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Enforcement In The 1990's Project

Recommendations Of The Analytical Workgroups

ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE ANALYTICAL WORKGROUPS

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A MESSAGE FROM THE ASSISTANT ADMINISTRATOR

The decade of the 1990's represents a new era in environmental enforcement as the Federal, State and local governments and citizen's groups better combine their resources to vigorously enforce our nation's environmental laws. The strategic planning reflected in the Enforcement Four-Year Strategic Plan set themes and directions for the Agency's enforcement program. The framework of the Plan, however, must be implemented by specific, targeted initiatives and activities in order to succeed. With this and other objectives in mind, Deputy Administrator Habicht and I directed the Agency's Enforcement Management Council to develop specific ideas for improving the enforcement process. Drawing on the talents of Office of Enforcement staff, other EPA personnel in Headquarters and the Regions, and, in some instances, non-EPA personnel, the six workgroups participating in the effort have produced reports, collected in the Enforcement in the 1990's Project, which complement the earlier Strategic Plan. Environmental experts from both inside and outside EPA were given the opportunity to comment on the draft reports before they were made final. These final reports provide concrete, thoughtful recommendations for action in six discrete areas: measures of success, the State/Federal relationship, environmental rulemaking, innovative enforcement techniques, compliance incentives, and the role of local governments.

The 1990's Project reports establish an extremely ambitious and exciting agenda that points in new, and sometimes wholly untried, directions. They identify numerous action steps for EPA staff at Headquarters and in the Regions, the States, the local governments, and citizens. We have begun to implement many of these, and more will be undertaken before the end of the current fiscal year. The Enforcement in the 1990's Project provides valuable, practical ideas whose implementation will strengthen significantly the Agency's enforcement program as we enter the 1990's.

James M. Strock

James M. Strock
Assistant Administrator
for Enforcement

Introduction

The dawning of the decade of the 1990's saw an outpouring of renewed concern about our environment. Symbolically, Earth Day 1990 signaled the emergence of a second environmental era at least as vital and energetic as the previous one which had begun twenty years earlier. Concomitantly, enforcement has re-emerged as a leading tool of environmental policy in recent years.

In the Fall of 1989, the Agency's Enforcement Management Council undertook to develop specific ideas for improving the enforcement process, with particular emphasis upon strengthening the intergovernmental relationship and reviewing the EPA enforcement management systems to better assess the environmental impact of the enforcement program. In order to capture a wide range of experiences and perspectives, the Council surveyed approximately 50 environmental officials inside and outside the Agency. In addition to the two subjects identified initially, the interviewees solicited their opinions about other enforcement issues that warranted analysis. Ultimately, the Council identified the six discrete enforcement topics which are addressed in the workgroup reports of the Enforcement in the 1990's Project.

The workgroup reports are founded on certain guiding principles:

(1) The relationships between the Agency and the states, and between the Agency and local governments, represent the key to more effective enforcement activity in the future; the development and strengthening of these relationships are essential to the improvement of enforcement performance.

(2) For purposes of targeting cases, the management system should be sufficiently flexible to encourage multi-media cases, and generally those cases which are environmentally significant (i.e., risk-driven).

(3) As a means of measurement, and as a medium of communication to the public, the counting of cases, referrals, convictions, penalties, and the like, which constitutes an established and important feature of the enforcement process, should be supplemented by alternative measurements which reflect tangible improvements in environmental quality.

(4) Environmental regulations should be developed in such a way that their enforceability is assured from the outset; greater involvement of enforcement attorneys in the rulemaking process will provide adequate representation of law enforcement interests.

(5) Positive behavior modification in the regulated community and more effective enforcement can be promoted by the use of innovative approaches, different incentives and leveraging actions.

Effective implementation of the 1990's Project recommendations will require a substantial commitment by the Agency, the States, the local governments and citizens. Nevertheless these measures can significantly improve an already strong enforcement program and promote a better environment.

EDITOR'S NOTE

The six Workgroup reports were prepared in the Spring of 1990. Subsequently, some revisions were made in response to certain of the comments received in the internal and limited external comment processes. In addition, the first report, "Managing for Environmental Protection," has been revised to incorporate significant pertinent findings and recommendations produced by the Multi-Media Enforcement Workgroup and reviewed by the Enforcement Management Council in the Spring of 1991. Otherwise, the reports appear essentially as they were written more than a year ago. Nevertheless, a number of the Workgroup recommendations are already being, or have already been, implemented; for this reason, and because of other supervening events, some statements and assumptions contained in the reports may no longer be accurate. The historic integrity of the documents as written, however, has been preserved.

Finally, I wish to thank Pete Rosenberg for his thoughtful editorial assistance and Robert Banks for his tireless help in the formatting of the 1990's Project for publication.

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ENFORCEMENT IN THE 1990's PROJECT

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ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE ENVIRONMENTAL MANAGEMENT/ENVIRONMENTAL MEASURES WORKGROUP

I. Goals and Objectives of the Project

An important issue among close observers of the country's environmental enforcement system is whether the most important environmental matters are being investigated and prosecuted. While there is broad agreement that a significant level of casework is occurring, some question whether the current federal and state enforcement efforts are focused upon the right mix of cases. Others wonder whether the Agency can adequately demonstrate that the federal/state enforcement effort truly furthers the country's environmental protection goals.

As one would hope, management systems drive behavior. Through direct and subtle messages they instruct managers what is and is not valued behavior. A perception exists that current management systems fail to provide adequate incentives for managers to initiate complex cases which may have the greatest environmental payoff.

We recognize that fundamental differences exist between the Agency's respective regulatory programs. These arise from the diverse nature of the regulated communities, differences in statutory and regulatory schemes, and differences in program history and culture. Beyond this, each program has developed an approach to establishing priorities, modeling workload, allocating resources, and rewarding performance which reflects the best thinking of those closest to the program.

In recommending that each program review certain aspects of their workload models or significant non–compliance definitions, we are not prejudging the result of such review. In some programs, the review may reinforce the wisdom and effectiveness of the current approach. In others, it may be the catalyst for innovation which helps make good programs even better.

The Environmental Management/Measures Workgroup identified a number of areas in which specific actions could be taken to address the issues. The objective of the effort was to evaluate the impact of existing management systems upon inspection targeting and case selection decisions made in the field. One goal was to examine whether current systems encourage state and regional managers to allocate investigative and prosecutorial resources to those matters with the greatest environmental payoff. The Workgroup also sought to identify opportunities to enhance the ability of regional and HQ managers to communicate the environmental significance of our enforcement efforts to the regulated community and to the American public.

II. Process Leading to Recommendations

The process for developing recommendations varied in the respective areas. In general, however, the recommendations were developed after consultation with the HQ compliance programs and other interested HQ [OPPE'S Environmental Results Branch] and regional offices.

Where it seemed instructive to do so, we also contacted other administrative [Administrative Office of the Federal Courts], regulatory [SEC, OSHA], and law enforcement [DEA, FBI, ATF] agencies to gain insight into their management practices. EPA's overall enforcement management system employs many elements common to these other systems. A description of the key features of the management systems utilized by these organizations is contained in Attachment A. Differences in the scope and rigor of regulatory programs, differing cultures and expectations regarding enforcement within the organization, differing levels and modes of oversight from Congress, and differing expectations from the public explain some of the dissimilarities between EPA's systems and those of these other agencies.

Nevertheless, many similarities exist. EPA relies heavily upon periodic on–site reviews to complement its quantitative approach to resource allocation and performance review. We consult with and value input from groups outside of EPA. Our resource allocation models contain a number of workload factors which have the effect of weighting more heavily certain types of complex cases. An example is the system of pricing factors utilized in the Office of Regional Counsel (ORC) workload model. Pricing credits may be allowed for multi–facility or cross–media matters, consent decree compliance proceedings, and significant amendments to complaints and decrees. Credit adjustments are determined by mutual agreement of the Regional Counsel, the appropriate Enforcement Counsel, and the Office of Compliance Analysis and Program Operations (OCAPO).

III. Overview of Recommendations

Our Workgroup focused its energies on recommendations designed to increase the emphasis on the qualitative benefits of enforcement actions. The Workgroup recommendations fall into six distinct areas:

Environmental Initiatives: Dedicating resources to special projects of unique environmental programmatic significance to complement the base enforcement program in each medium;

Management Incentives to Bring Cross Program/Cross Media Cases and Other Environmentally Significant Cases: Creating positive incentives to pursue the most significant environmental litigation;

Definition of "Significant Non-Compliance" (SNC): Evaluating each program's SNC definitions to ensure that they direct attention toward appropriate matters;

Use of Enforcement Initiatives: Developing environmental enforcement initiatives and incorporating within those initiatives measures of the environmental impact of enforcement actions;

Effective Communication: Enhancing our ability to communicate the qualitative environmental significance of individual enforcement cases, enforcement initiatives, or the body of enforcement casework; and

Improved Environmental Measures: Identifying program specific measures of the contribution enforcement actions make toward environmental improvement.

IV. Recommendations

A. PROVIDE REGIONS AND STATES WITH RESOURCES TO PURSUE UNIQUE ENVIRONMENTAL ENFORCEMENT INITIATIVES.

1. The Agency should allocate its enforcement resources so that some of the resources in any program are allocated to traditional enforcement workload factors. The remaining factors would be allocated specifically to special initiatives (e.g., targeted industry) or regional environmental priorities (e.g., geographical initiatives).

There is concern that the current Agency management systems [STARS, workload models] and priority setting tools [SNC definitions] discourage regional initiative and innovation, and deter the prosecution of multi-media cases, and cases that are the most environmentally significant. The management systems were designed as output-driven means of encouraging and tracking the volume of inspection and enforcement activities. While these management systems have served an important function in restoring the flow of enforcement casework, some feel that they are not sensitive to qualitative distinctions between cases and the variance in resources needed to manage multi-media cases and the most environmentally significant cases. Others perceive that they may not allow sufficient flexibility for a Region to focus concerted attention upon specialized local problems in an industry, geographic area, or program. Such cases often demand investments not provided for in our resource allocation models.

In designing such multi-media and "environmentally targeted" projects, senior Regional management must balance the demands upon Regional Counsel and program resources. An efficient process for documenting, reviewing and approving specific projects would need to be established for securing concurrence of

the Region, the HQ compliance programs affected by a proposal, and OE in such projects. HQ must be careful not to over–manage this process. The projects should be managed within the Region with periodic oversight by the HQ office.

Each Region would negotiate quantitative STARS commitments which reflect the revised level of resources available for base program monitoring and enforcement activities (i. e., outputs commensurate with funding at the reduced resource level).

2. STARS should be used to track the objective outputs associated with these "environmentally targeted" projects. Descriptions of the administrative and environmental progress of such projects would be described quarterly in the Regional Administrator's narrative memorandum accompanying the Regional Administrator's STARS submission.

The STARS management system was designed to expand managers' ability to negotiate performance targets which reflect their views of what ought to be accomplished in their programs. It encourages up–front planning, provides for qualitative narratives to augment quantitative reporting, and promotes negotiation in establishing the level of program activity outputs. Indeed, STARS fully complements the objectives of this set–aside program.

Furthermore, the Deputy Administrator has endorsed the recommendation of the Multi–Media Enforcement Workgroup that EPA provide balance in the STARS system, with its current single media focus, by introducing a limited number of new STARS measures to ascertain the Agency's success in multi–media compliance and enforcement activities. These cross program/multi–media STARS measures will be introduced in FY 1992.

STARS is the primary method for tracking the progress of "environmentally targeted" projects. The RAs can identify the qualitative value and environmental impact of these projects in the memorandum accompanying the RA's STARS submission.

3. To assure that these priority projects are undertaken, the Deputy Administrator should continue to direct the implementation of this process.

Since this proposal impacts upon the responsibilities of the Headquarters program offices and the Regions, and is covered by the Agency's management and accountability systems, it is a matter which OE should not (and cannot) unilaterally initiate. The Administrator's September 25, 1990, announcement of the enforcement goal for multi–media enforcement effectively established this approach as Agency policy. The Deputy Administrator issued implementing guidance to the Regions and the program offices applicable to FY 1991, and established an Agency–wide Multi–Media Enforcement Workgroup chaired by OE,

to develop policy guidance for future years.

The Workgroup's final report, which was issued after consultation with the Deputy Administrator and the Enforcement Management Council, presented a broader goal for application beginning in FY 1992: To integrate a cross-program/multi-media perspective into all stages of environmental enforcement planning and decision-making. Its stated purpose was to achieve additional public health and environmental protection results, deterrence, and efficiency which could not be achieved by traditional single media approaches alone. The Workgroup recognized six objectives associated with the revised goal:

(1) To institutionalize processes that provide enforcement staff with comprehensive information about facility compliance early enough in the enforcement process to facilitate informed, efficient targeting and enforcement response;

(2) To consolidate and coordinate cross-program/multi-media inspection plans and targets;

(3) To consolidate or coordinate enforcement actions where cross-program/multi-media violations exist at a given facility or company;

(4) To reduce transaction costs and minimize barriers to comprehensive solutions to environmental problems by, for example,developing training programs that foster a cross-program/multi-media perspective on enforcement;

(5) To seek enforcement settlements which address the broad range of environmental problems posed by the violator and correct underlying pollution and compliance management concerns; and

(6) To develop mechanisms for explaining the cross-program/multi-media goal to the regulated community, evaluating the success of cross-program/multi-media efforts, and communicating the results both internally and externally.

Guidance was also provided on related implementation matters such as counting multi-media cases for external reporting, allocating penalties in settled multi-media cases, cross-program/cross-media enforcement activity planning by Headquarters Program Offices, the evaluation of existing case screening guidance, and the development of an addendum on Multi-Media Enforcement to the Policy Framework on State/EPA Enforcement Agreements.

PROPOSED ACTION: The Regions should implement an integrated cross–program/multi–media perspective into all stages of environmental enforcement planning and decision–making beginning in FY 1992.

B. DEVELOP MANAGEMENT INCENTIVES TO BRING ENVIRONMENTALLY SIGNIFICANT CASES

1. All of the Agency's primary management systems should be reviewed to identify and remove elements which may discourage Regions from bringing the most significant cases.

2. OE should examine and revise as necessary the ORC workload model to provide incentives to initiate and prosecute multi-media cases. As part of this effort, OE should consider whether to utilize a case "tiering" or "weighting" system.

The challenge is to design management systems which implement the vision of the national enforcement strategic plan by providing incentives to encourage the enforcement program it foresees. EPA has long considered whether and how to assign differing resource allocation "weights" to different categories of cases. Prior efforts to devise a specific weighting scheme have given rise to the current ORC resources allocation workload model. This model does not expressly distinguish between the resource demands of major and minor cases. It does, however, contain a number of discriminating workload factors which tend to reflect the demands of more complicated cases. For example, the current model:

- Weights judicial cases more than administrative cases;
- Provides a vehicle for weighting multiple counts within a single referral;
- Provides a vehicle for weighting multi–facility cases greater than single–facility cases; and
- Provides weighted credit for amending an enforcement referral for separate and distinct violations of more than one statute.

The ORC Workload Model should be examined and revised as necessary to provide weighting factors which provide the resources needed to encourage multi–media and the most environmentally significant litigation. Some helpful adjustments have already been proposed for the Model, which is the one most impacted by the increased costs associated with cross–program/multi–media enforcement. After the ORCs have had more experience with these types of cases and associated costs, the Workload Model Workgroup of DRCs should review these adjustments to ensure that proper incentives are being created.

PROPOSED ACTION: Recent revisions to the ORC workload model for cross program/multi–media activities should be evaluated in the Spring of 1992 and any appropriate further revisions considered for FY 1993 implementation.

3. If program workload models become unfrozen, the Deputy Administrator should require each program to review its enforcement workload model, budget and accountability systems and make any changes that are necessary to provide incentives to initiate cross-program/cross-media cases, and those cases which are environmentally most significant.

Upgrading the ORC workload model will have only limited impact upon the behavior we seek to affect. The Regional program divisions make key decisions about which facilities to inspect based upon HQ program guidance and tracking systems like STARS. Because workload models are currently frozen, they are not a significant disincentive to cross–program/cross–media enforcement at this time. However, the Agency's budget and its resource distribution models should be designed to adequately support the planning, development, filing and conduct of cross–program/cross–media enforcement actions, whether the cross program elements are combined in one action or simply coordinated during all or part of the enforcement process. The ORC and program office management systems must work together to establish mutually reinforcing incentives for the Region's technical and legal staffs.

PROPOSED ACTION: Given the current workload model freeze, no action is recommended at this time. If, however, the models become unfrozen at some time in the future, issues related to the cost of cross–program/cross–media enforcement will need to be considered and factored into the models as appropriate.

4. At the end of each fiscal year, the Regional Administrators should provide a narrative analysis of the actions taken to implement the objectives of the Regions' strategic enforcement plans. This analysis should be included in the Regions' STARS memorandum for the fourth quarter.

At the end of each fiscal year, the Regional Administrators should evaluate the Regions' implementation of their strategic enforcement plans with particular emphasis on actions to implement multi–media approaches. The analysis should address the environmental significance and strategic value of the enforcement activity during the fiscal year. OE has provided the criteria and format for this analysis (see Attachment B).

5. At the end of each fiscal year, the Director, Office of Civil Enforcement, assisted by the Enforcement Counsels, should provide a narrative analysis of the manner in which the enforcement actions taken further the strategic enforcement plan with particular emphasis on actions to implement multi-media approaches. Where possible, this analysis should consider the environmental significance and qualitative merit of enforcement actions.

C. ASSURE THE APPROPRIATENESS OF "SIGNIFICANT NON-COMPLIANCE" DEFINITIONS

In designating certain violations to be "significant non–compliance," the Agency seeks to focus management attention and enforcement resources upon compliance problems of particular environmental and/or programmatic significance. Attachment C is a summary of FY 1991 program priorities and the SNC definitions in all environmental enforcement programs for FY 1991. We should continue to seek improvements wherever possible in the extent to which the current SNC definitions focus program activities on environmentally significant matters.

1. OE and the Headquarters compliance programs should establish a consistent view of the role and function that SNC definitions should play in each program. This should take into account the use of SNCs to reflect program priorities, strategic objectives, and the allocation of Federal/State resources.

While the concept of SNC definitions has been with EPA for a number of years, no consistent set of principles has been applied across programs for their use. As the Agency seeks to set clearer enforcement priorities and establish Agency–wide and Region–specific strategic plans which cut across program areas, it becomes essential that SNC definitions reflect the management priorities of each program.

2. The Deputy Administrator should require each program office to review its respective "Significant Non-Compliance" definitions to assure that they identify the most environmentally and programmatically significant behavior and effectively target the allocation of Federal and State enforcement resources.

As resources are stretched to meet increasing demands, SNC definitions must be carefully focused if they are to serve their purpose in priority setting. Each program should annually review the behavior it seeks to impact and refine its SNC definitions consistent with that end.

In view of the Agency's heightened commitment to strategic planning, it is appropriate to ask each program to assure that the SNC definitions established for each program accomplish these goals. Program offices should also review the backlog of cases which have been pending before the State for an excessive period to determine whether patterns of inaction by EPA suggest a need to amend SNCs (i.e., whether the SNC definition is too all–encompassing to be an effective prioritization tool).

PROPOSED ACTION: Working in conjunction with the HQ compliance programs, OE/OCAPO should, through the joint OE/program office Strategic Planning Meeting process, discuss the criteria and guidance needed to guide the review of each program's SNCs. Applying this guidance, each program office should

determine by the end of the third quarter of FY 1992 if amendments are needed to its SNC definitions. Each program should implement appropriate SNC changes by the beginning of FY 1993.

D. DESIGN ENFORCEMENT INITIATIVES WITH ENVIRONMENTAL IMPACTS IN MIND, AND DEVELOP BASELINES AGAINST WHICH TO MEASURE SUCCESS.

1. Focusing initially upon the pilot enforcement projects undertaken by the Regions, the Regions and HQ program offices should design measures of environmental impact. Experience gained through these efforts will enhance the design of future enforcement initiatives.

Enforcement initiatives provide opportunities to set specific environmental objectives and to evaluate the impact of such initiatives. Specific, measurable enforcement objectives should be identified at the inception of the initiatives. Specific means of evaluating the environmental and/or programmatic impact of the project should also be developed at that time.

The set of enforcement initiatives currently being developed may provide a useful laboratory for measuring the environmental benefits of pilots focusing upon a geographic area, a regulatory objective; or a high priority industry.

- Appropriate measures of success for a waterbody enforcement initiative might include surrogates such as quantifiable pollutant loadings, scope or frequency of shellfish closures, scope of "fishable/swimmable" designations, or levels of targeted toxics [PCBs, DDT] in fish/shellfish. Pollutant loadings measure the location, magnitude, type and timing of pollutant discharges. They indicate the pollutant stress placed on a system and the effectiveness of the regulatory program in controlling discharges. There is a good correlation between loadings and water quality, and levels are responsive to enforcement actions as loadings (or loading authorizations are reduced. Shellfish closures measure the degree to which states close off or limit access to shellfish harvesting areas. Because the objective measure used is coliform levels, which respond quickly to changes in loadings, there is a close link to the effectiveness of enforcement activities. "Fishable/swimmable" goals are, like shellfish closures, readily understood by the public, and have an indirect correlation to the success of enforcement. Toxics in fish/shellfish also furnish a potential enforcement measure since, over time, levels of contamination decline as compliance is achieved and maintained.

- Measures of air toxics emission reductions might include reductions in mass balance net loss calculations, or actual reductions in TRI emissions reported in subsequent years.

- Environmental indicators for an industry–specific enforcement initiative may include reduced loadings of fingerprinted contaminants or reduced levels of specific contaminants in fish/shellfish. Used to great effect in the Pretreatment Initiative, demonstrable changes in industry compliance rates may also be useful indicators of the impact of an industry–specific enforcement initiative.

2. Specific attention should be given to the data management and data quality needs of enforcement initiatives. Mechanisms must be in place to gather, maintain and analyze data on appropriate measures of enforcement impacts.

Considerable attention must be given to designing measures for which compared "before" and "after" data can be obtained.

E. DEVELOP ENVIRONMENTAL INDICATORS IN EACH PROGRAM TO MEASURE THE ENVIRONMENTAL IMPACT OF ENFORCEMENT ACTIONS.

1. In cooperation with OE and OPPE's environmental results staff, each program should develop indicators of the environmental impact of its enforcement activities.

Key characteristics of environmental indicators include a basis in sound scientific knowledge, reliance on an adequate data base, and the ability to:

- identify and track environmental progress;
- mark trends in environmental quality in unique geographic areas or eco–systems
- help evaluate program effectiveness;
- target the allocation of program and compliance and enforcement resources; and
- communicate effectively to the public the accomplishment of Agency programs.

2. The program offices should define appropriate measures which reflect the environmental impact of enforcement activities. Two types of indicators which can be implemented now are (1) the amount of pollution or emission reduced, eliminated, or prevented by each enforcement action, and (2) the results of effectiveness studies for enforcement initiatives. OE and OPPE will work closely with the programs in identifying indicators of these types which can be quantified and tracked.

Where these impact measures can be linked directly to enforcement activities, they may be useful tools in describing the environmental contribution of (1) individual enforcement cases, (2) specialized enforcement initiatives, or (3) the aggregate volume of enforcement actions in a given regulatory area.

Identifying indicators of the environmental contribution of a program's enforcement effort is a complicated matter. The indicators must measure true environmental conditions and not levels of administrative activity [e.g., permits issued]. They must be sensitive to the relatively small levels of environmental change likely to be brought about by an individual case or case initiative, but also capable of capturing the large benefit of the deterrence created by the enforcement program. Data on the measures must be scientifically valid and defensible, and cost effective to obtain. In addition, the measures must be understandable [and intuitively communicative] to the public, defining environmental protection in terms that the public cares about [e.g., returning water bodies to fishable/swimmable status]. Finally, because direct measurable benefit may occur substantially after the successful resolution of the enforcement action (where controls must be installed), associating the action with the corresponding benefit requires increased tracking effort, and the communications impact of reporting the environmental result is blunted by the passage of time.

Two basic types of indicators of enforcement activity have been recommended by Agency–wide groups for current implementation. They were identified by the Multi–media Enforcement Workgroup and reviewed by the Enforcement Management Council in the Spring of 1991 and presented to the Environmental Indicators Workshop in July 1991. These measures are as follows:

(1) Amount of pollutant or emission eliminated, prevented or controlled

On a case–by–case basis, the Agency will attempt to quantify the impact of an enforcement action on the amount of pollution released into the environment or controlled to avoid release. This measure would be designed to show the effect of the enforcement activity including pollution prevention and other innovative settlement provisions in bringing a facility from excess levels to allowable levels or better. It is intended that the resulting numbers would be reported as part of a narrative description, rather than in columns on a chart with totals.

(2) Effectiveness studies for enforcement initiatives

The second type of indicator would result from conducting one or two national enforcement effectiveness studies for each program each year. The recent studies of the National Municipal Policy and Lead Phasedown Program (see attachment D) attempt to evaluate the effectiveness of the enforcement strategies employed by EPA and the States using several measures, including: (1) measures of environmental

results and public health benefits associated with reductions in pollutant loadings, and (2) shifts in compliance rates due to enforcement actions. While deterrence was not directly measured, an attempt was made to find an association between enforcement actions and a subsequent decline in the frequency of new violations detected in the regulated community.

It is contemplated that effectiveness studies would also provide the potential vehicle for attempting to quantify the reduction in risk from enforcement actions. Risk reduction would be expressed in lay terms.

The Workgroup also identified another type of indicator for potential future development: measurements against a baseline of pollutants in an ecosystem. Recognizing the additional data needs associated with this indicator, some start-up time will be involved in bringing this approach on line.

PROPOSED ACTION: With respect to identifying environmental indicators of enforcement activities, OE, in coordination with OPPE, should continue to promote the use of these types of indicators by the program offices. Each program should use each of these types of indicators in at least one discrete regulatory activity during FY 1992.

F. ENHANCE THE AGENCY'S ABILITY TO COMMUNICATE ABOUT THE ENVIRONMENTAL CONTRIBUTION OF THE ENFORCEMENT PROGRAM.

1. OE should place emphasis on following detailed guidance recently issued to HQ and regional staff concerning personnel communicating effectively about the environmental contribution of enforcement actions.

OE has recognized that guidance is needed to assist technical and legal staffs in helping those HQ and Regional staff responsible for drafting announcements about enforcement actions. The guidance recently issued by OE's Director of Enforcement Communications is designed to fulfill our objective of better communicating the impact or importance of case-specific or program-wide developments. Adopting a concise and consistent format for all written enforcement communications enables texts prepared for EPA use also to be used for public outreach purposes. The guidance mandates the use of plain English in enforcement communications, and present and explain the formats appropriate for enforcement items used for both internal and external distribution. The guidance also provides procedures to deal with internal and external press organizations.

PROPOSED ACTION: OE should promote the use of the formats and concepts contained in the communication guidance whenever appropriate.

2. Enforcement outreach activities need to become a routine and institutionalized aspect of our casework. Each Region should assure that conscious consideration is given to the communications aspects of each case, and that HQ is apprised early of cases of national significance. OE should also consider making effective communications a part of the performance standard for each ORC and OE supervisor.

Management encouragement to make enforcement communications more effective should continue until it becomes as common to plan the communications aspects of an enforcement action as it is to plan the legal strategy of the case. Each Region should develop a process to assure that a decision regarding communications is made for each judicial or administrative case. The communications strategy for any given case might correctly range from active outreach to passive response to inquiries. OE should examine how to use the Weekly Regional Report or other means to make HQ aware of cases of potential national interest. Incorporating effective communications into the performance standard for each ORC and OE supervisor, manager or executive would assure that adequate attention is focused on the important task of enforcement communications.

PROPOSED ACTION: A standard clause addressing effective enforcement communications should be developed and included in the performance agreements for ORC and OE supervisors, managers and executives.

3. The Enforcement Counsels should be responsible for identifying and communicating to OE's Director of Enforcement Communications, major enforcement stories of interest to the trade press and newsletters in their fields as well as to the national media.

OE's Director of Enforcement Communications maintains liaison with the specialized trade publications, and conducts outreach activities in coordination with HQ and Regional public affairs personnel. The Enforcement Counsels should assist this effort by developing and maintaining active lists of trade press publications, analyses of these publications, coverage and intended audience, and assessments of the relative popularity or value of key trade press publications.

ATTACHMENT A

BRIEF DESCRIPTION OF ENFORCEMENT MANAGEMENT SYSTEMS EMPLOYED BY VARIOUS FEDERAL AGENCIES

The workgroup contacted certain administrative, regulatory, and law enforcement agencies to gain an understanding of their enforcement management systems. A brief description of the systems they use follows:

Occupational Safety and Health Administration. OSHA'S enforcement management system focuses on the number of inspections conducted against a known and almost infinitely large universe. Inspection targets are never met; but the management system stresses flexibility and forgiveness, and not attainment of pre–set objectives. Congressional oversight focuses on the size and nature of the gap between planned and accomplished inspections, and not upon actual enforcement accomplishments.

Securities and Exchange Commission. The SEC stresses and strongly encourages individual entrepreneurial activities leading to the uncovering and prosecution of cases. Each matter proposed for prosecution must come before the full Commission for approval. The number of judicial and administrative enforcement actions brought each year is small by EPA standards [312 in the high year], and substantial top management attention is given to each case. Accordingly, the SEC relies less upon management systems and more upon the personal involvement of top managers in making judgments about the strategic value and programmatic quality of their cases. Regional workload focuses substantially upon issues which are unique to the securities industry in their Region [i.e., oil and gas fraud in Texas; insider trading in NYC; penny stock in Denver]. Performance of program managers is based upon largely subjective evaluations of the extent to which cases being brought are consistent with national priorities, are highly complex, and are of sound legal quality.

Administrative Office of the Federal Courts. Judges maintain and use minute–by–minute time sheets to allocate judicial resources across over 200 different categories of civil and 1160 categories of criminal cases. This data is normalized to provide a relative weighting factor for each category of case. Each year, an analysis is performed of the case docket of each federal district. Multiplying the number of cases by the weighting factor yields the resources needed by each district.

Drug Enforcement Administration. The DEA management system employs two key indicators as bases for classifying a case. These indicators are weighted in descending order of importance to give the investigating office a relative level of credit for each case based on its value against Agency priorities. The first indicator is the drug involved, such as heroin, cocaine, morphine, etc. The second indicator is the level, function or impact of the criminal being investigated, such as a person who operates a laboratory which produces illegal drugs, the head of a criminal

organization which produces or distributes drugs, a financier who provides trafficking funds, or a person who is legally registered to dispense drugs and diverts them to illegal traffic. DEA Headquarters uses these two indicators to assign a weight to each case, based upon descriptive data provided by the field office in case–opening reports. Each year, resources are allocated pursuant to the value of the cases on the docket of that office, its relative level of success in prosecuting last year's cases, and Agency priorities for the coming year.

This process requires detailed definitions of the factors which govern the assigned values, and reserves to DEA Headquarters ultimate weighting judgments. Even with those factors in place, substantial discussion occurs concerning the upgrading or downgrading of cases.

Federal Bureau of Investigation. The FBI's management system relies heavily upon periodic in–person evaluations of each office. They do not apply a weight or value to cases, but instead conduct on–site reviews of each office every two years. These reviews tend to be exhaustive, using information provided by the office being reviewed, as well as interviews with other federal, state or local law enforcement agencies. Based on this information and the number of indictments, convictions and other relevant data, judgments are made about the office's efficiency and effectiveness.

Bureau of Alcohol, Tobacco, and Firearms. Until about seven years ago, the ATF utilized a management system which allocated resources based upon a case–by–case weighting system similar to the mechanism now used by DEA. Weights were assigned depending upon the nature of the contraband, the volume involved and the functions and scope of the operators involved. ATF abandoned the system to eliminate internal disputes. ATF now utilizes a process of periodic field office reviews similar to that employed by the FBI.

ATTACHMENT B

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

SEP 13 1991

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Guidelines for FY 1991 Regional Reports on Implementation of the Administrator's Multi-Media Enforcement Goal

FROM: Edward E. Reich
Acting Assistant Administrator
for Enforcement

TO: Regional Administrators

This memorandum transmits final guidelines for preparing the FY 1991 Regional Multi-Media Enforcement Reports on implementing the Administrator's multi-media enforcement goal (also known as the Transition Plan Report). A draft of the proposed guidelines was sent to you on July 23, 1991, for your review and comment. While several changes have been made to the guidelines in response to your comments, I have generally resisted adding new elements in an effort to limit the reporting burden on the Regions. Although the guidelines were developed to provide direction to the report and to promote some consistency in the Regional submittals, each Region has broad flexibility on how best to characterize their activities and on what additional information they want to provide in their report.

The guidelines for the Regions' FY 1991 Multi-media Enforcement Reports result from the Deputy Administrator's memo of February 19, 1991, entitled "Implementation of the Administrator's Multi-media Enforcement Goal," in which the Deputy Administrator requested that each Region provide an end-of-year report on their efforts to achieve multi-media enforcement. Each Region was given the flexibility to design its own report "to best reflect its progress in addressing each of the categories of multi-media enforcement." The Deputy Administrator's memorandum listed five broad categories of cross-program/multi-media enforcement: enforcement actions deriving from multi-media and cross-program inspections, even where the subsequent enforcement action is single medium;

enforcement actions deriving from multi-media and cross-program initiatives, even if action is single medium; any enforcement action resulting in multi-media and cross-program settlement conditions; multi-media or cross-program enforcement actions; and single medium actions which meet any of the above criteria by virtue of a coordinated effort with State and/or local governments or with other federal agencies.

The Multi-Media Enforcement Workgroup was established to analyze and develop recommendations on multi-media enforcement implementation issues. Among other things, it considered the form and content for the end-of-year reports. The Workgroup supported the need to retain flexibility in designing the Regional reports, but felt that the Office of Enforcement should develop an outline for the reports so that there would be some national consistency in reporting, and so that areas of interest to Headquarters would be covered in the reports. The Workgroup suggested topics that were appropriate for inclusion in the reports.

The guidelines for the end of year report (Attachment A) incorporate the five categories of multi-media enforcement, as well as updates on key items discussed in the FY 1991 Regional Transition Plans for implementing the cross-program, multi-media enforcement goal. The final guidelines also reflect the specific recommendations of the Workgroup.

We received a question on the proposal concerning the appropriate level of detail for the report, including a question on the Enforcement Results section of the report, asking whether the Regions should be providing only their raw numbers of cases, or narrative descriptions of each case, or perhaps narrative descriptions of a few of their more important cases. While we anticipate that Regions will include some numerical/statistical data on their multi-media activities, we do not view the report as primarily statistical. Thus, narrative descriptions of a few of the more significant cases completed or underway would add useful perspective. In any event, our primary interest is in the mechanisms the Region has developed or is developing to support its multi-media enforcement program and its overall experiences to date.

One Region expressed the view that the report "should address the real costs to the Regions of implementing multi-media enforcement." In response to this comment, we added a reference to costs in the guidelines, but are not asking that Regions undertake any specific analysis in preparing their reports. We would, however, be interested in Regional insights on the resource question. In this regard, you may wish to distinguish between the initial start-up costs and projections on what the longer term, ongoing costs might be.

I request that the Regional reports be submitted to me by November 27, 1991. Questions concerning these guidelines can be directed to Jerry Bryan at 260-4140 or Rick Duffy at 260-3130.

Attachment

cc: Assistant Administrators
Deputy Regional Administrators
Regional Counsels
Headquarters Compliance Office Directors

Attachment A

Outline of Topics for the FY 1991 Regional Multi-Media Enforcement Report

1. Overview
   - Impact of multi-media enforcement on Regional enforcement effort
   - Lessons learned from first year's efforts
   - Recommendations for any change to multi-media enforcement approach/future directions

2. Enforcement activities/results/accomplishments
   - Civil judicial, criminal, and administrative enforcement activity involving the following:
     a. Enforcement actions deriving from multi-media and cross-program inspections, even where the subsequent enforcement action is single medium;
     b. Enforcement actions deriving from multi-media and cross-program initiatives, even if action is single medium;
     c. Any enforcement action resulting in multi-media and cross-program settlement conditions;
     d. Consolidated or coordinated multi-media or cross-program enforcement actions
     e. Single medium actions which meet any of the above criteria by virtue of a coordinated effort with State and/or local governments or with other federal agencies.
   - Discussion on the implementation and results of Regional or national cross-program, multi-media initiatives such as geographic, pollutant, or industry or facility type.

3. Institutional adjustments made to stimulate/integrate multi-media approaches
   - Progress on incorporating multi-media inspections (coordinated, consolidated, checklist) into the Region's inspection practices.
   - Case screening
     a. Changes or additional details of case screening process since submission of the Regional Transition Plan. Changes in case screening planned for FY 1992.
     b. Early observations on implementing case screening in Region
   - Organizational or inter-regional coordination changes
   - Barriers to and costs of implementing multi-media approaches/how addressed
   - Other

4. Progress on developing Regional enforcement environmental measures

5. Communications (internally among programs and externally about enforcement actions)
   - Progress in implementing the FY 1991 Enforcement Communication Plan from the Regional Transition Plan (progress on communicating significant enforcement cases to the public, including high-risk cases and those resulting from targeting and other regional initiatives).

ATTACHMENT C

SUMMARY OF FY1991 PROGRAM PRIORITIES AND "SIGNIFICANT NON-COMPLIANCE" DEFINITIONS IN ALL ENVIRONMENTAL ENFORCEMENT PROGRAMS FOR FY1991

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NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM [NPDES]

Program Priorities

- Assuring Municipal Compliance, by expanding upon the success of the National Municipal Policy by focusing upon continuing compliance by POTWs

- Pretreatment, and continued enforcement against POTWs which fail to implement all aspects of their approved Pretreatment programs. This will include:

  - POTW actions to assure compliance by Industrial Users EPA or State enforcement actions against both the POTW and IU, focusing upon IUs which violate categorical Standards and where the POTW has interference or Pass-through problems;

  - Coordination between pretreatment and POTW programs;

  - Enforcement of whole effluent toxicity limitations;

  - Criminal Enforcement: Above areas, plus significant unpermitted discharges, knowing or negligent introduction into a POTW of toxic pollutants/HWs, fraudulent DMR reporting; and

  - Timely and appropriate enforcement.

Significant Non-Compliance Definitions [By Major Permittees]

- Violation of interim or final effluent limits of a defined duration and magnitude

- Violation of construction schedules

- Violation of reporting requirements
  Non-Compliance with pretreatment implementation standards

- Violation of a compliance schedule [short term/non-construction]

WETLANDS PROTECTION PROGRAM

Program Priority

- Unpermitted Discharges

Significant Non-Compliance Definitions: None

PUBLIC WATER SUPPLY SYSTEM PROGRAM [PWSS]

Program Priorities

- Compliance with National Primary Drinking Water Regulations re microbiological, turbidity, total trihalomethane, nitrate, VOC
- Consideration of degree of contamination, risk population, risk acuteness

Significant Non-Compliance Definitions

- Violation of microbiological or turbidity MCL for four months per year
- Violation of TTHM monitoring or reporting rule for 12 months
- Exceeding MCL for TTHM, for two or more annual averages
- Failing to monitor for, or report any regulated inorganic, organic [except TTHM] or radiological contaminant
- Violation of compliance schedule
- Major violation of monitoring or reporting requirement

UNDERGROUND INJECTION CONTROL PROGRAM

Program Priorities

- Violations at deep HW and commercial disposal wells [Class I]
- Use of banned shallow disposal wells [Class IV]
- Hazardous Waste restrictions under HSWA;

- Criminal: false reporting, fraud, injections following prohibitions

Significant Non–Compliance Definitions

- Any violation by owner/operator of Class I, Class IV well;
- Following violations by owner/operator of Class II, III, V well:
  - Unauthorized Injection;
  - Operation without mechanical integrity;
  - Excessive injection pressure;
  - Unauthorized plugging and abandonment;
  - Violation of Federal/State enforcement order, consent agreement, judgment; or
  - Falsification of permit application, report, data request.

SUPERFUND PROGRAM

Program Priorities

- Integrating enforcement and response programs by:
  - Starting PRP searches early;
  - Issuing information requests and follow–up;
  - Negotiating RI/FSs and RD/RAs where PRPs exist;
  - Using negotiating deadlines to push PRP settlements;
  - Issuing AOs to legally liable/financially viable PRPs;
  - Referring cases to DOJ if PRPs do not comply with AOs; and
  - Lodging CDs if settlements on PRP cleanup is reached.
- Priorities for cost recovery include:
  - Remedial actions and removal actions over $200,000;
  - Cases with statute of limitations problems; and
  - Better identification and documentation of costs.

Significant Non–Compliance Definitions: None

HAZARDOUS WASTE MANAGEMENT PROGRAM [RCRA]

Program Priorities

- Imminent hazard threats to health or environment

- Compliance by commercial TSD to further "off–site" policy to maintain CERCLA–eligible treatment/disposal capacity

- Land disposal: surface impoundments, or in non–compliance with corrective action, post–closure, groundwater monitoring requirements

- TSD facilities in violation of land disposal, corrective action requirements

- Federal facility HW management

Significant Non–Compliance Definitions

- Actual exposure [substantial likelihood] to HW

- Chronic or recalcitrant violator

- Deviation from permit, order, decree by missing deadlines, failing to perform work

- Violation of RCRA or regulatory requirement

UNDERGROUND STORAGE TANK PROGRAM [UST]

Program Priorities

- Closure or upgrading of existing tanks

- Installation and use of release detection systems

- Enforcement corrective actions or use of LUST Trust Fund for eligible corrective actions

Significant Non–Compliance Definitions: None

PESTICIDES PROGRAM [FIFRA]

Program Priorities

- Compliance with major pesticide regulatory actions: Cancellations, suspensions under Sec. 6; RUP designations; Sec. 3(c)(2)(b) suspensions

- Enforcement of revised worker protection standards

Significant Non–Compliance Definitions

- Any violation warranting penalty response
- Further defined in State–by–State EPA enforcement agreement

TOXIC SUBSTANCES CONTROL PROGRAM [TSCA]

Program Priorities

- Asbestos control: EPA/State compliance program plans under AHERA; asbestos in schools inspections; compliance with ban/phase–out requirements; decentralization to States
- PCB enforcement: compliance by permitted disposal sites; intermediate handlers/brokers; monitoring of cleanup of natural gas pipelines; compliance by PCB manifesting, storage, disposal sites. Development of State enforcement infrastructures
- Title III TRI [Sec 313]: Assure required and accurate reporting; action against non–reporters; late reporters; blatant errors
- Criminal: fraudulent reporters

Significant Non–Compliance Definitions

- Major PCB Violations: disposal; manufacturing; processing; distribution; use; storage; recordkeeping; marking
- PCB contamination of surface water, groundwater, food, feeds
- Test rule violations
- PMN violations
- Importation: Failure to certify compliance /not subject; falsification of certification report
- Recordkeeping: Failure to submit, falsification, incomplete reporting
- Any AHERA violation warranting administrative action

AIR PROGRAM [CAA]

Program Priorities

- Reduce air toxics through compliance with NESHAPS [benzene, asbestos, arsenic, etc.], using contractor listing and other innovative techniques
- Control toxic emissions from automobiles and fuels by enforcing lead phase–down rules, fuel switching, price margin for unleaded gas, truth–in–fuel–additives claims
- Enforce volatility rules at all levels: refiners thru distributors, transporters, retail outlets
- Car/light–duty truck and heavy–duty truck diesel particulate standards; using audits and recalls
- Control of VOCs through NAAQs for ozone and CO
- Review State SIPs for enforceability; ability to achieve attainment for ozone
- Federal motor vehicle standards; pre–production certification, assembly line testing, selective audits, recalls; in–use operation and maintenance programs
- Specialized SO2 problems thru SIPs to fix stack height/continuous emissions monitoring shortcomings

Significant Non–Compliance Definitions

- Violation of any NESHAP [except asbestos]
- Violation of new source requirement: NS performance standards, PSD requirements; NSR permits
- Class A source in violation of SIP in non–attainment area
- Violation of Federal CD or AO
- Class A federal facility violation

ATTACHMENT D

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

OFFICE OF ENFORCEMENT

DEC 6 1990

MEMORANDUM

SUBJECT: Final Summary Report: Enforcement Effectiveness Case Studies

FROM: James M. Strock
Assistant Administrator

TO: Steering Committee on the State/Federal Enforcement Relationship
Deputy Regional Administrators
Associate Enforcement Counsels
OE Office Directors

Attached is a summary report of two case studies of the effectiveness of enforcement prepared by the Compliance Policy and Planning Branch, Office of Enforcement (OE), in cooperation with EPA's Surface Water and Mobile Sources Programs for the Steering Committee on the State/Federal Enforcement Relationship. The cases selected were the National Municipal Policy (NMP) and the Lead Phasedown Program. I want to thank the Steering Committee for their comments at each stage in this project. The comments helped us to sharpen our analysis and conclusions, and clarify the methods we used to estimate environmental results.

These case studies are a significant step in ongoing efforts to evaluate the effectiveness of enforcement initiatives. The summary shows that enforcement programs can achieve significant environmental benefits, and the Lead Phasedown study suggests that a strong enforcement program did create deterrence reflected in a sharp decline in the frequency of new violations after initiation of the auditing program.

Purpose of the Case Studies

The two case studies attempt to evaluate the effectiveness of EPA's and the States' enforcement strategies using several measures, including: 1) measures of environmental results and public health benefits associated with reductions in pollutant loadings; and 2) shifts in compliance rates due to enforcement action(s). While deterrence was not directly measured in either case, the authors did look for an association between enforcement

actions and a subsequent decline in the frequency of new violations detected in the regulated community.

Success in Measuring Effectiveness

Agreeing on measures of effectiveness was the first step in the project. While the initial case study design envisioned drawing association over time among environmental results, compliance rates, inspections, enforcement actions, penalty assessments, and key outreach or policy actions, the final measures differed from the original proposal because of the limitations in data and methods of analysis described below. We were, however, able to quantify several results from each program.

Lead Phasedown - The Office of Mobile Sources (OMS):

1. Quantified the health effects and monetary benefits associated with the reduction in lead levels resulting from enforcement actions; and

2. Showed a link between enforcement actions and a subsequent decline in the frequency of new violations, thereby revealing a possible indicator of deterrence.

National Municipal Policy - The Office of Water Enforcement and Permits (OWEP):

1. Monitored the increase in compliance rates among major publicly-owned sewage treatment plants as a result of enforcement actions; and

2. Estimated the reductions in pollutant loadings associated with the shift of facilities in the NMP universe to secondary and/or advanced treatment.

Limitations on Measuring Effectiveness

Despite these successes, there were significant limitations and difficulties in preparing these studies:

1. Enforcement Actions Were Easier to Quantify than Environmental Results.

Trends in enforcement actions were easier to quantify than were trends in environmental results because: a) counting and recording enforcement activities over time is inherently less complex than monitoring changes in the environment, and b) the Compliance Programs have developed the necessary information systems. However, analysis of enforcement trends was possible only when historical enforcement data had been archived in an accessible way.

2. Reductions in Pollutant Loadings Were Easier to Quantify than Health and Environmental Benefits.

In order to estimate health and environmental benefits, it was necessary to calculate reductions in pollutant loadings associated with enforcement actions. In both cases it was easier to estimate pollutant loadings than to quantify health and environmental benefits. However, estimating pollutant reductions was in itself a challenge.

Because of the banking and trading of lead rights and associated reporting by refiners, OMS was able to estimate the lead rights that were retired as a result of direct enforcement. These data, which were included in an enforcement database and in case files, were aggregated for this study. Then, OMS quantified health benefits using cost/benefit methods developed specifically for lead, over several years, by EPA's Office of Policy Analysis (OPA) for the Agency's regulatory impact analysis (1985). Without this prior work by OPA, OMS would not have been able to quantify the health benefits of direct enforcement.

In contrast to Lead Phasedown, it was more difficult to estimate reductions in pollutant loadings and associated water quality benefits from the NMP. OWEP roughly estimated the reductions in toxic and conventional pollutant loadings associated with the shift in treatment levels by the NMP universe. Also, OWEP estimated the number of stream miles affected (not meeting applicable water quality standards) by the discharges of a subset of NMP facilities -- those facilities required to install advanced wastewater treatment (AWT). However, OWEP could not assert that water quality standards were met as a result of NMP without a case-by-case analysis of the stream segment where the facility is located. While improvements in water quality may have resulted from the installation of advanced wastewater treatment by 43% of the NMP facilities, other point and non-point sources of pollution might have prevented water quality from meeting standards. These sources were not addressed by the NMP.

Future Directions

Together with the "Enforcement in the 1990s: Environmental Management/Environmental Measures Study," these case studies suggest areas for future work by the Office of Enforcement, the Office of Policy Analysis and the Program Offices on environmental results of enforcement.

