

June 2000

# ENVIRONMENTAL PROTECTION

## More Consistency Needed Among EPA Regions in Approach to Enforcement



G A O

Accountability \* Integrity \* Reliability



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**Abbreviations**

EPA	Environmental Protection Agency
GAO	General Accounting Office
OECA	Office of Enforcement and Compliance Assurance



United States General Accounting Office  
Washington, D.C. 20548

Resources, Community, and  
Economic Development Division

B-284777

June 2, 2000

The Honorable Christopher S. Bond  
Chairman, Committee on Small Business  
United States Senate

Dear Mr. Chairman:

In response to your request, we are reporting on the extent to which variations exist among the Environmental Protection Agency's regions in enforcing environmental requirements, the factors that contribute to such variations, and the agency's efforts to achieve greater consistency in its nationwide enforcement program.

This report will not be distributed until 30 days after its issuance date unless you publicly announce its contents earlier. At that time, we will send copies to the appropriate congressional committees; the Honorable Carol Browner, the Administrator, Environmental Protection Agency; and the Honorable Jacob Lew, Director, Office of Management and Budget. We will also make copies available to others upon request.

Please call me at (202) 512-6111 if you or your staff have any questions. Major contributors to this report are listed in appendix II.

Sincerely yours,

Peter F. Guerrero  
Director, Environmental Protection  
Issues

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# Executive Summary

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## Purpose

The Environmental Protection Agency (EPA) administers its environmental enforcement responsibilities through its headquarters Office of Enforcement and Compliance Assurance (OECA). While OECA provides overall direction on enforcement policies, and occasionally takes direct enforcement action, much of its enforcement responsibilities are carried out by its 10 regional offices. These offices are responsible for taking direct enforcement action and for overseeing the enforcement programs of state agencies that have been delegated enforcement authority.

Although EPA acknowledges that some variation in environmental enforcement is necessary to take into account local conditions and local concerns, core enforcement requirements must nonetheless be consistently implemented. EPA also maintains that to ensure fairness and equitable treatment, similar violations should be met with similar enforcement responses, regardless of geographic location. Concerned that environmental requirements are not being enforced with sufficient consistency among EPA's regional offices, the Chairman, Senate Committee on Small Business, asked us to provide information on (1) the extent to which variations exist among EPA's regional offices in the actions they take to enforce environmental requirements, (2) what factors contribute to any variations, and (3) what the agency is doing to achieve consistency in regional enforcement activities.

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## Background

Since its creation in 1970, EPA has been responsible for enforcing the nation's environmental laws. This responsibility has traditionally involved monitoring compliance by those in the regulated community (such as factories or small businesses that release pollutants into the environment or use hazardous chemicals), ensuring that violations are properly identified and reported, and ensuring that timely and appropriate enforcement actions are taken against violators when necessary.

Most major environmental statutes allow EPA to authorize qualified states to implement key programs and to enforce their requirements. EPA establishes, by regulation, the requirements for state enforcement authority, such as the authority to seek civil and criminal penalties. EPA also outlines, by policy and guidance, its views as to the elements of an acceptable state enforcement program, such as the type and timing of the action that should be taken for various violations, and tracks how well states comply. Environmental legislation generally provides authority for EPA to take appropriate enforcement action against violators in states that

have been delegated authority for these programs when states fail to initiate an enforcement action. The statutes also provide that EPA may withdraw approval of a program if the state is not adequately administering or enforcing it.

EPA issues regulations, policies, and guidance to help ensure a consistent approach nationwide in the implementation of environmental requirements. OECA expects the regions to take a systematic approach in administering and overseeing the enforcement programs among delegated and nondelegated programs and, in doing so, to follow EPA's policies and guidance. Of particular note, agency officials maintain that enforcement responses selected should be directly related to the severity of the violation and that like violations should generally be met with comparable penalties. While federal and state enforcement officials agree that basic program elements should be largely consistent, some variation is to be expected—and, in some cases, encouraged. According to EPA, for example, some variation is to be expected in how regions target resources to the most significant compliance issues in different regions and states and in the level of regional oversight of state enforcement programs (with the greater oversight provided for weaker programs).

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## Results in Brief

Variations exist among EPA's regional offices in the actions they take to enforce environmental requirements, as illustrated by a number of key indicators that EPA headquarters enforcement officials have used to monitor regional performance. These indicators include, for example, (1) inspection coverage by EPA and state enforcement staff of facilities discharging pollutants within each region, (2) the number and type of enforcement actions taken, and (3) the size of the penalties assessed and the criteria used in determining penalties assessed. GAO also found variations in regions' overall strategies in overseeing the states within their jurisdiction, which may result in more in-depth reviews in some regional programs than in others. The type of variations shown in these data corroborate earlier findings detailed in a series of reports by EPA's Office of Inspector General and by headquarters own internal evaluations. EPA headquarters enforcement officials emphasize that the data, by themselves, do not offer the appropriate context to help determine the extent to which the variations pose problems. The officials note, however, that the data are useful for identifying general trends and possible strengths and weaknesses in regional and state programs, along with potential issues to investigate at greater length.

Also corroborating the variation it identified among regional enforcement activities, GAO found broad agreement in its interviews with EPA and state enforcement officials on key factors that contribute to such variations. Among the factors most commonly cited by these officials are (1) differences in the philosophical approaches among enforcement staff about how to best achieve compliance with environmental requirements; (2) differences in state laws and enforcement authorities, and in the manner in which regions respond to these differences; (3) variations in resources available to both state and regional enforcement offices; (4) the flexibility afforded by EPA policies and guidance that allow states a degree of latitude in their enforcement programs; and (5) incomplete and inadequate enforcement data which, among other things, hamper EPA's ability to accurately characterize the extent of variations.

EPA headquarters and regional enforcement officials have a number of efforts underway to help achieve greater consistency in regional enforcement activities. At the headquarters level, for example, enforcement officials are developing performance information that will allow for comparisons among both regions and states in their conduct of key enforcement responsibilities. Such assessments are expected to highlight any major variations and will be communicated through the issuance of periodic "Program Status Reports." A number of EPA regional offices have also sought to ensure more consistency in their state oversight by developing and applying new audit protocols in their state reviews and by encouraging more effective communication between and among regional and state enforcement staff. Notwithstanding these efforts, however, a number of factors will continue to challenge EPA's ability to ensure consistent enforcement across its regions. Among the most important of these factors is the absence of reliable data on how both states and regions are performing their enforcement responsibilities. Without such data, EPA is hampered in its ability to ascertain the extent to which inconsistencies do in fact exist, the impact they may have on human health and the environment, and the manner in which they should be addressed. This report makes a number of recommendations to further EPA's efforts to promote greater consistency in how EPA's regions approach the agency's nationwide enforcement program.

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## Principal Findings

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### Variation in Regional Enforcement Activities

Variations exist among EPA's regional offices in the actions they take to enforce environmental requirements, as illustrated by a number of key indicators that EPA headquarters enforcement officials have used to monitor regional performance. EPA's enforcement program, for example, depends heavily upon inspections by regional and/or state enforcement staff as the primary means of detecting violations and evaluating overall facility compliance. Thus, EPA maintains that the quality and the content of the agency's and states' inspections, and the number of inspections undertaken to ensure adequate coverage, are important indicators of an enforcement program's effectiveness. Fiscal year 1998 EPA data show that regional and state inspection coverage for Clean Air Act-related programs ranged from a low of 27 percent of facilities inspected in the Chicago region to a high of 74 percent for facilities in the Philadelphia region. For major dischargers under the Clean Water Act, inspection coverage also varied from a low of 57 percent of facilities in the Denver region to a high of 92 percent in the Atlanta region. The examples, however, also illustrate the importance of getting behind the data to understand the cause of apparently wide disparities to understand whether they reflect a problem. OECA's Deputy Assistant Administrator noted, for instance, that the Chicago office's relatively low 27-percent inspection figure could be explained by that office's recent emphasis on conducting detailed and resource-intensive investigations of the region's numerous electric power plants, which rely on resources from that office's inspection budget.

EPA Inspector General and OECA reports also found that regions vary in the way they oversee state-delegated programs. Among their findings were that, contrary to EPA policy, some regions did not (1) conduct an adequate number of oversight inspections of state programs; (2) sufficiently encourage states to consider economic benefit in calculating penalties; (3) take more direct federal actions where states were slow to act; and (4) require states to report all significant violators. A number of regions have recently begun to develop and implement state audit protocols in response to these findings, believing that having such a protocol could help them to review the state programs within their jurisdiction with greater consistency. Here too, regions' approaches differ. The Boston region has adopted a comprehensive "multimedia" approach in which it simultaneously examines all of a state's delegated environmental programs. The Philadelphia region, however, favors a more targeted approach where

air, water, and waste programs are audited individually. On the other hand, the Chicago office's air enforcement branch chief said that he did not view an audit protocol as particularly useful, noting instead that he prefers regional staff to engage in joint inspections with states to assess their performance in the field and to take direct federal action where a state action is inadequate.

Regional and state officials GAO interviewed generally indicated that it was difficult for them to ascertain the extent of variation in enforcement activities among regions, given their focus on activities within their own geographic environment. However, EPA headquarters officials responsible for the air and water programs noted that such variation is fairly commonplace and does pose problems. The director of OECA's water enforcement division, for example, said that in reacting to similar violations, enforcement responses in certain regions are weaker than they are in others. He also said that such inconsistency has increased in recent years. The director of OECA's air enforcement division said that given the considerable autonomy of the regional offices, it is not surprising that variations exist in how they approach enforcement and state oversight. According to the director, for the air inspection program, disparities exist among regions in the number and quality of inspections conducted and in the number of permits written in relation to the number of sources requiring permits.

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## Factors Contributing to Variations in Regional Enforcement Programs

EPA data and recent studies document variation in key measures associated with the agency's enforcement program, but do little to explain the causes of the variation. Without such information, it is difficult to determine the extent to which variation represents a problem, whether it is preventable, or the extent to which it represents the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances. Accordingly, in visits to regional offices and states and in discussions with headquarters officials, GAO sought to identify the factors that may be contributing to variation. Among the factors most commonly cited were the following:

Differences in philosophical approach to enforcement. While OECA has issued policies, memorandums, and other documents to guide regions in their approach to enforcement, the considerable autonomy built into EPA's decentralized, multilevel structure allows regional offices considerable latitude in adapting headquarters direction in a way they believe best suits their jurisdiction. Such differences often reflect alternative enforcement

approaches such as whether the region should (1) rely predominantly on fines and other traditional enforcement methods to deter noncompliance and to bring violators into compliance or (2) place greater reliance on alternative strategies such as compliance assistance (e.g., workshops and site visits to identify potential compliance problems). Regions have also differed as to whether deterrence could be achieved best through (1) a small number of high profile, resource-intensive cases or (2) a larger number of smaller cases that establishes a more widespread, albeit lower-profile enforcement presence. Further complicating matters are the similarly wide differences among states in their enforcement approaches and the various ways in which regions respond to these differences. Some regions step more readily into cases where they consider a state's action to be inadequate, while other regions are more concerned about infringing on states' discretion if they have been delegated enforcement responsibilities.

Differences in state laws and enforcement authorities. According to nearly all regional and state enforcement officials GAO interviewed, differences in state laws and enforcement authorities also contribute significantly to variations in enforcement programs. The enforcement director in EPA's Philadelphia office, for example, noted that Maryland, among other states, does not specifically provide that when calculating penalties, the penalties should be large enough to offset the economic benefits achieved by noncompliance (as provided for by EPA policy). States also vary widely as to whether they can pursue enforcement actions administratively or must instead use the more time-consuming and resource-intensive approach of referring a case to the state's Office of the Attorney General for judicial action.

Incomplete and inaccurate national enforcement data. OECA needs accurate and complete enforcement data to help it determine whether core program requirements are being consistently implemented by regions and states and whether there are significant variations from these requirements that should be corrected. Responsibility for inputting data to EPA's national databases resides with the region or with the state responsible for carrying out the enforcement program. Both the quality of and quality controls over these data were criticized by state and regional staff GAO interviewed. Recent internal OECA studies have also acknowledged the seriousness of the problem. For example, an internal OECA work group, the "Targeting Program Review Team," stated in its November 1999 report that key functions related to data quality, such as the consistent entry of information by regions and states, were not working properly and that there were important information gaps in its enforcement-related data bases. Another

OECA work group concluded that “. . . OECA managers do not have available to them timely, complete, and detailed analyses of regional or national performance.” A third OECA work group asserted that the situation has deteriorated from past years, noting that “. . . managers in the regions and in OECA headquarters have become increasingly frustrated that they are not receiving from [the Office of Compliance] the reports and data analyses they need to manage their programs,” and that there “. . . has been less attention to the data in the national systems, a commensurate decline in data quality, and insufficient use of data by enforcement/compliance managers . . .” OECA has recognized the seriousness of its data problem. Noting that the resources devoted to data quality may have been insufficient in recent years, the Acting Director of the Office of Compliance indicated headquarters intention to shift some resources internally to help alleviate the problem. GAO concluded, however, that in light of the scope and seriousness of the problem, EPA still needs a strategy that will bring to bear sufficient priority and resources so that the problem can be adequately addressed.

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## EPA Efforts to Achieve Greater Consistency

Headquarters and regional enforcement officials identified a number of activities it believes will further help to achieve greater consistency in how regional offices take direct enforcement action, and in how they oversee state enforcement programs within their jurisdiction. GAO acknowledges the merit of many of these activities but believes that additional action, and in some cases changes to its approach, would further EPA's effort to achieve an appropriate level of consistency in regional enforcement:

Providing comparative data on regional performance. OECA is developing a system in which periodic “Program Status Reports” would provide comparative information on each region's performance and the performance of the states within each region. According to senior OECA officials, the reports would allow for comparisons on a broader array of information that focuses increasingly on the results the enforcement program is trying to achieve. Additionally, OECA is developing a system of “Program Element Reviews,” which would be in-depth reviews targeting the regions' implementation of a particular program element. Both reviews have the potential to convey useful information to both EPA managers and to the public on the extent to which the enforcement program is being implemented consistently and fairly nationwide. However, the example cited previously concerning the Chicago office's relatively low 27-percent air inspection rate illustrates how a data point, unaccompanied by an explanation of the circumstances behind the data, can lead to incorrect

conclusions. OECA officials have also acknowledged that such data can be easily misinterpreted without the contextual information needed to clarify whether variation in a given instance is inappropriate, or whether it reflects the appropriate exercise of flexibility by regions and states to tailor their needs and priorities to their individual circumstances. GAO, therefore, concluded that the Program Status Reports can better serve their intended purpose for EPA management and the public if they (1) clarify what aspects of EPA's enforcement program the agency expects to see implemented consistently from region to region and where it believes greater variation is appropriate and (2) supplement their region-by-region data with contextual information that helps to explain why variations occur and thereby clarifies the extent to which variations are problematic.

Improving regional-state communications. Regional officials cited improved communication as a key component in their efforts to initiate new processes and effect change among their staff and among their states. Senior officials in the Seattle region, for example, instituted a Regional Enforcement Forum that brought together all regional program directors and top managers to share information and to ensure they are aware of how enforcement is approached elsewhere in the region. Other regional officials conveyed similar experiences, noting that better communication among federal and state enforcement officials within a region helps to identify approaches or performance levels that deviate significantly from the norm, thereby promoting a more consistent approach.

