United States General Accounting Office

GAO

Report to Committee on Commerce, U.S. House of Representatives

May 1998

ENVIRONMENTAL PROTECTION

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

GAO/RCED-98-113

GAO

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

Resources, Community, and
Economic Development Division

B-279372

May 27, 1998

The Honorable Thomas J. Bliley
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

As requested, we are reporting on the states' use of alternative strategies for improving compliance with environmental laws and regulations and the Environmental Protection Agency's oversight of these activities.

As arranged with your offices, unless you publicly announce its contents earlier, we will make no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the appropriate congressional committees; the Administrator, Environmental Protection Agency; and the Director, Office of Management and Budget. We will also make copies available to others upon request.

Please call me at (202) 512-4907 if you or your staff have any questions. Major contributors to this report are listed in appendix V.

Peter F. Guerrero
Director, Environmental
Protection Issues

Executive Summary

Purpose

Most major environmental statutes allow the Environmental Protection Agency (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 Chairman and Ranking Member of the House Committee on Commerce asked GAO 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.

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 of 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. The states 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 number of enforcement actions they take.

Results in Brief

Approaches used by 10 states contacted by GAO[1] 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 are "audit privilege/immunity" programs, which encourage facilities to use environmental auditing to assess their environmental performance and correct problems identified. In return, their audit findings and other information generated by their audits are 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.

GAO found broad agreement among the state and EPA officials contacted that the effectiveness of alternative compliance strategies should be measured and assessed. Officials from Florida, Pennsylvania, and Texas, for example, related experiences in which a drop in the number of enforcement-related actions taken was criticized heavily by the media, environmental groups, and others because a clear, quantifiable benefit

[1]GAO 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.

attributable to an alternative strategy could not be demonstrated. Nonetheless, while GAO 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 industrywide compliance rates), as compared with counting and reporting output measures.

Since 1994, EPA has initiated a number of activities to facilitate states' efforts, such as establishing compliance assistance centers and working jointly with states to develop results-oriented performance measures. In doing so, the agency has 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 believes compromise the efficacy of the states' enforcement programs. GAO observed that some of the differences between EPA and state regulatory authorities over these state initiatives reflect different legal and policy views on whether these state audit privilege laws compromise the states' authority to enforce federal environmental law and what the appropriate role of EPA and its state counterparts should be, particularly on the appropriate level of EPA oversight of state enforcement activities. GAO 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 nontraditional tools for achieving compliance. GAO also concluded that EPA could more effectively help states deal with some of the technical barriers impeding their efforts to develop measures needed to implement results-oriented enforcement strategies.

Principal Findings

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 State 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, Department 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. Similarly, the Massachusetts Department of Environmental Protection 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.

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, 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, facilities are not obligated to disclose the environmental audit reports in administrative or civil proceedings, nor may the reports be used as evidence in these 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, which eliminates or reduces certain penalties but does not provide either privilege or immunity.

Efforts to Measure New Strategies' Effectiveness

EPA and state officials contacted by GAO emphasized the importance of measuring the effects of their 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 begun 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 contacted by GAO have also augmented their efforts to go beyond measuring the outputs associated with their programs.

Nonetheless, most of the alternative strategies GAO 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 on results. Among the key barriers impeding greater use of results-oriented performance measures were the following:

- Absence of baseline data. 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 documented.
- Difficulty of quantifying outcomes. Officials in each of the states GAO 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.
- Difficulty in establishing causal links. 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. Florida 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 part of EPA's own enforcement program. Others bear more directly on states' 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 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. The agency's legal and policy concerns about a possible weakening of enforcement has led it to respond negatively toward a number of alternative compliance strategies, such as several states' audit privilege/immunity laws and "amnesty" programs that, under certain conditions, allow facilities additional time to correct violations and return to compliance before enforcement actions are taken. For example, EPA is concerned that some of these laws may prevent states from meeting basic requirements for the state enforcement authority established in federal laws and regulations as prerequisites for delegation, and thus has issued only interim approvals of states' environmental programs until the concerns could be resolved. Senior EPA enforcement officials also asked EPA regional offices recently 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.

While EPA's policy is that compliance assistance should 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 lower-level staff. These findings echoed those of an internal December 1996 EPA study that 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 "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, issuing "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. GAO 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, GAO's interviews with enforcement officials from the 10 states confirmed the difficulty of implementing a multifaceted compliance strategy in an organization in which enforcement responsibility is highly decentralized. The officials expressed the unanimous view that states are still receiving inconsistent messages from different EPA offices on this issue. In this connection, GAO also observed that the enforcement measures EPA says it will use in response to the Government Performance and Results Act are overwhelmingly weighted toward numerical targets for inspections, enforcement actions, and other outputs. For example, the "Performance Plan" prepared pursuant to the act notes that in 1999, the agency "will conduct 15,000 inspections and undertake 2,600 enforcement actions" and make 60,300 state pesticides inspections. The plan also includes numerous other output-oriented targets.

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. For example, 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 under 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.

Recommendations

GAO recommends that the Administrator, EPA, promote greater consistency in what has been a fragmented and inconsistent message by different EPA offices about the appropriate balance in EPA's enforcement program between enforcement and compliance assurance activities. In doing so, the Administrator should build on EPA's recent efforts to address this issue 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 policy 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 EPA's other results-oriented initiatives.

GAO makes additional recommendations in chapter 3 on the steps that EPA could take to more effectively assist states in dealing with some of the technical barriers impeding their efforts to develop results-oriented performance measures.

Agency Comments

GAO provided copies of a draft of this report to EPA for its review and comment. Among the major concerns raised in the agency's comments responding to the report were that the report (1) did not give the agency adequate credit for the efforts made to promote compliance assistance and develop innovative performance measurement efforts; (2) relied too heavily on impressions, opinions, and perceptions to support its conclusions about inconsistent implementation by different EPA offices; (3) did not acknowledge the value of deterrence to promoting environmental compliance; and (4) made recommendations that would do little to effectively address the problems and challenges it identified.

In connection with the first point, GAO noted that the draft report did in fact devote several pages of discussion to EPA's initiatives on these matters, citing, among others, the agency's efforts to establish compliance assistance centers, develop policies that provide incentives to the regulated community to comply with environmental laws, develop and implement its environmental auditing policy, and develop performance

measures. Where appropriate, GAO provided further recognition of these efforts in response to EPA's comments.

EPA's second point, that the draft report relied too heavily on impressions, opinions, and perceptions to support its conclusions about inconsistent implementation by different EPA offices, does not convey the breadth and consistency of the report's findings on this issue. GAO noted that the problem of inconsistent implementation was cited by EPA's own Office of Administration and Resource Management in a December 1996 report. The view that EPA has not solved the problem was substantiated not by sporadic impressions, opinions, and perceptions, but by (1) the overwhelming consensus of enforcement and other officials from among a diverse group of 10 relatively experienced states and (2) the strength and consistency with which these views were conveyed. This viewpoint was further reinforced by the enforcement section of EPA's 1999 Government Performance and Results Act Performance Plan, which focused solely on outputs, despite the agency's stated desire to move toward a greater focus on results.

EPA's third point, that the report did not acknowledge the value of enforcement as a deterrent and, therefore, as one of the principal tools for achieving compliance, reflects a misunderstanding about the report's purpose, which was to provide empirical information about 10 states' experiences with alternative compliance strategies and EPA's response to these efforts. Therefore, GAO did not reiterate its past acknowledgement of the value of enforcement in achieving compliance through deterrence. Nothing in this report, however, contradicts GAO's past statements about the importance of enforcement in deterring violation of environmental laws. Moreover, the draft report did explicitly convey EPA's position that strong enforcement is needed to make compliance assistance work, deter future violations, and ensure a level playing field for members of the regulated community. GAO added language offered by EPA to further expand on the importance the agency attaches to the deterrence value of an effective enforcement program.

In connection with the fourth point, GAO's recommendations are intended to address two major issues identified in its report: (1) the difficulties experienced by states in developing results-oriented measures and (2) the inconsistent manner in which different EPA entities are implementing the agency's policies on the use of enforcement and other compliance tools. The first recommendation essentially calls on EPA to follow through on its stated commitment to develop measures pursuant to its National

Performance Measures Strategy and to do so in a collaborative manner with states attempting to develop their own measurements. The second recommendation reflects GAO's conclusion that in the light of EPA's decentralized structure, resolving the inconsistencies identified will require the attention of the agency's top management, which has overall responsibility for directing and coordinating the activities of the diverse EPA organizational units with enforcement responsibility. GAO believes the other actions included in this recommendation will also help to alleviate the problem cited by many state officials—that they are often given conflicting information or direction by different EPA offices.

EPA's comments and GAO's responses are discussed in greater detail at the end of chapters 2 and 3. The full text of EPA's comments and GAO's point-by-point response are included in appendix IV of this report. GAO also provided relevant sections of the draft report to representatives of the 10 states included in its review to verify statements attributed to them and other information provided. GAO made revisions as appropriate to incorporate their comments.

Contents

Abbreviations

CAA	Clean Air Act
CSI	Common Sense Initiative
CWA	Clean Water Act
ECOS	Environmental Council of the States
ELP	Environmental Leadership Program
EPA	Environmental Protection Agency
ERP	Environmental Results Program
FDEP	Florida Department Of Environmental Protection
GAO	General Accounting Office
GPRA	Government Performance and Results Act
NAPA	National Association for Public Administration
NEPPS	National Environmental Performance Partnership System
NPMS	National Performance Measures Strategy
OECA	Office of Compliance And Enforcement
PPA	Performance Partnership Agreement
PPG	Performance Partnership Grant
RCRA	Resources Conservation and Recovery Act
TNRCC	Texas Natural Resources and Conservation Commission
VOCs	Volatile Organic Chemicals
XL	Project XL

Introduction

Since the Environmental Protection Agency's (EPA) creation in 1970, the agency has been charged with 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 injunctive relief[1] and civil and criminal penalties. EPA also defines by policy the minimal requirements of an acceptable state enforcement program, such as the type and timing of the action required for various violations, and tracks how well states comply. Environmental statutes generally provide authority for both EPA and states to take appropriate enforcement action against violators in states that have been delegated authority for these programs. They also provide that EPA may withdraw approval of a state's program if the state is not adequately administering or enforcing it.

In recent years, a number of states have begun to develop alternative approaches that supplement—and sometimes replace—these traditional enforcement activities with more cooperative approaches designed to achieve compliance by regulated facilities. These states have generally maintained that a wider array of "tools" is needed to help achieve environmental compliance and that they should be held accountable for this desired outcome—environmental compliance—rather than for the number of times they take traditional enforcement actions. This report examines (1) what alternative compliance strategies these states are practicing, (2) whether and how the 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 states accountable for achieving environmental results, rather than focusing solely on enforcement processes.

[1]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.

EPA and States' 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's approval to administer the Clean Air Act's (CAA) Title V permitting program for major air pollution sources,[2] states must have (among other things) "adequate authority" to "assure compliance" with title V permitting requirements and to "enforce permits," including authority to recover civil penalties and provide appropriate criminal penalties.[3] Similarly, the Clean Water Act (CWA) allows EPA to approve a state's water pollution programs under the National Pollutant Discharge Elimination System if the state programs contain, among other things, "adequate authority" to issue permits that "insure compliance" with applicable requirements of the act and "to abate violations," including "civil and criminal penalties and other ways and means of enforcement."[4] The Resource Conservation and Recovery Act (RCRA) provides for EPA's approval of states' hazardous waste programs unless, among other things, the program "does not provide adequate enforcement of compliance" with the applicable requirements of the act.[5]

EPA develops enforcement policies for these programs. For permitting programs, such as those authorized by the CAA, CWA, and RCRA, facilities are either required to report periodically on whether they are in compliance with their permit or are subject to inspections that check for compliance. 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 how serious the violation is and on 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

[2]Title V of the Clean Air Act requires large sources of air pollutants to obtain permits that specify the maximum amount of pollutants that can be released, and monitoring requirements.

[3]CAA § 502(b)(5)(A),(E), 42 U.S.C. § 7661a(b)(5)(A),(E).

[4]CWA §402(b)(2)(A), (7), 33 U.S.C. § 1342(b)(2)(A), (7). The National Pollutant Discharge Elimination System (NPDES) 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.

[5]RCRA § 3006(b)(3). 42 U.S.C § 6926(b)(3). The Resource Conservation and Recovery Act requires facilities that treat, store, or dispose of hazardous materials to obtain a permit covering the procedures for these actions.

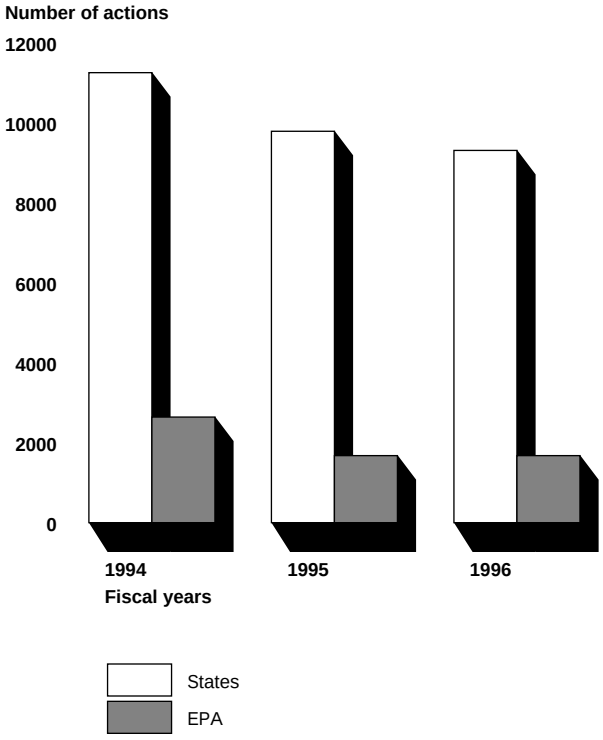
various types of violations. In the most serious cases, EPA or states can assess penalties or refer the case to the U.S. Department of Justice for prosecution. The monetary penalties EPA assesses include two amounts: a gravity-based portion based on the seriousness of the violation, and an economic benefit portion designed to remove any financial advantage the violator obtained over its competitors through noncompliance. EPA may also pursue criminal enforcement if the situation warrants.

Whether EPA or state personnel take the lead in taking enforcement actions depends heavily on whether the state has been delegated the authority to administer the program. In cases in which EPA has retained the program, the staff from the cognizant EPA regional office generally take the lead in taking enforcement actions, often with support and/or guidance from headquarters program offices, the Office of Enforcement and Compliance Assurance (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 their implementation of the federal programs. 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 their enforcement efforts, for example, on 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 CAA, CWA, and RCRA 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.

As states' responsibility for administering environmental programs has grown, so has their role in enforcing program requirements. States are now responsible for most environmental enforcement in the United States. For example, as figure 1.1 illustrates, in 1996 states took 9,306 administrative enforcement actions (85 percent of all such actions taken that year).

Figure 1.1: Number of Administrative Civil Enforcement Actions Taken by States and EPA



EPA and States Are Trying New Ways to Achieve Environmental Compliance

EPA has historically measured the performance of 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 and has been effective in deterring noncompliance and preventing violators from gaining economic advantage by violating environmental laws.

While acknowledging that enforcement has led to increased compliance throughout industries, EPA and state environmental officials have noted that a wider array of "tools" is needed to help achieve environmental compliance and that states should be held accountable for the results their programs achieve, rather than the numbers of regulatory actions they take. As a result, these officials have cited total reliance on such "output measures" as inappropriate indicators of program success and as unduly emphasizing punitive measures when technical assistance, incentives, and other, more cooperative strategies are also needed to increase compliance by the regulated community. They have pointed specifically to the number

of small businesses that must comply with complex environmental requirements, noting that their ability to identify the requirements and determine how to comply is more often a factor than their willingness to do so.

Such a results-oriented focus is also consistent with the Congress's intent in passing the Government Performance and Results Act of 1993. The Results Act requires agencies to clearly define their missions, establish long-term strategic goals (and annual goals linked to them), measure their performance against the goals they have set, and report this information to the Congress. Importantly, rather than focusing on the performance of prescribed tasks and processes, the statute emphasizes the need for agencies to focus on and achieve measurable program results.

EPA, in cooperation with the states, has in place several efforts to increase the results focus of enforcement programs. 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 on the basis of each 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 measurements to gauge progress toward those objectives. For its own enforcement programs, EPA is implementing a National Performance Measures Strategy (NPMS), intended to measure different types of enforcement and compliance assurance activities and their effect on compliance and environmental quality.

Objectives, Scope, and Methodology

As agreed with the Chairman and Ranking Member of the House Committee on Commerce, this report examines (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 states accountable for achieving environmental results, rather than focusing solely on enforcement processes.

To better understand the context for the issues discussed in this report, we reviewed studies by a variety of organizations (including GAO) on state and federal environmental enforcement. We also reviewed the growing literature on the efforts of EPA, as well as many other public and private organizations, to focus programs on the results they are intended to achieve.

To address each of our objectives, we first contacted EPA officials and officials with other organizations, such as the Environmental Council of the States (ECOS)[6] and the Environmental Law Institute, to identify appropriate state environmental programs for detailed study. In selecting states, we were primarily concerned with their level of experience in implementing alternative compliance approaches in any or all of three major environmental programs: the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act.[7] Other key criteria included (1) whether a state may have undertaken innovative efforts to quantify the effectiveness of its alternative compliance strategies and (2) a need to select states in different EPA regions, both to reflect variety in the types of environmental issues they face and to understand how different EPA regional offices deal with their state counterparts.

On the basis of these criteria, we visited five states for detailed study—Florida, Illinois, Massachusetts, Texas, and Washington. In each case, we interviewed program officials in the states' lead environmental agency, as well as enforcement and/or program officials in the EPA regional office with jurisdiction for that state. We also interviewed officials from other organizations with a major stake in environmental enforcement, including states' Offices of the Attorney General, environmental groups active in enforcement issues, and key associations representing the regulated community (e.g., associations representing small businesses).

After these visits, we conducted telephone interviews with, and obtained other information from, environmental officials from an additional five states (again using the criteria discussed above)—Colorado, Delaware, New Jersey, Oregon, and Pennsylvania. These contacts were generally

[6]ECOS is a national nonpartisan, nonprofit association of state and territorial environmental commissioners.