1. Environmental Results of Direct Enforcement

Additional efforts to quantify the environmental results of direct enforcement are important. Steps include:

a) Working with regulatory programs from the outset on reporting requirements and ways to analyze environmental results;
b) Developing ways to quantify pollutant loadings reduced by direct enforcement; and
c) Encouraging the Program Offices and OPA to develop methods of quantifying and, if feasible, monetizing the health and environmental benefits of pollutant reductions.

2. Deterrence and the "Total Benefits" of Enforcement

An important benefit of enforcement is deterrence which is very difficult to measure. However, if we only look at direct enforcement, we fail to capture the results of deterrence and the "total benefits" of enforcement. We will continue to work with the Steering Committee as we implement our Action Plan for the Enforcement in the 1990's Project with respect to finding improved measures of enforcement success. These actions include reviews of how other federal agencies measure deterrence. These steps, combined with those outlined above in item # 1 will enable us to work toward understanding the "total benefits" of enforcement.

3. Communications Strategy

The Steering Committee has noted that others will be interested in this report. We are developing a communications strategy for your review that will include publication of the report for other audiences such as Congress, State organizations and the interested public. The final plan will be ready by January 31, 1991.

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If you have any general questions, please call Susan Herrod or Becky Barclay on FTS or (202) 382-7550. For questions on the individual case studies, please contact the respective authors, John Holley on FTS 382-2635 or Dave Lyons on FTS 475-8310.

Attachment
cc: Edward Reich
Christian Holmes
OCAPO Managers

SUMMARY REPORT:

ENFORCEMENT EFFECTIVENESS CASE STUDIES

November 1990

Compliance Policy and Planning Branch
Office of Compliance Analysis and Program Operations
Office of Enforcement

ACKNOWLEDGEMENTS

This report was a summary of case studies performed by the Field Operations and Support Division (Office of Mobile Sources) and the Enforcement Division (Office of Water Enforcement and Permits). Susan Herrod (Office of Enforcement) was the principal author of the summary report. Assistants for the summary report and authors of the case studies were the following:

Field Operations and Support Division
Lead Phasedown Case Study — John Holley, Phyllis Anderson

Water Enforcement Division
National Municipal Policy Case Study — Chuck Evans, Ted Holly, Dave Lyons

Office of Compliance Analysis and Program Operations — Rebecca A. Barclay

SUMMARY

Enforcement is a powerful tool in the effort to achieve compliance with environmental regulations. The direct results of enforcement are valuable because of the benefits obtained from bringing violators into compliance, e.g., the mitigation of health risks, the reduction in pollution to ground, air, and water media, and in some instances, the restoration of damages to the environment. Further, and perhaps more significant, are the potential benefits from the deterrence that an enforcement presence fosters.

Difficulty arises when we try to measure the total benefits achieved from direct enforcement and deterrence. The results achieved by bringing violators into compliance can serve as a measure of the direct benefits. However, the benefits of deterring potential violators remain elusive due to the presence of other forces which influence compliance.

The purpose of this paper is to estimate the total environmental benefits and the factors contributing to the success of two enforcement initiatives - the Lead Phasedown Program and the National Municipal Policy (NMP). Although enforcement approaches in these cases varied because of extremely different circumstances, the studies show the same results: enforcement was successful in producing significant environmental benefits. In the Lead Phasedown Program, the health benefits from enforcement actions alone totalled at least 40 million dollars. The benefits resulting from the National Municipal Policy, due to direct enforcement, were the delivery of at-least secondary wastewater treatment to about 108 million people.

INTRODUCTION

Enforcement consists of actions intended to compel people to comply and to create a desire to avoid the consequences of noncompliance. Beyond restoring the violator to compliance, enforcement influences compliant behavior through the deterrent effect it creates. This deterrent effect depends on a potential violator's expectation that noncompliance will be detected and that undesirable consequences will follow, such as economic harm, adverse publicity or imprisonment. Much of what may be described as "voluntary" compliance is actually a result of this deterrent effect.

EPA has defined four necessary elements to achieve high compliance levels. They are credible likelihood of detection, a swift and sure response to the violation, appropriate consequences for violators, and a perception of the first three elements. The absence of a strong enforcement presence created by these elements risks losing not only the benefits from enforcement but also the benefits of "voluntary" compliance resulting from deterrence. The following case studies illustrate the effect of two very different, comprehensive compliance and enforcement

strategies. The benefits attributed to enforcement and its deterrent effects are significant and show the important role for enforcement in these two regulatory programs.

LEAD PHASEDOWN PROGRAM

BACKGROUND

Evidence of the ill effects of lead exposure on human health provided the motivation for regulatory efforts aimed at reducing the lead content of gasoline. As knowledge of the severity of the negative effects of lead grew, the regulations became more stringent.

In October 1979, gasoline lead was first controlled by limiting the average concentration permitted in a refinery's total gasoline pool. A re-evaluation of the regulations in October 1982 resulted in tighter standards and the creation of a trading system to improve the allocation of lead usage among refineries. Refineries which required less lead than the standard were permitted to sell their excess to other less technologically advanced refineries.

In 1985, the standard for lead was tightened further and a system of banking was introduced. Under the banking provisions a refiner was allowed to store in a bank account the difference between the standard and the larger of either actual lead usage or .10 gplg (grams per leaded gallon). The banked lead rights were available for use or transfer to other refiners or importers during any future quarter through 1987.

Compliance monitoring was conducted using the self-reporting system, both by checking the internal consistency of reports and employing an external check provided by reports from manufacturers of lead additives. The first full-scale audits of refiners began near the end of 1986.

RESULTS

Enforcement actions taken by EPA resulted in the removal of 150 million grams of lead from gasoline production in the form of lead rights that were retired by the end of 1987.[2] This reduction represents 40 million dollars worth of direct health bene-

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[1]Comprehensive enforcement and compliance strategies include not only traditional enforcement activities (e.g., effective compliance monitoring and enforcement response), but also compliance promotion, such as training and technical assistance, public information materials, and media coverage.

[2]The Office of Mobile Sources compiled this figure from a database of enforcement cases and from individual case files during the Summer 1988.

fits (1983 dollars).[3] For an estimate of health benefits for children and adults, see Table I on the following page.[4]

Although we do not have a method of measuring non-compliance that would have otherwise occurred without direct enforcement, a reasonable assumption is that the deterrent effect accounts for an additional increment of reduction in lead emissions. This amount is somewhere between 150 million grams and the total reduction in lead emissions of 380 billion grams attributed to the entire Lead Phasedown Program. (Figure 1 shows the estimated lead use had there been no Lead Phasedown Program.)

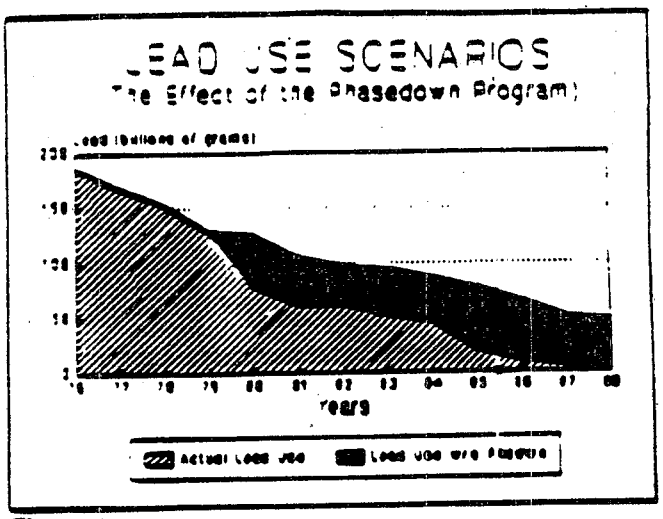

Figure 1

To illustrate the potential impact of deterrence, we have estimated the health benefits that would result if we assume that two more violations were prevented for every violation that EPA detected. This level of deterrence would have generated a further reduction in lead use of 300 million grams beyond the 150 million grams from direct enforcement for a total of 450 million grams attributable to enforcement. With this twofold increase in the lead rights retired, there is an equal reduction in the related health effects among children and adults. (See Table I.)

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[3]Derived using the methodology in Schwartz,J., et al, Costs and Benefits of Reducing Lead in Gasoline: Final Regulatory Impact Analysis, USEPA, Office of Policy Analysis, Washington, D.C., February 1985. EPA-230-05-85-006. Pages IV-47 and VI-66. [Confirmed by Hugh Pitcher, Economist, Office of Policy, Planning and Evaluation) in conversation with John Holley, Office of Mobile Sources, USEPA, Summer, 1988.]

[4]Ibid. Calculated from health effects data contained in the tables found on pages III-38, V-28, and V-34.

Table I

REDUCTION IN LEAD DUE TO DIRECT ENFORCEMENT

Grams of lead to health effects conversion

Amount of lead (grams):	150,000,000
Condition	**Number of Cases**
Cases of adult hypertension	7,417
Myocardial infarctions of adult males	22
Strokes - adult males	5
Deaths - adult males	21
Children with blood levels of 30 ug/dl	202
Children with blood levels of 25 ug/dl	674
Children with blood levels of 20 ug/dl	2,225
Children with blood levels of 15 ug/dl	6,859

REDUCTION IN LEAD UNDER PROPOSED SCENARIO

Grams of lead to health effects conversion

Amount of lead (grams):	450,000,000
Condition	**Number of Cases**
Cases of adult hypertension	22,251
Myocardial infarctions of adult males	66
Strokes - adult male	14
Deaths - adult males	64
Children with blood levels of 30 ug/dl	606
Children with blood levels of 25 ug/dl	2,023
Children with blood levels of 20 ug/dl	6,674
Children with blood levels of 15 ug/dl	20,576

EVIDENCE OF DETERRENCE

In the Lead Phasedown Program, a high degree of spontaneous compliance could have been expected because the regulated universe was primarily large refiners who were vulnerable to public opinion. The danger from lead toxicity was becoming a prominent public concern, which increased the likelihood of public condemnation of violators. In addition, detection was more likely because an outside source of information was available to verify refiners' reports.

However, two factors reveal that the occurrence of spontaneous compliance was far below a desirable level: one, the initiation of the audit program late in fiscal year 1986 revealed substantial noncompliance in absolute terms; and two, violations fell sharply after the audit program had been in place long enough to exert a deterrent effect (see Figure 2).

Distribution of violations through time shows that audits uncovered earlier instances of severe noncompliance while deterring new violations. In 1985, before the initiation of audits, violations were at their highest level, probably because of the opportunities for illicit profit presented by the accumulation period of the banking program. Most of these violations went undetected until EPA initiated the audit program in late 1986.

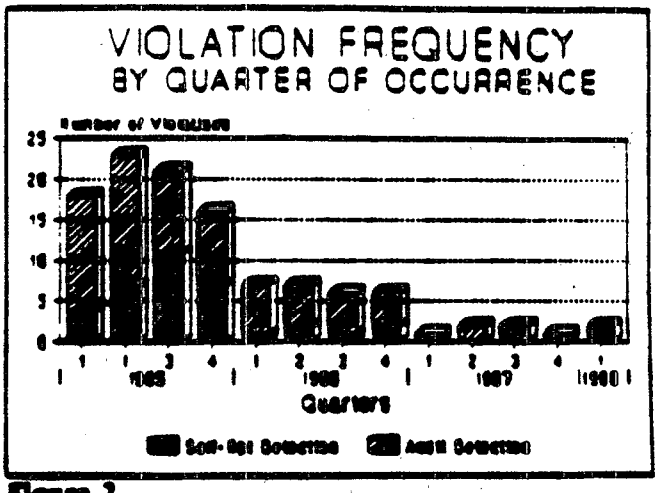

Figure 2

Many of the violations detected through audits were large, and the enforcement actions taken against the violators were given wide publicity. During the time when publicity would have drawn the attention of potential violators in 1987, there was a sharp decline in new violations to a level about one-third of that which prevailed in 1986, (see Figure 2). This pattern seems to indicate that the audits and the resulting Notices of Violation (NOVs) brought about a reduction in new illegal activity through

their deterrent effect.[1] This pattern occurred despite the increase in the sophistication of the audit program as a means of detecting violations.

As the pattern of violations suggests, the audits fostered deterrence because of the likelihood of detection. Together with the initiation of audits, there was a change in the penalty policy which made violations much more costly to the perpetrator. This also helped deter violators. For example, the introduction of the audit program resulted in 17 NOVs issued in 1987. A total of 54.4 million dollars in penalties was issued for fiscal 1987, 18 times the average of the previous four years. EPA's largest settlement in fiscal year 1987 was a lead phasedown case for over two million dollars. (See Figure 3.)

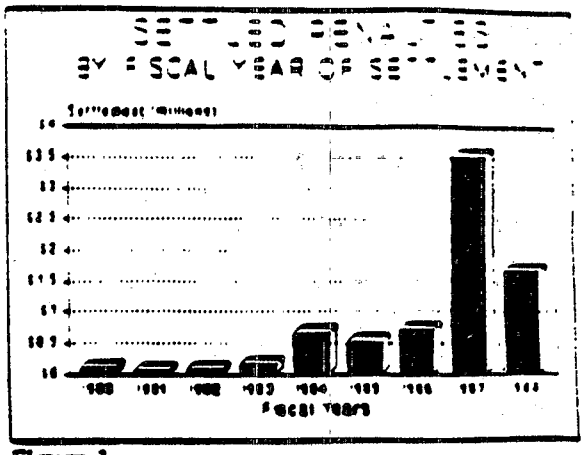

Figure 3

REASONS FOR DETERRENCE

The principal elements generally considered necessary for deterrence were strongly present in the Lead Phasedown Program. First, there was credible likelihood of detection. Before regulations became complicated enough to require audits, monitoring was easy because the number of regulated entities was reasonable and lead manufacturing reports were available as an independent source of information on the extent of compliance. Banking and trading made detection of violations difficult, which correlated with an increase in violations during this period. The introduction of individual audits made detection of violations much more probable once again, and violations dropped.

Second, the consequences of detection were serious. With the initiation of audits for individual operations, a new penalty policy in mid-1986 raising penalties, and high settlements, the consequences of violating the law became quite significant.

Third and fourth, the audit program ensured a fair and quick response: audits revealed violators immediately on the site, using a consistent standard of tests applied to each refinery

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[1]This drop in detected violations may also be explained in part by the fact that suspected violators were targeted for audits first. As time went on, refineries were more randomly selected for audits.

audited anywhere in the country. NOVs resulting from the audits received wide publicity in both the public and trade press. For an industry dominated by large companies vulnerable to public opinion, negative publicity was very effective. The combined presence of these elements created the necessary environment for successful deterrence.

NATIONAL MUNICIPAL POLICY

BACKGROUND

Less than half of all Publicly Owned Treatment Works (POTWs) were operating at treatment levels sufficient to meet national standards for technology-based effluent limits under the Clean Water Act (CWA) by the statutory deadline of July 1, 1977. The first Agency program to address this problem (1979) was unsuccessful. Its failure was due in part to two factors: EPA's ready issuance of extensions to POTWs to reach compliance, and EPA's and the States' reluctance to challenge municipalities for noncompliance if they had not received federal grants to build new facilities.

Congressional and public awareness and support for EPA's effort to pursue aggressive enforcement grew, in part, because of concern over the severe noncompliance problem highlighted in several GAO studies. As a result, EPA and the States created a work group in 1982 to develop a new strategy for dealing with municipal noncompliance. This strategy was a sharp contrast to previous policies. It signaled the Agency's and States' intention not to tie the compliance requirements to Federal financial assistance. Enforcement would be the key tool used to achieve the compliance requirements.' In January 1984, the EPA Administrator signed the NMP into effect.

RESULTS

The NMP was a highly successful program, targeted at 1,478 major facilities (the NMP universe). Over 71% of these POTWs not in compliance by 1984 were in compliance by the July 1, 1988 dead-

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'Congress amended section 301(i) to provide for extensions to be granted only in cases where reductions in the amount of financial assistance under the CWA or changed conditions affecting the rate of construction beyond the control of the owner/operator made it impossible to achieve compliance by July 1, 1983. In no case could extensions be made beyond July 1, 1988. Any POTW not in compliance with its permit and not in receipt of a Section 301(i) extension, was in violation of CWA. From 1972 to the drafting of the amendment, very few municipalities were subject to civil complaints brought by the Department of Justice, or to court-imposed sanctions.

line for achieving required treatment (see Table II). As of that date, NMP facilities were removing an estimated 2.325 million

Table II

COMPLIANCE STATUS OF NMP FACILITIES
(as of July, 1988)

	Number	Percentage
Total Major POTWs	3731	
Not in Compliance by 1984	1478	100%
In Compliance by 1988	1055	71%
On Enforceable Schedule by 1988	235	16%
Judicial	195	
Administrative	40	
Not on Enforceable Schedule by 1988	188	13%
Judicial - Filed	60	
Judicial - Referral, not Filed	38	

more pounds per day of conventional pollutants and 15,000 more pounds per day of toxic pollutants than in 1984.' (See Table III.)

Table III

RESULTS OF NATIONAL MUNICIPAL POLICY
(as of July, 1988)

Additional Conventional Pollutants Removed	2.325 million lbs/day
Additional Toxic Pollutants Removed	15,000 lbs/day

The estimated amount of toxic pollutants removed is based on a study of 40 POTWs, Fate of Priority Pollutants in POTWs, USEPA, Office of Water Regulations and Standards, 1981. OWEP multiplied the average amount of toxic pollutants removed at these plants by the number of POTWs in the NMP universe meeting required treatment by July 1988.

The NMP brought the total population of major treatment plants in compliance to 90%. Even more impressive were the environmental benefits resulting from these POTWs attaining compliance, because many of the NMP facilities were very large POTWs. As a result of their compliance, 95% of the total sewage processed in the United States was receiving secondary or better treatment, affecting 108 million people.

A subset of the NMP universe (650 facilities or 43%) contributed to known water quality problems, and as a consequence, had to install advanced wastewater treatment technology. Of these facilities, 525 POTWs, affecting an estimated 8,000 stream miles, met the July 1988 deadline because of the NMP.[6] (See Table IV.)

Table IV

NMP FACILITIES MEETING ADVANCED TREATMENT
(as of July, 1988)

Plants Required to Meet Advanced Treatment, 1984	650
Plants That Met Treatment Level Required, 1988	525
Number of Stream Segments Affected	500

However, we do not know whether these stream miles are now meeting water quality standards, because other sources may have contributed to the water quality impairment.

REASONS FOR SUCCESS OF NMP

In contrast to the Lead Phasedown Program where deterrence may have played a large role, the National Municipal Policy owed its success almost entirely to direct enforcement efforts. Before NMP was enacted, municipalities typically believed that compliance was achieved by acquiring grant funds. Permittees believed that the availability of Federal funding was a key part

[6]This estimate of stream miles is based on OWEP's analysis of a small sample of reports submitted by NMP facilities required to install AWT. OWEP multiplied the average number of stream miles affected by the discharge of the facilities in this sample by the number of NMP facilities required to install AWT that met the July 1988 deadline (525).

of determining whether the Federal government and the States would enforce the regulations. During this time, enforcement actions did not follow a consistent pattern.

With the initiation of NMP, enforcement by EPA and the States became the single most effective tool to bring POTWs into compliance. By fiscal year 1987 almost 80% of all NMP facilities (majors and minors) were under an enforcement order, either administrative or judicial. After this point, all POTWs subject to enforcement action (those who had not started construction), were dealt with primarily by judicial action, since facilities that were not in any phase of construction by this time would be incapable of compliance by the July 1, 1988 deadline. By the second quarter of 1988, almost 20% of all NMP major facilities were subject to judicial referrals. (See Figure 4.) On average, NMP facilities received 1.5 State or Federal enforcement

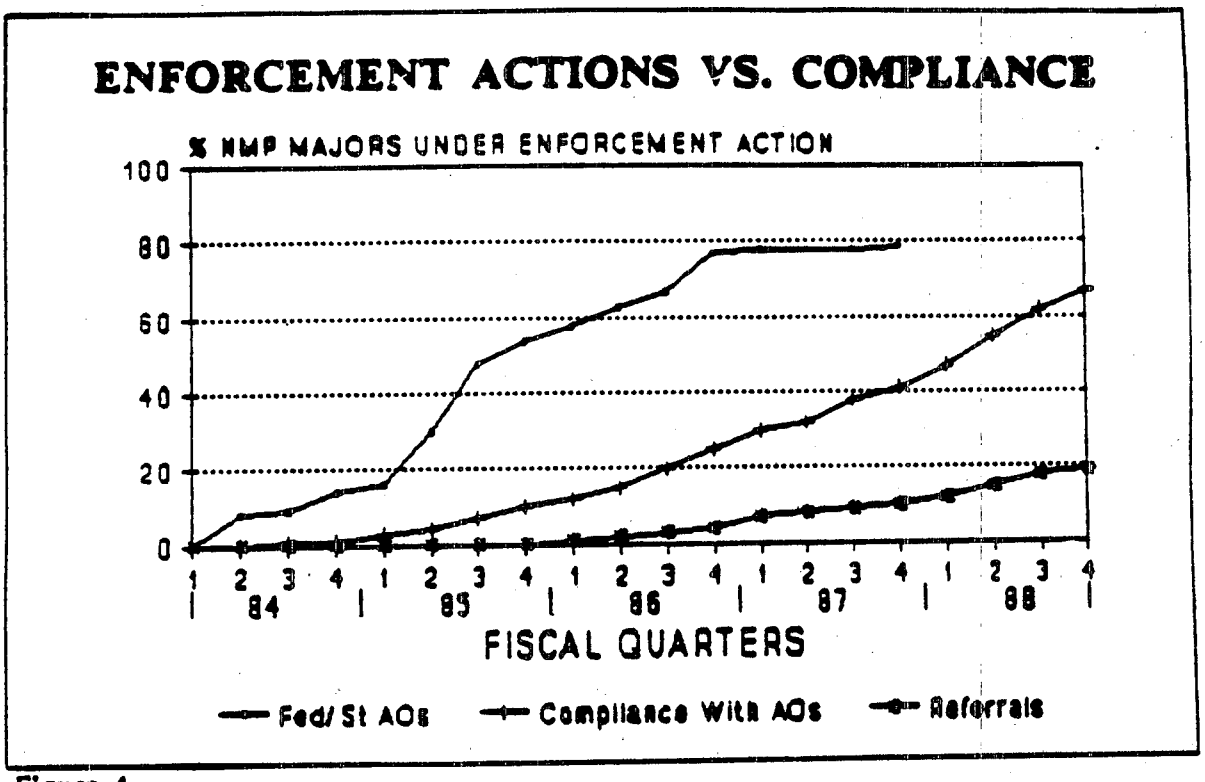

Figure 4

actions.' This means that almost all of the POTWs in the NMP universe have been under some sort of enforcement action.

'Estimate is based on a random sample of 49% of NMP facilities.

This program was successful largely because of several elements in the enforcement plan: first, there was a team of EPA managers and staff specifically assigned to make the effort succeed; second, the media, public, and Administrator of the EPA supported the NMP; third, the media gave wide coverage to enforcement initiatives and penalty results; fourth a unified State/Federal policy was established at the outset and the States generally supported the strong enforcement measures; fifth, the program established a fixed universe of facilities to target and tracked individual facilities on a case-by-case basis, continuing to pressure facilities until compliance was reached; and sixth, there was a clear statement and follow-through on the policy of no link between grant funding and statutory compliance.

All of these factors produced a strong and effective enforcement presence. The NMP set examples and precedents through federal and state enforcement actions, combined with favorable rulings on important cases. These cases and the significant penalties that were associated with them, permanently altered the commonly held attitude that it was improper for EPA and the States to enforce against municipalities. For the first time, enforcement actions and penalties became realistic, expected responses to noncompliance, and this created the possibility of future benefits from deterrence among municipalities.

CONCLUSION

The Lead Phasedown Program and the National Municipal Policy were triumphs for EPA and the States (in the case of the NMP) because of strong enforcement efforts. Though the conditions for each program were very different, enforcement proved to be one of the most important aspects of both regulatory programs.

To illustrate, the NMP was directed at those POTWs which had failed to comply with national standards established in the mid-1970s. Many facilities had a long history of noncompliance. Attitudes toward the need to comply and the reliance on Federal grants were huge barriers which had to be overcome. Due to this context, direct enforcement actions by EPA and the States were necessary for almost all POTWs in the NMP universe.

In contrast, the Lead Phasedown Program forced refineries to reduce lead use in gasoline through a series of tighter regulations between 1979 and 1985. At the same time, the program introduced new methods of compliance including trading of lead rights, and later, banking of these rights -- methods of compliance which offered flexibility, but made detection of violations more difficult. Although the emission reductions from direct enforcement were large, the sharp decline in new violations after 1986, suggests that enforcement had an even larger impact through deterrence.

ENFORCEMENT IN THE 1990's PROJECT

STRENGTHENING THE STATE-EPA RELATIONSHIP FOR ENVIRONMENTAL ENFORCEMENT

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ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE WORKGROUP ON STRENGTHENING THE STATE-EPA RELATIONSHIP FOR ENVIRONMENTAL ENFORCEMENT

I. Introduction

The State-EPA Relationship

Most Federal environmental programs were designed by Congress to be administered at the State (and sometimes local) level whenever possible. EPA's policy has been to transfer the administration of national programs to State and local governments to the fullest extent possible, consistent with statutory intent and good management practice. However, EPA remains ultimately responsible and accountable to the President, Congress, and the public for progress toward meeting the national environmental goals of these statutes, including assurance that the laws are adequately enforced. Therefore, EPA maintains a critical responsibility to oversee the conduct of delegated programs.

A fundamental tension exists between EPA and the States in the enforcement arena. Each side has independent authority and responsibility for assuring compliance with environmental laws, but EPA has ultimate responsibility for the national laws. When environmental programs are delegated, States assume primary, day-to-day enforcement responsibility. EPA generally defers to State action first, using oversight mechanisms to monitor the State's handling of enforcement matters. If EPA deems a State unable or unwilling to take appropriate action, EPA can and should file a Federal action. The actual incidence of EPA overfiling is quite rare, but the potential does lead to some degree of mutual wariness in the oversight process. Some of the tension also stems from the external pressure EPA receives on enforcement matters. Despite delegation, EPA's overall commitment to environmental protection is often judged by Congress and the public by the number of enforcement actions EPA itself pursues. This pressure for EPA enforcement can sometimes come into conflict with the general policy of deferring to States. On the other hand, in the interests of maintaining generally harmonious relations with States, EPA sometimes continues to defer to States on cases where Federal action would be appropriate.

While routine enforcement activities are conducted largely by the States, EPA retains an essential responsibility for direct enforcement in situations of national importance. Reserved for Federal enforcement are cases involving interstate issues, a unique Federal interest to be defended or vindicated, a program or legal national precedent, or a State standard that is substantially weaker than the Federal standard. Given EPA's fundamental charge to assure there is credible enforcement

throughout the country, Federal enforcement actions taken in a State with a weak enforcement program can also meet the criteria of being nationally important.

Finally, Federal enforcement -- with its generally higher visibility and greater deterrent effect -- is appropriate when it is the most effective means for addressing significant environmental problems or patterns of noncompliance.

State-EPA communications and understanding of respective roles and responsibilities for enforcement are improving. The general boundaries of the relationship have been established through policy and negotiated agreements between EPA and individual States. The circumstances that will lead EPA to take an enforcement action in a State are better defined. However, State-EPA relationships are still variable, reflecting differences in interpretation of policy, perceived strength or weakness of State programs, program and Regional enforcement philosophies, and even individual personalities.

EPA officials argue that many States still do not have strong enforcement programs, and the current oversight system which monitors how States address specific violations is necessary to assure that there is adequate enforcement. From EPA's perspective, EPA's vigilance is a key factor in motivating State action, even in those States with relatively strong programs. Many EPA officials feel that States must accept a meaningful oversight process, with overfiling where appropriate, as the *quid pro quo* for the large degree of deferral to States.

From the States' perspective, true delegation has not yet occurred. They believe what they see as EPA's continuing concern with their day-to-day operations and decisionmaking to be inappropriate. States want greater flexibility to plan and implement their enforcement activities according to their own priorities and enforcement approaches, which may or may not mirror EPA's. State officials feel that once a program is delegated, EPA should be concerned with overall program effectiveness and not about how a State handled individual enforcement matters.

Both State and EPA officials agree that improving the functioning of the State-EPA relationship would help avoid the duplication of effort and unproductive conflicts that have sometimes characterized the enforcement relationship. The challenge is to find the delicate balance in EPA oversight practices that will allow EPA to assure that States have effective compliance and enforcement programs while providing flexibility to allow for a diversity of approaches -- with State acceptance of EPA's oversight role.

Strategic Planning for Enforcement

Strategic planning to achieve the greatest benefit from environmental protection efforts has become a central theme in the management of environmental programs. A key part of the effort is affording environmental program managers

the flexibility they need to be able to focus their resources on the most pressing environmental problems.

As part of the Agency's strategic planning effort, EPA's Office of Enforcement worked with the EPA program offices and Regions in early 1990 to develop a national enforcement strategy. It sets out criteria for setting priorities for base program compliance monitoring and enforcement activities and for special, focused enforcement initiatives. Each EPA Region is establishing processes for targeting inspections and screening potential enforcement cases to assure that resources are directed to the most pressing problems.

Since States have primary responsibility for enforcement in most EPA programs, the national enforcement strategy cannot be implemented without active State participation. Although this first year's strategy was developed quickly with limited involvement of Regions and minimal State participation, an ongoing strategic planning process is envisioned that will increasingly involve the States, both at the Regional and national levels. Ultimately, the strategic planning process should allow State problems to be surfaced as national or Regional priorities, while States might be called upon to address problems identified through evaluation of information on a Regional or national level.

The strategic planning process should help to assure that both State and EPA enforcement resources are used more effectively to address the most important environmental and/or compliance problems. The process has the potential to result in improved State-EPA relationships by fostering joint planning and greater cooperation on compliance matters. However, strategic planning also brings challenges to the State-EPA relationship. For many years, EPA policy for enforcement in delegated programs has been that States are given the first opportunity to act, with EPA acting as backstop if the State is unable or unwilling. Even though application of this policy has been somewhat inconsistent, it nonetheless serves as the basis for the equilibrium that exists between EPA and the States. If EPA begins to aggressively pursue national or Regional initiatives without adequately involving the States, there is serious potential for damaging the EPA-State relationship. Appropriate State involvement in strategic planning should address this concern.

The recommendations in this report are designed to foster improved EPA-State relationships through State involvement in strategic planning as envisioned by EPA's Enforcement Four-Year Strategic Plan. Recommendations regarding the strategic planning process and changes that are needed in management systems and oversight practices are compatible with approaches under development in the context of the broader Agencywide strategic planning effort. The recommendations are also consistent with the recommendations of the State-Federal Roles Task Force (1983) and will further implementation of the Agency's delegations and oversight policy (1984). Many of the State-EPA issues addressed in this paper are relevant also

to the Headquarters-Regional office relationship.

II. Goals and Objectives of the Project

The task of environmental enforcement is now vast and complex, but there are limited resources. It is therefore essential that each level of government carry out those functions for which it is most suited, with a minimum of transaction cost lost to duplication of effort or disputes between levels of government. Since many environmental problems are nationwide in scope, it is also essential that there be some minimum degree of consistency and effectiveness of enforcement efforts across the country.

EPA-State relationships have often been strained by differing views of the respective roles each partner should play in enforcement as well as by a lack of flexibility in EPA policies, management systems, and oversight practices. The expected benefit of strategic planning for enforcement is that it will help focus resources on the most pressing problems, while providing the flexibility and opportunities for innovation long sought by the States (and EPA Regions). At the same time, however, strategic planning presents challenges in designing and carrying out EPA's national responsibility for assuring effective enforcement.

This project was undertaken to clarify the appropriate roles and responsibilities of EPA and the States in environmental enforcement, identify barriers and opportunities for State involvement in planning and implementing enforcement strategic plans, consider the need for more effective EPA oversight mechanisms, and examine the implications of strategic planning on existing policies and management systems. If the issues that have been the source of tension in the past are carefully identified and addressed, strategic planning for enforcement may well become an important vehicle through which the overall EPA-State relationship can be dramatically improved. The vision is of a process in which each partner feels ownership and a stake, resulting in a mutually designed and implemented program for effective environmental enforcement.

III. Process Leading to Recommendations

The interview phase of the 1990's Project generated a robust set of views and ideas on the Federal-State relationship that became the foundation for the project team's deliberations. In addition, the team consulted managers of the Agency's overall strategic planning process and accountability system, EPA compliance program managers, Regional planning and enforcement managers, and several State officials. The team explored such topics as incentives and barriers to State participation in strategic planning; the respective roles of EPA and the States in carrying out enforcement initiatives; and needed changes in policies, management systems, and oversight practices. For additional background, the team also reviewed existing documents such as the Final Report of the State-Federal Roles

Task Force, the Agency's delegations and oversight policy, Policy Framework for State-EPA Enforcement Agreements, timely and appropriate response reports, and the EPA Enforcement Four-Year Strategic Plan.

IV. Findings

Effective enforcement by both EPA and the States is essential to achieving the nation's environmental goals. Clearer understanding and acceptance of each other's roles and responsibilities in enforcement will lead to improved relations and more efficient use of limited State and EPA resources.

Without effective enforcement to assure a high degree of compliance, the benefits envisioned by national environmental laws cannot be realized. Carrying out the design that Congress intended, EPA has largely delegated responsibility for administering national environmental programs to the States. Where States now have primary responsibility for enforcement, EPA retains responsibility -- and is held accountable by the Congress and the public -- for assuring the adequacy of enforcement efforts through oversight and for taking direct enforcement actions when necessary to achieve national objectives. There is general consensus on this basic allocation of enforcement responsibilities between EPA and the States, but there are sometimes differing views about how it applies to a particular situation.

Environmental requirements are becoming more complex, the size of the regulated universe is expanding, and the remaining environmental problems are more technically difficult to resolve. Resources for conducting enforcement activities are not expanding, so that efficient use of both EPA and State resources has now become critical. The enforcement challenge is so vast that neither EPA nor the States can afford to waste resources on duplicative work or unproductive conflicts between levels of government -- recognizing that given EPA's responsibilities, some tension and conflict is unavoidable. Each partner's roles and responsibilities in environmental enforcement need to be defined and clarified in the context of current and anticipated environmental protection programs. Both State and EPA officials view getting mutual understanding and acceptance of where and how various enforcement-related functions are performed most effectively to be an important first step in achieving even more effective enforcement.

The 1984 EPA oversight policy defining the roles and responsibilities of EPA and States in the partnership for environmental protection is still considered valid. However, the culture change needed at both the State and Federal levels to put the full policy into practice has not yet occurred.

State-Federal Roles Task Force

In 1983, a special State-Federal Roles Task Force comprised of senior State and EPA officials defined the roles and responsibilities of EPA and the States for

environmental protection in light of increasing delegations of authority to the States. After extensive analysis and internal and external discussion, the Task Force defined EPA and State roles and responsibilities as follows:

ROLE	FUNCTION
STATE LEAD, EPA supporting	Direct program administration Enforcement
EPA LEAD, State supporting	Research Standard setting Oversight Technical support National information collection

While States are given the initial lead in environmental protection programs, EPA is responsible and accountable for progress toward national environmental goals and for the long-term success of environmental programs. Therefore, States must provide to EPA the information necessary to assess progress and implement State strategies which support national statutory goals, and if a State is unable or unwilling to act, EPA must step in if needed to assure that national objectives are met.

A major finding of the Task Force came from a study of the oversight practices of successful business and government organizations that have field units. Headquarters managers in these organizations recognized that they could succeed only through the success of their field units, so they viewed their primary responsibility to be helping the field units. Each organization had a comprehensive oversight program which included tracking and monitoring activities, in-depth audits and evaluations, and, as a crucial component, an extensive program to provide training and technical support. This finding led the Task Force to recommend that EPA focus on improving the quality of oversight and support to the States.

EPA's Oversight Policy

In response to the Task Force findings and recommendations, the Agency adopted an oversight policy in 1984 which states that the goal of oversight is to achieve mutually reinforcing evaluation and support activities. EPA's policy is to oversee State programs in order to:

- Ensure adequate environmental protection, through continued development and enforcement of national standards, and use of direct enforcement against polluters as necessary to reinforce; State action and authority.

- Enhance State capabilities to administer sound environmental protection programs, through increased communication and a combination of support and evaluation activities; and

- Describe and analyze the status of national and regional environmental quality, through continued collection and dissemination of information from State agencies and other major sources.

The policy sets out objectives for implementation of the partnership approach:

- Ensure continuing strong enforcement activity, with States as the first line of action and EPA as strong back-up for action when needed;

- Clearly define program goals, priorities, and measures of success;

- Provide constructive evaluations of delegated State programs, focused on problem-solving;

- Ensure timely identification of State program needs and State environmental problems and conditions; and

- Utilize a range of responses to State program performance and State needs, focused on preventing large mistakes and solving identified needs.

Related Enforcement Policies

The Policy Framework for State-EPA Enforcement Agreements (1984, and as revised) establishes Agency policy with regard to the partnership for environmental enforcement. It provides general guidance on developing State-EPA agreements covering such matters as criteria for oversight, including timeliness and appropriateness of enforcement response; oversight protocols; criteria for direct EPA enforcement; procedures for advance notification and consultation; and reporting requirements. To implement the Framework, individual enforcement programs developed more specific guidance in each area. Regional offices use the various guidance documents to negotiate annual State-EPA enforcement agreements.

Central to the management of enforcement programs, and thus to the oversight issue, is the concept of significant noncompliance. The concept is to focus inspection resources and enforcement activities on the most serious program violations. Significant noncompliance also focuses oversight activity (both within EPA and EPA to State), for example, by triggering timely and appropriate response criteria.

Implementation of the Policies

Most of the people interviewed for the 1990's Project were familiar with the Task Force effort and the policies that grew out the Agency's interest in improving State-EPA relationships. There was general agreement that the roles and responsibilities defined for EPA and the States by the Task Force are still appropriate. The only caveat expressed was that EPA's slowness in setting national standards in recent years has led several States to move ahead and set their own, more stringent standards -- and these more active States are unlikely to relinquish the standard-setting role.

There are differing points of view, however, about how well these policies are being implemented. Both State and EPA officials agree that communications have improved substantially in recent years and that the State-EPA enforcement agreement process as well as the availability of guidance on such matters as timely and appropriate response have brought greater clarity into the enforcement relationship. This agreement indicates that some real progress has been made since the policies were adopted. However, each side also points to aspects of the policies and/or their implementation that they find troublesome.

Some EPA and DOJ officials feel that the 1984 oversight policy may understate the role of Federal enforcement. Some think EPA has been far too timid about overfiling State actions, believing that by deferring to States too much, EPA has lost credibility as a "gorilla in the closet" -- both in terms of pushing for improvements in State programs and in deterrence value with the regulated community. Many EPA officials point out that some States have enforcement programs that are still quite weak, and that EPA's oversight policy has had the undesirable effect of discouraging EPA from taking direct enforcement actions in such States when they really should have been pursued. Although the oversight policy does warrant direct Federal action in cases of national significance, this is left fairly undefined. Some would prefer a stronger statement of the need for direct Federal enforcement, expressing the view that the Federal government must preserve the ability and will to investigate and prosecute cases on its own initiative -- independently of States. Other EPA officials support the basic policy of giving States the opportunity to act first, but even among these officials there were differing interpretations of when EPA direct action is warranted.

According to EPA officials, States should be more willing to accept EPA's oversight and overfiling role in exchange for EPA's general deference to State action. EPA cannot fulfill its ultimate responsibility for assuring adequate enforcement without a means for monitoring State performance. Under current management systems, EPA tracks whether the State's handling of particular enforcement matters is timely and appropriate. This case-by-case oversight approach is used so situations can be identified that warrant direct Federal action because of the inadequacy or

inappropriateness of the State's action. Many feel that States should not view EPA overfiling so negatively. They suggest that Federal actions can play an important role in bolstering the State's enforcement efforts. Sometimes a situation is simply more appropriately addressed by Federal action because of the associated greater visibility and deterrent value.

EPA officials generally acknowledge the predominance of State enforcement activity. However, enforcement staff feel they receive conflicting messages from EPA management about the work they are supposed to do: "Give States the first opportunity to act, but keep the EPA enforcement numbers up!" Some noted that the quality of EPA cases has suffered because many of the cases EPA now receives for action are cases the State did not pursue because they were of low priority. This situation is considered a result of current definitions of significant noncompliance as well as of the timely and appropriate response guidance of the various EPA programs.

For their part, State officials frequently expressed frustration that the Agency's oversight policy -- which they generally like -- has not resulted in much change in EPA practice. In particular, State officials said that the promise of more constructive oversight -- focused on problem-solving rather than review of day-to-day operations, and buttressed by greater provision of training and technical assistance -- has yet to be realized. State officials complain that EPA still does not trust them to perform adequately and that EPA oversight practices have not been modified in accord with the oversight policy. Both EPA and State officials pointed to a lack of management support for training and technical assistance, as well as limited or even reduced budgets for such activities. EPA staff noted that efforts to help States build better programs receive little recognition.

Several interviewees said that the culture change needed for a more effective relationship has begun to take hold among EPA's more senior managers, but that little has changed at the staff level where the day-to-day interactions between EPA and the States occur. They noted differences by program, by Region, and even by individuals within a given program or Region in interpreting the policies related to the State-EPA relationship and overfiling of State actions -- and these differences were readily apparent in the attitudes expressed by various EPA officials interviewed for the 1990's Project itself. Several interviewees did comment that the incidence of overfiling has diminished substantially, which can be viewed as an indicator of implementing at least the overfiling portions of the policy; however, not everyone sees this as a totally positive development.

State officials feel that some EPA policies and procedures drive them to do work of low importance. (This sentiment is echoed by EPA staff regarding EPA work as well.) Policies on timely and appropriate response and definitions of significant noncompliance were initially designed in part to narrow the focus of State-EPA interactions to the most significant compliance problems. While conceptually this

is still viewed as a valid approach, existing definitions and policies are viewed as not always reflecting the relative importance of various kinds of situations. To the extent this is true, they can focus State resources -- as well as EPA oversight and potential overfilings -- inappropriately.

There is a widely held perception that at least some of the enforcement actions EPA takes in delegated States are pursued solely to satisfy "quotas" in EPA's internal accountability and performance evaluation systems. State officials point out that EPA oversight still largely consists of conducting case-by-case reviews of the State's individual enforcement actions, rather than of conducting programmatic reviews that seek to identify and correct patterns of problems as the oversight policy directs.

State officials do acknowledge a need for EPA leadership and generally welcome Federal action if needed to address matters of national importance. Conflicts tend to rise from inconsistent interpretations of what constitutes situations of national importance, and from the lack of clear signals from EPA regarding the Agency's expectations of the State in a given enforcement matter. Interviewees outside the government were generally more concerned about getting a problem promptly corrected than about the level of government taking the action. They do ultimately hold EPA accountable, however, and expect EPA to act swiftly and strongly if a State fails to adequately enforce. One environmental representative and some State officials felt that EPA should give more scrutiny to the stringency of the requirements various States are enforcing. They point out that EPA's assessment of State performance based on the amount of significant noncompliance and how it is being addressed may unfairly reflect negatively on States with very stringent requirements while making a State with weak -- and therefore easier to comply with -- requirements look good.

Nearly all agreed that the most ideal situation would be one in which State and Federal officials conduct joint planning and coordinate their enforcement efforts, with the specific work to be performed divided up between them.

UST Program an Exception

There was one notable exception to the general criticism States had of EPA's current oversight approach. Virtually every State official interviewed had a very positive view of the approach being used by the underground storage tank (UST) program to oversee State implementation. The UST program sees helping States succeed as its primary function, and has designed its program around identifying what assistance and tools States need to improve their performance. The approach is based on an understanding and acceptance of where each State is now, with an expectation of continued improvement over time. Since to date there has been limited enforcement experience in the UST program, how well this approach will translate to enforcement oversight is not yet known. While State officials were universal in their approval of the UST approach and viewed it as a model for other

EPA programs, some EPA officials were enthusiastic supporters and others were frankly skeptical.

EPA must be willing and able to take direct enforcement action if a State is unable or unwilling to enforce where needed to meet a national objective. Direct Federal enforcement is also necessary when certain national issues are involved. EPA should withdraw program approval if a State has a consistently inadequate enforcement program.

Interviewees representing every interest -- business, environmental groups, States, EPA, and the Department of Justice -- emphasized that EPA must be vigilant in watching State performance and be willing and able to take enforcement actions in a delegated State that fails to have an adequate enforcement program or fails to take appropriate action in a particular case of national concern. Several used the "gorilla in the closet" analogy to describe EPA's role in backstopping the States. Several expressed concern that EPA has been unwilling or unable to play this role as strongly as it should.

EPA should work with a problem State to build its enforcement capacity, but if a State's performance continues to be poor even after provision of technical assistance and training, EPA should ultimately take back direct enforcement responsibility. Several pointed out that EPA has not exercised its program withdrawal authority often enough. It was generally recognized, however, that the threat of program withdrawal is somewhat of an idle one since EPA would have limited resources to conduct a program in lieu of a State. States pointed out that EPA funds only a small portion of State environmental budgets now, so threatening withdrawal of grant funds will not be particularly effective either.

In addition to taking Federal actions when delegated States are unwilling or unable to act, Federal enforcement is also necessary in several other circumstances. Of course, direct Federal enforcement is essential where programs have not been delegated to States (or Indian tribes). Other circumstances for which Federal action is necessary include cases involving interstate issues, national precedents, violations of Federal consent decrees or orders, or other issues of national importance. It is unclear what various people mean on a practical level by the term "issues of national importance," however.

Recognizing the limits of EPA's ability to directly implement in the States, the UST program has chosen a different model to follow: it works with State programs as they are, expecting to improve State performance over time by helping them strengthen their programs through training and technical assistance. The UST program believes this approach gives them the greatest leverage in affecting State behavior.

The potential for EPA overfiling provides essential leverage in assuring adequate State enforcement.

Overfiling is universally viewed as an essential tool for assuring that States are conducting adequate enforcement programs. There were conflicting opinions both inside and outside the Agency about how effectively EPA uses this tool. Some think EPA does not overfile frequently enough. They think that since States really hate overfiling, EPA should overfile more often as a way to push weaker enforcement States into developing stronger programs.

Overfiling does provide leverage to promote effective State enforcement and ensure minimum national consistency. Some EPA officials feel that States do not adequately recognize that EPA must overfile occasionally if the Agency is to carry out its enforcement responsibilities effectively. In their view, States should accept overfiling as a necessary part of having program delegation, and not place such a negative connotation on it. Many pointed out that contrary to a common perception, actual overfiling -- that is, when EPA takes an action because the State's action is deemed inadequate -- is quite rare. More often, EPA takes action at the State's request, or because the State has not yet acted. Some thought many of the cases EPA files are "leftovers" the State found not worthy of prosecution. Several State and EPA officials note that the threat of an overfiling often motivates the State to take an action itself, so the effectiveness of the overfiling tool cannot be measured by mere numbers alone.

Because overfiling is a powerful tool, balanced use is important: overfiling must be used often enough retain its effectiveness while recognizing that its use also carries some costs. A statement by one State interviewee sums up a typical State view best: "Nothing is as big a political buzzsaw as overfiling, even pulling back State grant funds." When EPA and the State disagree about an enforcement matter, transaction costs can be high. If poorly handled -- that is, without adequate State notice of EPA's expectations and its intent to overfile if they are not met -- overfiling can damage the Federal-State relationship itself. Some feel that overfiling by EPA can undermine the State's ability to deal effectively with its regulated community. Finally, enforcement disputes between EPA and the State can cost both sides to use up already stretched legal and technical resources. While the overriding concern in making an overfiling decision is whether a Federal case is needed to further a national objective, the transaction costs should also be considered.

Several interviewees feel that an EPA overfiling really means that communications between EPA and the State have failed. Clear communication of EPA's expectations was stressed by many as the key to resolving the overfiling problem.

Differences in enforcement approach between EPA and States -- particularly with regard to economic penalties -- are often the source of conflict.

Enforcement philosophies vary widely, but States generally rely more on informal mechanisms to achieve compliance than does EPA. Deterrence is a central theme of EPA's enforcement effort. EPA seeks to deter future violations by the violator and other potential violators by exacting an economic penalty that removes any economic benefit gained by being out of compliance as well as an additional amount based on the gravity of the violation. Several State and EPA interviewees noted that EPA's emphasis on the assessment of civil penalties has now become a principal source of conflict.

