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ENVIRONMENTAL PROTECTION

EPA's and States' Efforts to Focus State Enforcement Programs on Results

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Mr. Chairman and Members of the Subcommittee:

I am pleased to be here to discuss the findings of our recent report on the Environmental Protection Agency's (EPA) and states' efforts to focus state environmental enforcement programs on results.[1] Most major environmental statutes allow EPA to delegate the responsibility for key programs to qualified states. In order for the states to obtain such responsibility, the statutes generally require them to have adequate authority to inspect, monitor, and enforce the program. Recently, some states have supplemented these traditional enforcement activities with other, more cooperative approaches to improve compliance through technical assistance and various incentives.

To understand more about the potential for these alternative strategies to make compliance more efficient and effective, the full Committee asked us to determine (1) what alternative compliance strategies states are practicing, (2) whether and how states are measuring the effectiveness of these strategies, and (3) how EPA has responded to these states' efforts, focusing in particular on the agency's objective of holding the states accountable for achieving environmental results, rather than focusing solely on enforcement processes.

In summary, Mr. Chairman, we found the following:

- Approaches used by 10 states we contacted[2] that are experimenting with alternative compliance strategies generally fall into two categories: (1) "compliance assistance" programs that seek to help dischargers comply with environmental requirements and (2) programs that promote more flexible enforcement than is practiced under the current system (which generally prescribes when and what type of "timely and appropriate" enforcement action is required for a given violation). Most of the 10 states had developed some kind of compliance assistance program, which included such activities as seminars, technical assistance visits, and "plain-English" guides explaining regulatory requirements. These programs generally target smaller facilities or businesses that may not understand the requirements and the most efficient and effective ways of meeting them. Among the key flexible enforcement approaches employed were

[1]Environmental Protection: EPA's and States' Efforts to Focus State Enforcement Programs on Results (GAO/RCED-98-113, May 1998).

[2]We visited five states—Florida, Illinois, Massachusetts, Texas, and Washington—their corresponding EPA regional offices, and other interested parties to gather detailed information about states' alternative compliance strategies. Additional information and insights were gathered from another five states, including Colorado, Delaware, New Jersey, Oregon, and Pennsylvania.

"audit privilege/immunity" policies or laws, which generally encourage facilities to use environmental auditing to assess their environmental performance and correct the problems identified. In return, their audit findings and other information generated by audits may be granted confidentiality and/or penalties for violations found may be waived or reduced. Nine of the 10 states had some type of audit privilege/immunity program, four of which were authorized by the states' statutes.

- We found broad agreement among the state and EPA officials we contacted that the effectiveness of alternative compliance strategies should be measured and assessed. Yet while we identified a number of innovative efforts under way, states' efforts to measure the effectiveness of alternative compliance strategies have proven to be much more difficult than counting and reporting traditional enforcement "outputs," such as the number of inspections conducted or penalties assessed. Key challenges to developing results-oriented performance measures include (1) the frequent absence of the baseline data needed to determine whether compliance rates or environmental quality have improved under new strategies and (2) the inherently greater difficulty and expense involved in quantifying outcomes (such as industry wide compliance rates) as compared with counting and reporting enforcement activities.
- EPA has initiated a number of activities to improve compliance using nontraditional approaches, such as establishing compliance assistance centers, rewarding voluntary self-disclosure of environmental violations, and working jointly with states to develop results-oriented performance measures. These programs have complemented and facilitated states' efforts, but the agency has also maintained a continued emphasis on strong enforcement, noting that the deterrent effect achieved through enforcement actions motivates regulated entities to seek compliance assistance and use incentive policies. This emphasis has led the agency to raise concerns in cases in which states' data have shown decreased numbers of enforcement actions and to object on legal and policy grounds to a number of states' audit privilege/immunity laws and other programs that it has concluded compromise the efficacy of the states' enforcement programs. Some of the differences between EPA and state regulatory authorities over these state initiatives reflect different legal and policy views on (1) whether these states' audit privilege laws compromise the states' authority to enforce federal environmental law and (2) the appropriate role of EPA and its state counterparts, particularly on the appropriate level of EPA's oversight of state enforcement activities. We found, however, that these differences were exacerbated by inconsistent approaches by different EPA offices on how the adequacy of state enforcement programs should be assessed—particularly as it relates to the

appropriate balance in states' use of traditional and non-traditional tools for achieving compliance.