[7]These three programs account for 66 percent of all enforcement actions taken in the United States.

intended to gather additional information and perspectives on the key issues arising from the earlier five state visits.

In connection with the third objective (EPA's response to these alternative programs), in addition to our discussions with state environmental officials and cognizant EPA regional officials, we contacted OECA officials at EPA headquarters to understand the agency's own use of alternative compliance approaches, its oversight of the states implementing alternative compliance approaches, and its initiatives to improve measurement of enforcement performance. We also interviewed (1) EPA headquarters officials with the Offices of Air and Radiation, Water, and Solid Waste and Emergency Response and (2) U.S. Department of Justice officials to better understand how that agency has responded to states' alternative state compliance strategies and how it has coordinated that response with EPA.

We conducted our work from July 1997 through March 1998 in accordance with generally accepted government auditing standards. We provided copies of a draft of this report to EPA for its review and comment. EPA's April 28, 1998, letter and our detailed responses are included in appendix IV of this report. EPA's comments and our responses are also discussed at the end of chapters 2 and 3. We also provided relevant sections of the draft report to representatives of the 10 states included in our review to verify statements attributed to them and other information they provided. We made revisions as appropriate to incorporate their comments.

States' Efforts to Use and Evaluate Alterative Compliance Strategies

To improve environmental compliance among the regulated community, states have begun to experiment with a variety of alternative approaches to supplement traditional enforcement practices. The approaches used by the 10 states we contacted 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 for regulators than under the current system, which generally specifies when and what type of "timely and appropriate" enforcement action is required for a given violation. Compliance assistance programs often included such activities as seminars, technical assistance visits, and distribution of plain-English guides that explain 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) programs encouraging regulated facilities to conduct environmental audits to assess their environmental performance and (2) amnesty programs that, under certain conditions, allow facilities additional time to correct violations and return to compliance before enforcement actions are taken.[1]

GAO found broad agreement among the state and EPA officials contacted that the effectiveness of alternative compliance strategies should be measured and assessed in some manner—particularly if they are to be relied upon as a primary means of achieving compliance. In particular, officials from a number of states related experiences in which a drop in the number of enforcement-related actions taken was criticized heavily by the media, environmental groups, and others because a clear, quantifiable benefit attributable to the alternative strategy could not be demonstrated. Nonetheless, 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 the current practice of tracking enforcement actions, such as the number of inspections conducted or penalties assessed.

States' Experiences in Developing and Using Alternative Strategies

Most of the 10 states contacted were implementing compliance assistance programs intended specifically to alleviate the environmental compliance problems experienced by smaller facilities. All 10 states were also implementing flexible enforcement approaches, including programs to encourage the use of environmental auditing and/or programs that allow

[1]Beginning in 1994, EPA also implemented a number of compliance assistance and flexible enforcement policies at the federal level. Chapter 3 describes these programs.

amnesty to violators under certain conditions. A key feature associated with some of these alternative strategies was the effort to systematically follow up with regulated facilities after the alternative strategy was applied—both to encourage them to follow through with the agreed-upon corrective measures and to gauge the effectiveness of the program. While state officials generally agree on the value of such follow-up measures, the significant resources needed to carry them out may be a problem.

Compliance Assistance Approaches Focus on Smaller Facilities

During the last several years, some state environmental agencies supplemented their traditional regulatory approach to enforcement with alternative programs that emphasize providing assistance and gaining voluntary compliance, particularly for smaller facilities in these states. As OECA officials explained to us, enforcement of major environmental laws has concentrated on larger facilities in that they are typically required to have operating permits and report emissions and discharge information to EPA and states. Since these laws have been in place for several years, the larger facilities have adapted to these requirements, and mechanisms have been in place to monitor their compliance.

Accordingly, state officials have told us that they must now shift more attention to smaller facilities to achieve additional environmental improvements. They note that while an individual small facility may not emit enough waste to even require an operating permit, the large numbers of these facilities, taken together, result in a significant share of remaining pollution problems.

Nonetheless, state and EPA officials consistently told us that conventional enforcement approaches were often ineffective with these smaller facilities. One reason frequently cited was the view that these facilities were often willing but unable to comply with numerous, often complex regulations. Echoing a sentiment expressed by many of these officials, the Deputy Director of the Office of Compliance and Enforcement at the Texas Natural Resource Conservation Commission said that compliance assistance programs were created because the agency recognized that small businesses do not generally have the technical expertise or resources to understand what requirements apply to them and what they need to do to comply. Some states also found that these cooperative programs often offered a more efficient way to deal with the emissions and discharges of thousands of individual pollution sources, noting that the conventional permitting, compliance monitoring, and enforcement

approach was better suited to the much more finite number of major facilities in their jurisdictions.

Most of the compliance assistance efforts identified by state officials were targeted to a specific industry sector and typically included outreach efforts, such as educational workshops, proactive site visits to identify potential compliance problems, and distribution of plain-English guides that explain regulatory requirements. In some cases, states worked with business or industry associations to develop programs and identify facilities. The following illustrates some of these compliance assistance efforts.[2]

Washington's "Snapshots" Program

Noting that the complexity of environmental regulations was posing an increasingly difficult compliance challenge for small businesses, senior officials from the Washington Department of Ecology said their agency had begun conducting assistance campaigns for specific industry sectors several years ago. Of particular note, the agency in 1994 created the "Snapshots" Program, which focused on technical assistance for lithographic printers, screen printers, and photo processors across the state. The goal of the campaign was to provide technical assistance to enable these industries to reduce their waste generation, improve their waste management, and achieve compliance with hazardous waste, air, and water quality regulations through voluntary actions.

Department of Ecology and local county staff have since worked together to visit more than 1,300 shops identified with the help of a business association. The visits provided short, focused, site-specific recommendations to reduce waste generation, improve waste management, and help the shops achieve compliance with environmental regulations. Waste management and other environmental practices were discussed with the facility's representative during the visit. State or county staff then left a written list of recommendations and an informational booklet with each facility. The facilities were expected to address the recommendations identified during the site assessments.

Massachusetts' Environmental Results Program

The Massachusetts Department of Environmental Protection created its Environmental Results Program to develop a new and superior regulatory compliance system for the state's small and medium-sized facilities. While 25 years of using permits has achieved significant environmental improvements in Massachusetts, the approach has in some ways been inefficient and ineffective.

[2]Other states' compliance assistance efforts are described in appendix I.

For example, the Massachusetts Department of Environmental Protection (MDEP) has spent significant resources issuing air permits to about 4,400 facilities, of which two-thirds are small and medium-sized firms that together generate less than 5 percent of the state's total air pollution. Of the thousands of facilities in the state required by law to obtain sewer discharge permits, only about 500 have done so to date. Overall, the agency estimates that nearly two-thirds of the state's small and medium-sized facilities are out of compliance with at least some existing environmental requirements.

Consequently, in 1996 the agency established the Environmental Results Program to replace the existing permitting process with broad performance standards with which facilities must certify their compliance. The intent of the program, according to MDEP officials, was to better protect the environment and safeguard human health while making it easier, less time-consuming, and less costly for facilities to comply. Regulated facilities agree to be held accountable for meeting certain environmental performance standards and for submitting annual reports or "certifications" on their compliance with these standards.

For its part, MDEP strives to (1) set strict but achievable environmental standards tailored to each industrial and commercial sector; (2) perform more inspections and audits; (3) pursue enforcement against violators; (4) improve the quality of, and access to, compliance data so that the information will be more useful to the agency, the facilities, and the public; and (5) provide easy-to-understand, sector-specific compliance materials and educational programs, simplified reporting and recordkeeping requirements, and incentives for pollution prevention.

States' Growing Use of Flexible Enforcement

Along with their efforts to create compliance assistance programs, states are attempting to introduce more flexibility into their enforcement programs, most notably through

- programs that encourage environmental auditing through promises of confidentiality of the information generated during audits and/or penalty reductions for violations found and
- amnesty programs, under which penalties for violators may be waived under certain conditions.

States' Efforts to Encourage Environmental Auditing

During a typical environmental audit, a facility conducts an examination to determine whether it is complying with environmental laws and

regulations. Programs generally provide, under specified conditions, for some type of leniency or other consideration if an environmental audit reveals compliance problems. Environmental auditing is viewed by most of the state environmental agency officials we interviewed as a useful adjunct to traditional enforcement practices, given states' limited resources, because it may allow facilities to identify and correct environmental problems sooner than inspectors could identify them.

Our 1995 report on environmental auditing cited some reasons why a facility would be interested in performing environmental audits.[3] Businesses are increasingly recognizing that compliance is too important to be left to chance. For example, business managers view environmental auditing (1) as a powerful tool for monitoring and proactively managing compliance as well as overall environmental performance and (2) as a means of controlling the risks inherent in failing to meet legal requirements.

Nine of the 10 states contacted have either passed laws or developed nonbinding policies to encourage facilities to use environmental auditing. As table 2.1 shows, Colorado, Illinois, Oregon, and Texas have authorized audit privilege protection by statute. Under these laws, with certain exceptions, environmental audit reports and other information generated by the audit is not admissible in evidence or subject to disclosure in certain legal proceedings.[4] In order to invoke the privilege, regulated entities generally need not report violations to agency officials.

[3]Environmental Auditing: A Useful Tool That Can Improve Environmental Performance and Reduce Costs (GAO/RCED-95-37, Apr. 3, 1995).

[4]Appendix III shows which states have passed legislation encouraging environmental auditing through audit privilege and/or immunity provisions as of March, 1998. As discussed in chapter 3, EPA has supported states' policies encouraging environmental auditing but has expressed legal and policy reservations about many of these state laws because of its view that they may jeopardize these states' authority to enforce federal law and regulations. Specifically, the agency has noted that some of the laws may place restrictions on states' abilities to engage in enforcement activities required by federal law and regulations, including (1) obtaining penalties and injunctive relief for violations of federal program requirements or (2) obtaining information that may be needed to determine compliance status.

Table 2.1: States' Environmental Audit Provisions

	Audit privilege/immunity laws		
States	**Privilege[a] only**	**Privilege and immunity[b]**	**Other environmental audit policies[c]**
Massachusetts			X[d]
New Jersey			
Delaware			X
Pennsylvania			X
Florida			X
Illinois	X		
Texas		X	
Colorado		X	
Oregon	X		
Washington			X
Total	**2**	**2**	**5**

[a]A privilege provision generally prevents information in the audit report from being admitted as evidence or disclosed in certain legal proceedings, including enforcement actions.

[b]An immunity provision generally prohibits the assessment of certain penalties against facilities that identify and correct a violation as a result of conducting an audit.

[c]These policies generally provide that the state environmental agency will not routinely request audit reports. They also generally authorize, but do not require, the agency to reduce penalties for violations discovered and corrected as a result of an audit.

[d]Massachusetts currently has an interim audit policy. It has not yet been finalized.

Statutes in Colorado and Texas offer immunity for certain violations found during audits. Under Texas' law, 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 general, three conditions must be met under most states' environmental audit laws or policies in order to qualify for reduced penalties or immunity: (1) the regulated entity must conduct an audit that uncovers environmental violations; (2) the entity must promptly and voluntarily report the violations to authorities; and (3) the entity must expeditiously correct the violation.

As an alternative to authorizing such programs through legislation, a number of states encourage environmental auditing through audit policies that are similar to EPA's own environmental auditing policy. While their specific provisions vary from one state to another, these policies generally provide that the state will not routinely request audit reports to trigger enforcement actions—but it is not legally precluded from doing so.

Similarly, the environmental agency is authorized to provide penalty relief, but not immunity, for violations found during the course of audits but is not required by law to do so. Delaware, Florida, Pennsylvania, and Massachusetts have this type of environmental audit policy.

State Amnesty Programs

Seven of the 10 case-study states discussed programs they have created that grant amnesty from any penalties to certain facilities when violations are found during the state's initial assessment. State officials told us that these programs are particularly useful in situations in which small violators demonstrate a willingness to come into compliance with environmental regulations and simply cannot afford to pay a stiff penalty. Typically, such violators are given specified amounts of time to correct their problems and enter into compliance before enforcement actions are taken. State officials sometimes work directly with the facilities to correct the problem and develop strategies to avoid potentially more serious problems in the future. State environmental officials told us that these programs, when used under appropriate circumstances, have allowed them to bring violators into compliance more quickly and have avoided long, expensive, and sometime ineffectual enforcement actions. Examples of state amnesty programs include the following:

- The Illinois Environmental Protection Agency's Clean Break Program, initially developed in cooperation with a local Chamber of Commerce, began in April 1995 and specifically targets small businesses. By participating in the program, the facility allows the state to conduct an inspection of the facility and agrees to resolve the noncompliance discovered during the inspection to the state's satisfaction. By complying with the program requirements, the facility is immune from enforcement actions relating to the noncompliance.
- The Oregon Department of Environmental Quality identified small businesses that were potential emitters of volatile organic compounds (VOC). Facilities without appropriate permits were offered limited amnesty from civil penalties if they voluntarily agreed to conduct a pollution prevention assessment to determine if VOC emissions could be reduced and to obtain a state air contaminant discharge permit if necessary.

The introduction of state amnesty programs has not always been without problems or controversy. Some state officials told us that a number of practical implementation issues and other concerns were raised in their states. New Jersey's recently enacted Quick Compliance Law, for example, states that a facility cited for a "minor" violation will not receive a penalty

if the violation is corrected within 30 to 90 days. However, an Administrator with New Jersey's Department of Environmental Protection said that controversy has arisen about the definition of a "minor" violation, and the agency is still attempting to draft regulations defining this term. Concerns have been raised too that amnesty programs allow the state agency to be "too soft on polluters." For example, the Florida Department of Environmental Protection (FDEP) had its inspectors apply a "root cause analysis" to determine why incidents of noncompliance occurred. For example, the facility may have deliberately violated the regulations. On the other hand, the violation may have been accidental or the facility may have been legitimately ignorant of the environmental requirements. Rather than taking enforcement actions against a facility, in some cases, the staff from FDEP worked with the facility to determine the cause of the violation in hopes of avoiding similar violations in the future. The local media began writing articles that suggested the agency was not taking strong enough action against the violators.[5]

Follow-Up Strategies Help Ensure Facilities' Participation

Many state officials pointed out to us that if the participants in their alternative compliance programs know that the state may follow up to ascertain their future compliance status, they have a greater incentive to participate in the program and implement any necessary actions. Accordingly, these officials often spoke of the desirability of incorporating follow-up strategies into their compliance assistance and flexible enforcement programs.

Most of the compliance assistance and amnesty programs we examined did in fact include some type of follow-up strategy. For example, in Washington's Snapshots Program, Department of Ecology inspectors identify areas that the facility needs to address and subsequently apply a follow-up strategy consisting of three alternative courses of action, depending upon the violations found during the inspection. The facilities that did not have any major concerns received a letter expressing appreciation for their participation in the program. The facilities with fairly minor violations received a letter that similarly thanked them for participating, but which also (1) reminded them of outstanding issues at their facilities that needed to be corrected and (2) listed contacts for further technical assistance if needed. More intense follow-up was performed at those facilities with serious violations. The facilities first received a Certificate of Completion asking them if the violations had been corrected. Follow-up visits were conducted at those sites that did not

[5]Chapter 3 discusses EPA's reaction to the growing number of state amnesty programs.

respond to the certificate and those that indicated a major violation had not been corrected. Those facilities with continuing violations were asked to prepare a plan to address them. Noncompliers were referred to Department of Ecology field offices for potential inspections in the future.

Under Delaware's "Gray Hat" Inspection Program, inspectors systematically follow up to ensure that violators that were provided amnesty correct identified problems in a timely fashion. If inspectors discover a violation during an inspection, they have the discretion to not fine the facility, but instead to note the violation and give the facility a specified amount of time to correct it.[14] If the violation has not been corrected before the state inspector's follow-up visit, the inspector is supposed to take an enforcement action against the facility.

Massachusetts officials cited significant benefits in following up with participants in their Environmental Results Program, but they also identified an inherent problem with the practice—the considerable resources often needed to conduct follow-up. MDEP's comparison of "before" and "after" inspections of participating facilities 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.

States Are Beginning to Focus on Performance Measurement for Enforcement Programs

A few of the states we contacted have undertaken efforts to measure the effects of their alternative compliance strategies, hoping to gauge whether these programs were achieving their objectives. Few states, however, were able to determine whether their programs actually resulted in improved compliance or a cleaner environment. State officials cited a variety of problems impeding their measurement efforts, such as the absence of the historical data necessary for such a comparison, the difficulty in establishing causal links between a program activity and a desired outcome, and the significant resources needed to gather and analyze key data. They noted, however, that an increased focus on performance measurement for states participating in NEPPS may help to overcome some of these barriers.

[14]This policy applies only to inspections under the Resources Conservation and Recovery Act. It does not apply in the case of criminal violation or violations that immediately threaten human health and the environment.

Reasons for Increased Interest in Results-Oriented Performance Measurement

State officials we contacted agreed on the importance of measuring the results of their compliance efforts and offered a number of reasons for their increased efforts to measure the effects of their alternative compliance strategies. Enforcement officials in some states said that accountability to the public and the media was an especially important driving force behind their measurement initiatives. In Florida, for example, both the number of penalties assessed and dollar value of penalties collected under its federally delegated programs decreased from 1994 to 1996. According to Florida officials, this decrease resulted, in part, from a greater emphasis on the use of assistance to achieve compliance. Newspapers in the state subsequently published articles questioning whether the Department was letting violators continue to pollute unpunished. Florida officials told us they expect that performance measures focused on the results of its enforcement and compliance assistance efforts will demonstrate whether these concerns are accurate, while also informing the state where its resources are needed most. The Texas Natural Resources Conservation Commission faced similar criticisms of its enforcement record and hopes that its use of the core performance measures and the reports required by performance-based budgeting will respond to these criticisms. A Pennsylvania Department of Environmental Protection official said that EPA and the media had criticized the department over a strong downward trend in the amount of penalties collected from violators. He anticipated that improved performance measures would help the state to quantify the positive effects achieved by its new emphasis on compliance assistance activities.

In some cases, state officials pointed to a broader state government focus on results as a contributing factor that encouraged results-oriented measurement in the environmental enforcement program. Texas officials, for example, said that the state legislature's requirement that state agencies use performance-based budgeting in developing their annual budget requests led the Texas Natural Resources and Conservation Commission to develop performance measures for its programs. FDEP officials explained that their Secretary asked the department to begin to measure the results of its programs, including enforcement, after the department was formed from the merger of two other state agencies, hoping to target the new agency's resources to the programs that needed them most.