A few State officials and a representative of an environmental group noted that EPA's enforcement program seems to consist of infrequent inspections, then hitting violators hard with big economic penalties when they get caught. One State official argued that his State inspects frequently and issues citations that are followed up to assure compliance, creating a strong "presence." His view is that this is an equally valid approach to assuring compliance. Other State officials noted that they place greater importance on correcting a violation promptly than on assessing an economic penalty that might take years to litigate -- while noncompliance continues.

Several pointed out that States do not get "credit" for some kinds of actions (e.g., permit or license suspension) that have economic consequences, but for which EPA does not have comparable authorities. One State official pointed out that EPA would do a better job of influencing States regarding penalties if EPA did a better job of implementing its own penalty policies.

Establishing greater trust between States and EPA is the key to a successful partnership.

The relationship between EPA and the States on enforcement matters is still strained. EPA still has justified reservations about some States' will to enforce. States are reluctant to provide information to EPA for fear that it will lead to intervention, and their experience makes them skeptical about whether real change in EPA's oversight approach will ever occur. This atmosphere of mistrust does not provide a healthy environment for the open communication between EPA and the States that is needed to identify and build on the strengths of State programs and for working together to overcome weaknesses.

V. Recommendations

Summary of Recommendations

Recommendations for improving the EPA-State relationship for environmental enforcement fall into two broad areas, described below.

(1) EPA should work to build successful State programs as a primary means of achieving effective enforcement.

Recommendations in this area clarify the respective roles and responsibilities of States and EPA for environmental enforcement and suggest steps for achieving a more constructive relationship.

(2) EPA should use strategic planning as a means for providing greater flexibility to States.

These recommendations suggest steps for involving States in planning and implementing strategic plans for enforcement.

A. EPA SHOULD WORK TO BUILD SUCCESSFUL STATE PROGRAMS AS A PRIMARY MEANS OF ACHIEVING EFFECTIVE ENFORCEMENT.

1. EPA should reaffirm its commitment to the 1984 oversight policy and take steps to promote the culture change at the Federal and State levels needed for implementation. The policy will need to be interpreted in the context of the Agency's new strategic planning process, particularly for enforcement.

EPA's oversight policy has been in place for several years now, but the partnership envisioned by the policy has not yet been realized. EPA's oversight policy defined EPA's role in the Federal-State relationship several years ago as setting national standards and then providing States with the technical assistance and other tools they need to implement the program on a day-to-day basis. EPA is also responsible for assuring effective enforcement and for taking action when States are unwilling or unable to act.

While many senior managers have embraced the partnership concept envisioned by the policy, the concept has not fully translated into changes in the day-to-day interactions between EPA and the States. Implementation of the policy requires changes in management and performance evaluation systems, improvements in the content and quality of oversight, and a commitment to invest in the States through training and technical assistance.

The 1984 oversight policy, and the Policy Framework for State-EPA Enforcement Agreements that followed, establish States as the first line of action for enforcement, with EPA as a strong back-up when States are unwilling or unable to act. EPA also leads in cases of national significance. This approach characterizes the basic structure of the enforcement relationship now, although interpretations of when EPA direct action is appropriate vary substantially.

The strategic planning process initiated by EPA recently presents new challenges to the State-EPA relationship, particularly in the enforcement arena.

Under this process, EPA will be targeting special enforcement initiatives based on such factors as environmental risk or compliance patterns. Over time, States will become increasingly involved both in planning and implementing the strategic plans. The process that is envisioned includes joint planning and advance negotiation of respective roles in carrying out specific initiatives so that conflicts between levels of government can be avoided, but it will probably be many years before a smoothly running process is in place. In addition, a State may not wish to participate in, or may even be opposed to, a national or Regional initiative. Other initiatives might be designed around the specific tactic of using Federal enforcement authorities. Each of these situations raises questions about the appropriateness of the "States as the first line of enforcement action" policy.

EPA could interpret targeted initiatives as being "nationally important," thereby warranting direct EPA action if States do not or cannot participate. However, such an interpretation would be considered a departure from current policy. If EPA is viewed by States as asserting a more active enforcement role without adequate advance agreement about respective roles and responsibilities, there is serious potential for disrupting the tenuous balance in State-EPA relationships that exists now. A consensus-building process to refine the Federal-State relationship in light of strategic planning is therefore essential.

Exhibit 1 summarizes EPA and State roles as defined by the State-Federal Roles Task Force.

Exhibit 2 summarizes key features of the 1984 oversight policy.

Exhibit 3 outlines the enforcement component of the 1984 oversight policy.

Exhibit 4 describes EPA's current oversight approach and the shift envisioned by the oversight policy.

2. EPA should seek to build successful State enforcement programs as a principal means of carrying out the Agency's responsibility for assuring compliance with national environmental laws.

Direct responsibility for implementing environmental programs -- including enforcement -- has been largely delegated to the States, so EPA's success in achieving its environmental mission is dependent upon the success of the States. While EPA must continue to take direct enforcement action where necessary, EPA must adapt to the reality that the bulk of environmental enforcement activity takes place at the State level. States now perform some 90% of the inspections and pursue about 75% of the environmental enforcement actions taken.

If EPA is to be effective in carrying out its ultimate responsibility for effective enforcement, EPA must adjust both the content and manner of its work in a way

that seeks to strengthen State capabilities. This shift entails placing greater emphasis on building State enforcement capabilities by:

(1) Conducting a constructive oversight program oriented to fundamental problem-solving;

(2) Developing and providing training and technical assistance designed to improve the quality of enforcement efforts; and

(3) Analyzing compliance problems and the effectiveness of various compliance approaches, transferring information about successes and experiences throughout the enforcement system.

It also entails establishing an atmosphere of mutual trust and acceptance of each other's roles and responsibilities in the partnership.

Exhibits 5 and 6 provide statistics on the percentage of inspections and enforcement actions carried out by States.

3. EPA should lead States by example, demonstrating a strong enforcement posture by maintaining the ability and will to take independent, direct enforcement action when needed to achieve national objectives.

Ultimately, EPA is responsible and accountable for assuring compliance with national environmental laws and regulations. The enforcement posture that EPA maintains will help to establish expectations and set the tone for State enforcement programs. By its actions, EPA must demonstrate a commitment to strong enforcement. EPA must make clear the kinds of situations -- both in environmental terms and in terms of enforcement program quality -- that warrant national attention and potential Federal enforcement action. While EPA will endeavor to work with States to address enforcement problems of national importance in a cooperative manner, the Agency must independently exercise its enforcement authorities when necessary. The Agency must maintain the technical and legal capability and the will necessary to take direct enforcement actions when needed to achieve national objectives.

For their part, States should recognize and accept that some Federal enforcement will always be necessary. First, Congress and the public expect EPA to pursue important national cases. The higher visibility and generally greater deterrent value of Federal enforcement will sometimes be the most effective mechanism for addressing some kinds of environmental or compliance problems of national importance. Ideally, States should be working with EPA to jointly develop strategies for dealing with enforcement concerns -- sharing credit for cooperating towards efficient and effective enforcement.

4. EPA and the States should share credit for effective environmental enforcement. More State enforcement information should be included in national enforcement reports.

Many of the individuals and interest groups who follow the progress of environmental protection programs do not fully understand the partnership between EPA and the States in enforcement. EPA and the States should work together to project a mutual image of a system that is trying to maximize the use of limited resources to achieve effective enforcement.

EPA's current management and reporting systems focus on EPA enforcement actions. Since States perform the bulk of inspections and enforcement actions, to the extent that State information is missing, the full environmental enforcement story is not being told. Ultimately, the system should be neutral as to whether EPA or a State took an enforcement action needed to bring about compliance. Regions and States should be able to share credit for successful enforcement. State information should be included in national reports to Congress and the public to further external understanding and support for the partnership nature of the national environmental enforcement system. It is also important for States to be able to share credit for Federal enforcement actions; often, information from a State inspection forms the basis for Federal action. With the sharing of credit must also go the sharing of responsibility for meeting enforcement objectives; States must be willing to assist EPA in telling the enforcement story and take some of the pressure that is now directed at EPA regarding enforcement performance.

While some State enforcement information is now included in national reports, there has been some reluctance to providing information in a way that might lead to comparisons among States. Clearly, there is a large potential for misinterpretation when information from different States is compared. For example, a State with very stringent requirements might have more unresolved violations than a State with minimum requirements; the number of unresolved violations in the stronger State might be misread as the sign of a weaker program. Each State has a unique array of enforcement authorities, which are difficult to compare. Despite these difficulties, EPA is now beginning to publish State-by-State enforcement information. If State information is not available, EPA will be unable to convince Congress and the public that good environmental enforcement is occurring when EPA's "numbers" drop because EPA has shifted its focus to cases of truly national significance and to providing support to State enforcement efforts.

5. EPA should be clear to States about its expectations on specific enforcement matters and warn of the Agency's intent to overfile if they are not met.

Improved communications between EPA and the State are considered key to avoiding unnecessary conflicts and duplication of effort regarding potential overfiling actions. First, EPA should make its enforcement expectations clear to the

State, and give the State adequate warning that EPA plans to begin preparation for an action -- so that the State can file first if they can. However, States should be aware that once EPA and DOJ actually begin working on filing an action, a State's rush to file the case in State court has a negative impact on how the Federal government views the State. By this time, EPA and DOJ have invested resources in the case.

In making an overfiling decision, EPA's overriding consideration should be the importance of the case to meeting a national objective. For this reason, potential overfiling cases should go through the newly-established Regional case screening process. Because overfiling cases carry transaction costs, EPA should also take into account how the action is likely to affect the State-EPA relationship and what benefits beyond the State's action a Federal action would achieve. When an overfiling decision is made, EPA should work with the State to determine why the State was unable to take adequate action and develop a plan for helping the State overcome its barriers to enforcement.

6. EPA should tailor its enforcement oversight to reflect differences in State program maturity, capacity, and authorities. Stronger State programs should be given greater flexibility in designing and managing their enforcement efforts, and reduced day-to-day oversight. EPA should give greater attention to weaker States both in conducting oversight of enforcement activities and in providing needed technical and other support to build State capacity.

The concept of "differential oversight" has been discussed by EPA and the States for many years, and some implementation has occurred on a limited basis. Implementation discussions have focused largely on quantitative issues, such as how many fewer (or more) permits/enforcement actions will be reviewed in real time and under what specific circumstances. To some extent, a numeric approach misses the point, which is to allow those States with strong programs to design and manage their own work toward the objectives of their own strategies, and to use closer oversight as a means for building up weaker State programs.

Implementation of a differential, tailored approach is and will be controversial. States viewed as weaker will not welcome increased EPA attention. However, EPA should be able to avoid the strain if it enters this dangerous territory with a positive, constructive, program-building attitude rather than a punitive one. Reducing EPA direct oversight in stronger States may be viewed by some within EPA and externally as abdicating EPA's responsibility. Reduced oversight will need to be coupled with very open communications between EPA and the State about the State's enforcement strategy, as well as about progress and problems in achieving its objectives. The State will also need to keep up a flow of information to EPA that will allow the Agency to report on State efforts and to exercise its back-up enforcement authority when needed to achieve national objectives.

7. Senior, experienced EPA staff should perform periodic, in-depth audits of State programs as a constructive approach to oversight.

States indicate that EPA would be more effective than it is now in fostering the development of State enforcement capacity by conducting in-depth program audits. The quantitative assessments and case-by-case review of States actions that are the emphasis of current oversight practice are viewed as being of limited benefit. In an in-depth audit approach, experienced EPA staff would use audit criteria to identify strengths and weaknesses of an overall State program, followed by the development of a plan to work with the State to correct problems. Based on the experience of earlier EPA efforts to do such audits, it is essential that highly-qualified EPA personnel conduct the audits, and EPA must be committed to following up with the technical assistance needed by the State. Personnel from other States could participate in the audit itself and help the State address problems by sharing their enforcement expertise. Consistent with the concept of differential oversight, in-depth audits should be done on a periodic basis, with the frequency of follow-up reviews based on the number and types of problems encountered. The baseline frequency of periodic audits should be infrequent enough to assure the availability of the the right level of people and the ability to carry out the needed follow-up.

See Exhibits 2, 3, and 4 for a summary of EPA's oversight policy.

8. EPA should give credit to and reward EPA staff work that results in strengthened State enforcement capability.

Because States carry out the bulk of environmental enforcement work, a primary goal of everyone in EPA should be to build State capabilities. In many cases, program managers are given recognition when their counterpart State programs are successful, but this is not a consistent practice across all programs and all Regions. The current culture in at least some EPA enforcement circles tends to reward attorneys who are involved in prosecuting major enforcement cases. Not as visible are attorneys and other enforcement staff who work with States to build their enforcement capability through training, technical assistance, and other means. Where needed, performance standards should be revised to reflect the State-program building responsibilities of EPA staff in addition to their direct enforcement responsibilities. Other forms of getting recognition and credit for assisting States should also be explored.

B. EPA SHOULD USE STRATEGIC PLANNING AS A MEANS FOR PROVIDING GREATER FLEXIBILITY TO STATES (AND REGIONS).

1. EPA should actively involve States in the planning and implementation of the national and Regional enforcement strategies. EPA should begin involving States now to the extent possible, building a process that will lead to greater State participation over time.

Since States have primary responsibility for and perform the bulk of the enforcement work in delegated programs, the national and Regional enforcement strategies cannot be implemented without their active participation. Cooperative planning of enforcement efforts will have the additional effects of bolstering the Federal-State relationship and avoiding conflicts and duplication of effort on enforcement matters of interest to both EPA and the States.

States should become involved in EPA's planning process as soon as possible. However, it should be understood that developing a strategic planning capability both in EPA and the States will be a long term effort. Ultimately, the strategic planning process should be a system that includes planning at the State, Regional, and national levels -- with ideas generated at each level on both a program-specific and multi-media basis.

Since EPA's own strategic planning process is still in the early development phase, many issues are as yet unresolved. Chief among the unresolved issues are the role of the States in strategic planning and how cross-media initiatives will be funded. EPA can do some coordinated enforcement planning with States in the near term, but full implementation of State involvement may not be possible until funding and management of the overall planning process issues have been resolved.

The Agency must also recognize that not all States will be equally prepared to participate in comprehensive strategic planning for enforcement. The transition from program-specific to more comprehensive planning will need to be gradual, and may not be appropriate at all for some States because of the multiplicity of agencies involved.

Exhibit 7 shows an idealized enforcement strategy development process.

Exhibits 8 and 9 describe the base program and special initiatives components of the national environmental enforcement strategic plan.

2. EPA should consider refining base program strategies to allow for greater focus on priority compliance concerns. EPA should also clarify the relationship between base program activities and special initiatives.

While there appears to be substantial interest and willingness in EPA to target special initiatives, it is still unclear the extent to which refinement of base program strategies will be undertaken as part of the strategic planning process. In some programs, compliance monitoring plans have not been substantially revised in many years. In some cases, inspection frequency is directed by regulation or statute. The definitions of significant noncompliance also serve to direct inspections in the

various programs. Within these general constraints, there is some flexibility regarding the specific type or thoroughness of inspection to be performed.

There is growing sentiment that current base program strategies do not always direct resources to the most important potential violators or the most environmentally significant problems. For example, major (large) facilities are typically inspected annually regardless of their compliance history or contribution to an environmental problem. A strategy to address toxic discharges to air or water might focus in part on smaller facilities not now part of the inspection scheme. Similarly, solving an air or water quality problem on a geographic basis might involve both small and large facilities.

At issue is whether targeting efforts within a single media should or could be part of the base program or whether they are more appropriately dealt with in the realm of special initiatives. Some suggest that States are responsible for the "bread and butter," routine compliance and enforcement activities, and that States have enough to do without getting involved with potentially resource-intensive initiatives. Given the growth in number and complexity of environmental requirements and the static resources available for enforcement, however, there is some question as to whether the States can realistically do all the routine things they are expected to do. At least some States express interest in targeting their routine activities to be sure they are focusing on the most important compliance concerns. They feel they cannot afford to do otherwise.

States are unlikely to welcome an EPA strategy that carves out mostly routine work for States and focuses EPA efforts on the higher visibility, more interesting problems. Individual media program enforcement strategies may need to define base program activities in a manner that readily allows for targeting of even routine activities.

3. For strategic planning to work, EPA must recognize and accommodate the diversity of authorities, institutional arrangements, capacity, and environmental problems among the States.

One source of tension over the years between EPA and the States has been the limited flexibility available to the States in carrying out environmental enforcement activities. While current Agency guidance does provide, in theory, some of the needed flexibility, the willingness and ability of individual EPA programs and even individual staff members to allow flexibility to be exercised is uneven. The reality is that, in general, the culture of the Agency as well as its management systems make exercising flexibility in operation and practice a difficult and potentially risky undertaking. National guidance and policies as well as oversight measures have tended to limit the ability of States to target resources to their own perceived priorities. Further, EPA management systems have tended to push States toward the use of authorities that are equivalent to EPA's as opposed to other, potentially

more effective authorities they might have (e.g., authorities to revoke permits or licenses or to assess natural resources damages).

EPA also needs to acknowledge and accommodate differences in institutional and organizational structure among States. A State's enforcement system for environmental enforcement might include not only the environmental agency or agencies and the State Attorney General's office but also local district attorneys and government departments, independent boards, or other institutions. A State's institutional structure as well as the procedural requirements associated with the use of various authorities affect the State's enforcement choices and should be factored into EPA's assessment of State performance.

It is clear that providing greater flexibility to States will make EPA's oversight function a more challenging responsibility, and statistical reporting will become more complex. However, the test of a good strategy is not how well it fits a reporting structure; rather, a reporting structure should be built to fit a good strategy. If EPA provides greater flexibility, a State's part of the bargain must be to provide the information EPA will need to understand how well the State's enforcement program is working, be able to identify problems, and explain and justify the State's efforts to EPA's overseers.

EPA will need to carefully assess whether particular State authorities are appropriately incorporated into a broader definition of enforcement mechanisms. To provide this flexibility, yet carry out its responsibility for assuring consistent enforcement nationwide, the Agency will need to insist that State authorities meet some minimum criteria to have them qualified for consideration as an enforcement mechanism. In some cases, States may find they need to bolster existing authorities in order to meet the minimum set. For example, if the expected minimum includes an ability to impose economic sanctions administratively, a State would need to show that it has either administrative penalty authority or some other sanction with comparable economic consequences, such as the ability to revoke or suspend permits.

Changes will need to be planned carefully and pilot tested; full implementation will come slowly. Disputes between EPA and States will never completely disappear because there will always be honest differences in enforcement philosophy. However, EPA recognition and accommodation of each State's enforcement strategy, based on its own unique array of authorities and capacities, will aid in improving both the quality of enforcement efforts and the Federal-State relationship itself.

Exhibits 10-15 provide examples of the State institutional, procedural, and legal diversity.

Exhibit 10 shows the legal and institutional context for environmental enforcement.

Exhibit 11 depicts the variety of institutions with a role to play in environmental enforcement.

Exhibit 12 shows the diversity in State agency organizational structures.

Exhibit 13 gives examples of State authorities different from EPA's.

Exhibit 14 explains how seemingly similar administrative order authorities are really different.

Exhibit 15 shows that the final review of administrative orders in half of the States is done by a review board external to the environmental agency.

4. EPA should provide incentives such as increased flexibility in accountability measures and oversight, technical assistance, and financial support to encourage State participation in strategic planning and implementation of initiatives.

State officials indicate that perhaps the single most important incentive EPA can provide to secure their participation in strategic planning and implementation is greater flexibility in accountability and oversight; they are, however, quite pessimistic about the likelihood that it will happen. Implementation of initiatives also will be aided if EPA provides technical assistance, such as giving specialized training to inspectors and/or attorneys, performing laboratory analyses, or even lending personnel to the State if needed. To help States in planning, EPA should provide access to national computer data bases, planning software and guidance, results of comparative risk or compliance analyses, and other tools and information useful to States in identifying priority problems. EPA should also facilitate sharing of the lessons learned from various enforcement approaches and techniques being tried by EPA and the States. Special financial support would provide a significant incentive to do initiatives, but if no additional resources are available, at a minimum there must be a tradeoff against base program activities.

5. To start the momentum for change, EPA should begin right away by working closely with selected pilot States to learn the opportunities and barriers that exist for (l) State implementation of initiatives and (2) development of State strategic plans.

It will take many years to work out the details and policy changes necessary to fully implement the enforcement strategic planning process that is envisioned and to achieve the culture change that will result in improved EPA-State relationships. It is essential that EPA take steps now, however, to begin implementation. To the extent feasible within the constraints of the FY 1991 grant cycle, EPA should seek to begin pilot testing the involvement of States in strategic planning and in implementing enforcement initiatives.

This year, each EPA Region is beginning implementation of a pilot enforcement project based on integration of data systems. The role of States in these projects is still being determined, but working out the EPA-State roles is an integral part of implementation. The successes and problems in working with States should be assessed as part of the overall evaluation of these efforts.

Some States have expressed interest in developing enforcement strategic plans themselves. In another pilot effort, EPA could work with and follow the progress of selected, interested States that want to try to develop strategic plans. This experience would provide insights valuable in assisting other States doing strategic plans in the future as well as help EPA refine its policies and procedures regarding involving State involvement in the EPA strategic planning process.

These pilot tests and experiments should start to build a momentum for change. Meanwhile, EPA and States can learn together:

- The types of projects that tend to be successful;
- Productive ways to design and carry out progress assessment and project evaluation;
- What the practical, operational barriers are to implementation;
- Specific changes that need to be made in various management and oversight systems and policies; and
- Ways to transfer successes and lessons learned from the initiatives to others.

Exhibit 16 describes funding options for special initiatives.

6. EPA should encourage States to designate a high-level official with multi-media responsibilities to be responsible for environmental enforcement planning and negotiations with EPA. EPA should recognize, however, that this will not be feasible or even desirable for all States.

EPA's new enforcement strategic planning process is designed to target enforcement efforts to environmental problems that cross media boundaries, such as on a geographic, industry-wide, or pollutant basis, in addition to targeting within the individual media. EPA's Regional Administrators (RAs) and Deputy Regional Administrators (DRAs) are responsible for assuring that cross-media targeting and case screening occurs at the Regional level. The assignment of this responsibility to the RAs and DRAs should assure both greater integration within EPA as well as give State managers a focal point for enforcement agreement negotiations.

At present, enforcement agreements are often negotiated between State program divisions and the corresponding individual EPA program offices. The strategic planning process could be facilitated immensely if each State designated a high-level official with cross-media enforcement responsibilities similar to the RAs and DRAs to lead the State's participation. Since the traditional program-specific planning structure cannot change overnight, an interim way to involve States in EPA's multi-media planning efforts could be to invite an appropriate senior State officials to meet with the Agency's senior managers to discuss multi-media efforts and their interest in participating.

Meanwhile, EPA will be gaining experience with a centralized enforcement planning function at the Regional level. This experience should provide insights into the benefits of and problems associated with a centralized enforcement planning function that EPA could use to encourage (or discourage) States from adopting a similar approach.

It would be generally be desirable for EPA to have a single representative to work with on strategic planning in a State. However, in some States this may be difficult to achieve, e.g.,where multiple agencies have environmental enforcement responsibilities. In other situations, even the attempt to have such an individual named could be counterproductive, such as where there are conflicting agendas between the executive and law enforcement branches of government.

7. EPA should work with States toward development, over time, of a multi-media, integrated State-EPA enforcement agreement contained in a single document.

Current guidance on the development of State-EPA enforcement agreements states that the agreements need not be a single "document," but rather can be a compilation of a variety of conditions in grant agreements, enforcement policies, memoranda of understanding, and other written documents between EPA and the States. As noted above, these pieces are often negotiated at the program division level, and may or may not be compiled in one place even for a single program. With this fragmented approach, it is often difficult to learn just what the "State-EPA enforcement agreement" is or to understand the overall structure of the State-EPA relationship for a given State.

EPA should encourage States to initiate a process, similar to that which EPA recently began, to develop an integrated strategy. Integrated enforcement agreements should help facilitate implementation of strategic plans since implementation will cross traditional program boundaries and require special negotiation of what EPA and State responsibilities will be in carrying out particular enforcement initiatives.

EPA must recognize that it will take many years before this goal can be fully realized by either EPA or the States. It is important that this recommendation not be implemented prematurely, before EPA has adequate experience of its own in trying to develop and implement a multi-media strategy. In the near term, EPA could work with an interested State in a pilot effort (see recommendation B-5).

8. Single-media and cross-media enforcement priorities and initiatives should be generated in a process that considers national, Regional, and State concerns. Consultation between levels of government about initiatives is essential.

Some national and Regional enforcement priorities and initiatives will emerge from broad-scale analysis of environmental and/or compliance problems. States should also be able to generate initiatives since they are in a unique position to identify the specific problems they face which may warrant national or Regional attention. Ideally, the process should allow problems on a local level to be identified and considered for initiatives as well.

Consultation between levels of government, including the Department of Justice, is essential before embarking on State initiatives involving substantial Federal involvement (e.g., special funding or technical assistance), novel legal issues, or the potential for duplicative effort to assure that potential enforcement problems for the Federal government can be identified and addressed. This process goes both ways, however; the Federal government must also consult with States on initiatives to assure proper coordination. However, there are certain rare instances for which joint planning and execution of an initiative would be inappropriate. Examples include such situations as some Federal criminal investigations, when a State is the targeted defendant, when the State cannot accommodate Federal requirements for confidentiality, or when the Federal government is the subject of a State action.

Exhibits 17 and 18 present an idealized process for generating initiatives.

9. The respective responsibilities of EPA and the States in implementing specific initiatives should be negotiated in advance with each State.

The respective roles and responsibilities of EPA and individual States in carrying out specific initiatives will vary depending on the nature of the initiative itself, the level of interest of the State, and resource and capacity considerations. The roles may range from EPA having complete responsibility with virtually no State involvement to States having complete responsibility with EPA in an oversight role only. In between are various alternatives such as States conducting inspection work with EPA taking the lead in enforcement actions, joint inspections and enforcement actions, and either State or EPA having the lead for implementation but with active cooperation from the other partner. For smooth implementation, however, it is essential that these arrangements be negotiated and agreed to in advance.

Exhibit 19 shows the possible arrangements that can be established for carrying out initiatives.

10. If a national or Regional enforcement initiative addresses a problem of low priority to a State, the State should be able to decline participation. However, the State recognize that EPA will enforce in the State as needed to achieve the objectives of the initiative.

Sometimes, a national or Regional enforcement initiative might be designed to address a noncompliance or environmental problem that is not considered a high priority by a State. For example, the State might have a single facility of an industry category targeted by EPA because of a national pattern of noncompliance, and the particular facility's noncompliance is not a priority for the State when compared to other more pressing problems. The State might opt not to participate in the initiative. When implementation is needed to achieve the objectives of the initiative, however, States must recognize that EPA will take action in that State to carry out the initiative.

11. EPA should involve States in enforcement strategic planning early enough in the planning and budgeting cycle to allow for serious consideration of their priorities in Regional and national strategies.

States must participate early in the planning cycle if EPA is to be able to consider State priorities in developing Regional and national enforcement strategies and in preparing budget proposals. At present, the actual schedule for the ongoing strategic planning process and for phased implementation of Regional strategies is still under development. Once it has been more firmly developed, a schedule for phasing in State participation should also be prepared.

12. EPA should reform management systems, policies, and procedures that are barriers to implementing State strategic plans.

Some aspects of current policies and definitions constrain the ability to design and implement enforcement programs that are tailored to the particular needs and legal and institutional situations of individual States. Innovation is not encouraged. Timely and appropriate response criteria and accountability measures are viewed as pushing States toward use of enforcement mechanisms that can be swiftly executed and that are given "credit" by EPA. These mechanisms may not always be the most effective tools available to address a problem (e.g., suspending a permit until a violating facility comes into compliance could achieve compliance faster and be a greater economic penalty than might be exacted through an administrative order). The needed flexibility could be accomplished by broadening the kinds of mechanisms that are considered "enforcement" and thereby given credit by EPA, and by tailoring timely and appropriate criteria to the institutional

and legal situations of individual States. The definitions of significant noncompliance, a central management tool for environmental enforcement programs, are viewed as sometimes forcing enforcement efforts to problems of limited importance.

Current accountability measures, which count numbers of various kinds of enforcement activities (inspections, actions, etc.), may also inhibit State ability to implement strategic plans. Currently, such measures lump broad categories of activities together and cannot measure progress toward achieving specific objectives of initiatives. An alternative approach would include plans for collecting and analyzing information into the design of enforcement initiatives. Periodic reviews would focus on the progress being made and on identifying and correcting any problems being encountered. Some grant-related commitments would need to continue because of financial management requirements and normally-counted activities would continue to be included in statistical reports, but otherwise the emphasis of oversight would be on qualitative issues.

Planned assessment and evaluation will allow EPA and the States to share experiences about what worked well and what did not in a way that should ultimately result in future improvements in enforcement program design. These assessments should take place outside the accountability system if they are to have the desired results. However, the information gleaned from them should be used in explaining in more depth the successes of enforcement efforts and lessons learned from them that will be applied to future efforts.

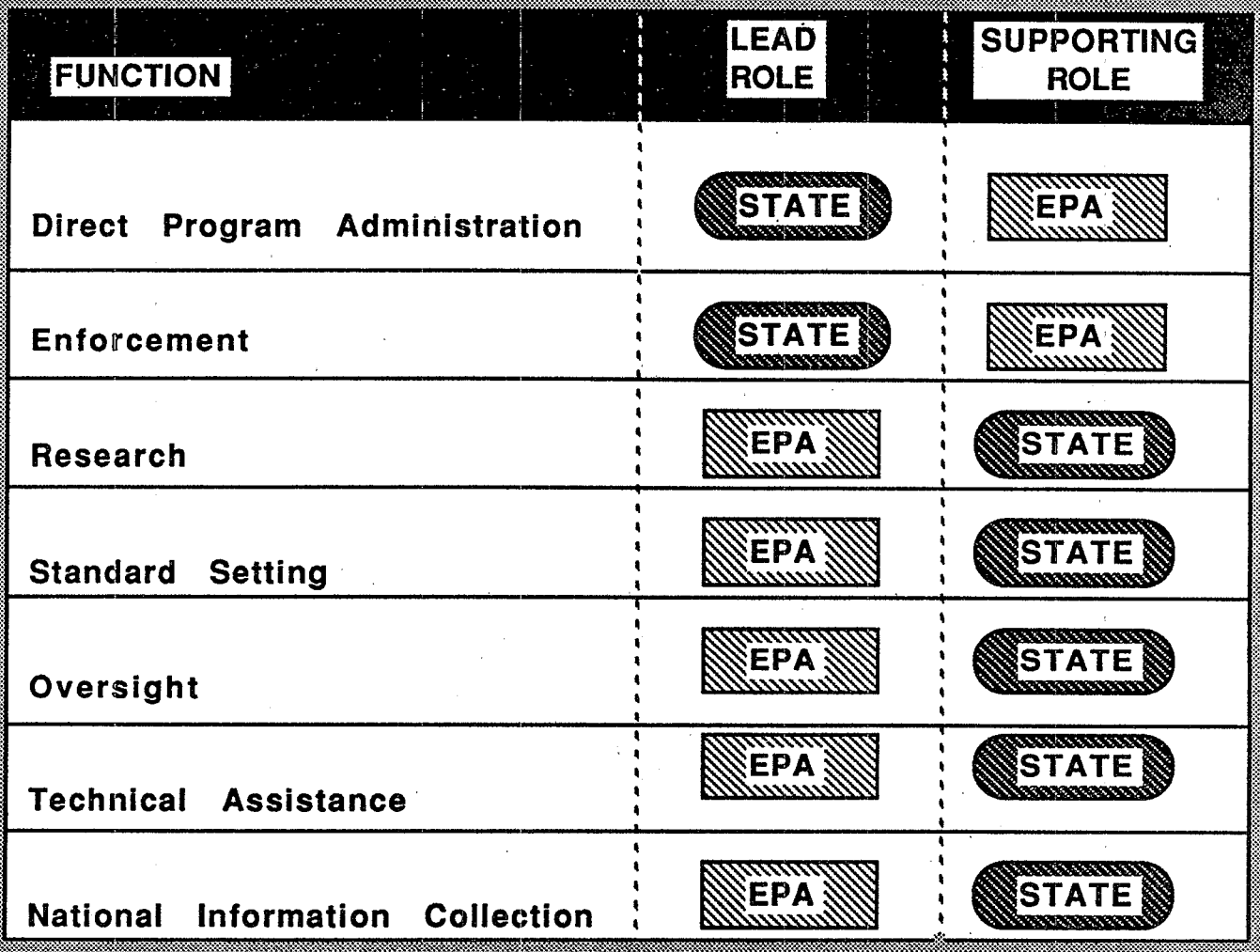
In the immediate term, EPA is testing alternative ways of measuring the success of enforcement initiatives as part of the Regional data integration pilots; the new STARS management system also provides for greater flexibility in accountability measures. Ultimately, these kinds of changes will need to be incorporated into EPA's oversight and accountability system for States.

Exhibit 20 describes the options for progress assessment that were considered.

EXHIBITS

EPA AND STATE ROLES IN ENVIRONMENTAL PROTECTION

1



Sources: State-Federal Roles Task Force, 1983
1984 EPA Delegations and Oversight Policy

1984 EPA OVERSIGHT POLICY

2

PURPOSE OF OVERSIGHT

1. Ensure adequate environmental protection through development and enforcement of national standards, and use of direct enforcement action when needed to reinforce State action and authority

2. Enhance State capabilities to administer sound programs, through increased communication and a combination of support and evaluation activities

3. Describe and analyze the status of national and Regional environmental quality, through collection and dissemination of information from State agencies and other major sources

OBJECTIVES FOR IMPLEMENTATION

1. Ensure continuing strong enforcement, with States as first line of action and EPA as strong back-up for action when needed

2. Clearly define program goals, priorities, and measures of success

3. Provide constructive evaluations of delegated State programs, focused on problem-solving

4. Ensure timely identification of State program needs and State environmental problems and conditions

5. Use a range of responses to State program performance and State needs, focused on preventing large mistakes and solving identified needs

ENFORCEMENT DISCUSSION IN 1984 EPA OVERSIGHT POLICY

3

Ensure continuing strong enforcement activity, with States as the first line of action and EPA as strong back-up for action when needed.

Delegated States have lead for compliance and enforcement activities; EPA expects strong State programs

EPA role is shifting from a primary focus on performing inspections and taking enforcement actions to an emphasis on conducting review and evaluations and providing States with guidance and technical assistance

EPA must assure that national goals and objectives are met, so must be strong back-up to States to provide direct enforcement when needed.

EPA should establish in advance with the States the general criteria or guidalines for when EPA will take independent action

EPA and the States should conduct joint annual planning, in order to establish and coordinate priorities

Develop annual program strategies and priorities for targeting compliance and enforcement activities

Establish agreed-upon criteria for, and measures of, adequate overall State compliance and enforcement programs

Tailor national program criteria to fit each State's unique circumstances, procedures, and authorities

States must provide EPA with prompt, accurate information regarding sources out of compliance and on State plans for enforcement actions, focused especially on mutually established annual priorities

CURRENT EPA OVERSIGHT OF STATE ENFORCEMENT PROGRAMS

4

QUANTITATIVE MEASURES

Number of inspections
Number of enforcement actions
Grant commitments

CASE-BY-CASE REVIEWS

Timely and appropriate enforcement
EPA overfiling

TECHNICAL ASSISTANCE

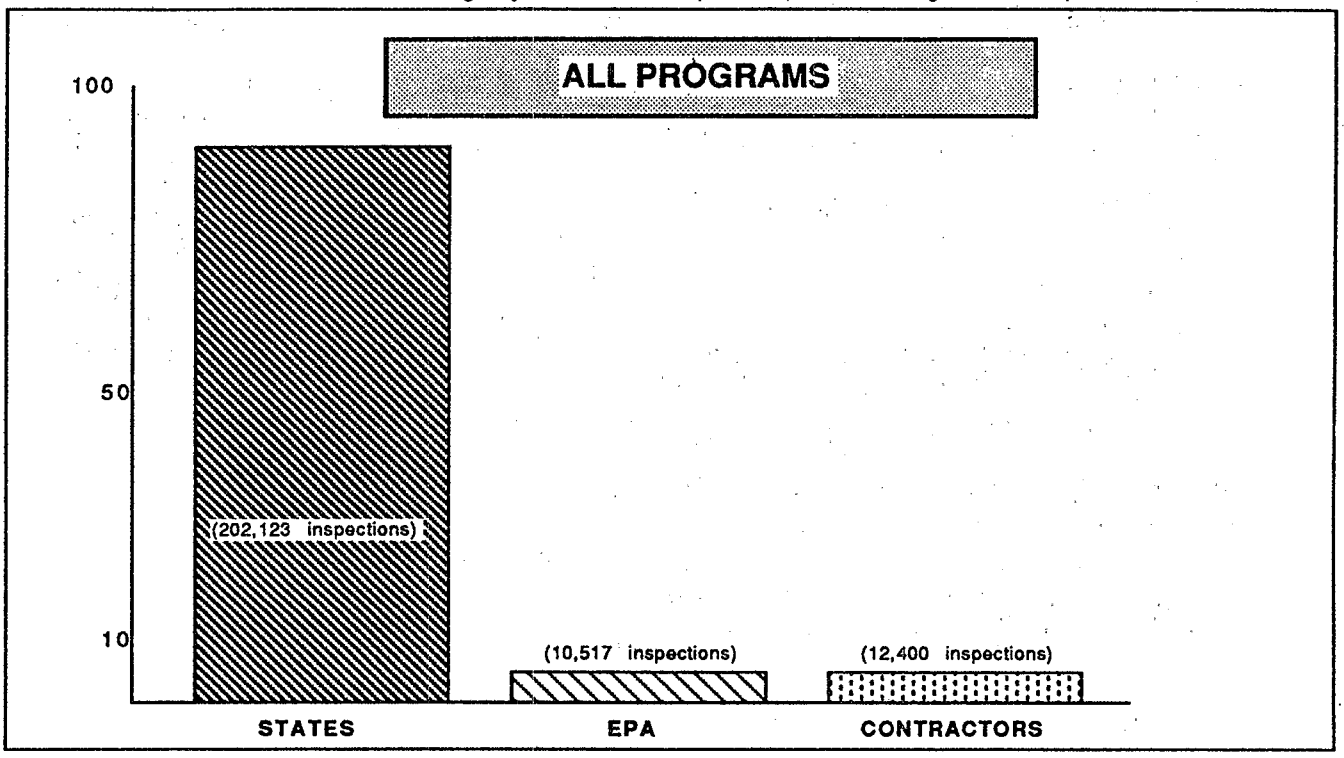
Training
Direct assistance on specific cases

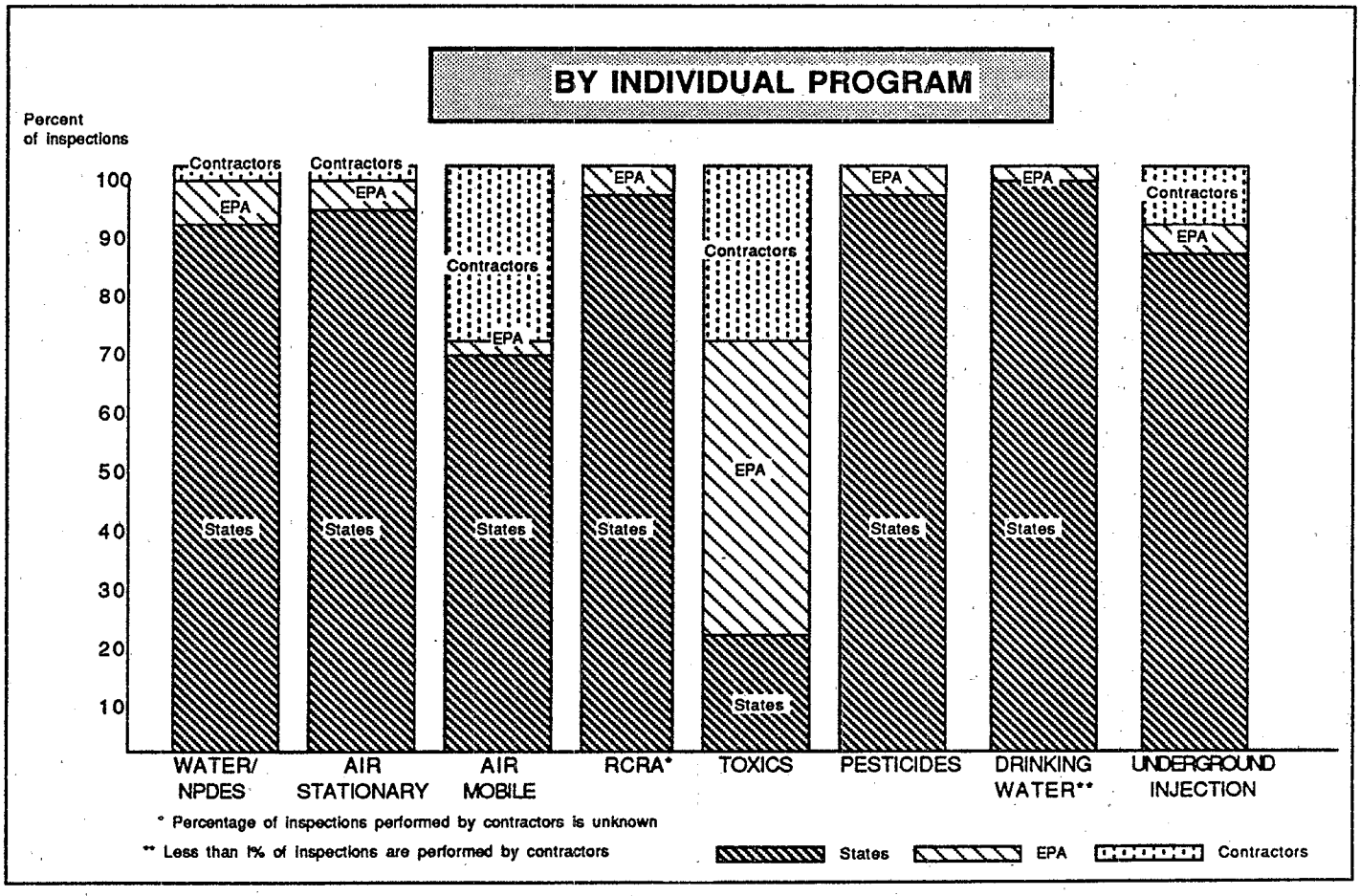
IMPLEMENTATION OF EPA OVERSIGHT POLICY WOULD SHIFT EMPHASIS:

- IN-DEPTH PROGRAM REVIEWS
- TECHNICAL ASSISANCE
- QUANTITATIVE MEASURES
- CASE-BY-CASE REVIEWS

WHO PERFORMS ENVIRONMENTAL INSPECTIONS?

