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Federal Facilities' Compliance With the
Clean Water Act

Statement of
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Before the
Environmental Restoration Panel
Committee on Armed Services
House of Representatives



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Mr. Chairman and Members of the Panel:

Thank you for the opportunity to be here today to discuss our report on federal facilities' compliance with the Clean Water Act.¹ A major source of water pollution is discharge from municipal sewage and industrial treatment plants. The Environmental Protection Agency (EPA), through its National Pollutant Discharge Elimination System (NPDES) permit program, is responsible for regulating and reducing the discharge of pollutants from these sources. The federal government, as well as local governments and private entities, owns and operates facilities discharging both sewage and industrial waste.

Convinced that the federal government needs to set a good example of compliance with environmental laws and regulations, Congressmen George Miller, Chairman, Subcommittee on Water and Power Resources, House Committee on Interior and Insular Affairs, and Vic Fazio asked us to assess, among other things,

- major federal facilities' compliance with priority requirements of the pollutant discharge elimination program and
- EPA and state oversight and enforcement of these facilities' compliance.

In summary, we found that major federal facilities' rate of noncompliance with priority program requirements is twice that of nonfederal industrial facilities.² We believe that a fundamental barrier to compliance has been the low priority that federal facilities have assigned to compliance with pollution discharge

¹Water Pollution: Stronger Enforcement Needed to Improve Compliance at Federal Facilities (GAO/RCED-89-13, Dec. 27, 1988).

²We defined noncompliance with priority NPDES requirements to include facilities in significant noncompliance (as defined by EPA) and those under enforcement orders.

requirements. Taking enforcement actions on significant violations within prescribed timeframes is essential to raising the priority that federal facilities place on compliance. EPA and state regulators, however, have rarely done so. Furthermore, EPA's enforcement and oversight of state enforcement have been hindered by ineffective management controls for identifying and following up on cases of untimely enforcement.

BACKGROUND

The Federal Water Pollution Control Act Amendments of 1972 established the NPDES program to help restore and maintain the quality of the nation's water. Under this program, any facilities discharging pollutants into the nation's waters, such as industrial and municipal wastewater treatment facilities, are required to have permits that limit the types and amounts of pollutants that they may discharge. Permitted facilities are classified as major or minor on the basis of the risk they may pose to the environment. Major permittees have the greatest potential to affect water quality. Of the nearly 64,000 active permits issued to federal, industrial, and municipal facilities as of March 1988, about 7,000 were classified as major. We evaluated the compliance of only major federal permittees.

During our review, there were 150 major federal permittees. One hundred and seven of these facilities (71 percent) were Department of Defense (DOD) installations. Most of the remaining facilities were owned by the Departments of Interior and Energy and the Tennessee Valley Authority. Most of these 150 facilities (at least 62 percent) are industrial wastewater treatment plants; the remaining facilities treat domestic sewage.

The NPDES program requires EPA (and those states that have been delegated program responsibility) to issue permits and monitor and enforce compliance. Facility operators monitor their own

operations and submit periodic reports on compliance with their permit to their regulating authority (either EPA or the delegated state water authority). The regulators review the facilities' monitoring reports, track their compliance, and inspect the facilities at least once a year.

Instances of severe and chronic violations of pollutant limits or reporting requirements are called "significant" noncompliance. The regulators are required to take timely and appropriate enforcement actions before facilities have been in significant noncompliance for 2 consecutive quarters. In the case of federal facilities, EPA meets this criterion by issuing negotiated compliance agreements. In the case of nonfederal facilities, EPA uses unilateral administrative orders and law suits. The difference in EPA's enforcement of federal and nonfederal facilities is based on the Department of Justice's position that one executive branch agency may not issue unilateral orders to or sue another executive branch agency. On the other hand, delegated states can use the same enforcement procedures against federal facilities that they use against nonfederal facilities.

FEDERAL FACILITIES ARE NOT
FULLY COMPLYING WITH
PRIORITY NPDES REQUIREMENTS

On average, we found that 20 percent (30) of the 150 major federal facilities were not in compliance with priority program requirements during any given quarter of fiscal years 1986 and 1987. This rate was twice the noncompliance rate for nonfederal industrial facilities. Furthermore, over 40 percent of all violating federal facilities were noncompliant for a year or longer. Among federal agencies with major pollutant discharge permits, the Navy and the Department of Energy had the largest percentage of facilities in noncompliance for at least 1 quarter during the 2-year period--65 percent and 57 percent respectively--

while the Army had the most facilities in noncompliance (24 of their 51 facilities).

