frames and the enforcement actions that would have been allowed in the revised strategy would have been consistent with those provided for in the Enforcement Response Policy with the exception of (1) the dispute resolution process, which would be handled through the executive branch rather than through the courts and (2) no penalties would be assessed against federal violators. We recommended in our report that EPA issue the strategy as scheduled.

As of April 1988, EPA has not issued its revised Federal Facilities Compliance Strategy. Furthermore, EPA has been unable to use its Enforcement Response Policy to its full extent against federal facility violators. One particular concern that has delayed the issuance of the strategy and affected enforcement actions against federal facility violators pertains to the propriety of one federal agency—EPA—issuing administrative orders against other federal agencies. The Department of Justice (DOJ) has taken the position that Section 3008(a) of RCRA does not provide EPA the authority to issue administrative orders to federal facilities. If EPA had the authority to issue administrative orders to federal facilities, the dispute resolution process would then be handled through the courts. DOJ, however, maintains that an approach for resolving RCRA violation disputes is provided for in Executive Orders 12088 and 12146 and that the executive branch should have the prerogative of settling such disputes. These executive orders provide for a nonadversarial approach to resolving such problems and require that problems that cannot be

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<sup>4</sup>Hazardous Waste: Federal Civil Agencies Slow to Comply With Regulatory Requirements (GAO RCED-86-76, May 6, 1986).

resolved by EPA and the pertinent federal agency headquarters officials be referred to the Office of Management and Budget for resolution. Furthermore, the states may also be precluded from taking similar actions—and issuing penalties—because of the federal government's incomplete waiver of sovereign immunity.<sup>5</sup>

EPA, based on DOJ's position, has revised its Federal Facilities Compliance Strategy and anticipates its issuance in the summer of 1988. The current draft strategy provides that the time frames for enforcement action that have been developed for the various environmental programs (i.e., air, water, etc.) be followed in pursuing enforcement actions at federal facilities. It also describes the actions to be taken and the dispute resolution process that is to be followed should the EPA region and a federal agency disagree on the enforcement action. The draft strategy provides that a notice of violation or equivalent without penalties—similar in form to a proposed administrative order, but not enforceable in the courts—be issued to federal violators. For RCRA high-priority violators, under the Enforcement Response Policy these notices should be issued within 135 days. Among other things, the notice will include a compliance schedule for correcting violations and a date that the federal facility is either to respond to the notice or to request a conference with EPA.

Through this process the EPA region, or a state, is to develop and enter into a compliance agreement with the facility for correcting regulatory deficiencies that may include a clause to provide for citizen and state suits should the federal violator not comply. The strategy outlines time frames for escalating enforcement actions to EPA headquarters—and, if necessary, to the Office of Management and Budget—in the event that the EPA regions and the federal violator are unable to conclude negotiations and sign a compliance agreement. For example, the strategy provides that when a region and a federal violator are unable to negotiate a compliance agreement within the time frames allowed for a specific environmental program, the case should be referred to EPA headquarters within 60 days. The strategy also provides additional time frames for headquarters agency-to-agency negotiations and to the Office of Management and Budget if necessary.

In a related effort, the Assistant Administrator for the Office of Solid Waste and Emergency Response, who is responsible for the development and implementation of the RCRA Enforcement Response Policy, issued

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<sup>5</sup>Sovereign immunity is the legal doctrine that bars a lawsuit against the federal government unless it has consented to being sued.

two guidance documents, dated January 25, 1988, and March 24, 1988, which prescribed time frames and/or enforcement actions to be taken against federal facilities violating RCRA requirements. Guidance contained in these documents appears consistent with the guidance contained in the current draft Federal Facilities Compliance Strategy. For example, the January guidance outlines enforcement options available against federal violators and specifies that a “notice of noncompliance,” equivalent to a proposed administrative order, be issued to federal high-priority violators. As in the draft strategy, the guidance specifies that the notice include a compliance schedule for correcting the violations and the date that the federal violator is to either respond to the notice or request a conference with EPA.

Also consistent with the draft strategy is the requirement that EPA develop and enter into a compliance agreement with the federal violator for correcting deficiencies that will include a clause to provide for citizen and state suits, should the federal violator not comply with the terms of the agreement. In the event that the EPA region and the federal violator are unable to conclude negotiations and sign a compliance agreement, the March guidance outlines time frames for escalating enforcement actions to EPA headquarters. In addition, it also specifies that after the issuance of the notice of noncompliance, the period of negotiating a compliance agreement should not exceed 120 days, at which point the case should be referred to EPA headquarters. The guidance also states that the EPA region should consider issuing a press release on the compliance status of the facility at that time.

Two bills have been introduced in the 100th Congress addressing the issue of EPA enforcement authority over federal facility compliance with RCRA regulations. One bill, H.R. 3785, clarifies section 6001 of RCRA to make federal facilities subject to all enforcement sanctions, including administrative orders, civil and criminal actions, and penalties. The other bill, H.R. 3782, would amend RCRA by establishing an independent “special environmental counsel” within EPA with powers to take enforcement actions against federal facilities for failure to comply with RCRA requirements (and also requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, commonly referred to as Superfund). However, while these bills would appear to strengthen EPA’s hand in dealing with federal facility noncompliance, according to DOJ, they raise constitutional questions regarding the dispute resolution process and separation of powers.

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Other Reasons for Untimely or  
Inappropriate Enforcement  
Responses Involving High-  
Priority Violators

A number of other reasons were also cited by the regions and states for not taking timely and/or appropriate enforcement action against high-priority violators. However, none seemed to occur frequently or be widespread across the regions and states. For example, a lack of personnel resources to pursue enforcement actions was cited as the reason for not taking timely and appropriate action in five Texas cases and three EPA region V cases. Bankruptcy and/or the inability to pay penalties was cited in three region VI cases and two Ohio cases as the reason for not taking appropriate action against high-priority violators. Changing regulations or guidance was cited in five Texas cases as the reason for inappropriate action. In three region V cases, four Texas cases, and one Illinois case, action was untimely because additional information on the conditions at facilities was needed before making an enforcement decision.

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Class I Violators

We were unable to determine the specific reasons for not meeting the timeliness and appropriateness criteria for almost half of the class I violator cases in our review. Where we were able to obtain a reason for the improper enforcement action, the cited reasons again varied widely and included a lack of resources or competing priorities, lengthy negotiations involving government-owned facilities, the informal resolution of cases without the issuance of a notice of violation or equivalent action, and disagreements between EPA and states over violation classifications.

No Specific Reason for Not  
Meeting Objectives

State and EPA officials did not document, and were unable to provide, specific reasons for not meeting the timeliness objectives for almost half of the 254 untimely class I violator enforcement actions. Similarly, they did not know the specific reasons for not meeting the appropriateness criteria for almost half of the 61 inappropriate class I violator enforcement actions. Almost two-thirds of the improper enforcement actions where no specific reason was cited were in New Jersey and New York. Most of the cases involved (1) untimely enforcement actions, (2) no formal enforcement escalation when facilities did not come into compliance, or (3) no enforcement action taken.

Our attempts to determine the specific reasons for not meeting EPA's policy objectives included discussions with enforcement officials and/or reviews of facility files. New Jersey officials generally attributed untimely and inappropriate class I enforcement actions to a backlog of

enforcement cases, which could be categorized as a lack of adequate personnel resources and/or competing priorities. New York officials were unable to generalize about untimely class I violator cases.