Background

As a condition of accepting responsibility for implementing the Clean Water Act, Clean Air Act, and other environmental statutes, delegated states must establish enforcement programs approved by EPA to ensure that the regulated community complies with pollution discharge limitations and other environmental requirements. Such programs typically include monitoring compliance by the members of the regulated community, reporting violations to state and/or EPA authorities, and taking "timely and appropriate" enforcement action when necessary. Depending on the nature of the violation, an appropriate enforcement action could be an informal measure (such as a verbal warning or written notice of violation) or a more formal measure (such as a fine or criminal prosecution). These actions must be taken according to time frames set by the agency. EPA's regulations generally provide that EPA may withdraw its approval of a state's program if the state does not act on violations or does not seek adequate enforcement penalties.

EPA has historically measured the success of states' enforcement programs by the number of inspections conducted and the number of enforcement actions taken against violators. The agency has generally maintained that the emphasis on inspections and enforcement action is necessary to deter noncompliance and prevent violators from gaining economic advantage by violating environmental laws. Increasingly, however, states have cited such enforcement-related "output measures" as inappropriate indicators of a program's success and as unduly emphasizing punitive measures when technical assistance, incentives, and other more cooperative strategies are needed to increase compliance by some members of the regulated community. They point specifically to the growing number of small businesses that must comply with highly complex environmental requirements. They believe that a wider array of "tools" is needed to help achieve environmental compliance and that state regulators should be held accountable for the results their programs achieve, rather than only for the numbers of enforcement actions they take.

In this connection, EPA, in cooperation with the states, has in place several efforts to increase enforcement programs' focus on results. Of particular note, the agency established the National Environmental Performance Partnership System (NEPPS) in 1995 as an important incentive to implement new programs and measure their results. NEPPS is intended to strengthen

the effectiveness of the nation's environmental programs by redefining the federal and state roles to ensure that public resources are used efficiently to address the most important environmental problems. One of NEPPS' primary objectives is to measure and report the progress that states and EPA are making toward their environmental and programmatic goals. A key element is EPA's commitment to give states with strong environmental performance greater flexibility and autonomy in running their environmental programs. Under the program, states and EPA set environmental priorities that are based on individual state's environmental conditions and priorities. The results of these negotiations are documented in Performance Partnership Agreements (PPA) that explain the states' objectives, including objectives for enforcement, and also establish performance measures to gauge progress toward those objectives.

States' Experiences in Developing and Using Alternative Compliance Strategies

States' efforts to provide compliance assistance frequently target smaller facilities in specific industry sectors. The Washington Ecology Department's "Snapshots" Program, for example, provides on-site technical assistance for lithographic printers, screen printers, and photo processors across the state. Under the program, the Department's staff have worked with local officials to visit over 1,300 shops, providing customized recommendations to reduce waste generation, improve waste management, and help the shops achieve compliance with hazardous waste regulations. Ecology Department inspectors identify areas that the facility needs to address and then subsequently apply a follow-up strategy consisting of three alternative courses of action, depending upon the violations found during the inspection.

Similarly, Massachusetts' Department of Environmental Protection (MDEP) created its Environmental Results Program to replace the existing permitting process with broad performance standards with which small and medium-sized facilities must certify their compliance. MDEP's comparison of "before" and "after" inspections of 18 facilities participating in a pilot of this program showed a post-certification compliance rate of 78 percent—a significant improvement over the pre-certification rate of 33 percent and the average statewide industrial compliance rate of 42 percent. Improvements were noted across the board, both in meeting new standards created by the Environmental Results Program and in complying with long-standing regulatory requirements, such as hazardous waste management standards.