Regional development of audit protocols. A number of regional offices have developed protocols that they hope will achieve more effective and more consistent oversight of the states within their jurisdiction. One of the more comprehensive of these new protocols is the Denver office's "Unified Oversight System." Under the system, regional staff evaluate all state environmental programs using certain performance criteria such as data entry, timeliness of actions, penalties recovered, and the effectiveness of inspections. Each state is graded on each category and then given an overall rating. The system is built, in part, on the concept of a comparative review system to pinpoint the weakest states and programs needing the most oversight attention. The belief is that by developing and disseminating comparative data among the region's states, the states with the lowest rating will, over time, be assisted and encouraged to rise to the level of their peers. GAO acknowledges the potential of these protocols to achieve greater consistency by a region in its oversight of its states, and that such protocols should be tailored to meet the needs of each region. However, GAO concluded that headquarters guidance on key elements that should be

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common to all protocols would help to engender a higher level of consistency among all 10 regional offices in the way oversight of states is conducted nationwide.

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## Recommendations

GAO recommends that the Administrator of EPA

- provide, as part of the agency's efforts to develop Program Status Reports containing comparative data on regional and state enforcement performance, the contextual information needed to help EPA management and the public properly understand them;
- develop a comprehensive strategy that will bring to bear sufficient priority and resources so that the problems affecting the quality of the agency's enforcement data can be adequately addressed; and
- issue guidance to EPA regions describing the required elements of audit protocols to be used in overseeing state enforcement programs.

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## Agency Comments

GAO provided a draft of this report to EPA for its review and comment. EPA said that it shared GAO's view on the importance of consistency of regional enforcement but raised a number of issues concerning the draft report's discussion of that issue. Among them, EPA noted that the draft report was not clear as to whether GAO was evaluating consistency among EPA regions or between EPA regions and states. In GAO's view, the draft report was clear on this point. The report stated that GAO's evaluation focused on "the extent to which there are variations among EPA's regional offices in enforcing environmental requirements." The report's "Objectives, Scope, and Methodology" section further clarified that while variation among states' enforcement programs has also been the subject of study by various organizations, "[GAO] examined such variations only to the extent that they provide insights into the actions of, and variations among, EPA's regional programs."

EPA also said that the draft report did not define consistency or provide parameters for defining consistency in a way that would be instructive for EPA. At the outset of its review, GAO worked with EPA headquarters enforcement staff to identify the criteria or areas where EPA would expect to see consistency among regions in conducting enforcement programs and overseeing state delegated programs. These staff identified several elements that should be "consistent or largely consistent." These elements included such issues as whether inspections consistently detect

noncompliance; the selection of enforcement response; the manner in which enforcement data are entered into databases and used for performance measurement; and whether comparable penalties are imposed for like offenses. During its field work, GAO discussed these elements with EPA regional and state officials, who generally concurred that these elements should be largely consistent from region to region.

EPA noted that GAO's draft report did not identify any inconsistent enforcement results or present evidence that unequal treatment of similarly situated violators is occurring. GAO met with EPA officials on several occasions to explore the possibilities of identifying similar violations in different regions to allow for such cross-regional comparisons. EPA staff pointed out that such an approach would require detailed follow-up work for each violation to determine the specific circumstances in each case. The staff also acknowledged that regardless of the follow-up work conducted, questions could still be raised as to whether the selected violations were truly comparable. Consequently, GAO focused its review on the elements of EPA's enforcement program that are most likely to determine whether consistent treatment of violators is likely to occur.

EPA said that GAO's draft report incorrectly implied that in a number of areas of program management, variation is inappropriate and that it is a widespread problem. GAO believes the report neither stated nor implied that variation was either widespread or that it was always inappropriate. GAO believes it took a cautious approach in characterizing both the extent and appropriateness of variation. The draft report states, for example, that variation in some cases may represent "...the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances."

EPA emphasized that it has principles and management mechanisms that ensure national consistency among its regional enforcement programs. The draft report did include a description of many of these principles and mechanisms but was revised to provide a fuller description of these items in response to EPA's comment. Importantly, however, GAO's findings suggest that the effectiveness of principles and management systems in "ensuring" consistency depends heavily on their implementation by the regions.

EPA disagreed with GAO's recommendation that the agency's Program Status Reports include the contextual information needed to help EPA management and the public better understand raw data characterizing

regional performance. EPA noted that the reports are not intended for public distribution and, consequently, do not “need contextual information ... since they are designed to be used by Agency program managers who understand how to use them.” GAO disagrees with this statement. First, past experience indicates that whether intended or not as public documents, the Program Status Reports will likely be made public and will be used by interested parties. Consequently, the contextual information explaining the variations is essential if the reports are to clarify, rather than confuse, the public’s interpretation of the data. Second, while EPA notes that the reports are designed for agency managers “who know how to use them,” GAO’s experience during this review indicates that without better contextual information, even agency managers have had difficulty interpreting the raw data to determine the extent to which variations are problematic, whether they are preventable, or whether they represented the appropriate exercise of flexibility.

EPA did not respond directly to GAO’s recommendation that the agency issue guidance identifying elements that should be common to all regions’ state oversight audit protocols. However, the agency expressed concern about the comprehensiveness of some of the protocols, noting that they “do not all review State performance against all national policies, including the 1986 State Guidance, other national policies, and the [Memorandum of Agreement] process.” GAO acknowledges EPA’s concern about the comprehensiveness of the various protocols being tested in different regions and continues to believe that the recommended guidance would help to address the problem identified by EPA while still allowing each region to tailor its protocol to meet its unique circumstances.

EPA’s comments and GAO’s responses are discussed in detail at the end of chapters 2 and 4. The full text of EPA’s comments and GAO’s responses are included in appendix I.

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# Introduction

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Since the Environmental Protection Agency's (EPA) creation in 1970, the agency has been responsible for enforcing the nation's environmental laws. This responsibility has traditionally involved monitoring compliance by those in the regulated community (such as factories or small businesses that release pollutants into the environment or use hazardous chemicals), ensuring that violations are properly identified and reported, and ensuring that timely and appropriate enforcement actions are taken against violators when necessary.

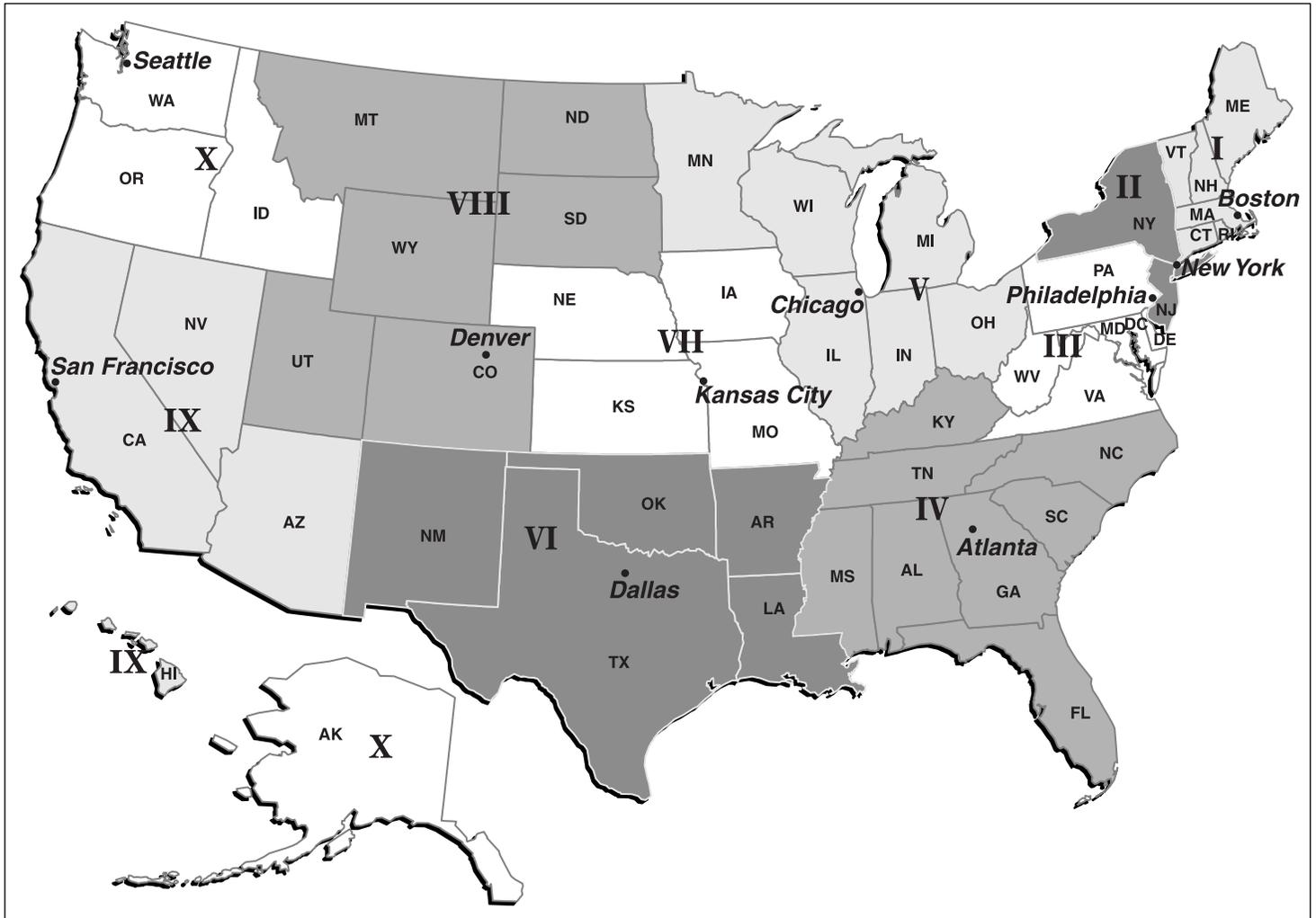
Most major federal environmental statutes permit EPA to allow states meeting specified requirements the authority to implement key programs and to enforce their requirements. EPA establishes by regulation the requirements for state enforcement authority, such as the authority to seek injunctive relief<sup>1</sup> and civil and criminal penalties. EPA also outlines by policy and guidance its views as to the elements of an acceptable state enforcement program, such as necessary legislative authorities and the type and timing of the action for various violations, and tracks how well states comply. Environmental statutes generally provide authority for EPA to take appropriate enforcement action against violators in states that have been delegated authority for these programs when states fail to initiate enforcement action. The statutes also provide that EPA may withdraw approval of a state's program if the program is not administered or enforced adequately.

EPA administers its environmental enforcement responsibilities through its headquarters Office of Enforcement and Compliance Assurance (OECA). While OECA provides overall direction on enforcement policies, and sometimes takes direct enforcement action, it carries out much of its enforcement responsibilities through its 10 regional offices. (See fig. 1.). These offices are responsible for taking direct enforcement action and for overseeing the enforcement programs of state agencies in those instances in which the state has been delegated such enforcement authority.

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<sup>1</sup>The authority to order a party that is violating a provision of the law to refrain from further violation is referred to as injunctive relief.

Figure 1: EPA's 10 Regions and Regional Office Locations



Although EPA acknowledges that some variation in environmental enforcement is necessary to take into account local conditions and local concerns, core enforcement requirements must nonetheless be consistently implemented. EPA also maintains that to ensure fairness and equitable treatment, like violations in different regions of the country should be met with comparable enforcement responses.

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## EPA and State Roles in Enforcing Environmental Programs

Most major federal environmental statutes allow EPA to delegate responsibility to states to administer environmental programs. One of the key conditions for delegating this responsibility to a state is that the state acquire and maintain adequate authority to enforce the federal law. For example, to obtain EPA approval to administer the Clean Air Act's title V permitting program for major air pollution sources,<sup>2</sup> states must have, among other things, adequate authority to ensure compliance with title V permitting requirements and to enforce permits, including authority to recover civil penalties and provide appropriate criminal penalties.<sup>3</sup> Similarly, the Clean Water Act allows EPA to approve state water pollution programs under the National Pollutant Discharge Elimination System if the state programs contain, among other things, adequate authority to issue permits that ensure compliance with applicable requirements of the act, and to abate violations, using civil and criminal penalties and other ways and means of enforcement.<sup>4</sup> For permitting programs, such as those authorized by the Clean Air Act and Clean Water Act, facilities either report periodically to the cognizant state or federal regulatory authority on whether they are in compliance with their permit, or are subject to periodic inspections that check for compliance.

EPA develops enforcement policies for these programs. The enforcement policies outline EPA's traditional regulatory approach to enforcement, including what constitutes a violation—especially the significant violations that are likely to require an enforcement action. When a violation is discovered, the policies generally require an escalating series of enforcement actions, depending on the seriousness of the violation and the facility's level of cooperation in correcting it. Actions might start with a verbal warning, or a warning letter, and escalate to administrative orders to change the facility's practices. These enforcement policies also define timely and appropriate enforcement actions for various types of violations. In the most serious cases, EPA or the states can assess penalties or refer the case to the U.S. Department of Justice or the states' Office of Attorney

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<sup>2</sup>Title V requires large sources of air pollutants to obtain permits that specify the maximum amount of pollutants that can be released and monitoring requirements.

<sup>3</sup>Clean Air Act § 502(b)(5)(A),(E), 42 U.S.C. § 766a(b)(5)(A),(E).

<sup>4</sup>Clean Water Act § 402(b)(2)(A),(7), 33 U.S.C. § 1342(b)(2)(A),(7). The National Pollutant Discharge Elimination System of the Clean Water Act requires major sources of discharges to surface water to obtain permits that control the amount of pollutants that may be discharged to surface water and sets monitoring requirements.

General for prosecution. The monetary penalties EPA assesses include two amounts: one amount based on the seriousness of the violation and the other amount designed to remove any financial advantage the violator obtained over its competitors through noncompliance. EPA may also pursue criminal enforcement action if the situation warrants.

Whether EPA or state personnel take the lead in taking enforcement actions depends on whether the state has been delegated the authority to administer the program. If EPA retains the program, the cognizant EPA regional office generally takes the lead in taking enforcement actions, often with support and/or guidance from EPA headquarters program offices, OECA, and the Office of General Counsel.

In situations in which the state has been delegated authority to administer the program, EPA's enforcement polices provide guidance to the states. Moreover, EPA's regions and the states work together each year to establish enforcement expectations and lay out their respective roles. EPA also provides grant funds to states to assist in the implementation of the federal programs and can, under certain circumstances, condition receipt of grant funds on compliance with EPA guidance.

EPA oversees the states' enforcement in a variety of ways, including reviewing inspection reports and enforcement actions, and accompanying state inspectors. EPA also requires states to report information on various aspects of their enforcement efforts, such as the number and type of inspections the state has taken, the results of those inspections, and any enforcement actions resulting from discovered violations. EPA's enforcement policy under the Clean Air Act and Clean Water Act is concentrated primarily on large facilities and large sources of pollution. States have more autonomy to determine how they will enforce the law at smaller sources and smaller facilities.

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## EPA Tries to Achieve Consistency in Its Enforcement Programs Nationwide

EPA has established consistent principles to define a quality enforcement and compliance program. State guidance, providing the framework for state/EPA enforcement agreements, has been in place since 1986. According to EPA, this state guidance, together with statute-specific guidance, is the blueprint for both EPA and state enforcement and compliance programs and serve as the basis for both authorizing and reviewing state programs. Additionally, EPA has established (1) enforcement response policies that classify types of violations, appropriate responses, and the timeline in which those violations must be addressed;

(2) penalty policies that specify the dollar amount assigned to classes of violations; and (3) a national model that can be used for the recovery of the economic benefit so that violators do not gain an economic advantage over law abiding competitors. EPA has also established a management system that includes mechanisms to (1) agree on enforcement priorities at the national, regional, and state levels; (2) allow EPA to determine whether states are adhering to national policies and principles; and (3) provide oversight of both regional and state enforcement of environmental laws throughout the nation. The management system also includes strategies and procedures for compliance monitoring.