In our opinion, the absence of clearly documented reasons for not taking timely and appropriate enforcement action is indicative of a lack of adequate internal controls needed to assure that enforcement objectives are met. A system of internal controls requires that all transactions and significant events be clearly documented and that the documentation be readily available for examination. Such an absence of internal controls should warrant EPA attention—especially in region II—to determine the underlying causes for states' taking untimely and/or inappropriate action against class I violators. This issue is discussed in more detail in chapter 3.

#### Lack of Resources and/or Competing Priorities

A lack of resources and/or competing priorities was the most frequent reason given for untimely enforcement action, yet this reason was cited in only about 10 percent of the cases that were untimely. Over half of these (17 of 27) were Texas cases. According to Texas officials, the state had a large backlog of high-priority violator cases from the prior year and thus elected to concentrate on those cases. As a result, class I violator cases had to be given a lower priority.

#### Problems Involving Government- Owned/Operated Facilities

Forty-five of the 254 class I cases that we reviewed that received untimely enforcement action were government-owned/operated facilities. Twenty-two of these 45 were federal agencies, and 23 were state or local agencies. Frequently cited reasons for the untimeliness were lengthy periods of negotiation, disputes between EPA and the state regarding the classification of violations identified, and lack of resources.

Lengthy negotiation periods was cited as the reason for untimeliness in 16 of these cases—8 federal facilities and 8 facilities owned/operated by state or local governments. Disputes between EPA and the state regarding the significance of the violations identified during inspections resulted in 9 of the 45 cases—7 federal agencies and 2 state/local agencies—receiving untimely actions. Eight of the 45 cases—4 federal and 4 state/local—received an untimely action because of resource constraints. In the remaining 12 cases—3 federal and 9 state/local—various other reasons, such as additional case development and enforcement process delays, were cited for the delays in issuing enforcement actions.



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### Informally Resolved Cases

We categorized 11 class I violator cases as untimely enforcement action because they were informally resolved; that is, the violations were corrected without the issuance of a notice of violation or equivalent document. Two of these involved EPA region VI and nine involved Texas cases.

According to the Enforcement Response Policy, the prescribed enforcement action against a class I violator is a notice of violation, warning letter, or equivalent action. These types of informal enforcement actions are written notices that provide documentation to the violator and the enforcement agency of the specific violations involved. Informally resolving a violation without a written notice provides no documentation of the specific violations, thus distorting the compliance history of a handler for future inspections.

### Other Reasons for Untimely and Inappropriate Class I Enforcement Actions

A number of other reasons were cited by the regions and states we reviewed for not taking proper enforcement action against class I violators. However, none seemed to occur frequently. For example, additional information on conditions at facilities was identified seven times as the reason for not taking timely action; lack of state penalty authority needed to escalate an enforcement action was identified five times; untimely receipt of lab analysis was identified four times; and late state referral of a case to EPA for enforcement action was identified one time. RCRA regulatory uncertainty was identified in one case, and bankruptcy was identified in another case as reasons for not taking appropriate enforcement action.

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### Impact of Not Taking Timely and Appropriate Enforcement Action

EPA's Enforcement Response Policy was developed to ensure that aggressive and consistent enforcement actions were taken against hazardous waste handlers that were not in compliance with RCRA regulatory requirements—requirements designed to reduce the potential threat to human health and the environment posed by hazardous wastes—and that the more serious offenders be penalized. According to the policy, it is important that all serious violators be penalized to ensure that they are equitably treated and deterred from violating the regulations in the future. We found that EPA's enforcement policy has not been fully implemented in the regions and states we reviewed for a number of reasons. Until EPA's enforcement policy is fully implemented, there is no assurance that potentially threatening environmental conditions associated with the mismanagement of hazardous waste are being dealt with in a timely and appropriate manner nationwide. In addition, the effect that

the policy could have in deterring owner/operators from not complying with regulatory requirements may be weakened.

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## **Actions Taken by EPA Headquarters to Improve Regional and State Performance in Meeting Timely and Appropriate Criteria**

EPA headquarters recognizes that the regions and states have had problems in adhering to the timely and appropriate criteria and has made several changes to the enforcement effort that address some, but not all, of the problems faced by the regions and states.

First, EPA has issued a revised Enforcement Response Policy that it believes will provide a more focused definition for high-priority violators. EPA believes that the revision should reduce the number of violators subject to resource-intensive priority enforcement actions, focus on the most serious violators, and improve the regions' and states' performance in meeting the timely and appropriate criteria. EPA headquarters officials have concluded that the current definition of a high-priority violator is too broad and does not provide an adequate tool to identify the most serious violators requiring immediate attention. EPA believes the revised definition focuses more on the actual environmental threat posed by a regulatory violation, rather than on the type of violation itself. For example, under the revised definition a handler that has caused actual exposure to hazardous constituents would be targeted for priority enforcement action, whereas a handler submitting an incomplete groundwater sampling and analysis plan may receive less enforcement priority. Under the current definition, both would be considered high-priority violators. We did not analyze how the change in high-priority definition would have affected the number of high-priority cases in our review, nor whether the new definition would be an adequate tool for discriminating between the more serious and less serious violations.

In addition to the revised definition, the revised policy requires that 90 percent of all enforcement actions meet the prescribed time frames. In setting the 90 percent goal, EPA recognizes that some cases may take longer to address, such as when sampling and analysis of site conditions are required.

A third change made by EPA is intended to address the type of problem that occurred when Texas reorganized its RCRA program and EPA was unable to enforce RCRA regulations in the interim. EPA is now in the process of codifying all authorized states' RCRA regulations in the Federal Register. This step will allow EPA to enforce regulations in the event of a state reorganization.

Fourth, EPA has issued two guidance documents that outline enforcement options available against federal violators and also plans to issue a revised Federal Facility Compliance Strategy.

Another change addresses the problem of lack of administrative penalty and order authority in states. EPA is scheduled to issue a notice of proposed rulemaking in June 1988 requiring state environmental agencies to have this authority in order to receive authorization to run their own hazardous waste programs.

Finally, EPA headquarters is in the process of developing a training program for inspectors and a guidance document to assist them in gathering sufficient information at the time of the inspection to alleviate the problem of insufficient information for the enforcement staff and, it is hoped, result in more timely and appropriate actions. These plans respond to EPA headquarters' recognition that one of the reasons the regions and states have not met timely and appropriate enforcement criteria more often is that enforcement staff often need additional time to develop sufficient evidence, which frequently was not obtained during the inspection.<sup>6</sup>

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## Conclusions

The Enforcement Response Policy prescribes timelines and levels of appropriate enforcement response to be taken by EPA and state environmental agencies against violators of RCRA regulatory requirements. Our review disclosed that three EPA regions and six states have not fully met EPA's objectives for taking timely and appropriate enforcement against violators warranting priority enforcement attention. The reasons for not meeting the enforcement objectives varied widely. The more significant reasons for not meeting the enforcement objectives appear to be related to the way individual states and regions chose to implement the policy. Some enforcement actions did not meet the policy objectives because of what we believe to be extenuating circumstances. For example, the Texas RCRA authorization problem in all likelihood may not have been foreseen by EPA. In other cases, such as region V's decision to use a definition of high-priority violators that was inconsistent with the Enforcement Response Policy, the lack of timely and appropriate enforcement action would not seem acceptable in our view. Although the new high-priority definition contained in the revised policy is similar to region V's,

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<sup>6</sup>In our November 1987 report Hazardous Waste: Facility Inspections Are Not Thorough and Complete (GAO/RCED-88-20), we noted that EPA and state inspections were generally not comprehensive, and, as a result, enforcement actions were often delayed or incomplete.

the region deviated from national guidance in existence at the time of our review.