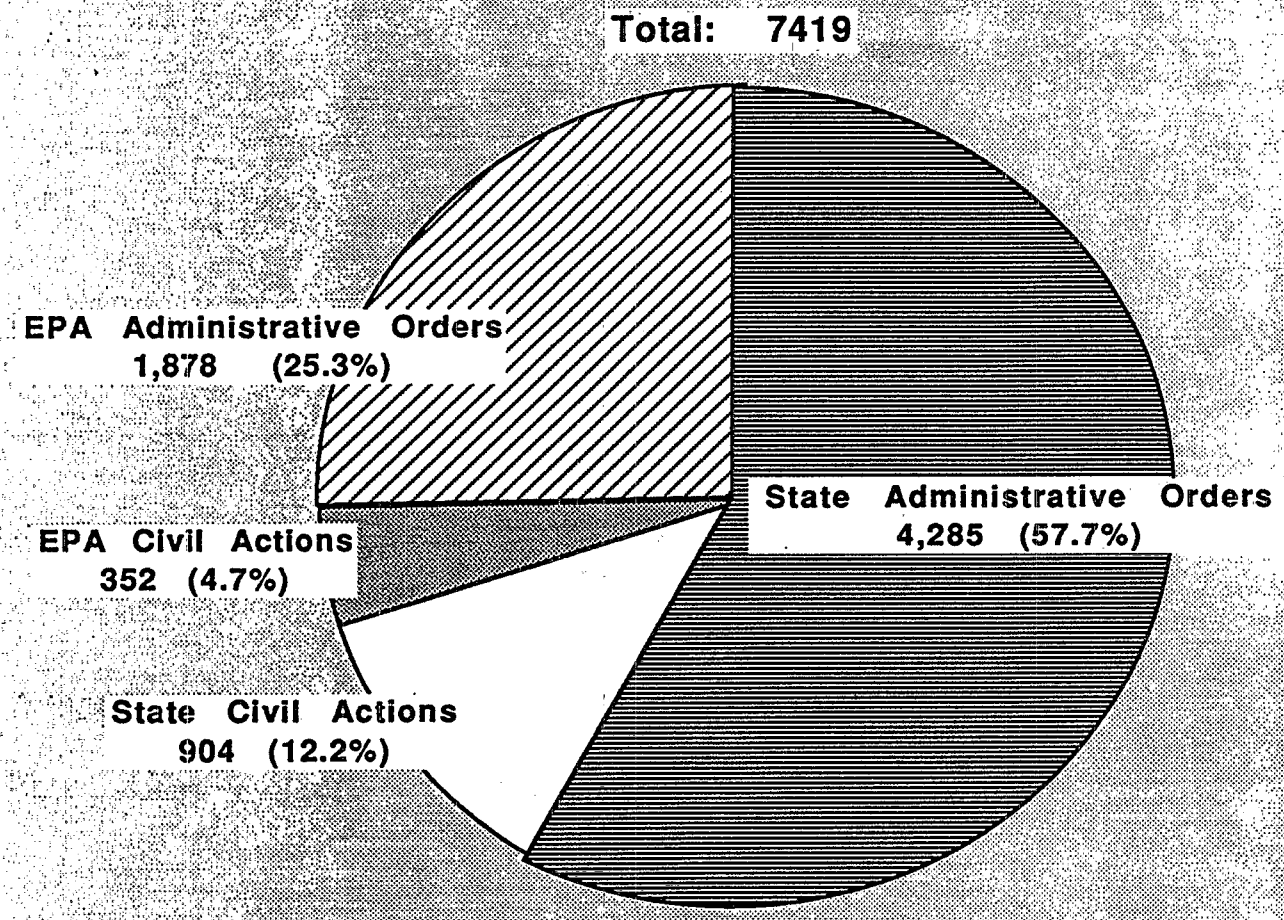
SOURCE: Estimates for FY 1988, as provided by EPA compliance program offices to the Agency-wide Work Group for Inspector Training and Development





ENFORCEMENT ACTIONS 1988 (AIR, WATER, RCRA)

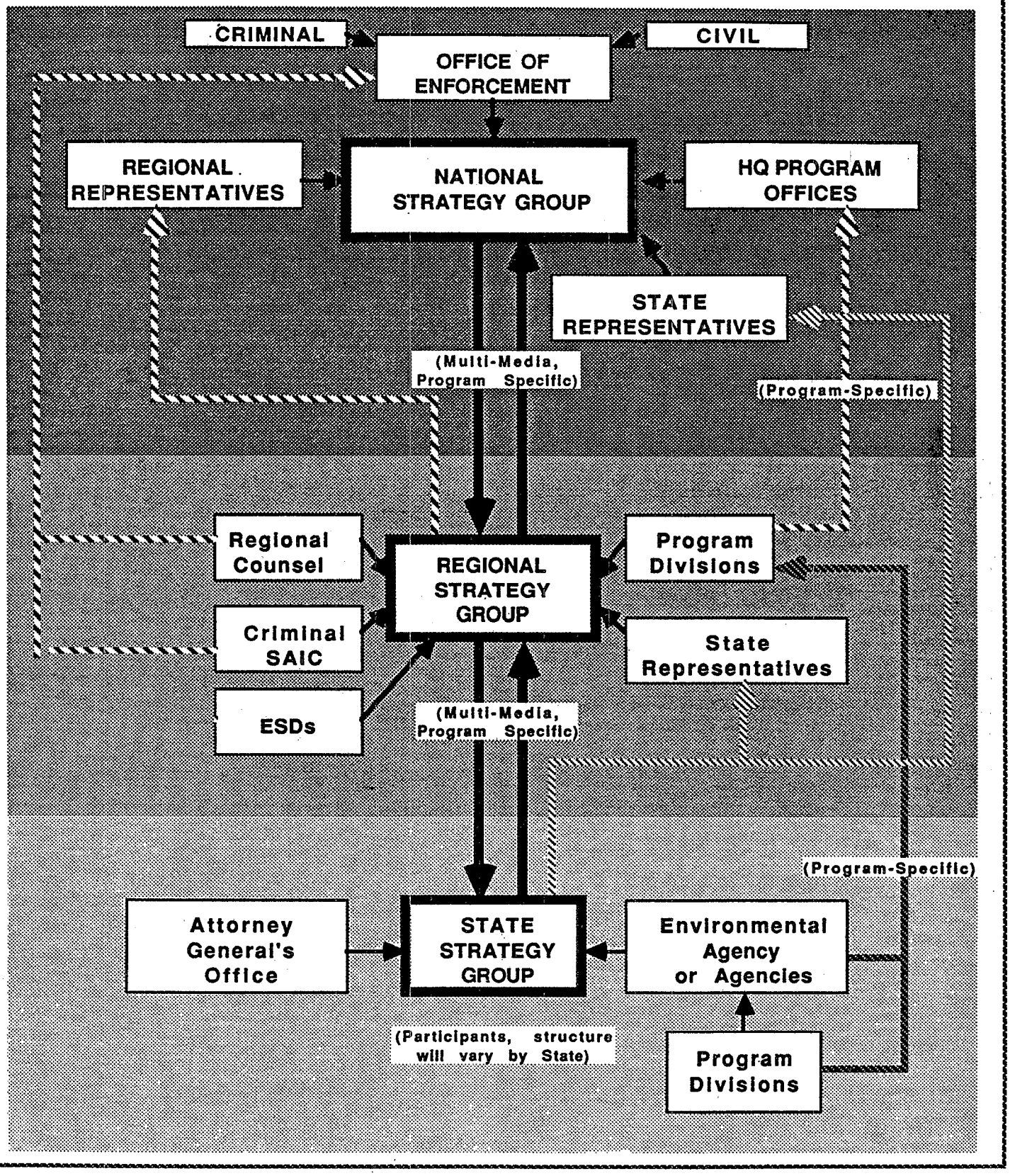
6



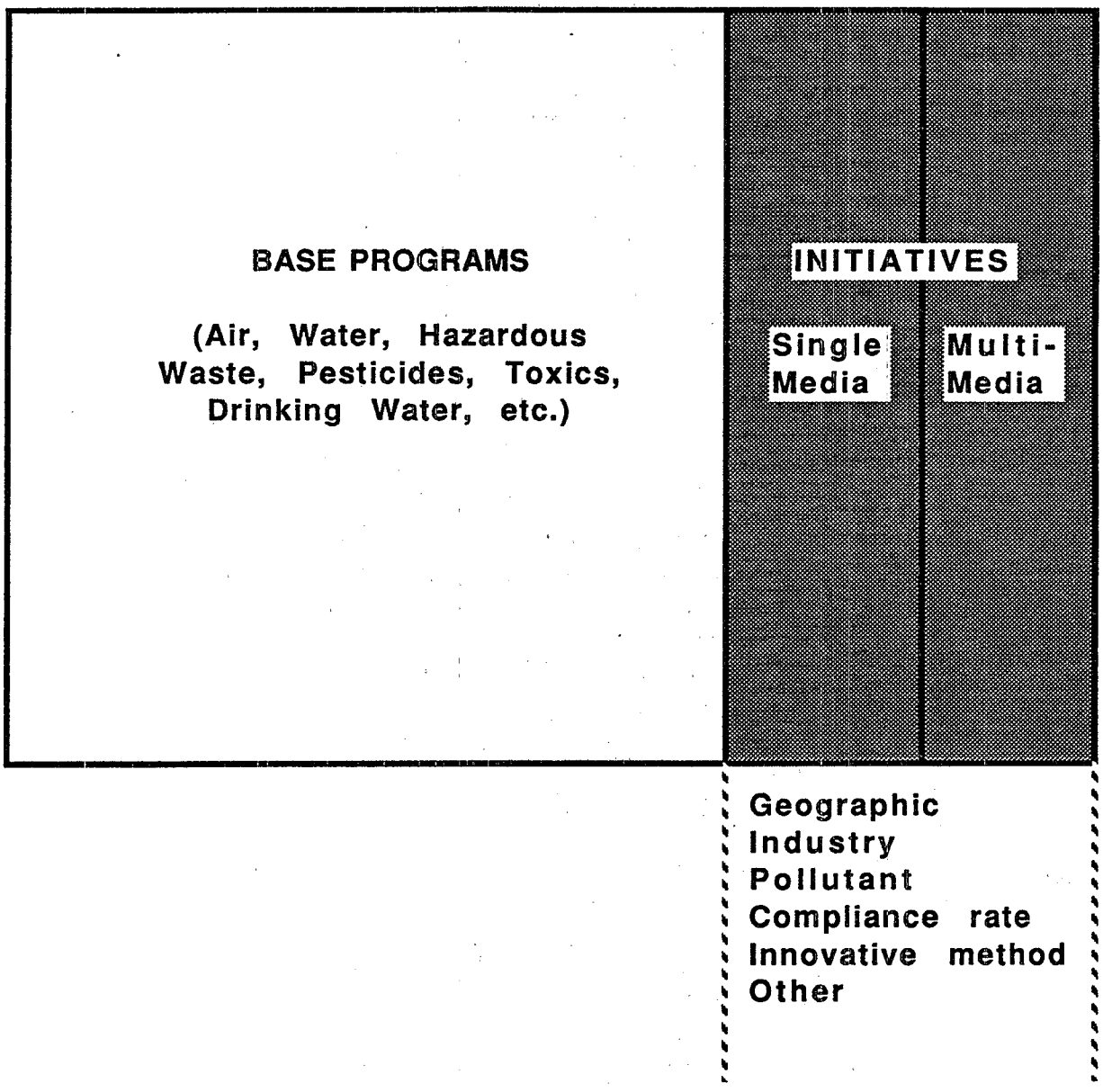
Source: EPA Press Release, 1/8/88; Trends in Statutory Enforcement Programs

ENFORCEMENT STRATEGY DEVELOPMENT PROCESS

7

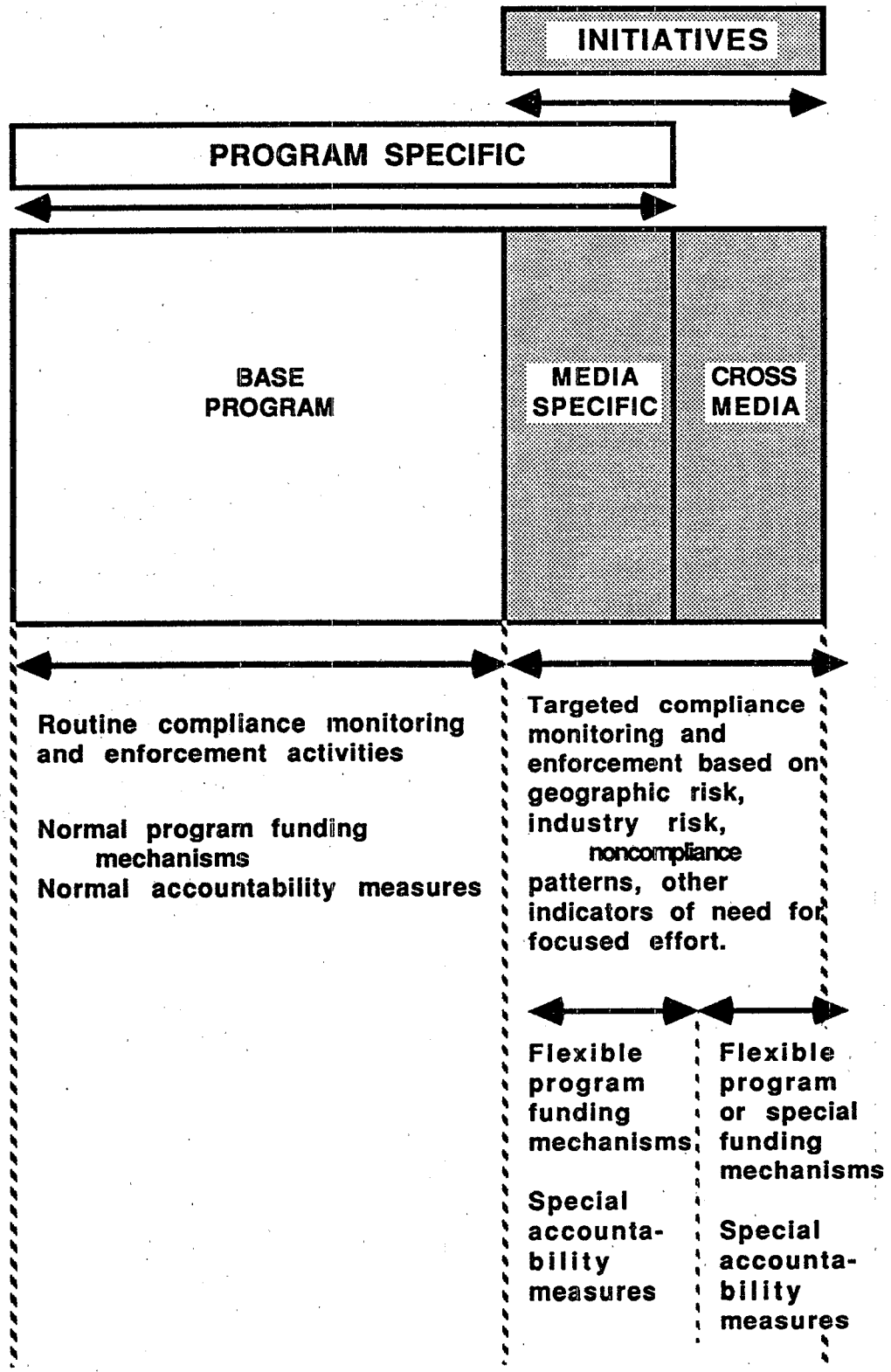


EPA ENFORCEMENT STRATEGY 8



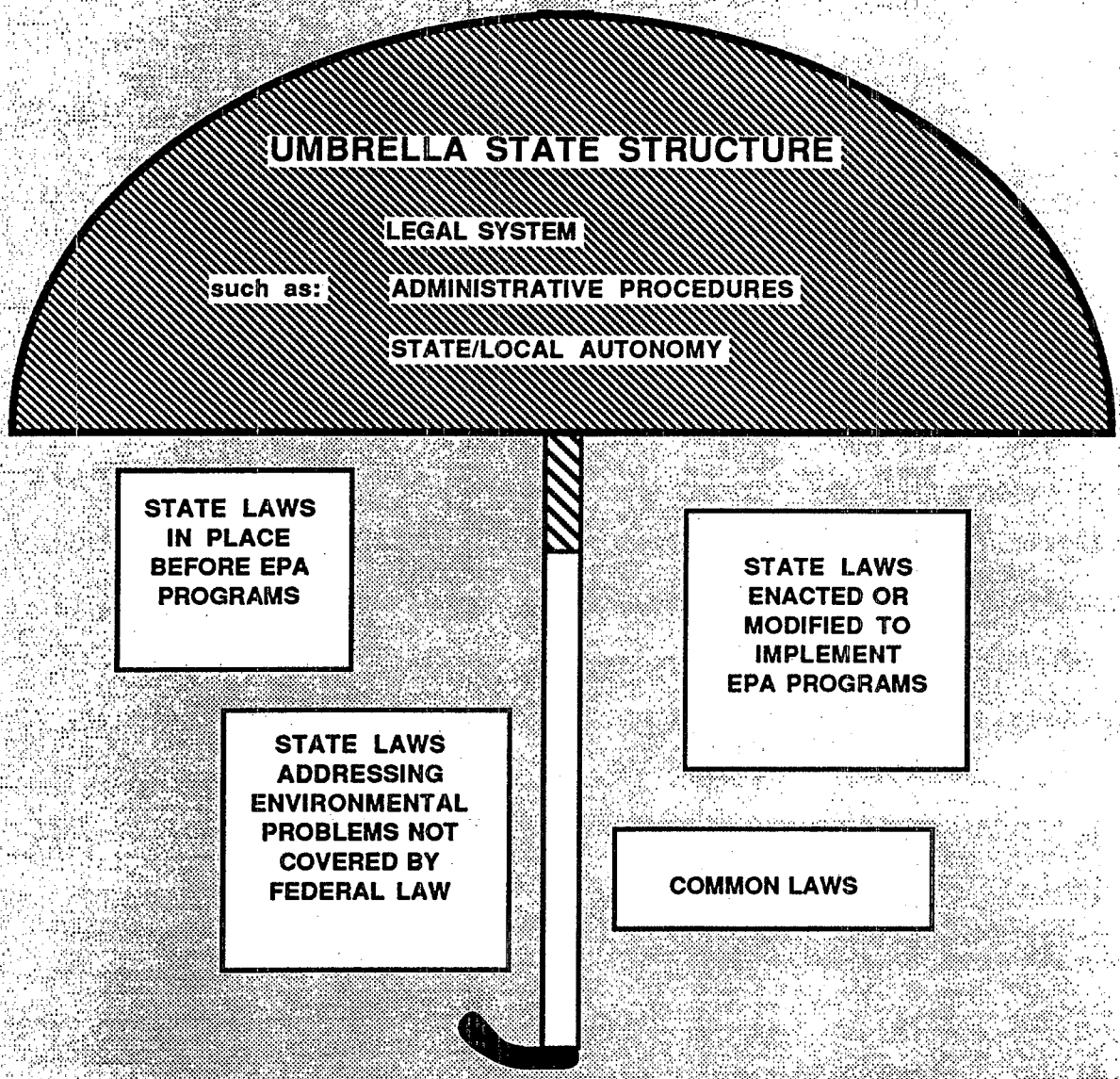
ENVIRONMENTAL ENFORCEMENT STRATEGY

9



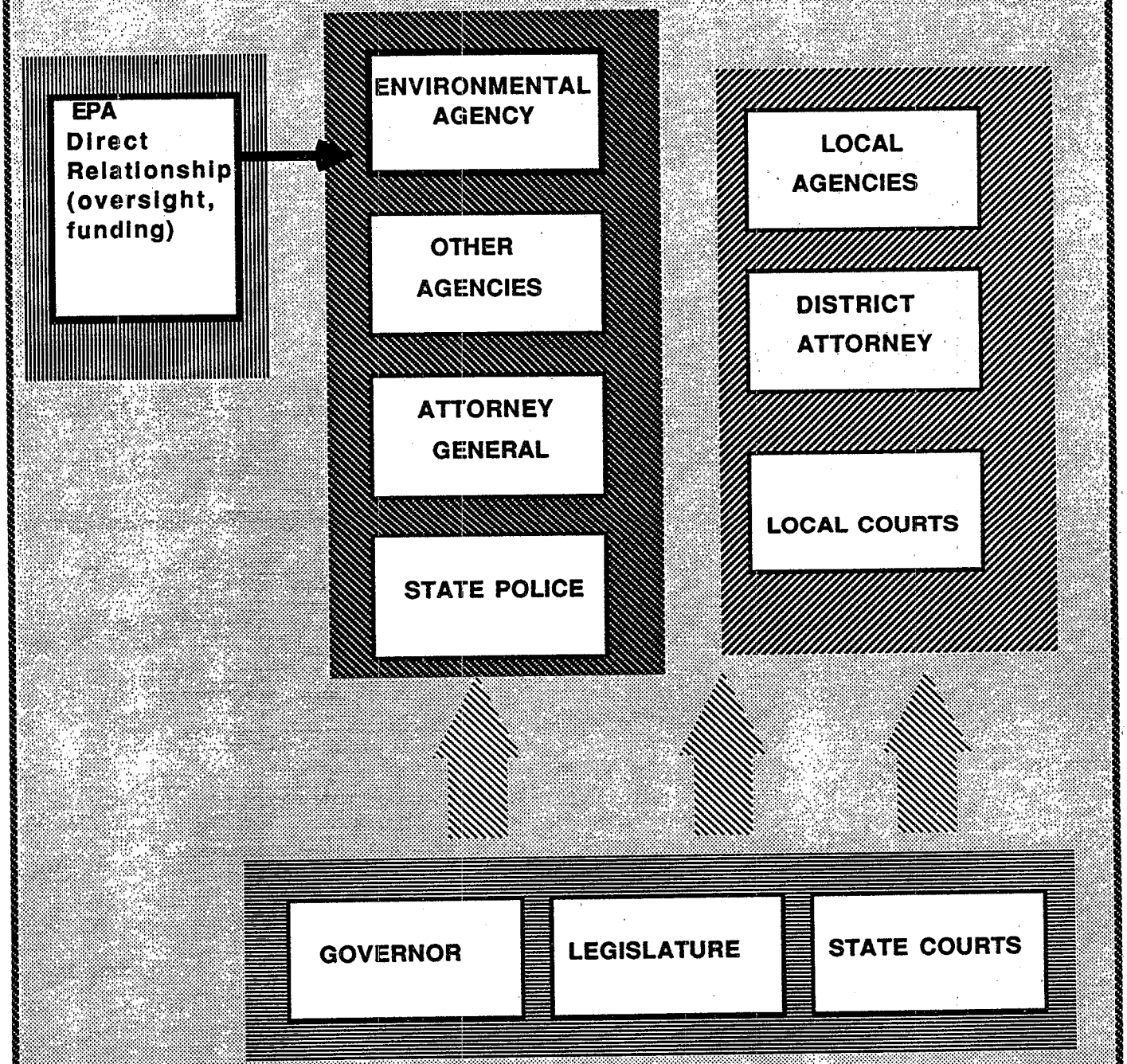
10

THE CONTEXT FOR STATE ENFORCEMENT



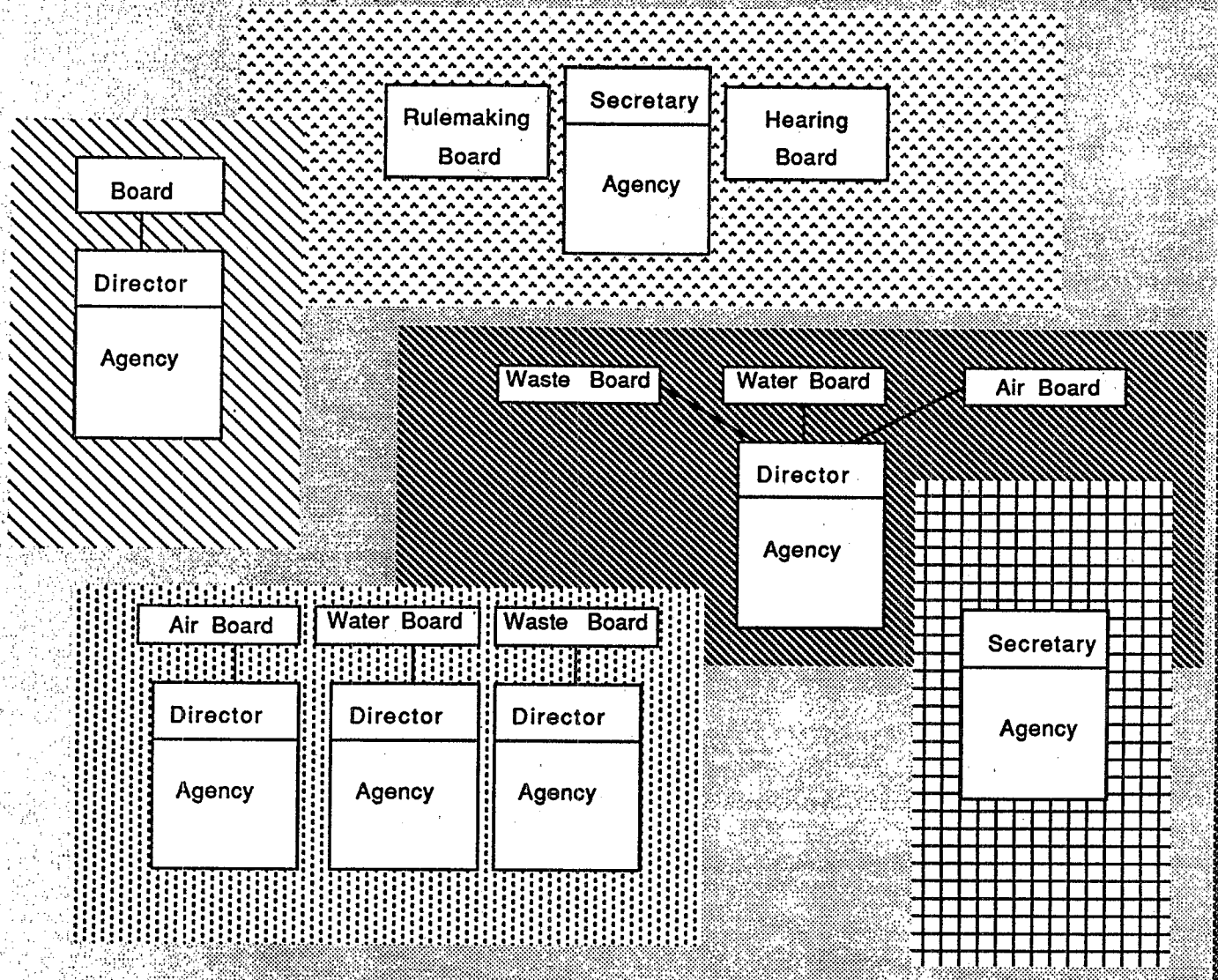
STATE INSTITUTIONS WITH ROLE IN ENFORCEMENT

11



ENVIRONMENTAL AGENCY ORGANIZATIONAL STRUCTURES

12



STATE ENFORCEMENT AUTHORITIES ARE SOMETIMES BROADER THAN EPA'S

13

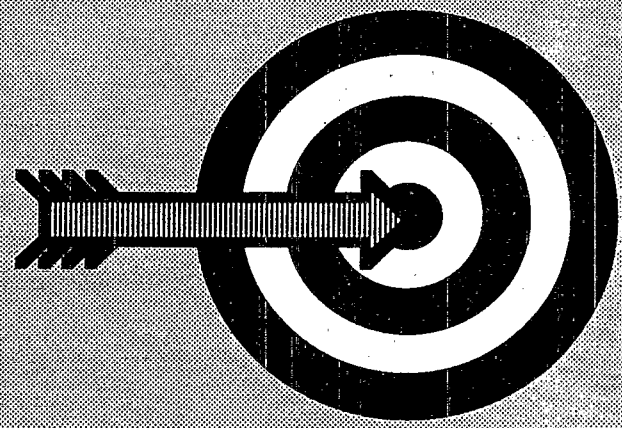
EPA-REQUIRED AUTHORITIES	OTHER COMMON STATE AUTHORITIES
Criminal Sanctions	Nuisance Law
Injunctive Relief	Permit Bar
Civil Penalties	Licensing
Administrative Orders	Superlien
	Registration
	Property Transfer Requirements
	Natural Resource Damages

DIFFERENCES IN ADMINISTRATIVE ORDERS

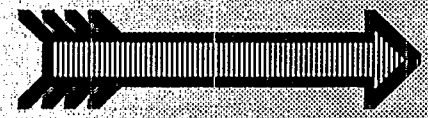
14

Immediately effective upon issuance

(State must be prepared to litigate right away)

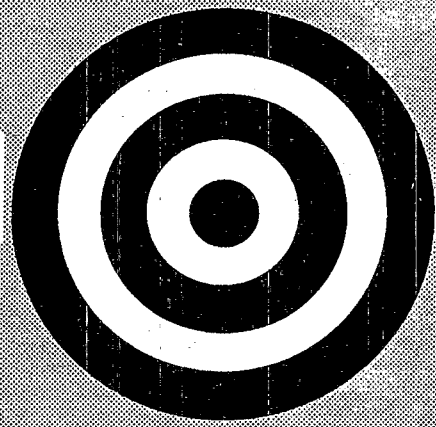


8 States



Effect delayed if review requested

(Agency has time to prepare case if challenged)



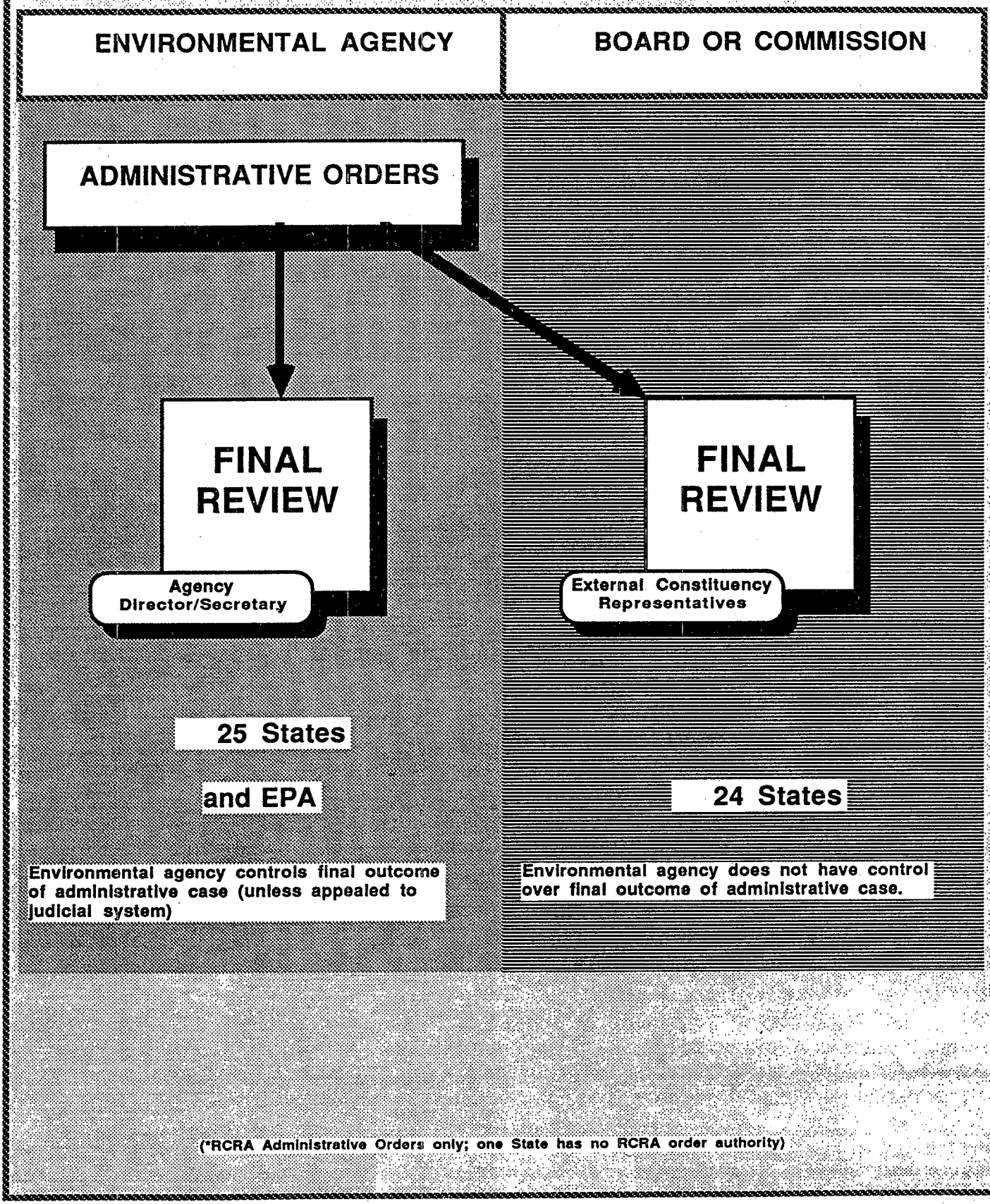
41 States and EPA*

EPA treats both types the SAME for oversight purposes.

* Most EPA orders are "complaint orders", but there are a few exceptions

15

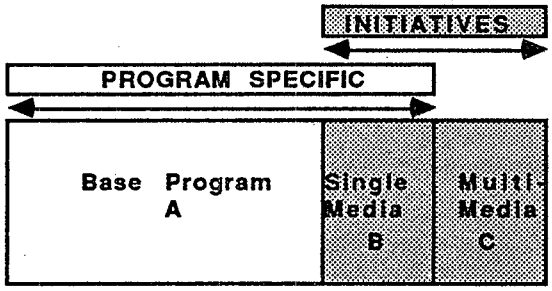
FINAL REVIEW OF ADMINISTRATIVE ORDERS*



(*RCRA Administrative Orders only; one State has no RCRA order authority)

FUNDING OPTIONS FOR SPECIAL INITIATIVES

16



OPTION 1 — **Funding for A, B, and C from normal program funding**
No special funding available

PROS
- Reinforces concept that strategic planning should be a routine process
- No disruption to current funding approaches

CONS
- Initiatives may not receive adequate support or attention
- Programs would provide resources as needed to carry out initiatives

OPTION 2 — **Funding for A and B from normal program funding**
Special multi-media funding for C

PROS
- Keeps program-specific activities funded through normal process
- A portion of "normal" program funds could be reserved for single-program initiatives
- Special funds for multi-media projects would help assure projects happen
- High visibility to multi-media initiatives

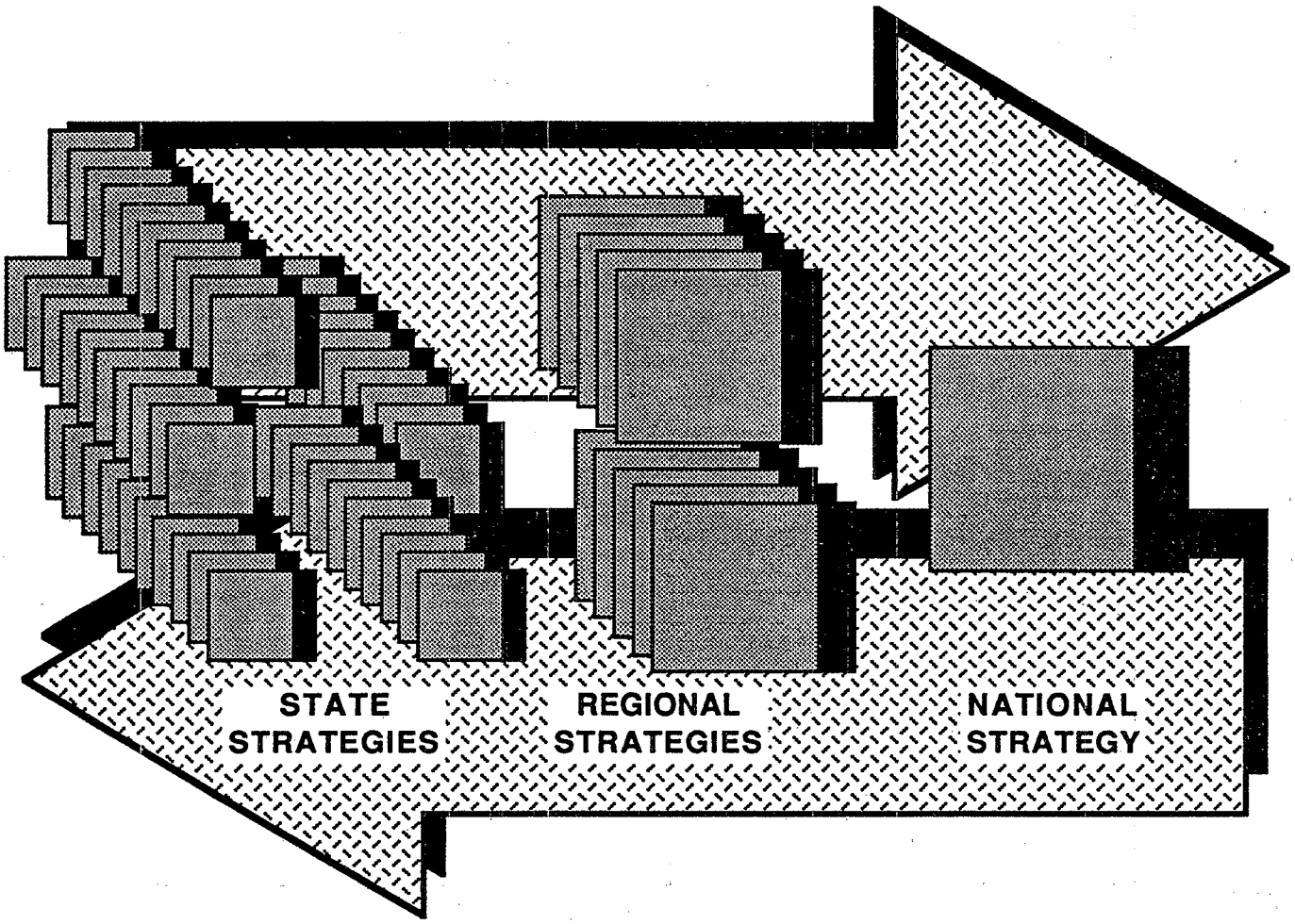
CONS
- Source of special funds would need to be found (this could be a percentage tap from each program area)
- States unlikely to hire under special funding because of uncertainty
- Competition between base program, program initiatives, and multi-media initiatives could be damaging
- Some disruption of current funding process

OPTION 3 — **Funding for A from normal program funding**
Reserved percentage of program funding for B
Special multi-media funding for C

PROS
- Gives special attention to both program-specific and multi-media initiatives
- A required percentage of funds could be reserved for program-specific initiatives, and each grant program could be tapped for multi-media initiatives

CONS
- Disruptive to current funding process
- Competition for resources could be damaging
- Base programs may be jeopardized
- Unless there is stable funding, projects may suffer due to lack of certainty

ENFORCEMENT STRATEGIES 17

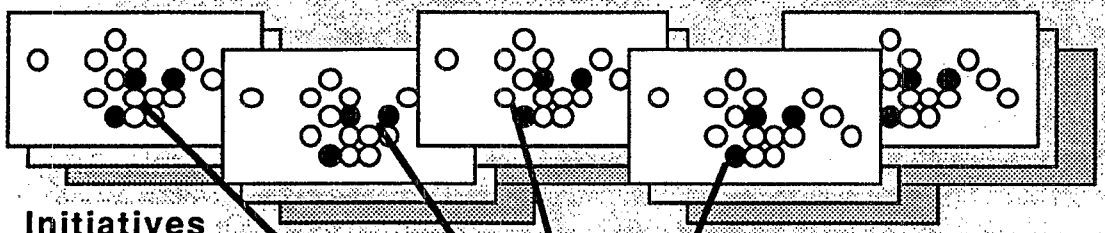


BASE PROGRAM,

SPECIAL INITIATIVES

ENFORCEMENT INITIATIVES

18



State Initiatives

Regional Initiatives

Some State Initiatives become Regional Initiatives, others are originated by the Region

National Initiatives

Some Regional Initiatives become National Initiatives, including some that were originated by States; others are originated at the national level

Negotiations Process

REGIONAL PROGRAM

Negotiations Process

STATE PROGRAM

State/Cross Media
State/Single Media

Regional/Cross Media
Regional/Single Media

National/Cross Media
National/Single Media

EPA AND STATE ROLES
NATIONAL, REGIONAL ENFORCEMENT INITIATIVES

19

The chart below summarizes various negotiated arrangements that can be made between EPA and the States with regard to carrying out EPA initiatives. In a given State, the roles arrangement might be different for each initiative, based on the nature of the initiative, degree of State interest, and resource concerns. To assure smooth implementation, roles must be clearly negotiated and understood.

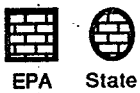
KEY TO ROLES SUMMARY

Lead Responsibility

Active Cooperator

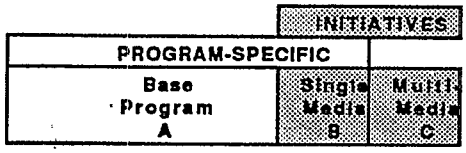
Joint Responsibility

Consultation Role

ACTIVITY	EPA LEAD	STATE LEAD	EPA-DOMINANT	STATE-DOMINANT	JOINT (Negotiated)
Planning					
Inspection					
Enforcement Response Decision					
Case Development					
Prosecution					
Evaluation					

PROGRESS ASSESSMENT
ENVIRONMENTAL ENFORCEMENT STRATEGIES

20

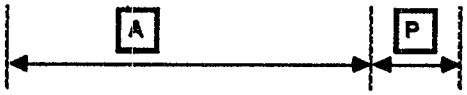


OPTION 1: CURRENT ACCOUNTABILITY SYSTEM

Numerical commitments for inspections, types of enforcement actions; activities tracked against commitments

PROS
- Minimum disruption to current program
- Numerical measures will be better measure of environmental importance as SNC definitions are refined
- Program evaluation can be carried out as completely separate function

CONS
- Does not provide much flexibility or ability to accommodate innovative approaches
- Results of initiatives will be lost in total numbers
- Multi-media projects likely to have difficulty getting support, credit

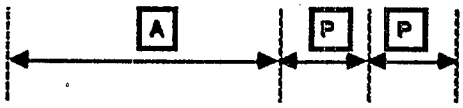


OPTION 2: PROGRESS ASSESSMENT FOR MULTI-MEDIA INITIATIVES

Numerical accountability measures for program-specific activities; progressed measured against plans for multi-media inititiatives

PROS
- Same as Option I
- Multi-media initiatives assessment will develop experience in designing evaluation measures into plans
- Narrative descriptions of results, problems available for external audiences, tech transfer

CONS
- Still limited flexibility, innovative approaches captured only for multi-media initiatives
- The "numbers" could drop due to initiatives
- If multi-media initiatives are outside routine accountability system, they might not recieve adequate attention

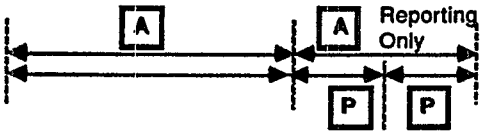


OPTION 3: PROGRESS ASSESSMENT FOR ALL INITIATIVES

Numerical accountability measures for base program, progressed measured against plans for single-media and multi-media initiatives

PROS
- Reinforces strategic planning and targeting, making initiatives seem more "routine"
- Greater flexibility in all areas
- Gradual implementation could minimize program disruption

CONS
- Significant disruption to current program, culture
- The "numbers" might drop
- Limited experience in progress assessment approach



OPTION 4: PROGRESS ASSESSMENT FOR INITIATIVES, WITH NUMERICAL REPORTING

Numerical accountability measures for base program, progress against plans assessed for initiatives, but activities (e.g., numbers of inspections, enforcement actions) are counted and reported in accountability system

PROS
- Same as Option 3
- Measuring progress against plan rather than numerical targets provides flexibility
- Impact on "numbers" should be minimized since activities will be reported
- Progress assessment approach could be phased in, including multi-media initiatives and/or selected single-media projects first to build experience

CONS
- Moderate disruption to current program, culture

ENFORCEMENT IN THE 1990's PROJECT

ENHANCING ENVIRONMENTAL RULEMAKING

WORKGROUP CONTRIBUTORS

Elliott Gilberg
P. Anne Allen
Elyse DiBiagio-Wood
Ken Harmon
Jon Jacobs
Mimi Newton

ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE WORKGROUP ON RULEMAKING ENFORCEABILITY

I. Goals and Objectives of the Project

EPA has encountered problems enforcing some regulations in each of its statutory programs. These problems may in part be attributable to the Agency's failure to give sufficient consideration to enforceability during the development of these regulations. The goal of this project is to propose changes in the way the Agency develops regulations that will place enforceability considerations in the forefront of the decisionmaking process.

II. Process Leading to Recommendations

The rulemaking project workgroup identified, in each program, several examples of regulations which present enforcement concerns. Based on our analysis of these problems, we selected several issues concerning EPA's rulemaking process which we would investigate. Each issue was assigned to a workgroup member, who developed a description of the issue and questions to be posed to program regulatory and compliance managers. Workgroup members have discussed their recommendations with managers in most program regulatory and compliance offices, as well as with the Chairman of the Steering Committee.

III. Recommendations

The recommended actions divide into two categories: those which the Office of Enforcement can implement unilaterally, and those which require the cooperation and assistance of other offices. The first category generally addresses ways in which Office of Enforcement attorneys can more effectively influence the development of regulations, and ways in which OE managers can pay closer attention to their staffs' work on regulations. These recommendations can be implemented by the Assistant Administrator immediately. It is recognized that some of these improvements, although beneficial, will add to the time it takes to complete a rulemaking, as commenters have noted. In the implementation process, efforts must be made to minimize the time costs associated with these measures. The second category generally addresses ways in which the Agency as a whole can ensure that a regulation's enforceability receives adequate consideration during the rulemaking process. These recommendations involve OE's proposing changes to the Steering Committee and to originating offices.

The recommended actions also break into categories in another sense: those which improve on existing mechanisms for considering enforceability in

rulemaking, and those which are new approaches which the Agency has not previously tested. In this way, our recommendations try to achieve a balance between "old" and "new" ways of doing business.

It is recognized that some of these improvements, although beneficial, will add to the time it takes to complete a rulemaking, as commenters have noted. In the implementation process, efforts must be made to minimize the time costs associated with these measures.

Finally, rulemaking potentially provides greater opportunities for State participation than this report expressly recognizes, as noted in the comments. An example for consideration is field testing. Attentiveness to possible opportunities in this regard is strongly encouraged.

IV. Recommendations

A. EPA SHOULD PILOT THE USE OF "FIELD TESTING" OF REGULATIONS PRIOR TO PROMULGATION.

We suggest a pilot project in each medium whereby proposed regulations would be tested by members of the regulated industry under EPA supervision or control prior to promulgation. Field tests could be used to test inspectors' ability to determine compliance with the regulation as well as industry's ability to understand and implement it. If the field test identified problems, EPA could make corrections to the regulation before it was finally promulgated.

We realize that field testing could enlarge the length of time it takes to promulgate a regulation. Nonetheless, field tests of some regulations, particularly those relying heavily on recordkeeping and self–reporting as means of determining compliance, could expose weaknesses in the rule that might render the regulation unenforceable if left uncorrected.

PROPOSED ACTION: Each program office, jointly with the Office of Enforcement, should identify one or two candidates for a pilot project on field testing. OE will work with each program office to develop a protocol for field testing of each of the selected regulations. The timing of the actual field test will vary depending on the schedule for development of the selected regulations.

B. EPA SHOULD PILOT THE USE OF AN "ENFORCEMENT IMPACT ANALYSIS" AS PART OF THE DECISIONMAKING PROCESS IN DEVELOPING A REGULATION.

EPA's regulatory development process has been insufficiently responsive to enforcement concerns in promulgating regulations. Enforcement concerns which are "technical" (e.g., unavailability of test equipment or methodology), "logistical"

(e.g., shortage of inspectors, lack of training), or "legal" (e.g., vagueness, complexity, unclear evidentiary standards) are often addressed inadequately.

One way to improve EPA's ability to identify and resolve enforcement concerns in the regulatory development process would be to formalize consideration of these issues in an "Enforcement Impact Analysis." Such an analysis would delineate how technical, logistical and legal enforcement concerns have been addressed in the regulation. The analysis would set out how the proposed regulation would be implemented and enforced. It would be a valuable source of information to upper level managers, the Deputy Administrator and the Administrator in making their decisions to concur on or sign the proposed regulation.

An Enforcement Impact Analysis should not be required for all regulations, but only those that would involve sufficient enforcement issues to warrant the analysis. One suggestion is that a decision should be made at the time of approval of the Start Action Request. If so, a subgroup of the workgroup could be set up to address enforcement concerns throughout the process, ensuring that such concerns are raised early in the rulemaking process and are sufficiently addressed in the proposed regulation. The subgroup should consist of a variety of people with various areas of expertise and knowledge of the enforcement issues associated with the regulation. The Office of Enforcement would take the lead in addressing legal issues, and the National Enforcement Investigations Center would be available to assist in addressing technical issues. Additional technical support would be required from program offices. The subgroup would draft the Enforcement Impact Analysis to be included in the Red Border Package to the Administrator. Due to the need to keep such an analysis confidential, a means would have to be devised to ensure that the analysis would fall within either the deliberative process or attorney–client privileges.

PROPOSED ACTION: Office of Enforcement representatives on regulatory workgroups should begin to evaluate regulations early in development, based on Start Action Requests if possible, to determine if an EIA would be appropriate. Workgroups will identify one or two candidates in each program for a pilot project to develop an EIA. The timing of preparing the EIA will vary depending on the schedule for development of the individual regulations.

C. THE OFFICE OF ENFORCEMENT SHOULD ESTABLISH AN AUTOMATED TRACKING SYSTEM COVERING REGULATORY DEVELOPMENT.

The Office of Enforcement should implement an automated tracking system for rulemaking projects. Participating Headquarters and Regional attorneys shall update the system in the same manner as for the Enforcement Case Docket. We believe that the addition of this system will greatly improve the Office of Enforcement's ability to complete program reviews and strategic planning. In addition, we believe that inclusion of this data will enable OE managers to pay closer

attention to their staff's participation in rulemaking workgroups. The implementation of this tracking system will present a comprehensive picture of the Office of Enforcement's participation in rulemaking projects at EPA.

It is imperative that the system accurately and completely reflect the number, nature, and status of all rulemaking projects. To do this, procedures similar to those used for the Enforcement Case Docket shall be modified for purposes of this proposed system. Such procedures include operation and maintenance of the data base that pertain to data requirements, initial entry of a project, and regular monthly review to indicate the status of the project.

PROPOSED ACTION: The Office of Enforcement should evaluate whether to use the Agency's existing tracking system for regulatory development or to develop one of its own.

D. THE OFFICE OF ENFORCEMENT SHOULD TAKE STEPS TO ENHANCE THE EFFECTIVENESS OF ITS REPRESENTATION ON THE STEERING COMMITTEE.

As an initial matter, we recommend asking OPPE to provide some more information in the Start Action Request that would enable OE to make an early assessment of enforcement needs. The appropriate OE media division should review the SAR and either send a representative to the Steering Committee meeting or supply the OE representative with enforcement–related questions to raise at the meeting. The OE representative should notify the workgroup chair at, or shortly after, the Steering Committee meeting of the extent of further OE participation.

In addition, OE needs to improve its internal procedures for keeping its Steering Committee representative informed concerning enforcement issues. In particular, the workgroup member needs to raise issues that are not being adequately addressed by the workgroup, so that the OE representative can bring such issues to the attention of the Steering Committee.

PROPOSED ACTION: The Office of Enforcement should issue a memorandum to its staff setting forth revised procedures for regulation review. The memorandum should incorporate our recommendations for keeping the Steering Committee representative informed of enforcement issues. A Steering Committee workgroup on regulatory development recommended that the Steering Committee adopt a format for the SAR that is somewhat more informative, and that change was instituted at the beginning of FY 1991.

E. THE OFFICE OF ENFORCEMENT SHOULD FORMALLY REQUEST REVISIONS TO PROMULGATED REGULATIONS WHICH POSE ENFORCEMENT PROBLEMS.

The Office of Enforcement currently does not give sufficient feedback to originating offices regarding enforcement problems with existing regulations. Concerns are often expressed informally, anecdotally, and at staff level.

When a regulation is presenting enforcement concerns, based on federal and State experience with its application, OE should evaluate the need for revisions to the regulation. If OE determines that revisions are needed to enforce the regulation effectively, OE should make a formal written request to the Assistant Administrator of the program office to revise the regulation. OE should work closely with the program office to determine how the need for the revised regulation compares to competing regulatory priorities. In addition, OE should work with the program offices to explore development of an expedited, streamlined process to make limited revisions to regulations to address specific enforcement concerns.

PROPOSED ACTION: The Office of Enforcement should issue a memorandum to its staff setting forth procedures for requesting program review of a regulation. We cannot project the timing of invoking such procedures, since it will occur only as the need arises. OE should meet with representatives of program offices to discuss ways to expedite rulemaking procedures for the purpose of limited revisions addressing enforcement concerns. If such a process appears feasible, the Agency should put such procedures in place.

F. THE OFFICE OF ENFORCEMENT SHOULD RELY MORE HEAVILY ON WRITTEN COMMENTS AND USE NON-CONCURRENCES WHERE SIGNIFICANT ISSUES HAVE NOT BEEN ADEQUATELY ADDRESSED.

As OE staff participate in regulatory development workgroups, it is important that they raise enforcement concerns in writing whenever possible. Written comments will help to ensure that OE's concerns are clearly understood and are given adequate consideration, and will establish an administrative record of the decisionmaking process. Where OE staff believe that enforcement concerns are not being adequately addressed, it is important that such concerns be elevated early.

Ideally, enforcement concerns will be resolved before workgroup closure, final Steering Committee and red border review. However, where OE has actively participated in the regulatory development process and has raised its concerns appropriately, OE should be prepared to exercise its authority to non-concur on regulatory packages that have not addressed important enforcement concerns adequately. Non-concurrence will ensure that these concerns are addressed at the highest management levels where necessary.

PROPOSED ACTION: The Office of Enforcement should issue a memorandum to its staff, setting forth revised procedures for regulatory review. (See recommendation No. 4.) Such procedures should incorporate our

recommendations for increased reliance on written communications.