OECA expects the regions to take a systematic approach to administering and overseeing the enforcement programs among delegated and nondelegated programs and, in doing so, to follow the policies and guidance issued for this purpose. While federal and state enforcement officials agree that core enforcement requirements should be generally implemented consistently, some variation is to be expected—and, in some cases, encouraged. According to EPA, for example, some variation is to be expected in how regions target resources to the most significant compliance issues in different regions and states, the level of enforcement activity (which should vary with the severity of the problem), and the level of regional oversight of state enforcement programs (with the greater oversight provided for weaker programs).

EPA officials use a number of methods to oversee regional and state enforcement programs. An important first step undertaken every 2 years between EPA headquarters and the regions is the Memorandum of Agreement, which contains the core program requirements and national priorities that both headquarters and the regions agree must be addressed. In addition to the national priorities, the agreements with each individual region contain region-specific priorities that are reviewed and approved by OECA. The regions share this agreement with their states so that all key parties understand the regions' goals and commitments with headquarters. Senior OECA managers visit the regions during the year to review regional progress in meeting the agreed-upon enforcement goals and commitments in the memorandum and to make mid-year corrections. OECA also sponsors national meetings, routinely scheduled conference calls between headquarters and regional media program staff, and conducts periodic evaluations of regional enforcement programs. EPA regional enforcement program staff frequently communicate with state enforcement staff through routinely scheduled telephone conferences. In addition, a number of regions have implemented protocols for overseeing state performance.

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## Objectives, Scope, and Methodology

This report examines (1) the extent to which there are variations among EPA's regional offices in the action they take to enforce environmental requirements, (2) what factors contribute to the variations in regional enforcement activities, and (3) what the agency is doing to achieve greater consistency in regional enforcement activities.

Our review examined the extent of variation among EPA regional enforcement programs, focusing in particular on air and water pollution programs. While variation among states' enforcement programs have been the subject of study by a number of organizations, we examined such variations only to the extent that they provide insights into the actions of, and variations among, EPA's regional programs.

To respond to the first objective, we examined past studies by GAO, OECA, EPA's Office of Inspector General, and other organizations to ascertain the elements of program implementation where issues of inconsistent regional performance may exist (e.g., the extent to which variations exist in the penalties assessed in different regions for comparable violations and variations in the number and type of enforcement actions taken). We also examined the most current available EPA data on a variety of these elements, much of which is in the agency's Reporting for Enforcement and Compliance Assurance Priorities system. This system compiles information from other databases containing compliance and enforcement information, such as the Permit Compliance System for water programs, the Aerometric Information Retrieval System Facility Subsystem (AFS) for air programs, and the EPA civil docket. These data are summarized in EPA's April 1999 Measures of Success Management Report, which was used for some of the information presented in chapter 2 of this report. In situations where we needed more detailed information, we obtained OECA's assistance in extracting and interpreting the additional information from its databases.

We did not perform an independent test of the data's accuracy and completeness. However, we did seek information concerning their accuracy and completeness in our interviews with headquarters, regional, and state officials and by examining past studies and EPA documentation.

To supplement our interpretation of these data and to address the second and third objectives, we interviewed officials responsible for enforcement issues, and more specifically for the enforcement of air and water programs in three EPA regions—Chicago, Philadelphia, and Seattle. We

selected these regions based largely on the history of enforcement performance (as indicated by EPA's national databases and prior work by EPA's Inspector General and us) and on a desire to assess regions in different geographical settings and with different environmental and regulatory issues. (For example, the Chicago region is more industrialized than most other regions, and the Seattle region includes some states that have and have not been delegated either air or water programs.) To obtain diverse state perspectives within each region on the key research questions for this review, we selected two states within each region for detailed study. These states included Maryland and West Virginia in EPA's Philadelphia region; Indiana and Ohio in the Chicago region; and Idaho and Washington in the Seattle region. We also obtained pertinent data and other documentation from these officials. In some cases, we contacted officials in other regions and in other states to obtain additional perspectives and to substantiate findings from the states and regions we selected for detailed study. We verified statements attributed to these state officials and other information provided by them in our draft report.

We also contacted senior enforcement officials at EPA headquarters to ensure that we had current information on agency regulations, policies, and guidance and to obtain their perspectives and other information on our issues of inquiry. In addition, we contacted other groups to obtain a national perspective on these issues, including the Association of State and Interstate Water Pollution Control Administrators, the Environmental Council of the States, the Environmental Law Institute, the Environmental Working Group, the National Petrochemical and Refiners' Association, and the State and Territorial Air Pollution Program Administrators.

We conducted our work from July 1999 through March 2000 in accordance with generally accepted government auditing standards.

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# Variations in Regional Enforcement Activities

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Variations exist among EPA's regional offices in the actions they take to enforce environmental requirements, as illustrated by a number of key indicators that EPA headquarters enforcement officials have used to monitor regional performance. These indicators include (1) the percentage of regulated facilities that are inspected by EPA and/or state enforcement staff for compliance (and the comprehensiveness of those inspections), (2) the number and type of enforcement actions taken, (3) the size of the penalties assessed and the criteria used in determining the penalties, and (4) the extent to which violations are referred to the Department of Justice. The type of variations conveyed by these data corroborate earlier findings detailed in a series of reports by EPA's Office of Inspector General and by OECA's own internal evaluations. We also found variations in regions' overall strategies for auditing state enforcement programs to determine whether program requirements are being met.

OECA officials emphasize that enforcement data, by themselves, do not offer the appropriate context to help determine the extent to which the variations pose problems. Rather, the officials maintain that the data are a useful starting point for identifying general trends and possible strengths and weaknesses in regional and state programs, along with potential issues to investigate at greater length.

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## Inspection Coverage

EPA's enforcement program depends heavily upon inspections by EPA regional and/or state enforcement staff as the primary means of detecting violations and evaluating overall facility compliance. Thus, EPA maintains that the quality and the content of the inspections, and the number of inspections conducted to ensure adequate coverage, are important indicators of an enforcement program's success. Where programs are delegated to the states, regional offices retain oversight responsibility for ensuring that state inspection programs meet EPA's criteria in terms of how inspections are conducted and how the results are reported.

Data in OECA's most recent Measures of Success Management Report do, in fact, show that there is wide variation in inspection rates nationwide. The April 1999 report noted, for example, that for fiscal year 1998, regional and state inspection coverage for Clean Air Act-related programs ranged from a low of 27 percent of facilities inspected in the Chicago region to a high of 74 percent for facilities in the Philadelphia region. For major dischargers under the Clean Water Act, inspection coverage also varied from a low of 57 percent of facilities in the Denver region to a high of 92 percent in the Atlanta region. The example, however, also illustrates the

importance of getting behind the data to understand the cause of apparently wide disparities to understand whether they reflect a problem. OECA's Deputy Assistant Administrator said that the Chicago office's 27-percent inspection figure could be appropriately explained by that office's recent emphasis on conducting detailed investigations of the region's numerous electric power plants. According to this official, such investigations can be extremely resource-intensive, and that the resources to conduct them would most likely come from the region's budget for inspections.

In addition to the variation in the percentage of facilities inspected, EPA's Inspector General reports in recent years have documented variations in the comprehensiveness of inspections. In its 1998 consolidated report on air enforcement audits completed in EPA's Boston, Philadelphia, Dallas, and Seattle offices, the Inspector General points out that to adequately evaluate a facility's compliance with the Clean Air Act, it is necessary to perform at least a level 2 inspection—designed at a level of sufficient detail as to detect violations—at major stationary sources. The report found that in four of the six states included in the audit, inspectors did not always complete the tests required for such an inspection and noted that the regions did not ensure that state inspectors completed the tests and evaluations required.

In response to the Inspector General's report, OECA contracted to undertake a review of its 1991 compliance monitoring strategy for the air program to determine the extent that it is used and whether it needs to be updated. The compliance monitoring strategy contains guidance for regions and states for, among other things, determining sources to target for inspections and the appropriate level of inspection that should be conducted. The contractor's July 1999 review documented considerable variations among the 10 regions in their approach toward the compliance monitoring strategy. Specifically, the review noted that only five regions implement major components of the strategy. The other five regions reported that they do not implement the strategy and engage in only minimal inspection planning and oversight with their states. According to the study, almost all regions agreed that compliance monitoring requires some guiding method or strategy, but many were resistant to any guidance that was highly prescriptive and imposed new requirements on the states.

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## Number and Type of Enforcement Actions

While EPA recognizes that differences may exist in the choices that regions and states make in selecting enforcement actions, agency officials maintain that enforcement responses selected should be directly related to the severity of the violation and that like violations should generally be met with comparable penalties. As discussed later, EPA data show that the number and type of formal enforcement actions have varied considerably from one regional office to another.

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## Administrative Versus Judicial Remedies

Where a facility fails to achieve compliance within a specified period of time and/or fails to respond to an informal action such as a notice of violation, EPA and approved states may proceed with a formal enforcement action. A formal enforcement action requires compliance, lays out a specific timetable for completing certain items, contains consequences for not doing so, and subjects a person or facility to adverse legal consequences for noncompliance. Such actions may be imposed either administratively by the region or state enforcing agency, or judicially by the courts.

Administrative actions can generally be processed more quickly and easily than can civil judicial actions. In choosing an administrative action, the region or state issues an administrative compliance order requiring the facility to return to compliance within a certain time frame and/or an administrative penalty order, which assesses a certain dollar amount.

Civil judicial actions tend to be more complex and resource-intensive than administrative actions. At the federal level, such actions are generally initiated by regional offices and then referred to the Justice Department. Justice, in turn, generally files a formal lawsuit in U.S. federal court. This course of action is generally used for cases that may set a precedent, involve serious environmental harm, or where a violator is deemed likely to be uncooperative. For state-delegated agencies, such judicial remedies are sought through the state's Office of the Attorney General. Judicial actions generally result in penalties and court orders requiring correction of the violation, along with specific actions to prevent future violations, and tend to be taken more seriously by the regulated community.

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## Variation in the Number and Type of Actions Taken

Simply presenting the absolute numbers of enforcement actions across regional offices does not take into account important factors, such as the varying size of different regions and the enforcement resources available to

them. Accordingly, the agency has accounted for these factors by comparing the number of actions to the size of the enforcement staff in each region. Thus, for example, OECA's Measures of Success Management report observes that the Chicago office made considerably more civil referrals to Justice for judicial action—as a function of its available enforcement resources—than did other regions. Similarly, the report's data show that the Philadelphia office obtained the greatest percentage of civil judicial penalties in comparison to its allocation of resources. On the other hand, citing corresponding data from the previous year, OECA's evaluation of the Seattle office's performance observed that the region was less “productive” when comparing its enforcement activity to its allocation of resources. The study noted specifically that while the region was allocated 6.5 percent of the national enforcement resources, its percentage of output of civil judicial referrals was only 4.5 percent, and its issuance of administrative penalty orders was only 4.3 percent of the national total.

OECA notes that the complexity of a region's enforcement actions may affect its relative productivity as compared with other regions. In its 1998 evaluation of the Chicago office, OECA reported that while the air, water, and waste programs historically produced lower outputs of administrative penalty orders relative to their enforcement resources, these numbers needed to be considered in light of the office's higher outputs of more resource-intensive judicial referrals by each of these programs. For example, in fiscal year 1997 the Chicago air program with 24 percent of all regions' air resources produced about 30 percent of all regions' judicial referrals. The Chicago water and waste programs in fiscal year 1997 also outpaced their enforcement resources in producing judicial referrals.

The impact on productivity of a region's reliance on more complex actions was reinforced by OECA water enforcement officials, who provided comparative information among the regions concerning their enforcement of the National Pollutant Discharge Elimination System under the Clean Water Act.<sup>1</sup> The officials noted that the Chicago office emphasizes civil judicial actions and currently has a large docket of open judicial cases. They noted that the region's choice of these more complex, resource-intensive actions could help to explain the lower numbers in other aspects of its enforcement program (e.g., lower inspection coverage previously discussed). The officials also cited other regions in which high numbers of

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<sup>1</sup> The National Pollutant Discharge Elimination System is the primary regulatory program governing the discharge of pollutants by facilities into U.S. waters.

administrative orders may also reflect an inventory of cases that are more straightforward, or in which the region chooses lower-level actions and does not escalate them when compliance is not achieved.

The EPA Inspector General's 1997 consolidated audit report for Chicago, Dallas, and San Francisco regional air enforcement programs also considered the productivity of the three regions in its review of regional actions and similarly found variation. The report found that with approximately 50 percent of the resources among the three regions studied, the Chicago office completed approximately 50 percent of the actions. However, with 24 percent of the regions' resources, the Dallas office was responsible for 3 percent of the actions completed, and with 22 percent of the regions' resources, the San Francisco office completed 42 percent of the actions. The report noted that the Chicago office had more staff and thus it was reasonable that they could complete more actions. However, the Dallas and San Francisco offices had similar resource levels but widely different numbers of enforcement actions completed. The report suggested that the variation and the disparity between the Dallas and San Francisco offices may be due to factors other than resources (such as the region's attitude toward enforcement, the type of industry in each region, among other factors), but did not evaluate the impact of these factors.

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## Variations in Penalties Assessed

Penalties play a key role in environmental enforcement by deterring potential violators and by ensuring that members of the regulated community cannot gain a competitive advantage by violating environmental regulations. EPA's penalty policy provides that all penalties should include two components. The first is an "economic benefit" component that reflects the benefit achieved by avoiding compliance. The economic benefit component is considered important to "level the playing field" among companies within an industry and eliminates any economic advantage violators gain through delayed or avoided compliance costs. The second component is called a "gravity-based component," which reflects the seriousness of the violation, the actual or possible harm it causes, and the size of the violator.

EPA's penalty policies provide that, at a minimum, a penalty should remove any significant economic benefit resulting from noncompliance but allows negotiators more flexibility in assessing the gravity component. For example, EPA's small business and self-policing policies allow mitigation or the elimination of the gravity portion of a civil penalty for qualifying

companies. Recognizing that it may not always be feasible to recoup the full amount of the economic benefit of noncompliance plus some amount based on the gravity of the violation, the agency's policy allows for mitigating or adjusting the penalty to a lesser amount. Such a decision may be reached in cases where the violator demonstrates an inability to pay the full penalty or where the risks and costs to litigate a case justify a smaller amount. The policy requires documentation of the amount of the economic benefit and any decision to lessen a penalty.

Fiscal year 1998 data published in OECA's Measures of Success Management Report show that the number and size of administrative penalties assessed by regional offices varied. The data show, for example, that the Philadelphia office assessed \$422,000 in Clean Air Act administrative penalties for 22 cases during fiscal year 1998, and the Chicago office assessed over \$1 million for 27 cases. On the other hand, the Seattle office assessed \$10,000 for one case. The disparity was less pronounced for the regions' Clean Water Act programs: the Philadelphia office assessed \$523,000 in administrative penalties for 23 cases during fiscal year 1998, the Chicago office assessed over \$1 million for 39 cases, and the Seattle office assessed \$441,000 for 25 cases.

The Inspector General's 1997 consolidated report for the air enforcement program in Chicago, Dallas, and San Francisco offices similarly found that over an 18-month period, the regions varied in both the number of administrative actions completed and penalties assessed. Specifically, the Chicago office completed 33 actions and assessed more than \$6 million in penalties; the San Francisco office completed 25 actions and assessed about \$3.5 million in penalties; and the Dallas office completed 2 actions and assessed penalties of just over \$100,000.