EPA's decision to revise its high-priority definition is expected to reduce the number of high-priority violators and focus EPA's and the states' limited resources on the violators posing the more significant environmental threats. Our review indicated that resource limitations have been a factor in EPA's and states' ability to take timely and appropriate enforcement actions. We did not, however, perform an in-depth analysis of the impact this change in definition would have had on the high-priority cases included in our review. We agree that fewer violators will probably be identified as high-priority violators. However, on the basis of our work, we do not know if the revised definition will adequately discriminate between the more serious violators requiring priority enforcement action and the less serious violators.

EPA has taken or proposes to take several other actions that should improve its and the states' performance in meeting timeliness and appropriateness enforcement criteria. These actions include codifying state regulations so that they are immediately enforceable by EPA, proposing a rule requiring states to have administrative order and penalty authority as a condition of authorization, and issuing two guidance documents that outline enforcement options available against federal violators and adopt time frames for escalating unresolved disputes between the EPA regions and other federal agencies to EPA headquarters for resolution.

These actions, taken together, should help improve enforcement performance; however, in our view, they do not go far enough. Other actions we believe EPA should take to improve adherence to the timeliness and appropriateness criteria as well as the overall objectives of the Enforcement Response Policy are discussed in chapter 3.

# Additional Steps Needed to Improve Timeliness and Appropriateness of Enforcement Actions

Although EPA has taken, or plans to take, several actions that could improve the timeliness and appropriateness of enforcement efforts, additional steps will be required if the objectives of the Enforcement Response Policy are to be met. Specifically, EPA headquarters needs to

- ensure that its regions take enforcement actions against handlers with regulatory violations when states fail to meet the timeliness and appropriateness enforcement goals;
- take additional steps to ensure that its regions meet the timely and appropriate criteria for the enforcement actions they take;
- ensure that penalties for violations are large enough to provide a deterrence to noncompliance;
- ensure that the states take timely action on cases referred to them from EPA for enforcement;
- provide greater emphasis on follow-up monitoring of enforcement actions to assure that compliance is in fact achieved in accordance with administrative orders or other compliance agreements; and
- ensure that enforcement actions are fully documented.

## EPA Regions Should Take Enforcement Action When States Fail to Meet Timeliness and Appropriateness Criteria

The December 1984 Enforcement Response Policy timeliness criteria establish trigger points at which EPA should initiate enforcement action if an authorized state has failed to take timely action or has initiated an inappropriate enforcement action. For example, the Enforcement Response Policy notes that if a state has failed to issue an order or complete a referral of a high-priority violator within 135 days after an inspection, the EPA regional office should, after notifying the state, take enforcement action. The regional office may also assess a penalty against a high-priority violator if the state fails to do so or if the state penalty is judged insufficient. According to the Enforcement Response Policy, only if the state has made reasonable progress in returning the facility to compliance or in processing an enforcement action should the region hold off direct federal response when the enforcement timelines are not met.

## EPA Regions Are Not Taking Direct Enforcement Actions When Warranted

The 3 EPA regions we reviewed did not take direct enforcement action in 570 cases we identified in which the states did not meet either EPA's timely or appropriate criteria—or both. The 6 states in our review completed 208 enforcement actions against high-priority violators and 499 against class I violators. As shown in table 3.1, the states did not meet the timeliness criteria as specified in the Enforcement Response Policy in 181 high-priority and 217 class I violator cases. In a number of cases,

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extenuating circumstances would explain the absence of EPA regional enforcement actions when the states failed to meet the timeliness criteria. For example, if the EPA region believed the state was making reasonable progress in returning a violator to compliance, no regional intervention would have been expected. Similarly, as noted in chapter 2, we believe that the Texas reauthorization problem is a plausible reason for not meeting the Enforcement Response Policy criteria. On the other hand, however, region V's decision to use a high-priority definition inconsistent with the current Enforcement Response Policy is not, in our view, an acceptable reason for not taking timely and appropriate enforcement action. Our analysis indicates that 116 of 181 untimely enforcement actions against high-priority violators, and 193 of 217 untimely actions against class I violators, did not appear to involve extenuating circumstances, and the regions did not step in and use their enforcement authority.

**Table 3.1: Number of Untimely Enforcement Actions Against High Priority (HPV) and Class I Violators**

	Total untimely actions		Untimely actions with no extenuating circumstances	
	HPV	Class I	HPV	Class I
Region II states	45	104	44	94
Region V states	105	35	53	30
Region VI states	31	78	19	69
<b>Total</b>	<b>181</b>	<b>217</b>	<b>116</b>	<b>193</b>

Many of the high-priority cases in which there were no extenuating reasons for states not meeting the enforcement goals involved lengthy periods of time, yet EPA took no direct enforcement action in any of these cases. For example, for 58 of the 116 high-priority violator cases that involved no apparent extenuating circumstances, the states did not issue formal enforcement actions within twice the time allowed by the response policy. The policy allows 135 days to take action on high-priority cases after an inspection; doubling this allowance would mean that 270 days would have elapsed before action was taken.

Our review indicates that, in addition to not intervening when states do not take timely enforcement actions, the regions are not stepping in when the states take inappropriate enforcement actions. As shown table 3.2, our analysis indicates that 59 of the inappropriate high-priority and 43 of the class I violator enforcement actions did not appear to involve extenuating circumstances, yet EPA took no direct enforcement action in any of these cases. For example, the state of New Jersey did not issue

formal enforcement orders and penalties against 24 high-priority financial responsibility violators we reviewed. EPA region II enforcement officials were aware of New Jersey's lack of enforcement action, but did not intervene in any of these cases because they thought the state was making reasonable progress in taking the appropriate action. However, in December 1987, about 6 months after the close of our fieldwork, EPA region II began taking action on some of the New Jersey cases.

**Table 3.2: Number of Inappropriate State Enforcement Actions Against High-Priority Violators and Class I Violators**

	Total inappropriate actions		Actions with no extenuating circumstances	
	HPV	Class I	HPV	Class I
Region II states	36	29	36	28
Region V states	74	4	15	4
Region VI states	13	16	8	11
<b>Total</b>	<b>123</b>	<b>49</b>	<b>59</b>	<b>43</b>

### Reasons for EPA Regions' Lack of Action

We asked EPA regional enforcement officials why the regions had not been more aggressive in taking enforcement actions when the states failed to take enforcement actions as prescribed in the Enforcement Response Policy. According to the regional officials, they have been reluctant to take direct enforcement action in authorized states primarily because (1) they do not want to damage established working relationships with the states, and states normally prefer to handle their own enforcement actions without federal interference; (2) they lack enforcement resources or they have other priorities that preclude them from taking such actions; and/or (3) they believe the states are making reasonable progress in taking an enforcement action—even though the timelines in the enforcement policy have been exceeded—and that EPA's added involvement would not speed up the process.