Provisions for audit privilege and/or immunity, used by states to encourage facilities to undertake environmental auditing, have become among the more prevalent means of enforcement flexibility exercised by the states visited. During a typical environmental audit, a facility voluntarily conducts an examination to determine whether it is complying with environmental laws and regulations. Statutes in two of the states we contacted, Colorado and Texas, offer immunity for certain violations found during audits. Under Texas' law, for example, with certain exceptions, a facility reporting a violation pursuant to an environmental audit may not be assessed an administrative or civil penalty for violations identified and corrected as a result of conducting the audit. In addition, in Texas and several other states, environmental audit reports and other information generated by the audit are not admissible in evidence or subject to disclosure in certain legal proceedings. As an alternative to authorizing such programs through legislation, a number of states encourage environmental auditing through nonbinding audit policies. Many of these are similar to EPA's own environmental auditing policy that eliminates or reduces certain penalties but does not provide either privilege or immunity.

Efforts to Measure New Strategies' Effectiveness

EPA and state officials we contacted emphasized the importance of measuring the effects of compliance and assistance programs. For example, officials from Florida, Pennsylvania, and Texas cited innovative programs they initiated that relied less on enforcement but which, they maintained, actually improved compliance and environmental quality. However, they noted that without tangible, measurable proof that the strategy maintained or improved either compliance or environmental quality, they found themselves vulnerable to criticism that they were "going soft on polluters." Florida has since undertaken an extensive effort to measure the results achieved by each of its major programs, using statistical inspection samples to obtain compliance rates for different industry sectors. Other states we contacted have also augmented their efforts to go beyond measuring the outputs associated with their programs.

Nonetheless, most of the alternative strategies we examined either were not being systematically evaluated or were still being assessed on the basis of outputs (such as the number of facilities participating in a program or the number of workshops conducted) rather than results. Among the key barriers impeding greater use of results-oriented performance measures were the following:

- Because states have only recently begun to measure enforcement outcomes, they have generally not measured or kept records on such outcome-related data as industrywide compliance rates. Without such baseline data, the relative success of new strategies cannot be easily analyzed.
- Officials in each of the states we visited cited the difficulty in quantifying program results. Florida was one of the few states to have attempted to quantify outcomes, noting that calculating accurate industrywide compliance rates was an important part of the state's effort to focus programs on results. Doing so, however, required a substantial investment to change the data systems used by the Florida Department of Environmental Protection and its method of selecting facilities for inspection.
- It is inherently difficult to establish a specific causal link that can isolate the effect of a particular strategy on compliance rates or environmental quality. State and EPA officials noted that even when environmental quality can be quantified, measuring the impacts of enforcement strategies is complicated by the influence of other factors affecting the environment, such as the weather and economic activity.

EPA's Response to States' Alternative Compliance Strategies

EPA has initiated a number of activities during the past few years to encourage voluntary compliance by facilities—thereby alleviating the need to respond to violations exclusively by means of traditional enforcement action. Some of these activities are carried out at the federal level and are viewed as a part of EPA's own enforcement program. Others bear more directly on state enforcement programs. Key activities include (1) establishing compliance assistance centers for automotive repair, metal finishing, and several other industry sectors; (2) working with states and other interested parties in a significant and innovative effort to develop results-oriented measures; and (3) encouraging regulated entities to voluntarily discover, disclose, and correct violations through environmental auditing.

EPA's senior leadership has underscored on numerous occasions, however, that these initiatives are intended to supplement—not replace—a strong enforcement program. Consequently, senior EPA enforcement officials recently asked EPA regional offices to focus their attention on what was perceived to be an unacceptable drop in the number of enforcement actions by many of the states in the regions' jurisdiction.