The Inspector General also found that penalties assessed varied significantly among the states in the three regions and that the regions could do more to address the variations. The primary factor appeared to be that the state penalty assessments did not always consider or assess the economic benefit of noncompliance. The 1997 report recommended, among other things, that the regions (1) hold discussions about recovering economic benefit with the states when negotiating various EPA-state agreements and (2) assist states in calculating economic benefit and in securing state legal authority where necessary. At an EPA/State Enforcement Forum in February of 2000, EPA discussed the importance of recovering economic benefit and followed up with a letter to state

commissioners in March of 2000 that included a fact sheet and sources for training and help in recovering and calculating economic benefit.

On average, civil judicial actions result in significantly higher penalties than do administrative actions. For example, according to fiscal year 1998 data in OECA's Measures of Success Management Report, the average civil judicial penalty for Clean Air Act programs was about \$603,453 compared with the average administrative penalty of \$17,656. Some regions, however, obtained a significantly higher percentage of their overall penalties through civil judicial versus administrative action. The Dallas office, for example, obtained 62 percent of its penalties (\$1.46 million) through civil judicial action. On the other hand, the Chicago office obtained over 87 percent of its penalties (\$7.22 million) through civil judicial action.

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## **Referrals of Violations to the Department of Justice**

Regions refer to the Department of Justice larger, more complex cases involving violators of environmental laws, as well as cases they believe may set a precedent. The Department then brings these cases to U.S. federal court. Settlement of cases and agreements reached between the agency and responsible parties are formalized in a court-approved consent decree. Consent decrees for civil judicial cases generally will contain provisions for penalties, requirements for correction of the violations, and specific actions to prevent future violations.

OECA also maintains that it is important to track the status of all active consent decrees to ensure that such agreements are carried out. Accordingly, each region is required to maintain a database of consent decree milestones and, to determine the defendants' current compliance with the decree.

OECA data show variation in both (1) the extent that violations of consent decrees are referred to Justice among regions and (2) the extent to which the regions track the status of compliance with the consent decrees. Regarding the extent of referrals, OECA's Measures of Success Management Report concluded that, "There continues to be a wide disparity among the regions in terms of how frequently they refer violations of consent decrees to the Department of Justice." The report shows that from fiscal years 1990 through 1998, the New York and Chicago offices referred about 60 and 40 consent decree violations, respectively, to Justice; the Boston and Philadelphia offices each referred between 10 and 20 consent decree violations; and the Atlanta, Kansas City, San Francisco, and Seattle offices each referred less than 10 consent decree violations. The

data indicate that the Dallas and Denver offices did not refer any violations of consent decrees to Justice over the same 9-year period.

Tracking and reporting on the status of consent decree implementation also varied widely, based on data submitted by the regions to EPA headquarters by the end of fiscal year 1998. The Dallas, Kansas City, San Francisco, and Seattle offices did not report or did not know the status of any of their active cases. On the other hand, the Atlanta, Chicago, and Philadelphia offices reported that they had tracked 97 percent of their cases.

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## Regions' Approaches to Enforcement Oversight

EPA Inspector General audit reports and OECA regional evaluations, issued since the mid-1990s, found that regional oversight of state delegated programs had been reduced or varied considerably from program to program. The Inspector General and OECA reports criticized the regions for inadequate oversight of state programs. Among other things, the reports cited the regions for not conducting an adequate number of oversight inspections; not sufficiently encouraging that economic benefit be considered in calculating penalties; not taking more direct federal actions where states were slow to act; and not requiring states report all significant violations. Regional officials acknowledged that at least to some extent, the criticisms were valid. Seattle officials, for example, explained that there had been a downturn in oversight activities in their region for some time prior to the Inspector General reports. They noted that decisions were made to conduct less oversight because (1) their own resources were inadequate to continue all their oversight activities and (2) their agreements with states to build more cooperative partnerships warranted less intense and detailed review.

In recent years, a number of regions have begun to develop and implement state audit protocols in response to these criticisms. The regions also noted that having such a protocol—which lays out the type of oversight inspections that will be conducted and the specific program elements that will be examined—could help them to review the state programs within their jurisdiction with greater consistency. In most cases, the protocols were developed with the support and participation of the states within each region and exhibit a number of key differences from one region to another.

The Boston region's protocol is particularly unique in that the region has adopted an approach in which it simultaneously examines a state's entire array of delegated air, water, and waste programs. Given the resource-

intensive nature of the audit, the region is only able to examine one state every year and a half. Regional enforcement officials commented that this approach provides both the region and the states with a holistic view of their enforcement efforts. The officials also pointed to one particular case in which they were able to make the head of the state's environmental agency aware that the waste management division took a considerably more stringent approach to enforcement than the water division. The officials said the state commissioner took steps to resolve the differences so that the enforcement programs were more consistent. Regional officials said that absent the multimedia audit, such a finding would not have been so readily apparent to them.

Philadelphia regional enforcement officials, however, told us that the Boston office's multimedia audit would not likely be acceptable to states in their region. They explained that in contrast to the Boston office, which has a centralized organizational structure with a multimedia focus, the Philadelphia office focuses its efforts on individual environmental programs. Accordingly, officials in Philadelphia's regional air protection division developed an audit protocol, in concert with states in the region, to aid the region in its oversight and evaluation of the effectiveness of state-delegated air enforcement programs. The audits are to be conducted by Philadelphia air enforcement staff along with state enforcement staff. The Deputy Director of West Virginia's Division of Environmental Protection said that the agency not only participated in the development of the Philadelphia air enforcement protocol, but volunteered its air enforcement program to undergo one of the first audits believing that the audit could help identify strengths and weaknesses in the program. West Virginia officials are currently awaiting the results.

The Seattle office jointly developed a set of Compliance Assurance Program Evaluation Principles that the region and states agree define the elements of a successful compliance assurance program and constitute a broad framework for evaluating programs delegated to the states. For example, the principles identify what environmental results are to be achieved and how they will be measured; what kinds of facilities will be targeted for inspection; and what process is to be used by the region and its states to resolve disputes. In addition, regional enforcement officials negotiate separate Compliance Assurance Agreements with their states for each delegated program outlining in more detail responsibilities for conducting certain functions, including regional oversight. The region undertook evaluations based on the Compliance Assurance Program Evaluation Principles of various media programs in two of the region's

delegated states. The first state reviews were focused reviews in Oregon, where the region focused on compliance assurance programs for separate environmental media. Subsequently, a contextual review was conducted of the Washington State air program. This review was broader in scope and addressed the full range of the state air program activities, including the compliance assurance component.

OECA's 1998 evaluation of the Seattle office's performance, however, raised concerns that the principles may conflict with agency policy and limit EPA's oversight authority to certain areas. Also, OECA noted that it is not clear whether certain provisions in the principles document limit EPA's ability to (1) take issue with a state's policy-level decision not to seek economic benefit or (2) review a state's decision concerning allocations of resources that affects the implementation of the state enforcement program. Therefore, OECA recommended that the Seattle office ensure that the states understand that EPA retains the latitude to take the enforcement lead in instances described in its guidance and to take the lead in any case in which the agency determines that there are issues of national significance or precedence that require federal action.

Officials from EPA's Chicago office had mixed opinions as to whether an established audit protocol would improve their oversight of their states. Chicago's water enforcement branch chief and the region's enforcement coordinator said that they would consider developing a protocol for their respective programs, although they do not have one underway at this time. The region's air enforcement and compliance assurance branch chief, however, said that he did not believe an audit protocol would be particularly useful, noting instead that he prefers regional staff to engage in joint inspections with states to assess their performance and to take direct federal action where a state action is inadequate.

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## **State and EPA Perspectives on the Extent of Regional Variation**

To supplement the information from EPA's databases and recent studies, we interviewed officials from the states and EPA regional offices and headquarters on their perceptions as to whether variation exists in key components of the enforcement program and whether such variations are problematic. Regional officials generally indicated that it was difficult for them to assess whether variations are problematic, given their limited vantage point. Some noted in particular that while they were aware of various cases and reports of alleged inconsistency among regions through exchanges at national meetings and through publications, they do not have sufficient information for an informed opinion. They added that without

more detailed information and a better grasp of the national data, they are hesitant to suggest that variation or differences among regions are either extreme or harmful. The state officials we interviewed essentially agreed, frequently noting that they were mainly concerned that their EPA regional office apply consistent treatment to all states within the region.

EPA headquarters officials' expressed substantially more definitive views on these issues, perhaps because their vantage point provides them with a broader overview of the national program. The EPA officials we interviewed noted that variation is fairly commonplace and that it does in fact pose a problem. They expressed the concern that in reacting to similar violations, enforcement responses in certain regions are weaker than they are in other regions. The director of OECA's water enforcement division noted in particular that the lack of consistency in regional enforcement of water programs has worsened over the years.

The director of OECA's air enforcement division said that given the considerable autonomy regional offices possess, it is not surprising that there is substantial variability in how they approach enforcement and state oversight. He illustrated the point with the inspection program. Specifically, he said that because the air program does not have continuous monitoring, facilities found in compliance some years ago may fall into noncompliance without being detected unless they are periodically retested. Therefore, he said a good indicator of variation is the number and quality of inspections that a region or state conducts because this tells him whether a region knows what its states are doing and whether it "has the will to press the issue." He said that based on the numbers of inspections, as well as the number of permits written in relation to the number of sources, there is clearly disparity among both regions and states.

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## Agency Comments

In commenting on the draft report, EPA said it shared our view on the importance of consistency of regional enforcement, but raised a number of issues concerning our discussion of that issue in this chapter. First, the agency said that the draft report was not clear in the scope of consistency being evaluated, particularly whether we were evaluating the consistency in enforcement activity between federal and state activities or among EPA regions themselves. The draft report had stated that, as requested, our evaluation focused on "the extent to which there are variations among EPA's regional offices in enforcing environmental requirements." Our "Objectives, Scope, and Methodology" section further clarified that while variation among states' enforcement programs has also been the subject of

study by various organizations, “we examined such variations only to the extent that they provide insights into the actions of, and variations among, EPA’s regional programs.” This approach is consistent with the approach OECA used in past evaluations of regional office enforcement programs. For example, its 1998 evaluation of the Seattle office’s enforcement program noted that its review “... includes data and a review of state performance only to the extent necessary to evaluate the region’s performance in overseeing state compliance and enforcement activity.”

Second, EPA said that the draft report did not provide parameters defining what was meant by “consistency,” or discuss where variations might be acceptable. At the outset of our review, we worked with EPA headquarters enforcement staff to identify the criteria or areas where EPA would expect to see consistency among regions in conducting enforcement programs and overseeing state-delegated programs. The former Director of OECA’s Office of Planning and Policy Analysis identified several elements that should be “consistent or largely consistent.” These elements included such issues as whether inspections consistently detect noncompliance; the selection of enforcement response; the manner in which enforcement data are entered into databases and used for performance measurement; and whether comparable penalties are imposed for like offenses. During our fieldwork, we discussed these elements with EPA regional and state officials, who generally concurred that these elements should be largely consistent from region to region.

EPA’s comment that the draft report did not discuss where variations might be acceptable is incorrect. For example, the draft report noted EPA’s position that some variation was to be expected in how regions target resources to the most significant compliance issues, and in the level of regional oversight of state enforcement programs (with the greater oversight provided for weaker programs). The draft report also acknowledged that there were circumstances under which variation may represent a problem, but that there are also circumstances in which variation “represents the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances.”

Third, EPA noted that our draft report did not identify any inconsistent enforcement results or present evidence that unequal treatment of similarly situated violators is occurring. We met with EPA officials on several occasions to explore the possibilities of identifying similar violations in different regions to allow for such cross-regional comparisons. EPA staff pointed out that such an approach would require detailed follow-up work

for each violation to determine the specific circumstances in each case. They also acknowledged that regardless of the follow-up work conducted, questions could still be raised as to whether the selected violations were truly comparable. Consequently, we focused our review on the elements of EPA's enforcement program that are most likely to determine whether consistent treatment of violators is likely to occur.

Fourth, EPA said that the draft report implied that, in a number of areas of program management, variation was inappropriate and was a widespread problem. We disagree. We believe we took a cautious approach in characterizing both the extent and appropriateness of variation. For example, the draft report acknowledged EPA's position that "some variation is to be expected—and, in some cases, encouraged." It also stated that variation in some cases may represent "...the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances." Indeed, the only instance in which the report documented a view of a serious and persistent problem was in noting the observation expressed by some senior OECA managers that variation in regional approaches to enforcement was fairly commonplace and that it did pose problems.

Fifth, EPA emphasized that it has principles and management mechanisms that ensure national consistency among its regional enforcement programs. The draft report had discussed these principles and mechanisms but was revised to include a fuller description of them in response to EPA's comment. Importantly, however, consistent principles and management systems, by themselves, cannot "ensure" consistency. As documented in this report, and by past reports of both OECA and EPA's Inspector General, the key is implementation: the mere existence of enforcement principles and management systems does not ensure they will be followed.

Last, EPA said the draft report did not sufficiently acknowledge that specific data on such measures as "penalty amounts" must be analyzed in conjunction with other facts and circumstances. We agree that specific data on such measures are not useful indicators of variation unless analyzed in conjunction with other facts and circumstances, and had made that point in the draft report. For example, the draft report's executive summary cited the concerns of OECA officials that "the data, by themselves, do not offer the appropriate context to help determine the extent to which the variations pose problems." The draft report also highlighted "the importance of getting behind the data to understand the cause of apparently wide disparities to understand whether they reflect a

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**Chapter 2**  
**Variations in Regional Enforcement**  
**Activities**

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problem.” Indeed, as discussed in chapter 4, our concern with EPA’s current approach regarding its planned use of Program Status Reports, which will present region-by-region information on enforcement practices, is that it makes no provision for the “facts and circumstances” and other contextual information needed to interpret regional variation.

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# Key Factors Contributing to Variations in Regional Enforcement Activities

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EPA's data and recent analyses by OECA and EPA's Inspector General show variation in the quantity and quality of inspections, the number and type of enforcement actions, and other key elements of the agency's enforcement program. However, the data themselves do little to explain the causes of the variation. Without such causal information, it is difficult to determine the extent to which variation represents a problem, whether it is preventable, or the extent to which it represents the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances. Accordingly, in our visits to regional offices and states and in our discussions with headquarters officials, we sought to identify the factors that may be contributing to the variations.

Overall, we found broad agreement among EPA and state enforcement officials on the factors that contribute to variations in regional enforcement activities. Among those factors commonly cited were (1) differences in the approaches among enforcement staff about the best way to achieve compliance with environmental regulations, (2) differences in state laws and enforcement authorities and the manner in which regions respond to these differences, (3) variations in resources available to both state and regional enforcement offices, (4) the flexibility afforded by EPA policies and guidance that allow states a degree of latitude in their enforcement programs, and (5) incomplete and inadequate enforcement data that hamper OECA's ability to detect variation.

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## Differences in Regions' and States' Enforcement Approaches

While OECA has issued policies, memorandums, and other documents to guide regions in their approach to enforcement, the considerable autonomy built into EPA's decentralized, multilevel structure allows regional offices considerable latitude in adapting headquarters direction in a manner that they believe best suits their jurisdiction. The majority of regional and headquarters officials cited differences in approaches to enforcement among regional staff as accounting for a major share of the variation that exists among regions' enforcement programs.

Such differences also exist among state enforcement authorities—perhaps even more so, given their dual accountability to their governors' offices as well as to EPA. While our review focused on variations in enforcement practices among regions, the wide variation in approaches among states poses additional complications for the regions that oversee them. How the regions respond to widely differing state enforcement approaches offers yet additional ways in which regions may exhibit variation in the exercise of their enforcement responsibilities.