### EPA Headquarters Has Noted Lack of Regional Intervention

EPA headquarters conducts periodic evaluations of regional performance in overseeing state RCRA programs about every 18 months. These evaluations are called regional program reviews and are performed at the regional offices by headquarters EPA staff. In the program reviews conducted between September 1986 and May 1987 for the three regions we visited, headquarters noted that the states were having difficulty meeting the timely and appropriate criteria and the EPA regions were not taking direct enforcement actions when states failed to follow the enforcement policy.

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For example, the September 1986 program review for region VI noted that, historically, the region has not taken direct enforcement action when the states did not take timely or appropriate enforcement actions. According to the findings presented in the program review, EPA region VI prefers to pressure the states to take action or refer the case to EPA because it believes that direct EPA enforcement action does not change the internal problems that cause state inaction, but does hurt relations with the states. The same report further noted that, although in region VI a significant number of handlers have unresolved class I violations in the areas of groundwater monitoring, financial responsibility, and closure/postclosure, the region is reluctant to demand referral of these cases due to its own resource constraints. The report did not, however, include recommendations for improving timely and appropriate enforcement response in the region.

A March 1987 program evaluation report on region II noted that the region threatened to take direct enforcement action in New Jersey if the state failed to take certain enforcement actions in four cases within specified time frames. The state did not take the actions as prescribed by the region, but subsequently referred one case to EPA for enforcement. The region did not take direct enforcement action on the remaining 3 cases as of June 30, 1987. Region II officials noted that they did not have sufficient resources to carry out the threatened intervention.

A May 1987 RCRA program review of region V noted that the region and its states have found it difficult to meet the 135-day enforcement response time for high-priority violators. The report commented that most states frequently take the full 135 days to attempt negotiation of voluntary consent orders and penalties with violators before referring cases to the region for issuance of formal enforcement orders. For example, our review of Ohio enforcement referrals to EPA region V during our 15-month review period showed that the average time elapsed between an inspection and a referral was 180 days (14 referrals).

In discussing the lack of regional intervention when states fail to meet enforcement goals with headquarters officials, we were told that EPA-state relationships are important to the success of the RCRA program. In the view of headquarters officials, they prefer that the regions work with the states to the maximum extent possible to bring hazardous waste handlers into compliance with RCRA regulatory requirements before taking unilateral regional enforcement action. In our opinion, while this may be the preferred approach, the enforcement performance of the states, as reflected in our review, suggests that this approach is



not working as envisioned by headquarters officials. A major reason for adopting the Enforcement Response Policy in 1984—with specific timeliness and appropriateness criteria—was to get the regions and states to become more aggressive in enforcing RCRA regulatory requirements. We believe that the absence of unilateral regional enforcement actions, especially when states are taking more than double the amount of time allowed in the policy before taking enforcement action, runs counter to the message that EPA was attempting to convey when issuing its enforcement policy—that is, compliance and deterrence from future violations. The EPA regions lack of direct action also results in inequitable treatment among violators with some receiving stringent enforcement actions and penalties and others receiving no action.

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### EPA Headquarters Should Ensure That Its Regions Meet Timeliness and Appropriateness Criteria

EPA regions should set an example for the states by taking timely, visible, and appropriate enforcement actions against violators of RCRA regulations. Furthermore, EPA headquarters should ensure that the EPA regions meet the Enforcement Response Policy timeliness and appropriateness criteria by monitoring its regions' performance in implementing the policy and, where necessary, taking action to ensure that its regions meet their enforcement responsibilities. It should be pointed out that regional enforcement responsibilities are twofold. They are responsible for overseeing state enforcement activities and also for taking timely and appropriate enforcement action at facilities they themselves inspect.

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### Regional Enforcement Efforts Do Not Set an Example for States

In addition to not aggressively following up on state enforcement actions that are not timely and/or appropriate, the regions themselves are not meeting the timely and appropriate criteria contained in the Enforcement Response Policy for the enforcement actions they undertake. For example, our analysis of regional enforcement cases indicated untimely or inappropriate enforcement actions in 80 high-priority violator cases and 37 class I violator cases. The large number of untimely and/or inappropriate regional enforcement actions against high-priority violators is mostly attributable to the different high-priority definition used in region V and the Texas authorization problem in region VI. These 2 regions account for 76 of the 80 high-priority enforcement actions.

With regard to the 60 regional class I enforcement actions we reviewed, the regions did not meet the timeliness and appropriateness criteria in 37, or about 62 percent, of the cases. According to regional enforcement

officials and the results of our analysis, the regions were unable to meet the enforcement criteria in these cases for a number of reasons, including a lack of resources and lengthy amounts of time required to negotiate compliance agreements with federal facilities.

One of the more significant changes in the revised policy is the definition of high-priority violators, which EPA headquarters officials believe will reduce the number of violators requiring the more time-consuming formal enforcement actions. Should this happen, it would seem that the number of class I violators would increase, and thus an increase in enforcement resources would be required to handle the additional workload. It may be that resources that have previously been directed toward handling high-priority enforcement cases may become available to handle class I cases. Given that informal enforcement actions require less time to take, it may be possible to handle the increased class I workload with these resources. On the other hand, the regions and the states may find that the high-priority workload is reduced to be more in line with enforcement resources that have been utilized for high-priority enforcement cases. In discussing these possibilities with EPA headquarters officials, we were told that more resources may be required to meet the enforcement criteria for class I violators under the new policy than under the current policy. Resource requirements to implement the new policy, however, were not assessed prior to its revision.

Our review has shown that the regions' and states' record in taking enforcement actions against class I violators is already less than what will be acceptable under the new policy that 90 percent of the enforcement actions should meet the timely enforcement criteria. Increases in the number of class I enforcement cases may, however, require additional resources if the 90 percent goal in the new policy is to be met. EPA headquarters and the regions should ensure that they are prepared to handle the shift in the workload, especially in view of their prior performance in addressing class I violators.

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**Regions and States Not  
Accountable for Meeting  
Timeliness and  
Appropriateness Criteria  
Through Reporting System**

Through its Strategic Planning and Management System (SPMS), EPA headquarters negotiates and establishes program implementation performance commitments with its regions for each year. The regions report quarterly to EPA headquarters on regional and state progress in achieving these commitments. RCRA enforcement is included in the SPMS system; however, the enforcement objectives that have been established with the regions, and the information that is to be reported, are not entirely consistent with the timeliness and appropriateness criteria in

the Enforcement Response Policy. For example, under SPMS the regions are to report only information concerning high-priority land disposal facilities that are in violation of groundwater, financial responsibility, or closure/postclosure requirements. The regions are not required to report on other high-priority violators or on class I violators. The reason given by EPA officials for obtaining information on only land disposal facilities is that EPA headquarters considers land disposal facilities to be the most environmentally significant hazardous waste handlers. However, EPA headquarters officials told us that they do plan to begin phasing in some of the other types of high-priority violators (i.e., treatment and/or storage facilities) into the reporting system in fiscal year 1989.

In addition, under SPMS, the enforcement measures to be reported do not match the timeliness and appropriateness criteria contained in the Enforcement Response Policy. For example, SPMS does not hold regions and states accountable for reporting whether penalties are assessed against high-priority violators. Furthermore, the elapsed time between inspections and enforcement actions for high-priority violators in the system is not required to be reported. The regions are only required to report the elapsed time from inspections for handlers where enforcement actions have not been initiated.