With respect to the 107 DOD facilities, we found that on average about 22 percent of these facilities were not in compliance with priority program requirements during any given quarter as compared to 15 percent for non-DOD federal facilities. More specifically,

- 50 DOD facilities (47 percent) were noncompliant at least 1 quarter, and 23 of these facilities were noncompliant for a year or longer,
- among the noncompliant facilities, Air Force facilities had the longest period of noncompliance during the 2-year period of our review, spending 13 months in noncompliance on average, and
- the noncompliant Army and Navy facilities spent, on average, more than 3 quarters in noncompliance.

Federal Budget and Procurement
Processes Cause Delays in
Correcting Some Violations

Regulators and agency officials identified the federal budget process and procurement procedures as the most important underlying factors affecting federal facilities' compliance. They noted that the budget process can slow the approval of funding needed for projects requiring large expenditures and thus delay facilities' return to compliance. Likewise, they said that procedures for acquiring parts or hiring contractors can delay the completion of corrective activities. Other factors that they cited included the age and complexity of federal facilities and staffing problems.

For example, funding limitations lengthened the time it took Anniston Army Depot to return to compliance. In September 1985, Anniston officials requested \$991,000 for equipment repairs and additions to address ongoing permit violations of cyanide and cadmium limits. They requested a type of funding used to pay for high priority projects that need to be completed quickly and have not been included in the regular budget submittal. Nevertheless, even with this expedited funding process, the request was not approved until February 1987, and the upgrade was not completed until December 1987. Normally, it would have taken 5 years to receive military construction funds for this project. Consequently, even though the facility saved over 3-1/2 years by requesting special funds, it still remained in noncompliance for violations of its cyanide and cadmium limits for all of fiscal years 1986 and 1987.

While there were cases such as Anniston that required large expenditures and lengthy approval procedures, data that we collected from federal facilities in two EPA regions and from seven case studies indicated that these were factors in only about one-quarter of the corrective actions undertaken at those facilities. At each case study facility, the majority of corrective actions required either no additional expenditure of funds or expenditure of facility operating funds only. For example, at three of our DOD case studies--the Anniston Army Depot, Norfolk Naval Shipyard, and Beale Air Force Base--approximately 90 percent of the corrective actions for NPDES violations fell into these two categories.

Priority Given Environmental
Compliance Can Mitigate
Factors Affecting Compliance

We found that a more fundamental barrier to achieving compliance was the low priority that federal facilities gave to correcting violations of environmental problems. Environmental

compliance must generally compete with the mission goals of every agency since it is not directly linked with the missions of most federal agencies operating treatment facilities. Agency officials at the treatment facility level noted that competing demands for funds always necessitate ranking various facility goals and that the priority of environmental compliance varies according to the availability of and demand for facility resources.

Regulators and agency and facility officials agreed that raising the priority given to environmental compliance can help to override the effect of other underlying factors. When the priority of environmental compliance is raised, factors that inhibit the facilities' ability to comply can be lessened in a number of ways. For example, the budget process can become less of a problem when approval of needed projects is speeded up or special abbreviated procedures are used and procurement may proceed more quickly. More importantly, regulators and federal agency officials agreed that enforcement actions against noncompliant federal facilities resulted in increased priority of environmental compliance and prompt corrective actions.

An example from Norfolk Naval Shipyard serves to illustrate the effect of enforcement on priority. Virginia officials referred the shipyard to the state attorney general for civil action in March 1987, after 9 months of significant noncompliance for violations that included copper, zinc, and chromium discharges due in part to malfunctioning equipment. Virginia State officials told us that the enforcement action increased the priority that Norfolk officials gave to environmental compliance. Prompted by the legal suit, the shipyard corrected all significant violations within 4 months.