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## **Differences Among Regions’ Enforcement Approaches**

Differences at the regional level often reflect alternative views on the extent to which traditional enforcement measures should be relied upon to deter noncompliance and to bring violators into compliance, with some regional staff preferring a greater reliance on alternative strategies such as compliance assistance (e.g., workshops, site visits to identify potential compliance problems) to a more traditional reliance on taking enforcement action. EPA’s Chicago office, for example, has long held a reputation for having an aggressive enforcement program in which the region would act quickly and forcefully if it determined that the state was not performing its responsibilities adequately. A Chicago office official told us that the region believes that it is important to maintain an “enforcement presence” in states as a deterrent to the regulated community, in contrast to other regions that believe having to take an enforcement action is a sign of failure.

Other variations reflect differences over whether deterrence could be achieved best through a small number of high profile, resource-intensive cases or a larger number of smaller cases that establishes a more widespread, albeit lower-profile enforcement presence. According to a number of EPA officials we interviewed, these alternative approaches help to explain some of the discrepancies between regions in the numbers of enforcement actions they take. For example, a Boston office official told us that the region tends to focus on a small number of large, high-profile penalty cases while other regions tend to focus on a large number of small penalty cases. Similarly, EPA’s enforcement data for fiscal years 1996 through 1998 indicate that the Chicago office led regions in pursuing judicial actions while the Dallas office led in taking administrative penalty actions.

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## **Regions’ Responses to Varying State Approaches**

State enforcement authorities also exhibit differences in their approaches to enforcement. The variations derived from states’ enforcement approaches can lead not only to differential treatment of violators from one state to another but can also pose a complicated landscape for regional overseers. In cases where states do not take sufficiently strong action, each region decides how far to let states go before it intervenes.

An enforcement official in the Chicago office told us that each of the states in the region has a different enforcement philosophy in dealing with violators. He said states range from those who strive to identify violators and take strong deterrent actions, to those who view themselves as partners with industry and, therefore, adopt a more cooperative approach.

The official said that such philosophical differences among their states play a significant role in determining the level of oversight the region exerts over each state's enforcement program.

In contrast, EPA's Inspector General's 1998 analysis of Idaho's Air Enforcement Program showed a different regional approach to identified weaknesses in a state's environmental program. Specifically, the report found that the state often did not take appropriate enforcement actions, did not assess sufficient penalties, and did not inspect facilities in accordance with EPA guidance. The report concluded that the main reason for these deficiencies was the state's policy of focusing on compliance assistance rather than enforcement to bring sources back into compliance. When compliance assistance efforts did not achieve their intended results, the state failed to pursue enforcement actions against violators. The Inspector General faulted the Seattle office for entering into an agreement with the state that did not require them to follow EPA's enforcement guidance.

OECA acknowledged the particular challenge posed by varying state approaches in its formal response to EPA's Inspector General's 1997 Consolidated Review of the Air Enforcement Compliance Assistance Programs. OECA noted that EPA's enforcement partnership with the states is complicated by the fact that some states "...do not place enough emphasis on deterrence of noncompliance through strong enforcement programs..." and that this "...reflects differences in philosophy that cannot be addressed solely through more effective oversight or better technical assistance to states."

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## **Variations in State Laws and Enforcement Authorities**

Differences in state laws, and in the enforcement authority granted to environmental agencies by state legislatures, can significantly impact the operational aspects of state environmental programs. Nearly all regional and state enforcement officials interviewed agreed that differences in state laws and enforcement authorities contribute to variations in enforcement programs. Among the most commonly cited variations were in states' authority to (1) resolve compliance problems through administrative action rather than relying solely on civil judicial action and (2) recover the economic benefit a violator may have gained through noncompliance.

Enforcement officials in EPA's Chicago office noted that whether a state has administrative authority to resolve compliance problems can be a significant factor contributing to variations. If delegated agencies can pursue violations administratively, they can avoid lengthy delays associated

with going through judicial channels to assess penalties. As noted in EPA's 1997 Inspector General's Consolidated Review of Air Enforcement and Compliance Assistance Programs, having such administrative authority is particularly important to delegated agencies that do not have strong legal support from their state's Attorney General's office. The Inspector General reported that limited legal support from Attorney General's offices in California, Illinois, Indiana, and Wisconsin, combined in some cases with a lack of administrative order authority, contributed to lengthy delays in resolving enforcement cases, and in some cases, a reluctance to refer cases to legal authorities because of the delays.

In those states without administrative order authority to assess penalties, the region's role becomes more important. West Virginia officials, for example, noted that while they have the administrative authority to order violators to correct violations, they do not have the administrative authority to assess penalties. Nevertheless, West Virginia officials said they have been successful in negotiating "consent settlements" with violators in lieu of penalties in large part because the Philadelphia office is viewed by the regulated community as a credible enforcement threat if the state's negotiations fail.

Another key difference among state enforcement authorities is the extent to which they provide for the recovery of the economic benefit of violations. EPA policies for determining appropriate penalties provides that consideration be given to a number of factors, one of which is the recovery of any economic benefits gained by the violator as a result of not complying with environmental requirements.<sup>1</sup> While some states' penalty policies provide for recovery of economic benefits in accordance with EPA guidelines, other states' policies do not. Among the six states included in our review, four states either have, or are in process of developing, written penalty policies that include economic benefit recovery provisions. Enforcement officials in West Virginia, a state that does not have a written penalty policy, said that they consider economic benefit recovery in their penalty calculations, but do not follow the specific EPA calculation procedures because they believe the calculation procedures result in excessively high penalties. Maryland officials said that their state statutes

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<sup>1</sup> Past reports by both GAO and the EPA's Inspector General have concluded that repeated violations have occurred in the absence of adequate penalties that at least recover the economic benefits of noncompliance. See, for example, *Environmental Enforcement: Penalties may Not Recover Economic Benefits Gained by Violators* (GAO/RCED-91-166, June 17, 1991).

do not require nor list the use of economic benefit as a determining factor in calculating or recovering penalties. Thus, Maryland's penalty policy does not mention economic benefit. Officials stated, however, that in assessing penalties they do consider the broad concept of economic benefit but they do not believe they are compelled to use or follow EPA's guidance in their penalty calculations.

Senior OECA officials acknowledge that variations in states' enforcement authorities have contributed to wide variation in states' enforcement capabilities and have noted that their past efforts to address the disparity have been difficult. They noted, for example, that several years ago they proposed requiring economic benefit as a requirement for the delegation of a program under the Resource Conservation and Recovery Act but that it was dropped in the midst of considerable state resistance. They further noted that if economic benefit were required and a state did not adopt the provision, EPA would be faced with a decision whether to take back delegation from the state altogether. Furthermore, if a state did not recover economic benefits in all cases, EPA would be faced with the decision whether to "overfile" the state's action with its own enforcement action. Either alternative could be extremely controversial.

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## Variations in Resource Commitments to Enforcement

Senior OECA officials point out that resource shortages at both the federal and state level have been amplified in recent years by the expansion of the universe of facilities inspected which could be subject to potential enforcement action. As examples, they cited increased emphasis on new requirements that municipalities address problems associated with combined sewer overflows<sup>2</sup> and new discharge requirements facing animal feeding operations. In this resource-constrained environment, a majority of the enforcement officials we interviewed in EPA regions and states agreed that differences in resource allocations can contribute significantly to variations in regional enforcement activities. In such an environment, regions and states must make choices about where to focus their attention. Where state agencies are particularly understaffed, EPA regional staff sometimes help the states carry out their enforcement responsibilities.

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<sup>2</sup> Combined sewer overflows affect municipalities whose storm water and wastewater sewer systems are combined. During large rainstorms, the surge in water volume can cause the system to overflow, resulting in untreated sewage flowing directly into a body of water.

Enforcement officials in EPA's Seattle office told us that civil judicial cases have been particularly taxing on resources of some of their states. As a result, some states have been very selective about which cases they decide to pursue with legal action. According to the EPA officials, these states sometimes settle for less of a penalty than they believe is warranted to avoid litigation that would otherwise consume considerable resources. As long as environmental compliance is achieved, some states in the region generally view compliance assistance and working with violators as a cheaper way to achieve the environmental results. To ease the burden on states with particular resource limitations, Seattle regional staff are engaging in "work sharing" to take some of the load off the states. Work sharing is also practiced among some states' agencies as a means of reducing the impact of resource limitations. The Idaho Department of Agriculture, for example, incorporates environmental inspection objectives into their annual inspections of dairy farms subject to the Clean Water Act requirements, relieving the state environmental agency of this inspection responsibility.

Among the regions we visited, EPA's Philadelphia office was most direct in pointing to resource constraints as affecting their basic enforcement responsibilities. Regional enforcement officials noted, for example, that a lack of travel funds in fiscal year 1999 hampered both training and inspections. Additionally, the director of the water protection division in this region said that he has about 10 vacancies on his enforcement staff that he is unable to fill.

Senior OECA officials acknowledged that while they try to allocate resources fairly and efficiently among the 10 regions, regional management sometimes exercises discretion in assigning enforcement staff to what they view as higher responsibilities. The officials note that in some cases, such decisions reflect an appropriate exercise of management discretion, but that in some instances, they have found it necessary to ask the region to alter its decision to ensure that minimum program requirements are met.

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## **Flexibility in EPA Policies and Guidance**

Inspector General reports during the past decade have documented confusion among both EPA regional and state enforcement officials as to the extent regions and states are permitted to vary from EPA policies and guidance. Most notably, in a series of air program audits during this period, EPA's Inspector General found a widespread failure among states to report all significant violators to EPA. This situation was attributed, in part, to regional and state confusion over the air program's significant violator

guidance and the extensive flexibility it contained. To remedy this situation, EPA and states jointly developed a new “High Priority Violations” policy to replace the old guidance.

Even where EPA’s enforcement policies and guidance are clear, they often provide latitude that is wide enough for state and regional enforcement actions to differ substantially and yet still abide by the policy or guidance. EPA’s penalty response policies, for example, provide for a range of appropriate responses for given scenarios. Depending on the situation, appropriate responses could include warning letters for minor violations, or civil or criminal remedies and sanctions for more serious violations. Civil remedies and sanctions may be imposed either administratively by the enforcing agency or by the courts. The Director, Office of Enforcement, Compliance and Environmental Justice in the Philadelphia office noted that the latitude provided by EPA’s penalty calculation policies helps to explain why different states can calculate different penalties for essentially the same or very similar violations. She said that while penalty calculations are subjective and can never be done identically in different states, it is nonetheless important that penalties are calculated in a comparable manner, and that extremes are avoided.

EPA’s policies for assessing penalties takes into consideration such factors as severity of the violation, litigation considerations, and the economic benefit of noncompliance. These factors are largely subjective, and the values assigned to each factor can vary widely. Consequently, it is unlikely that any two enforcement professionals could look at the same violation, consider the same calculation factors, and come up with precisely the same penalty amount. EPA officials noted, however, that one could reasonably expect that the calculated penalties would be in the same broad range.

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## **Incomplete and Inaccurate Enforcement Data**

OECA needs accurate and complete data as a key tool to assess whether minimum program requirements are being met by regions and states, and whether there are significant variations from these requirements that should be corrected. Responsibility for entering data into EPA’s national databases resides with the region or state responsible for the enforcement program. Both the quality of and quality controls over these data have been widely criticized by the regional and state officials we interviewed, and recent internal OECA studies have acknowledged the seriousness of the problem.

Many state enforcement programs we reviewed maintain their own databases to manage their programs and do not use EPA's national databases. Consequently, keeping the information in the EPA databases current is a low priority for the states in an environment of limited resources—which has only further aggravated the problem for OECA. For example, an internal OECA enforcement work group called the Targeting Program Review Team commented in its November 1999 report that while EPA's air and water databases indicated very different enforcement programs across states, it could not determine whether the variation was a function of real differences or the fact that data are not getting into the databases for some states. This work group reported that functions related to data quality, such as the consistent entry of information by regions and states, is not working properly. The work group also cited important information gaps in the databases. The group noted, for example, that EPA has little compliance information about minor Clean Water Act dischargers, even though two-thirds of all Clean Water Act enforcement actions are now taken at these facilities.

Other work groups also underscored the seriousness of the data problem. The report by OECA's National Planning work group concluded that "...one of the difficulties in current planning and evaluation is that OECA managers do not have available to them timely, complete, and detailed analyses of regional or national performance." The Data Quality work group reported that "Data is viewed by most state, regional, and Headquarters programs as a reporting exercise for 'bean-counting,' rather than as a day-to-day management tool to identify problems and determine progress against commitments and goals." Additionally, the Data Quality work group asserted that the situation has deteriorated from past years, noting that "Over the past several years, managers in the regions and in OECA have become increasingly frustrated that they are not receiving from the Office of Compliance the reports and data analyses they need to manage their programs." The group further noted that there "...has been less attention to the data in the national systems, a commensurate decline in data quality, and insufficient use of data by enforcement/compliance managers in managing their programs." The various internal work groups made a number of recommendations to OECA to ease the problems they had discovered. At the time of our review, OECA was considering what action to take on these recommendations.

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# Recent EPA Efforts to Achieve Greater Consistency in Regional Enforcement Activities

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EPA has an array of principles, policies, guidance documents, and other tools that are intended to ensure that minimum program requirements are met and to help ensure reasonable consistency in the way regional offices across the country take direct enforcement action and in the way they oversee state enforcement programs. However, as discussed earlier in this report, these traditional tools have not ensured consistency because their implementation has often varied across EPA's 10 regions.

EPA headquarters and regional enforcement officials identified a number of planned and ongoing activities that could help to achieve greater consistency in how regional offices take direct enforcement action and in how they oversee state enforcement programs within their jurisdiction. This chapter describes these activities and, in some cases, suggests how they may be modified to more effectively foster greater consistency in EPA's nationwide enforcement program.

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## Developing Comparative Information on Regional Enforcement

During fiscal years 1997 and 1998, OECA engaged in broad-based, region-by-region performance reviews on a rotating 2-year schedule, with half of the regions being reviewed each year. In addition to examining enforcement practices associated with regions' air, water, and other media programs, these detailed reviews included extensive examinations of cross-cutting program activities, such as setting enforcement priorities, addressing multimedia problems, conducting regional oversight of states' activities, and managing data systems.

According to senior OECA officials, these intensive reviews were discontinued because they were viewed as both burdensome and costly for the regional offices and for headquarters officials. They also expressed doubts as to whether the reviews produced sufficiently useful information for improving regional performance because they took too long to complete and did not always identify the most critical problems. An OECA official explained, for example, that the reviews typically took a year to complete and were based on the prior year's data. He noted that by the time a review was completed and published, any problems identified would be 2 years old and possibly not representative of current conditions.

As an alternative, OECA is presently developing a system in which Program Status Reports would be issued about twice a year and would provide a variety of information, by region, that would gauge both regional office performance and performance by states within each region. According to the Director of the Enforcement Planning, Targeting, and Data Division, the

Program Status Reports will draw information from existing data systems and other sources. Information to be included will extend well beyond the historic focus on “output measures” such as the number of inspections conducted and enforcement actions taken. Instead, the reports will provide comparative information on a broader array of information that focuses increasingly on the results the enforcement program is trying to achieve. Thus, for example, in addition to providing regional and state trend data on the number of inspections conducted and the number of enforcement actions taken, the report will attempt to convey, by region, the duration in which significant violators remained in noncompliance; the extent to which past violators returned to compliance have remained in compliance; and the qualitative impact of enforcement actions taken (e.g., the extent to which pollutants are reduced).