Another inconsistency between SPMS reporting requirements and the Enforcement Response Policy measures regards allowable time frames for taking enforcement action. As indicated above, regional commitments to EPA headquarters are established on a fiscal year basis. We reviewed the SPMS measures in RCRA program guidance documents for fiscal years 1986, 1987, and 1988 and found no time frame requirement or commitment for the regions to take enforcement action on high-priority violators identified during the fiscal year. The fiscal year 1987 and 1988 guidance documents did, however, establish maximum time frames for taking action against some high-priority violators identified in prior fiscal years where no enforcement action had been taken, or was pending, at the beginning of the fiscal year. The instructions to the regions regarding these prior year violators was that they all must be addressed with a formal enforcement action and/or return to compliance by the end of the current fiscal year. Using this criterion, the regions would be allowed at least 365 days—rather than 135 days, as required under the Enforcement Response Policy—to take a formal enforcement action against a high-priority violator. In addition, under the Enforcement Response Policy criteria, all high-priority violators must receive a timely

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and appropriate enforcement response regardless of whether the violator has returned to compliance. SPMS does not monitor the extent to which enforcement actions are taken in such cases.

These and the other inconsistencies discussed above are important distinctions because, as regional and headquarters officials told us, the SPMS measures, rather than the enforcement response objectives, are the measures that the regions are accountable for when headquarters evaluates regional performance.

In discussing the difference in SPMS reporting measures and the timeliness and appropriateness measures in the Enforcement Response Policy with EPA headquarters officials, we were told that the measures in the policy represent idealistic objectives while the SPMS measures represent more realistic objectives, given the amount of resources the regions can dedicate to enforcement actions. However, we believe that reporting systems should measure the policy objectives that EPA is trying to implement. According to headquarters officials, the requirement to have the regions report on the elapsed time from inspections for handlers that have not yet received enforcement actions was added to the SPMS system beginning in fiscal year 1987. This new reporting requirement, along with the additions discussed above, will partially provide information to monitor adherence to the Enforcement Response Policy time frames for some high-priority violators. However, the SPMS system still will not be monitoring whether penalties are being assessed against high-priority violators, nor will it provide information on the timeliness and appropriateness of actions against all high-priority and class I violators.

At a minimum, we believe EPA headquarters should monitor, and hold regions and states accountable to meeting, both timeliness and appropriateness criteria as specified in the Enforcement Response Policy for all high-priority violators and also monitor and hold regions accountable for taking such actions against class I violators. EPA should also consider monitoring class I actions taken by the states through SPMS, because implementation of EPA's new enforcement policy in October 1988 could result in a much larger universe of class I violators.

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## RCRA Penalties May Not Equal the Economic Benefit of Noncompliance

Our review showed that penalties assessed by EPA and the states against violators of RCRA requirements may not be large enough to offset the economic benefits of noncompliance. According to the Enforcement Response Policy, the EPA regions are required to follow guidelines contained in the RCRA Civil Penalty Policy (RCPP) when assessing penalties against violators of RCRA regulatory requirements. The RCPP was issued in May 1984 to ensure that RCRA penalties are equitably applied and provide an adequate deterrent to noncompliance. The policy provides that, with four exceptions (discussed below), a penalty should be large enough to remove the economic benefits waste handlers might gain by not complying with RCRA requirements. The Enforcement Response Policy, however, does not require the states to use the RCPP when calculating penalties. We found that state penalty policies are not uniform in how they consider the economic benefit of noncompliance in penalty calculations and that existing EPA and state policies and procedures for calculating penalties are not being properly documented. Consequently, there is no assurance that EPA and state penalty policies are being properly implemented and that the economic benefit of noncompliance is being adequately calculated and included in the final penalty assessment. As a result, final penalty assessments may not be large enough to offset the economic benefit of noncompliance and thus deter future noncompliance in the regulated community.

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## Regions and States Are Not Required to Use the Same Penalty Policy

In assessing penalties for noncompliance, regions and states are not required to follow the same policies. The RCPP is to be used by the EPA regions to calculate RCRA penalties. The policy provides recommended ranges of penalties for particular violations and states that the total penalty calculation should be based on a number of factors, one of which is the economic benefit that may be derived by the violator from noncompliance. The penalty policy requires that, at a minimum, the economic benefit of noncompliance be included in any penalty calculation and a specific formula, based on the delayed and avoided costs derived from noncompliance, be used to calculate the economic benefit.<sup>1</sup> The RCPP does provide, however, that a total penalty that is less than the economic benefit may be assessed under one of four conditions: (1) the economic benefit is less than \$2,500, (2) compelling public concerns exist, (3) it is highly unlikely that EPA will recover the economic benefit through litigation, or (4) the violator is financially unable to pay the appropriate penalty.

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<sup>1</sup> Using the RCPP formula, economic benefit = (avoided costs of compliance x marginal tax rate of handler) + (delayed costs of compliance x IRS delinquent tax rate).

However, authorized states are not required to follow the RCPP when assessing penalties and therefore are not required to apply economic benefit factors when determining appropriate penalty amounts.

EPA Regions Are Not Documenting Economic Benefit Calculations

In general, we could not determine whether the EPA regions issued penalties as prescribed by the RCPP because of the lack of documentation in the files. The regions we reviewed issued proposed penalties in 40 of the high-priority enforcement cases included in our review. As shown in table 3.3, we reviewed 31 of these penalties and found only 2 cases in which we could verify that the economic benefit was calculated in accordance with the RCPP.

Table 3.3: EPA Regions' Consideration of Economic Benefit of Noncompliance in Penalty Calculations

	Region II	Region V	Region VI	Total
Economic benefit calculated using RCPP	0	1	1	2
Economic benefit not considered necessary	2	4	3	9
Economic benefit not shown in penalty calculations	0	9	6	15
Documentation not available on penalty calculations	0	1	4	5
<b>Total</b>	<b>2</b>	<b>15</b>	<b>14</b>	<b>31</b>

In nine cases we found that conditions related to one of the four exceptions noted above applied, and thus there was no need to include the economic benefit in the proposed penalty. However, we found no documentation supporting these determinations. In 15 cases, we reviewed the penalty calculations, but we did not find sufficient evidence or documentation to show that the economic benefit of noncompliance had been considered in the penalty calculation. For the remaining five cases, we found no documentation on penalty calculations to review. Thus, in these 29 cases we were unable to determine whether the proposed penalties adequately considered the economic benefit of noncompliance.

States Are Not Documenting the Economic Benefit of Noncompliance

Because the states are not required to follow any particular criteria in setting penalties, state policies differ in their treatment of the economic benefit derived from RCRA violations. For example, two of the four states we reviewed that have authorized their environmental regulatory agencies to issue administrative penalties<sup>2</sup> —Louisiana and New York—

<sup>2</sup>Illinois and Ohio state environmental agencies do not have administrative penalty authority and thus were excluded from this analysis.

require calculation of the economic benefit using the RCRA civil penalty policy formula when assessing penalties. New Jersey allows an adjustment for economic benefit, but does not provide specific guidelines for calculating the economic benefit of noncompliance. Texas requires "consideration" of the economic benefit of a violation as one of several possible adjustments to a set range of penalties for specific violations, but places a limit on how much penalties may be increased.