REGULATORS ARE NOT ALWAYS
TAKING TIMELY ENFORCEMENT ACTIONS

Regulators and federal agency officials agreed that enforcement actions against noncompliant federal facilities resulted in increased priority of environmental compliance and prompt corrective actions. Nevertheless, we found that during the 2-year review period, EPA and state regulators did not take timely enforcement actions against federal facilities in 31 of 46 cases that required enforcement. These included 24 untimely DOD cases. In 8 of the 46 cases the regulators took timely enforcement actions, and in the remaining 7 cases, we were unable to determine if the actions taken were timely. On average, the 31 untimely enforcement cases remained in significant noncompliance for a year without a formal enforcement action. Delegated states had jurisdiction over 18 untimely enforcement cases; the other 13 were under EPA's jurisdiction.

NPDES program policy requires regulators to issue formal enforcement actions before facilities are listed in significant noncompliance for the same violation in 2 consecutive quarters. To meet this requirement, delegated states must issue formal administrative orders or take judicial action, and EPA regional offices must negotiate compliance agreements with noncompliant federal facilities.³ To meet the timeliness criterion, regulators must take a formal action (or negotiate a compliance agreement) by the end of the eighth month (2 consecutive quarters and a 2-month reporting time lag) that a facility is reported in significant noncompliance.

³Although a compliance agreement is not technically a formal enforcement action, EPA treats it as such for the purpose of determining whether EPA regions have issued timely enforcement actions against federal facilities.

On average, the 24 DOD cases with untimely enforcement remained in significant noncompliance for the same violation(s) for 11 months. By comparison, the 7 non-DOD cases remained in significant noncompliance for 13 months.

EPA regional offices provided us several reasons for not taking timely enforcement action on the 13 cases under their jurisdiction. These reasons included waiting to reissue or modify the permits and waiting for facilities to obtain funding for equipment repairs and improvements. For example, Fort Polk was reported in significant noncompliance with all of its permit limits for all of fiscal years 1986 and 1987. EPA's Dallas regional office reissued Fort Polk's permit in April 1986. According to an EPA official, Fort Polk officials wanted the permit requirements modified to allow them to discharge at their then current level so they would no longer be in significant noncompliance. EPA staff waited for the facility to officially request a permit modification, which it had not done as of May 1988. According to the timely enforcement criterion, EPA's Dallas office should have taken a formal enforcement action by the end of May 1986. After issuing two warning letters in fiscal years 1986 and 1987, EPA finally took a formal enforcement action against the facility in October 1987, nearly a year and a half after it should have under the timely enforcement requirement.

State regulators also gave various reasons for not taking timely enforcement actions. Theirs included waiting to determine the causes of violations, waiting for plant construction to correct the violations, state administrative procedures that made it difficult to meet the enforcement criteria, and a work backlog of enforcement cases. For example, the Tobyhanna Army Depot in Pennsylvania was reported in significant noncompliance from October 1985 to September 1986 for violations of its cadmium limits. On the basis of EPA's timely enforcement criterion, Pennsylvania should have issued a formal enforcement action by the end of May

1986. According to a state official, the state took no formal action because the treatment plant at Tobyhanna was new and was experiencing "debugging" problems. The facility eventually returned to compliance on its own by the end of September 1986, after 12 months of significant noncompliance.

EPA Regional Office
Oversight of State
Enforcement Is Insufficient

When states do not take timely enforcement actions, EPA regions have the authority to initiate enforcement. During fiscal years 1986 and 1987, however, EPA did not exercise that authority for the 18 untimely enforcement cases in delegated states. According to EPA regional officials, they do not take enforcement actions against federal facilities in such cases because they have limited tools to use against federal facilities--negotiated compliance agreements--compared with some states, which can issue unilateral administrative orders or sue the facilities.

When a delegated state has not taken timely enforcement action, the Clean Water Act authorizes EPA (1) to notify the state of the requirement to issue a formal enforcement action and (2) to take formal action against the noncompliant facility if the state has not begun action within 30 days. However, we found no record of any EPA region issuing such notices for federal facilities in delegated states during fiscal years 1986 and 1987. Likewise, we found no instances in which EPA took a formal enforcement action because of a delegated state's inaction during this time.