According to OECA, the Program Status Reports will be used, in combination with other information sources, to identify specific program elements where more detailed examination of regional and state performance is warranted. These program elements will be prioritized, and then Program Element Reviews will be used to examine specific aspects of selected programs. During these reviews, a team of experts will review their implementation by EPA headquarters, by most or all regions, and by one or two states in each region. According to a letter dated June 1999 from the former Director of the Office of Compliance to a member of the Environmental Council of the States’ executive committee, the reviews “. . . will enable [OECA] to describe how effectively the program elements are being implemented by both EPA and the states.” OECA maintains that in contrast to the discontinued regional reviews, the Program Element Reviews will be more narrowly focused, cover headquarters and most regions and several states in each region, and provide more timely information. The agency currently envisions completing two Program Element Reviews each year. According to the Director of the Enforcement Planning, Targeting, and Data Division, the Program Element Reviews are expected to provide a logical vehicle for assessing consistency and identifying areas for improvement.

Program Status Reports and Program Element Reviews have the potential to convey useful comparative information to both EPA managers and to the public on the extent to which the enforcement program is being implemented consistently and fairly nationwide. However, as OECA officials acknowledge, raw enforcement data, such as the number of inspections conducted or the number of enforcement actions taken, can be easily misinterpreted. Consequently, for the Program Status Reports to

provide useful, comparative information on regions' enforcement programs to both agency officials and the public, it is essential that the data be accompanied by the contextual information needed to clarify whether variation in a given instance is inappropriate, or whether it reflects the appropriate exercise of flexibility by regions and states to tailor their needs and priorities to their individual circumstances.

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## **Recognizing the Seriousness of the Data Quality Problem**

The unavailability among OECA program managers of comprehensive and reliable enforcement data, particularly at the state level, significantly impedes OECA's ability to diagnose and address unwarranted variation among regional enforcement practices. While this issue will take both time and funds to address, OECA has at least acknowledged the seriousness of the problem and is exploring alternatives to deal with it. OECA's Office of Compliance has organized a number of work groups which, in a series of reports in 1999, identified a number of problems and made a series of recommendations to address them. Of particular note, the Data Quality work group found that data quality needs to be fully integrated into strategic planning, staffing levels, agreements with the regions, regional reviews, and reporting in order to convey a clear message of the importance of data in all aspects of the enforcement program. In addition, the Targeting work group acknowledged problems with the quality and uses of enforcement data and made a series of recommendations designed to "...make OECA a more information driven, and thus strategic organization." The Targeting work group recommended that "The use of targeting methods that incorporate risk, environmental quality, and pollutant data...be promoted to augment or replace existing methodologies that are driven almost exclusively by policy mandates that tend to be inflexible."

The Acting Director of the Office of Compliance noted that the resources devoted to data quality may have been insufficient in recent years and indicated headquarters' intention to shift some resources internally to alleviate the problem. He also indicated that his office is studying the work groups' recommendations to decide which should be adopted and how they should be implemented. We believe such a study should be an important part of a comprehensive strategy that identifies the key actions needed to address OECA's data quality problems, and then brings to bear sufficient priority and resources needed to address them.

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## **Improving Regional and State Communications**

Regional officials cited improved communication as a key component in their efforts to initiate new processes and effect change among their staff and among their states. Senior officials in the Seattle region, for example, instituted a Regional Enforcement Forum attended by all regional program directors and top managers to share information and to ensure that they are aware of what is going on in other programs in the region. The Seattle Regional Administrator told us that the region looks at data, such as penalties, and puts all of the states' data in a matrix for comparison and analysis. Seattle officials noted that program reviews have highlighted diametrically opposed philosophies between the states of Oregon and Washington in targeting their enforcement efforts. One state believes in using its limited resources to target a few large violators that have a large impact on the environment while the other state believes in targeting many small violators that, cumulatively, also have large impacts on the environment. The Regional Administrator also said that when top-level state directors see something amiss when their own data are arrayed in a matrix with neighboring states, they question their own staff for explanations for the differences. He said that this process has created peer pressure and has helped to bring about a greater level of consistency among the states in the region.

Other regional officials conveyed similar experiences. The Director of the Office of Enforcement, Compliance and Environmental Justice in EPA's Philadelphia office said the regional office's decentralized enforcement structure (i.e., enforcement is organized as a separate component within each media program)—and the need to work closely with six states in the region with evolving political leaderships—makes frequent and effective communication critically important. Therefore, the office holds regularly scheduled conference calls with regional and state staff to discuss issues that may arise, and she also holds annual meetings to improve communication between the region and its states and among the states.

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## **Developing Regional Audit Protocols to Improve Oversight**

A number of regions have developed and implemented audit protocols to improve the consistency and effectiveness of their oversight of the states within their jurisdiction. Among the most recent and comprehensive experiments with such a protocol is in the Denver region, where the Denver Regional Office recently developed a Unified Oversight System. Under this new system, the regional office will review all state environmental programs using a broad range of performance criteria such as data entry, timeliness of actions, penalties recovered, and effectiveness

of inspections. Each state will be graded on each category and then given an overall rating. The system is built, in part, on the concept of a comparative review system to pinpoint the weakest state programs needing the most oversight attention by the regional office. The protocol is also premised on the belief that over time, states with the lowest rating will eventually rise to the level of their peers.

Senior OECA officials acknowledged that regional protocols may help a region oversee its state programs, although they cautioned that the protocols should not be viewed as a regional “report card.” Our interviews with regional officials also suggest that oversight protocols, negotiated between regional and state officials, offer a promising mechanism to improve regional oversight that can help to ensure that each region’s oversight is fairer and more consistent among all the states within its jurisdiction. Moreover, we also acknowledge the view among many regional staff that in light of the different organizational structures among regional offices, working relationships between different regions and their states, and other factors, these protocols should be tailored to meet the needs of each region. Nonetheless, EPA’s guidance on elements that should be common to all protocols could help to engender a minimal level of consistency in the way the 10 regional offices oversee their states.

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## Conclusions

While noting that some variation among regions’ environmental enforcement activities may be appropriate, OECA has underscored the importance of an appropriate level of consistency to ensure fairness and equitable treatment, and to help ensure that minimum requirements will be met. OECA has relied on a number of traditional tools to ensure reasonable consistency, such as the use of formal memorandums of agreement outlining regions’ and states’ enforcement responsibilities, and periodic visits by senior enforcement managers to each regional office. Yet, maintaining a consistent approach among 10 regional offices and 50 states has proven to be a difficult challenge. EPA has also experienced problems in identifying and communicating the extent to which variation (1) represents a problem, (2) is preventable, or (3) represents the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances.

Headquarters and regional enforcement officials have identified a number of planned and ongoing activities that could further help to improve consistency in how regional offices take direct enforcement action and in how they oversee state enforcement programs within their jurisdiction. We

acknowledge the merit of many of these activities but believe that additional action, and in some cases changes to its approach, will further the agency's effort to achieve an appropriate level of consistency in regional enforcement.

First, OECA is planning to use Program Status Reports to provide comparative data on regional enforcement practices and on the practices of states within each region. Program Status Reports have already been the subject of much discussion in the environmental media and among EPA and state enforcement officials. The reports have the potential to convey useful information to both EPA managers and to the public on the extent to which the enforcement program is being implemented consistently and fairly nationwide. However, as OECA officials acknowledge, the data can be easily misinterpreted without the contextual information needed to clarify whether variation in a given instance is inappropriate, or whether it reflects the appropriate exercise of flexibility by regions and states to tailor their needs and priorities to their individual circumstances. We, therefore, believe that EPA's Program Status Reports can better serve agency management and the public if EPA (1) clarifies what aspects of its enforcement program it expects to see implemented consistently from region to region and where it believes greater variation is appropriate and (2) supplements its region-by-region data with contextual information that helps to explain the causes of variation and thereby clarifies the extent to which such variation is problematic.

Second, the effort to develop such comparative information will only succeed if it draws from data systems that are complete and reliable. However, the reliability of the agency's enforcement data has been widely challenged from both outside and inside the agency. Senior OECA officials have acknowledged that it will require additional staffing and resources to deal with the issue and have indicated that they are considering the reallocation of some resources from other functions to augment their data quality efforts. Nonetheless, EPA still needs to articulate a comprehensive strategy that will build on internal analyses and recommendations concerning the agency's enforcement databases, and will bring sufficient resources to bear in a manner that will sufficiently address this critical and complex problem.

Third, a number of regional offices have worked with their states to develop audit protocols that are designed, in part, to achieve more effective and more consistent oversight of the states within their jurisdiction. We acknowledge the potential of these protocols and believe there are good

reasons that such protocols should be tailored to meet the needs of each region. However, we also believe that headquarters guidance on elements that should be common to all protocols would help to engender an improved level of consistency in the way the 10 regional offices oversee their states.

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## Recommendations

We recommend that the Administrator of EPA

- provide, as part of the agency's efforts to develop Program Status Reports containing comparative data on regional and state enforcement performance, the contextual information needed to help EPA management and the public properly understand them;
- develop a comprehensive strategy that will bring to bear sufficient priority and resources so that the problems affecting the quality of the agency's enforcement data can be adequately addressed; and
- issue guidance to EPA regions describing the required elements of audit protocols to be used in overseeing state enforcement programs.

## Agency Comments

In its comments on our draft report, EPA disagreed with our recommendation that the agency's Program Status Reports include the contextual information needed to help EPA management and the public better understand raw data characterizing regional performance. EPA noted that the reports are not intended for public distribution and consequently do not "need contextual information . . . since they are designed to be used by Agency program managers who understand how to use them." We disagree with this statement. First, past experience indicates that whether intended or not as public documents, the Program Status Reports will likely be made public and will be used by interested parties. This occurred in the case of OECA's regional evaluations discussed in our report, which were released on the basis of a Freedom of Information Act request and were reported widely in the trade press. Recent press coverage anticipating EPA's Program Status Reports provide a strong indication that they too will be used by members of the public. Consequently, the contextual information explaining the variations is essential if the reports are to clarify, rather than confuse, the public's interpretation of the data. Second, while EPA notes that the reports are designed for agency managers "who know how to use them," our experience during this review indicates that without better contextual information, even agency managers have had difficulty interpreting the raw data to determine the extent to which

variations are problematic, whether they are preventable, or whether they represented the appropriate exercise of flexibility.

EPA did not respond directly to our recommendation that the agency develop a comprehensive strategy to improve the quality of its enforcement data. The agency noted that the “root causes of the data quality problems are many and varied.” EPA noted in particular the importance of the state role in both the causes and solutions to data quality problems in EPA’s national data systems, since they are the repository of most of the data and are typically responsible for entering this data into the national data systems. We agree that the states must be part of the solution if EPA is to have a useful and reliable national enforcement database. However, EPA itself suggests that solving the problem will require its leadership. EPA notes, for example, that its data systems have aged to the point where many states have built their own parallel data systems that incorporate more modern, user-friendly architectures. Data entry by states into the national databases has therefore waned as they have placed greater emphasis on maintaining their own systems. EPA also points to “system or definitional incompatibilities” between EPA enforcement databases and those of a number of states, and the added burden on both states and EPA regional offices of entering data into national databases that do not help them manage their programs. This point echoes the findings of the agency’s Data Management and Quality Program Review Team which, as discussed in chapter 3, observed that “Data is viewed by most state, regional, and Headquarters programs as a reporting exercise for ‘bean-counting,’ rather than as a day-to-day management tool to identify problems and determine progress against commitments and goals.” The team’s November 1999 report recommended that data quality needs “be elevated to an OECA priority . . .” and that such needs “be considered in strategic planning, budget formulation, and reporting to ensure a clear articulation of the importance of good data and how it fits into all aspects of the enforcement program.”

EPA did not respond directly to our recommendation that the agency issue guidance identifying elements that should be common to all regions’ state oversight audit protocols. However, the agency cautioned that the protocols are not a substitute for a comprehensive oversight program. EPA also expressed concern about the comprehensiveness of some of the protocols, noting that they “do not all review State performance against all national policies, including the 1986 State Guidance, other national policies, and the [Memorandum of Agreement] process.” We acknowledge that the protocols are not a substitute for a comprehensive regional

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oversight program. We also acknowledge EPA's concern about the comprehensiveness of the various protocols being tested in different regions and continue to believe that the recommended guidance would help to address the problem identified by EPA while still allowing each region to tailor its protocol to meet its unique circumstances.

# Comments From the Environmental Protection Agency

Note: GAO's comments supplementing those in the report text appear at the end of this appendix.



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

MAR 30 2000

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

Peter Guerrero, Director  
Environmental Protection Issues  
Resources, Community, and Economic  
Development Division  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Guerrero:

Thank you for the opportunity to review and offer comments on your March 13, 2000, draft report entitled Environmental Protection: Further EPA Action Can Help Achieve Consistency in Nationwide Enforcement Program (GAO/RCED-00-108, code 160497). We share GAO's view of the importance of consistency. However, we are concerned the draft report is generally not clear in the scope of the consistency being evaluated, i.e., whether GAO is evaluating the consistency between Federal and State activities or Federal regional enforcement activities, e.g., inspections (compliance monitoring), applying penalty policies (enforcement response); or the consistency in EPA's oversight of Federal regions and States.

We appreciate GAO's recognition that inevitable barriers to consistency may exist. EPA must balance consistent and fair enforcement of Federal environmental laws throughout the nation - a fundamental tenet of Federal enforcement policies - with inevitable variations that occur. Enforcement cases are very fact specific, and typically do not involve the same set of facts. In addition, Federal environmental laws require us to consider variables such as the duration of the violation, the nature of the violation, the compliance history of the violator, etc. Your report does not define "consistency," provide parameters for defining "consistency" in a way that would be instructive for EPA, or discuss where variations might be acceptable.

EPA constantly strives to balance our goal of equal treatment under Federal environmental laws for violators in similar circumstances with the need for flexibility to address regional and local environmental issues in all aspects of our program. The GAO should evaluate EPA's enforcement and compliance program against these expectations, or explain why different expectations should be established. We note that the draft GAO report does not address, or cite, any inconsistent enforcement results; rather, it critiques some management mechanisms used to accomplish program goals, including regional performance reviews, regional-state

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See comment 1.

See comment 2.

See comment 3.

**Appendix I  
Comments From the Environmental  
Protection Agency**

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communication mechanisms, and audit protocols. We further note that the draft GAO report presents no evidence that unequal treatment of similarly situated violators is occurring. It does, in a number of areas of program management, imply that variation is inappropriate and a widespread problem. As noted in more detail below, some variation in management approaches is desirable and appropriate. For example, it may make perfect sense for oversight to vary from State to State, or for inspection numbers to vary from region to region.

See comment 4.

EPA has consistent principles in place to define a quality enforcement and compliance program:

- A State/EPA framework - State authorizations to implement Federal environmental laws, together with the 1986 State Guidance, are the first step in setting out what constitutes a good state program;
- Enforcement Response Policies (ERPs) specify and set management benchmarks by classifying types of violations, appropriate responses, and the timeline in which those violations must be addressed;
- Penalty policies specify the dollar amount assigned to classes of violations; and
- A consistent national model (BEN) for recovery of economic benefit so that violators do not gain an economic advantage over law abiding competitors.

These policies specify appropriate response criteria for State and EPA personnel.