The 4 states issued proposed penalties in 40 of the high-priority enforcement cases included in our review, 35 of which we reviewed. We reviewed 21 proposed penalties in Louisiana, New Jersey, and New York and found no cases in which a formula had been used to calculate the economic benefit of noncompliance (see table 3.4). The 14 Texas cases are discussed separately later in this section.

**Table 3.4: New Jersey, New York, and Louisiana Calculation of Economic Benefit of Noncompliance in Determining Penalties**

	New Jersey	New York	Louisiana	Total
Economic benefit calculated using RCPP	0	0	0	0
Economic benefit not considered necessary	0	2	4	6
Economic benefit not shown in penalty calculations	9	0	0	9
Documentation not available on penalty calculations	0	0	6	6
<b>Total</b>	<b>9</b>	<b>2</b>	<b>10</b>	<b>21</b>

In 6 of these 21 cases, the economic benefit calculation was not performed because it was considered unnecessary due to conditions related to one of the 4 exceptions cited previously. For example, in one Louisiana case, the case files indicated that the facility lost money the previous year and, therefore, must not have realized any economic benefit from its noncompliance. However, we found no documentation or evidence in the 6 cases to support these assertions.

In 9 of the 21 cases, we reviewed the penalty calculation records and found no adjustment for the economic benefit of noncompliance included in the proposed penalty and no evidence that it was considered in the total penalty calculation. In the remaining 6 of 21 cases, we found no evidence in the files of any penalty calculation records whatsoever. Thus, in these 21 cases we were unable to determine whether the proposed penalties adequately considered the economic benefit derived from noncompliance.

Texas was the only state with administrative penalty authority that consistently documented all penalty calculations. We reviewed 14 proposed penalties in Texas, all of which were properly documented according to their state policy and included a consideration of economic benefit. However, because of limitations in the Texas penalty policy regarding the method used to calculate the economic benefit, the policy may not produce penalties large enough to offset the economic benefit of noncompliance. For example, any adjustment made in consideration of economic benefit may not increase the recommended base penalty by more than 20 percent of the difference between the high and low amounts in the recommended base penalty range, and the total penalty may not exceed \$10,000 per day. The maximum recommended base penalty range in Texas for the most severe RCRA violations is \$8,000 to \$10,000 per day. Thus, the total adjustment for the economic benefit of noncompliance in the most severe case cannot exceed \$400 per day (20 percent times \$2,000-range difference equals \$400).

This limitation may adversely affect Texas' ability to eliminate the economic benefit of noncompliance. For example, one enforcement action involved a Texas high-priority violator that was cited for sulfate and chromium groundwater contamination. The penalty computation sheet cites "substantial economic benefit results from not remediating the problem," and it further notes that "it will cost approximately \$500,000" for the violator to make the necessary corrections to the hazardous waste unit. The recommendation was a 15-percent increase in the base penalty for economic benefit. This resulted in adding \$630 to the penalty. Using the RCPP formula, however, the calculation for the economic benefit associated with this \$500,000 delayed cost should have been a minimum of about \$31,000.<sup>3</sup> Thus, the minimum \$31,000 savings in delayed costs that accrued to the violator only resulted in a \$630 penalty adjustment for economic benefit.

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## Time Frames for Taking Action After State or EPA Enforcement Referrals

The December 1984 Enforcement Response Policy did not establish a timeline for EPA to take enforcement action on cases referred from states. Neither did the policy include time frames for states to take action on referrals from EPA. Because the referral is only an interim step in the process and not a final enforcement action, it is important, for example, to establish time frames to initiate enforcement actions after

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<sup>3</sup>Using the RCPP formula, economic benefit = (avoided costs x marginal tax rate of handler) + (delayed costs x IRS delinquent tax rate). In this case avoided costs are unknown and therefore are not included. Economic benefit is calculated for 7 months (October 1985 through March 1986) of noncompliance. Economic benefit = [(\$500,000 x 10.6%) 12] x 7 = \$30,917.



receipt of the referral. In its revised Enforcement Response Policy, EPA headquarters has partially addressed this concern by establishing a 90-day criterion as a timely response after a state referral to EPA. No similar timeline, however, was established for states to take action on EPA referrals. For purposes of our review, as noted in chapter 1, we asserted a 90-day criterion for all types of referrals.

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### State Actions on Referrals From EPA Regions

Two of the three regions that we reviewed referred five high-priority violator cases to states for enforcement action during the period of our review. Of the five referrals, the states did not take enforcement action within 90 days in four cases. Of the four untimely state enforcement actions, two involved federal facilities in which the state disagreed with the violations discovered by EPA inspectors. One of the two was resolved in the state's favor, and the other was still in dispute as of January 1988. One of the remaining two cases involved groundwater monitoring violations noted by EPA in an April 1986 inspection. Enforcement action was delayed until May 1987 primarily because the state agency and EPA region disagreed over the content of a proposed state order and penalty amount. The fourth case was delayed because of the time needed to prepare a comprehensive enforcement action.

Fifteen class I referrals were made to the states from the EPA regions. The states did not take timely enforcement action within 90 days of the referral on 13 (87 percent) of these referrals. Of the 13 untimely state actions, 11 involved government-owned facilities—9 federal and 2 state. For 9 of these 11 cases, the states disagreed with the violations discovered by EPA inspectors, and thus negotiations between state and EPA enforcement personnel delayed enforcement action. As of January 1988, 6 of the 9 violation disputes were still unresolved.

We asked EPA headquarters officials why time frames for state action on EPA referred cases had not been included in the revised Enforcement Response Policy. We were told that it was probably an oversight that a similar time frame for EPA referrals to the states was not included in the revision. They said that the states should meet the same 90-day criteria in taking enforcement actions on cases referred from the EPA regions; however, they have no plans to revise the policy. We agree that the criteria should be the same and that this should be clarified in EPA's enforcement policy.

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## **EPA Regional and State Follow-Up to Ensure Violations Are Corrected**

Our review indicates that the regions and states are generally following up on compliance with enforcement directives for high-priority violators, but class I follow-up needs improvement. However, the procedures being followed to ensure compliance for all types of violators appear to be informal and inconsistent between the regions and states. Furthermore, EPA's criterion that compliance verifications be performed within 30 days after a handler's scheduled compliance date is not always achieved.

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## **Compliance Follow-Up Requirements**

The primary objectives of the Enforcement Response Policy are to ensure that violators comply with the RCRA regulations as expeditiously as possible and to deter them from violating regulations in the future. The Enforcement Response Policy timeliness criteria require that the regions and states escalate enforcement action when compliance with an administrative order or notice of violation is not achieved, but does not outline systematic procedures for the regions and states to follow to ensure that violations are corrected. However, the policy does reference a 1984 EPA RCRA policy directive entitled "Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA" whose October 1985 and June 1986 revisions state that verification of compliance actions be performed within 30 days after a handler's scheduled compliance date.

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## **Regions/States Generally Follow Up on Enforcement Actions Taken Against High-Priority Violators**

Of the 311 high-priority violator cases included in our review, 60 had been issued final compliance orders. We reviewed these 60 compliance orders to determine if violators came into compliance as required and, if not, whether EPA or the state escalated its enforcement action or referred the case to a higher authority. Our review showed that in 25 of the 60 cases the handlers returned to compliance as scheduled. An additional 25 cases were not scheduled to return to compliance until after June 30, 1987, or were under appeal by the violator and were yet to be resolved; however, EPA or the states were still monitoring these cases. In the remaining 10 cases, the violators had not returned to compliance as required. EPA or the states had escalated the enforcement action in seven of these, and EPA has continued to follow up on the remaining three cases.