In both EPA's Philadelphia and Atlanta regional offices -- which had oversight responsibility for 10 cases of untimely state enforcement -- EPA officials told us that they do not issue such notices to states for federal facilities, although they do so for cases involving nonfederal facilities. They explained that they do

not issue these notices because they cannot issue administrative orders or sue the facilities if states fail to enforce. Although EPA regions negotiate compliance agreements with noncompliant federal facilities in nondelegated states to meet their criterion for timely formal enforcement, they do not use them in delegated states when the state does not take timely enforcement. We believe that EPA should use compliance agreements in a consistent manner when enforcing requirements at federal facilities in nondelegated states and in delegated states that do not issue timely enforcement actions.

EPA Headquarters Oversight
of Enforcement Timeliness
Is Insufficient

In addition, we found that EPA headquarters is not adequately overseeing the regions' enforcement at federal facilities in nondelegated states or regional oversight of state enforcement. The agency oversees the timeliness of enforcement actions by regional offices and delegated states through a quarterly report called the exceptions list. EPA regions report untimely enforcement cases to EPA headquarters through this list. However, EPA headquarters did not effectively use the list to follow up on the 31 untimely enforcement cases we identified. Specifically, EPA's activities were characterized by (1) untimely review of the exceptions list, (2) infrequent follow-up actions, (3) lack of criteria for making consistent follow-up decisions, and (4) underreporting. For example,

- EPA headquarters takes no action when facilities are reported on the list for 1 quarter. Action is considered only if facilities remain on the list for 2 or more quarters. This means that EPA headquarters does not consider follow-up actions until a facility has been in significant

noncompliance for a year or longer (2 quarters in significant noncompliance and at least 2 additional quarters on the exceptions list).

- Even after facilities appear on the list for a second quarter, headquarters takes follow-up actions infrequently. We found 15 cases that were reported on the exceptions list for 2 or more quarters. EPA headquarters made follow-up phone calls for only six of these cases. Follow-up consisted of initial telephone calls to the regions by staff from the enforcement branch and in some cases additional telephone calls by the head of the enforcement branch.

- EPA headquarters staff have no criteria to consistently follow up on facilities appearing on the exceptions list. According to an EPA official, follow-up decisions are made on a "case-by-case" basis, and no standard criteria are used. No written guidelines or specific requirements for follow-up actions exist. As a result, according to EPA staff, follow-up action based on the exceptions list is not necessarily consistent every quarter.

- Only 23 of the 31 untimely enforcement cases that occurred during fiscal years 1986 and 1987 were reported on the exceptions list. The eight unreported cases remained in significant noncompliance for 3 consecutive quarters on average. Three of these cases remained in noncompliance for a year or more. EPA headquarters officials told us that they were unaware of the omissions and that while they do not verify the

accuracy of the information on the exceptions list, they plan to spot-check its accuracy in the future.

SUMMARY AND
RECOMMENDATIONS

Timely enforcement action on significant NPDES permit violations is essential to raising the low priority that federal facilities give to compliance and improving their compliance record. However, despite an overall poor compliance record by federal facilities, EPA and state regulators are not taking timely enforcement actions to return them to compliance. Untimely enforcement actions have contributed to some federal facilities' violating their permits and polluting the nation's waters for years.

EPA headquarters oversight of enforcement timeliness for federal facilities is not as effective as it could be. Management controls do not include criteria for consistently following up on facilities that have not been issued an enforcement order, allowing some facilities to remain in significant noncompliance up to 2 years without being issued an enforcement order. Furthermore, EPA headquarters controls do not include verification of the accuracy and completeness of information received from regions on facilities that have not been issued timely enforcement actions.

In addition, regional staffs have been reluctant to take follow-up action when states do not obtain timely enforcement actions at federal facilities. During the 2-year period covered by our review, no EPA region used available follow-up mechanisms-- that is, issuing notices to delegated states and compliance agreements to federal facilities. EPA headquarters needs to improve its oversight of regional and delegated state enforcement activities at federal facilities.

To ensure that NPDES regulators take timely and appropriate enforcement actions, we recommended in our report that the Administrator of EPA take several actions to strengthen the NPDES program's enforcement function. These included (1) establishing criteria to consistently follow up on federal facilities that have not received a timely enforcement action and (2) obtaining compliance agreements for federal facilities in delegated states when they have not issued timely enforcement actions.

Mr. Chairman, this concludes my prepared statement. I would be glad to respond to any questions that you or members of the Panel might have.