State officials also cited their increased use of performance measurement as a response to encouragement from EPA. Specifically, the agency has periodically questioned whether states are able to achieve the same or

better results with alternative strategies in comparison with traditional enforcement techniques. One notable example involves the Washington State Department of Agriculture. Officials in EPA's Seattle regional office recently cited a sharp reduction in the number of enforcement actions as evidence that the state's pesticide enforcement program had weakened.[7] Washington responded that its technical assistance efforts have increased compliance and therefore have reduced the need for the state to use enforcement. However, EPA remained unconvinced in the absence of hard data supporting the claim, noting in its February 1998 report on the matter that

"until EPA is assured through comprehensive compliance data that technical assistance results in compliance comparable to traditional enforcement, EPA will require that enforcement efforts be maintained."

EPA's Seattle office committed to working with Washington to "develop performance measures beyond traditional enforcement accounting which better show the rate of compliance."

EPA has also expressed similar concerns about declining enforcement numbers on the basis of nationwide trends. Specifically, the agency has noted that states as a whole reported taking 17 percent fewer formal enforcement actions in 1996 than in 1994.[8]

Finally, other key EPA initiatives, most notably the National Environmental Performance Partnership System, call for the participating states to focus on meaningful performance measurement. In negotiating Performance Partnership Agreements, states and EPA include performance measures for the states' objectives, including performance measures for the states' enforcement efforts.

Tiered Approach to Results-Oriented Performance Measurement

States and EPA recognized that measuring the results of these new programs meant moving beyond counting the number of actions taken to evaluating their actual effect on the regulated community and the environment. In response, they are starting to use new forms of performance measurement. EPA and the Environmental Council of the States developed a tiered approach, illustrated in table 2.2, to better account for program results. EPA will use this approach in judging the

[7]Specifically, EPA's Seattle office noted that the number of the Washington State Department of Agriculture's pesticides-related enforcement actions dropped from 168 actions in fiscal year 1996 to 59 actions in fiscal year 1997.

[8]EPA's concerns about recent trends in states' enforcement actions are discussed in detail in chapter 3.

performance of its own enforcement programs, and states negotiating a Performance Partnership Agreement with EPA are expected to select appropriate performance measures from the three tiers.

Table 2.2: Categories of Environmental Performance Measurement

Measure[a]	Characteristic	Examples	Purpose
Output	Numbers of actions	Number of penalty dollars collected; number of violations discovered	Demonstrates level of activity; demonstrates how resources are used
Outcome	Results associated with a particular policy	Percent of facilities in environmental compliance	Demonstrates results of specific initiatives or policies
Environmental indicator	Indicators associated with overall program objectives	Trend in number of bodies of water meeting clean water standards	Demonstrates whether overall, long-term agency objectives are being achieved

[a]In its efforts to develop overall performance measures for the Government Performance and Results Act (GPRA), EPA uses slightly different terms: "outputs," "intermediate outcomes," and "long-term outcomes." The Office of Management and Budget in its guide to implementing GPRA distinguishes between "output goals," and "outcome goals" and calls on federal agencies to measure progress toward both. Other experts in the field of government performance measurement labeled the three tiers "outputs," "policy or behavioral outcomes," and "program outcomes." See for example, Malcolm Sparrow,, "Regulatory Agencies, Searching for Performance Measures That Count," and John M. Greiner, "Positioning Performance Measurement for the Twenty-first Century," Organization Performance and Measurement in the Public Sector, Quorum Books, 1996.

Using a combination of these measures, environmental agencies can report information about the effectiveness of their programs. They have traditionally focused on measuring outputs, such as the number of inspections conducted and enforcement actions taken. These actions are easiest to count and they provide a useful measure of the level of agency activity and resources devoted to enforcement and compliance programs. GAO's 1997 report on performance measurement also found that outputs are sometimes appropriate performance measures, stating that "output measures such as the number of inspections conducted can be used when studies exist to demonstrate their relationship to the results that agencies are attempting to accomplish."[9] Measuring outcomes, such as the degree of regulatory compliance, is more difficult but provides information on whether the goals of the regulatory program are being achieved. Environmental indicators reflect the ultimate goals of the program—the

[9]Managing for Results: Regulatory Agencies Identified Significant Barriers to Focusing on Results (GAO/GGD-97-83, June 24, 1997).

extent to which the overall mission of a cleaner environment is being achieved.

Measuring Results Has Proven to Be Substantially More Difficult Than Measuring Outputs

Despite the acknowledged benefits of measuring program results and the availability of new approaches, several states we contacted still relied primarily on outputs when evaluating their traditional and alternative enforcement programs. Outputs, by their nature, are inherently easier to measure, report, and understand than outcomes and environmental results. In fact, one expert in the field of performance measurement notes that EPA and others may be

> "tempted to lurch back to the enforcement numbers game; partly because it seems to be the only game their audience understands, and partly because counting enforcement actions is so much simpler than trying to deal with the complexities of measuring outcomes or impacts."[10]

EPA does, in fact, already require delegated states to periodically report such output measures as the number of inspections conducted, the number of significant violations detected, and how violations are handled. States generally have the data systems in place to record and report these kinds of output measures.

Officials in each of the states visited readily acknowledged the relative ease of collecting this type of information. However, they also emphasized the limited usefulness of these data for both traditional and alternative enforcement programs. For example, one OECA official pointed out that a decrease in the number of reported violations detected could be interpreted in two very different ways: It could indicate that fewer facilities are violating environmental laws, or simply that the state is performing fewer inspections. Similarly, some state officials pointed out that counting the number of businesses contacted through a compliance assistance program does not demonstrate whether compliance is improving or deteriorating, nor does it allow states to report information about their alternative compliance programs.

A few states we contacted had begun to address these issues and were able to cite compliance rates in certain facilities, or trends in environmental indicators. For example, Florida officials reported in October 1997 that 84 percent of petroleum and hazardous substance

[10]Malcolm Sparrow, "Regulatory Agencies, Searching for Performance Measures That Count," June 9, 1997.

storage tank facilities selected through random inspections were in compliance with regulations. Through subsequent quarterly reports, FDEP will be able to measure trends in compliance rates. Similarly, after following up with violators participating in Washington's Snapshots Program, state officials were able to determine that 80 percent of participants had corrected the waste management problems identified in the initial visit.

Nevertheless, measuring outcomes and environmental impacts associated with new compliance strategies has proven to be difficult. Even these relatively advanced efforts were unable to measure the precise impacts a given regulatory strategy may have had on a desired result. As the following section describes, part of the problem is explained by a number of barriers impeding states' measurement efforts. Part of the problem, however, reflects the inherent limitations in performing this type of analysis. These limitations suggest that while better performance measurement is necessary, expectations for performance measurement should recognize that some challenges will be difficult to overcome.

Barriers to Measuring the Results of Enforcement Programs

While some progress has been made in results-oriented performance measurement and some creative and fruitful experiments have been pursued, state officials we contacted consistently cited several key barriers that will need to be overcome before states can successfully focus measurement on desired results. These include (1) an absence of baseline performance data for both traditional and alternative strategies, (2) the inaccessibility of key data to evaluate programs' success, (3) the inherent difficulty in quantifying certain results, (4) the difficulty in linking enforcement strategies to environmental results, and (5) the considerable resources needed for high-quality performance measurement.

Lack of Baseline Information

Officials from each of the five states visited agreed with the statement that "baseline compliance data are not available or not comparable with new data" and that this lack poses a key barrier to measuring the performance of their alternative compliance strategies. Because states and EPA have compliance information typically only for the larger, more significant facilities, they have not measured the extent to which all regulated facilities have complied with environmental laws. Both the identified universe of regulated facilities and the potential universe (facilities that should obtain permits or authorization, but have not) are much larger than states have resources to routinely inspect and gather compliance information from. Data are especially scarce for small businesses that

historically received few inspections. Without such data, state programs that are just now attempting to measure results will have no past data with which to compare them. For example, Florida officials said that their environmental reports will generally have a baseline of 1997 or 1998, since past information is unavailable or unreliable.

The absence of adequate baseline data for comparison is, in fact, a common problem among many organizations engaged in performance measurement, including federal agencies. Indeed, our own work on performance measurement at the federal level indicates that federal agencies frequently need to build entirely new data systems and ways of collecting data because the old systems are of no use in analyzing programs' performances.[11] Similarly, one expert noted that regulatory agencies such as EPA have typically "not yet devised the measurement, recording, or reporting systems necessary to dethrone the enforcement statistics in the minds of their audience. Consequently, these agencies find themselves held hostage by their own reporting traditions."[12]

Necessary Data Are Inaccessible

As some of the ongoing state experiments discussed above illustrate, generating relevant and accurate data is a challenge under the best of circumstances. We found that certain characteristics of some of the states' alternative programs may further complicate performance measurement by inhibiting state officials from obtaining the data needed to evaluate the programs' success. For example, audit privilege laws, such as those in Texas and Colorado, prevent the state from reviewing the information in environmental audits. As a consequence, these states can only confirm that a facility conducted an audit, or that it discovered or corrected a violation, if the facility chooses to reveal that information. These states have summary information about the numbers of facilities that revealed violations in order to obtain immunity from enforcement, the nature of these violations, and how they were corrected. However, they cannot, for example, obtain any broader information about violations that facilities chose not to disclose, or the effectiveness of the privilege law in improving

[11]Executive Guide: Effectively Implementing the Government Performance and Results Act (GAO/GGD-96-118, June 1, 1996).

[12]Malcolm Sparrow, "Regulatory Agencies, Searching for Performance Measures That Count," June 9, 1997.

compliance.[13] The Illinois audit privilege law does not provide immunity to facilities that disclose and correct violations. Thus, a facility may have little incentive to report that it has completed an audit. The facility, however, is required to report any noncompliance to the state in accordance with the applicable statutory and regulatory requirements.

In addition, results-oriented performance measurement often requires an up-front commitment to follow up with participants to determine the effect on compliance. States that did not include such a follow-up component have generally had a difficult time measuring outcomes. For example, officials associated with New Jersey's Environmental Management Assistance Program were able to determine the number of participants receiving assistance from the state but not whether this program has improved compliance with environmental regulations. Similarly, officials associated with Illinois' Clean Break Program said that they often answered technical questions about correcting violations at the seminars they conducted for small businesses but had no way of documenting any resulting improvement in environmental management practices.

Difficulty of Quantifying Outcomes

Officials in each of the five states we visited agreed that "program results are difficult to quantify"; some added that quantifying compliance rates and other outcomes of enforcement programs often sounds easier to do than it is. Officials from the five states said they wrestled with the issue of how to define a compliance rate and then with how to calculate it. A Texas Natural Resources Conservation Commission official expressed concern that each state will end up quantifying results differently.

One expert also cites the complexity of measuring compliance rates, noting that to be statistically valid, they must result from a random, representative, or comprehensive sample of the relevant industry or population. He further adds that

> "Few agencies can produce such compliance measures, because most available compliance figures result from inspection programs which are focused or targeted on known or suspected risks, and which therefore produce biased estimates of underlying compliance

[13]A planned study may shed some light on the overall consequences of states' audit laws and policies. EPA awarded the National Conference of State Legislatures a grant to evaluate the effects of the voluntary environmental audit privilege and immunity legislation enacted in 19 states and of environmental audit policies adopted in 3 states. While the evaluation will not specifically address the outcomes associated with these audits, it will attempt to shed light on whether more and better audits are resulting from these laws and policies and any differences in the number and quality of audits in states with laws as compared with states with policies. The Conference will also identify six states that have never had audit laws to use as a control group for comparison purposes.

rates. Dealing with this problem necessitates the diversion of resources from focused inspection programs into random sampling, for the sake of measurement—which has always been (and remains) notoriously difficult."[14]

Nonetheless, FDEP undertook such an effort in 1996, noting that calculating accurate compliance rates was an important part of their effort to focus programs on achieving desired outcomes. FDEP officials said they had to change their data systems and distinguish between the different types of regulatory inspections the agency conducts to produce the representative sample of inspections necessary to calculate a compliance rate for different industry sectors. They noted that the agency had typically conducted some inspections because officials suspect a violation exists—and that including these inspections of known "bad actors" in calculating a compliance rate could artificially inflate the percentage of noncompliers detected.[15] Consequently, FDEP now includes only results from facilities that were randomly selected and excludes from its compliance rate calculations those "targeted" at suspected violators. According to FDEP officials, this practice required training inspectors to place different types of information in the department's data system, distinguish between types of inspections, and use a common definition of significant compliance.

FDEP released its first report on compliance rates and other outcomes in October 1997 and plans to build on this information in future quarterly reports and use the information as a basis for negotiating its Performance Partnership Agreement with EPA's Atlanta office. A senior OECA official said that EPA too has experienced difficulty in attempting to measure compliance rates, citing in particular the significant resources and planning necessary to develop them successfully.

Linking Enforcement Strategies to Environmental Results

Ideally, agency officials would be able to link their alternative compliance programs' direction to changes in compliance rates and environmental conditions. But as we noted in a 1997 report on the complexities associated with performance measurement, "Separating the impact of [a] program from the impact of other factors external to the program was cited by government agency officials as the most difficult challenge in

[14]Malcolm Sparrow, "Regulatory Agencies, Searching for Performance Measures That Count," June 9, 1997.

[15]In certain programs, like the National Pollutant Discharge Elimination System, for example, states receive compliance information regularly on all permitted facilities. In these programs, a compliance rate is easier to calculate because the state can include the entire universe of facilities, rather than taking a sample.

analyzing and reporting government performance."[16] These sentiments were also expressed at an EPA-sponsored meeting in July 1997 on compliance assistance, in which state and EPA officials agreed that distinguishing between the effects that their programs and other enforcement programs had on environmental indicators was difficult and counterproductive.

While the states we visited had efforts under way to improve the measurement of environmental indicators (i.e., quality of air and water), only Massachusetts attempted to determine whether changes in these environmental indicators could be linked to specific alternative compliance strategies. For approximately 2 years, Massachusetts has been measuring and evaluating the environmental results of the state's Environmental Results Program by using "environmental business practice indicators," compliance inspection findings, and data reported on self-certification forms. Environmental business practice indicators are essentially industry-specific performance practices that provide a snapshot of a facility's environmental performance. These practices, if followed, reflect a facility's level of environmental performance, including both traditional regulatory standards and "beyond compliance" measures. Examples of such indicators are the proper storage of hazardous waste and the education of consumers about "environmentally friendly" products.

Each of the five states we visited agreed with the statement that "it is difficult to link program activities to results." Even in the case of Florida's significant commitment to measuring compliance rates and environmental indicators, noted above, regulators made a conscious decision not to link their enforcement programs with trends in environmental indicators or outcomes like compliance rates. They explained that the causes of these trends are subject to other influences outside the Department's control, such as the state of the economy, the weather, and other departmental actions besides enforcement. FDEP's consultant agreed, noting that

"If and when the scallop population in Tampa Bay is restored to healthy levels, Florida's Department of Environmental Protection . . . would be hard pressed to prove beyond doubt that their interventions actually

[16]Managing for Results: Analytic Challenges in Measuring Performance (GAO/HEHS/GGD-97-138, May 30, 1997).

produced this result, no matter how compelling their scientific analyses and explanations."[17]

He added that regulatory agencies should not feel obligated to prove causality. Rather, "They should be content to demonstrate publicly their ability to focus on specific risks, to design and implement creative solutions, and to determine when the risk has abated sufficiently to permit them to move on to other priorities."

Resource Constraints

A final barrier, which essentially flows from the others identified above, relates to the significant resources and expertise required to gather and analyze the data needed to do quality performance measurement. FDEP, for example, hired a consultant to assist in the effort and dedicated several staff to its efforts to develop and implement its new measurement system. Officials from other states, agreed that it is difficult to make such a resource commitment while still meeting other program requirements.

Even monitoring the results of an individual program, such as Massachusetts' Environmental Results Program, can also require considerable resources. While only 18 companies participated in the pilot, the Deputy Commissioner said that the agency had to invest a great deal of time and energy to work with the facilities and measure the ultimate results. He added that these efforts would be difficult to duplicate as additional facilities participate in the program.

Conclusions

States' recent efforts to focus their enforcement programs on environmental compliance represent a significant departure from past enforcement strategies. Past efforts focused on the largest sources of pollution and relied on the government to detect violations. States we reviewed now say that, while it is still important to pay attention to large facilities, achieving additional environmental improvement requires bringing the much greater number of smaller facilities into compliance. To do so effectively, they say, requires solutions that supplement the deterrent effect of enforcement with opportunities for voluntary compliance. Toward that end, states we reviewed had implemented a number of promising programs to reach facilities seldom reached through traditional enforcement. They pointed to several factors that they expect to contribute to their success, including working with local business

[17]Malcolm Sparrow, "Regulatory Agencies, Searching for Performance Measures That Count," June 9, 1997.

associations in developing the programs and using follow-up strategies to encourage compliance and measure the results of the programs.

These alternative strategies have sometimes raised concerns among affected communities, the media, some regulators, and other interested parties, particularly to the extent that they offer amnesty or other forms of flexible enforcement to violators. States have responded with efforts to measure their new strategies' effectiveness but are facing significant challenges in producing the kind of performance measurement that can convincingly demonstrate the efficacy of their approaches.

Some of these challenges, such as the difficulty in developing causal links between program activities and environmental indicators, will be difficult to address. States have found other barriers challenging but solvable, if sufficient effort and resources are brought to bear on them. Especially promising are commitments to include performance measures in Performance Partnership Agreements between states and EPA. As we discuss in the following chapter, there may be a role for EPA in helping states deal with these problems—a role made all the more appropriate by EPA's belief that states should demonstrate the efficacy of their alternative strategies (particularly strategies employing flexible enforcement) if they are to rely upon them to achieve compliance.