EPA also has a management system in place to ensure EPA achieves equal treatment under Federal environmental laws for violators in similar circumstances, including:

- A national priority setting process that sets priorities and establishes benchmarks for near-term planning;
- State/EPA Memoranda of Agreement, Performance Partnership Agreements and Grants (PPAs/PPGs) to allow EPA to look at adherence to national policies and principles;
- Compliance assistance for the regulated community and consistent technical procedures for compliance monitoring;
- Oversight of regional and State programs to ensure fair and consistent enforcement of environmental laws throughout the Nation;
- A set of uniform core performance measures to evaluate success; and
- Management enhancements to ensure the best quality data in our data systems.

See comment 5.

Details on each of these and an explanation of how they achieve consistency are provided in the sections below.

**I. Consistent Principles Define a Quality Enforcement and Compliance Program**

**EPA/State Framework**

States play a crucial role in the implementation of the national environmental enforcement and compliance assurance program - inspecting 90 percent of the facilities inspected. States are able to perform this role when they have been authorized to implement the federal environmental program.

The general principles defining a quality enforcement and compliance assurance program have been in place since 1986. The "Revised Policy Framework for State/EPA Enforcement Agreements" sets out the framework for implementing the Federal/State enforcement relationship through national program guidance and Regional/State agreements. ["Revised Policy Framework for State/EPA Enforcement Agreements", August 25, 1986 [hereinafter "1986 State Guidance"], as revised by "Oversight of State and Local Penalty Assessments: Regions to the Policy Framework for State/EPA Enforcement Agreements," July 20, 1993.] It also contains the "criteria and measures for defining good performance." The 1986 State Guidance together with statute-specific guidance - particularly the "timely and appropriate" enforcement response criteria - are the blueprint for both EPA and State enforcement and compliance programs. These serve as the base for both authorization of state programs and their review.

EPA has consistent expectations regarding State programs. State authorizations to implement federal environmental laws are a first step in setting out what constitutes a good program. Additional expectations are set forth in the 1986 State Guidance, the general enforcement policy on penalty assessments, and the media-specific enforcement response [penalty] policies.

**Enforcement Response Policies (ERPs)**

The ERPs guide both EPA and States in identifying and defining significant noncompliance under a specific rule or statute, taking timely and appropriate action to correct the problem, and deterring future noncompliance. The policies require that significant noncompliance be addressed through a formal enforcement action if it persists for an established period of time and that the appropriate response consider various factors. The ERPs "timely and appropriate" guidances are periodically revised in conjunction with States and local officials, e.g., EPA recently revised the Clean Air Act "timely and appropriate" guidance in response to State concerns about the need for improving the policy. [See Enclosed "Timely and Appropriate Enforcement Response to High Priority Violations."] We continue to revise the ERPs as appropriate.

**Penalty Policies**

See comment 6.

The results of our enforcement and compliance assurance efforts - individual cases - are influenced by both the general principles cited above and the case-specific nature of the work. The 1986 State Guidance and our "timely and appropriate" response policies ensure there is roughly equal treatment under the law for violators in similar circumstances. The general enforcement policy on penalty assessments together with the media-specific enforcement response [penalty] policies contain the companion principles to be applied recognizing that variables such as specific facts, duration of violation, nature of violation, compliance history of violator, etc. affect the assessed penalty. [See Enclosed EPA General Policy "A Framework for Statute-Specific Approaches to Penalty Assessments" February 16, 1984.] Calculating the penalty, and including economic benefit, based on these principles for violators in similar circumstances will yield reasonably similar results.

See comment 7.

EPA uses these policies as one important tool to evaluate regional and State performance. The Inspector General's and EPA's state audits cited in the draft GAO report used these policies as a benchmark. The GAO report does not adequately note the key role these policies and criteria play in oversight.

See comment 8.

Nor does GAO present significant evidence that unequal treatment under the law for violators in similar circumstances is a widespread problem. The Inspector General report cited by GAO references differences in raw penalty (dollar) amounts, but this variation reflects the very different types of cases brought by the regions. [Draft GAO Report at 29.] As explained in detail in the section below on implementing MOA agreements, penalty amounts are not a useful indicator of variation unless analyzed in conjunction with other facts.

See comment 9.

**Consistent National Model (BEN) for Recovery of Economic Benefit**

The Inspector General and EPA's audit reports found that some authorized states do not recover the economic benefit of noncompliance. EPA has long promoted recovery of the economic benefit of noncompliance in enforcement so that violators do not gain an economic advantage over law abiding competitors. Our reliance on the BEN model, which has been tested successfully in court, has led to fairly consistent recovery of economic benefit across all EPA programs. Recovery of economic benefit is less consistent among States. We have taken a number of steps to address the issue. [See Enclosed OECA Responses to Inspector General Audits; Correspondence to Arkansas regarding Economic Benefit.] However, we believe some States do not accept the importance of recovering economic benefit.

**II. Management Mechanisms Ensure Equal Treatment of Violators in Similar Circumstances**

**Memorandum of Agreement Guidance - Establishing Consistent National Priorities**

In addition to the common principles governing the enforcement and compliance assurance program, OECA also has an extensive national, regional and state planning process to determine how national priorities are set while ensuring regions and states have the flexibility to accommodate local/regional priorities. This helps accomplish national goals while providing flexibility to States and regions. The OECA Memorandum of Agreement (MOA) Guidance not only sets priorities, it also establishes benchmarks for regions and States to use in planning near-term compliance and enforcement activities. The draft GAO report fails to fully articulate the importance of this planning process in achieving national consistency.

See comment 10.

The MOA Guidance specifies how EPA and States should implement the enforcement and compliance assurance policies and principles detailed above in the short-term. It is a nationally written document that sets forth the national enforcement and compliance goals, objectives, and priorities for a two-year period which the regions, States, and OECA's other partners should use in planning their annual activities. The priorities ensure consistency of national targeting of environmental compliance issues that pose the greatest potential threat to human health and the environment. Development of the priorities and the guidance is a collaborative effort that involves meetings with other EPA program offices, states, and approximately 14 other stakeholder groups to gather input regarding program direction and potential priorities. [See Enclosed Lists of State Contacts and Stakeholder Organizations for the FY2000/2001 MOA Process.]

Over the last several years EPA has refined the MOA process recognizing the need to adopt well-defined priorities that are clearly articulated and understood. The FY2000/2001 MOA Guidance (Figure 1) contains the few substantial priorities that guide OECA, Regions and States. The national priorities and initiatives like petroleum refineries and NSR/PSD ensure consistent results since the violators receive like treatment, and the injunctive relief and enforcement response are similar.

See comment 11.

**Figure 1. FY 2000/2001 NATIONAL PRIORITIES**

- \* Clean Water Act-- Wet Weather
- \* Safe Drinking Water Act-- Microbial Rules
- \* Clean Air Act--New Source Review/Prevention of Significant Deterioration (NSR/PSD)
- \* Clean Air Act --Air Toxics
- \* Resource Conservation and Recovery Act--Permit Evaders
- \* Petroleum Refinery Sector
- \* Metal Services (Electroplating and Coating) Sector

The MOA Guidance also provides regions and States flexibility to accommodate their local priorities. This means that some regions and States may be addressing different sources and using different tools than other regions and States. This is perfectly appropriate variation because it addresses the most significant regional problems. The MOA Guidance is also the primary document for defining the performance measures that we, and others will use to hold ourselves accountable for meeting program goals.

**Agreements Implementing the MOA Planning Process**

The Regions use the MOA Guidance as a basis for negotiating with States (in Performance Partnership Agreements and Grants - PPAs/PPGs), and integrating and balancing national, regional and State priorities. Any variation between the MOA Guidance and proposed regional MOAs is managed by Headquarters and Regions through the priority setting process consistent with the 1986 State Guidance. The agreement- analogous to a business plan- allows OECA to review adherence to national priorities, policies and principles.

The draft GAO report discusses regional variation in implementing enforcement and compliance programs, but does not note that such variation is not only allowed, but in some cases encouraged by Headquarters to address regional problems, or that it is specifically reviewed and approved by Headquarters in MOA discussions and memorialized in the final 2-year agreement (MOA).

For example, the evidence cited by GAO of variations in inspection rates (draft report at p. 24), penalties (p. 26) and types of actions (pp. 28-29) is not meaningful when considered in isolation to determine whether similarly situated violators receive equal treatment. For example, GAO acknowledges that fewer but larger more resource-intensive investigations may contribute to differences in inspection levels, but other factors may also cause differences. We believe the starting point to assess performance is the most recent annual data, but one must also look trends over

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time, consider variations in the types of facilities and environmental compliance problems presented in different regions, etc.

**Table 1.** Data for Regions 3 and 5 Contained in the FY 1998 Measures of Success Management Report, April 1999.

	EPA Region 3	EPA Region 5
Clean Air Act Universe (p. 65)	4,347	8,110
# of EPA & State Coverage Inspections (p. 65)	3,213 (74%)	2,178 (27%)
State Enforcement Activity - Orders (p. 32)	290	158
State Enforcement Activity - Referrals (p. 32)	6	47
FY 1998 APO Complaints (p. 24)	20	41
FY 1998 Civil Referrals to DOJ (p. 23)	15	26
CAA Penalties (p. 42)	\$1,582,957	\$7,224,200

Table 1 arrays the relevant data in the FY 1998 Measures of Success Management Report, April 1999 for Regions 3 and 5 to begin a management review of regional performance. The raw FY 1998 numbers show the regulated community in Region 5 is almost twice as large as Region 3; the number of State orders in Region 3 is almost twice as large - perhaps a lack of State performance contributed to the relative difference in results. The number of new penalty complaints and civil referrals in FY 1998 (p. 19) indicate Region 5 has almost twice as many new formal enforcement actions as Region 3. In addition, Region 5 consistently has a larger proportion of significant FY 1998 enforcement outputs than Region 3 - excepting criminal penalties. (p. 28b) The trends over time show that Region 5 had 17 percent of the APO complaints from FY 1991 to FY 1998; Region 3 had 7 percent. (pp. 23, 24, 30). If one looks behind the data as GAO correctly suggests is appropriate, Region 5 was dealing with the contentious issue of NAPALM storage and remediation in that region. They were also working on major Clean Air Act cases, e.g., Pro-Tec (PSD/NSR), Ford Motor Company (\$7.8 million CAA settlement announced on June 8, 1998), and were the lead region on Ashland Inc. (\$32.5 million settlement for multiple environmental law violations announced October 10, 1998). [See Enclosed Press Releases.] In addition, Region 5 had a greater number of multimedia enforcement cases, including WCI Steel, a large case with two CAA components. Thus, Region 5 staff were engaged in several high profile and complicated on-going CAA cases.

This is not to say that either Region 5 or Region 3 is better - the issue is whether they were making rational management judgments based upon the priorities in the MOA Guidance and MOAs as agreed upon with Headquarters to deal with responding to regional environmental issues. As the example illustrates, GAO presents no evidence the two regions were making irrational and unfounded management judgments.

See comment 13.

**Compliance Assistance and Consistent Technical Procedures to Compliance Monitoring**

Consistent technical procedures for compliance monitoring helps to ensure reasonably consistent results. The draft GAO report fails to consider compliance monitoring as a way EPA achieves consistency. The 1986 State Guidance recognizes the need for a consistent approach to analyzing and detecting violations. There are natural limitations on achieving a perfectly consistent approach to monitoring violations, e.g., varying levels of staff expertise and geographic variations. The Agency has taken several steps to improve monitoring compliance with Federal environmental laws, including:

- Training 494 Federal students, despite travel budget limitations;
- Conducting standard investigations, e.g., of utilities, petroleum refineries, concentrated animal feeding operations;
- Sharing analyses of compliance problems through multiple Enforcement Alerts; and
- Conducting root cause analyses, occasionally in cooperation with industry, e.g., Chemical Manufacturing Association.

Standardized investigations are a good example of efficient and effective use of scarce resources that enhances consistency and achieves reasonably consistent results. They involve an examination of commercially available production data for an industry to determine whether the production may have triggered certain requirements, developing networks of experts to provide common analyses, and clearly articulating the issues in Enforcement Alerts. In the coal-fired utilities initiative, EPA examined the data to determine whether New Source Review and Prevention of Significant Deterioration requirements were triggered. [See Enclosed Enforcement Alert for Detailed Description.] On November 3, 1999, after a 2 ½ year investigation, the Justice Department filed seven lawsuits charging that 17 power plants released two million tons per year of illegal sulfur dioxide into the air (seven times what is emitted by all cars on the highway) and 530,000 tons per year of illegal nitrogen oxide into the air (equivalent to the annual emissions of 25 million cars on the road today).

The Inspector General audits and EPA's regional audits of State performance show this is an area we need to continue working on. While we have made progress in addressing the issues raised in the audits, we believe some fundamental philosophical differences remain between EPA and some State agencies, particularly regarding the role of environmental enforcement and compliance monitoring in general, and federal policies governing "timely and appropriate" enforcement responses to violations.

The Inspector General also found that EPA needed to disseminate compliance assistance information to the regulated community. We seek to provide the most effective methods of communication through existing information sharing mechanisms. Our strong compliance assistance program complements our enforcement program to ensure that the regulated community - especially small businesses, small communities and local governments - has the

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information it needs to comply with federal environmental laws. EPA is using new tools, improved information and enhanced public access to increase the capacity of the regulated community to fully comply with the law, including:

- Establishing nine Compliance Assistance Centers through a partnership approach;
- Developing Sector Notebooks - plain English guides for industrial sectors; and
- Introducing the Sector Facility Indexing Project (SFIP) to make it easier for the public to access a wide range of environmental information about regulated facilities.

EPA recently completed a mid-course review of our compliance assistance program to evaluate the new directions we've taken and to identify additional steps we can take to improve our program. Our extensive stakeholder outreach, while generally confirming these steps, showed us a number of steps we could take to further the new directions. As a result, EPA is committed to broadening its compliance assistance programs by generally changing our role in compliance assistance from a "retailer" approach to one of a "wholesaler," and by expanding our efforts to provide timely compliance assistance for major final rules.

**Oversight of Regional and State Programs**

Effective oversight of regional and authorized State programs is important to maintain fair and consistent enforcement of Federal environmental laws. OECA takes a number of actions to ensure that national priorities are being addressed and enforcement policies followed by regions, including:

- Conducting in-depth reviews of all regional enforcement and compliance assurance programs;
- Quarterly national meetings of Senior regional and Headquarters enforcement and compliance assistance managers;
- Monthly management teleconferences with Deputy Regional Administrators, Regional Counsels, and Regional Enforcement Coordinators;
- Frequent visits to each region by the Assistant Administrator, Deputy Assistant Administrators and other senior program managers to review performance, discuss policy issues, and further identify needs for technical assistance; and
- Developing and implementing revised Program Status Reports and in-depth Program Element Reviews.

In addition, Federal laws provide EPA with oversight authority in States where a federal environmental program is implemented by the State pursuant to federal authorization. Federal oversight assures fair and consistent implementation and enforcement of federal environmental laws across the nation. One purpose of federal oversight is to preserve a level economic playing field for law-abiding companies and to protect States that enforce requirements of federal law from being undercut by States that do not. [See Enclosed Statement of Steven A. Herman,

See comment 15.

See comment 16.

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Assistant Administrator, OECA before the Committee on Commerce, Oversight and Investigations Subcommittee, United States House of Representatives, March 17, 1998 at 6.]

See comment 17.