G. WORKGROUP MEMBERS DEVELOPING MAJOR REGULATIONS SHOULD RECEIVE TRAINING TARGETED TO ENFORCEABILITY CONCERNS BY MEDIUM.

Everyone participating in a regulatory development workgroup has a responsibility to assure that an enforceable regulation is developed. To assure that workgroup members can effectively carry out that responsibility, at least for selected major regulations, training should be provided early in the regulatory process that is targeted to the types of enforcement concerns that prevail in that particular medium.

PROPOSED ACTION: OE should begin working with the EPA Training Institute to develop a session on enforceability concerns arising under each statute. The end product should be a curriculum for training sessions in each medium, to be given on an as needed basis, and, if appropriate, an enforceability checklist which can be used by workgroups for each medium.

WORKGROUP REPORT

I. Introduction

EPA protects the nation's environment largely by regulating activities that pollute the air, water, or land. If its regulations are not enforceable, the Agency has failed to fulfill its mission, and the public resources expended upon the development of those regulations are wasted.

EPA has encountered problems enforcing regulations in each of its statutory programs. For example, provisions of a State Implementation Plan which grant discretion to the director of the State air pollution control agency to approve an "alternative means of control" have been construed by courts to displace EPA's review of such changes, thereby nullifying EPA's authority to enforce the underlying requirements. The lack of specific recordkeeping and reporting provisions in the Underground Injection Control regulations developed under the Safe Drinking Water Act have hampered enforcement against owners and operators of well fields. Imprecise definitions of key terms in regulations implementing the Resource Conservation and Recovery Act have complicated enforcement efforts.

Enforcement problems have manifested themselves in a number of ways. Judicial enforcement actions have been dismissed. Adverse judicial precedent has chilled initiation of similar actions. Enormous resources are expended on discovery regarding the appropriate interpretation or application of a regulation. The Agency has been forced to discount its minimum penalty settlement amounts because of the litigation risks associated with enforcing problematic regulations. Even where EPA

ultimately prevails in an enforcement action, the cost of victory may be unnecessarily increased by deficiencies in the regulation.

These problems may in part be attributable to the Agency's failure to give sufficient consideration to enforceability during the development of the regulations. To assure that its regulations are as effective as possible in achieving their objectives, EPA must make a greater commitment to examining enforceability concerns during the development of these regulations.

II. Goals and Objectives of the Project

The goal of this project is to propose changes in the way the Agency develops regulations that will place enforceability considerations in the forefront of the decisionmaking process. Specifically, the offices (both legal and technical) responsible for enforcement and compliance activities must invest time and effort to identify and resolve enforcement concerns during regulatory development. In addition, the program offices must recognize an obligation to write regulations which are understandable, which precisely define the regulated activity and the regulatory requirements, and which clearly address how compliance is to be determined.

III. Process Leading to Recommendations

The rulemaking project workgroup identified, in each program, several examples of regulations which present enforcement concerns. Based on our analysis of these problems, we selected several issues concerning EPA's rulemaking process which we would investigate. Each issue was assigned to a workgroup member, who developed a description of the issue and questions to be posed to program regulatory and compliance managers. Workgroup members have discussed their recommendations with managers in most program regulatory and compliance offices, as well as with the Chairman of the Steering Committee and a workgroup examining regulatory development.

IV. Findings

A. EPA MUST MAKE A GREATER COMMITMENT TO EXAMINING ENFORCEMENT CONCERNS IN ITS REGULATORY DEVELOPMENT PROCESS.

EPA fails to perform its basic function as a regulatory agency when it develops regulations that are not enforceable. At the heart of this project's recommendations is a call for the Agency to devote more resources to the critical examination of regulations for enforceability issues. While the Office of Enforcement should have the primary role in such review, the enforceability of regulations is ultimately the responsibility of everyone who participates in the regulatory development process.

B. ENFORCEABILITY CONCERNS SHOULD BE RAISED AS EARLY AS POSSIBLE IN THE REGULATORY DEVELOPMENT PROCESS.

Program regulatory managers generally recognize the need to examine enforcement concerns more carefully in developing regulations but caution that it must be done as early as possible. Raising problems after critical decisions have been made is disruptive and may result in significant delay, as well as a waste of resources already expended.

C. REGULATIONS SHOULD BE WRITTEN CLEARLY ENOUGH TO BE THE BASIS OF A CRIMINAL PROSECUTION

Criminal enforcement of environmental laws is emerging as an increasingly important part of the Agency's program. To prevail in a criminal enforcement action, the United States must prove the elements of an offense beyond a reasonable doubt. This higher standard of proof should be the benchmark for an enforceable regulation.

V. Recommendations

A. EPA SHOULD PILOT THE USE OF "FIELD TESTING" OF REGULATIONS PRIOR TO PROMULGATION.

Introduction

To assist EPA in its efforts to identify and correct deficiencies in its regulations before such deficiencies adversely affect enforcement efforts, we recommend that the Agency pilot a project to field test regulations prior to final promulgation. The Office of Enforcement and the program office for each medium should select at least one regulatory initiative amenable to this approach for dedication to the pilot project. After these regulations have been finally promulgated, EPA will evaluate the effectiveness of the field testing process, and issue recommendations for its future use.

Applicability

Not all proposed regulations lend themselves to field testing. EPA cannot expect the regulated community voluntarily to install capital equipment required by a unfinished regulation that is subject to change. Even if a trade organization were willing to fund a field test requiring significant capital expenditures, EPA might not be willing to approve the test if it would mean delaying the rulemaking process to allow time for planning, permitting, construction, and start-up of new equipment.

Accordingly, field testing is more appropriate for regulations involving operation and maintenance or recordkeeping and reporting provisions, new methods of testing compliance with standards, or perhaps even a new standard. In these areas, the prospective regulated community should be more eager to volunteer to conduct a field test, and planning and performing the test and analyzing the results should not greatly delay the process of regulatory development.

Implementation

The current regulatory development process proceeds from the start action memorandum, to information gathering, to analysis of different competing regulatory options, to proposal of the rule, to receiving comments, and to final promulgation. EPA could insert field testing into regulatory development either as part of its initial information gathering or after proposal as an expansion of the comment process. In general, the Office of Enforcement recognizes that conducting field testing as early as possible in the process is most beneficial, preferably before the notice of proposed rulemaking is issued.

Whatever the timing, field testing requires EPA oversight and preferably direct observation. To assure industry cooperation in this regard, correspondence with sources contemplating field tests should stress that EPA will be visiting solely for the purpose of observing the test, and will not treat its visit as an opportunity to conduct inspections for violations of existing regulations. Nonetheless, EPA's correspondence should reserve the Agency's right to take action to address observed violations that represent an imminent and substantial endangerment to public health or welfare.

Field testing as part of information gathering

While EPA is still gathering information to use in developing the regulation, but after the Agency has collected sufficient information to enable it to produce the regulation in working draft form, EPA could contact trade organizations or leaders in the prospective regulated community to solicit comments on the draft and volunteers for field testing. Field testing a draft regulation prior to proposal allows the Agency to proceed in an informal fashion with few restraints on time and on contacts with industry. Some of the persons interviewed in the course of preparing this study indicated that this is the manner in which EPA currently develops its regulations.

Before a rule is formally proposed, EPA can engage in ex parte discussions with industry representatives that need not be recorded and placed in the public docket, thereby, some say, avoiding the appearance of intimacy with the regulated community. Because the Agency is not yet formally engaged in the rulemaking process, EPA can take time to investigate and thoroughly analyze a number of

different field tests and regulatory approaches without the pressure of short rulemaking deadlines. Conducting field tests during the information gathering phase of rulemaking would allow EPA to propose a regulation that should require very little amendment before final promulgation. Because the major affected parties should have participated in field testing, comments on the proposed regulation should not be extensive, and responding to comments should not demand a great investment of Agency resources.

Conducting field testing during the information gathering phase of rulemaking would be a front-loaded process. The largest part of EPA's time and resources would be invested early in the regulatory development process. The contacts with the prospective regulated community and the actual field testing would occur outside the public docket, and would not require comment. The regulation would be proposed in very nearly final form and would draw only limited comment. EPA could address those comments and proceed to promulgation expeditiously.

Field testing as part of the comment process

Despite a general preference for early field testing, sometimes it is appropriate to solicit its employment when the rule is formally proposed. In those instances, EPA, in its notice of proposed rulemaking, would invite members of the targeted regulated community to enlarge their comments by field testing the proposed regulation. Field testing would be voluntary. Parties providing comments are always free to include a discussion of their efforts to apply a proposed regulation to their operations, but a field test as we envision it requires EPA participation.

Affected facilities, or perhaps trade organizations, would propose a field testing protocol for EPA approval. EPA would observe the test and review the results. All correspondence and reports describing the test would be placed in the public docket. The Agency would then seek additional comments from interested parties. If, as a result of the deficiencies identified by the field test, EPA determined that it should make significant changes to the proposed regulation, EPA would repropose the regulation in corrected form. The public would be given the opportunity to comment on the amended version before the Agency promulgated the regulation in final form.

The differences between field testing as an expansion of the comment process and field testing as part of information gathering are more than just procedural. The necessary formality of field testing as an expansion of the comment process would require greater expenditure of resources and would result in greater delays in promulgating regulations. Nonetheless, conducting field tests in the open (only confidential business information would be deleted from the public docket) provides interested parties with the opportunity to comment on aspects of the tests of which they may have otherwise been unaware. A better regulation should emerge from wider discussion. The public, too, should respond favorably to open

field testing. Some members of the public may feel that, by field testing regulations, EPA allows industry too great a voice in developing regulations, but EPA would likely appear worse if it were to be revealed that the Agency had participated in ex parte field tests that helped shape the regulation prior to its proposal.

Incentives

Some of the persons interviewed suggested that EPA may have difficulty locating volunteers for field testing regulations. Others believed that industry, and especially industry trade organizations, would jump at the chance. The deciding factor would probably be the extent to which testing an unfinished regulation would require unrecoverable capital outlays. EPA should consider this factor when soliciting participants for field testing. We should recognize, however, that industry's interest in being subject to understandable and smoothly functioning regulations will probably provide sufficient incentive to encourage sources to participate in the field testing of regulations that do not require expenditure of undue resources. We should also recognize that industry's unwillingness to volunteer to field test a particular regulation does not signal catastrophe, because EPA can still proceed with its "normal" rulemaking process. Provision of EPA funding or other incentives (such as remission of permitting costs, relief from regulatory requirements, or credit toward penalty amounts) is unnecessary, and not advised.

Measuring Success

Some of those interviewed proposed that EPA could evaluate the effectiveness of field testing simply by reviewing regulations that have already been promulgated and are currently in use. Their rationale focused on the fact that regulatory deficiencies identified during actual application of a regulation would be the same deficiencies that would have been identified in a field test of that regulation. Additionally, some asserted that industrial volunteers would be unlikely to draw EPA's attention to regulatory deficiencies that work to industry's benefit.

EPA has already determined that some of its regulations are deficient. EPA's recognition of this situation led to our recommendation of field testing. The question is not whether field testing will identify regulatory deficiencies, but how the Agency can most effectively integrate field testing into the process of developing regulations.

During the course of the field testing pilot project, EPA can measure the success of the effort by the number and the magnitude of the regulatory deficiencies detected. If the process identifies a number of deficiencies that would not otherwise have been detected and which would render the regulation ineffectual if left uncorrected, the pilot will have demonstrated that field testing is an avenue to be pursued. If the process fails to identify significant deficiencies and yet consumes

large amounts of time and resources, EPA will analyze the additional costs created by field testing balanced against the benefit accruing to the Agency from occasionally detecting and correcting a regulatory deficiency before the regulation is promulgated.

B. EPA SHOULD PILOT THE USE OF AN "ENFORCEMENT IMPACT ANALYSIS" AS PART OF THE DECISIONMAKING PROCESS IN DEVELOPING A REGULATION.

Why an Enforcement Impact Analysis is Needed

EPA's regulatory development process is deficient with regard to the inclusion of enforcement concerns in proposed regulations. "Technical" enforcement concerns are often addressed inadequately, resulting in regulations which may be impossible to implement due to the unavailability of equipment, test methodologies or other technical requirements. "Logistical" enforcement concerns may also not be addressed adequately, and regulations may be promulgated which are difficult to enforce due to the shortage of inspectors or other resources needed to enforce the regulation. Finally, "legal" enforcement concerns are often insufficiently dealt with in the development of regulations. Legal deficiencies may result in vague or overly complex rules, inadequate provisions directed at evidentiary standards, such as who has the burden of proving a violation, and other drafting flaws which make the enforcement lawyer's job more difficult than it might otherwise be.

There are a variety of reasons why the present regulation development process fails to adequately address these enforcement concerns in the regulatory process. One reason may be that enforcement concerns are not perceived as sufficient cause to hold up a regulatory package. In addition, program office representatives are often working under a different set of priorities than enforcement representatives. Program office representatives who typically chair regulatory development workgroups may simply be unwilling to devote their time to solving enforcement problems. The lead office may feel pressure, justifiably, to complete a regulation due to management demands, statutory deadlines, or court orders. Tied into this problem is the complication that arises when two offices under the same AA–ship have different priorities in reviewing regulatory packages. An office with enforcement concerns faces a difficult dilemma if it chooses to recommend non–concurrence of a sister office's package to their mutual AA.

Another reason that the present system needs to be improved is that the Administrator and other upper level managers may not be getting enough information about important enforcement issues which may arise during the regulatory development process. Sometimes these concerns are addressed in the transmittal or action memorandum from the lead AA which accompanies the Red Border Package to the Administrator. However, unless the lead office is especially concerned with enforcement issues, such issues may not receive the amount of

attention they deserve in these memoranda. Two or three sentences dealing with an enforcement problem may simply be an inadequate means of catching the Administrator's attention.

There is a need to present a cohesive and comprehensive collection of enforcement concerns to upper level management and the Administrator. Before a regulation is proposed, the Steering Committee and the Administrator need to know what kinds and amounts of resources will be needed to implement or enforce the regulation. They also need to be made aware of the practical issues which are involved when one particular enforcement mechanism is chosen over another. This type of information may be inappropriate for inclusion in an action or transmittal memo but the ramifications and concerns involved with certain decisions do need to be communicated.

How an Enforcement Impact Analysis Would be Implemented

Agency Rulemaking Process

Almost all proposed regulations require the review of Office of Enforcement staff and the official concurrence of the AA (AA/OE). Usually, the Enforcement Counsel (EC) will submit the name(s) of their staff who will participate in the work group meetings, and the AEC will make any comments on the Start Action Request to the Office of Standards and Regulations (OSR) in OPPE. OE's representative in work group activities is responsible for presenting a consensus OE position on matters and issues discussed before the work group. OE's workgroup member may raise "real world" enforcement concerns at the workgroup meeting, or those concerns may be raised by the program compliance office or regional members.

One goal of work group meetings is to discuss, select or reject, and refine the options for further development. An options selection paper, prepared by the lead office, should include an evaluation and analysis of the resources required for implementation and enforcement of the regulation.

Steering Committee representatives are given the opportunity, through the Consent Calendar review process, to provide written comments on a regulation package. During the Red Border review process, the AA/OE, along with other participating AAs, indicates whether he or she concurs in the regulation package. The package will be reviewed by the appropriate OE media division and concurred in by the EC, where applicable, or by the AA/OE.

How to Integrate EIAs Into the Agency Rulemaking Process

At the first stage of the development of a regulation, the SAR, a decision would need to be made whether an EIA should be required for that particular regulation. Such a decision could be made by the Steering Committee or the office which

originated the SAR. Many regulations would not need an EIA due to the absence of significant enforcement issues involved in those regulations.

There are a variety of ways in which EIAs could be prepared. Some interviewees suggested that a standing committee of various representatives in offices throughout the Agency be created to examine the enforcement issues surrounding each regulation. Other interviewees suggested that ad hoc groups be created by the Steering Committee to coordinate with the workgroups and focus on the enforcement concerns associated with specific regulations. Another interviewee suggested that each workgroup, through its chair, make the decision of who would develop an EIA, a subgroup or the entire workgroup, depending upon how many people are in the workgroup, or how complex the enforcement issues associated with the regulation are.

If this last suggestion were implemented, the workgroup, or a specially formed subgroup, could study the enforcement issues and prepare the EIA. Enforcement concerns could be analyzed and problems could be resolved during all the stages of development of the regulation.

The preparation of an EIA will necessarily entail a coordinated effort by various offices and their staff members with expertise in one or more of the various aspects of enforcement concerns. Different offices could assign representatives to the workgroups or subgroups that they wanted to have input in. The Office of Enforcement would generally have the lead responsibility for the effort. Individuals would not be burdened with responsibility for examining each enforcement oriented regulation, and workgroup representatives would be unlikely to feel that "outsiders" were making suggestions about rules which they do not adequately understand (as could occur with the situation of a standing committee).

The Office of Enforcement would have the lead responsibility for examining legal enforceability issues. The National Enforcement Investigations Center will be able to assist on some technical issues. Nonetheless, program offices would need to provide technical support for the preparation of an EIA.

As the program is started, one or more EIAs could be conducted as test pilots in each media. Such experiments would be useful in allowing workgroup representatives to get a feel for the extent to which considering enforcement concerns would affect the regulatory development process.

It would be beneficial if a draft of an EIA were prepared at the options selection phase of the development of the regulation. This would ensure that Steering Committee members would be aware of the enforcement issues, and be able to give their feedback on these issues at an early enough stage so that the workgroup members could reevaluate enforcement concerns, if necessary. The final EIA would need to be prepared and presented to the Steering Committee in the Consent

Calendar review process. It would also be included in the Red Border Package prepared for the Administrator, since one of the primary purposes of the EIA would be to inform the Administrator of the ramifications of enforcement issues associated with a regulation.

What an Enforcement Impact Analysis Would Contain

The basic form of an EIA could be a two–page checklist of broad enforcement related questions. This would be relatively easy to fill out, although the questions themselves would have to be constantly considered as the development of the regulation progressed. This basic form, however, might be too broad. It might not cover specific and important enforcement concerns which arise during the development of an individual regulation. A miscellaneous section could be incorporated into the basic questions form, or the EIA could simply be written free–form, explaining the specific enforcement issues which arose under each particular regulation. This free–form option could allow for brevity or length, depending on the specific regulation involved.

One interviewee suggested that only technical and logistical enforcement concerns would need to be addressed in an Enforcement Impact Analysis. Most interviewees, however, felt that legal enforcement concerns should also be addressed since these legal concerns are often not considered a priority, and efficiency would seem to suggest that the universe of enforcement concerns be addressed in one analysis. The scope of analysis, depending upon the specific program involved and the nature of the regulation, may include its enforceability not only by EPA, but by States (authorized, delegated, etc.) and by citizens; this portion of the analysis may raise questions which, in close cases, should be presented in the notice of proposed rulemaking for public comment.

Confidentiality

An important consideration in preparing an EIA is that it should, to the extent possible, be protected against disclosure. Such protection would seem to be essential, particularly because an EIA could reveal weaknesses in enforceability which would, if publicly disclosed, undermine enforcement, yielding the precise result the Agency sought to avoid by preparing the EIA. In order to ensure an open and frank discussion of enforcement issues, the EIA would need to be written so that it would remain confidential.

A number of legal arguments may be available to protect this information against disclosure. The deliberative process privilege may apply, but its use is disfavored by the Agency and often unsuccessful when challenged in court. The attorney–client privilege could also apply if the document were sent as advice from the attorney to the client. Assuming an OE representative leads the enforcement subgroup responsible for the EIA, the AA for OE could sign the analysis and send it

to the Administrator, the client.

C. THE OFFICE OF ENFORCEMENT SHOULD IMMEDIATELY ESTABLISH AN AUTOMATED TRACKING SYSTEM AND A CENTRALIZED FILING SYSTEM COVERING REGULATORY DEVELOPMENT.

Why an Automated Tracking System is Needed

The Office of Enforcement does not currently maintain a system to track its participation in, and the status of, rulemaking projects. As a result, staff attorneys and managers lack a useful tool to manage and prioritize regulatory development work. A tracking system would enable OE to participate more efficiently in regulatory development and help OE to meet important deadlines in the process.

We recommend that the Office of Enforcement immediately implement an automated tracking system for rulemaking projects. EPA currently maintains an automated tracking system for regulatory development. The Office of Enforcement should evaluate whether the current system can meet these needs, or whether OE should develop its own system.

How the Tracking System Should be Maintained

Participating Headquarters and Regional attorneys should update the system in the same manner as the Enforcement Case Docket. We believe that the addition of this system will greatly improve the Office of Enforcement's ability to complete program reviews and strategic planning. The implementation of this tracking system will present a comprehensive picture of the Office of Enforcement's participation in rulemaking projects at EPA.

It is imperative that the system accurately and completely reflect the number, nature, and status of all rulemaking projects in which OE is participating. To do this, procedures similar to those used for the Enforcement Case Docket shall be modified for purposes of this proposed system. Such procedures include operation and maintenance of the data base that pertain to data requirements, initial entry of a project, and regular monthly review to indicate the status of the project.

Why A Centralized File is Needed

The Office of Enforcement does not currently require staff attorneys to submit copies of all relevant documents, comments, briefing papers, concurrences, and other workpapers generated during the course of rulemaking projects to a centralized docket. Each staff attorney maintains in his or her own office a personalized filing system during the course of their participation in the rulemaking project, regardless of the category of rule (i.e., substantive, interpretative, or statement of policy) being proposed and finalized or its EPA

classification (i.e., major, significant, or minor). The result of this informal and often haphazard storage and filing system is that deadlines are sometimes missed, and documents as well as comments lost. In addition, new attorneys are often assigned to a rulemaking project well after its inception due to staff turnover. These attorneys may be forced to assemble an entire new rulemaking package because the file has been misplaced or contains inadequate information. Failure to develop such a system restricts the Office of Enforcement's ability to compile and review, in a systematic, comprehensive, and timely manner, the information developed during rulemaking projects at EPA.

How a Centralized File Should be Established

It is recommended that the Office of Enforcement immediately implement an Enforcement Filing System for rulemaking projects. Participating Headquarters and Regional attorneys shall submit, on a timely and regular basis, to a formally-designated office copies of all documents, comments, concurrences, and other relevant workpapers developed during the rulemaking project. We believe that the addition of this system will greatly improve the Office of Enforcement's ability to complete rulemaking projects in a coordinated and timely manner.

The proposed docket and filing systems for rulemaking projects offer a multitude of advantages over the current ad hoc system for rulemaking participation, including: tracking projects and relevant documents from the Steering Committee to Red Border Review, identifying participating attorneys at Headquarters and the Regions, eliminating gaps in coverage due to staff turnover, allocating resources, enhancing coordination between the divisions within the Office of Enforcement, and compiling a record. The system will enable OE to anticipate resource demands at key stages of the rulemaking process and will greatly enhance OE's ability to manage the rulemaking process without imposing significant burdens on Office of Regional Counsel and Office of Enforcement personnel.

Concerns identified at this point are the following. First, the Office of Enforcement must create or specify an office to be used for collecting and storing the relevant documents. This inevitably involves questions of resources, funding, space allocation, and furniture. Second, the Office of Enforcement must determine whether this recommendation will apply to all rulemaking projects or be based upon the category of the rule being developed and finalized. Third, this recommendation is only for the provision of temporary filing and storage activity. Once the final rule is issued and the deadline passed for filing a judicial challenge to the rule, it is incumbent upon the participating attorney to notify the filing center that the file should be readied for permanent storage at the appropriate facility.

D. THE OFFICE OF ENFORCEMENT SHOULD TAKE STEPS TO ENHANCE THE EFFECTIVENESS OF ITS REPRESENTATION ON THE STEERING COMMITTEE.

Problem Identified

The OE Steering Committee Representative may not have sufficient information to adequately inform the OE Division Directors of matters important to OE or to adequately raise OE concerns to the Steering Committee.

At present, the regulatory process is begun by submitting a Start Action request (SAR) to OPPE. OPPE distributes the SAR to all members of the Steering Committee and schedules a brief presentation by the originating office to the Steering Committee. The SAR contains a brief description of the purpose of the regulation, lists the authority for its issuance and lists the statutes which would be impacted.

Normally, the OE Steering Committee member distributes the SAR to the Division Director of the OE media likely to be impacted and asks if there is any interest in the regulation. Because of the paucity of information in the SAR, however, it is difficult for the Division Director to make such a determination prior to the initial Steering Committee meeting. The Division Director must, therefore, either send a member of his staff to the Steering Committee with the hope that the information provided in the briefing will be sufficient to determine OE interest, as the staff person is not permitted to ask questions; or, without further information, determine to participate, or relinquish the right to participate, in the early stages on a workgroup. Such a system is ineffective in alerting OE to the need for substantial early participation in the development of a particular regulation.

Conversely, in those situations where OE actively participates in a regulatory development workgroup, it often fails to use the Steering Committee representative to raise important issues of concern to OE to the representatives of the originating program office when those issues are being ignored by the regulatory workgroup.

Recommendations

1. OPPE should require that the SAR contain a descriptive outline of the rule to be promulgated which should include a) the purpose of the rule; b) what activities will be regulated and how; and c) the need, if any, to monitor compliance with and enforce the rule to be proposed.

This improved SAR would provide the appropriate Division Director with better information with which to make a determination as to the need for OE participation.

2. After review of the "improved" SAR by the appropriate media Division Director, that Division Director could either send a representative from his\her office to the steering committee meeting with the OE representative to ask questions or the OE Steering Committee representative should be supplied by the appropriate office with a list of enforcement related questions to raise at the meeting. The appropriate Division Director can then make an informed decision on whether OE wishes to participate in the workgroup based on these responses.

3. Regardless of which approach is taken in No. 2, the OE Representative should indicate the intent to notify the workgroup chair of the extent of further OE participation within the next week.

4. After the regulatory workgroup is formed and in progress, the OE Steering Committee member should be kept apprised of issues which OE believes are crucial to OE management but do not appear to be resolvable in the workgroup so that the OE Steering Committee representative can, if appropriate, ask the entire Steering Committee to call for a report on progress from the workgroup, or raise the issue of concern to the other AA representatives during the regulation development process. This would alert the other AAs and OPPE to the problem before the workgroup reaches the closure stage when many AAs feel that so much work has gone into the regulation that they are reluctant to non-concur.

5. In those cases where OE has a genuine problem, the OE representative should also insist on a formal workgroup closure procedure, even if the Committee had earlier dispensed with the requirement, as a way of obtaining the formal position of each AA on conflicting issues.

6. It should also be the responsibility of all Steering Committee representatives to see that their management is being adequately informed and the position of their management is being adequately and accurately represented in the workgroup. However, if this responsibility is assigned to the Steering Committee representative, some oversight techniques, such as regular reports from workgroup members, would be necessary to enable him or her to fulfill this function.

E. THE OFFICE OF ENFORCEMENT SHOULD FORMALLY REQUEST REVISIONS TO PROMULGATED REGULATIONS WHICH POSE ENFORCEMENT PROBLEMS.

Enforcement in each program is hampered by deficient regulations. Moreover, a greater commitment by EPA to develop enforceable regulations should reduce, but cannot be expected to eliminate, problems in the future. Notwithstanding the competing pressures to develop new regulations to meet program needs, statutory deadlines, and court orders, the Agency must recognize the need to "fix" regulations that are posing significant impediments to enforcement.

The Office of Enforcement currently does not give sufficient feedback to originating offices regarding enforcement problems with existing regulations. Concerns are often expressed informally, anecdotally, and at staff level. Program managers are sometimes unaware of the difficulties the Agency is having in enforcing a particular regulation.

When a regulation is presenting enforcement concerns, OE should evaluate the need for revisions to the regulation and the effect of those revisions on other regulations. If OE determines that revisions are needed to enforce the regulation effectively, OE should make a formal written request to the Assistant Administrator of the program office to revise the regulation. OE should work closely with the program office to determine how the need for the revised regulation compares to competing regulatory priorities. In addition, OE should work with the program offices to explore development of an expedited, streamlined process to make limited revisions to regulations to address specific enforcement concerns.

F. THE OFFICE OF ENFORCEMENT SHOULD RELY MORE HEAVILY ON WRITTEN COMMENTS AND USE NON-CONCURRENCES WHERE SIGNIFICANT ISSUES HAVE NOT BEEN ADEQUATELY ADDRESSED.

Problem Identified

Informal comments made by enforcement workgroup members, or comments accompanying formal concurrences, are often ignored by the lead office in the interests of "getting the regulation out".

Case studies and discussions with OE personnel concerning their experiences with regulatory development clearly revealed that the effectiveness of informal communications in accomplishing enforcement objectives is determined solely by the receptivity of the originating office and other workgroup members to enforcement concerns. Although OE can foster receptivity by taking an active, participatory role on the workgroup, such participation, alone, by no means ensures that OE's concerns will be adequately addressed. In one case, enforcement members of a workgroup wrote the enforcement provisions of a regulation in order to ensure adequate enforceability. The originating office, after red border concurrence by all offices, then unilaterally removed the enforcement provisions, without notifying or consulting with OE.

Recommendations

The following recommendations can be implemented unilaterally by OE without the necessity of approval by other Offices. Some of the recommendations, however, may require additional budgeting of staff to participate more fully on all important workgroups.

1. OE staff should actively participate on each regulatory workgroup involving the development of a major rule which will require enforcement or has implications for enforcement.

An OE staffer who understands the objectives of a workgroup and the complexity of the technical issues involved in a rule is more likely to raise the appropriate enforcement concerns to both the workgroup and his own management and have them accorded consideration.

2. OE workgroup participants should communicate all substantive enforcement concerns in written memoranda.

Regardless of whether communication of enforcement concerns is informal (staff to staff) or formal (division director to division director or work group chair), such communications should, in almost all instances, be written, or followed up with a written memo confirming oral communications. Written communications should be the rule for two reasons; 1) Written communications are more difficult to misinterpret; and 2) If there is a subsequent disagreement between offices, written comments provide an administrative record of each office's concerns and of the decision making process.

3. When lead offices appear unresponsive to important enforcement concerns, OE workgroup members should raise and division directors should address such concerns at an early stage in the regulatory development process.

When it becomes clear, during the regulatory process, that a particular office is not receptive to important enforcement concerns raised by staff, the OE staffer is obligated to bring the issues to the attention of his/her division director. If the division director determines that the issue is significant, the division director should elevate these concerns by meeting with his/her counterpart in the program office, or sending a formal memorandum raising OE concerns.

If the program office continues to be unresponsive, and the issue is sufficiently serious, the conflict should be raised to the Assistant Administrator with a request that the AA raise it with his counterpart in the originating office.

4. OE should, when necessary, non-concur during workgroup closure or red border review.

Ideally, enforcement concerns will be resolved before final Steering Committee and red-border review. However, where OE has actively participated in the regulatory process and has raised its concerns appropriately, OE should be prepared to exercise its authority to non-concur on regulatory packages that have not addressed important enforcement concerns adequately. Non-concurrence will

ensure that these concerns are addressed at the highest management levels where necessary. It was determined that addressing important enforcement concerns through concurrence with comment was not a suitable alternative because the Agency's regulatory process contemplates that concurrence with comment be reserved for minor comments and the originating office is free to promulgate its regulation without addressing such comments.

G. WORKGROUP MEMBERS DEVELOPING MAJOR REGULATIONS SHOULD RECEIVE TRAINING TARGETED TO ENFORCEABILITY CONCERNS BY MEDIUM.

Everyone participating in a regulatory development workgroup has a responsibility to assure that an enforceable regulation is developed. To assure that workgroup members can effectively carry out that responsibility, at least for selected major regulations, training should be provided early in the regulatory process that is targeted to the types of enforcement concerns that prevail in that particular medium.

ENFORCEMENT IN THE 1990's PROJECT

USING INNOVATIVE ENFORCEMENT TOOLS

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ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE WORKGROUP ON INNOVATIVE ENFORCEMENT TOOLS

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I. Goals and Objectives of the Project

The innovative enforcement workgroup was charged with:

1) recommending ways we can more aggressively implement the several enforcement innovations that have been identified within the Agency to better realize their full potential;

2) identifying areas that may be fruitful to explore over a longer planning horizon and an ongoing process for doing so; and

3) developing a generic approach to creating an environment for innovation.

II. Process Leading to Recommendations

Recognized leaders in implementing each of eleven areas of innovation were asked to lead individual projects to explore:

1) definition of the innovation, potential scope, anticipated benefits and limitations;

2) current experience, potential for expansion, and barriers; and

3) initiatives to overcome barriers and action plan.

Regions and Headquarters programs were asked to designate contacts to serve as resource people to the project leaders in reviewing experience to date and recommendations. Three group discussions facilitated development of individual products and common themes.

III. Summary of Recommendations

Despite the differences in the eleven innovation areas identified, there was substantial unanimity about barriers and initiatives to overcome those barriers. Generic recommendations are offered for more aggressively implementing innovative enforcement techniques and for creating a climate for innovation.

IV. Individual Recommendations

See TABLE 1.

V. Findings

A. INNOVATION IS IMPORTANT TO CONTINUALLY IMPROVE OUR ENFORCEMENT PROGRAMS WHICH ARE CONSTANTLY CHALLENGED BY NEW DEMANDS AND LIMITED RESOURCES.

Innovations can offer one or more of the following:

Greater Efficiency:

- Timeliness: increase in speed of case closure/compliance; and
- Resource Efficiency.

Improved Settlement Quality:

- Global/comprehensive approach to settlement solutions: and
- Fundamental improvements to environmental management.

Greater Effectiveness -- promoting broad compliance/deterrence:

- Leveraging the extent of compliance and deterrence; and
- Leveraging new technology.

B. EPA'S CURRENT APPROACH TO INNOVATION IS CHARACTERIZED BY:

- An atmosphere of encouragement at senior levels without an on going process for institutionalizing change;
- Isolated efforts to test and implement innovative approaches that are not tried elsewhere; and
- Loss of institutional memory and the ability to learn from each experience of what actually worked and did not work well and how the participants would do it differently next time.

C. WE ARE NOT REALIZING THE FULL POTENTIAL OF ANY OF THE INNOVATIONS LISTED.

Eventually innovations will either become part of the routine, be used in limited but well defined circumstances where they are appropriate, or limp along as occasional trials that show up now and again without realizing their full potential. Each of the innovations listed in TABLE 2 is in the latter category.

We have neither defined well the circumstances for their use, nor have we routinized them. Nevertheless, the benefits they offer the agency in carrying out its mission warrant the expanded use summarized in TABLE 3.

D. THE OBJECTIVES WHICH THE INNOVATIVE TECHNIQUES ARE DESIGNED TO FURTHER ARE NOT OBJECTIVES FOR INDIVIDUALS WE EXPECT TO USE THEM.

Innovations have been implemented either by innovators, a risk taking individual who is sufficiently motivated by and has or acquires the role, responsibility and/or resources to carry new ideas out, or by someone with a problem to solve. Usually both conditions are there. The TSCA and Mobile source programs have been most successful in generating and applying innovative enforcement techniques, in part due to the small staffs, with broad responsibility and large universe to address.

Most of the innovative enforcement techniques are expected to be used by individuals who are neither risk takers, nor do they have the problem the technique is designed to solve given the current set of priorities, job descriptions and incentives of the various actors within our organization.

- Leveraging an enforcement case is only a goal if widespread compliance is a goal of those handling the case.

- Closing a case is only a goal for case attorneys and personnel if they are accountable for case closure.

- Global, multi-media, risk-based remedies are only a goal if agency operations are geared to solving environmental problems, not just implementing programs.

E. MANY OF THE INNOVATIONS LACK CONSISTENT CONTEXTS WITHIN WHICH THE NEED FOR INNOVATION WOULD MOST LIKELY ARISE.

- To the extent Regions are driven by program implementation rather than environmental problems which need to be addressed, it is difficult to find a context for geographic, multi-media or risk-based

enforcement.

- Multi-media concerns require additional effort to identify as they do not arise in daily implementation.

- A one-time, useful exercise developing an integrated enforcement statute, has not been followed with a similar updating annually of missing authorities, and a legislative agenda for enforcement.

- We do not routinely inquire of staff and managers at both the Federal and State levels as to what they need to make their jobs easier, more successful.

F. BECAUSE INNOVATIONS ARE NOT ROUTINE, THEY SUFFER FROM START UP COSTS AND INERTIA, ALMOST BY DEFINITION THEY REQUIRE ENHANCED VISIBILITY AND/OR ASSISTANCE FOR INITIAL IMPLEMENTATION.

There can be significant start up costs to implement innovative enforcement techniques since nothing is routinized and issues and problems generally have not been encountered before, at least by the persons responsible for the task. This is true even if the innovation, if successful, can offer greater efficiencies in the long run.

Opportunities for applying innovative techniques are likely to get passed over since innovative techniques are not part of the daily experience.

G. THE PERSONAL RISKS FOR INNOVATION ARE TOO HIGH.

In innovation, failure should be as informative as success; however, without the time to assess their application, bad experiences become folklore and good experiences become exceptional circumstances. Where the individual is at risk and not the institution, careers can be affected. Where the person as manager is at risk, resources may be lost if those parameters which drive allocations are adversely affected, e.g., trial of a new detection approach which did not lead to any new cases.

H. WHERE WE DO HAVE EXPERIENCE, WE ARE LOSING INSTITUTIONAL MEMORY AND THE ABILITY TO LEARN FROM EACH EXPERIENCE.

Each experience is an isolated event with no record of how it worked and what lessons were learned. This is a particular problem since:

- Institutional memory can reduce start up costs; and

- Learning from each experience enables us to fine tune the technique

and its appropriate application (e.g., a settlement provision requiring an environmental audit tied up rather than freed up agency resources because of the way it was drafted. What gets learned is "never again"instead of how to draft it differently to avoid the pitfalls).

The lead Region concept as currently implemented is not functioning to capture institutional memory nor to provide essential assistance to those trying to apply innovative techniques.

V. GENERAL RECOMMENDATIONS

A. ISSUE AGENCY POLICY WHICH BETTER DEFINES AGENCY OBJECTIVES IN CASE SETTLEMENTS AND HOW TO RESOLVE COMPETING OBJECTIVES. ADJUST MANAGEMENT SYSTEMS AND OVERSIGHT APPROACH ACCORDINGLY.

A policy on enforcement settlements would serve to redefine expectations for managers to ensure settlements appropriately address real problems facing the enforcement program in:

- expeditious case closure;
- ensuring the compliance problem and damages are corrected to the extent possible;
- ensuring solutions to non-compliance do not transfer pollution from one medium to another;,
- reflecting opportunities to eliminate the source of pollution rather than to just control it (pollution prevention);
- correcting underlying management problems to maintain improved compliance over the longer term as well as achieve compliance in the short run; and
- reflecting opportunities to leverage more widespread compliance through a single enforcement settlement.

1. OE should develop policy statement in cooperation with Headquarters and Regions setting forth these broad goals for enforcement settlements. This should be given immediate priority. The timing must ensure buy-in and sensitivity of wording. It would have to closely track policy on administrative penalties.

Coordination with DOJ is essential. An issue that must be resolved is the distinction between our authority to settle versus authority to impose through court or administrative action. Most feel they can go to the mat only on penalties for gray areas where settlement proposals would go beyond correcting the immediate violation under a single statute. Our policy would therefore reserve higher penalties for settlements which do not address broad environmental concerns.

2. Anticipating a National Enforcement Training Institute concept, OE should prepare material and supporting tape which articulates why we take enforcement action and what we hope to gain from individual enforcement activities.

Use training opportunities, particularly joint training of program personnel and attorneys involved in enforcement to create/change the enforcement culture to emphasize these broader goals and identify what approaches/techniques may be appropriate to achieve these objectives, beyond just routine enforcement. The training material should build on the policy statement (Recommendation #1), and may include a tape of the AA/Deputy Administrator to senior managers and staff involved in enforcement.

3. Tie management accountability more closely to implementation of Regional strategic plans that are based upon a sound assessment of the compliance or environmental problems of the Region as envisioned by the Four Year Strategy. Ensure that Regional Plans foster the use of innovative tools by requiring Regional Strategic plans to provide the context for the use of innovative techniques specifically addressing, e.g.:

- multi-media enforcement targets
- facilities with underlying management problems, including repeat violators in same medium, multi-media violators, facilities ranking high in number of chemical emergencies/releases for consideration of environmental auditing provisions in any outstanding settlements.
- use of ADR, short form NOV's, and other "field citation" or related techniques for specific cases or violator categories in the Region for expediting settlements.
- repeat violators as candidates for contractor listing and environmental auditing.

4. OE should assess workload and accountability implications of expanded use of comprehensive settlements in criminal enforcement, contractor listing, and multi-media involvement in cases.

OE should explore how to capture the multi-year, multi-office implications of innovative enforcement techniques related to both workload models and STARS commitments (in particular, how to avoid having innovations appear as a negative experience due to insufficient information in case dockets. (See D.4. below)

OE also should explore how to address the fluctuations in workload created by innovations. Almost everyone wants the Agency to provide resources and/or relief in exchange for innovation, despite the fact that some of the innovations may represent resource savings over the longer run. Strategic plans may provide a mechanism for synchronizing resource credits and work requirements of innovative activities.

B. CREATE MECHANISMS TO CAPTURE INSTITUTIONAL MEMORY AND ADVANCE THE APPLICATION OF THE INNOVATIONS.

1. Create a support network for specific innovations.

OE and Headquarters Program Offices, as appropriate, should assign key individuals in Headquarters to be responsible for maintaining contacts and expertise in the Regions for each innovative enforcement technique. The existing lead Region support networks should be enhanced to ensure there are designated individuals in each of the Regional Offices who are or should become resident experts and who would receive materials, training and keep up to date on developments. Designations must be kept current. Resident experts would include, for example, expertise in: 1) use of information gathering authorities across all EPA statutes and authorities which can be used effectively in a multi-media context; 2) environmental auditing provisions in enforcement settlements, etc.

The Agency should involve the States in the innovative networks by dissemination of information, sharing Federal experiences with specific innovative approaches as well of those of other States, and by soliciting information about innovative approaches that States have successfully employed on their own.

2. Prepare written evaluations of each use of an innovative technique.

a. OE should identify areas to be described and analyzed for each use of an innovative technique, and create a short summary sheet that would be prepared and maintained in a centralized notebook retained by each program office in Headquarters, and, as relevant, each lead individual in Headquarters responsible for the support group. (See recommendation B.1.).

b. Each Headquarters office should issue implementing guidance to Regional Divisions and Headquarters staff for completing evaluations following use of an innovative enforcement technique.

3. Develop Targeted Training Units for Innovative Techniques:

OE should develop hands on training courses/materials to be delivered through the National Enforcement Training Institute, capturing what has been learned from experience in implementing the innovative technique(s). Resident experts would assist in developing the training. This exercise includes an analysis of past experiences. Training materials would be routinely updated based upon lessons learned. Training would be offered to States as well as Regions.

C. HEIGHTEN THE VISIBILITY OF POTENTIAL AND FOSTER USE OF INNOVATIVE TECHNIQUES

1. Require that the listed innovations be duly considered in appropriate cases through the use of case checklists to accompany referrals, and case files, but do not require that the listed innovations be used or implemented. This avoids ineffective or inappropriate use of the innovations where they may increase cost at little benefit.

OE with program office and regional input should develop criteria for which cases do or do not warrant consideration of a specific innovative technique, and develop a simple vehicle i.e. checklist for making this process more visible and routine. Checklists should force explicit consideration of innovations by asking questions that lead one to explore the potential advantages of using the innovative approach in that case.

2. Regions should be encouraged (by OE/Deputy Administrator) to institute enforcement oriented bulletin boards and seminars in the Regions to overcome lack of institutional focus for talking enforcement/compliance.

D. INCREASE PERSONAL INCENTIVES TO INNOVATE

1. Enhance recognition of those who try to employ innovative enforcement techniques through stories in EPA news journals, soliciting articles in NAAG Journal etc. The Headquarters lead for support groups should identify such opportunities to the OE Special Assistant for Communications, and make arrangements for responsible staff to prepare such articles.

2. Emphasize use of AA/RA awards for innovative pilots and leadership within networks.

3. Include in ORC and Regional Program Office performance standards for outstanding performance, effective use of innovative enforcement techniques to further the broad objectives of agency compliance programs highlighted in A above.

4. Ensure complete information on innovative cases is captured in Enforcement Dockets. OE and the Programs should create new docket fields and codes to support recognition of the full benefits from innovative cases which inappropriately now appear to be less significant. For example, a case may have lower penalty levels or delayed compliance but greater successes may have been achieved but not captured.

E. INVEST IN SUCCESS AND MAKE IT EASY TO SUCCEED.

1. OE and Program Offices need to offer Headquarters assistance, investing in early applications to ensure success and overcome start up costs related to having to develop prototype procedures, agreement language etc. and to assist in the evaluation of the use of the innovative technique. Headquarters support group leads should facilitate such requests.

2. Implement the support networks and training as described above.

3. Facilitate data integration and access by inspectors, program and attorney staff. OE implements data integration project as planned.

4. Be willing to go to the brink in selected cases to establish precedents.

Most of the innovative settlement conditions do not have a clear statutory basis, although clearly within the broad mandate of the agency, statutes, and enforcement approach. As a result, they have usually required some penalty reduction and settlement discretion to be accepted as settlement terms. The policy statement in recommendation A should address the extent to which these conditions would be required of settlements and whether we would be willing to litigate if not included. Such a strategic view of what it may take to foster precedent should be facilitated through the support networks, with the Headquarters lead ready, willing and able to give a negotiating team feedback on what senior management is willing to do in a particular case.

F. ASSIGN TO OE/OCAPO RESPONSIBILITY FOR ISSUING THE POLICY, ENSURING THE SUPPORT NETWORKS AND TRAINING PROGRAMS ARE ESTABLISHED AND RUNNING AS PLANNED, THAT RELEVANT GUIDANCE IS ISSUED AND CHANGED AS APPROPRIATE TO IMPLEMENT IT, AND THAT PROBLEMS AND ISSUES ARE SURFACED FOR SENIOR MANAGEMENT ATTENTION.

One focal office is needed, not to assume responsibility for implementation of specific techniques nor for running any or all support networks, but rather to ensure that the proper linkages have been made, for example, between the umbrella policy, and program specific guidance, and that the broad range of recommendations

have been implemented.

G. EVALUATE THE NEEDS OF ENFORCEMENT PERSONNEL ON A REGULAR BASIS TO ENSURE THERE IS AN ONGOING CLIMATE FOR NEW IDEAS TO SURFACE.

Budget and management systems issues currently predominate in our reviews of enforcement and how it is working. A greater focus on compliance and how to achieve it would lead to more creative thinking.

TABLE 1

INNOVATION-SPECIFIC RECOMMENDATIONS
[other than those already addressed above]

Contractor Listing

- OE should highlight contractor listing and debarment as "off the shelf", ready to use tools.
- OE should initiate projects with GSA to: amend FAR to make mandatory listing more self-implementing i.e. less dependent on notice and strengthen FAR/DAR on general compliance, e.g. contract language on contract performance vs. compliance, and bases for award fees.
- OE should work with OL to seek Statutory Amendments to RCRA, TSCA, FIFRA, MPRSA.
- OE should increase coordination with GAD and IG issuing joint guidance on regional and HQ referrals for both civil and criminal violations.
- OE should issue policy on plea bargaining and work with DOJ to disseminate to each USA handling case, and to reinforce through DOJ training.

Criminal Sentencing

- Approach Administrative Office of the U.S. Courts, which oversees operations of the U.S. probation offices, to define any avenues by which EPA, in coordination with the Environmental Crimes Division of DOJ, can facilitate the monitoring of compliance with terms of probation for environmental offenders.
- Develop computerized central informational source relating to criminal convictions at both the State and Federal levels. (NEIC with Hazardous Waste Projects)
- Issue a reference guide on possible probation and sentencing terms for use by probation officers and courts. (Show how easy it can be to impose meaningful terms.)
- More aggressively use contractor listing to leverage comprehensive settlements in criminal cases.
- Revise MOUs with other agencies performing environmental investigations to improve communications and case referral process.
- Strengthen specific statutory language which is weak on criminal enforcement e.g. TSCA, FIFRA, CAA. OE should work with OL and program offices to identify opportunities for change.

Innovative Remedies

- Seek legislative changes which specifically allow innovative remedies such as TSCA which include mitigation of penalties. OE/OL develop language and a strategy for incorporating in enforcement provisions in statutes as they come up for revision.

Legal Tools

- Seek legislative changes to develop broad information gathering authorities to address emerging issues of toxic chemicals and emergency preparedness. OE/OL develop language and a strategy for incorporating enforcement provisions in statutes as they come up for revision.

Risk-based/Pollution Prevention

- Broaden use of some authorities such as CERCLA, TSCA, SARA, EPCRA explicitly for more comprehensive enforcement responses to pollution problems.
- Develop written policy and guidance on how to evaluate pollution prevention initiatives submitted by industry.