Agency Comments

EPA's letter responding to a draft of this report included several comments on material in this chapter. (App. IV contains the text of EPA's letter and our response.) The letter states that "several critical assumptions about the state of enforcement and compliance assurance seem to be accepted without challenge," in particular whether large facilities have improved compliance as a result of past enforcement actions and whether alternative approaches are more appropriate for small facilities. The letter cites several passages in the chapter of particular concern. We attributed these statements to state officials who offered them to explain why they had adopted alternative approaches as a supplement to enforcement. We obtained similar opinions and information in our interviews with EPA staff. In addition, some of the passages cited in the EPA letter were paraphrased in a manner that made them appear more sweeping than they were as presented in our draft report. For example, the letter quoted the report as stating "conventional enforcement approaches are ineffective with small facilities." The actual passage stated that "State officials told us that conventional enforcement approaches were often ineffective with these smaller facilities."

The letter asserts that the draft report did not reflect the deterrence value of enforcement in promoting compliance. It states, "the report provides no discussion of the fundamental concept that enforcement actions protect the environment and public health by deterring violations of pollution standards, and by requiring those who do violate the law to return to compliance." The report, however, was intended to describe alternative approaches to enforcement in 10 states, and therefore we did not reiterate our past acknowledgement of the value of enforcement in achieving compliance through deterrence. Nevertheless, the report did explicitly convey EPA's position on this issue. It cited, for example, the position of EPA's Assistant Administrator for Enforcement and Compliance Assurance that "enforcement is the mechanism that makes compliance assistance work, deters future violations and ensures a level playing field for those who comply." The draft executive summary noted that "the emphasis on inspections and enforcement action is necessary to deter noncompliance and prevent violators from gaining economic advantage by violating environmental laws." We added language offered by EPA to further expand on the importance the agency attaches to the deterrence value of an effective enforcement program.

The letter states that the report contained inaccurate information about some state audit privilege and immunity laws. The report provides an overview of this issue by setting forth the general characteristics of these laws. Therefore, in some cases we did not describe the details of how each state's law varied from this overview. Nevertheless, as EPA suggested, we did add information on the scope of privilege accorded information in an audit and the requirements for audits and distinguished between those laws that required that a violation be revealed in order for immunity or privilege to apply and those laws without such a requirement.

Finally, in connection with states' amnesty programs, the letter suggests that the report should distinguish between policies that provide state officials with enforcement discretion versus laws that remove the ability of these officials to take enforcement action under certain circumstances. We provide examples of both types of programs in chapter 2. New Jersey's Quick Compliance Law is an example of the latter, while Illinois' Clean Break Program is the former. In addition, chapter 3 describes EPA's legal concerns about amnesty laws, citing EPA's particular concerns about Washington's amnesty law.

EPA Needs a Clearer and More Consistent Response to Alternative State Compliance Strategies

Since 1994, EPA has led a number of efforts to encourage the use of alternative compliance strategies, including establishing compliance assistance centers for several industries, working with states and other interested parties to develop results-oriented measures, and 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 compliance assistance initiatives are intended to supplement—not replace—a strong enforcement program. The agency's legal and policy concerns about a possible weakening of enforcement has led it to react critically to a number of state initiatives, such as several states' audit privilege/immunity laws. EPA is also concerned about "amnesty" programs, which, as discussed in the previous chapter, generally allow facilities additional time to correct violations and return to compliance before enforcement actions are taken. The agency also asked its regions to reverse what it believed to be an unacceptable drop in the numbers of enforcement actions by states in their jurisdiction.

To some extent, the differences that have arisen between EPA and state regulatory authorities over these state initiatives, particularly those providing for flexible enforcement, reflect different legal and policy judgments about what constitutes adequate enforcement under federal environmental law and about the appropriate role of federal and state government in deciding how environmental compliance can best be ensured. Yet while these issues will continue to be the subject of debate in coming years, broad agreement already exists among concerned parties on the desirability of moving toward a system that (1) focuses more on achieving desired outcomes through a combination of compliance assistance activities and conventional enforcement and (2) systematically measures progress on how well these outcomes are being achieved. Toward this end, our work suggests that EPA should be doing more to (1) facilitate states' efforts to develop effective program measures and (2) provide greater consistency in what has become a fragmented and inconsistent message, as conveyed by different EPA offices in a decentralized organization, on states' efforts to employ a wider array of tools in achieving environmental compliance.

EPA Views Alternative Strategies as Supplements to Conventional Enforcement

EPA's creation in 1994 of its Office of Enforcement and Compliance Assurance clearly reflected the agency's efforts to use new strategies to encourage and facilitate compliance as supplements to—not a replacement of—its long-standing focus on traditional enforcement activities. On the one hand, the Office is charged with developing ways to assist the regulated community and encourage voluntary compliance with regulations. On the other hand, OECA officials emphasize that EPA is still charged with applying powerful sanctions, as necessary, to compel compliance by the regulated community.

EPA's Efforts to Encourage the Use of Alternative Compliance Strategies

EPA has initiated a number of activities in recent years that are intended to help bring facilities into voluntary compliance—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; (2) encouraging regulated entities to voluntarily discover, disclose, and correct violations through environmental auditing; and (3) developing results-oriented measures.

Compliance Assistance Centers and Related Initiatives

At the federal level, EPA has to date established compliance assistance centers for four industry sectors—printing, automotive service and repair, metal finishing, and agriculture. These function as communication centers and serve sectors with a large number of companies, particularly a large number of small companies. The ultimate goal of the centers is to provide small businesses with an understanding of their specific environmental requirements and encourage them to take appropriate steps to improve their compliance status. Each center provides services through the Internet or via telephone, fax, and mail. Because of the high rate of interest in these centers, EPA is developing new ones to assist chemical manufacturers, municipal/local governments, transportation, and printed wiring board manufacturers.

EPA has also developed a number of policies that give incentives to the regulated community to comply with environmental laws—especially in the case of small businesses and small communities. For example, EPA officials said the agency worked collaboratively with various stakeholder groups, including states, to develop its Policy on Compliance Incentives for Small Businesses. The final version of this policy was effective in June 1996, and along with this policy, EPA has also issued guidance to help states and local governments offer these incentives. Under certain

circumstances, this policy provides penalty relief for those small businesses that are not repeat violators under the policy and that make a good faith effort to comply with environmental regulations by using on-site compliance assistance or by conducting an environmental audit and promptly disclosing and correcting any violations that may be identified. This policy does not apply if the violation is caused by criminal conduct or has caused actual serious harm or imminent and substantial endangerment to public health or the environment.

EPA provided compliance incentives to small communities through its November 1995 Policy on Flexible State Enforcement Responses to Small Community Violations. This policy encourages states to establish small community environmental compliance assistance programs that provide flexible enforcement responses to small communities making good faith efforts to comply with environmental mandates. It describes the circumstances in which EPA will defer to a state's decision to place a small community on an enforceable compliance agreement that provides for timely compliance with all applicable environmental mandates. Under the policy, states can allow small communities to set priorities among competing environmental mandates on the basis of comparative risk, and EPA will defer to the state's decision to waive part or all of the noncompliance penalty.

In addition, EPA has launched a number of initiatives that, while not focused specifically on providing compliance assistance, are intended to offer participants the opportunity to experiment with innovative ways to improve compliance more efficiently and effectively. For example:

- The Common Sense Initiative (CSI) focuses on improving environmental regulations for six industrial sectors: iron and steel, electronics and computers, metal plating and finishing, auto assembly, petroleum refining, and printing. For each sector, EPA convenes high-level teams composed of industry executives, environmental leaders, government officials, and labor and environmental justice representatives. OECA is represented on every sector's team.
- Project XL allows individual companies to test innovative ways of achieving environmental protection at both the facility and the community levels if they can demonstrate that the proposed changes will yield superior environmental performance.
- The Environmental Leadership Program provides public recognition and certain other benefits to facilities demonstrating strong commitments to continued compliance and efforts to go "beyond compliance." Among the

requirements for participation are that a company have an auditing program, establish community outreach and employee involvement programs, and undertake innovative environmental enhancement activities.

Policy to Encourage Environmental Auditing

Chapter 2 discussed a number of states' efforts to encourage environmental auditing by regulated facilities as a way of discovering, disclosing, correcting, and preventing violations. EPA has similarly encouraged environmental auditing—but has done so as a matter of policy and has not pursued statutory change, as have many states. Specifically, in collaboration with various stakeholder groups, EPA developed a policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." This policy, which was effective in January 1997, states that where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence[1] and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based penalties[2] and will generally not recommend criminal prosecution against a regulated entity. EPA will reduce gravity-based penalties by 75 percent for violations that are voluntarily discovered and are promptly disclosed and corrected, even if they were not found through a formal audit or due diligence. Under this policy, EPA retains its discretion to recover economic benefit gained as a result of noncompliance so that companies will not obtain an economic advantage over their competitors by delaying their investment in compliance. Finally, the policy restates EPA's policy and practice to refrain from making routine requests for environmental audit reports. As of October 30, 1997, under this policy, more than 225 companies have disclosed and corrected environmental violations at more than 700 facilities.

EPA Efforts to Develop Measures That Focus on Results

Environmental statutes require EPA to ensure that minimum standards are maintained for states' enforcement programs, and EPA's policy requires the agency to ensure that such standards are maintained for the nation's overall environmental quality. As part of this commitment, the agency

[1]According to EPA's policy, "due diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations through various means, including (1) compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, and other sources of authority for environmental requirements; (2) assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for ensuring compliance with each facility or operation; and (3) procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

[2]Gravity-based penalties generally reflect the seriousness of the violator's behavior and are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from noncompliance.

maintains that states should be able to measure and report on the success of alternative compliance strategies to ensure that these minimum standards of protection are not compromised. As discussed in chapter 2, most of the measures in use today are "output" measures of traditional enforcement activities, such as number of inspections performed or amount of penalties assessed. EPA officials note that the agency is involved in a number of efforts to develop results-oriented performance measures that, among other things, are intended to better capture the impact of compliance assistance and incentive strategies.

Through the National Environmental Performance Partnership System (NEPPS), signed by the EPA Administrator and state environmental leaders on May 17, 1995, EPA has been encouraging the use of performance measures. NEPPS is designed to give states with strong environmental programs more leeway in setting environmental priorities, designing new strategies, and managing their own programs, while concentrating EPA's oversight and technical assistance on weaker programs. The major components of the program include increased use of environmental goals and indicators, state assessments of environmental and program performance, and the negotiation between EPA and states of Performance Partnership Agreements. As mentioned in chapter 1, through the negotiation of Performance Partnership Agreements, states and EPA negotiate performance measures for environmental objectives, including performance measures for a state's enforcement efforts. These performance measures will likely include many of the recommended core performance measures that EPA has negotiated separately with the Environmental Council of the States (ECOS).

EPA has also spent considerable time and energy in developing its National Performance Measures Strategy (NPMS), released in December 1997.[3] While this strategy applies only to measures of EPA enforcement, its influence may extend to state enforcement. In fact, EPA sought broad involvement by states and other stakeholders in developing the strategy. NPMS was initiated in response to the need to develop an enhanced set of performance measures for EPA's enforcement and compliance assurance program. The strategy was developed, in part, to recognize that traditional

[3]According to EPA officials, as of April 1998, all EPA regional offices had been briefed on the measures and their implementation, workgroups had been formed to develop definitions and collect information for individual measures, more than $300,000 had been awarded for contractor and consultant support for certain measures, pilot projects were being developed to test measures in three to five regions, and several states (Florida, Colorado, New York, Oregon, South Carolina, Texas, and Washington) had begun working with EPA to collaborate on developing measures or conducting pilot projects.

output-based measures do not capture the impact of compliance assistance and incentive-based approaches.

The measures developed through the NPMS are to be incorporated in EPA's strategic plan and annual performance plans, which are required under GPRA. A key element of the strategy is the development of a measurement framework called the Performance Profile for Compliance and Assurance, which lays out a plan to develop the combination of output measures, outcome measures, and environmental indicators that will be used as part of the agency's effort to implement a more results-oriented compliance approach toward EPA enforcement. The agency plans to implement these measures in fiscal year 1998, although it cautions that some measures will be implemented more quickly than others. According to OECA officials, as of April 1998, EPA has identified and begun implementation on seven outcome measures, including statistically valid compliance rates.

Continued Emphasis on Strong Enforcement

While EPA has strived in recent years to provide assistance to the regulated community, encourage voluntary compliance with regulations, and develop results-oriented measures, agency officials stress that these efforts cannot come at the expense of traditional enforcement. In this connection, EPA has expressed concern that some states' efforts to encourage voluntary compliance—particularly states' audit privilege/immunity laws and amnesty laws—may compromise states' ability to enforce federal environmental laws.

Continued Focus on the Number of Enforcement Actions Taken

Although EPA has several efforts under way to encourage states' use of alternative compliance strategies, agency officials emphasize that the success of these efforts depends on a continued emphasis on traditional enforcement action. EPA officials said that the agency has been told repeatedly by complying companies that enforcement is an important and appropriate tool for ensuring compliance. These officials strongly believe enforcement actions provide a specific and general deterrent effect that motivates regulated entities to seek compliance assistance, utilize incentive policies, and participate in alternative compliance strategies.

Top EPA officials have publicly stressed that EPA's new compliance assistance and incentive programs are not intended as a substitute for a strong enforcement program. For example, during her keynote address at the OECA National Conference held in April 1996, the EPA Administrator said that the agency's recent compliance initiatives, while important, supplement—but do not replace—a strong enforcement program. At the

same conference, EPA's Assistant Administrator for Enforcement and Compliance Assurance noted that enforcement is the mechanism that makes compliance assistance work, deters future violations, and ensures a level playing field for those who comply. He further explained that the initial emphasis on compliance tools "was necessary and essential to affect change—to initiate something new. However, . . . strong enforcement cannot be replaced, and a strong compliance program cannot succeed without strong enforcement."

This view of the importance of traditional enforcement activities was shared by other senior EPA headquarters officials we interviewed. In particular, OECA's Director of Enforcement acknowledged to us that in the wake of an unusually low number of enforcement actions in fiscal year 1996[4]—and the lack of evidence that the drop in these numbers resulted from increased compliance—she met with each region's management to encourage them to restore their numbers to "appropriate" levels. Commenting on this message, EPA regional officials explained that their own performance is judged primarily on the basis of output-oriented measures that reinforce the use of traditional enforcement approaches. Accordingly, they expect the state enforcement programs to reflect these priorities as well.

Concerns About States' Audit Privilege and Amnesty Laws

While EPA has long supported the use of environmental auditing, in reviewing the adequacy of state enforcement authority for purposes of the federal delegation and approval of state environmental programs, EPA has frequently taken issue with the type of state laws discussed in chapter 2. These audit laws protect regulated entities from having to disclose the results of an audit and/or provide immunity from enforcement, in exchange for a regulated facility's use of an environmental audit. The agency explained, for example, that some of these laws may prevent states from meeting basic requirements for state enforcement authority established in federal laws and regulations as prerequisites for delegation because they (1) restrict the ability of states to obtain penalties and injunctive relief for violations of federal program requirements and (2) restrict the states' ability to obtain information that may be needed to determine whether a facility is in compliance with environmental laws and regulations. Furthermore, the agency is concerned that these laws interfere with the public's access to information. For example, EPA was concerned that Texas' audit privilege law initially allowed the privilege to be asserted in criminal enforcement cases. The agency considered these

[4]OECA's Director of Enforcement attributed much of this drop to an increased focus on compliance assistance and the effects of the government shutdown that occurred in fiscal year 1996.

provisions and others in the Texas law to be in conflict with laws and regulations controlling the delegation of environmental programs and initially issued only an interim approval of the Clean Air Act Title V program in Texas until EPA's concerns could be resolved.

EPA has been able to negotiate agreements to resolve some of these disputes. For example, after negotiations with EPA, Texas environmental officials proposed revisions to the state's audit privilege to address many of EPA's concerns (such as removing the privilege from criminal proceedings), and the Texas legislature amended the law. EPA has resolved similar disputes with 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. 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 the information needed to identify noncompliance and criminal conduct. EPA is currently in discussion with five other states about bringing their audit laws in line with these principles.

Despite the agency's statement of principles, however, controversy remains among some states over the extent to which EPA should be influencing state policies and laws in this area. EPA has voiced strong reservations about Colorado's audit privilege law, for example, arguing that it could weaken the state's ability to adequately enforce a number of delegated environmental programs including the National Pollutant Discharge Elimination System program under the Clean Water Act. EPA has received a petition from a citizens group asking that delegation be rescinded because of the audit law.[5] Colorado officials, on the other hand, defend the state's law, saying that stringent conditions must be met before a facility qualifies for privilege, and the law has had the positive effect of bringing facilities into compliance. Colorado officials sent a letter to EPA on November 18, 1998, defending the state's audit law, noting that many of

[5]An OECA official said that citizen or environmental groups in four other states with audit privilege laws also petitioned EPA to remove delegation of a federal program. EPA is not likely to act on the petitions in three of the states because the agency reached agreement with two of them and the third state's audit law expired. EPA has not yet acted on the petitions in the final state, and has not decided whether to rescind delegation in any other state because of its audit law.

EPA's concerns are based on hypothetical scenarios and that EPA's actions are interfering with the state's flexibility in administering environmental programs. EPA subsequently responded in a January 28, 1998, letter to the Governor that the law still undercuts the state's NPDES authority and therefore the state will have to amend it if it wishes to "maintain the minimum required authorities to administer and enforce" the NPDES program.[6]

According to a senior OECA official, EPA is also concerned that some states' amnesty laws may undercut states' enforcement authority. According to this official, where these laws provide "grace periods" and technical assistance to small businesses, they can be valuable tools in helping these businesses comply with environmental requirements. However, this official noted that where these laws provide amnesty for minor violators, the definition of what constitutes a minor versus a major violator can be particularly important.