The regions and states have not generally taken additional punitive enforcement action (e.g., additional penalty, revocation of interim status/permit, cease and desist order) in cases of noncompliance. However, as noted by a Louisiana official, such actions are sometimes used as a

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bargaining tool in order to persuade recalcitrant violators to comply with their compliance requirements.

It should be noted that only a small number of cases in our review have been issued final orders. Thus, the results of our review may not necessarily be indicative of nationwide regional practices.

**Regions/States Follow-Up  
Against Class I Violators  
Needs Improvement**

In contrast to the regions' and states' performance in following up on high-priority violators, their performance for class I violators is not as strong. While they appear to be monitoring class I violators, we found that 79 such violator cases had not returned to compliance as scheduled. Enforcement action had been escalated in 51 of the cases, but in 28 cases enforcement action had not been escalated. As indicated in table 3.5, 24 of the 28 cases involved state enforcement actions. Only Louisiana had escalated all class I violator enforcement cases that should have been escalated during the period of our review.

**Table 3.5: Analysis of Class I Violator  
Enforcement Actions That Should Have  
Been Escalated**

<b>Regions/States</b>	<b>Should have been escalated</b>	<b>Enforcement not escalated</b>
Region V	6	4
Louisiana	2	0
Texas	8	4
Illinois	5	3
Ohio	10	1
New Jersey	46	14
New York	2	2
<b>Total</b>	<b>79</b>	<b>28</b>

Our primary review emphasis was on high-priority violators; as a consequence, we did not determine case-specific reasons why the state agencies did not escalate enforcement actions against class I noncompliers, nor did we determine specific reasons why the EPA regions did not take direct enforcement actions in these cases.

**Improved Compliance  
Follow-Up Procedures  
Needed**

Although the regions and states appear to be monitoring handler compliance with enforcement actions, we found that the procedures used were generally informal and inconsistent. Furthermore, as indicated above, actual follow-up to verify compliance with enforcement directives is not always being performed within 30 days, as required in EPA's June 1986 policy directive noted above.

Generally, we found that EPA regions and most states rely on a combination of correspondence, special follow-up inspections, or annual scheduled facility inspections (not necessarily corresponding to compliance dates) to determine if a violator has returned to compliance. For example, Louisiana routinely scheduled follow-up inspections to correspond with compliance dates as a means of assuring compliance schedules were met. On the other hand, our review in regions II and VI indicated that these regions do not generally schedule follow-up inspections; instead, they wait for the next regularly scheduled annual inspection to verify compliance. We also found that New Jersey only requires formal follow-up on violations at commercial hazardous waste facilities.

Furthermore, we found that incorporation of the 30-day criterion in the region/state enforcement agreements has been inconsistent. For example, the region V grant agreement with Illinois requires follow-up inspections to verify compliance within 90 days of the scheduled compliance date.

In this regard, we also found that EPA's Inspector General had reviewed compliance follow-up procedures in region IX to determine if monitoring was adequate to ensure handler compliance with provisions contained in EPA enforcement orders. The review was limited to seven RCRA facilities that had been issued final orders in the region. The Inspector General's report, issued on March 31, 1987, stated that regional tracking procedures did not assure timely correction of regulatory violations and that follow-up was left up to the discretion of enforcement personnel assigned to the case.

In our opinion, EPA and the states need to give more attention to compliance follow-up actions. We believe that not escalating enforcement action for continued noncompliance not only runs counter to the Enforcement Response Policy, but also sanctions continued noncompliance that may have potential human health and environmental consequences, and could greatly limit deterrence of other violations. As indicated earlier, the class I violator universe will probably increase as a result of the revision in the enforcement policy. This means that follow-up actions for class I violators will require even more attention. Earlier in this chapter we indicated that the EPA regions needed to be more aggressive in pursuing enforcement action when the states fail to meet timeliness and appropriateness enforcement objectives. In our view this same aggressiveness needs to be extended to state enforcement compliance follow-up actions. Should the states not escalate enforcement actions when hazardous waste handlers fail to return to compliance, and

there are no compelling reasons for not doing so, the regions should escalate the enforcement action.

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## Internal Controls Need to Be Improved

As indicated in chapter 1, the EPA Administrator reported state implementation of RCRA, including effective enforcement, as a material internal control weakness in the RCRA enforcement program in 1983. Internal controls are integral to all agency operations, not just the financial or administrative areas, and weak or nonexistent internal controls are often the underlying causes of agency problems. The need for strengthened internal controls, first required under the Accounting and Auditing Act of 1950, was emphasized by the Congress' enactment of the Federal Managers' Financial Integrity Act in September 1982, which directed executive federal agencies to ensure compliance with government wide standards prescribed by the Comptroller General.<sup>4</sup>

In the fiscal year 1984 report, the Administrator listed the issuance of five guidance and policy documents as actions taken to correct the internal control problems in the RCRA enforcement program. These documents were the

- RCRA Civil Penalty Policy,
- a September 1984 memorandum on the issuance of administrative orders,
- Technical Guidance for Enforcement of Closure, Postclosure and Financial Responsibility Requirements,
- Technical Guidance for Enforcement of Interim Status Ground Water Monitoring Requirements, and
- Interim National Criteria for a Quality Hazardous Waste Management Program Under RCRA.<sup>5</sup>

In addition to these documents, EPA also issued its RCRA Enforcement Response Policy in 1984. The policy, however, was not listed as a corrective action taken in the RCRA enforcement program in the 1984 report.

With the exception of the RCRA Civil Penalty Policy, which is discussed earlier in this chapter, we did not assess the impact of these documents in correcting internal control weaknesses in the enforcement program. Yet our findings with respect to the RCRA Civil Penalty Policy indicate

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<sup>4</sup>Standards for Internal Controls in the Federal Government. United States General Accounting Office, 1983.

<sup>5</sup>As previously indicated, this document was revised in October 1985 and again in June 1986.

that internal control problems continue to exist in that states have not been required to follow the policy. Our review also indicates that other internal control weaknesses exist in the enforcement program. For example, we believe that weaknesses in EPA's use of supervisory internal controls have adversely affected implementation of the RCRA Enforcement Response Policy. In addition, EPA needs to improve its internal controls in the RCRA enforcement program by institutionalizing minimum procedural requirements for follow-up enforcement compliance actions and also needs to require that increased attention be given to fully documenting enforcement actions. These internal control problems are discussed below.

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## Supervision

Supervision is a key internal control standard for ensuring that agency program objectives are met. The supervision standard requires managers to continuously review and approve the work of subordinates and to require that corrective action be taken when objectives are not met. Our review indicates that neither EPA headquarters nor the regions have aggressively supervised the implementation of EPA's Enforcement Response Policy. For example, although the regions in our review were aware that the states were having problems in implementing the policy, they did not take sufficient action to improve states' performance, nor did they take direct enforcement action against violators when the states failed to meet the enforcement policy timeliness and appropriateness criteria. Similarly, EPA headquarters has been aware that both the regions and states have experienced difficulties in implementing the policy. Only recently has EPA headquarters taken action to address these problems. Headquarters has yet to change its SPMS reporting system to hold the regions accountable for meeting timeliness and appropriateness requirements contained in the Enforcement Response Policy. In our opinion, EPA needs to be more aggressive in its supervision of regional enforcement actions and also needs to ensure that the regions are aggressively pursuing full implementation of the enforcement policy with the states.