It is unclear in the draft report whether GAO is examining variation among federal actions (between regions) or State and federal actions combined across geographic regions of the country. Certainly, Inspector General, EPA state audits and GAO reports have found variation in State responses. EPA will continue our oversight efforts and our efforts to address the concerns identified in these audits. [See e.g., "Consolidated Report on OECA's Oversight of Regional and State Air Enforcement Programs Inspector General Report No. 8100244", September 25, 1998; "Consolidated Review of the Air Enforcement and Compliance Assistance Programs Inspector General Report No. 7100306, September 30, 1997; "Report on Idaho's Air Enforcement Program, IG Report No. 8100249", September 30, 1998; "Region 10's Oversight of Washington State's Air Compliance and Enforcement Program, IG Report No. 810094", March 30, 1998; "Audit of Region 9's Administration of the California Air Compliance and Enforcement Program, IG Report No. 7100246," July 1997; "Region 6's Oversight of New Mexico Air Enforcement Data IG Report No. 8100078" March 13, 1998; "Region 6's Oversight of Arkansas Air Enforcement Data IG Report No. 7100295", September 26, 1997; "Region 6's Enforcement and Compliance Assurance Program IG Report 610039", September 26, 1996; "Region 5's Air Enforcement and Compliance Assistance Program IG Report No. 61000284", September 13, 1996; "EPA Region 3's Oversight of Maryland's Air Enforcement Data IG Report No. 7100302", September 29, 1997; "Validation of Air Enforcement Data Reported to EPA by Pennsylvania, IG Report No. 7100115," February 14, 1997; "EPA and the States: Environmental Challenges Require a Better Working Relationship GAO/RCED-95-64", April 1995; "Water Pollution: Differences Among the States in Issuing Permits Limiting the Discharge of Pollutants GAO/RCED - 96-42", January 1996.]

See comment 18.

The draft GAO report also includes a discussion of state oversight presumably to determine whether state programs are producing a level playing field. The draft report cites some differences in approach to State oversight. [Draft GAO Report at 6, 11, 31-34.] EPA believes variation in State oversight is necessary to address variations in performance. NEPPS also recognizes the need for some variation in State oversight - "differential oversight" is one of NEPPS' seven principles. ["Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System", May 17, 1995 at 5-6.] Following the Inspector General audit of Pennsylvania, Steven Herman, Assistant Administrator of OECA, charged regions to conduct in-depth evaluations of state environmental enforcement program including how effectively they identified violators, how timely and appropriately the state responded to violations, how promptly they reported violations to EPA, and how effectively they provided public access to accurate information on environmental violations in each state in the region.

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See comment 19.

The draft report cites regional audit protocols as a potential mechanism to achieve consistency in State oversight. [Draft GAO Report at 6, 11, 31-34.] We caution that there is a danger in gross over generalizations that audit protocols reflect State performance. Many regions have developed, and are testing a variety of tools to review State performance based on a subset of the national criteria for State programs. These pilots are under review and caution should be exercised in relying on any single model as being comprehensive enough for State oversight. The regional audit protocols do not all review State performance against all national policies, including the 1986 State Guidance, other national policies, and the MOA process. For example, one of the protocols cited is actually a tool to rank States within a region -- mostly based on short-term State/EPA agreements. This, while a useful management tool, it is not a substitute for comprehensive oversight.

The Inspector General reports highlighted the need to improve State oversight and EPA has undertaken many actions in response to those reports. Nevertheless, EPA remains concerned about the Inspector General findings and is continuing to consider ways to improve State oversight. [See Enclosed OECA Responses to Inspector General Reports.] EPA believes the new Program Element Reviews will be a useful management tool to bring State oversight issues to our attention.

**Measuring Success Through Core Performance Measures**

A uniform set of public core performance measures provides accountability for both Federal and State performance. OECA has expanded its performance measures to include results (or outcomes achieved), as well as outputs (or number of activities conducted). Outcomes add to traditional output measures by measuring the state of compliance with environmental laws, the environmental results achieved through our activities, and the degree to which program objectives are met and noncompliance problems are addressed. Our performance measures allow us to make direct links between compliance and enforcement actions and environmental results. For example, our data shows that during FY 1998 chlorofluorocarbons were reduced by over five million pounds, asbestos by more than seven million pounds, carbon monoxide by 188 million pounds and nitrogen oxide by 23.6 million pounds as a result of enforcement actions. This moves beyond the number of inspections conducted and penalties assessed.

**Data is One Piece of Information In Reviewing Performance**

While we believe that efforts presently underway will lead to better, more reliable compliance and enforcement data, it is also important to understand that it is not appropriate to use the information from the national data systems, by itself, to reach conclusions about Regional or state performance. Data from the national systems is only a part of the information that must be considered. It is essential to look at the circumstances behind the data (as discussed earlier), to apply experience and expertise, and examine other relevant information before reaching a conclusion on the meaning of the data -- this is what was done in Inspector General and regional audits of State performance. For this reason, the Program Status Report is being developed

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See comment 20

specifically for internal Agency use. It is not intended for public distribution as your draft indicates. The Program Status Report will be used as a starting point in program implementation discussions between enforcement program managers in OECA, the Regions, and the states. Therefore, the Program Status Reports do not need contextual information as you recommend since they are designed to be used by Agency program managers who understand how to use them. Nevertheless, we recognize that the Program Status Reports are subject to release to the public upon request. Therefore, we will develop a transmittal cover sheet that explains the purpose of the Report and how the information included should and should not be used or interpreted.

See comment 21.

EPA operates many national environmental compliance/enforcement data systems. Though EPA operates these data systems, approximately 90% of the data in these systems comes from the states. The states, which have been authorized to operate their environmental programs, conduct most of the inspections, receive most of the reports submitted by regulated entities, and bring most of the enforcement actions. The states, therefore, as the repository of most of the data, also, typically, are responsible for entering this data to the national data systems. The EPA Region enters the data where a state does not operate a program. Your draft report needs to recognize the importance of the state role in its discussion of the causes and solutions to data quality problems in EPA's national data systems.

The root causes of the data quality problems are many and varied. Some of the data systems are old and are accordingly limited in their functionality and user-friendliness. In addition, as EPA's systems have aged, many states have taken to building their own, parallel data systems that incorporate modern, user-friendly architecture. As states have relied on EPA's national data systems less, their interest in entering data into those systems has waned.

In some cases, state systems communicate well with EPA's systems and data can be transferred directly from the state system to the national system. In other cases, communication between the systems is poor due to system or definitional incompatibilities. In these cases, entry of data to the national databases tends to become a low priority for the state. Even where the data systems communicate well, some states view entry of data to the national systems as little more than an unwelcome burden. They have become less willing to take the steps necessary to assure timely, accurate and complete entry of data to the national systems.

Further complicating this picture is the tension between gathering more data on program operation versus the burden that such efforts place on the Regions and states. As a result, we are asking our state partners to enter only the data that the Agency must have to adequately manage and oversee enforcement and compliance programs. By limiting our collection of detailed compliance information to those facilities or activities that we consider to be of national consequence, there appears to be much data "missing". This data is not missing, but is purposefully omitted to ease the data reporting burden.

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Each of these factors have contributed to data quality problems. As such, the solutions to these problems must address each causative factor. Resolving these data quality issues is a high priority for EPA. OECA is a key participant in the Agency's strategy to modernize its aging data systems. The key to this strategy, from an enforcement/ compliance data system perspective, is our development of a General Enforcement Management System (GEMS) as part of the Agency's larger Integrated Information Initiative. The system is to be a multimedia database that houses compliance and enforcement data for all of EPA's programs in one place. As envisioned, this integrated system will provide easy input of and access to data. This will make state support and use of the national data base much more attractive. Further, in developing GEMS, we will address the other issues affecting data quality, including reexamination of required data fields and the definitions associated with each of the data fields.

Other components to assuring the quality of the data in the national systems include working with our State partners to assure that they enter all required data to the systems and to assure that they take the steps necessary to assure its quality. Clearly, the solutions to improving data quality rest not only on EPA as you suggest. Rather, the States must also be committed to taking the steps necessary to assure that they provide complete and accurate data. Only through a cooperative effort between the Agency and the States will the data quality issues be resolved.

**Conclusion**

Our comments reflect our concern that the scope of your report is not clear and, thus, does not assist us in defining "consistency." EPA's goal is fair and consistent enforcement of Federal environmental laws. It is expected that variations will occur due to the fact specific nature of enforcement. Cases vary in terms of the entity involved, duration of violation, type of entity, litigation facts, and the severity of the violation, just to mention a few. That is why EPA has in place a framework of common principles and management mechanisms to ensure that in general terms violators in similar circumstances receive similar treatment under Federal environmental laws. In preparing your final report, I hope you will examine the individual elements of our existing framework to determine if each serves to ensure similar treatment under Federal environmental laws by EPA or authorized programs for violators in similar circumstances, and make revisions as appropriate. This issue is a fundamental one to EPA, and we believe the framework described above is a sound one, that serves our goal well. We appreciate your contributions to our ongoing efforts to continually improve this system.

Sincerely,

  
Steven A. Herman  
Assistant Administrator  
Office of Enforcement and  
Compliance Assurance

Enclosures

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The following are GAO's comments on the Environmental Protection Agency's letter dated March 30, 2000.

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## **GAO's Comments**

1. EPA noted that the draft report was not clear as to whether we were evaluating the consistency among EPA regions or between EPA regions and states. Our response is discussed at the end of chapter 2.
2. EPA's letter states that the report does not define consistency nor does it provide parameters for defining consistency in a way that would be instructive for EPA or discuss where variations might be acceptable. Our response is discussed at the end of chapter 2.
3. EPA noted that our draft report did not identify any inconsistent enforcement results or present evidence that unequal treatment of similarly situated violators is occurring. Our response is discussed at the end of chapter 2.
4. EPA states that our report incorrectly implies that, in a number of areas of program management, variation is inappropriate and that it is a widespread problem. Our response is discussed at the end of chapter 2.
5. The draft report had included a description of EPA policies, procedures, and management systems that the agency maintains will ensure national consistency among its regional enforcement programs. We revised chapter 1 of the draft report to provide a fuller description of these items. Importantly, however, consistent principles and management systems, by themselves cannot "ensure" consistency. As documented in this report, and by past reports of both OECA and the EPA Inspector General, the key is implementation: the mere existence of enforcement principles and management systems does not ensure they will be followed.
6. EPA notes that its "timely and appropriate" response policies ensure that there is roughly equal treatment under the law for violators in similar circumstances. As noted in comment 5 above, while it is critical that EPA have such policies in place, the existence of national program guidance such as "timely and appropriate" response policies does not ensure that such policies will be implemented consistently.
7. EPA states that our report does not adequately note the role that EPA penalty policies and criteria play in oversight. We disagree. Chapter 1 of the draft report presented an extensive discussion on EPA and state roles

in enforcing environmental programs, including EPA's oversight of states' performance. The draft report also noted that these policies provide for a range of different responses for given scenarios.

8. EPA states that we do not present significant evidence that unequal treatment under the law for violations in similar circumstances are a widespread problem. As noted earlier in comment 4, the draft report did not state, nor do we believe it implied, that variation is always inappropriate and that it is a widespread problem.
9. EPA points out that specific data on such measures as "penalty amounts" are not useful indicators of variation unless analyzed in conjunction with other facts and circumstances. Our response is discussed at the end of chapter 2.
10. EPA states that the draft report did not fully articulate the importance of the memorandum of agreement planning process in achieving national consistency. We disagree. The draft report noted that "an important first step defining expectations between Regional Offices and OECA is the Memorandum of Agreement negotiated between the parties every 2 years." The draft also pointed out that the agreement contains the core program requirements and national priorities that the regional offices and OECA have agreed will be addressed and the steps that OECA takes to follow up with the regions.
11. EPA states that national priorities and initiatives targeting specific industry sectors ensure consistent results since violators receive like treatment. We agree that management systems and establishing national priorities are important in an effort to help ensure consistency. However, as we note in comment 5, implementation is the key to whether consistency is actually achieved.
12. EPA states that the draft report did not note that variation is not only allowed, but in some cases encouraged by headquarters to address regional problems, or that it is sometimes reviewed and approved by headquarters. We disagree. Chapter 3 of the draft report had already acknowledged that variation in some cases may represent "...the appropriate exercise of flexibility by regions and states to apply national program goals to their unique circumstances." With regard to headquarters approval of instances of variation, we added language in chapter 1 to more fully address the establishment and approval of region-specific problems and priorities.

13. EPA points to our discussion of regional variations between regions 3 and 5 and states that we present no evidence that the two regions were making irrational and unfounded management judgments. The comment does not accurately reflect the report's discussion of this issue. We made no attempt to comment on the regions' performances but present data that show variations do exist--a fact that points up the need to get behind the data to evaluate regional performance. The draft report did not imply that either region was making irrational or unfounded management judgments.

14. EPA states that the report did not sufficiently consider compliance monitoring as a way EPA achieves consistency. We have added information to chapter 1 to further emphasize that EPA's compliance monitoring strategy is a key mechanism under EPA's management system. However, as noted in comment 5, the existence of a strategy does not guarantee consistent implementation. In fact, consistent implementation has proven to be difficult. In the air program, for example, Inspector General audits have found problems with how compliance monitoring is conducted and the extent to which the compliance monitoring strategy is being followed by some regions and states. As noted in chapter 2 a more recent 1999 OECA review of the air program's compliance monitoring strategy found wide variation among regions in how they are implementing the strategy. The review found that five regions reported that they implement some major components of the strategy while five other regions do not implement the strategy and engage in only minimal inspection planning and oversight with their states.

15. EPA states that it takes a number of actions to ensure that national priorities are being addressed and that enforcement policies are followed by the regions. We added information in chapter 1 of the draft report to amplify the discussion of these activities. As noted in comment 5, we acknowledge the value of these efforts but do not believe they have "ensured" consistent implementation.

16. EPA notes that federal oversight assures fair and consistent implementation and enforcement of federal environmental laws across the nation and that one purpose of federal oversight is to preserve a level economic playing field for law-abiding companies. We acknowledge the importance of federal oversight to, among other things, help promote consistent enforcement among regions. For the reasons discussed in our report, however, such a consistent approach has yet to be "assured."

17. EPA states that it is unclear whether the draft report examined variation “among federal actions (between regions) or State and federal actions combined across geographic regions of the country.” As noted in our response to comment 1, the draft report stated that, as requested, “our review examined the extent to which there are variations among EPA’s regional offices in enforcing environmental requirements.” It also explained that the report examined states’ enforcement programs “... to the extent that they provide insights into the actions of, and variations among, EPA’s regional programs.”

18. EPA notes that some differences in approach to regional oversight of states is necessary to address variations in performance. We agree that regions’ oversight needs to take into account the capabilities and performance of states, providing less attention to states that have demonstrated their ability to meet program requirements and greater attention to those experiencing difficulty in doing so.

19. EPA expresses concern about the comprehensiveness of some regions’ audit protocols, noting that they “do not all review State performance against all national policies, including the 1986 State Guidance, other national policies, and the [Memorandum of Agreement] process.” We acknowledge this concern and believe it serves as further justification for our recommendation that EPA issue guidance identifying elements that should be common to all regions’ state oversight audit protocols.

20. EPA states that its Program Status Reports are not intended for public distribution, and, therefore, do not need the contextual information we recommend because “they are designed to be used by Agency program managers who understand how to use them.” Our response is discussed at the end of chapter 4.

21. EPA states that our report should recognize the importance of the state role in both the causes and solutions to data quality problems in EPA’s national data systems, since they are the repository of most of the data and are typically responsible for entering this data into the national data systems. We agree that the states must be part of the solution if EPA is to have a useful and reliable national enforcement database but continue to believe that solving these problems will require EPA leadership.

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# GAO Contacts and Staff Acknowledgments

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## GAO Contacts

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## Acknowledgments

In addition to those named above, Maureen Driscoll, Barbara Johnson, Gerald Laudermilk, and Lisa Pittelkau made key contributions to this report.

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