A significant controversy has arisen over Washington's amnesty law, where EPA has expressed concern that portions of the state's law conflict with EPA's delegation requirements. In a November 20, 1997, letter to the Washington State Department of Ecology, the Regional Administrator of EPA's Seattle Regional Office notified the state that its amnesty law conflicts with the necessary enforcement authority required for delegation of federal environmental programs to the state. Among other things, EPA found the law unacceptably restricts the state from assessing a penalty for each day that a facility is in violation of environmental requirements and impermissibly increases the state's burden of proof in establishing violations. Because of the agency's concerns, the letter states that EPA "does not intend to approve requests from [Washington state] for the approval of new federal environmental programs" and that the identified problems "jeopardize existing approvals." In response to EPA's concerns, Washington's Department of Ecology invoked a provision of the state's law making inoperative any part of the law determined by the department to be in conflict with federal law or program requirements. In response to the growing number of these laws, EPA has launched a review of states' amnesty laws to determine if these laws may undercut states' enforcement

[6]Controversies over state audit privilege/immunity laws have led to the introduction of a number of bills in the Congress that would grant privilege and immunity under federal law for those facilities that meet certain requirements. Specifically, S. 866 (The Environmental Protection Partnership Act of 1997), introduced in the Senate on June 10, 1997, and H.R. 1884 (Voluntary Environmental Self-Evaluation Act), introduced in the House on June 12, 1997, would both establish limited privileges and immunities for facilities that conduct self-audits and voluntarily disclose and correct any violations found. S. 1332 (The State Environmental Audit Protection Act), introduced in the Senate on October 29, 1997, would create a "safe harbor" to protect from federal interference state audit laws that provide a limited privilege for audit information and limited protection from penalties.

authority and serve as an impediment to the delegation of federal environmental programs.

Barriers Impeding a More Results-Oriented Compliance Approach

To some extent, the controversies about states' audit privilege statutes and amnesty laws reflect different legal and policy judgments on whether these states' audit privilege/immunity laws compromise the states' authority to enforce federal environmental law and on the appropriate roles of federal and state governments in deciding how environmental compliance can best be ensured. Yet while participants in the environmental regulatory process continue to debate these issues, all parties generally agree on the desirability of moving toward a system that focuses more heavily on achieving desired outcomes through a combination of compliance assistance activities and conventional enforcement and that systematically measures progress on the extent to which these outcomes are being achieved. Our contacts with a broad range of EPA and state officials and other interested parties suggest that regardless of how the specific issues associated with states' audit privilege/immunity statutes are resolved, EPA can in the meantime take important steps to (1) facilitate states' efforts to develop effective results-oriented performance measures and (2) promote greater consistency in what has been fragmented and inconsistent implementation by different EPA offices of the agency's policies on the appropriate balance in EPA's enforcement program between enforcement and compliance assurance activities.

EPA Assistance Needed to Facilitate States' Efforts to Measure Progress

EPA can facilitate states' efforts to measure progress in achieving compliance by (1) developing baseline data and other information needed to help states measure success in achieving program outcomes and (2) helping states deal with a reporting burden caused by overlaying new reporting requirements on top of existing requirements.

Assistance in Developing Program Measures

As noted in chapter 2, performance measurement is a worthwhile but inherently difficult enterprise. States have been gathering and reporting enforcement outputs (i.e., numbers of inspections, enforcement actions) for many years but have had significantly less experience in the more results-oriented measures—environmental indicators and environmental outcomes. In its National Performance Measures Strategy, EPA acknowledges the added difficulty of obtaining and analyzing the necessary information to do these more results-oriented analyses. In this strategy, the agency categorizes the difficulty in assessing environmental indicators (e.g., assessing a program's impact on environmental

conditions) as "high," noting that such evaluations "will require significant resources and sophisticated analysis methods." It also categorizes the implementation difficulty associated with outcome measures (i.e., compliance rates) for key industry sectors as "high," because of "the design and execution of [an] inspection/sampling plan, which will require significant resources."

Through the development of its Performance Profile (discussed earlier), 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. According to a senior OECA official, the implementation schedule laid out in EPA's Measures Strategy, which calls for fully implementing or conducting pilot projects for each new measure during fiscal year 1998, is very ambitious and will be difficult to meet. This schedule includes gathering and analyzing the information needed to support the development of output, outcome, and indicator measures. While the effort is designed primarily to develop the data needed to measure EPA's own enforcement program, one of OECA's two Deputy Assistant Administrators acknowledged that the Office was giving some thought to whether and how the effort could be simultaneously designed to help interested states tap into EPA's effort so that it can help meet their own data and analytical needs. In the light of the states' considerable needs in this area, identified in chapter 2 of this report, such an effort may be particularly worthwhile and should be systematically built into EPA's Performance Profile plan.

Assistance in Reducing the Reporting Burden

In our Executive Guide on implementing GPRA, we noted that

> "The number of measures for each goal at a given organizational level should be limited to the vital few . . . .Organizations that seek to manage an excessive number of performance measures may risk creating a confusing excess of data that will obscure rather than clarify performance issues. Limiting the number of performance measures to the vital few . . . will not only keep the focus where it belongs, it will help ensure that the costs involved in collecting and analyzing the data do not become prohibitive."[7]

There has long been considerable discussion between state environmental agencies and EPA about a perceived reporting burden in the enforcement program, both in terms of the information that regulated entities are required to report to the states (and sometimes directly to EPA) and the information that states must report to EPA. While the recent EPA-ECOS effort to develop agreed-upon core performance measures represents progress

[7]Executive Guide: Effectively Implementing the Government Performance and Results Act (GAO/GGD-96-118), p. 25.

in shifting measurement toward environmental outcomes, both EPA and the states have acknowledged that adding these measures to the ones already in place could have the unintended consequence of exacerbating such a reporting burden.

EPA and ECOS both acknowledged this concern in a joint statement last year on this issue, noting that as EPA and the states "start using more outcome measures, we want to ensure that we do not ultimately increase the overall state reporting burden."[8] The statement goes on to say that the parties to the agreement hope to reduce unnecessary reporting and activity counting so that their time is spent sharing information on the nation's environmental and pollution problems.

Our interviews suggest that concerns about a reporting burden have grown as states have increasingly sought to incorporate the core performance measures into their performance agreements with EPA. Of the 10 states contacted during this review, officials from 5 cited a reporting burden as a problem needing attention. One other state (Pennsylvania) noted that a potential reporting burden is a "looming issue" in light of the state's imminent efforts to change the manner in which it plans to report compliance trends in the future. A senior Massachusetts official, for example, told us that the focus of future reporting should center around the core measures negotiated by EPA and the states and that the cumulative burden of reporting associated with these measures in addition to existing reporting requirements is excessive. He amplified the point by questioning the value of many of the existing requirements, noting that (1) many efforts to develop new measures are "serving different masters" within EPA and (2) an effort is needed at the agency to determine which data being collected are useful and which are not.

Delaware's Environmental Administrator echoed these sentiments, noting that EPA should do a "housecleaning" to determine which data are no longer needed to manage environmental programs. He added that the agency should work toward a system whereby more of the data that states submit in hard copy are instead placed in electronic databases and that EPA would then have the responsibility for extracting the required data rather than requiring state personnel to periodically submit them in written reports.

[8]"Joint Statement on Measuring Progress Under the National Environmental Performance Partnership System," ECOS and EPA, p. 2.

The burden-reduction issue was raised repeatedly at ECOS' September 1997 annual meeting, prompting senior EPA officials to cite numerous individual efforts within the agency to reduce states' reporting burden. State officials at the meeting acknowledged these efforts but questioned their effectiveness. An ECOS workgroup addressing this issue noted, for example, that "there has been a substantial amount of discussion between the states and EPA regarding reduction of burden . . . ." and that

"It has become increasingly evident that what is lacking is any coordinated vision of what burden reduction means and what all [EPA's] efforts are designed to accomplish. Further, there has been no mechanism for coordination of these efforts to assure consistency and lack of duplication of effort."[9]

These concerns about the effectiveness of EPA's actions were echoed in our contacts with officials from the 10 states, most of whom indicated that EPA needed to make a more concerted and cohesive effort to address the issue. The senior Massachusetts DEP official noted that "no one is really looking at whether the information collected is valuable" and questioned how seriously EPA's burden reduction efforts are taken by EPA staff. A Colorado official maintained that EPA staff "sometimes recognize that some of the information collected is useless, but collect it anyway." The official asserted that "culture change is not happening at the staff level" and that as a consequence, some EPA officials do not take seriously the agency's stated desire to focus increasingly on core performance measures. Florida's response to this question suggested that EPA should (1) establish a hierarchy among reporting requirements, emphasizing measures that allow states to demonstrate the outcomes of their programs; (2) eliminate requirements for extraneous data; and (3) consolidate databases for different media so that multimedia analyses can be done more easily.

EPA officials have acknowledged the need to take a more comprehensive approach to addressing this problem. At the September 1997 ECOS meeting, for example, the EPA Administrator indicated that the agency had tried to be responsive to states' concerns through numerous individual efforts but that the time had come to coordinate and consolidate these efforts in a more cohesive manner. Along these lines, EPA has an initiative under way called Reinventing Environmental Information, which includes negotiating a comprehensive information management agreement with the states.

[9]"States' Vision for Improving Environmental Information Management," ECOS Strategic Planning Committee (Draft), 9/18/97.

Among other things, the current draft of this agreement acknowledges the need to collect data in such a way that it imposes the least burden on the private and public sectors. EPA is currently negotiating this agreement with ECOS, and the success of this effort, particularly as it relates to the reporting burden issues identified in this section by the states, remains to be seen.

EPA's Fragmented and Inconsistent Response to States' Alternative Compliance Strategies

Perhaps the most serious problem affecting EPA and state efforts to balance states' conventional enforcement activities with alternative compliance strategies is a fragmented approach by the numerous EPA offices whose responsibilities bear on this issue. A consequence of this fragmentation, according to information supplied by each of the 10 states we contacted, is that "mixed messages" from different entities within EPA make it difficult to devise a coherent, results-oriented approach acceptable to all of the key "stakeholders" within EPA. An internal EPA analysis had previously cited the problem, noting that it has led to confusion within and outside EPA and, in the opinion of some regional representatives, to inconsistent approaches across EPA regional offices on how best to balance enforcement and compliance assurance efforts. As discussed below, this fragmentation manifests itself in inconsistencies (1) between EPA headquarters and regional offices, (2) among the EPA headquarters offices with key enforcement responsibilities, (3) between EPA management and lower-level staff, and (4) among the key agency initiatives designed to promote a greater focus on achieving cost-effective program results.

Inconsistencies Between Headquarters and Regions

As noted in chapter 1, EPA headquarters offices with primary enforcement responsibility include the program offices, OECA, and the Office of General Counsel. Regional offices are responsible for negotiating directly with the states the states' program goals and the means by which those targets will be achieved. These agreements have typically been documented in EPA-state enforcement agreements. A growing number of states have documented these understandings as part of their Performance Partnership Agreements.

In a study that focused on the varying structures of EPA's regional offices, a December 1996 report by the agency's Office of Administration and Resources Management noted that "representatives of several regions complained that they had received mixed messages about the relative

priority of enforcement and compliance assurance."[10] The report identified sources of these mixed messages as the Administrator, OECA, and the senior leadership of the regional offices. Among the consequences cited were "considerable confusion" among regions and states and distrust in the regulated community.

Officials from all 10 states contacted indicated that they too believed they were receiving divergent messages from EPA headquarters and their EPA regional offices on key issues affecting their enforcement programs. Most were critical of the headquarters message that the state needs to raise the number of enforcement actions being taken, or at least had to achieve some baseline in the number of actions. Many asserted that this message was inconsistent with the one arising from negotiations with their region concerning their Performance Partnership Agreements, which tend to focus less on achieving higher numbers of enforcement "outputs" and more on ensuring an approach that achieves compliance through a mix of tools (one of which is enforcement). Pennsylvania's respondent said that his agency's Operations Chiefs continually report that EPA's Philadelphia regional office staff push them to achieve numbers of enforcement actions and that pressure from headquarters is frequently cited by the regional office staff as a factor. As one example, he cited a memorandum from the state agency's Waste Management Operations Chief, which complained that EPA staff in Philadelphia had unexpectedly required the state to begin tracking all violations for a return to compliance (not just the more serious "Class I" violations, which had been the case during the previous 16 years of the state's RCRA program) and that the state would have to ensure that all "violations [are] corrected regardless of seriousness." The memorandum noted that despite vehement objections from the state's RCRA enforcement personnel over "this middle of the year unannounced switch," they insisted the change was based on "orders from headquarters."

Beyond the central question about the appropriate emphasis on numbers of actions, states also told us that differences over other priorities between regions and headquarters offices complicates their efforts to set their own priorities. Oregon officials, for example, said that they spend months working with EPA's Seattle office to establish enforcement priorities for the year, but various headquarters offices are continually developing initiatives that sometimes conflict with these priorities. Similar concerns were voiced by respondents from Colorado, Massachusetts, and Texas.

[10]Management Review: Innovative Regional Structures, Environmental Protection Agency (Dec. 1996), p. 29.

Inconsistent Priorities Among Different EPA Headquarters Offices

Several states also cited inconsistent messages from a number of the headquarters offices with key enforcement responsibilities. Oregon officials, for example, cited "internal battles" between OECA 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 to enforcement, while others advocate the more traditional approach that emphasizes counting numbers of enforcement actions.

Respondents from Delaware, Massachusetts, and Texas also highlighted divergent messages from within OECA itself. Delaware's Environmental Administrator said that the Office sometimes appears to be speaking with two voices, noting that the OECA staff responsible for the Office's compliance assistance efforts support the use of a wider variety of tools to achieve compliance but that the staff responsible for tracking enforcement appear substantially more concerned about the number of enforcement actions taken.

Inconsistent Messages From EPA Management and Staff

Our recent report on EPA's efforts to "reinvent" environmental protection cited the difficulty in achieving "buy-in" among EPA's rank and file to new ways of achieving environmental objectives.[11] In particular, the report noted that while senior EPA managers have articulated a clear commitment to finding improved ways of achieving environmental goals, the agency has had difficulty in achieving buy-in among its rank and file to new ways of doing business.

Several of the state respondents conveyed experiences in their enforcement relationship with EPA staff and management that were consistent with this finding. The Secretary of Florida's Department of Environmental Protection expressed some frustration about the agency's follow-through on its rhetorical support for innovation, noting that while headquarters may announce a new initiative, and regional administrators encourage states to participate, regional program staff are generally less flexible. Massachusetts' Associate Commissioner for Enforcement, for example, said that the state DEP had few problems with, and greater access to, top management at EPA's Boston office. Rather, conflicts generally occur with the region's mid-level managers "who make the more

[11]Environmental Protection: Challenges Facing EPA's Efforts to Reinvent Environmental Regulation (GAO/RCED-97-155).

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 headquarters.

Inconsistencies Among Different EPA Initiatives to Measure Progress

As discussed above, EPA has several enforcement-related initiatives under way that are all intended to focus greater attention on achieving results rather than on performing prescribed tasks and processes. Among the most important of these initiatives are

- the National Environmental Performance Partnership System, under which EPA and states negotiate agreements on such matters as (1) which problems will receive priority attention, (2) what their respective roles will be, and (3) how their progress in achieving clearly defined program objectives will be met;
- OECA's National Performance Measures Strategy, which is intended to build results-oriented measures into EPA's existing accountability system, which currently focuses heavily on output measures; and
- OECA's performance measures required by GPRA; EPA's Strategic Plan, required by GPRA, emphasized the need for a mix of output and outcome performance measures, noting 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."

EPA's goals under NEPPS, the National Performance Measures Strategy, and its GPRA-related activities would appear to share the same goal of focusing on environmental results. However, the enforcement-related performance measures that EPA prepared pursuant to GPRA, as reflected in EPA's recently issued Performance Plan, are heavily weighted toward numerical targets for inspections, enforcement actions, and other outputs. For example, the Performance Plan notes that in fiscal year 1999, EPA "will conduct 15,000 inspections and undertake 2,600 enforcement actions." Similarly, it calls for 53,000 state pesticides inspections in 1998 and 60,300 in 1999. The plan also sets numerical targets for compliance assistance (such as the number of compliance tools developed and the number of compliance assistance centers in operation) and notes that EPA is working to improve measures of compliance and to develop measures to assess its compliance assistance efforts.

Officials from Delaware, Massachusetts, New Jersey, and Pennsylvania each raised concerns about OECA's implementation of GPRA to date, noting that OECA's heavy focus on outputs was inconsistent with other ongoing

efforts designed to help states focus their environmental programs on results. The New Jersey respondent echoed the view that OECA's response to GPRA has thus far focused on traditional output measures, offering the partial explanation that outputs are easier to quantify than results. But he said that such a focus was contrary to both the spirit of GPRA and to the results-oriented manner in which the state was attempting to negotiate its Performance Partnership Agreement (pursuant to NEPPS) with EPA's New York Regional Office.[12] Pennsylvania's respondent shared a similar impression, pointing to the "unfortunate way GPRA is being used by EPA to say to the states, 'collect all these enforcement beans because we'll need to report this stuff to the Congress pursuant to GPRA.'"

EPA's Efforts to Achieve Greater Consistency on the Use of Alternative Compliance Tools

The information gathered from the 10 states contacted confirmed the widely held perception that different EPA offices continue to convey an inconsistent message on the appropriate use of various compliance tools. In commenting on this issue, one of OECA's Deputy Assistant Administrators pointed out that to some degree, the Congress's long-standing practice of holding EPA accountable for certain outputs (e.g., inspections conducted, enforcement actions taken) has reinforced the belief among many at EPA that the numbers of enforcement actions deserve greater priority. He cited press releases, for example, that strongly criticized the agency during 1996 for its drop in these outputs and noted that many in EPA have been sensitive and responsive to these criticisms. He nonetheless cited the Congress's ongoing efforts to ensure effective implementation of the GPRA as a factor in focusing greater attention among enforcement staff on the importance of developing results-oriented performance measures.

He also emphasized that OECA has, in fact, taken steps to resolve perceived inconsistencies in the appropriate mix of compliance tools through quarterly meetings between OECA management and the management teams of each of EPA's 10 regional offices. He also cited a number of other efforts, including the issuance in November 1996 by OECA of "operating principles" that were intended to clarify how to integrate enforcement and compliance assurance activities, an annual conference of OECA staff and its

[12]Among other things, the 1997-1998 New Jersey Performance Partnership Agreement established (1) overall goals for seven major topic areas (e.g., air quality/radiation, drinking water, site remediation), (2) subgoals, (3) milestones/objectives for achieving its subgoals (which, where feasible, are quantitative with dates for completion), and (4) indicators for measuring progress toward the milestones/objectives. Thus, for example, under the goal that "every person in New Jersey will have safe drinking water," the agreement states that "[b]y 2005, 95 percent of the public water systems (and 95 percent of the population served) will provide water that meets the microbiological drinking water standards.

regional counterparts, and twice-yearly meetings between OECA staff, regional enforcement staff, and managers of regional program offices.