In addition to ensuring that the regions and states take timely and appropriate enforcement actions, EPA headquarters needs to make certain that follow-up actions ensure that compliance is completed as mandated.

Although EPA has established time frames for compliance follow-up, increased supervision is needed to ensure that both the regions and states meet minimum enforcement follow-up standards. As previously

indicated, we found that although the regions and states appear to be monitoring hazardous wastes handler compliance actions, the procedures being followed are not always systematic and may not be adequate to ensure that handlers comply with enforcement directives. Our review indicated that the follow-up procedures used by the regions and states vary considerably.

Although our review indicates that compliance has been a problem only with class I violators to date, we believe that EPA's current method of allowing the regions and states to use whatever means they choose to verify compliance does not provide for a minimum degree of assurance that enforcement directives will be complied with.

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## Documentation of Enforcement Activities

In our review we found that documentation included in enforcement files was often incomplete or not current. We were unable to determine the causes for untimely enforcement action in about 50 percent of the class I violator cases either from the enforcement files or from the enforcement officials with whom we spoke. Other examples include the lack of documentation for penalty calculations, which we discussed earlier in this chapter, and the absence of documentation regarding compliance follow-up actions.

In the section above we commented on the absence of formal procedures for following up on enforcement actions. Our review also disclosed that compliance follow-up activities were not well documented. In numerous cases we were unable to determine the complete compliance status of a facility from the enforcement files. The Inspector General's review of region IX compliance activities discussed above also commented on documentation problems with respect to compliance follow-on actions. According to the Inspector General's report, documentation in region IX files for the seven cases reviewed indicated that only about 18 percent of the enforcement requirements in the compliance orders had been met as specified by the orders. In particular, the report stated that groundwater monitoring requirements could not be verified as having been complied with for 37 of the 48 compliance items reviewed. The Inspector General concluded, on the basis of the documentation available in region IX files, that compliance could not be conclusively demonstrated for six of the seven violators. Region IX officials, in commenting on the report, asserted that compliance was better than was concluded in the Inspector General's report, but that the compliance actions had not been fully documented in region IX's facility files.

Adequate internal controls are important to EPA's successful implementation of the Enforcement Response Policy criteria. Procedural requirements and documentation are especially important because the majority of the enforcement responsibility rests with the states, and not EPA. Without minimal procedural requirements and full and accurate documentation, it is difficult for EPA to assure that enforcement objectives are being met and for EPA to assess the impact of its policy in achieving greater compliance with regulatory requirements.

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## Conclusions

EPA has taken a number of actions to improve regional and state enforcement of RCRA regulatory requirements. However, in our view, EPA headquarters should take additional actions to further improve enforcement efforts. Specifically, we believe EPA headquarters needs to improve its oversight of both regional and state enforcement performance. As a minimum, EPA headquarters needs to monitor and hold regions accountable for meeting the enforcement measures prescribed in its Enforcement Response Policy in its SPMS reporting system and, where enforcement actions fall short of enforcement objectives, aggressively follow up with regions and states that have problems to ensure that enforcement actions are vigorously pursued. Headquarters also needs to emphasize to its regions that they should be more aggressive in overseeing state enforcement activities and, where state enforcement actions fall short, step in with their own enforcement efforts. Headquarters also needs to emphasize to the regions that they are to set an example for the states to follow in fulfilling their enforcement responsibilities. Furthermore, EPA headquarters also needs to clarify its enforcement policy to ensure that states understand that they are to take enforcement action on cases referred from the regions within 90 days, the same time frame that regions are given to take enforcement action on state referrals.

In order to ensure that penalties represent a deterrent to noncompliance with regulatory requirements, and to establish a minimum level of penalty consistency between EPA and the states, EPA should require that authorized states adopt its penalty policy for determining any economic benefits that handlers may realize when they are not in compliance with regulatory requirements and including these amounts in assessed penalties.

In addition to improving supervisory internal controls over enforcement activities, EPA also needs to improve internal controls in its enforcement program in two other areas: minimum compliance follow-up procedures



need to be articulated, and enforcement documentation requirements need to be reemphasized.

A lack of resources was often cited as a reason or contributing factor for why the regions did not take enforcement action when states failed to meet the timeliness and appropriateness criteria or when the regions did not meet the criteria themselves. With the current emphasis on reducing government spending, we recognize that it may be difficult to obtain additional funds for enforcement activities. However, we believe these activities are important if the Enforcement Response Policy objectives of a sufficient and uniform response, and compliance and deterrence to future violations is to be achieved. In our view EPA is in the best position to determine if additional resources are needed for the program and, if there are shortages, provide such information to the appropriate congressional committees for their consideration.

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## Recommendations

To improve EPA and state performance in implementing EPA's Enforcement Response Policy, and also to ensure an equitable and consistent application of RCRA enforcement actions nationwide, we recommend that the EPA Administrator reinforce to the regions their responsibility to monitor state enforcement actions and to take direct enforcement action against hazardous waste handlers when states fail to do so in a timely and appropriate manner. Reinforcement of this requirement should, as a minimum, be reflected in annual headquarters RCRA program implementation guidance to the regions. Periodic headquarters directives to the regions regarding RCRA implementation and performance issues could also be used to communicate this message. We also recommend that the Administrator direct the regions to take steps to ensure that they themselves meet the timeliness and appropriateness criteria for enforcement actions that they take in order to set an example for the states to follow in implementing the Enforcement Response Policy and hold the regions accountable for meeting these criteria.

In order for EPA headquarters to closely monitor regional and state performance in meeting the timely and appropriate criteria, we also recommend that the Administrator direct that EPA's Strategic Planning and Management System be revised to incorporate enforcement performance reporting requirements that are consistent with the timeliness and appropriateness criteria in the Enforcement Response Policy and hold regions accountable for meeting these criteria.

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In addition to these recommendations, we also recommend that the Administrator take action to

- require authorized states to adopt penalty policies that take into consideration the full economic benefit of noncompliance consistent with the RCRA Civil Penalty Policy;
- clarify the Enforcement Response Policy to include time frames for states to take enforcement action on cases referred to them from EPA regions;
- require that the regions and states fully and clearly document their enforcement activities with specific emphasis on penalty calculations and compliance follow-up activities; and
- determine the resource needs of the enforcement program, and, if resources are insufficient, provide such information to the appropriate congressional committees for their consideration.



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# Major Contributors to This Report

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Resources,  
Community, and  
Economic  
Development Division,  
Washington, D.C.

Hugh J. Wessinger, Senior Associate Director, (202) 275-5489  
Gregg A. Fisher, Group Director  
James Fowler, Assignment Manager  
Pat Gleason, Staff Member  
Cathy Helm, Staff Member  
Abby Spero, Writer-Editor  
Donna J. Hubbard, Secretary

---

Dallas Regional Office

David Marks, Evaluator-In-Charge  
Philip Caramia, Staff Member

---

Chicago Regional  
Office

David Hoffman, Site Senior  
Nancy Mitchell, Staff Member  
Jack Mester, Staff Member

---

New York Regional  
Office

George Pagnillo, Site Senior  
Sarita Valentin, Staff Member

---

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