Field Citation

- Determine specific program needs for implementation, and identify where techniques are potentially used in each program, e.g., ask each program to identify type of case/violation where there is a backlog/significant resource component where settlements have become or could be routinized.
- Establish pilots nationally in using short form settlements to assess resource savings and feasibility of moving to next step of field citation in identified areas.

ADR

- Establish national roster of ADR neutrals.
- Identify and commit resources for all programs (as done in Superfund).

Environmental Auditing

- Expand outreach to promote environmental auditing in public and private sectors.
- Continue to facilitate auditing by developing and publishing inspection and other protocols for determining compliance and pollution

prevention opportunities.

- Develop auditing guidance for municipalities and transfer successful approaches.
- Offer technical assistance to groups attempting to define audit standards and protocols, including compliance, pollution prevention and real property assessments and audits.
- Further examine the need for certification of environmental auditors. Consider needs and differences among compliance audits, waste/minimization and pollution prevention audits, and environmental assessments for real property transactions. Explore options ranging from federal inspector certification as a model, to sponsoring legislation for an independent public/private certifying body, to approaching states/organizations willing to pilot certification programs and offering assistance/evaluating results. Issues include scope of certification and whether it is effective in influencing quality of service and resources required to monitor compliance.

Compliance Monitoring

A significant effort to improve compliance monitoring agency-wide has had no home. The inspector training program was a limited recent effort to focus on this aspect of the function. An agency-wide compliance monitoring workgroup, could develop further some of these recommendations:

- Increase use of self-monitoring data, especially submittal of data in an electronic format that is easily screened. (Task the Agency electronic reporting workgroup to address this issue).
- Increase use of continuous or on-line monitors. (Ask ORD to evaluate current use in programs, available technology and potential for expansion)
- Run a citizen awareness campaign and encourage tip offs of violations. Institute an enforcement hotline. Publicize and reward those who help the Agency find and prosecute violators. (OE should explore feasibility of a hotline for enforcement possibly using the Superfund bounty program as a base; Regional tie-ins and region specific numbers should be explored along with implications for state enforcement programs).
- Include Operation and Maintenance requirements in permits to help insure compliance and treat as equally important as emission/discharge violations. (Refer to work group on improving enforceability of permits).
- Provide inspectors with more information in the field through the use of portable computers which could link up to national data bases. Computers would also allow report preparation in the field. (Ask OIRM to set up pilot in one Region using productivity improvement funds from OMB; link to data integration project).

- Perform more surprise inspections. (Pilot in a Region and evaluate success).
- Make more use of statistical approaches for targeting inspections. (OE reviews results of pilots). Consider software to assist regions and states in applying statistical techniques.
- Vary the frequency of inspections based upon the number of violations detected and the compliance history. Begin with a given frequency, if no violations are detected, then decrease the frequency or the converse. (Pilot and evaluate, or adopt as national policy that overlays program-specific frequency guidance).
- Improve the transfer of information on successful approaches across agencies and levels of government. Consider an electronic newsletter.

(Locate home for leadership in this area and assign mechanism to communicate successful approaches).

TABLE 2

SCOPE OF INNOVATIONS STUDIED

CONTRACTOR LISTING/SUSPENSION AND DEBARMENT: includes use of both EPA'S programs as well as the GAD/GSA program to debar or suspend contractors.

CRIMINAL ENFORCEMENT: includes greater use of criminal probation to speed application of legal sanctions for new violations and creative sentencing for compliance and pollution prevention consistent with the new U.S. Sentencing Guidelines.

ENVIRONMENTAL AUDITING: includes use of environmental audit conditions in settlements to address management problems and/or patterns of violations as well as promotion of the practice of environmental auditing and exploration of possible certification programs for environmental auditors.

LEGAL TOOLS: includes innovative use of existing authorities such as subpoenas, as well as other authorities which federal EPA lacks which could enhance enforcement. It draws upon past efforts to develop an integrated enforcement statute by the EPA and the Environmental Law Institute.

MULTI-MEDIA ENFORCEMENT: includes planned multi-media inspections and/or consolidated enforcement responses.

TARGETING: includes approaches to targeting either compliance monitoring and/or enforcement response to specific industries, chemical sources, geographic areas or compliance problems.

RISK BASED/ POLLUTION PREVENTION ENFORCEMENT: includes the use of conditions and existing enforcement authorities to prevent or correct environmental problems which cannot be addressed through traditional regulatory/permit enforcement.

INNOVATIVE REMEDIES: includes use of specific case conditions of settlements to leverage a single enforcement action to influence greater compliance behavior, deterrence and/or environmental result. Examples include training provisions, oversight and training programs for distributors and subcontractors, or small businesses in related fields, etc.

FIELD CITATIONS: includes use of in-field "traffic-type" tickets with penalties, in-field notices of violation (as opposed to notices issued from the main office), and proposed settlements accompanying notices of violation to speed resolution of cases.

ALTERNATIVE DISPUTE RESOLUTION: includes arbitration, mediation, facilitation, and other negotiation aids for settlements.

COMPLIANCE MONITORING: includes an examination of innovations such as privatization of quality assurance of self-monitored data (i.e., source pays fee to certified lab lab for performance of check sample, and, if it fails, it must use an outside party which has passed such tests until problems are corrected) and use of computers in the field to speed inspector report preparation and access to laws, compliance history, etc..

TABLE 3

THERE IS SIGNIFICANT UNTAPPED POTENTIAL FOR INNOVATIVE TECHNIQUES

INNOVATIVE ENFORCEMENT TECHNIQUE	POTENTIAL FOR EXPANSION

Contractor Listing

- Failure to Comply with AOs/CDs
- Unresolved judicial cases past certain timeframes which are otherwise good listing candidates
- Other Statutes: RCRA,TSCA,FIFRA,MPRSA
- More aggressive State solicitations
- Solicitations from citizens
- More aggressive use for GOCOs

(Suspension/Debarment)

- Aggressive use of referrals for repeat/significant violators

Environmental Auditing

- Compliance audits to efficiently address similar violations at other facilities or to ensure problems remain corrected over time
- Management Audits for repeat violators, multiple/multi-media violations and frequent chemical emergency releases
- Management audits of both health, safety and environmental programs for appropriate types of problems
- Auditing by municipalities

Alternative Dispute Resolution

- Superfund cost-recovery
- Resolving technical provisions of consent decrees and orders
- Multi-party PRP disputes under the Superfund program
- Great potential generally given limited use to date and flexible formats

Innovative remedies/settlements

Expand beyond major users in TSCA and Mobile source enforcement:

- Major violations where there is substantial room to negotiate and still preserve economic benefit and gravity component of penalty

- Programs where public perception or education and outreach are important
- Where individual action can affect a generic solution

Multi-Media

- Where multi-media violations have been identified
- Where settlement in one media has multi-media impacts or other violations are discovered
- Screening for other media while on single media inspection
- Where targeting is on an industry or geographic basis

Pollution Prevention/Risk Based Enforcement

- Addressing TRI data and waste minimization potential.
- Releases of hazardous substances from all media

Criminal Sentencing

- Most criminal cases

Compliance Monitoring

- Expanded use of self-monitoring and reporting based upon continuous monitors, particularly air program
- Productivity improvements through computer applications in-field and in-office

Targeting

- Untapped potential for using targeting to leverage broad based compliance within the target class with well placed publicity and escalating penalty approaches which encourage expeditious compliance or settlement

Legal Tools

- Information gathering in multi-media, pollution prevention, problem based situations

Field Citation

- Short-form settlements can be employed in any program, for any violation amenable to standardized settlement terms.

- Low priority violations,violations which are objectively

recognizable and unlikely to be challenged, warranting low penalties are good candidates for field citations.

II. CONTRACTOR LISTING/SUSPENSION - DEBARMENT

I. Definition

Contractor listing is a formal administrative procedure to prohibit Federal contracts, loans, or grants to "facilities" violating the Clean Air or Clean Water Acts. EPA listing regulations (40 CFR 15) provide for mandatory (criminal) and discretionary (civil) listing. Suspension and debarment is administered by the Grants Administration Division (GAD) under 40 CFR 32 and Federal procurement law (FAR) to bar contractors for offenses including fraud or performance integrity. Contractor listing, suspension and debarment actions were also the subject of another "1990's" subcommittee, which arrived at similar recommendations.

II. Scope of Potential Use

- Listing and debarment can reinforce environmental compliance as a U.S. Government-wide policy, thereby making it an integral part of the way all agencies procure services or offer assistance.

- Both of these sanctions may be used in addition to ongoing administrative and judicial proceedings to compel better compliance settlements ("global" settlements).

- These actions work as a substitute or addition to enforcement actions (such as contempt) to address violations of existing settlements.

- They may act as the civil component of criminal actions to ensure comprehensive compliance plans ("correcting the underlying condition").

- A list of violators can operate as a longer "dirty dozen" list in identifying environmentally unsatisfactory contractors under the GSA procurement and assistance lists. 40 CFR and FAR criteria include "responsible" compliance with applicable law, including environmental laws and regulations.

III. Type of Benefits

(listing may apply more than debarment in some of these generalized benefits)

- Using these actions may expedite settlement negotiations which are not progressing, in order to achieve more immediate compliance.

- The streamlined administrative procedures, elements of a cause of action, and burden of proof (e.g., no "right" to a government contract) can reduce the time and resource investments needed to achieve

compliance with existing orders/decrees.

- Listing and debarment can enhance environmental results by requiring that the underlying "condition" be corrected before removal from the list. However, discretionary listing, suspension, and debarment may apply for a particular period of time.

- One of the basic purposes is to protect the government from doing business with violators who may have a competitive advantage by avoiding compliance costs, or who are not complying with the contract or with applicable law.

IV. Limitations

- The violator would have to do government business (even indirectly) for these sanctions to be effective. If the violator is an important sole-source to the government, the sanction may not be practicable.

- Under listing, the "facility" must have a pre-existing CAA or CWA enforcement action for criminal, continuing, or recurrent violations (distinctions between mandatory and discretionary listing are described at 40 CFR 15).

V. Current Experience

- Discretionary listing has not been used alone, but in conjunction with parallel ongoing civil actions. When the underlying action is resolved, listing has been withdrawn, the facility removed from the list, or conditionally removed from the list.

- Discretionary listing has been initiated solely by the Regions, although HQ has the authority to initiate (and reviews regional actions). States and citizens have not utilized the listing authority through petitions to EPA.

- Mandatory listing represents the large majority of listing cases and facilities on the list. (Currently, 32 mandatory, one discretionary).

- EPA regulations make listing an automatic consequence of applicable CAA and CWA criminal convictions (which is defined as judgment). However, other procedural requirements can complicate the application of actual listing sanctions. For example, Federal Acquisition Regulations and forms focus on the applicant's listing status as opposed to CAA or CWA convictions. Delays in the required notice to GSA and the violating "facility" and the determination of applicability of listing to the

violation can postpone the date of the GSA listing of a violator.

- Most mandatory cases involve little leverage (limited reliance on Federal dollars) for expanding compliance terms in plea agreements or settlements. Nevertheless, in several major important cases listing has been used to achieve global settlements with significantly enhanced environmental results.

- CAA and CWA counts may be removed from indictments during plea bargaining by U.S. Attorneys either out of ignorance of potential listing impact or as part of a quid pro quo. While only the EPA AA for OE can remove a listed source, EPA has little control over U.S. Attorney actions on specific counts.

- Some Regions have utilized listing more than others, or used listing for different reasons, and achieved different results. In addition, EPA has experienced time and resource demands widely divergent from those originally expected. This has led some Regions or offices to question their expectations of listing as an expeditious, low-cost enforcement technique with relatively straightforward procedure. As current contested cases reach judgment and create a body of listing "case law," some protracted proceedings on new issues may become shorter and more routine.

- The suspension and debarment staff process about 100 actions a year encompassing a broader concern than just environmental violations, with very few referrals from the listing program, the criminal program, completed civil cases, and other environmental enforcement sources. There is no formal OE referral strategy at present. Suspension/debarment actions have formed the basis for "global" settlements in certain cases.

VI. Potential for Expansion

- Discretionary listing is underutilized, and could be more strategically used, for example, for serious violations of AOs/CDs in CAA and CWA.

- EPA could work further with States to use their petition authority under the listing regulations.

- Listing authority may be added in the RCRA reauthorization bill and strengthened in CAA amendments. In addition, listing could be incorporated, with certain limitations, in CERCLA/SARA, TSCA, FIFRA, and MSPRA.

- EPA could make more systematic use of suspension and debarment for: (a) violators of all environmental statutes (not just CAA/CWA) (b) repeat violators (c) multi-media violators and "global" settlements and (d) referral to GAD offices in other agencies.

- EPA could expand the use of listing and debarment against GOCOs under the Federal Facility Compliance Strategy.

- The citizen petition provision has never been used. However, it may have unknown but potentially significant impact.

- Any expansion of listing, either strategically planned or imposed from outside the Agency, will have resource implications.

VII. Barriers to Expanded Implementation

- The timeliness of involvement in plea bargaining with criminal defendants may reduce leverage for compliance and broader environmental results from settlements.

- Judges may be reluctant to allow administrative proceedings parallel with litigation. These remedies should not be over-employed as empty "threats" to coerce settlements. However, even if stayed, the listing action may have a beneficial impact.

- Staff size and resources in HQ may be too limited to provide regional support and process more cases (including trial costs, etc.).

- There is a lack of workload credit comparable to other enforcement actions (including the potential regional and HQ work on listing removal and suspension/debarment), although there has been some recent effort to incorporate these actions in workload models.

- There are inadequate incentives to bring cases to closure in current policy and procedures.

- If used as a parallel enforcement tool, listing may not be as efficient at achieving some innovative remedies in national companies because of its limitations to CAA or CWA, and the definition of "facility."

VIII. Initiatives to Overcome Barriers

- EPA should continue backing legislation to include listing in other statutes (such as CAA and RCRA in the near term).

- OE, with DOJ, should consider the need for a plea bargaining policy statement to address underlying compliance problems, restrict authority to bargain listing away, and specify procedures and restrictions on listing removal before conviction or sentencing. In general, OE should continue its training programs including U.S. Attorneys and EPA staff. OE should promote listing through case studies.

- EPA should develop policy for application to state criminal convictions.

- OE should make case closure a priority, and require management review of cases pending more than a certain time.

- EPA should institutionalize listing by requiring explicit consideration of listing in certain enforcement areas, such as AO and CD violations (need to evaluate potential problems with this type of proposal).

- Incorporate environmental audits in listing removal actions.

- OE and other affected offices need to examine and improve workload models to incorporate listing activities. OCE and CLS should coordinate potential listing removal issues with affected Regions.

- EPA should recommend amending the FAR and FAR assistance agreement language to strengthen compliance with environmental laws and regulations (as DOE has just completed).

- OE should expand and formalize use of a referral system in conjunction with the IG and GAD to more closely coordinate joint interests in improving environmental compliance by contractors and grantees.

IX. Plan of Action

(Note: Many of these recommendations require resources to <u>implement</u> as well as <u>operate</u> a new or expanded program.)

<u>Immediate</u>

- Workload models
- Reporting Systems
- Training

<u>Near Term</u>

- Strategy integration and planning
- Plea bargaining policy/guidance
- Training and guidance

- Referral system

Long Term

- Statutory changes: OE, GAD, OGC, OL
- Regulatory changes: OE -- Listing OE, GAD, OGC, OIR -- FAR

III. CRIMINAL ENFORCEMENT

I. Definition

All of the environmental statutes administered by EPA include three types of sanctions for violations of the statutes and their progeny regulations -- administrative, civil, and criminal. Criminal enforcement is distinguished from administrative and civil actions in several key respects: (1) the severity of the sanction, i.e., imprisonment of convicted individuals; (2) the level of proof (beyond a reasonable doubt) the government is required to establish as to each element of the offense; (3) and the societal stigma and accompanying attention associated with a criminal conviction.

One of the other key distinguishing aspects of criminal enforcement is the possible use of probation in the sentencing process. Federal statutes, in particular 18 U.S.C. § 3563, the Sentencing Guidelines now in effect for individuals, and the Guidelines for Organizational Defendants as proposed by the U.S. Sentencing Commission, allow a sentencing court to impose discretionary conditions of probation, which may include community service having a nexus with the nature of the offense, restitution, and remedial measures which address future harms.

II. Scope of Potential Use

- Sentencing courts are allowed much leeway in fashioning conditions of probation, provided conditions further overall sentencing purposes and are not unreasonably burdensome.

- Since probation can be used in sentencing individuals and organizational defendants, sentences can be specifically structured to the type of defendant.

- Environmental trusts, such as those covering future anticipated health costs arising from environmental offenses, as well as compliance plans, and audits can be required as part of sentence.

III. Type of Benefits

- Provides opportunity for Agency to have input with U.S. Attorney on outcome of criminal prosecution. Such input is increasingly necessary to apply the Sentencing Guidelines.

- Probation allows a single judicial forum to potentially address all aspects of an environmental violation through orders of restitution and specific remedial measures.

- Due to severity and stigma of criminal convictions, individual and business environmental offenders are very receptive to accomplishing suggested corrective measures in order to be placed in a favorable light before sentencing court.

- Use of probation allows for swift imposition of severe sanctions via violation of probation hearing if environmental misconduct is repeated during term of probation.

- Since probation requires compliance with both federal and state laws, state and federal environmental compliance can be enhanced during probation.

- Probation and threat of violation of probation can be strong tool for inducing long-term modifications of business practices to ensure permanent changes in corporate behavior.

- While on probation, individual and organizational defendants are especially responsive to environmental compliance duties and can be closely monitored by environmental authorities. Inspection authority can be based on fact of probationary status.

IV. Limitations

- Because EPA has only 53 criminal investigators for the entire U.S., wide-ranging sentencing options can be used in only few cases.

- Cases are not uniformly selected consistent with Agency enforcement objectives to ensure that criminal investigations are targeted on criminal problems where sentences will have the maximum benefit.

- There is insufficient notification to EPA's program components of pending criminal sentencing hearings and program involvement in fashioning constructive sentencing terms.

- Working relationships between probation authorities of the U.S. Courts, and EPA programs which can monitor compliance with environmental aspects of probationary terms, have not been established.

- There is insufficient exchange of information between state and federal enforcement authorities to ensure that federal environmental compliance monitoring personnel know of state sentences involving terms of probation and vice versa.

V. Current Experience

- If we obtain jail term for individual defendants, or substantial fine for company, restitution and remedial measures are often forsaken.

- In the few cases where the Government has taken the initiative in its sentencing recommendations, courts have been responsive to such suggestions and have established, for example, environmental trusts covering, for instance, enhancement of river's fisheries, funding a local recycling program, and paying for employees' long-term medical costs.

- Many U.S. Attorney Offices are still not tapping Agency expertise on sentencing issues, especially with regard to cases developed independently by FBI.

VI. Potential for Expansion

- If Sentencing Guidelines are adhered to by federal courts, and courts make maximum use of courts' broad powers to require restitution and formulate conditions of probation, criminal enforcement should become the most effective and attractive of the Agency enforcement tools.

- Federal support through training programs and regional state enforcement associations will develop criminal enforcement programs on state and local levels, so that advantages to be gained from criminal sentencing process are realized on all levels.

VII. Barriers to Expanded Implementation

- Too few federal environmental criminal investigators and limited case support resources means too few criminal cases can be developed, which means too few defendants can be the subject of the sentencing process.

- U.S. Probation Offices, due to large caseloads and limited resources, do not give attention to environmental cases that the Agency believes is necessary.

- U.S. Sentencing Guidelines for Organizational Defendants may be modified by Congress to limit use of federal courts' sentencing options.

VIII. Initiatives To Overcome Barriers

- EPA is continuing to work with the U.S. Sentencing Commission to ensure that present Sentencing Guidelines for Individuals and draft Sentencing Guidelines for Organizational Defendants address EPA concerns in federal sentencing process.

- EPA is providing training to Agency enforcement personnel and (through NEEC, NAAG, and Regional State Environmental Enforcement Associations) developing awareness by state personnel to the role regulatory agencies can play in the sentencing process.

IX. Plan of Action

- Continue to seek to obtain more enforcement resources for the criminal enforcement program.

- Continue training for EPA personnel and federal prosecutors on significant services that EPA can provide as to sentencing matters.

- Develop increased awareness in program offices to potential presented by sentencing process for correcting environmental harm and enhancing environmental compliance by immediate defendant and similarly situated defendants.

- Work to make EPA compliance monitoring personnel "partners" with U.S. Probation Offices.

IV. ENVIRONMENTAL AUDITING

I. Definition

The July 9, 1986 EPA Policy Statement on Environmental Auditing (51 FR 25004) defines environmental auditing as "a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risk from regulated and unregulated materials and practices." It can be performed by internal or external third parties so long as it meets basic standards of independence. The EPA policy statement defines several key elements of what constitutes an effective audit program: top management support for auditing and commitment to follow-up on audit findings; independence of function; staffing and training; structure with explicit written audit procedures and protocols; a system for collecting all necessary information; and a process for reporting findings to senior management and for tracking commitments and schedules for corrective action.

Environmental auditing is distinguished from: a) government inspections which are conducted to determine compliance with requirements; b) source self-monitoring, record-keeping and reporting which are required in regulations and permits to enable the facility and government to assess compliance status; and c) ongoing environmental management programs which are responsible for day-to-day compliance, reporting, monitoring and recordkeeping.

II. Scope of potential use

- In circumstances where noncompliance appears to be the result of underlying problems in management commitment, organization, and/or systems, environmental management audits may be treated as a part of the remedy in enforcement settlements when accompanied by commitments to correct management deficiencies.

- When violations are likely to be found in similar facilities and operations owned and/or operated by the violator, environmental compliance audits can serve as an efficient means of improving compliance, although not replacing separate government inspections and enforcement actions.

- In the context of an enforcement settlement, third parties may be called upon to provide recommendations as to an effective remedy. This advice may involve the conduct of an audit.

- Environmental auditing as a standard practice for regulated entities can aid them in achieving current and continued compliance through improved management systems and compliance awareness at the highest levels in the organization. Environmental (risk) audits which focus on waste minimization or pollution prevention can lead to reduced environmental risk.

- Third party audits and certifications of compliance, while not substitutes for government inspections, may enable EPA to acquire a more comprehensive compliance evaluation.

III. Type of Benefits

- Requiring management audits in enforcement actions enables EPA to address management problems at facilities without itself getting in a position in which EPA is telling sources how to manage their operations.

- Requiring management audits ensures that enforcement corrects compliance problems so as to increase the likelihood that the source will improve its environmental compliance.

- Compliance audits can add to the value of Federal and state inspections when undertaken in a manner in which EPA can be confident of quality and thoroughness.

IV. Limitations

- Environmental auditing does not substitute for sound environmental management nor can an audit be expected to uncover all violations or management problems.

- Environmental auditing is ideally an ongoing process; however, as a provision in an enforcement settlements it is generally limited to the life of the decree or order.

- Audits are not useful in simple cases (single violation, limited sanction) where actions needed to achieve compliance are well defined, where compliance is easy to detect, or where management does not appear to be a major problem.

- Neither industry nor a third party can substitute for an independent EPA role, and the value added of the audit must be carefully appraised as to whether it truly represents a resource savings.

- An audit is only as good as the individuals performing the audit and the management support for the audit and follow through on recommendations. There is currently no quality control or list of acceptable auditors, nor is certification viewed as a fool-proof means of ensuring quality.

V. Current Experience

- The Office of Enforcement has issued policies encouraging environmental auditing, guidance for incorporating audits in enforcement settlements and for establishing effective Federal facility audit programs.

- Several articles have been published describing the use of audits in enforcement actions. OPPE and OE maintain an active program encouraging voluntary private sector audits. Many well-established environmental audit principles are incorporated in audits employed in enforcement actions.

- The attached chart summarizes most of EPA's experience in audit provisions in enforcement settlements. In summary, cases have included audits addressing single pollutants or requirements (PCB), multi-media, multi-facility, foreign importation, risk-based, management, compliance-plus-management, and compliance capability artificial input audits. Environmental audits have been used in conjunction with stipulated penalties, compliance certifications, and ADR provisions, as well as other innovative and established enforcement methods.

- Interviews with staff indicated that, as with many settlement terms, enforcement-designed environmental audits have been primarily negotiated in exchange for penalty mitigation or penalty remitted credits (primarily mitigation). Audits were most easily negotiated where there was a sufficient differential between the original proposed penalty and the economic benefit of noncompliance (if applicable). Evaluating the "value added" component of an environmental audit in a particular case is extremely problematic, but not a good reason to rule out audits. EPA now has a fair amount of experience and data on the cost of audits, the value to the Agency, and the risks and compliance impacts on the source. The extent to which a judge could "order" the remedy EPA is attempting to achieve has been an important consideration in negotiations. For example, a court could possibly order a company to comply with a audit term, but would be unlikely to "order" management improvements recommended in an audit. "Comprehensive" audits, negotiated in settlements, may go

beyond the court's jurisdiction to enforce, if enforcement becomes necessary.

- Staff made observations that an audit is most desirable where neither EPA nor the source have all the answers nor knowledge about all the problems. It is not as useful in cases, e.g., asbestos demolition, where good management and operations practices such as training and reporting can be pre-packaged as an injunctive relief.

- Outreach activities to promote audit programs in public and private sectors now include: speeches and articles which are regularly given by OE/OPPE on the policy, encouraging these practices; technical assistance in the form of case studies, protocols and bibliographies distributed on request (recently waste minimization assessment guidance was added to these materials); audit guidance for federal agencies; active representatives in the Environmental Auditing Roundtable, an industry group dedicated to promoting auditing as a profession. NEIC has trained federal agency auditors.

VI. Potential for Expansion

- Auditing works well in conjunction with other innovative tools, such as pollution prevention and multi-media actions.

- Management audits have been underutilized as a means of correcting underlying compliance problems, particularly for repeat violators and multi-media violations.

- The chemical emergency preparedness strategy calls for a rank ordering of emergency incidents and either a chemical emergency preparedness audit or a comprehensive environmental audit requirement within any pending enforcement actions.

- Auditing may become an important tool under new statutory authorities (such as EPCRA, CAA, FIFRA, and MPRSA which either have draft auditing provisions in proposal bills, or inherently require the use of auditing to effectively comply with requirements).

- Development of auditing for municipalities is another frontier for auditing and ripe for its application given compliance pressures on city and county governments. We are aware of only one municipal auditing program at present. In response to interest expressed by this community, OE and OPPE explored and proposed an initiative to promote auditing practices tailored to this group and its environmental concerns. The project is on hold pending funding.

VII. Barriers to expansion

- Staff need experience with drafting audit provisions in settlements so they do not generate more EPA follow-up than necessary to achieve the benefits.

- Management and staff are reluctant to initiate cross-program and cross-regional audit requirements because of the increased workload and difficulty of tracking follow through.

- Environmental audits have been an innovative remedy as part of an overall set of settlement terms. There is no specific statutory "authority" for environmental audit remedies, and EPA could have difficulty incorporating an audit (especially a management audit) in an individual judgment, although EPA and DOJ believe they have the authority to require an audit as an element of injunctive relief where appropriate.

VIII. Initiatives to Overcome Barriers

- Require Headquarters OE/Program to identify which settlements lend themselves to using audit provisions in settlements, and which do not, (e.g., voc cases may not but air toxics cases may).

- Create a network of individuals in the Regional Counsel's office in each branch and OE Headquarters in each Division who would maintain up-to-date case examples and information on audit provisions in settlements. Request such individuals also to make themselves available to speak to industry groups in their Region about environmental auditing. HQ should have a trained, knowledgeable contact in each OE office.

- Provide additional credit for enforcement settlements (including workload models) with audit provisions, especially multi-media, Federal facility, or multi-facility audits.

- Expand outreach to promote environmental auditing in public and private sector.

- Continue to facilitate auditing by developing and publishing inspection and other protocols for determining compliance and pollution prevention opportunities.

- Develop auditing guidance for municipalities and transfer successful approaches.

- Offer technical assistance to groups attempting to define audit standards and protocols, including compliance, pollution prevention and real property assessments and audits.

- Further examine the need for certification of environmental auditors. Consider needs and differences among compliance audits, waste/minimization and pollution prevention audits, and environmental assessments for real property transactions. Explore options ranging from federal inspector certification as a model, to sponsoring legislation for an independent public/private certifying body, to approaching states/organizations willing to pilot certification programs and offering assistance/evaluating results. Issues include scope of certification and whether it is effective to monitor compliance.

IX. Plan of Action

Immediate

- Designate an office as a repository for audit provisions in enforcement actions.
- Designate and train contacts in HQ offices and Regions.
- Identify potential settlement negotiation.
- Prepare options for enhancing outreach efforts to public and private groups.

Near Term

- Develop and implement training.
- Prepare white paper on certification of environmental auditors.
- Develop and implement municipal audit guidance and initiative.
- Develop workload and reporting measures to credit audit project in enforcement actions.

Long Term

- Support groups develop audit standards and certification programs.

ATTACHMENT

ENVIRONMENTAL AUDITING

A SUMMARY 1983 - 1989

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No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
1	1982	El Paso	TSCA §5 PMN	Management and Reporting Systems	Report to EPA- Presentation to Trade Assoc.	New Management, Report Systems; Model Sysltems for Trade Assoc.	Compliance with all Terms of CAFO
2	1983	Conoco Inc. Kayo Oil Co. CAA(211)-449-520,596,709 710	CAA/ mobile sources				Gasoline smplng; Certify tampering; Public information
3	1983	Potlatch Corp. TSCA-V-C-137	TSCA PCB	Compl. audit PCB 48 facilities	Certify compliance Report location and quality of PCB		A PCB removal plan
4	1983	Crown Zeller-back Corp. X83-06-08-2614	TSCA PCB	Corporate-wide compl. program	Certify compliance	Stipulated penalty $ 4,000 Refine compl. program	Guidance manual for management of PCB
5	1983	Dept. of Defense	TSCA PCB	Compl. audit PCB	Quarterly status reports	Establ. compl. plan	Implement Compliance Plan
6	1983	Michigan Dept. of Corrections TSCA-V-C-187	TSCA PCB	Compl. audit PCB all fac.	Certify compl.	Reduced penalty to zero	Cert. compl.

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No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
7	1984	Owens-Corning Fiberglass TSCA-V-C-101	TSCA PCB	Compliance Audit - 63 facilities	Report, Certify compliance	Compliance	Self-inspection, Public inform., Compliance, Facility risk improvements
8	1984	United Amer. Fuels Inc. FOSD-1578	CAA Mobile	Compliance Control and Test programs			Self-insp. Compliance
9	1984	Chrysler Corp	CAA Mobile	Compliance			Cert. Compl.
10	1984	CWM Emelle Ala. facility TSCA-84-H-03	TSCA RCRA	Mgmt. audit TSCA, RCRA + PCB mass balance	Audit report, inventory of PCBs etc., Certify compl., Disposal report	Stipulated penalties, Permit terms	Compliance Certification
11	1984	Washington State Univ. X83-05-02-2614	TSCA PCB	Compl. audit TSCA PCB all bldgs.	Certify compliance		Guidance manual, Training
12	1984	Allstate Ins. Co. X83-09-09-2614	TSCA PCB	Compliance audit 140 bldg. nationwide	Report implementation and completion of program	Stipulated penalty	Self-insp., Training conf., Guidelines
13	1984	Nat. Conven. Stores, Inc. FOSD-1140 1404	CAA	Compl. audit QA Program	Certify compl.	Periodic verification of compl.	Empl. training, Control program, Self-insp.

No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
14	1984	R.I. Marketing Inc. FOSD-1611	CAA	Compliance Management Training	Report Certification		Program for 200 retail outlets
15	1985	Savoca's Service Center Inc. FOSD 2101	CAA	Compliance Management Training	Report		Program for all retail outlets
16	1985	Chem Security Systems Inc. TSCA 1085-07-42-2615P RCRA 1085-06-08-3008P	TSCA PCB RCRA	Compl. audit (4 quarterly) TSCA, PCB, RCRA	Audit report		Compliance, by Insp.
17	1985	CWM Kettleman Hills fac. TSCA 09-84-0009 RCRA 0984-0037	TSCA RCRA	Management audit Compl. audit TSCA, RCRA	Within 90 days submit findings and recomm. action to be in compl. Schedule for implement.	6 months grace period to correct audit-discovered viol. with no penalty	Compliance Certification
18	1985	Diamond Shamrock Corp. TSCA-85-H-03	TSCA PCB	Compl. audit TSCA, PMN 43 facilities	Report violations	After 6 months remedy viol. Stipulated penalty	Manuals for handling and managing PCB
19	1985	CWM Inc. Vickery fac. TSCA-V-C-307 RCRA-V-85R-019	RCRA TSCA	Management audit TSCA, RCRA	Audit report	6 month grace period to correct viol. with no penalty	Compliance Certification

No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
20	1985	Michigan Dept. of Mental Health TSCA-V-C-231	PCB	Compl. audit PCB all fac.	Certify compl.		Cert. Compl.
21	1985	Bonneville Power Adm. MOU, EPA 2/20/85	TSCA PCB	Compl. audit	Annual self-insp. reports		Personnel training Self-inspection
22	1985	Rosenburg Lumber Company X83-05-02-2614	TSCA PCB	Compliance audit	Certify compl.	Compl. program for 12 fac. Stipulated penalty	Training program PCB manual PCB equipment building
23	1985	American Petrofina Company of Texas (RVI-1217, 1293)	CAA	Management			Annual visit program to verify proper procedures
24	1985	Chapman Chem. Co. 9/30/85	CAA Mobile	Management	Results of audit		Participate in voluntary Consumer Awareness Program Audit the program
25	1985	Mac Oil Company FOSD 1908	CAA	Management Compliance			Test program Self-insp. program Compl. policy
26	1985	Phillips Petroleum Company	CAA	Compl. audit (Q.A. program)	Report effect of program		Self-insp. program Sampling program
	1987	Canon Copier (Japan)	TSCA PMN	Artificial Input Management Audit	Report: response to test inputs	Training, Mgmt., Reporting changes	Complied w/CAFO

No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
27	1985	Parma, Ohio C-85-208	CAA	Compliance	Report tamperings	Compliance	Self-inspections. Public inform. Testing Replace converters
28	1985	State of Maine 84-0152-B	CAA	Compliance			Self-insp. Public inform. Audits
29	1986	Union Carbide Corp. TSCA-85-H-06	TSCA PMN	Artificial Input Management Audit	Results from test program	Training Program; video tape; Management Changes	Educational progr. Test program to monitor response
30	1986	Crompton & Krowles Corp. TSCA-PCB-82-0108	TSCA PCB	Compl. audit TSCA, PCB 28 facilities	Certify inventory of PCBs etc. Certify compl. Describe audit	Stipulated penalty	Compliance Certification
31	1986	BASF Wyandotte Corp. TSCA-V-C-410	TSCA PMN	Compl. audit TSCA 13 facilities	Certify compliance	Mitigated penalty	Compl. Cert.
32	1986	BASF Systems Corp. TSCA-85-H-04	TSCA PMN	Management audit Compl. audit TSCA 13 facilities	Interim status report Final report Certify compl.	Stipulated penalty $10.000 per "safe" chem. penalty per "bad" chem	Develop procedures for handling chemicals.
33	1986	Detroit Metropolitan TSCA-V-C-468	PCB	Compl. audit PCB All facilities	Certify effect compl. Submit inventory-PCB		Compl. Cert.

No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
34	1986	Ren Plastics TSCA-V-C-411	TSCA	Review chem. manuf. TSCA	Certify compl.		Environmental seminar Training program
35	1986	Georgia-Pacific Corp. 84-457-B 84-136-B (MD-La)	CAA PVC	Annual management review	Revised standard operating directives Test data	Implement compliance plan for PVC: Stipulated penalty	Maintenance program Self-inspec. Training
36	1987	Ashland Oil Inc. 86--203 (ED-Ky)	CAA Benzene	Compl. audit Benzene VOC	Audit report of recomm.	Implement recomm. Stipulated penalty Status of compl. plan. Revise compl. manual	Wastewater study Training Best-management-practices-study Testing and Control plan Maintainence program
37	1984	General Electric Co. 84-CV-681	TSCA PMN		Monthly progress report	Study to insure compl.	Compl. Rept.
38	1988	Texaco Refining & Marketing 86-321-MMS (D-Del)	CAA Benzene	Compl. audit Benzene	Audit report of recomm.	Implement recomm. Stipulated penalty	Implemented
39	1988	Union Carbide	TSCA 8(e)	Risk Assessment Audit	Audit Report	Stipulated Penalties/w ADR	Penalty & Penalty reduction for audit & stipulated penalties case completed & report submitted
40	1989	Texas Eastern	TSCA RCRA	PCB Compliance	Report	Stipulated Penalties Certification of Compliance	Pending

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No.	Year	Case Name	Viol.	Scope of Audit	Submission	Consequences of Submission	Outcome
41	1987	BFI (Reg 6)	RCRA Jud.	Management (sequential Audit) Compliance	Report	Stipulated Penalties	Completed Compliance w/CD
42	1990	BFI (Reg 6)	RCRA Jud.	Management (sequential Audit) Compliance	Report Compliance Certification	Stipulated Penalties	Pending
43	1989	Monsanto	TSCA 8(e) HQ	Risk Assessment	Report	Stipulated Penalties Compliance Terms	Pending
44	1988	Sandoz	TSCA	Management Compliance	Report	Stipulated Penalties	Compliance w/settlements
45	1989	McCloskey	TSCA	Management Compliance	Report	Stipulated Penalties	Compliance w/settlement
46	1989	Albright & Williams	TSCA	Management Compliance	Report	Stipulated Penalties	Compliance w/settlement
47	1988	LTV	TSCA RCRA CERCLA CAA CWA	Compliance, Env. Assess.	Report to Bankruptcy Court	Compliance needs identified	Environmental compliance, cleanup incorp. into Bankruptcy

V. LEGAL TOOLS

I. Definition

"Legal Tools" is a label for a project leading to line personnel identifying, describing, using and evaluating useful new or untried applications for identified statutory enforcement mechanism or legal tools.

This endeavor has no media boundaries and encourages efforts to transplant LEGAL TOOLS and mechanisms from any media where they have proven practicable to any other program with the same or an analogous need.

II. Scope of Potential Use

- Inter-media enforcement is a prime source for exploring the abstract merits of case-specific legal tools innovation (e.g., TSCA subpoena use to investigate what may turn out to be a FIFRA pesticide misuse case).

- The first-priority candidates for "re-thinking" and "re-examining" (and resharpening) EPA's legal tools seem to be EPA's information gathering tools. Not only is accurate information the first consideration in any enforcement case, but that is also the area where the courts are most likely to be sympathetic. It is the area in which EPA in the past has had the most visible successes.

- Only modest successes have been registered in regard to innovatively applying existing statutory authorities in a way that the ordinary reader of the precise language for such authorities might not have anticipated even if he/she had thought about the matter. But what few authorities do exist seem to be encouraging. (The Tivian Laboratories case and Alyeska Pipeline Service Co. case, **in the appended illustrations** are prime examples). The techniques in using existing tools can be preserved (cataloged) or "warehoused" and disseminated through training by the EPA Institute which in part has been funded by OE. Mere memos to Regional Counsels are inadequate to the job.

- Just keeping track of, and inventorying, failures as well as innovative ideas serves EPA well as an institution because it "earmarks" pitfalls experienced previously which can be avoided.

- Some identified group **(probably at headquarters) to be tasked with "sheparding" this project** is essential to success. Such group needs to catalog track, analyze, and recommend/advocate or disparage some technique touted as innovative.

- A long range vision of ideal "legal tools" for EPA must be created, publicized, and promoted as a baseline, recurring and simmering activity so that at any point in time EPA can respond to Congress' inquiry re EPA's legislative desires, with answers to the question, "What tools does EPA need, which EPA now lacks?", in order to make EPA enforcement more 'behaviorally influential' as well as more of a genuine disincentive to violate, or to fail to comply with applicable environmental requirements?" Putting together and periodically re-examining a "consolidated proposed statute" for EPA enforcement **(which EPA has done)** helps maintain a long range vision of enforcement whether or not such a statute is ever actually enacted.

III. Types of Benefits

- Morale of "front-line" EPA employees is inevitably raised by a senior management initiative to invite work-in-process "suggestions" or "alternative solutions" to case-specific problems. THIS IS NOT a "bean-counting high-yield" endeavor or a short term or "one-shot" endeavor. It is a long-term investment, particularly as to attorney training.

- Avoiding past miscalculations - EPA can avoid past mistakes, errors and miscalculations, by cataloging and advance in-depth analytical study of how EPA's enforcement tools have been, and are being, used. That promotes and advocates use of legal tools in ways which have an acceptable risk of loss in the courts and thus appear genuinely productive.

- Managed vice serendipitous innovation - Risk assessment of enforcement innovation can be estimated, but unless the specific efforts can be cataloged for imitation and use, or avoidance, by some component of EPA in addition to the innovating originator, the "yield" from the effort may not be worth the cost. Such management consumes personnel and time which OE must commit on a long term basis.

- Networking is promoted - The freedom regional personnel would feel by having a pro-innovation enforcement "think-tank" or unit for enforcement available at Headquarters, both as a stimulator and as a reality-check resource for contact and kicking around case specific problems, would counterbalance the inhibition which regional units tend to fear as a source of criticism of their field generated ideas as being "wild and crazy".

- Need for uniform generic authority is highlighted - The fact that "assembly-line innovations must become relied upon" is significant evidence that the "explicit existing regime" is in need of a re-examination, and an "overhaul" where warranted. This effort creates a clamor for a "one tool-kit" system for EPA enforcement -- regardless of the statute or substantive standards involved.

IV. Limitations

- Both APA (5 U.S.C. Section 551 et seq.) and Constitutional limitations are fundamental recurring limits to innovation which EPA must live with and explicitly support lest popular acceptance of EPA's regulatory role degenerate in the public view to one of heavy-handedness, or mindless bureaucracy. "Compliance", NOT "bean counting" or "scalps", must remain the articulated goal of EPA enforcement.

- Expanding the application of some existing statutory legal tool of EPA must be carefully distinguished and separated in its treatment from what is, in fact, or what will be perceived to be (by the bar, by the regulated community, by the Congress, or by the courts) a legislative proposal ONLY, but not acceptable as an interpretive based innovation (e.g., if it is perceived ONLY as a boot-strapping technique masquerading in euphemistic language, it is probably doomed).

- "Traditional" mechanisms, analogous to those techniques which some sister federal administrative agency (for example, the IRS) already employs, seem to be the most fruitful areas for EPA to explore as new stimuli for innovative techniques in enforcement. "Analogy" and "Imitation" seem to justify as well as to exemplify innovative enforcement mechanisms.

- Incremental evolution of enforcement techniques and mechanisms seems to have been about the only work-a-day innovations which "catch-on" in a real sense in EPA enforcement as opposed to broad-scale announced "initiatives". The Branch Chief and Section Chief levels seem to be the sources for truly promoting and encouraging enforcement innovation.

V. Experiences to Date

- Most of the limited successes EPA has enjoyed in innovation since 1974 seem to have clustered around enforcement-related **information gathering mechanisms or "tools"** whether or not they originated as legal tools "dubbed" as "innovative". Illustrative examples are appended. That is also the primary focus of the draft "consolidated

enforcement statute".

VI. Potential for Expansion

- The phenomenon of innovation is inevitable -- particularly where the workforce is composed of bright and dedicated people. But it should be routinized and managed rather than allowed to "grow wild". "Managing innovation" seems more efficient and productive.

- Refurbishing "legal tools" requires some unit (probably at Headquarters) to be tasked to do the cataloging analysis-training functions which would be crucial to "managed-innovation". To the extent that some innovative technique received OE approval and support, the EPA Institute which provides training for newly hired EPA attorneys could be enlisted to design and present modular courses which would articulate, display and epitomize the advantages of some innovative technique and would provide "how-to-do" instruction with respect to it -- a very pressing need for this type of institutionalization -- particularly in enforcement. EPA has never formally trained personnel in "enforcement". Institutional memory drains away with departure of experienced employees unless captured by formalized training.

VII. Barriers to Expanded Implementation

- **"Media-myopia"** - This means that some units have become overly comfortable with some familiar boundaries and limitations on the enforcement techniques provided by a particular statute and are disinclined to take "risks", or to attempt some expanded use of an existing technique, or some new application of some statutory technique which has not been tried before. No stigma or career-affecting view should exist for any such innovative efforts.

- **Lack Of Training Resources** - Even if regional units are amenable to trying new and innovative techniques, it is essential that for any routinized use they be first "trained and instructed" in such new methods. That, by itself, is an invitation to become innovative. The EPA institute which provides training for newly hired EPA attorneys is probably the best vehicle for articulating and promoting "enforcement innovation". Previously, an annual "national enforcement conference" was held for EPA, but that method (while useful for demonstrating some headquarters support) did not sufficiently institutionalize the "training" necessary to establish, agency-wide, any innovative enforcement techniques. Money, positions, and qualified instructors must be made available to EPA's training institute if

innovation in enforcement tools is to become meaningful in EPA.

VIII. Initiatives to Overcome Barriers

a. An articulated and descriptive "clear and distinct" workplan must be prepared for this project and written down.

b. Some already-cohesive unit under the Office of Enforcement must be identified and charged at Headquarters with the collateral task of "shepherding and advocating" **sound** innovative enforcement efforts, and obtaining case-specific OE support for any such innovative action before it is widely employed -- but with an attitude that "risk-taking" is AOK.

c. Such unit's secondary ongoing mission could be established as preparing "training modules or short-term courses" (and materials therefore) which could be offered to the Regions under the EPA training institute auspices regarding, for example, information-gathering mechanisms (e.g., warrants, TSCA subpoenas, CERCLA 104(e) orders, etc.) in a generic way.

d. Such unit must also establish a "contact" network in the regional offices so that any innovation to be publicized and promoted actually reaches those people who presumably run into the problem an innovation can alleviate.

e. As an initial effort, such unit could profitably focus on:

   (1) Forms and procedures for using TSCA investigative subpoenas in non-public investigations regarding possible releases of imminently hazardous chemical substances or mixtures (Thereby building on the favorable decision in the Alyeska case);

   (2) Forms and Procedures for judicially enforcing investigative subpoenas;

   (3) Forms and procedures for applying for and executing administrative warrants (or any CERCLA functional equivalent); and

   (4) Preparing course outlines and syllabuses in anticipation of disseminating innovating experiences forces the analysis and evaluation needed for any innovative technique to be emulated and to prosper.

APPENDIX

APPENDIX

"LEGAL TOOLS PROJECT IN INNOVATIVE ENFORCEMENT"

- An early case illustrative of innovation was U.S. v. Tivian Laboratories, 589 F.2d 49 (1st Cir., 1978) where what EPA then called a "request for information" under CWA Section 308 was used to call for industry-wide information about PCBs. There, EPA asked the court for specific enforcement of its request for information. EPA explicitly declined to ask for civil penalties under CWA Section 308, and sought **only** specific enforcement. The Court of Appeals upheld and specifically enforced EPA's request USING RULES OF LAW TRADITIONALLY EMPLOYED THERETOFOR IN CASES WHICH HAD INVOLVED ADMINISTRATIVE INVESTIGATIVE SUBPOENAS---a different "legal tool".

- A more recent illustrative case involving a so-called "request for information" was EPA v. Charles George Trucking Co., 24 ERC 1812 (D.Mass.,19860), under RCRA Section 3007 where EPA sought both specific enforcement of the request for information PLUS civil penalties for having failed to comply therewith. (The FTC v. St. Regis Paper Co. case, penalizing while enforcing specifically FTC subpoenas was regrettably not relied upon by EPA).

- A recent case illustrative of "purposeful" innovation is U.S. v. Alyeska Pipeline Service Co., 836 F.2d 443 (9th Cir., 1988). There, EPA sought to specifically enforce an administrative investigative subpoena which had been issued under TSCA Section 11(c), 15 U.S.C. Section 2610(c). EPA wanted the company president to produce records and to testify about activities regarding the Valdez, Alaska, pipeline terminal and the ballast liquids there off-loaded from oil tankers. EPA's legal theory, in part, was that EPA was trying to learn whether an "imminently hazardous chemical substance or mixture" under TSCA section 7, [15 U.S.C. section 2606] had been released in consequence of such activities. The trial and Circuit courts specifically enforced EPA's TSCA subpoena using traditional administrative investigative subpoena enforcement rules and used unusually supportive language of EPA efforts. The DOJ appellate division gave yeoman service on the appeal to EPA's cause. The appeal indicated that EPA was **not** constrained to using TSCA for its ultimate enforcement so long as EPA remained legitimately within the empowering statutory language for subpoena issuance.