The agency's legal and policy concerns about a possible weakening of enforcement has also led it to question a number of states' alternative compliance strategies, such as several states' audit privilege/ immunity laws, and "amnesty" programs, which, under certain conditions, allow facilities additional time to correct violations and return to compliance before enforcement actions are taken. For example, EPA has expressed concern that some of the audit privilege/immunity laws may prevent states from meeting basic requirements for state enforcement authority that are established in federal laws and regulations and are prerequisites for program delegation. The agency has been able to negotiate agreements to resolve these disputes with several states, including Texas, Michigan, Utah, Virginia, and Wyoming. In an effort to forestall similar disputes in the future, EPA has issued a "statement of principles" reflecting the agency's position on whether and how approval of new state programs (or program modifications) could be affected by state audit laws that restrict state enforcement and information gathering authority.[3]

While EPA's policy is that compliance assistance and flexible enforcement should in fact be accompanied by a strong and credible enforcement deterrent, state officials have noted that the inconsistent manner in which this policy has been interpreted and implemented by different EPA offices has led to confusion about the appropriate balance between traditional enforcement and other compliance tools. Specifically, officials from each of the 10 states contacted maintained that a fragmented and inconsistent approach among different EPA offices on the appropriate use of alternative compliance strategies has made it difficult to devise a coherent, results-oriented approach acceptable to all key EPA stakeholders. The inconsistencies most frequently identified were between EPA headquarters and regional offices; among the EPA headquarters offices with key enforcement responsibilities; and between EPA management and staff responsible for implementing EPA's programs and overseeing states' actions.

These findings echoed those of an internal December 1996 EPA study which reported complaints by EPA staff in several regions that "they had received mixed messages about the relative priority of enforcement and compliance assurance." Among the consequences cited by the study were

[3]Among other things, this statement requires that, at a minimum, a state must maintain certain authorities, including those that provide for recovering penalties for significant economic benefit, repeat violations, and activities that may present imminent and substantial endangerment as well as authority to obtain fines and sanctions in criminal proceedings. Also the state must maintain the ability to obtain information needed to identify noncompliance and criminal conduct. EPA is currently in discussion with several other states about bringing their audit laws in line with these principles.

"considerable confusion" among regions and states, and distrust among the regulated community.

Senior EPA enforcement officials have attempted to clarify the issue through quarterly meetings between management staff in EPA's Office of Enforcement and Compliance Assurance and the management teams of each of EPA's 10 regional offices, "operating principles" that clarify how to integrate enforcement and compliance assurance activities, and other actions. They also implemented an ambitious National Performance Measures Strategy, with wide participation from various stakeholder groups, to develop results-oriented measures for the agency's own enforcement effort. Our report acknowledges these important efforts, noting that they have, in fact, shed some light on the agency's policy on the appropriate use of alternative enforcement and compliance tools.

Nonetheless, our interviews with enforcement officials from the 10 states confirmed the difficulty of implementing a multi-faceted compliance strategy in an organization in which enforcement responsibility is highly decentralized. The officials expressed a unanimous view that states are still receiving inconsistent messages from different EPA offices on this issue. For example, officials from several states cited inconsistent messages from different EPA headquarters offices with key enforcement responsibilities. Oregon officials, for example, cited "internal battles" between EPA's Office of Enforcement and Compliance Assurance and the agency's program offices, noting that the two tend to have different initiatives and priorities, leading to confusion for both the regions and the states. Colorado, Massachusetts, and Pennsylvania cited similar problems. The Pennsylvania respondent noted in particular that some offices, such as the Office of Reinvention, appear to advocate a more risk- and results-based approach toward enforcement, while others advocate the more traditional approach that emphasizes counting numbers of enforcement actions. As another example, Massachusetts' Associate Commissioner for Enforcement reported that the state's Department of Environmental Protection has generally experienced few problems with, and has had greater access to, the EPA Boston office's leadership. She noted that conflicts generally occur with the region's mid-level managers "who make the more specific decisions about what data need to be reported and whether the state can or cannot exercise flexibility." She also cited similar conflicts with mid-level managers at EPA's headquarters.