Our contacts with officials from the EPA regional offices that oversee the five states we visited suggest that these efforts have shed light on this matter. Some progress may also be occurring at the state level. Florida officials said that EPA regional officials had recently agreed to use the state's new measurement systems as a basis for negotiating its 1999 Performance Partnership Agreement. Information from the measurement system will be used to set annual priorities, and specific measurements will be substituted for some of Florida's current reporting requirements.

However, the broad consensus among representatives of the 10 states we contacted supports the view that further actions will be needed before the agency is perceived to be speaking with one voice on the appropriate use of alternative compliance tools. Also, EPA's response to GPRA, as reflected in its Performance Plan, reinforces the agency's preexisting focus on outputs and is at odds with states' efforts to negotiate results-oriented Performance Partnership Agreements with their corresponding regions. Fiscal year 1999 is the first year EPA and other agencies have been required to submit Performance Plans under GPRA, and for the reasons outlined earlier in this report (i.e., the relative ease of developing output versus outcome measures), it is not surprising that the agency's early efforts to develop performance measures under GPRA to emphasize outputs. Nonetheless, EPA can go a long way toward improving the consistency of its message on this matter—and the likelihood that a mix of tools can be successfully used to achieve environmental results—by (1) expeditiously developing and implementing a broader range of output, outcome, and indicator measures and (2) reflecting these measures in its GPRA Performance Plan and the other key vehicles used by the agency to set performance expectations for its regions and the states.

Conclusions

The differences that have arisen between EPA and state regulatory authorities over some state initiatives, particularly those providing for flexible enforcement, in part reflect different views on the appropriate roles of federal and state government in deciding how environmental compliance can best be ensured. Yet while these issues will continue to be the subject of debate in coming years, EPA can take a number of important steps to move toward a system that focuses more on achieving desired outcomes through a combination of compliance assistance activities and

conventional enforcement and which systematically measures progress on how well these outcomes are being achieved.

First, states face a number of difficulties in developing and analyzing the key data needed to measure the results of their compliance strategies. Without this information, it will be difficult to move from the present focus on counting outputs to the more results-oriented focus they are seeking. Through the development of its Performance Profile, EPA plans to develop at least some of this vital information—although the effort is largely intended to refocus EPA's own enforcement program on results. EPA has been giving some thought to whether and how the effort could be simultaneously designed to help interested states tap into the EPA effort so that the agency can help states meet their own data and analytical needs. In the light of the states' considerable needs in this area—and EPA's insistence that states should demonstrate the efficacy of their alternative strategies if they are to rely upon them to achieve compliance—EPA needs to ensure that development of its Performance Profile stays on the schedule identified in OECA's National Performance Measures Strategy and that it be developed collaboratively with interested states in a manner that helps these states meet their own performance measurement needs. The "best practices" resulting from these efforts could be usefully shared with other states interested in improving their own capacity for performance measurement.

As a related matter, adding results-oriented performance measures to the ones already in place could have the unintended consequence of exacerbating states' already-burdensome reporting requirements. EPA has a major initiative under way that it hopes will deal with the problem. Specifically, the agency's Reinventing Environmental Information initiative calls for negotiating a comprehensive information management agreement with the states and is intended, among other things, to address the need to collect data in way that imposes the least burden on the private and public sectors. The success of this effort, particularly in terms of its effectiveness in responding to the reporting burden issues identified by the states in this chapter, remains to be seen.

Second, information from each of the 10 states contacted shows a fragmented and inconsistent approach by different EPA offices to how the success of state enforcement programs should be judged, particularly as it relates to the appropriate balance between traditional enforcement and other tools to ensure compliance. OECA has taken a number of important steps to address the issue, which have helped to a degree. However, the

broad consensus among representatives of the 10 states we contacted confirms EPA's view that it is difficult to integrate "traditional compliance monitoring and enforcement actions with compliance assistance and incentive approaches, doing so in a multi-layered federal-state system, with a set of organizations that are highly decentralized." It also supports the view that further actions will be needed before the agency is perceived to be speaking with one voice on the extent to which states are to be held accountable for achieving output targets and the extent to which they are to be held accountable for achieving results. EPA can go a long way toward improving the consistency of its message on this matter—and the likelihood that a mix of tools can be successfully used to achieve environmental results—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.

Recommendations

We recommend that the Administrator, EPA, take the following actions:

- Ensure that the development of the Office of Enforcement and Compliance Assurance's (OECA) Performance Profile stays on the schedule outlined in its National Performance Measures Strategy; that the Profile be developed collaboratively with interested states in a manner that helps these states meet their own performance measurement needs; and that OECA periodically disseminate information (as it becomes available) among the states on effective practices in measuring enforcement programs' results.
- Promote greater consistency in what has been a fragmented and inconsistent message by different EPA offices on the appropriate balance in EPA's enforcement program between enforcement and compliance assurance activities. In doing so, the Administrator should build on EPA's recent efforts to address this issue 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 policy 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.

Agency Comments

EPA raised a number of concerns about the information presented in this chapter. The following summarizes its major concerns and our responses. The full text of EPA's comments, and our detailed responses, are included in appendix IV of this report.

EPA's letter maintains that the draft report did not give the agency adequate credit for its efforts to either (1) promote compliance assistance or (2) develop innovative performance measurement efforts. We disagree. In recognizing EPA's compliance assistance efforts, the draft contained several pages describing EPA's efforts to establish compliance assistance centers, develop policies that give incentives to the regulated community to comply with environmental laws, and develop and implement its environmental auditing policy. It also recognized related agency initiatives that, while not focused specifically on providing compliance assistance, are intended to offer participants the opportunity to experiment with innovative ways to improve compliance more efficiently and effectively (e.g., Common Sense Initiative, Project XL, Environmental Leadership Program). We nonetheless added language suggested by EPA to further convey the agency's role in developing alternative compliance strategies and in assisting the states in their own efforts to develop such strategies.

In connection with EPA's efforts to develop and implement enhanced performance measures, the draft noted that the agency had "spent considerable time and energy in developing its National Performance Measures Strategy [and that] its influence may extend to state enforcement." The draft also credited the agency with "broad involvement by states and other stakeholders in developing the strategy." In addition, the report cited other initiatives, such as the National Environmental Performance Partnership System, as further encouraging use of

performance measures. Nonetheless, we added language suggested by the letter to further explain the agency's commitment of resources to this effort.

EPA also said the draft report (1) relied too heavily on impressions, opinions, and perceptions as the basis for its conclusions about inconsistent implementation by different EPA offices and (2) should acknowledge the difficulty of dealing with this problem "in a multi-layered federal-state system, with a set of organizations that are highly decentralized." The first of these statements inaccurately conveys the basis for the report's findings on inconsistent messages and uneven implementation by different EPA offices. As our report points out, the problem of inconsistent implementation was cited by EPA's own Office of Administration and Resource Management, which in December 1996 identified complaints by EPA regional staff that "they had received mixed messages about the relative priority of enforcement and compliance assurance," and that the problem had resulted in "inconsistent approaches across [EPA regional offices] on how to best balance enforcement and compliance assurance efforts." The fact that EPA did not solve the problem was substantiated not by sporadic impressions, opinions, and perceptions, but by (1) the overwhelming consensus of enforcement and other officials from among a diverse group of 10 relatively experienced states and (2) the strength and consistency with which these views were conveyed. The uniformly output-oriented enforcement component of EPA's GPRA Performance Plan is also inconsistent with the agency's expressed desire to use a combination of output and results-oriented measures.

As a related matter, we do agree with EPA's suggestion that we acknowledge the difficulty associated with integrating traditional enforcement approaches with compliance assistance/incentive approaches "in a multi-layered federal-state system, with a set of organizations that are highly decentralized." We have added language pointing to the inherent difficulty in ensuring consistency in the light of EPA's decentralized structure and the diversity among the state organizations with which the agency deals. We would observe, however, that EPA's request for such an acknowledgement appears to demonstrate that the problem of inconsistency still exists.

EPA said that the report took a simplistic view of the difficulty of reducing the reporting burden caused by adding new measures to existing ones, noting that the report seemed to imply that data about environmental conditions should simply replace, rather than supplement, output and

source-specific data. We disagree. The report in no way reflects a view that output measures and source-specific data should be replaced with data on environmental conditions, and in fact acknowledges the value of output measures when linked in some way to the results an organization is trying to achieve. The report's discussion of this issue does, however, reflect a view repeated by many state officials—and acknowledged by senior EPA officials—that adding new measures to existing ones poses legitimate concerns for state officials. The report cites EPA's efforts to deal with the problem, noting that their effectiveness remains to be seen.

EPA also asserts that the report makes recommendations that would do little to effectively address the problems and challenges identified. The report's recommendations are intended to address two major issues identified: (1) the difficulties experienced by states in developing results-oriented measures and (2) the inconsistent manner in which different EPA entities are implementing the agency's policies on the use of enforcement and other compliance tools. The first recommendation essentially asks EPA to follow through on its stated commitment to develop measures pursuant to its National Performance Measures Strategy, and to do so in a manner that will assist interested states in developing their own measurements. We modified the recommendation to (1) reinforce the value of disseminating information among the states on effective practices and successful efforts to measure programs' results and (2) suggest that EPA should work collaboratively with states in developing the measures.

The second recommendation reflects our conclusion that EPA's decentralized structure requires the attention of the agency's top management because it has overall responsibility for directing and coordinating the activities of the different EPA organizational units with enforcement responsibility, including OECA, program offices, the Office of General Counsel, and its regions. Realistically, the task of resolving the inconsistent implementation discussed in the report would still be a difficult task. Nonetheless, we believe this level of management attention to the issue would substantially increase the chances for progress on this key issue. We also added language to this recommendation to encourage different EPA offices with enforcement responsibility to more systematically coordinate their negotiations with, and oversight of, state agencies. We believe that this action would help to alleviate the problem cited by many state officials that they are often given conflicting information or direction by different EPA offices.

Examples of Compliance Assistance Programs Being Implemented by the Case-Study States

State	Program[a]	Description
Massachusetts	Environmental Results Program	Small to medium-sized facilities are asked to commit to certain performance standards and self-certify their compliance with these standards.
Massachusetts	Printers Partnership Program	This program is an effort to reformat regulatory requirements for the printing industry and provide compliance assistance materials to printers to help them meet these requirements. Printers were asked to voluntarily participate and were given incentives for joining.
New Jersey	Environmental Management Assistance Program	New Jersey's Department of Environmental Protection will create a cross-media, cross-functional team to evaluate a facility's—primarily small businesses—compliance with environmental regulations. The team prepares an environmental oversight document identifying a facility's environmental requirements.
Delaware	Business and Permitting Services Unit	The unit provides assistance to program offices within the state seeking to improve their compliance assistance and provides information/assistance to businesses applying for permits.
Pennsylvania	Self-Evaluation Guide	Small businesses are given a guide, which includes several different checklists, to use in helping them determine if they are in compliance with various environmental regulations.
Illinois	Dry Cleaners Outreach	Illinois' Environmental Protection Agency worked with dry cleaners associations and dry cleaners facilities to ensure the facilities were in compliance. Illinois' Department of Environmental Protection conducted numerous workshops and provided on-site assistance to some facilities.
Texas	Small Business Assistance Program	This program offers small businesses confidential assistance by request. The program provides environmental technical assistance on air, water, waste, and pollution prevention issues.
Colorado	Targeted technical assistance	Small businesses, such as dry cleaners, are targeted to ensure that they understand environmental regulations.

(continued)

State	Program[a]	Description
Washington	Snapshots	Multimedia inspections were conducted at lithographers, screen printers, and photo processors. Educational materials were given to each facility inspected. The facility was responsible for implementing the recommendations. Follow-up was dependent upon the inspection findings.
Washington	Shop Sweep	Streamlined inspections were conducted at auto repair shops concentrating on the most common waste management problems. Educational materials were given to each facility inspected. The facility was responsible for implementing the recommendations. Follow-up inspections were conducted at a random sample of sites.

[a]The summary table does not capture all of the compliance assistance efforts the case-study states are undertaking. Rather, these are the programs that were highlighted in our discussions with state officials.

Examples of Amnesty Programs Being Implemented by the Case-Study States

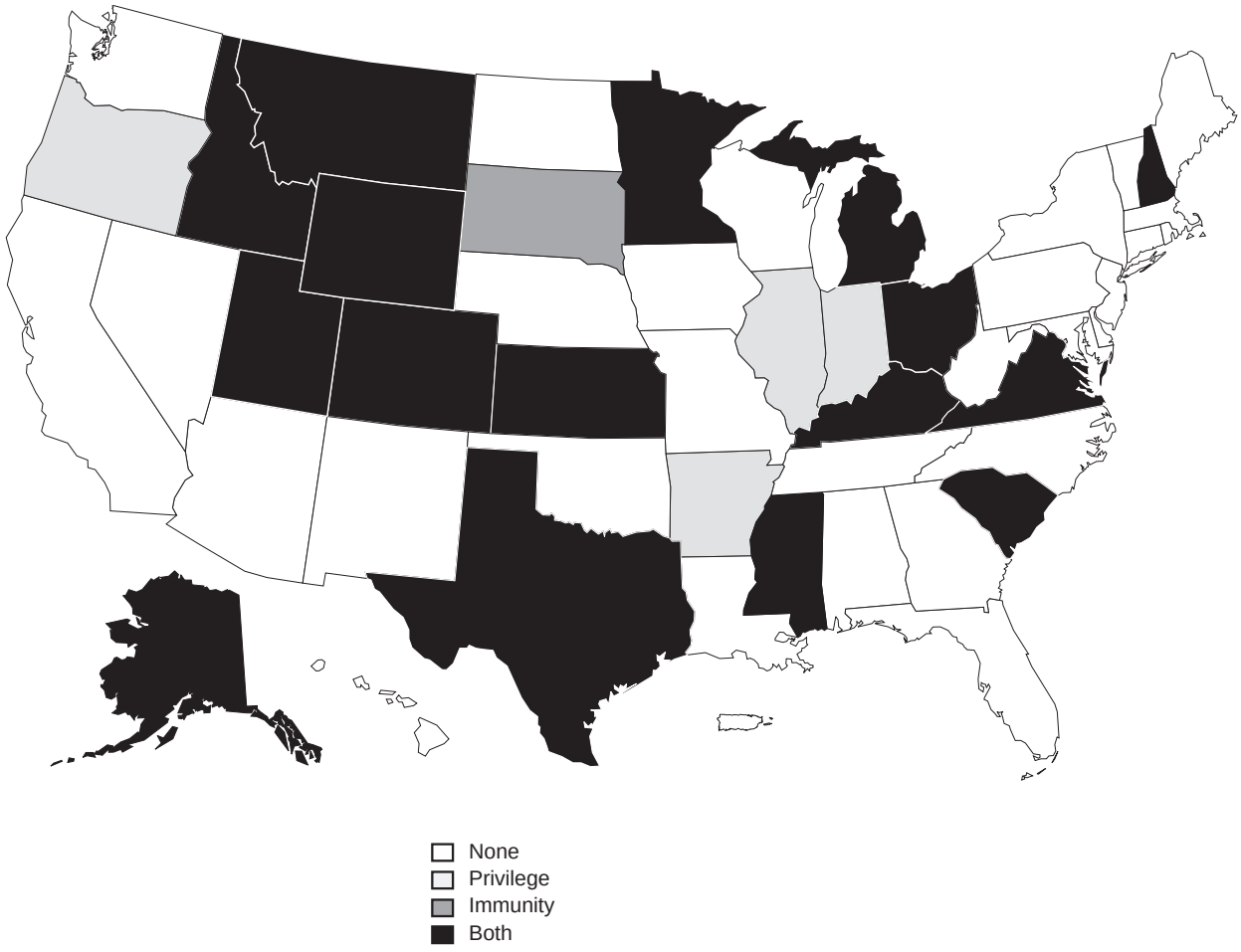
State	Program[a]	Description
New Jersey	Green Start Program	This is a voluntary compliance assistance program for small businesses and local governments. A facility asks for assistance in meeting environmental regulations. An inspection is performed and a report is issued listing the requirements that must be met to reach compliance. Penalties are waived under certain circumstances if the facility comes into compliance within a specified period of time.
New Jersey	"Quick Compliance" Law	If violations meeting certain criteria are identified by the government, the facility will not receive a penalty for the violations if they are corrected within 30 to 90 days.
Delaware	"Gray Hat" Program	Once a violation is identified, inspectors may allow the facilities a chance to correct the violation before taking a formal enforcement action. A follow-up inspection is conducted to ensure the violation is corrected.
Florida	General technical assistance	Inspectors attempt to identify the root cause for the violation. If the violation is minor and occurred because of genuine ignorance of the regulations, the inspectors may provide technical assistance to the facility. A follow-up inspection is conducted to ensure the violation is corrected.
Illinois	Clean Break	Illinois' Environmental Protection Agency targets small businesses to participate in the program. By participating in the program, the facility allows the state to conduct an inspection of the facility and agrees to resolve the noncompliance discovered during the inspection to the state's satisfaction. By complying with the program requirements, the facility is immune from enforcement actions relating to the noncompliance.
Illinois	Pre-enforcement Strategy	Once a violation is identified, the state may decide to resolve a facility's noncompliance issues, to avoid litigation, through a "compliance commitment agreement." This agreement details the steps the state requires the facility to take to return to compliance under a specific time frame. If the facility does not satisfy the agreement, the state may take formal enforcement actions.

(continued)

State	Program[a]	Description
Texas	Small Business Amnesty Programs	This program targets specific industries: foundries, wood products, metal finishing, dry cleaners, body shops, printers, gas stations, and dairies/confined feeding lots. Technical assistance and additional time are granted to come into compliance.
Oregon	Volatile Organic Compound Limited Amnesty Program	Oregon's Department of Environmental Quality identified small businesses that were potential emitters of volatile organic chemicals. Facilities without appropriate permits were offered limited amnesty from civil penalties if they voluntarily agreed to conduct a pollution prevention assessment to determine if volatile organic chemical emissions could be reduced and to obtain a state air contaminant discharge permit if necessary.
Oregon	Waste Reduction Assistance Program (WRAP)	During technical assistance visits at facilities located in Oregon's Western Region, inspectors leave a form that lists improvements and recommendations instead of making an enforcement referral. The facility is responsible for implementing the recommendations, completing the form, and returning it to the Oregon Department of Environmental Quality by an agreed-upon date.
Washington	House Bill 1010	With certain exceptions, the Department of Ecology must provide technical assistance rather than take an enforcement action when visiting a small facility for the first time.