- A case illustrative of EPA's "fitting in" with the administrative warrant scheme, laid down by Supreme Court caselaw is the Bunker Hill Co. v. EPA, 658 F2d 1280, (9th Cir., 1981). There, instead of forcibly entering with U.S. Marshal assistance, EPA sought a contempt order against the company which had obstructed entry and inspection under CAA Section 114. Both the trial and Circuit court upheld the administrative warrant but declined to find the company in contempt, yet confirmed EPA's right to seek such warrants ex parte without need for surprise, etc.

- Not all experiences have been rosy for EPA with its use of investigative information-gathering tools.

- In a recent ruling, the Idaho District Court (faced with essentially the same fact pattern reported in 820 F2d 308 (9th Cir. 1987) dismissed as moot and not decided) ruled (on the basis of dicta appearing in See v. City of Seattle, 387 U.S. 541 (1967)) that an administrative warrant obtained under CAA Section 114 allowing an examination of all records on the premises should be treated like an investigative subpoena thereby allowing the premises occupant to screen and segregate its own records rather than enabling EPA officers executing the warrant to verify the presence and whereabouts of "to-be-copied" records by examining all records on the premises and then copy those they selected as indicative of compliance or non-compliance with NESHAPS (asbestos removal-demolition) regulations.

- One Regional office took the specific wording of CERCLA Section 104(e)(2) at face value, regarding the word "require" in that subsection to be equivalent to "order"; and based on that reasoning, proposed having civil investigators searching for PRPs sign and issue administrative orders pursuant to that subsection calling for provision of information orally as well as by the production of pre-existing records. One such order was signed and served. The company attorney contacted EPA Headquarters by letter, saying, in effect, that EPA had no authority under CERCLA Section 104(e)(2) of the type it had claimed by such order, and EPA Headquarters contacted the region, in turn, indicating dissatisfaction with what the region had done. The company had made a pro-forma response and the matter was not pressed by the region. Innovation was not "risked" here.

- EPA directed self-investigation Orders have run into some legal snags:

- The case of Wyckoff v. EPA, 796 F2d 1197 (9th Cir. 1986), a case involving a RCRA self-investigation directed by an order under RCRA Section 3013 resulted in EPA's power to direct such action even in an "authorized State" being upheld, but also resulted in a protective order being imposed because the company involved was then under criminal indictment.

- The case of ASARCO, INC.v. EPA. 616 F2d 1153 (9TH Cir. 1980) involved EPA-ordered stack testing under CAA Section 114. There, the Circuit Court probed EPA's informal administrative record for EPA's rationale for so imposing such a requirement on the company. It concluded that such informal administrative record did not substantiate EPA's rationale, for so issuing such a requirement, hence EPA's order under CAA Section 113 was ruled "arbitrary, capricious, and not in accordance with law...." the APA standard. The need for "informal administrative record" pre-paration became clear from this decision, but EPA training has not kept pace with the need for a well done informal administrative record.

VI. MULTI-MEDIA ENFORCEMENT

I. Definition

Multi-media enforcement includes coordinating inspections and/or enforcement responses involving violations in more than one environmental area or "media" at a single facility.

II. Scope of Potential Use

All violators, excluding CERCLA, RCRA corrective action, wetlands and minor violations or small facilities where the potential for violations in more than one media is limited.

II. Type of Benefits

Multi-media enforcement can produce the following benefits:

- Additional leverage over violators;
- Conserving EPA enforcement resources by improving efficiency;.
- Increased media coverage for enforcement actions;
- Larger penalties, and greater likelihood of getting company's management attention; and
- Greater potential for innovative settlements, audits, pollution prevention projects, and comprehensive environmental solutions.

IV. Limitations

Multi-media enforcement by definition is only appropriate for industrial facilities or companies whose activities require compliance under more than one statute. Also, since the relevant statutes, CAA, CWA, RCRA and TSCA primarily, have different enforcement provisions and procedures, timely coordinated response may be difficult or impossible. There are limitations in DOJ and EPA settlement policies which currently limit certain aspects of the more innovative settlements which may logically flow from multi-media enforcement. Settlements involving multi-media aspects such as audits, pollution prevention projects or remedial action in non-target areas may violate current policies. Additional quasi-limitations are EPA program guidance, strategic plans, workload models and accountability systems which cause disincentives to working on cases that are not priorities in all programs.

V. Current Experience

In discussions with individuals who have had experience with multi-media enforcement, we have developed four models representing the range of experience with these activities.

a. Targeted multi-media enforcement - This approach involves selecting potential facilities for multi-media enforcement by reviewing available information on facility location, emissions and compliance history. Automated data systems and other state and federal information can be used. Geographic Information Systems may be used for assessing priorities according to industry clusters, pollutant type, environmental or health risks or other factors. Once facilities are selected, coordinated inspections are arranged and multi-media response is based on the results of the inspections. This targeting approach requires a significant up-front resource commitment and there is, of course, no guarantee that violations will be found. It is the best way of ensuring that multi-media cases are developed in areas that fit environmental program priorities.

b. Multi-media case screening - Under this approach, a process is established for screening known violators for the potential for violations in other areas. The screening can be done by searching data systems for other violations, past or present, reviewing source information, TRI data and state and federal files to see if the violator is one with a significant potential for violations in other areas. Based on the screening process, coordinated inspections and enforcement would be undertaken as appropriate. This screening approach differs from the targeting approach in that the starting point is an existing violation rather than a source/risk review. Up-front resource commitment is significantly less and there will always be, by definition, at least one violation. The multi-media cases identified will not, however, necessarily reflect planning priorities.

c. Self-generating multi-media cases - Some multi-media enforcement cases just happen as a result of the development of a single-media case. EPA staff occasionally discover other violations or the potential for them as they are reviewing source information during the case development process. When this happens, decisions are necessary concerning additional compliance inspections, timing or follow up and lead responsibility. Occasionally, violations are discovered in a second or third area that are more significant than the original case.

d. Single-media violation/multi-media settlement. The fourth type of multi-media case is one in which a single-media case leads to a multi-media settlement or decision. Examples of this would be a settlement requiring the facility to conduct a multi-media compliance audit or to undertake a pollution prevention project in another area. This approach is particularly useful where it was not possible or appropriate to arrange for up-front multi-media inspections and followup but the

facility is nonetheless one with emissions affecting more than one medium.

VI. Potential for Expansion

The focus for expansion of the use of multi-media enforcement lies in improving the enforcement case development and screening process to develop and follow through on multi-media cases. Multi-media enforcement can be made a part of our routine enforcement process, as can criminal enforcement or ADR, if appropriate procedures are established to encourage and support such an approach. Multi-media enforcement can become simply one option in our process rather than a special initiative. (One useful tool for assisting in making multi-media enforcement more routine would be a case development/screening flowchart for use by Regions. This is listed as one element in the Plan of Action, part 9.)

VII. Impediments to Expanded Implementation

EPA's organizational structure is a significant impediment. Our media-focused agency leads to differing enforcement priorities, inspectors that are familiar with only one program and compliance and other environmental data systems which have not been designed to be compatible. Of course, our structure mirrors our statutory authority and the substantial variance in the enforcement tools in the various statutes can also make coordination challenging. An additional impediment, at least in the approach taken to date, is that startup costs are substantial due to the need to analyze data, identify sources and coordinate inspections. It is entirely possible that after this substantial effort no, or only insignificant, violations may be identified. Also, programs may be reluctant to become involved in a multi-media case if it means a loss of control over the enforcement process. A significant impediment in the Regional counsels' offices is that multi-media cases receive no more credit in workload models than single-media cases.

VIII. Potential Incentives

- Workload models, STARS measures and other accountability systems need to give credit for multi-media cases.
- Strategic plans should include specific consideration of the development and management of multi-media enforcement.
- Enforcement reports should highlight multi-media successes.
- Media releases should emphasize multi-media cases.

IX. Plan of Action

- Development of inspector training and checklists for multi-media inspections
- Improved data system compatibility
- Statutory and regulatory amendments to make enforcement procedures more uniform
- Accountability system and workload enforcement
- Policy development by the Office of Enforcement with followup policies by other offices
- Inclusion of multi-media enforcement in Strategic Plans
- Development of a model case development/screening flowchart to aid Regions in managing the enforcement process

VII. ENFORCEMENT TARGETING

I. Definition

Enforcement targeting is the activity of selecting a category of sources to evaluate for compliance and appropriate enforcement action. The category that is selected has a common theme that is based on a defined objective. This objective may be pollution reduction from an industrial class of sources that has a high noncompliance rate, risk reduction in a geographic area, evaluating the effectiveness of a particular regulation, or ensuring awareness of a new regulation. Given the resource constraint environment in which we work, a selection process to reduce the number of violators that we address, while ensuring the deterrent effects remains high, must be incorporated into our strategic planning.

II. Scope of Potential Use

Targeting can be program-specific or a multi-media/multi-statute approach. It can be geographic area based or source typed based.

- Program specific targets may be based on industry type, geographic area,pollutant type, individual regulation, or a combination of these. It may be decided to identify a specific industry, such as steel, petrochemical, or feedlots, for compliance with either a newly adopted regulation or a regulation that has been on the books for some time.

- Targeting a geographical area may be based on determining compliance for specific pollutants in a sensitive area or focusing on an area known to have incidence of a specific cancer or other health effect relating to a pollutant that is regulated under a program.

- Multi-media/multi-statute targeting is usually done to address a potential high risk concern or reported environmentally related health problem, or to ensure that a class of sources is in full compliance. This type of targeting may be driven by Toxic Release Inventory analysis, public concerns, or Agency priorities.

III. Types of Benefits

As previously mentioned the prime reasons for enforcement targeting is driven from resource constraints. Targeting carries with it a number of efficiencies:

- Dealing with a specific industry or pollution problem allows greater expertise to be developed throughout the staff involved in the project;

- Efficiencies in the development of technical and legal background material are gained through the use of targeting.

- There is a greater consistency in the implementation of the individual regulations;

- Greater compliance can be leveraged through a carefully planned outreach program;

- The effectiveness of an individual regulation can be evaluated;

- Awareness of a new regulation can be enhanced; and

- The greatest risk reductions can be addressed with scarce resources.

IV. Limitations

- Any office using a targeted enforcement approach must reserve some resources for general enforcement so unexpected important compliance problems can be addressed.

- Certain regulated populations are so large and the program resources devoted to monitoring compliance is so small that initially a neutral inspection/enforcement program is the best way to send the enforcement message out to the community.

V. Current Experience

Most program offices have policies on "Significant Non-compliers" and "Timely & Appropriateness". While these are forms of targeting there has been significant use of more defined targeting by each program office.

- Most of the current experience in enforcement targeting has been on a national program level with the Regional Offices following these strategies. Recently, Regional Offices have initiated targeted enforcement efforts based on high risk geographical areas or groups of sources screened for there high risk.

- When new regulations are adopted, a special emphasis is usually placed on the regulated sources during the first year.

- A program office may decide that a source category is too large to maintain a high level of continual compliance monitoring and therefore periodic "messages" need to be sent to the regulated community. Such was the targeted enforcement initiative that

culminated in the announcement of the filing of 21 civil complaints against NESHAPS asbestos removal activities by the U.S.

Attorney General in 1988. By targeting this source type for intensive inspections over a finite period of time and then bunching the cases, the announcement became a media event and the agency was able to reach a much larger segment of the community with the enforcement message then would have occurred if each case was worked separately.

- Targeted enforcement has been used to judge the effectiveness of various VOC regulations. Prior to conducting these projects it was assumed that from a planning perspective these regulations were 100% effective. However, after reviewing a high percentage of sources covered under a specific regulation through a well planned process it was determined that somewhat less than the assumed environmental reductions in loadings were actually occurring. This type of targeted effort can help to identify inconsistencies in implementation, problems with language interpretation by field inspectors and office case review teams, adequacy of surveillance, and why planning strategies did not meet desired goals.

VI. Potential for Expansion

The greatest area for increasing the use of enforcement targeting is in the Regional Offices. With the increased emphasis on regional strategic planning and flexibility in STARS, the Regions have greater latitude to initiate strategies that reflect regional, state, or community concerns and needs.

- Identification of geographic areas of high risk through the use of Toxic Release Data (TRI) is becoming more commonplace in Regional Offices. The usefulness of TRI data to screen for high risk areas is enhanced by the tools available in the Graphic Information System (GIS). The use of these tools to target multi-media/multi-statute risk reduction should be increased.

- A targeting strategy can be combined with penalty policies and an outreach program so that as time passes the penalties will increase. As the strategy progresses and the regulated community's awareness of the compliance initiative and staged penalties is increased, this will hopefully increase voluntary compliance.

- Data integration of the compliance records from all media and States will enhance our ability to improve targeting.

VII. Barriers to Expanded Implementation

- The major barrier to expanding regional targeting initiatives is the need to comply with national Timely & Appropriateness policies or the perception of that need.

- Timely & Appropriateness policies also can present difficulties with state agencies in the implementation of an enforcement targeting strategy.

- If targeting is heavily directed towards complex cases and a mix is not maintained in the case load of an office, then the general enforcement statistics may suffer.

- Multi-media/multi-statute targeting currently suffers from the limitations on who gets credit for the case.

VIII. Initiatives to Overcome Barriers

- Regional initiatives should be encouraged by national program offices. National program managers should solicit regional initiatives and ensure that these initiatives receive the same recognition that enforcement generated through conventional adherence to national objectives receives.

- Equally, the Regions must share responsibility in ensuring that national program objectives can be met. This requires the regional offices to develop strategies, clear objectives, and explanations of increased benefits, and present their plans early in the planning cycle to their national program managers, so that they can be incorporated into the national commitments.

- If responsibility for enforcement of the targeted population is shared with the state agency, then it must be brought into the planning. This will help to ensure that their support and expertise will enhance the effort, state needs can be factored in the strategy, and ensure that they will conduct their enforcement efforts in support of the initiative.

IX. Plan of Action

- Guidance pertaining to development of annual program objectives and strategic planning should encourage greater use of enforcement targeting. Encouragement should be directed to both the national program offices and the regional offices.

- Workload models must provide appropriate recognition for regional enforcement targeting.

- Guidance should be expanded to aid in the development of the various types of targeting strategies. This guidance should identify factors that must be considered in developing a targeting strategy, evaluating the success, understanding the leveraging effects of penalties and outreach, and use of targeting tools such as TRI and GIS.

VIII. RISK-BASED /POLLUTION PREVENTION ENFORCEMENT

I. Definition

Risk-based enforcement considers application of existing federal authorities to any media in order to address releases into air, groundwater or surface water which pose a high risk to human health or the environment. Superfund authorities in particular are very broad and provide an opportunity to address all releases at a facility using a risk based approach. Once releases are identified and prioritized, a waste minimization or pollution prevention strategy for remediation can be developed in an enforceable agreement, starting with those that pose the highest risk.

II. Scope of Potential Use

- Risk based enforcement can be incorporated into ongoing enforcement actions in any media or can be applied to targeted facilities which have reported releases under TRI.

III. Types of Benefits

- EPA can target any facility which has high risk releases into air, groundwater or surface water.
- Sites with multi-media releases of hazardous constituents can be characterized at one point in time.
- EPA can negotiate total site clean-up, incorporating waste reduction strategies.
- Facilities will be required to focus clean-up efforts on the most significant releases.
- TRI information can be effectively utilized.

IV. Limitations

- Administrative enforcement procedures are inconsistent among media programs.
- Not all media regulate using a risk-based approach.
- There is no policy or guidance available to the Regions on how to evaluate, approve and incorporate industry pollution prevention initiatives into an enforcement agreement.

V. Current Experience

- EPA's enforcement approach is inconsistent under current Federal/State control programs.
- Existing statutes provide varying degrees of protection.
- Not all programs use risk-based authorities to determine clean-up levels.
- Some Regions have initiated pilot studies for risk-based enforcement. Facilities have been targeted based on TRI information, geographic studies and compliance history. Multi-media assessments for targeted facilities are currently being done.
- Regions have begun negotiating pollution prevention conditions into enforceable agreements; however, in some cases final agreements are being delayed due to a lack of settlement guidance from HQ.

VI. Potential for Expansion

- There is substantial interest and activity by the Regions in the areas of risk-based enforcement and pollution prevention. With EPA's focus changing to total environmental impact, risk-based enforcement and waste minimization are both key tools for addressing facilities which pose the highest risk to human health and the environment.
- Risk-based enforcement and pollution prevention can be incorporated into existing media programs.
- Ongoing Regional pilot projects should be nurtured by OE. Expansion to all Regions should be evaluated based on success of the pilot efforts.

VII. Barriers to Expanded Implementation

- Implementation is subject to buy-in by Regions and HQ.
- A significant investment in cross-media enforcement training will be required by HQ and Regions.
- Risk-based enforcement actions will be more complicated and resource intensive.
- Each media program may have other enforcement priorities.

- EPA risk-based enforcement may conflict with authorized state programs.

- Need to make pollution prevention guidance available to the Regions for settlements.

- Risk-based enforcement may supersede media-specific decisions to allow higher risk releases in a particular industry.

VIII. Initiatives to Overcome Barriers

- Regions and HQ must work together to overcome "media-myopia." Risk-based enforcement and pollution prevention initiatives by definition must cut across traditional media boundaries to be implemented effectively. Environmental groups are already beginning to target facilities using risk as the principal criterion.

- For risk-based enforcement, existing legal authorities are available to all media programs. Evaluation of legal authorities has not resulted in any apparent impediments to cross-media application to date. Lack of progress in this area appears to be principally self-imposed.

- An infrastructure should be established by OE which results in successes and failures from ongoing pilot projects being effectively communicated to the Regions and HQs. Formal training should be made an integral part of the process to ensure best possible implementation.

- Criteria should be developed by OE in conjunction with each program to determine when application of risk-based enforcement or pollution prevention is most appropriate.

- HQ should develop policy for evaluating pollution prevention/waste minimization initiatives submitted by industry. Lack of written guidance is hindering negotiation of enforceable agreements incorporating pollution prevention in some Regions.

IX. Plan of Action

<u>Near Term</u>

- Educate Agency offices regarding ongoing pilot projects.

- Develop written policy and guidance for evaluating pollution prevention initiatives submitted by industry.

- Develop penalty mitigation guidance for pollution prevention initiatives.

Long Term

- Evaluate pilot projects for suitability for larger scale implementation.
- Determine specific program needs for implementation.
- Conduct training for program offices and legal staff.

IX. INNOVATIVE REMEDIES

I. Definition

Innovative remedies and settlements include both legal and technical enforcement activity included in case resolution which in some unusual way promotes compliance and/or reduces pollution to improve the public health, welfare, and the environment. Broad categories of such activity consist of:

a. Publicity which creatively combines innovation with tradition to extend the reach of response strategies and promotes compliance;

b. Promoting new technologies with potential to improve our ability to solve environmental problems;

c. Promoting training in the regulated communities which fosters compliance; and

d. Environmentally beneficial projects aimed at achieving a number of objectives, such as:

- increasing the use of effective, though infrequently used, remedies;
- importing remedies from other media and tailoring them to fit specific cases;
- leveraging a single case for broader compliance; and
- remedial action which goes beyond fixing the current problem.

Examples of such activity include the following:

- designation of settlement funds in trusts held to foster vehicle inspection programs;
- training courses for operators of control facilities;
- use of public information to change public perceptions about tampering and fuel-switching and automobile emission controls; and
- use of publicity in trade magazines to deter removal of vehicular emission control systems.

II. Scope of Potential Use

Full Range of environmental enforcement activity;

- Federal, State and local enforcement;
- All environmental media; and
- Initially best limited to applications in areas where risk of failure is low and there is a well defined potential benefit (e.g., large cases where the total penalty is well beyond economic gain and the benefit of the innovation is easily recognized). Gradually build on the successes until such projects can be routinely considered as part of the settlement process for all cases.

III. Benefits

- Deal with specific problems larger than the case (e.g., publicity to reduce customer demand for tampering and fuel switching; translating TSCA Import regulations for foreign chemical manufacturers (Japanese) to ensure compliance upon arrival in USA).
- Deter original offenders, repeat offenders and set the stage for non-recurrence of violations in broad context (e.g., ad in trade publication by a violator cautioning peers about non-compliance),
- Support overall environmental efforts (e.g., allow violator to fund AAA program to test cars).
- Test new technology.
- Identify most effective remedies and standardize (encourage refiners who exceeded lead in gasoline standard to reduce usage in future periods).
- Publicize new Agency efforts (e.g., MWPP training).
- Settle cases better.
- Allow previously unresolved, unaddressed problems to be dealt with.

IV. Limitations

- Although the recently issued policy on the use of Supplemental Environmental Projects in assessing penalties provides considerable

flexibility to enhance settlements with innovative remedies, some restrictions still apply because of the Anti-Deficiency and Miscellaneous Receipts Acts.

- Past misuse of innovative remedies limits their effectiveness. Negotiators have sometimes accepted poorly designed, minimally acceptable projects which were difficult to monitor in order to expedite settlement. These become horror stories and frighten other program officials.

- Initial Investment can be high. This include new project start-up costs as well as the risks of mistakes in trial-runs, field tests or false starts. These become sunk costs which dampen the desire to innovate.

- Statutory provisions for enforcement and compliance vary among the major environmental laws (CWA, CERCLA/SARA, TSCA etc.), making it difficult to achieve consistency and compatibility.

- Many cases, therefore, just are not conducive to innovative settlement. Innovative remedies/settlements must fit within case structure to make sense (e.g., major innovations may be out of proportion for minor settlements) (e.g., can't negotiate where major portion of penalty is economic gain).

- Enforcement sanctions are carried out through multiple organizations, either directly or through delegated authority; this makes consistency difficult to achieve.

V. Current Experience

The Office of Mobile Sources in the Air program has historically used innovative settlement, primarily in the use of publicity (see Attachment 1), and auditing to deal with tampering and fuel switching. The publicity was successful because a major problem in its effort was public perception. The public believed that fuel switching (using leaded gasoline in cars designed to use unleaded), and tampering did not hurt the environment (i.e., my car really is clean - look at the buses), gave them increased performance, saved energy, and was cheaper. Dispelling this perception through publicity via case settlement was a good way to reduce or eliminate the very basis for non-compliance by the regulated industry. This effort in conjunction with other effective program activities did in fact reduce both fuel switching and tampering.

The basic process used in case settlement by the Mobile Source Program also helped. In every instance in order to settle a case the violator was required to: 1) fix the problem (e.g., replace ruined catalysts), and 2) pay a penalty in excess of

economic gain, and then, if appropriate, the penalty could be mitigated further if the violator did something beneficial to the environment.

Over time the office built up a record of settlements with examples of good mitigation projects so that each case attorney had a good example to follow for almost any case which might arise. As the experience grew the settlements became more creative and better.

The TSCA program also has successfully used innovative remedies as part of its case settlements. In each case it used one case to achieve a broader goal successfully leveraging the value of that one settlement. Attachment 2 contains a list of these cases.

VI. Potential for Expansion

- Use by all programs for major violations where there is substantial room to negotiate.

- Use in new program efforts to describe value, goals, etc., of innovation (e.g., potentially valuable in settlement of CWA municipal violations where the new Municipal Water Pollution Prevention Program can be forwarded by POTW operators explaining how the program works to their peers.).

- Use publicity in any case where public opinion can directly influence environmental activity.

- Use where individual activity can affect a generic solution.

- State and local regulators should be encouraged to adopt Federal innovations as appropriate, adjusting them or creating their own.

VII. Barriers to Expanded Implementation

- Current "culture", performance standards, program, enforcement goals and organization not yet set up to recognize value of innovative settlements.

- Bad experiences with new ideas discourage repeated attempts.

- Economic benefits of non-compliance are often so high that they more than offset deterrent value of penalties (i.e., no room to negotiate).

- State-Federal-local jurisdictions sometimes have different -- even incompatible -- views of remedies.

- Competing priorities for fixed resources may require that some current activity either be discontinued or redirected.

- There is an absence of shared successful experiences.

- There is some regional perception that demand for innovative remedies is greater in Superfund than in Air or Water Programs.

- Pollution can be easily be pushed from one media to another (e.g., burning sludge may solve a water pollution problem while creating an air pollution problem).

VIII. Initiatives to Overcome Limitations and Barriers

- OE and/or individual program offices to evaluate current practices to see if remedies are really working as expected; if not, identify areas for improvement and innovation.

- Update Guidance Documents to incorporate areas where innovative remedies can be (have been) successfully used.

- Ensure quicker response to non-compliance to reduce economic gain from violations.

- Ensure a sufficient range of penalties to accommodate innovative, multifaceted settlements as well as deterrence.

- Give awards for outstanding innovative settlements and publicize these awards in EPA.

- Analyze "bad" experiences to ascertain what went wrong and develop a checklist of practices to avoid consider transferability of remedies from both technical and legal points of view.

- Seek legislative changes which specify acceptability and desirability of innovative remedies.

IX. Plan of Action

- Fashion generally acceptable "innovative remedies" for specific type cases in specific program.

- Put "innovation" into performance agreements of key enforcement personnel in headquarters and Regions.

- Add innovative settlements as a criteria for an outstanding rating in ORC performance standards.

- Promote value of innovation repeatedly in memos to programs and Regions on case settlements focusing discussion on specific types and how they worked.

- Include guidance on when and how to use innovation in Guidance Documents to programs and Regions, requiring that it be considered in all settlements in selected well-defined cases.

- Have Program Offices review existing penalty policies to determine how to incorporate innovative remedies.

- Have OE put together examples of successful innovative remedies, put these into a notebook and distribute.

ATTACHMENT 1

Attachment #1

Air - Mobile Sources

Following are examples of environmentally beneficial penalty mitigation projects designed to change the behavior of known polluters and raise the environmental awareness of potential polluters among various groups such as fleet operators, mechanics, high school students and other members of the driving public using group events, when appropriate. (Use of these remedies in settlements prior to involving DOJ is still not routine, especially in program areas outside of Air.)

- On EARTH DAY, pre-diagnostic emissions testing will be conducted by the AAA and the American Lung Association with funds from penalties.

- Notices about emission controls were included in routine mail-outs of motor vehicle registration forms to alert drivers that they need to know not only that their licenses are expiring, but also that new clean air requirements are in effect.

- A Goodyear blimp with an environmental message was rented by a polluter to circle a baseball field during a world series game.

- Clean Air jogging marathons were organized and conducted with penalty funds to make a serious statement about the effects of pollution on breathing.

- Radio and T.V. ads were developed and delivered by polluters describing their particular violation and resulting penalty.

- Magazine articles were written and published by polluters under Agency guidance to detail the harmful effects of their violations and make a case for preventing pollution rather than paying penalties.

- Posters warning drivers about the ruinous effects of fuel switching on their engines or tampering with emission controls were hung up in gas stations.

- Polluters funded endowments for professorship or grants for environmental studies at universities (e.g., Brown Cloud Study at Denver).

- Courses on emission controls and environmental impacts were developed for mechanics as well as high school students in vocational-technical curricula.

ATTACHMENT 2

Attachment #2

TSCA

El Paso Polyolefin (1982) - Used settlement to compel respondent to develop an EPA - approved trade association presentation stressing compliance with new TSCA pre-manufacture notification requirements.

AT&T (1986) - Settlement required notice in major trade journals of TSCA compliance implications for "high-tech" industries, which had recently been identified as having a high rate of noncompliance.

Canon Copier - Settlement attempted to address foreign chemical importers' noncompliance with TSCA. Settlement compelled translation of TSCA regulations, policies, guidelines into Japanese, and development and presentation of a Japanese national trade association program on TSCA compliance. An EPA representative supervised the translation and attended the meeting.

Chemical Waste Management (Emelle and Vickery) Combined TSCA and RCRA environmental audit with credit for "experimental" waste reduction technology demonstration projects.

X. FIELD CITATIONS

I. Definition

The term "field citation" defines a class of enforcement documents issued by inspectors in the field and designed to streamline enforcement of health and environmental regulations. Field citations have characteristics similar to traffic tickets, that is, the citation typically addresses a clear-cut violation, requires the violator to correct the violation, often carries a small penalty, and provides for some type of appeal. However, the citation can be one of several legal entities, including a notice of violation, an administrative order, a short-form settlement agreement, or a summons. While field citations are, by definition, issued in the field and assess penalties, related procedures include in-field notices (issued in field but without assessing a penalty) and short-form notices (issued from the office after review of the inspection report). In contrast to traditional enforcement, field citations and these related techniques usually provide resource-effective, on-the-spot enforcement response and remediation since the violator has a greater incentive to address the cited violation than to contest.

II. Scope of Potential Use

- Because field citations are flexible tools, they can be used by a variety of federal, state and local programs to address numerous clear-cut or relatively minor violations.

- By arming inspectors with an on-site enforcement tool, field citations provide an enforcement presence in the field. Field citations allow inspectors to address violations that may not have been addressed previously or to address a greater number of violations.

- Field citations allow a program to reduce a backlog of environmental cases. Each case can be resolved in a shorter period of time, using fewer program resources, thus enabling programs with small staffs to improve compliance. This is especially true for programs that settle certain classes of cases for relatively low amounts, as field citations will achieve the same result quicker and easier.

- Programs that experience difficulty competing for legal resources or getting on a court docket may be able to avoid this barrier through the use of field citations. If properly designed and implemented, field citations are infrequently appealed and often allow the substitution of informal appeals procedures for traditional legal procedures.

III. Type of Benefits

- Field citations streamline the enforcement process, making it quicker, less resource-intensive, and more automatic. Field citations reduce the amount of time inspectors and administrative staff spend on each violation by reducing the amount of follow-up paperwork that must be completed. For example, California's Department of Health Services initiated a field citation pilot program in 1989 to enforce RCRA Class II violations (i.e., less serious violations). Before the ticket was developed, "minor" violations took about 592 hours of staff time per case to resolve; after the ticket, total staff time was reduced to 7 to 10 hours per case.

- Field citations, especially those carrying penalties, create a clear enforcement message for violators that no violation will be overlooked.

- Field citations can reduce court backlogs and facilitate enforcement. The Province of Ontario, Canada initiated a field citation program in part to remove many of its environmental and health violations from criminal court, where they competed with much more serious violations (e.g., murder), were rarely placed on the court docket, and rarely enforced.

- A field citation program builds staff morale. Field citations allow staff, especially inspectors, to see a case through from initial ticketing to settlement and compliance. Inspectors also substitute for higher level administrative personnel and lawyers for certain classes of violations.

- Field citations with penalties can be used to generate revenue.

IV. Limitations

- Field citations may not be useful for addressing all violations, especially those that cause immediate environmental harm, such as spills or releases of hazardous substances.

- Field citations might not significantly expedite enforcement in programs with complex regulatory requirements. Field citations are most appropriate for clear-cut violations; if the regulations are too complex and/or require inspectors to use too much discretion in the field, inspectors may prefer to continue using traditional enforcement tools and violators may be more likely to contest the citation.

- Because the inspector has the key role in determining when to issue a citation or when more or less severe enforcement is indicated, inspector training is critical. In addition, providing support and building incentives into inspector performance review are important to program success.

- While some programs have effectively implemented field citation programs without having administrative penalty authority (e.g., using short-form settlement agreements), others want to obtain clear legislative authority before proceeding with the program. Obtaining this authority may be difficult for some programs, especially if the legislature is cautious in granting policing authority or if passing legislation is excessively protracted.

- Field citations may not be effective in a jurisdiction that anticipates a large number of appeals of the citations. If the agency must devote substantial resources to accommodating appeals (e.g., court time, lawyers, etc.), the advantage of using field citations disappears. The nature of the regulated community, previous enforcement efforts, and the amount of the fine can all affect the number of appeals.

V. Current Experience

- The most significant effort to implement field citations is in the Office of Underground Storage Tanks (OUST). Field citations appear to be ideal for the UST program because of the size and nature of the regulated universe, OUST's decentralized approach to enforcement and the number of relatively minor violations that are not well suited to traditional enforcement. OUST has already initiated pilot field citation projects in several state and county UST programs. OUST is examining using field citations as an additional federal enforcement tool during initial inspections in those cases where EPA will conduct inspections. However, field citations may not be appropriate for addressing state referrals, since, by the time a state refers a case to EPA, the violation is likely to merit a more serious enforcement response than a ticket.

- EPA's Office of Mobile Sources inspectors issue $200 citations for fuel dispenser nozzle violations. Originally, the citation was a short-form settlement agreement issued from the office after the inspection, but the citation evolved into a ticket which could be issued in the field.

- PCB pilot programs were initiated in Regions III and V; while Region III discontinued the pilot because it felt that the regulations were too complex to be effectively addressed with citations, Region V has

integrated the successful pilot into its program. As described below, minor PCB violations, as well as other environmental violations, are addressed using field citations in Region VII.

- Region VII inspectors issue various forms of a notice of violation on-site for addressing minor violations in several environmental programs (PCBs, pesticides, RCRA, and NPDES). The notice instructs the violator to correct the infractions and submit evidence of compliance within a set period of time or risk penalties or formal orders, although the notice reserves the right to pursue enforcement of any other violations detected during the inspection. By reserving case developer and attorney time for more ambiguous cases and civil complaints, the field citations have successfully reduced backlogs of minor enforcement cases and allowed the programs expeditiously to achieve high rates of compliance for these classes of violations.

- Several state and local programs have also independently instituted field citations in a number of health and environmental areas (e.g., New Jersey, the District of Columbia, Dade County, FL and New York City), or for select programs (e.g., California for RCRA violations or North Carolina for water discharge violations).

VI. Potential for Expansion

- Programs currently using field citations to address a few violations may be able to expand the number of citable violations.

- Federal programs that do not use field citations but where federal, state or local efforts have indicated success should be able to adopt field citation techniques. For example, the RCRA program might examine the California, New Jersey and Region VII field citation experience. A number of Regions might benefit from Region VII's success using field citations in a variety of environmental programs.

- Programs with large regulated universes and scattered sites should be targeted for expansion efforts, since on-site enforcement can be effective in these situations.

- Expansion is most likely to occur in those programs which have an incentive to apply field citations, such as those with a large case backlog or new programs that would like to institute compliance monitoring and enforcement activities but have limited staff and resources.

- Concern over placing inspectors into potential confrontations with violators or, even worse, into compromising relationships, might

discourage some programs from using existing authority to issue citations in the field. However, short-form settlement agreements issued from the office after case review can be substituted for field citations without seriously diminishing the efficiency of the program.

VII. Barriers to Expanded Implementation

- Lack of knowledge of field citation program and its uses

- Lack of authority for issuing field citations with penalties. Some programs might be reluctant to permit inspectors to issue citations without clearly defined statutory authorization, e.g., the EPA Office of Stationary Sources is awaiting specific statutory authority under the Clean Air Act to support a field citation program. In contrast, the Office of Mobile Sources pioneered a field citation program using a short-form settlement agreement in lieu of administrative penalty authority

- Lack of authority for delegating enforcement powers to inspectors; inability or unwillingness to provide adequate training and incentives for inspectors

- Federal penalty policies and enforcement procedures that restrict ability to use streamlined citation and appeals procedures

- Reluctance of decision-makers to accept change

- Federal focus on big enforcement cases that leads to the impression among program staff that small cases are expendable or that a backlog of minor cases is permissible

VIII. Initiatives to Overcome Barriers

- Promote field citations through sales efforts, focus groups, or word of mouth. Provide interested staff with "sales" material designed to overcome psychological barriers to implementation and change.

- Encourage and train federal program managers to systematically study the need for improved methods for enforcing regulations. For example, managers that apply total quality management analysis to examine program shortcomings in addressing violations, enforcing against violators, or reducing time and resource expenditures may find that field citations would be an effective method for improving performance in these areas.

- Create ways to overcome structural barriers to implementation, such as

the delegation of authority to inspectors, or the conflict between traditional enforcement measures (which reward programs for large numbers of "big" enforcement cases and large penalties) and the use of field citations (which are effective but address minor violations and assess smaller penalties).

- Provide ways for programs to overcome some of the practical difficulties of implementing field citations by providing programs with tools for implementation, such as inspector training in field citation techniques.

- EPA may be able to assist states in obtaining administrative penalty authority by taking every legislative and administrative opportunity to include the requirement that states obtain administrative penalty authority as a condition for state program approval.

IX. Plan of Action

Immediate

- Educate Agency offices about successes using field citations.
- Develop Agency-wide list of interested and appropriate programs for field citations.
- Determine specific program needs for implementation.
- Study barriers to federal and state use of field citations and identify methods for removing each barrier.

Near Term

- Pilot field citation programs in several federal and state programs.
- Work with EPA and DOJ attorneys to identify and overcome real and perceived barriers to the use of field citations. Determine and identify which classes of cases are appropriate for field citations and which require traditional enforcement.

Long Term

- Provide training in field citation techniques.
- Alter state program approval requirements and penalty and enforcement policies to allow greater flexibility in a program's approach to enforcement.
- Revise measurement and reporting criteria for enforcement.

Recommendations

"Get the word out" about field citations to environmental enforcement

programs.

Provide interested programs with names of contact persons in programs that use field citations; show "who's doing it".

Develop identifiers that will help EPA target the types of programs that will benefit from using field citations.

Get programs to systematically study enforcement problems and areas for improvement (using total quality management analysis) and then explore the use of field citations to improve program performance. Other expedited techniques may be identified as well.

Examine structural and practical barriers to the implementation of field citations and work to eliminate those barriers.

APPENDIX I

APPENDIX I

Field Citations - Supporting Program Examples

California's Department of Health Services initiated a field citation pilot program in 1989 to enforce RCRA Class II violations (i.e., less serious violations). The program was implemented without acquiring administrative penalty authority. Program officials simply streamlined the corrective action order and complaint for penalty procedures into a ticketing process. Thus, they did not have to undergo the difficult task of obtaining authority in order to proceed with field citations. Officials have noted that before the ticket was developed, "minor" violations took about 592 hours of staff time per case to resolve, and after the ticket, total staff time was reduced to 7 to 10 hours per case.

Inspectors schedule informal conferences when field citations are issued in the field. Respondents can argue their case at the informal conference or request a formal hearing. Most cases are resolved at the informal conference stage, thus avoiding complicated court proceedings.

New Jersey Department of Environmental Protection issues summons on site to violators of RCRA Class II violations. The program has been effective in promoting compliance. New Jersey officials hope to expand the program to cover violations of air and water regulations, as well as RCRA Class I violations.

EPA's Office of Mobile Sources' federal inspectors issue $200 citations for fuel dispenser nozzle violations. After instituting the field citation program, the program was able to eliminate a large backlog of enforcement cases that had developed. Average case completion time shrank from 3 months to 30 days under the field citation program, and only 1 to 2 cases are prosecuted in court annually; the remaining cases are resolved using field citations.

Dade County, Florida's Department of Environmental Resources Management's inspectors issue citations for many code violations in virtually all of its various environmental programs. Overall, greater than 90% of all violators comply within a month's time. Program directors believe the field citation program provides the Department with high visibility within the regulated community and allows program staff to address a greater number of violations and to concentrate on more serious violations.

The **District of Columbia's Department of Civil Infractions** uses field citations to enforce a number of environmental and health violations and is currently in the process of expanding the use of field citations to its new programs, such as underground storage tanks. The District of Columbia's inspectors have used Civil Infraction Notices for two years and have found that the compliance rate has shown

a significant increase. In fact, inspectors no longer encounter some violations that used to be the most prevalent problems.

A number of **Region VII** environmental programs (hazardous waste, water and toxic substances) use field citations to address relatively minor violations in their enforcement programs. These notices, variously entitled notices of violation (RCRA), notices of non-compliance (PCBs), and notices of deficiency (NPDES), serve the same purpose of notifying the violator of violation, requiring corrective action within a set period of time, and instructing the violator to submit evidence of compliance. If potentially more serious violations are uncovered, the file is reviewed in the office before the field citation or more serious enforcement action issues. Of the hundreds of citations issued annually, the vast majority are quickly closed. Only a few must be followed up with civil citations and most of these are settled before administrative hearings.

Region V PCB field inspectors issue field citations for a variety of minor, clear-cut violations. Region V staff attribute their success with field citations (despite relatively complex regulations) to clear direction from the program managers and strong inspector training. Inspectors have a clear idea of what they should cite and what should be reviewed for more serious action before they arrive in the field, thus avoiding ambiguity and inconsistency. Region V also occasionally stipulates that states must adopt field citation techniques in their cooperative grant agreements in order to increase the program's enforcement presence in the field.

APPENDIX II

APPENDIX II

A Systematic Approach to Create a Better Climate for Innovation in Enforcement

A. Identify major existing enforcement problems.

B. Three-pronged approach to enforcement:

1. Traditional enforcement;
2. More "high publicity" actions; and
3. Innovative approaches.

C. List examples of types of innovative approaches which have proven effective.

D. Focus on the enforcement "customers'" needs:

1. Identify who the enforcement customers are (e.g., Regional attorneys, judges, DOJ, OE, RPMs, State officials, etc.).

2. Identify their enforcement needs:

   a. What do they indicate are their needs?
   b. Work together with customer to do a TQM analysis of their needs (fish-boning, etc.).

3. Do a TQM analysis with the customer on potential innovative solutions. (e.g., process flow-charting, etc.).

E. Create the tools that the innovative approach requires

1. Convene workgroup of experts and potential customers;

2. Study history and potential uses of new tools;

3. Develop manual on how to set up new innovative approach;

4. Develop training manuals, as required; and/or

5. Develop "sales" brochures.

F. Develop a strategy on how to communicate with and best sell the new innovative enforcement ideas to potential customers.

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XI. ALTERNATIVE DISPUTE RESOLUTION

I. Definition

Alternative Dispute Resolution (ADR) consists of processes other than adjudication for resolving disputes. These processes include:

Mediation/Conciliation - Facilitation of a negotiation by neutral 3rd-party professional.

(1) Parties retain power to decide issues; outcome of discussions non-binding

(2) Voluntary process

(3) Party-selected outside facilitator, often with specialized subject matter expertise

(4) Mutually acceptable agreement sought

Settlement Judge - Facilitation of a negotiation by a court appointed neutral jurist.

(1) Parties retain power to decide issues; outcome of discussions nonbinding

(2) Voluntary or court mandated process

(3) Mutually acceptable agreement sought

Fact-Finding - Determination by a neutral 3rd party of issues specified by parties.

(1) Parties retain power to decide issues; outcome of fact-finding nonbinding without agreement of parties.

(2) Voluntary and non-binding, but may be admissible

(3) Parties select a 3rd-party neutral with specialized subject matter expertise.

(4) Informal procedures; investigatory process or arbitration-type setting

(5) Results in report or testimony to parties

(6) Useful in narrowing factual or technical issues in dispute

Arbitration - Formal hearing before a neutral 3rd-party decision-maker.

(1) Party-selected 3rd-party arbitrator, usually with specialized subject matter expertise.

(2) Procedural rules usually set by arbitrator or parties

(3) Scope of issues to be decided by arbitrator determined by parties

(4) Voluntary; can be binding or non-binding at option of parties

Mini-trial - Neutral 3rd-party monitored trial-like presentation of each party's position regarding dispute to ultimate decision-makers

(1) Parties retain power to decide issues

(2) Voluntary and non-binding

(3) 3d-party neutral advisor, usually with specialized expertise in subject matter of dispute, sits as 'judge' to advise parties regarding possible court rulings. Third-party neutral also runs mini-trial process

(4) Procedures and scope of issues set by parties and neutral advisor

(5) Opportunity for each side to present best case arguments supporting results in its favor

(6) Useful in evaluating both sides of a cases

II. Scope of Potential Use

- Alternative means of dispute resolution have long been utilized in the private sector to resolve contractual and commercial disputes.
- Substantial potential exists for use in the resolution of disputes which arise in the context of enforcement cases under all statutes administered by EPA.
- Substantial potential exists for increasing the efficiency of enforcement negotiations proceedings.
- Substantial potential exists for use to expedite resolution of costs

reimbursement actions through use of arbitration under Superfund.

- Substantial potential exists for decreasing EPA and judicial resources expended in enforcing the technical provisions of consent agreements by providing for resolution of future implementation disputes through ADR.

III. Types of Benefits

- Provides increased enforcement case efficiency at time of expanding enforcement responsibilities and respective increasing caseload.

- Enhances ability of Agency to process increased number of enforcement cases.

- Allows enforcement staff the opportunity to concentrate on substantive aspects of actions instead of being overwhelmed by complex negotiation process.

- Lowers average time for resolution of complex enforcement cases which are not readily addressed through traditional enforcement negotiations.

- Lessens burden on federal judicial/administrative law system caseload.

IV. Limitations

- ADR should not be utilized in any civil action in which a negotiated settlement is not an appropriate outcome (e.g., judicial precedent is desired).

- The ability of the Agency to effectively utilize ADR professionals is limited by the present lack of training and experience with ADR by EPA and DOJ staff. This leads to a reluctance on the part of staff to use ADR processes in situations where it could prove useful to the enforcement process.

- It is the stated position of the Attorney General that the U.S. favors the use of alternative dispute resolution methods such as minitrials, arbitration and mediation. This preference is balanced, however, against the responsibility of the Attorney General, as ultimate legal official of the U.S., to ensure that settlements of liability for violations of federal law are in the public interest. Therefore, there is a presumption against the use of ADR processes which are binding upon the U.S. to resolve ultimate issues of statutory liability unless

such authority is specifically granted by statute (e.g., CERCLA small cost recovery cases).

- The Agency's experience in the use of ADR indicates that it is crucial to the effective resolution of protracted disputes that the appropriate ADR process be matched with cases ripe for ADR assistance. (See, ADR Case Selection Criteria, Section III of the August 1987 ADR Guidance, cited below)

V. Current Experience

In order to establish the practice of ADR usage in EPA enforcement activities, the Agency established a national ADR enforcement program in 1987.

On August 14, 1987, the Administrator issued "Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions" (ADR Guidance). This Agency-wide guidance establishes a preference for the use of ADR in appropriate cases. The guidance provides a basic education in ADR processes, suggests criteria for selection of cases for ADR assistance and of ADR professionals, establishes funding for employment of ADR professionals, and describes procedures for approval of cases for ADR assistance. Model ADR agreements and procedures for conduct of ADR processes are also included. As a pilot project in the use of ADR processes, the Administrator requested that each Regional Administrator nominate cases for ADR assistance.

Issuance of the ADR Guidance has been followed by an ongoing effort to educate Agency personnel about the advantages of ADR and to solicit appropriate cases for ADR assistance.

The Assistant Administrator has assigned two senior staff attorneys with extensive experience in ADR and negotiations, David C. Batson (OE) and Richard Robinson (OWPE), as ADR Coordinators to oversee guidance implementation and funding. The Agency has established a $500 Million fund, administered by OE-Waste, for the employment of ADR professionals to assist EPA staff in the resolution of CERCLA related disputes.

The ADR Coordinators provide regular trainings on ADR techniques, and work to establish active ADR enforcement programs for regional staff and management. In addition, the ADR coordinators act as resources and ADR experts to assist regional and HQ staff in the selection of cases for ADR assistance and the employment of ADR professionals.

The Agency, in a joint effort with the Administrative Conference of the United States (ACUS), has developed a nation-wide roster of ADR professionals. The roster, to be implemented by ACUS with initial funding from EPA, will serve as an

important resource to EPA and other parties seeking to use ADR processes in disputes involving federal agencies.

To date, the Agency has processed 20 nominations from regional offices for use of ADR in Agency enforcement actions. ADR processes have been, or are currently being, used in 12 of those actions. Additionally, ADR provisions have been included in 8 consent agreements entered by the Agency in settlement of enforcement actions as a mechanism for resolution of future agreement implementation disputes.

The Agency has successfully used ADR processes in several enforcement related activities:

Settlement Mediation - U.S. v City of Sheridan (Wyoming)

This civil action concerning violations of the Safe Drinking Water Act, involved numerous parties with a long history of mistrust and protracted negotiations. Parties included federal, state, and local governments, industry and local citizen organizations. After extended unsuccessful negotiations between EPA and responsible local government officials, the parties employed a professional mediator to facilitate settlement discussions. The mediator expanded discussions to include all affected citizens and industry, allowing for a full review of the issues preventing settlement by the local government. A settlement agreement was obtained shortly after the mediator became involved.

Fact-Finding Settlement Provision - U.S. v Union Carbide Corp.

This civil action was initiated for violations of reporting requirements of the Toxic Substances Control Act. As part of the settlement agreement, the Agency included a provision which provided that factual disputes that arose over the company's compliance with statutory reporting requirements would be forwarded to a neutral panel of experts selected by the parties for an opinion prior to initiation of civil action for penalties by EPA. EPA agreed to accept the factual determination of the panel in deciding whether enforcement action was warranted.

Private Industry Mediation - (e.g., Clean Sites Inc.)