EPA's April 28, 1998, letter responding to our report took issue with, among other things, our conclusions about inconsistent implementation by

different EPA offices, arguing that they relied too heavily on impressions, opinions, perceptions, and complaints. We disagree. As noted above, the problem of inconsistent implementation was cited by EPA's own Office of Administration and Resource Management in its December 1996 report. The prospect that EPA did not solve the problem its own report identified was, in our view, convincingly substantiated by both the overwhelming consensus of enforcement and other officials from among a diverse group of 10 states, and by the strength and consistency with which these views were conveyed.

In this connection, our report also observed that the enforcement measures EPA says it will use in response to the Government Performance and Results Act (the Results Act) also raise questions about the consistency of the agency's message on this matter. Specifically, the agency's strategic plan for implementing the Results Act said that EPA is "striving to develop a range of measures that reflect the broad spectrum of enforcement and compliance activities, the degree to which they protect human health and the environment, and industry compliance with applicable laws." Nonetheless, the actual measures the agency has thus far developed, as reflected in its Results Act's "Performance Plan," are overwhelmingly weighted toward numerical targets for inspections, enforcement actions, and other output measures. Officials from Delaware, Massachusetts, New Jersey, and Pennsylvania each raised concerns that EPA's heavy focus on outputs in responding to the Results Act is inconsistent with the agency's other ongoing initiatives designed to help states orient their environmental programs toward results. The New Jersey respondent said that such a focus on outputs was contrary to the results-oriented manner in which New Jersey was attempting to negotiate its performance partnership agreement with EPA under the agency's National Environmental Performance Partnership System. This system, which is explicitly intended to focus on achieving environmental results, provides a framework within which EPA regional offices and states agree on such matters as which problems will receive priority attention, what their respective roles will be, and how their progress in achieving clearly defined program objectives will be measured. EPA's efforts to develop results-oriented measures for its enforcement and compliance assurance activities may, if they stay on schedule, eventually improve the balance in EPA's Performance Plan between measures of enforcement outputs and the results of enforcement and compliance activities.

In closing, Mr. Chairman, the differences that have arisen between EPA and state regulatory authorities over some states' initiatives, particularly those

providing for flexible enforcement, in part reflect different legal and policy views on whether these initiatives compromise states' authority to enforce federal environmental laws and on the appropriate roles of federal and state government in deciding how environmental compliance can best be ensured. While these issues will continue to be discussed, our report recommends a number of steps EPA can take—in concert with the states—to move toward a system that (1) focuses less on process and more on achieving desired outcomes through both compliance assistance activities and conventional enforcement and (2) systematically measures progress on how well these outcomes are being achieved.

First, the agency needs to work with the states in developing the kind of information that will allow for a greater focus on results. Through its National Performance Measures Strategy, EPA plans to develop at least some of this information—although the effort is largely intended to refocus EPA's own enforcement program on results. Nonetheless the effort could be simultaneously designed to help interested states tap into EPA's effort so that the agency can help meet the states' own data and analytical needs. In light of the states' considerable needs in this area, such an effort may be particularly worthwhile and should be systematically built into the EPA strategy.

Second, EPA needs to take further actions before the agency is perceived to be speaking with one voice on the extent to which states are to be held accountable for achieving results, and particularly on the appropriate balance between traditional enforcement and other tools to ensure compliance. We acknowledge the challenge of maintaining consistency on such an issue in an organization as complex and decentralized as EPA. However, as we concluded in our report, we believe EPA can go a long way toward improving the consistency of its message by ensuring that (1) the expectations set for the Office of Enforcement and Compliance Assurance, program offices, and other EPA headquarters and regional offices are consistent with the agency's operating principles calling for an appropriate mix of tools to achieve compliance; (2) different EPA offices with enforcement responsibility more systematically coordinate their negotiations with, and oversight of, state agencies on enforcement-related matters; and (3) the enforcement-related provisions of EPA's Performance Plan, prepared pursuant to the Government Performance and Results Act, focus on outcomes in a manner consistent with that of the core performance measures developed under EPA's National Performance Measures Strategy, the National Environmental Performance Partnership System, and the agency's other results-oriented initiatives.

Mr. Chairman, this concludes our prepared statement. We would be pleased to answer any questions you or Members of the Subcommittee may have.

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