[a]Note: The summary table does not capture all of the amnesty programs the case-study states are undertaking. Rather, these are the programs that were highlighted in our discussions with state officials.

States With Audit Immunity/Privilege Laws



Comments From the Environmental Protection Agency

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

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

APR 28 1998

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 offer comments on your April 1, 1998 draft of your proposed report entitled Environmental Protection: EPA's and States' Efforts to Focus Enforcement Programs on Results (GAO/RCED-98-113, Code 160401). The subject of this report is of vital importance to both EPA and State enforcement and compliance assurance programs.

We have solicited comments about the draft from a broad range of EPA regional and headquarters managers and staff. This letter conveys general concerns about the report, issues about specific subjects, and suggests recommendations for your review. Whenever possible, we have directed our comments and suggested revisions to specific locations in the draft to help your consideration of our concerns.

See comment 1.

Section I. General Concerns About the Report

1. Unchallenged Assumptions. Several critical assumptions about the state of enforcement and compliance assurance seem to be accepted without challenge by the General Accounting Office (GAO). For example:

- large sources are mostly in compliance and can be de-emphasized as targets (pages 20 and 44);
- greatest compliance gains can now be made in encouraging small businesses to comply (pages 21 and 44);
- conventional enforcement approaches are ineffective with small facilities (pages 15 and 21).

These assumptions, with the added luster of GAO acceptance, will be adopted as facts although there is little or no empirical basis for them. In fact, EPA's data and experience does not support these sweeping statements. For example, regarding compliance of large sources:

a) An Inspector General's Report (Validation of Air Enforcement Data Reported to EPA by Pennsylvania, Office of Inspector General, Report of Audit, February 14,1997). suggests that some states are generally not properly identifying significant violations, and recent data suggests an increase in unaddressed violations.

b) Analysis of Clean Air Act Title V permit applications (in which sources certify compliance status), available for review for the first time, suggests significant levels of noncompliance with emission control requirements. EPA investigations have raised concerns about possible widespread noncompliance with Clean Air Act Prevention of Significant Deterioration (PSD)/New Source Review (NSR) permit requirements.

c) A review of Significant Noncompliance (SNC) data under the Clean Water Act does not indicate an improved compliance trend over the past several years.

Thus, this report should not take as given the unsupported assumption upon which states have justified their disinvestment in enforcement programs.

See comment 2.

2. Use of Impressions and Opinions. Large sections of the report -- particularly Chapter 3, pages 44-70 -- relay impressions, opinions, perceptions and complaints subjected to very little analysis and examination. These are piled on to support charges of inconsistent messages and uneven implementation of various enforcement and compliance assurance initiatives and changes.

But many of these opinions are questionable. For example, on page 65, Delaware's Environmental Administrator stated that "[OECA] sometimes appears to be speaking with two voices, noting that the OECA staff responsible for compliance assistance efforts support use of a wider variety of tools to achieve compliance, but that the staff responsible for tracking enforcement appear substantially more concerned about the number of enforcement actions taken." But given that the OECA program is attempting to utilize enforcement, compliance assistance and compliance incentives, it would seem appropriate that various parts of OECA would specialize in particular components of the program. Each of these components is valuable and all must operate to maximize compliance.

Similarly, on page 66, the report cites a Florida Department of Environmental Protection (FDEP) official who "noted that while EPA's National Performance Measures Strategy implies a greater focus on compliance rates as an indicator of success, regional enforcement staff are clearly still looking for adequate numbers of inspections and enforcement cases from FDEP." The comment fails to acknowledge that output measures about inspections and enforcement actions are part of the set of measures EPA has adopted in the Strategy, along with outcome measures such as compliance rates. EPA believes a combination of output and outcome measures is necessary to evaluate the effectiveness of enforcement and compliance assurance programs.

Finally, state opinions about "inconsistent" approaches need to be considered in light of EPA's need to tailor its relationships with states to address the myriad combinations of strengths, weaknesses, capabilities, deficiencies, and emerging philosophies present in the myriad of state enforcement and compliance assurance programs. (For a more detailed discussion of the "mixed messages" issue see Section VI below.)

See comment 3.

3. The Value of Deterrence. The report provides no discussion of the fundamental concept that enforcement actions protect the environment and public health by deterring violations of pollution standards, and by requiring those who do violate the law to return to compliance. Yet that is at the heart of the current debate between EPA and some states. Both EPA and the States agree on the importance of compliance assistance; our concern is that some states do not place equal emphasis on an effective compliance monitoring and enforcement program which is necessary to maximize compliance and make assistance efforts most effective. Reports by the Inspector General (Validation of Air Enforcement Data Reported to EPA by Pennsylvania, Office of Inspector General, Report of Audit, February 14,1997) have found that some states do not adequately identify serious violations, do not respond in a timely fashion, do not take enforcement actions even when violations are repeated many times, and do not consider recovering economic benefit. These same concerns have been frequently raised by the GAO in the past (See e.g., Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators (GAO/RCED-91-166, June 17, 1991). The neglect of this central issue seriously undermines the value of this report. (A more detailed discussion of this subject can be found in Section III below.)

See comment 4.

4. Role of Federal Law. The report is silent on the extent to which federal laws -- for example, those provisions that require specific penalty authorities for authorized programs -- impose obligations on the States. For example, EPA's position on state audit laws is informed by our understanding of what federal law requires, and not merely by our own policy preferences. In the past, GAO has taken both EPA and the States to task for deviating from what it perceives to be statutory requirements. For example, the GAO criticized EPA sharply in 1993 (March 1, 1993 letter to Congressman Dingle B-247155.2) for our more flexible approach to a penalty policy that emphasized environmental results rather than penalty collection. Partially in response to the GAO criticism, EPA revised its Supplemental Environmental Projects Policy in 1995 (recently revised again in 1998). This report, on the other hand, does not seem to acknowledge the fact that federal law sets parameters within which alternative and compliance approaches must be framed.

See comment 5.

5. EPA Implementation of Alternative Compliance Strategies. The report seems to portray EPA as at best a follower, at worst an obstacle, rather than as a leader in developing and implementing alternative compliance strategies. The facts show the opposite is true. EPA fundamentally reorganized its enforcement and compliance assurance efforts at the beginning of the Clinton Administration. The vision for our program was a strong enforcement effort complemented by a program of compliance assistance and incentives. This vision recognized the need to work with regulated entities to ensure understanding of regulatory requirements, provide incentives to responsible actors, and maintain a strong enforcement program to deter serious noncompliance

and ensure that those who pollute do not profit from noncompliance. (A more detailed description of EPA implementation efforts can be found in Section II below.)

See comment 6.

6. EPA Measurement Efforts. The report does not adequately or fairly describe the efforts that EPA has made to develop and implement an enhanced set of performance measures for its enforcement and compliance assurance program. Nor does it adequately describe the efforts of EPA to work with states to develop and implement those measures. Through its National Performance Measures Strategy, EPA has worked with more than twenty states to identify meaningful outcome measures and collaborate on implementation of particular measures. Through the Strategy, and previous work that EPA has done to measure the environmental results of enforcement cases, the Agency has been a leader in establishing a set of enforcement and compliance assurance performance measures that will be a powerful tool to enhance program effectiveness and accountability. (For a more detailed discussion of this subject see Section VII below).

See comment 7.

7. Useful Recommendations. The report provides small-scale recommendations which offer a vague prescription for the two large and formidable challenges it is attempting ultimately to address -- how can enforcement and compliance assurance activities be integrated most effectively, and how can results from those activities be measured in the most meaningful way? The report needs to offer recommendations about the types or mix of measures needed for enforcement and compliance assurance programs, effective practices used in successful efforts to measure the results of these programs, and how EPA and States can make responsible progress in moving toward the goal of using outcome measures. (For a more detailed discussion of this subject see Section X below.)

Section II. EPA Implementation of Alternative Compliance Strategies

See comment 8.

1. The report understates EPA's progress in developing and implementing alternative compliance strategies at the federal level, and its role in supporting appropriate use of such strategies by the States. The report should not confuse State and EPA policy differences on these strategies for lack of progress in implementing compliance assistance efforts and compliance incentive policies.

2. The facts show that since 1994, OECA has:

- developed and provided compliance assistance through industry-specific centers and guidance efforts;
- developed a self-policing policy to encourage audit and self-disclosure, which has resulted in voluntary disclosure from 760 facilities so far;
- developed a policy to encourage small businesses to seek compliance assistance and correct violations;
- developed a policy to give small communities flexibility to set compliance priorities and schedules;

- used incentive programs to promote compliance through temporary limits on penalties (e.g., for reporting risk information under Toxic Substances and Control Act);
- developed and used outcome measures for completed enforcement actions.

Each of these has had concrete results and accomplishments over the last four years. Perhaps citing these efforts earlier in the report (e.g., the executive summary, and on page 15 in the discussion of new ways to achieve compliance) would put EPA's leadership role in proper perspective.

3. On a related point, the report fails to mention that many of these efforts were carried out using open, collaborative processes which encouraged input from stakeholders, constituency groups, and regulatory partners. The development of the audit policy, the small business compliance assistance policy, and enhanced performance measures all utilized extensive outreach efforts which greatly strengthened the final products. OECA has been a leader in using these processes when making significant changes in its programs. Acknowledging these collaborative approaches in the report (perhaps on page 15 as revised in #2 above or somewhere in the description of EPA initiatives on pages 47-50) might encourage use of these approaches by other environmental agencies.

III. Recognizing the Value of Deterrence

See comment 9.

1. Remarkably, the report does not acknowledge the value of deterrence as one of the principal tools for achieving compliance. This de-emphasis on enforcement is inconsistent with previous GAO and Inspector General reports which have taken states and EPA to task for failing to maintain enforcement programs adequate to deter violations of federal law. Examples of such reports include: Water Pollution: Many Violations Have Not Received Appropriate Enforcement Action (GAO/RCED-96-23, March 20,1996); Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators (GAO/RCED-91-166, June 17, 1991); Validation of Air Enforcement Data Reported to EPA by Pennsylvania (Office of Inspector General, Report of Audit, February 14,1997). The lack of acknowledgment in this report appears to relegate environmental law to an "advisory" status, where compliance is dependent on whim or good will. Environmental law is after all, law -- compliance should be expected and serious noncompliance should have consequences.

2. The report tends to treat enforcement and its deterrent effects as a set of processes or procedures which do not produce environmental results. For example, on page 20, the report describes a trend in state environmental offices to "shift their use of a traditional regulatory approach to a results-oriented approach that includes providing more compliance assistance to facilities ..." This statement seems to assume that enforcement and conventional regulatory approaches are incapable of producing results.

3. The report does not acknowledge that the specific and general deterrent effect achieved through enforcement actions motivates regulated entities to seek compliance assistance, utilize

incentive policies and participate in alternative compliance strategies, and generally improve environmental management practices. The use of the strategies and tools described in the report is likely to be much more effective if they are offered in the context of a strong and focussed enforcement program.

4. The report does not acknowledge that enforcement actions also level the playing field -- they eliminate the unfair financial and competitive advantage that noncomplying facilities and companies gain over those who comply. For example, in 1991 GAO pointed out the importance of recovering economic benefit:

> "As for state penalty practices, we believe that EPA has not only the authority but also sound reasons for requiring states to have a penalty policy that requires recovery of economic benefit...As a basis for assessing penalties, economic benefit ensures that regulated facilities are penalized in the same way regardless of which state they are in or whether they are regulated by a state or federal agency."
> [Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators (GAO/RCED-91-166, June 17, 1991)]

EPA has been told repeatedly by complying companies that enforcement is an important and appropriate tool for ensuring compliance among members of their industry who are out of compliance. The report also fails to mention that enforcement also helps ensure that citizens enjoy equal protection through environmental law.

5. If GAO prefers not to make its own acknowledgment in this report about the value of deterrence and how it makes alternative strategies more effective, these points could be made to help explain why EPA believes alternative strategies can supplement -- but not replace -- traditional enforcement. (Page 46 paragraph regarding role of enforcement, or page 52 section about continued emphasis on enforcement might be places in which the report can describe why EPA feels strongly about the value of deterrence).

See comment 10.

IV. Auditing Laws

1. The report does not always accurately describe the policy and legal issues surrounding state audit privilege and immunity laws. The issues between EPA and states on auditing go beyond differing "views" as stated in the report. There are legal and regulatory authorities and requirements that states need to have in order to operate federal programs, many of which are jeopardized by audit privilege and immunity laws.

2. The report inaccurately suggests that state audit privilege laws make only audit findings secret. Some of them actually provide a broad privilege for all information generated by an audit (including violations discovered in the course of these audits) as well as a testimonial privilege to participants in an audit. Some even apply to criminal proceedings. For instance, prior to

discussions with EPA, the original audit laws of Utah, Texas and Michigan applied to criminal proceedings or violations.

3. The report also overstates the rigor required under many state laws for a practice to be considered an environmental audit to which privilege and immunity attaches. Often, even the most cursory of compliance evaluations qualifies for both privilege and immunity.

4. Contrary to the report, audit privilege laws did not require entities to disclose violations in order to obtain the privilege. Companies can use a privilege to conceal information from regulators and the public permanently, including information on the cause of violations, the environmental harm resulting from violations, and the steps needed to prevent recurrence. Furthermore some audit privilege laws do note even require actual correction of the violation for privilege to apply. Such privilege flies in the face of the public's right to know about environmental noncompliance in their communities.

5. The description of the National Conference of State Legislatures (NCSL) study of states' audit laws (page 40) should include a statement that NCSL will identify six states that have not passed audit privilege and immunity legislation nor have audit policies to serve as a control group for the study.

See comment 11.

V. Amnesty Laws and Programs

1. The report needs to distinguish between amnesty laws that eliminate the discretion of a regulatory agency to impose a penalty for violations from a program under which the regulatory agency adopts a particular approach to the exercise of its discretion.

2. The state amnesty programs described in the report appear to be the latter and seem to be targeted to the compliance problems of particular (mostly small) businesses while the laws about which EPA has raised concerns apply to all businesses, big and small, and eliminate the discretion of the state to tailor its strategy to the compliance needs and resources of a particular sector. The report should clarify these issues.

See comment 12.

VI. "Mixed Messages" from EPA

1. The report offers a series of opinions and impressions from states about alleged "inconsistent" approaches and messages from EPA about the appropriate use of alternative compliance strategies. The report fails to recognize the complexity associated with implementing a multi-faceted program that is not limited exclusively to either enforcement or compliance assistance. The report should acknowledge the difficulty associated with integrating traditional compliance monitoring and enforcement actions with compliance assistance and incentive approaches, doing so in a multi-layered federal-state system, with a set of organizations that are highly decentralized.

2. Since 1994, EPA has been implementing and operating a national enforcement and compliance assurance program that consists of four elements: compliance assistance efforts; compliance incentive policies and programs; compliance monitoring (through inspections, investigations, etc.); and enforcement actions. EPA has policies on the use of each of these elements. Some state programs have been moving toward this combination of elements. The challenge confronting both EPA and the States is how to integrate these elements into an effective and coordinated program to achieve maximum compliance with environmental requirements.

3. Integrating these elements cannot be reduced to a simple rule (e.g."assistance first, enforcement as a last resort") or a resource formula (e.g., 60% to enforcement, 40% to assistance). Instead, these elements need to be applied based on a factual analysis of noncompliance patterns and environmental problems and on the need to maintain an enforcement presence which provides a general deterrent to violation of environmental law.

4. EPA believes, and has stated repeatedly, that a strong enforcement presence which creates a credible deterrent is an indispensable element of an integrated program that utilizes the full range of tools to improve compliance and protect the environment. The tensions between EPA and the States are over the extent to which enforcement is valued and used in state programs, and the creation and use by states of assistance, incentive, and amnesty approaches which actually reduce the motivation to comply and/or impede legal authorities which deter violations.

5. The report should acknowledge that the concern about EPA's message is not so much that it is inconsistent, but that EPA's emphasis on the need to use enforcement to address serious noncompliance is a message with which many states disagree.

See comment 13.

VII. EPA Measurement Efforts

1. While pointing out more than once in the report that OECA's 1999 Performance Plan contains output goals, it inexplicably fails to mention other OECA efforts that have yielded concrete results toward an enhanced set of performance measures. For more than three years, OECA has been collecting and using outcome data to measure the results being achieved by completed enforcement cases. Through its National Performance Measures Strategy, OECA has identified and begun implementation of seven outcome measures (including statistically-valid compliance rates). The Measures Strategy has also moved EPA toward a process for measuring its contribution to the achievement of environmental and human health objectives in the Agency's Strategic Plan.

2. The report should point out that EPA has dedicated significant resources to its effort to implement an enhanced set of measures. Briefings about the measures and their implementation have been held in all EPA regional offices, work groups with regional and headquarters staff and managers have been formed and are developing definitions and information collection processes for individual measures, more than $300,000 is being awarded for contractor and consultant

support for certain measures, pilot projects to test measures in three to five regions are being developed, and several states are working with EPA to collaborate on development of measures or conduct pilot projects (Florida, New York, Texas, Colorado, Washington, Oregon, and South Carolina are the states which have begun to work with EPA.) Finally, long-term system modernization work in the main federal data systems is being planned and designed to accommodate new pieces of data needed to measure program performance.

4. While moving toward greater use of outcome measures, EPA does, in fact, intend to continue using certain output measures as part of its enhanced system of performance measures. We will measure outputs for monitoring compliance, enforcing the law, providing assistance and information, and building capacity. For monitoring and enforcement, we believe it is important to track and analyze outputs as a measure of deterrence presence in the regulated universe. Further, we believe that the Government Performance and Results Act (GPRA) is meant to provide Congress and the public with a way to evaluate the relationship between the activities of a program and the results it obtains, so that government can adjust its program to achieve the highest level of performance.

5. The report may also need to note that in conducting the extensive public meetings held as part of the Measures Strategy, EPA learned that output measures are valued by a variety of important stakeholders. In addition to environmental groups and environmental justice advocates who wanted to know how many enforcement actions EPA produces each year, representatives of Office of Management and Budget, the Inspector General, and GAO urged OECA not to abandon output measures as we place more emphasis on outcome measures. In the words of EPA's OMB budget examiner, EPA should not give up output measures until we have other measures in place which are "equally as clear and powerful."

See comment 14.

VIII. State Measurement Efforts

1. While failing to recognize fully the OECA measurement efforts and taking a somewhat critical approach to them, the report takes a very charitable view of state efforts to grapple with the technical and other problems which make outcome measurement such a challenge. But states also need to be held accountable for some of the difficulty in moving toward cooperative approaches to measuring the performance of enforcement and compliance assurance programs.

2. In working with the Environmental Council of States (ECOS) Compliance Committee to develop National Environmental Performance Partnerships core performance measures for state enforcement and compliance assurance programs in June 1997, OECA was told by Mark Coleman, the Commissioner of the Oklahoma Department of Environmental Quality and the Chairman of the ECOS Compliance Committee that states saw such programs as a "tool, not a goal" and, as such, it would not be appropriate to have performance measures for these programs.

To quote Mr. Coleman's letter of June 5, 1997 to OECA:

> "... we are absolutely committed to the language in the Joint Statement which specifies that permitting, inspections and enforcement actions must be defined as 'reporting requirements' and can't be defined as 'core program output measures.' Our position has consistently been that enforcement, like permitting and inspection, is a tool that is used to drive changes in the environment, but is not a measure of environmental improvement, and thus is not a core measure."

This statement simultaneously signals a failure to recognize the importance of enforcement and compliance assurance programs as a distinct and integral part of an environmental protection program; dismisses a range of useful output and outcome measures which fall short of measuring "environmental improvement"; and ignores the fact that it is possible to measure outcomes (e.g., pollutant reductions) that are directly attributable to enforcement and compliance assurance activities.

2. The result of the ECOS position was a compromise in which the enforcement and compliance assurance measures were labeled "accountability measures." The set of eight accountability measures (four output measures supported by continued state reporting into existing national systems, four outcome measures for which states were asked to provide any existing data they had developed) has been in use for one round of Performance Partnership Agreements (PPAs). States have largely ignored the outcome measures and failed to provide EPA existing data about measures such as results of compliance assistance initiatives.

3. During state round table meetings OECA held as part of the National Performance Measures Strategy in June 1997, a group of participating states developed a "statement of commonality" to provide feedback about performance measures for enforcement and compliance assurance programs. In their statement, they said that "states do not believe that enforcement can or should be separated from all other tools and measured independently."

4. The report needs to put state efforts to measure enforcement and compliance assurance results in perspective. Individual states (cited in your report) have made attempts to measure outcomes of specific compliance assistance programs. Florida has developed a powerful set of measures for its Department of Environmental Protection as a whole. A number of states have expressed interest in moving toward statistically valid compliance rates. But the evidence suggests strongly that no individual state or set of states combined has done as much as EPA to develop and implement a comprehensive set of performance measures for enforcement and compliance assurance. In fact, as described above, the States as a whole have resisted efforts to make progress on measuring such programs.

See comment 15.

IX. Burden Reduction

1. The report takes a simplistic view of the difficulty of reducing information collection burden. The dilemma that EPA and the States face is to balance the continuing need for data about outputs and source-specific compliance and the need to develop data to support measures which quantify or otherwise characterize outcomes and environmental quality. There seems to be an assumption in the report that burden reduction will be achieved by replacing output and source-specific data with ambient condition data. Further, we must also be cognizant of the continuing need for output data as an element of the fiscal and program accountability required for management of the various environmental grant programs to the States.

2. The prudent approach for States and EPA on this matter is to use the current period to: 1) develop, test and use outcome and environmental quality measures; 2) determine which output measures are useful in assessing how activities contributed to achievement of outcomes and changes in environmental quality; and 3) then establish the information reporting and collection requirements for a set of measures that uses the most effective combination of outputs, outcomes, and environmental indicators. The current period should be used as a transition to a more effective set of measures supported by a well-defined set of data. This transition is beginning in the efforts of EPA and States to move toward outcome measures, but there is much work to be done by all parties to develop and establish the set of measures which will serve as the basis for improved information reporting and collection practices.

See comment 16

X. Recommendations

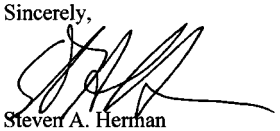
1. The report focusses almost all of its attention on defining issues, problems, and challenges while devoting very little of its attention to recommendations which would address those challenges in an effective manner. In its current form, the report is a lost opportunity to advance ideas, promote successful practices, identify and expand common ground between EPA and States, and serve as a catalyst for progress.

2. GAO should consider recommendations in the following areas: 1) Reiterate the need for strong enforcement as the foundation for integrated programs that use alternative compliance strategies; 2) Reiterate the need to use enforcement to provide a level playing field and eliminate unfair economic advantages of noncompliance; 3) Identify the common elements or effective features of successful efforts to measure compliance assistance results or outcomes, and urge that these elements be used more frequently by EPA and the States; 4) Commend the Florida DEP approach to developing statistically valid compliance rates and encourage others to explore it as way of moving more quickly to develop this crucial outcome measure; 5) Commend the EPA approach of using open, collaborative consultations with stakeholders when developing alternative compliance strategies and new approaches to measurement; 6) Endorse the idea that enforcement and compliance assurance programs warrant development and implementation of a distinct set of performance measures; and 7) Address specifically what output and outcome measures make sense for measuring results of enforcement and compliance assurance programs,

and suggest ways that States and EPA can move toward a more collaborative approach to developing and implementing these measures.

Our comments reflect our view that the draft report has some significant shortcomings, about which we have very serious concerns. In preparing your final report, I hope you will consider our comments and make revisions as appropriate. As mentioned in the beginning of this letter, this subject is an important one to EPA and the States. The final report can and should make an important contribution to addressing the challenges of EPA and State efforts to focus enforcement programs on results.

Sincerely,



Steven A. Herman
Assistant Administrator

The following are GAO's comments on the Environmental Protection Agency's (EPA) letter dated April 28, 1998. The comments are organized in the order of the major sections of EPA's letter.

GAO's Comments

Section I. General Concerns

1. EPA's statements about GAO's acceptance of "unchallenged assumptions" do not reflect our purpose in including this information. The statements are presented not as statements of fact, but as the rationale that state officials offered in explaining why they were pursuing alternative approaches to supplement their traditional enforcement programs. The state officials noted, for example, that compliance among large sources had improved as a result of the considerable enforcement effort that had been directed toward them and that additional environmental improvements could be obtained through a variety of methods to bring smaller businesses and sources into compliance. We would note that similar opinions were in fact offered by EPA enforcement staff. Finally, some of the passages cited in EPA's letter were paraphrased in a manner that made them appear more sweeping than they were as presented in the draft report. For example, EPA's letter quoted the draft report as stating that "conventional enforcement approaches are ineffective with small facilities." The actual passage stated that "State officials consistently told us that conventional enforcement approaches were often ineffective with these smaller facilities."

2. EPA's statements about our reliance on "impressions and opinions" do not accurately convey the basis for the report's findings about inconsistent messages and uneven implementation by different EPA offices. As our report points out, the problem of inconsistent implementation was cited by EPA's own Office of Administration and Resource Management, which in December 1996 identified complaints by EPA regional staff that "they had received mixed messages about the relative priority of enforcement and compliance assurance," and that the problem had resulted in "inconsistent approaches across [EPA regional offices] on how to best balance enforcement and compliance assurance efforts." The fact that EPA did not solve the problem 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. The uniformly output-oriented enforcement component of EPA's GPRA Performance Plan is also inconsistent with the

agency's expressed desire to use a combination of output and results-oriented measures.

3. This report was intended to provide empirical information about 10 states' experiences with alternative compliance strategies and EPA's response to these efforts. As such, we did not reiterate our acknowledgement of the value of enforcement in achieving compliance through deterrence. Furthermore, the report does not contradict past GAO statements about the importance of enforcement in deterring violations of environmental laws. Nevertheless, the report did explicitly convey EPA's position on this issue. For example, it cited the position of EPA's Assistant Administrator for Enforcement and Compliance Assurance that enforcement is the mechanism that makes compliance assistance work, deters future violations, and ensures a level playing field for those who comply. The draft executive summary had noted EPA's position that "the emphasis on inspections and enforcement action is necessary to deter noncompliance and prevent violators from gaining economic advantage by violating environmental laws." We nonetheless added language offered by EPA to further expand on the importance the agency attaches to the deterrence value of an effective enforcement program.

4. The draft report discussed the role of federal law in establishing enforcement requirements and noted that states are expected to follow these requirements in implementing their enforcement programs. It also described the basic requirements of RCRA, the Clean Air Act, and the Clean Water Act and the statutory criteria for delegating these programs to the states—including requirements that states have in place enforcement and penalty provisions consistent with these federal statutes. We did add language to clarify the legal basis for EPA's position on a number of issues discussed in the report, such as the agency's concerns about the states' various audit privilege and immunity laws. We acknowledged EPA's stated position, for example, that some of these laws hamper the states' ability to comply with statutory enforcement requirements by restricting their ability to obtain penalties and injunctive relief and to obtain information about a facility's compliance status.

5. The draft report devoted several pages crediting EPA's efforts to establish sector-specific compliance assistance centers, develop policies that give incentives to the regulated community to comply with environmental laws, and develop and implement its environmental auditing policy. The draft also recognized the agency's related initiatives that, while not focused specifically on providing compliance assistance,

are intended to offer participants the opportunity to experiment with innovative ways to make compliance more efficient and effective (e.g., Common Sense Initiative, Project XL, Environmental Leadership Program). We added language to further convey EPA's role in developing alternative compliance strategies and in assisting the states in their own efforts to develop such strategies.

6. The draft report fairly described EPA's efforts in developing and implementing enhanced performance measures. In particular, the draft noted that the agency had "spent considerable time and energy in developing its National Performance Measures Strategy" and that "its influence may extend to state enforcement." The draft also credited the agency with seeking "broad involvement by states and other stakeholders in developing the strategy." In addition, the report cited other initiatives, such as the National Environmental Performance Partnership System, as further encouraging use of performance measures. Nonetheless, we added language that EPA suggested to further explain the agency's commitment of resources to this effort.

7. The report's recommendations are intended to address two major issues identified: (1) the difficulties experienced by states in developing results-oriented measures and (2) the inconsistency with which different EPA entities are implementing the agency's policies on the use of enforcement and other compliance tools. The first recommendation essentially asks EPA to follow through on its stated commitment to develop measures pursuant to its National Performance Measures Strategy and to do so in a manner that will assist interested states in developing their own measurements. We did modify the recommendation, as EPA suggested, to (1) reinforce the value of disseminating information among the states on effective practices and successful efforts to measure programs' results and (2) reflect that EPA should work collaboratively with states in developing the measures.

The second recommendation reflects our conclusion that the problems of inconsistent implementation identified in the report require the attention of the agency's top management because it has overall responsibility for directing and coordinating the activities of the different EPA organizational units with enforcement responsibility, including OECA, program offices, the Office of General Counsel, and the regions. Admittedly, the task of resolving the inconsistent implementation discussed in the report would still be a difficult task. Nonetheless, we believe that this level of management attention to the issue will move things in the right direction.

We also added language to this recommendation designed to encourage EPA's various offices with enforcement responsibility to more systematically coordinate their negotiations with, and oversight of, state agencies. We believe this effort would help to alleviate the problem cited by many state officials that they are often given conflicting information or direction by different EPA offices.

We believe that EPA's suggested recommendations on "the types or mix of measures needed for enforcement and compliance assurance programs" were not appropriate for this report. In this connection, the letter itself points out that integrating these elements "cannot be reduced to a simple rule . . . or a resource formula (e.g., 60% to enforcement, 40% to assistance)."

Section II. EPA Implementation of Alternative Compliance Strategies

8. As noted above under Section I ("General Concerns"), point #5, the draft report presented considerable discussion acknowledging EPA's efforts to develop and implement alternative compliance strategies. In connection with the third point raised by Section II of EPA's letter—that we should have mentioned EPA's use of a collaborative process involving other stakeholders—the draft report cited EPA's use of a collaborative process in developing the National Performance Measures Strategy, noting that the agency had "sought broad involvement by states and other stakeholders in developing [this] strategy." As requested by EPA, the published report includes additional recognition of stakeholder involvement in the agency's other initiatives.

Section III. Recognizing the Value of Deterrence

9. As noted above under Section I ("General Concerns"), point #3, while we do not believe it appropriate to use this report to reiterate our acknowledgement of the value of enforcement in achieving compliance through deterrence, we emphasize that nothing in the report contradicts GAO's past statements about the importance of enforcement in deterring violations of environmental laws or of "leveling the playing field" among regulated companies and facilities. While the draft report had reflected EPA's position on these issues, we added language suggested by EPA to describe why it feels so strongly about the value of deterrence.

In connection with EPA's specific comment in point #2 of this section that the report does not acknowledge that the "specific and general deterrent

effect achieved through enforcement actions" motivates participation in alternative enforcement strategies. It was not our intent to imply that enforcement and conventional regulatory approaches are incapable of producing results, and we revised the passage cited to avoid any such implication.

Section IV. Auditing Laws

10. We revised our draft report to reflect EPA's legal concerns about audit privilege and immunity laws, currently in chapter 3, in other parts of the report as appropriate. The draft report set forth the general characteristics of states' audit privilege and immunity laws without describing in detail their myriad provisions. However, in the light of EPA's comments, we have added language to make clear that some audit privilege laws protect not only audit findings, but also other information generated by an audit. We also (1) reflected the fact that some audit laws do not require that the audit be comprehensive in order for the privilege or immunity to apply and (2) clarified that audit immunity laws, but not audit privilege laws, generally require disclosure and correction of the violation in order to obtain the privilege or immunity. The information EPA provided on the National Conference of State Legislatures study has been included in the report.

Section V. Amnesty Laws and Programs

11. Chapter 3 of the draft report discussed EPA's concern that some state amnesty laws may undercut state enforcement authority. It cited EPA's specific concern that Washington's amnesty law unacceptably restricted the state from assessing a penalty for the time in which a facility is in violation and impermissibly increased the state's burden of proof in establishing violations. This section of the draft report also noted that EPA recently launched a review of states' amnesty laws to determine if they might undercut states' enforcement authority and serve as an impediment to the delegation of federal environmental programs to the states.

Section VI. "Mixed Messages" from EPA

12. See our response to Section I above (General Concerns), point #2, which discusses the basis for our conclusions about inconsistent messages and uneven implementation by different EPA offices with enforcement and compliance assurance responsibilities. In addition, this section of the EPA letter raises several additional points, including the following:

- The letter states that the report should acknowledge the difficulty associated with integrating traditional enforcement approaches with compliance assistance/incentive approaches "in a multi-layered federal-state system, with a set of organizations that are highly decentralized." We agree with this suggestion and have added language pointing to the inherent difficulty in ensuring consistency in the light of EPA's decentralized structure and the diversity among the state organizations with which the agency deals. We would observe, however, that the EPA request for this revision appears to us as an acknowledgement that the problem of inconsistency still exists.
- The letter states that the concern about EPA's message is not so much that the message is inconsistent, but that EPA's approach to enforcement is one with which many states disagree. We firmly believe that our findings do reveal inconsistency, but it is worth clarifying that the inconsistency is not one of the message articulated by enforcement management, but one of implementation by the various EPA offices charged with carrying that message out. We revised language in the draft report to clarify this distinction.

Section VII. EPA Measurement Efforts

13. The points raised in this section generally (1) request greater acknowledgement of EPA's efforts to develop performance measures and (2) defend the agency's continued use of output measures:

- As noted above under Section I ("General Concerns"), point #6, the draft report had given EPA considerable credit for its progress under its measures strategy. This section of EPA's letter further states that the agency had already developed seven outcome measures (including statistically valid compliance rates). We have acknowledged the additional progress. However, the agency should then indicate when this progress will be reflected in the measures contained in the enforcement section of its GPRA annual performance plan, which, as our draft report notes, is currently focused entirely on output measures.
- We agree that EPA will continue to need output data for the reasons cited in this section. We would add that the agency should complement this reliance on output measures with an increasing reliance on outcome measures and environmental indicators. As we stated in our report, we believe progress in this direction can be made through aggressive pursuit by EPA of its National Performance Measures Strategy.

Section VIII. State Measurement Efforts

14. Our review was not intended to resolve a debate between EPA and "the states as a whole" on fundamental policy issues about the appropriate role of enforcement in promoting greater compliance and environmental protection. Rather, as requested, we examined the practices of 10 states (among the acknowledged leaders in testing alternative compliance strategies) to provide information on (1) what alternative compliance strategies the states were practicing, (2) whether and how they were measuring the effectiveness of these strategies, and (3) how EPA had responded to their efforts. The product of this effort is intended to suggest ways in which EPA and the states can work together more effectively to achieve the developing common goal of state compliance strategies that increasingly focus on results. We agree with EPA that it is important to recognize the diversity among the states in capability and orientation, and to recognize that the rate of progress in developing results-oriented compliance strategies (and the appropriate mix of compliance tools) may vary from state to state.

Section IX. Burden Reduction

15. We believe the report more than adequately reflects the reporting burden dilemma faced by EPA and the states. Of particular note, the report in no way reflects a view that output measures and source-specific data should be replaced with ambient condition data. It does, however, reflect a view repeated by many state officials—and acknowledged by senior EPA officials—that adding new measures to existing ones poses legitimate concerns for state officials about a reporting burden. The report cites EPA's efforts to deal with the problem, noting that their effectiveness remains to be seen.

Section X. Recommendations

16. See our response above under Section I ("General Concerns"), point #7, which explains the rationale for the recommendations contained in this report. We believe that some of the additional suggestions offered by EPA in this section were not appropriate to include as formal recommendations. However, we did include the information in some of the suggestions elsewhere in the draft report. For example, EPA suggested that we commend the Florida Department of Environmental Protection for its measurement efforts. The draft report acknowledged Florida's considerable efforts in developing statistically valid compliance rates and EPA's open, stakeholder approach in pursuing its National Performance Measures Strategy. On the other hand, we did not believe it appropriate to

prescribe specifically what output and outcome measures should be used by EPA and the states (EPA's seventh suggested recommendation in this section) or to "reiterate" opinions about (1) the need for strong enforcement as a foundation for programs that use alternative compliance strategies and (2) the need to use enforcement to provide a level playing field and eliminate the economic advantages of noncompliance (suggested recommendations one and two).

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