Agency enforcement actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) often involve sites where liability for site cleanup costs is shared jointly and severally by numerous companies. Some hazardous waste sites involve over 200 defendant companies, each equally liable under CERCLA for the full cost of site cleanup. This multiplicity of defendants makes settlement negotiations extremely difficult, if not impossible. To assist the numerous liable companies to reach agreement on a common negotiating position and their relative monetary liability, several private firms provide mediation

expertise to industry. ADR services generally include mediation of the negotiations between the numerous liable companies and data evaluation efforts to appropriately allocate the costs of cleanup. In many cases, the employment of such mediation services by "PRPs" is crucial to the Agency's ability to complete settlement negotiations without lengthy court procedures.

Small Claims Arbitration - CERCLA Section 122(h)(2)

An area of federal enforcement endeavor which has great potential for benefit from the use of ADR is statutory claims for monetary recompense which are of amounts too small to justify the expenditure of litigation expenses to obtain payment. The use of a binding arbitration process to determine the appropriate amount of such claims would save federal resources while expediting the resolution of claims. The Agency, as authorized in CERCLA Section 122(h)(2), may utilize arbitration in small claim actions under CERCLA reimbursement actions. CERCLA claims arbitration procedures are codified at 40 CFR 304.

RCRA Siting\Site Cleanup Dispute Mediation

The siting of hazardous waste landfills and incinerators required by RCRA, and the cleanup of contaminated sites under statutory enforcement actions, is a matter of extreme sensitivity and public concern. A siting or cleanup decision often raises extreme public opposition and desire for involvement in decisions affecting the site. Unfortunately, these situations often involve emotional and divisive positions which make discussions difficult. The Agency has found that employment of ADR professionals by the parties to such a dispute is extremely useful in facilitating discussions. This approach has been used by the Agency and state officials with success at several sites.

Administrative Settlement Judges

The use of jurists as settlement mediators in filed civil actions has been used with great success by several state and district courts. In an effort to expedite the resolution of cases filed with the EPA administrative court system, the Agency is initiating a program of allowing Administrative Law Judges (ALJ) to require mediation of appropriate disputes prior to hearing. Negotiations are mediated by an ALJ not associated in any way with the substance of the dispute. EPA is currently scheduling training for ALJ jurists in ADR techniques.

VI. Potential for Expansion

- Given the limited use of ADR to date, substantial potential exists for expanded use of nonbinding ADR techniques to assist Agency enforcement negotiations under all statutes administered by the Agency.

- CERCLA small cost recovery cases provide a unique opportunity for experimentation with arbitration for the expeditious resolution of reimbursement actions.

- Substantial potential exists for expanded use of ADR provisions in settlement agreements to provide expeditious resolution of disputes over implementation of technical provisions.

- Substantial potential exists for expansion of the use of ADR professionals to assist PRPs in the resolution of internal PRP committee disputes, thereby allowing expedited resolution of EPA enforcement actions.

VII. Barriers to Expanded Implementation

- Lack of training and experience of EPA/DOJ staff in the use of ADR techniques and professionals

- Lack of internal incentives (resource allocations, audit criteria, etc.) for Regional offices to utilize ADR

- Lack of coordination between EPA and other federal and state enforcement agencies regarding the use of ADR

- Lack of understanding and agreement between EPA and the regulated community regarding the appropriate use of ADR in enforcement cases

- Lack of understanding in enforcement offices that ADR is standard operating procedure for Agency enforcement actions

- Lack of specific legislative direction authorizing the use of ADR in federal agency practice

VIII. Initiatives to Overcome Barriers

At the direction of former Assistant Administrator Richard Mays and the current Assistant Administrator, OE has initiated several initiatives to foster and routinize the use of ADR in Agency civil enforcement actions as requested by the Administrator in the August 1987 ADR Guidance and subsequent memoranda. Activities to date include:

- Regional pilot projects in the use of ADR in enforcement actions;

- Establishment of a national roster of ADR neutrals;

- Assignment of OE and OWPE senior staff to serve as Coordinators of the ADR Enforcement Initiative;

- Establishment of a funding mechanism for the use ADR professionals in CERCLA cases; and

- Training of Agency personnel in ADR techniques and the establishment of effective regional ADR programs.

At the direction of the Assistant Administrator, the OE ADR Coordinators developed an ADR Development Workplan to fully implement use of ADR in Agency civil enforcement actions. The Workplan, which was approved by the Assistant Administrator in November 1989, is currently being implemented by the ADR Coordinators.

IX. Plan of Action

Continue implementation of the ADR Development Workplan as approved by the Assistant Administrator.

XII. COMPLIANCE MONITORING

I. Definition

Compliance monitoring is any activity undertaken by EPA to insure that a regulated entity is in compliance with a regulation, permit, or other standard. This could include, but is not limited to, reporting, testing, and notifying requirements which are overseen, audited, or reviewed by the Agency. As is is most commonly used in the Agency, it involves self-monitoring and reporting, notifications and inspections.

II. Scope of Potential Use

- Can be employed in any instance where the Agency imposes a standard or regulatory requirement.
- Increase use of self-monitoring data, especially submittal of data in an electronic format that is easily screened.
- Increase use of continuous or on-line monitors.
- Run a citizen awareness campaign and encourage tip offs of violations. Institute an enforcement hotline. Publicize and reward those who help the Agency find and prosecute violators.
- Include Operations and Maintenance (O&M) requirements in permits to help ensure compliance and treat these violations as equal in importance to emission/discharge violations.
- Provide inspectors with more information in the field through the use of portable computers which could link up to national data bases. Computers would also allow report preparation in the field.
- Make more use of statistical approaches for targeting inspections and, additionally, perform surprise inspections.
- Vary the frequency of inspections based on the number of violations detected and the compliance history. Begin with a given frequency, if no violations are detected, then decrease the frequency or conversely, if violations are detected, increase the frequency of inspection.
- Improve communication among Federal, State, and local governments. Share successful strategies and other information among agencies. Consider using an electronic "newsletter".

- Improve ability of Federal inspectors to support State and local inspectors and encourage consistent inspections among the various levels of government. Maintain Federal skill level in the field.[1]

- Increase the number of inspectors trained to perform multi-media inspections and with multiple program knowledge. Consider the organizational structure needed to support this.

- Assign inspectors to cases - from planning the inspection through the enforcement action - including planning the remedy.

- Streamline inspection procedures to target the most critical violations.

III. Type of Benefits

- Receiving self-monitoring or other data in an electronic format allows a quicker, more accurate, and less resource intensive screening thereof. The computer can also generate Notices of Violation or notification letters to other levels of government immediately.

- Using continuous monitors provides a constant check on effluents and allows faster detection of and quicker response to non-compliant levels.

- An educated citizenry with a means and motive to monitor their environment provides the Agency with more eyes and ears, and in a sense, expands the inspector force.

- Consistent operation and continuous maintenance of equipment assures fewer breakdowns and more accurate response to deviations, overall providing better compliance with a permit and less pollution entering the environment.

- Inspectors with electronic links to national data bases can perform more informed inspections and better target potential problem areas. Preparing reports in the field allows the inspector to record the information while it is still fresh.

- Statistical, and other targeted approaches to inspections, coupled with surprise inspections provide for maximum effectiveness and most efficient use of inspector resources while providing a maximum deterrent to non-compliers. Also varying frequency of inspection based on compliance history makes better use of resources, as does the

[1] See the attachment, "EPA Inspector Profile", for specific information on inspectors.

ability to detect violations in multiple programs while on an inspection.

- Assigning an inspector to a case provides consistency to the entire enforcement process as well as educating the inspector as to what he/she can do better to support the enforcement actions. It also increases professionalism among the inspectors and improves morale.

IV. Limitations

Limitations to the implementation of these suggestions fall under several categories; resources ($ and FTE), statutory and regulatory requirements, support structures (data bases, software, etc.), and training.

V. Current Experience

The Agency has experience with all of these suggestions in some manner or program. The challenge is to apply them successfully to all programs where compliance monitoring is conducted.

VI. Barriers to Expanded Implementation

- The increased use of self-monitoring data and on-line monitors, and inclusion of O&M requirements in permits may require regulatory, statutory, or permit modifications.

- Improving the effectiveness and efficiency of inspectors/inspections will require time and money for training, money to purchase hardware and software, and management/organizational structure changes to support inspectors (i.e., organizational placement of multi-media inspectors and enforcement teams, etc.).

VII. Initiatives to Overcome Barriers

- Support the Enforcement Advocacy Institute and other program specific training for EPA and State/local inspectors in order to provide necessary training.

- Support development of software to screen self-monitoring data.

- Support development of hardware/software to link HQ data bases to each other and to inspectors in the field.

- Follow success of Regional Enforcement Pilot Projects to determine which types of targeting approaches are most effective and encourage their use.

- Develop an electronic newsletter or bulletin board to share information and successes among various agencies and levels of government.

- Develop an advertising campaign to educate the public and encourage them to report violations. Establish a hotline to accept the calls.

ATTACHMENT

SUMMARY

- The organizational location of inspectors is highly variable across Regions.
- Reporting relationships for inspection work are complex and often indirect.
- More than 3/4 of the inspectors spend less than 20% of their time on inspection work for their respective programs.
- Only about 15 % of inspectors perform inspections in more than one program area. Less than 4% inspect in 4 or more program areas.
- About 3/4 of the inspectors who inspect in more than one program area are located in the Environmental Services Divisions.
- About 1/3 of inspectors can perform the most complex level of inspection for their respective programs.

EPA
INSPECTOR PROFILE

Prepared by the Office of Cooperative Environmental Management

Based on 1987 survey data by the Inspector Training and Development Workgroup

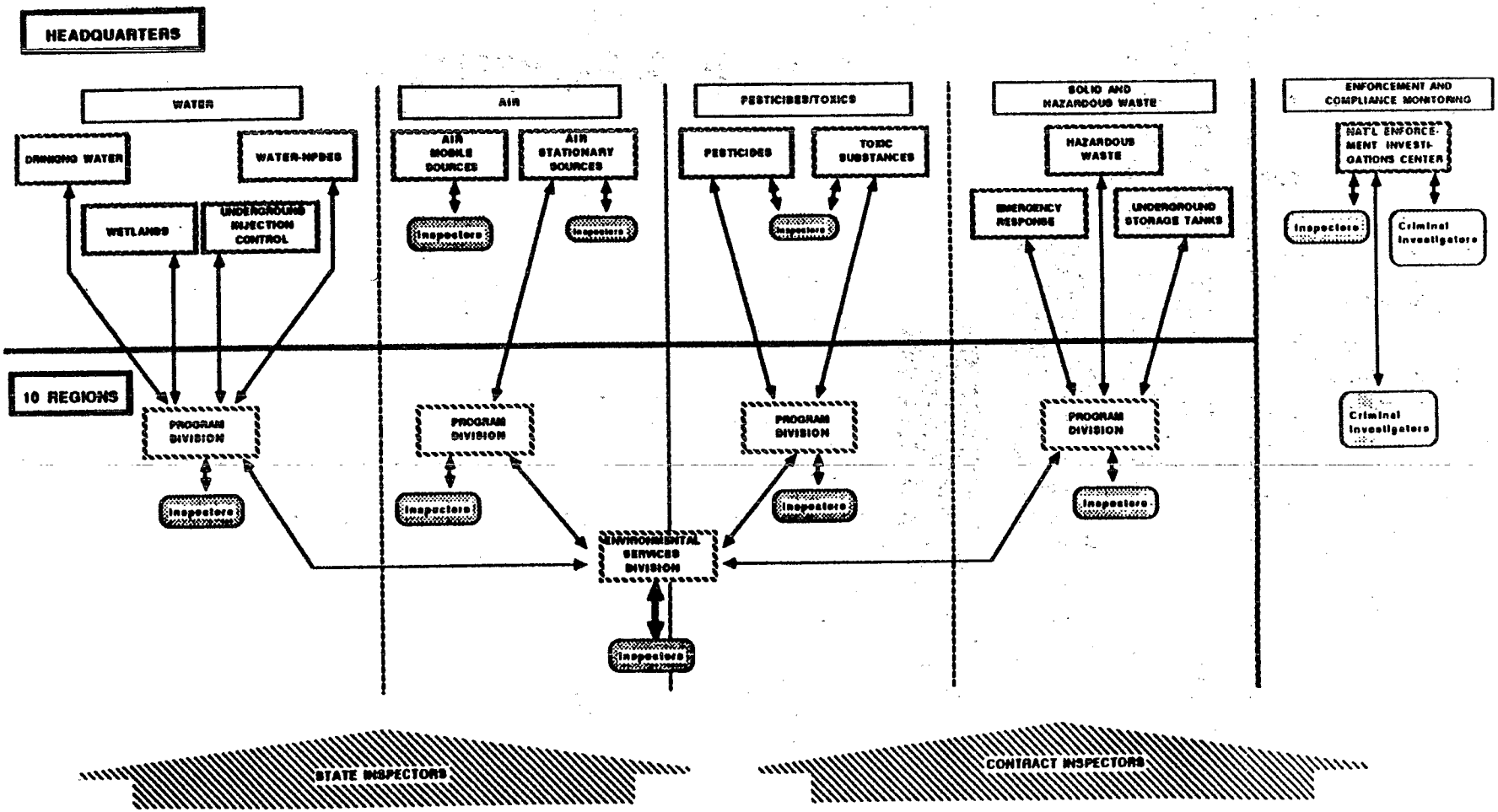
DRAFT 9/10/89

NOTES TO ASSIST IN INTERPRETING

INSPECTOR PROFILE DATA

- Data comes from a survey of inspectors conducted in 1987.
- The term inspector was broadly defined as anyone engaged in any field work which has a bearing on compliance or enforcement.
- All data on the graphs are approximations only. For precise data, see "Inspector Profile," prepared by Region II for the Inspector Training and Development Workgroup, May 1987.
- Regional organizational structures vary. Division-level analyses are based on scope of program coverage as indicated by division name.

ORGANIZATIONAL LOCATION OF EPA INSPECTORS



NOTES:

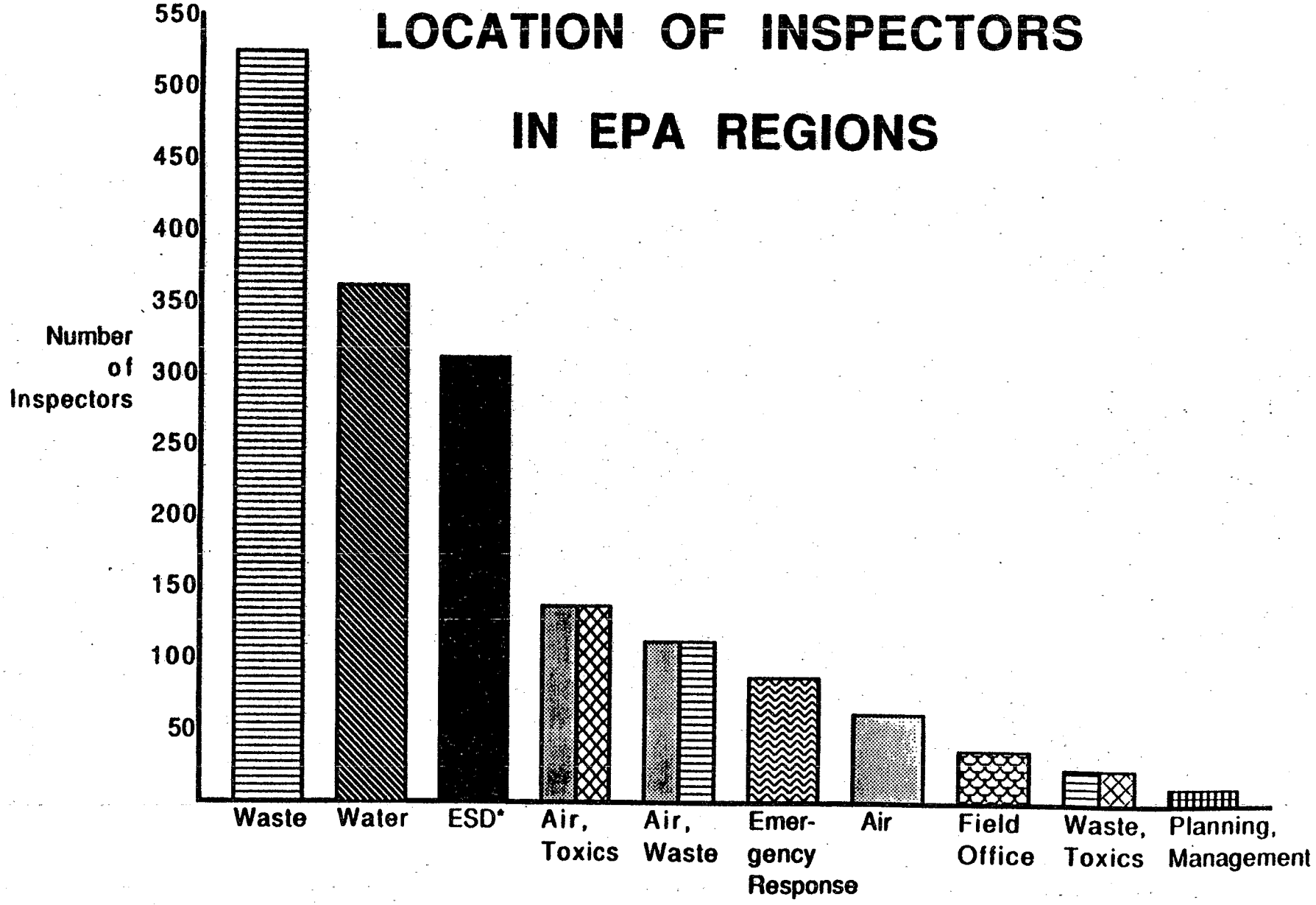
Only major EPA programs are shown. Each will typically include several different compliance monitoring efforts.

The bulk of environmental inspections are performed by State personnel. EPA contractors perform a significant portion of the EPA-conducted inspections. In most cases, State and contractor inspections are overseen by Regional program divisions.

The Headquarters offices indicated have staff who routinely conduct certain types of inspections. Other Headquarters offices may also have staff who participate in inspections on an occasional basis

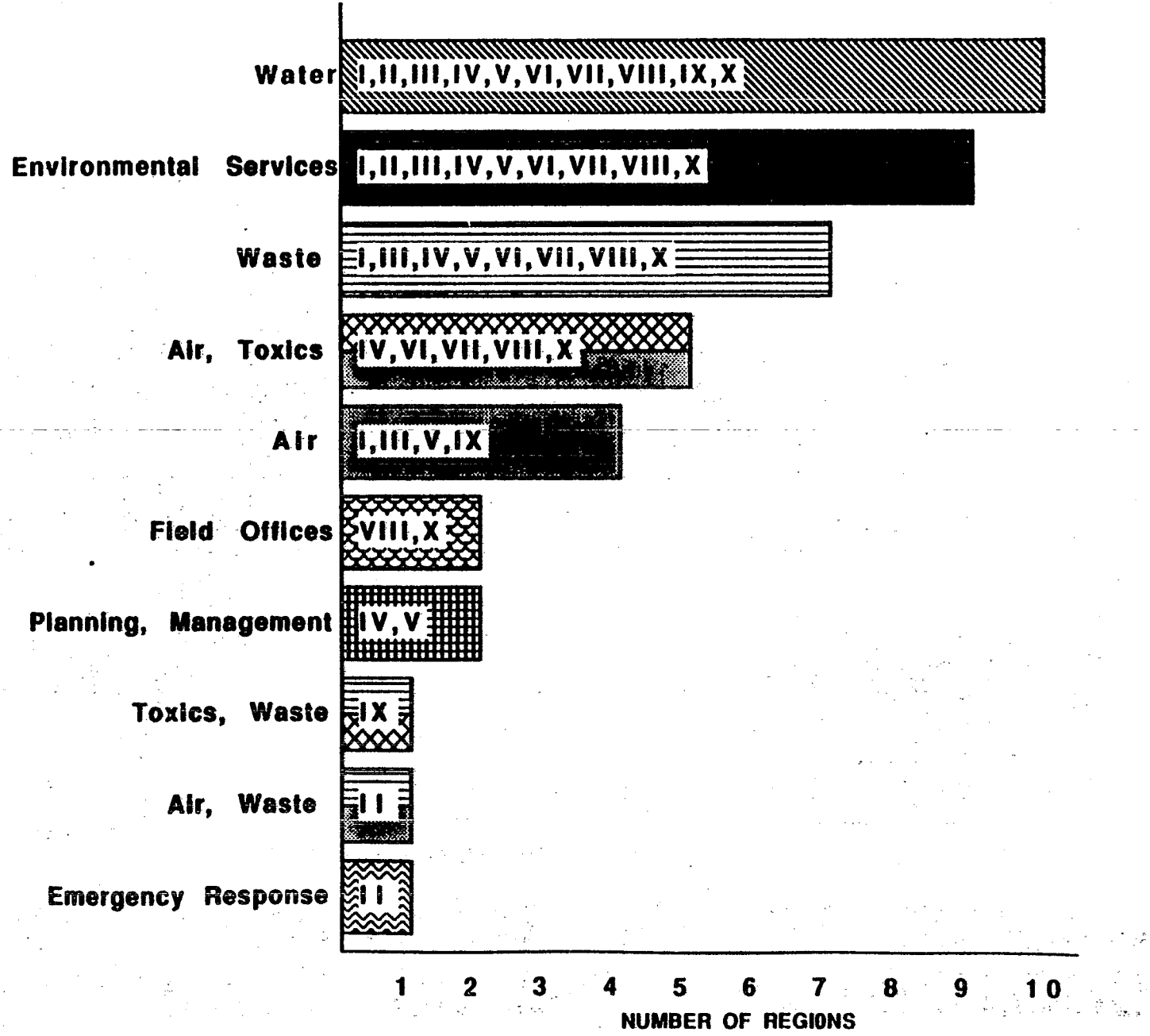
NATIONAL SUMMARY:

LOCATION OF INSPECTORS IN EPA REGIONS

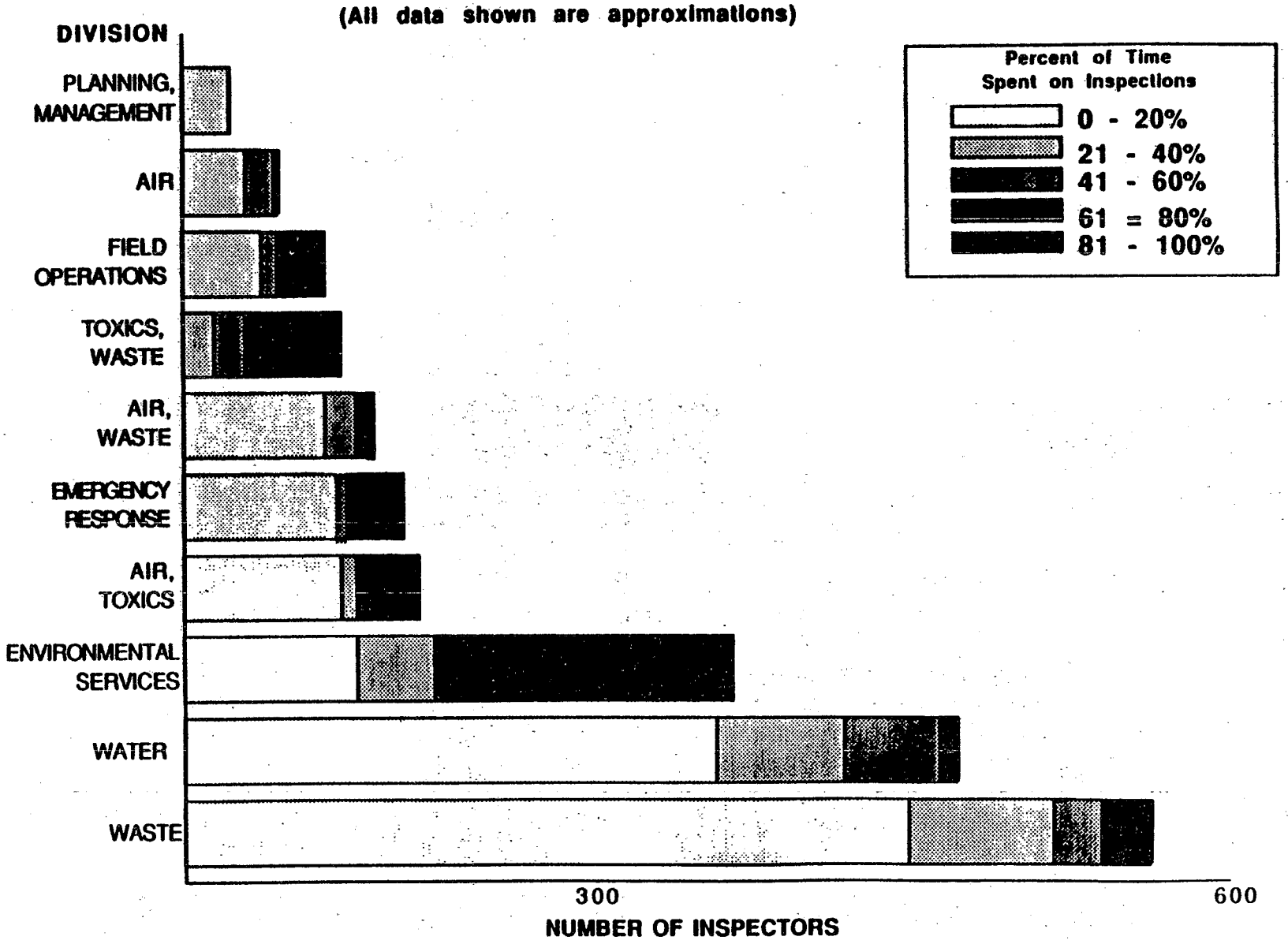


*Environmental Services Division

REGIONAL DIVISIONS WITH INSPECTORS

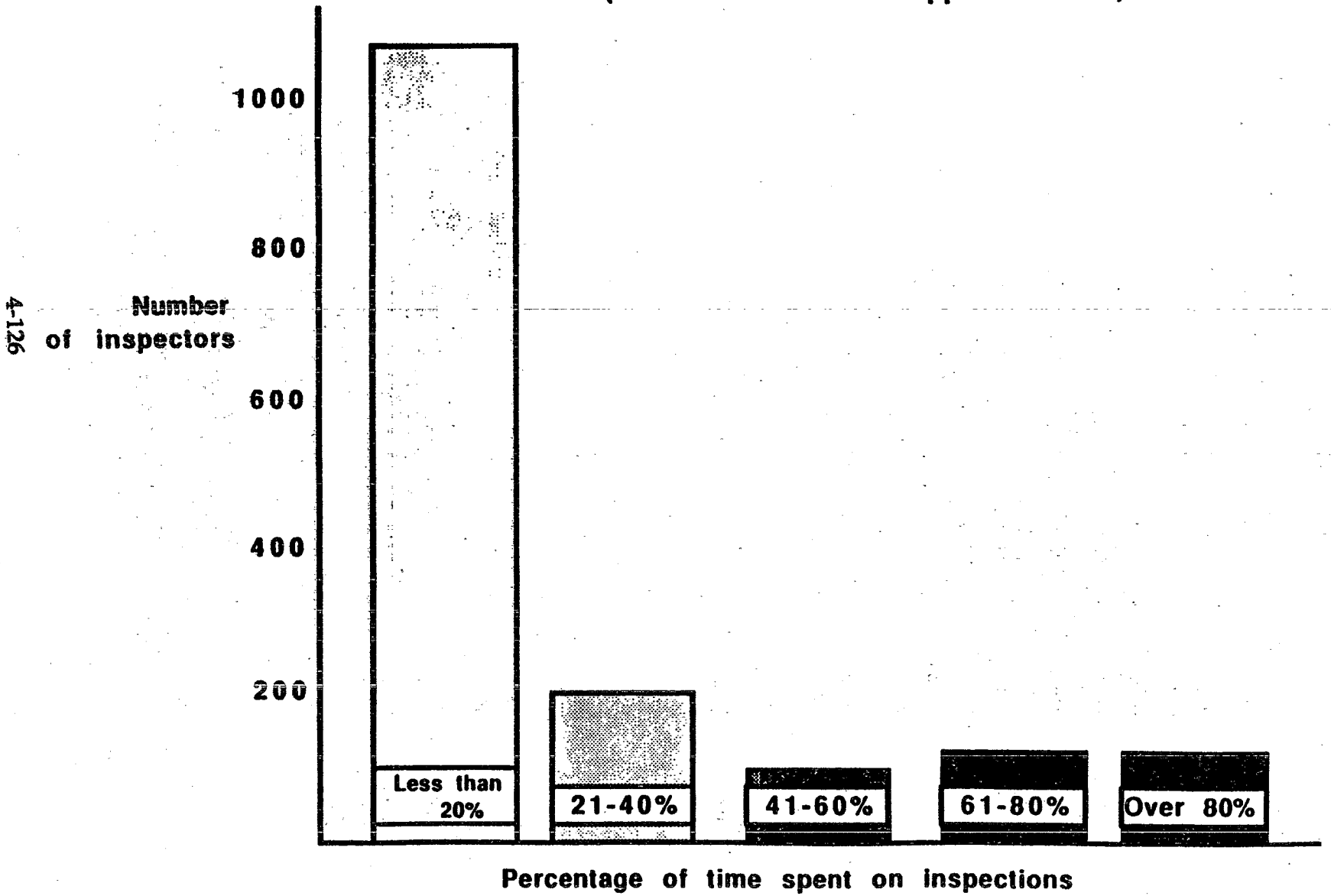


PERCENTAGE OF TIME INSPECTORS SPEND ON INSPECTIONS, BY DIVISION



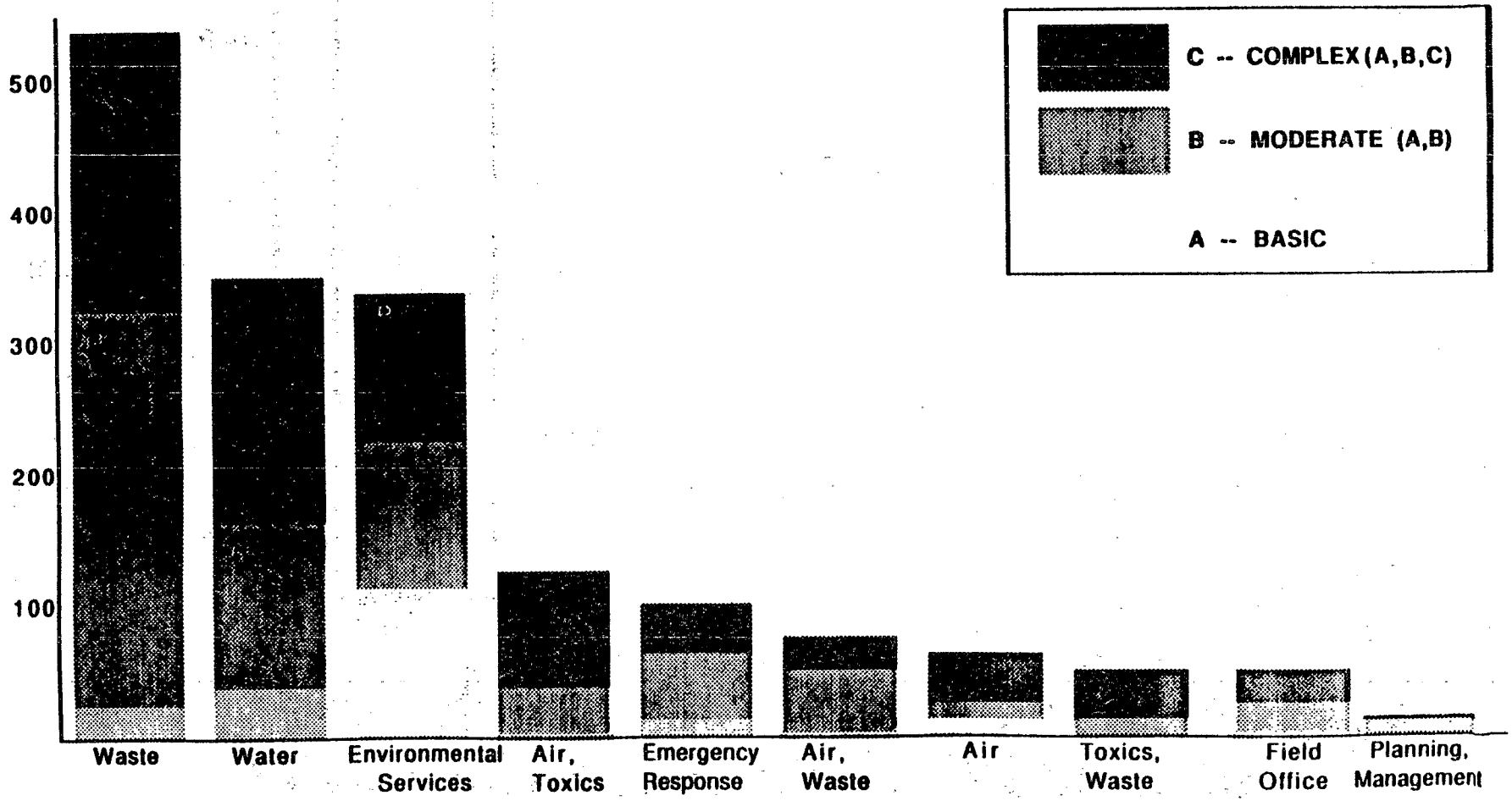
PERCENTAGE OF TIME INSPECTORS SPEND ON INSPECTIONS, NATIONAL SUMMARY

(All data shown are approximations)

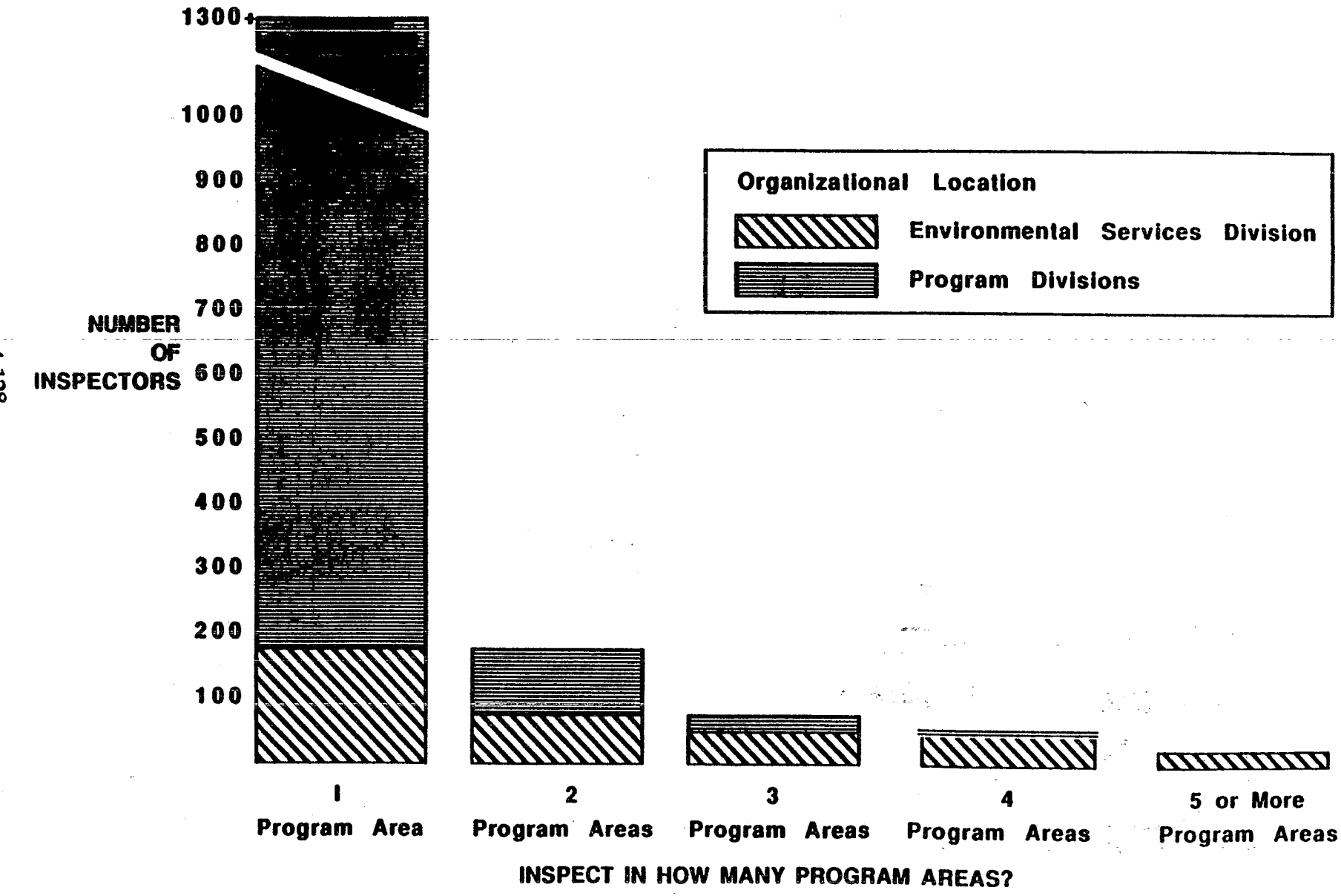


NUMBER OF INSPECTORS

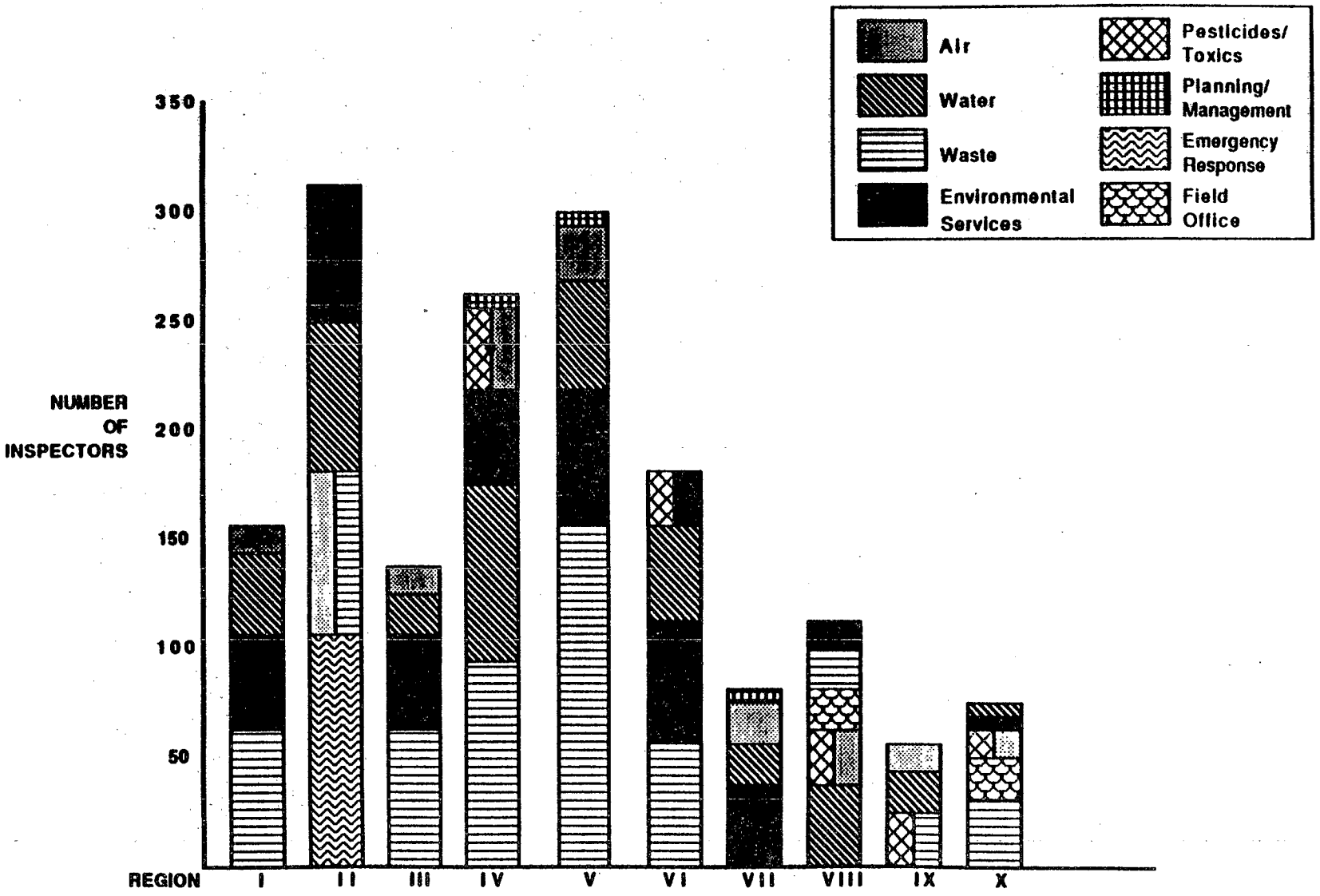
BY HIGHEST LEVEL OF COMPLEXITY



INSPECTORS BY NUMBER OF PROGRAM AREAS

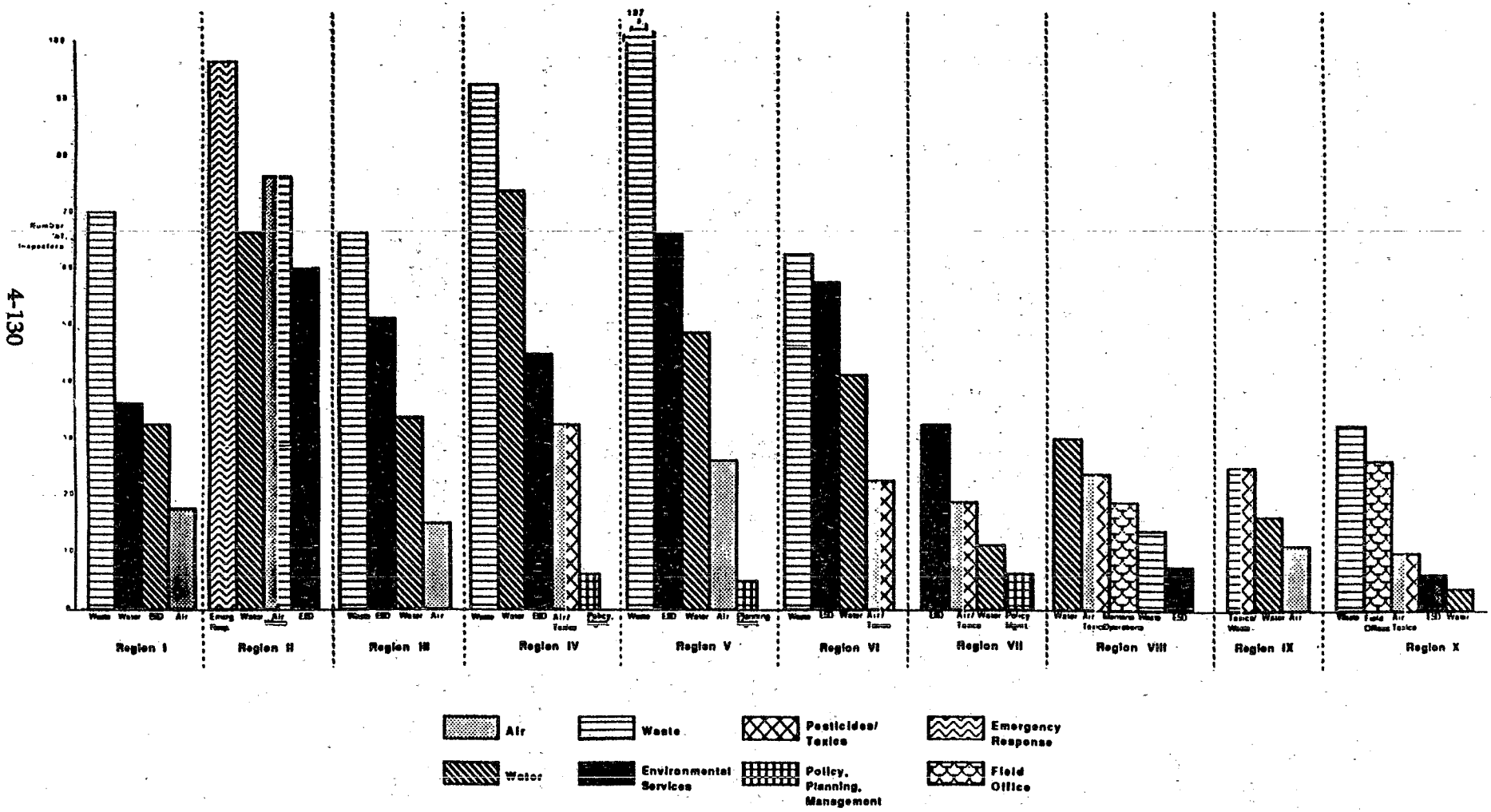


LOCATION OF INSPECTORS IN EPA REGIONS



LOCATION OF INSPECTORS

IN EPA REGIONS



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV - ATLANTA, GEORGIA

DATE:

SUBJECT: Self-Monitoring and the Clean Water Act: A Model for the Clean AIr Act

FROM: Paul S. Reinermann, Environmental Engineer
Compliance Technology Section

TO: Self-Monitoring Workgroup
(Addresses on last page)

As discussed in our March 6, 1990, conference call, I have contacted Mr. Pete McGarry of Region IV's Water Division to ascertain their self-monitoring and enforcement program. In general, self-monitoring is the backbone of their enforcement program and oversite by Headquarters to ensure that their enforcement policies are followed does exist.

SELF-MONITORING AND THE CLEAN WATER ACT

The water program has promulgated self-monitoring test procedures to determine compliance with the permitee's effluent limitations. Excluding effluent flowrate, temperature and ph monitoring, the self-monitoring data does not represent a continuous sampling test procedure but instead represents a weekly, daily or hourly grab sample. Each permit specifies the self-monitoring and reporting requirements for the discharger. OMB approved forms are provided to the discharger for periodic submittal to the permit enforcement agency.

Enforcement of permit limitations and identification of violators are dictated by a dynamic document entitled the Enforcement Management System (EMS). A portion of this document is enclosed. The purpose of the EMS is to provide " a systematic administrative approach to compliance monitoring and enforcement with the objective of achieving a consistent, uniform national posture in the implementation of the National Pollutant Discharge Elimination System (NPDES) program...".

The EMS provides a system for translating compliance information into timely and appropriate enforcement actions in a manner to achieve a swift return to compliance, to protect water quality and to ensure that dischargers receive fair treatment under the law. Basically, more severe permit violations are dealt with more severe enforcement actions as indicated in the tables of the EMS entitled VIOLATION REVIEW ACTION CRITERIA and ENFORCEMENT RESPONSE. Please note that these tables indicate that some degree of noncompliance is tolerated.

CURRENT STATUS OF SELF-MONITORING IN THE AIR PROGRAM

The air program has a much different approach to self-monitoring than the water program. Originally, measurement of air pollution was accomplished by short-term, wet test methods which became the basis for our regulations and sole basis for enforcement of the emission standards. Eventually, CEMs were developed and subsequently required to be installed on major air pollution sources. However, these CEMs were not promulgated to be the technique to determine compliance with the emission standard except in a very few cases. Since most CEMs are not the compliance method but just inconclusive proof that an emission standard may have been violated, CEM data does not have the importance of water self-monitoring data. The only difference between the two being the difference in the regulations.

Self-monitoring in the air program also includes monitoring of process and air pollution control device (APCD) parameters. In most cases, process and APCD monitoring data is not submitted to any enforcement agency but is required to be kept on file at the source for review. This type of self-monitoring data very seldom becomes the origin of any significant enforcement action because the type of violation would be procedural in nature.

SELF-MONITORING: HOW WE CAN DO BETTER

In order to upgrade the status of self-monitoring data within the current air program structure, several steps should be undertaken such as:

1. Headquarters should prescribe meaningful SPMS commitments regarding implementation of their self-monitoring related policies and guidance.

2. Enforcement guidance should be revised to state that as part of the resolution for all enforcement cases, source owners should be required to prepare an O&M manual which must address all required self-monitoring data. The basic principal should be that as the self-monitor indicates that the monitored parameter or pollutant is nearing its limitation, then corrective action should be taken before a violation occurs.

3. All new permits, especially PSD and NSR permits, should required sources to install CEMs, where possible, which are considered the compliance method for enforcement of the emission standards and to prepare an O&M manual which must address all required self-monitoring data. These permits should also state that if certain process and/or APCD parameters are exceeded, then these exceedances would be considered violations of the related emission standards. Where CEMs are not available or too costly for monitoring pollutants, then annual stack tests should be required.

4. We should require sources to submit self-monitoring data in a standardized format and should revamp the CEMS Subset so that the self-monitoring data is properly reflected. For example, leak detection reports required to be submitted under NSPS, Subpart VV and NESHAP, Subpart J cannot be inputted or retrieved in a manner to reflect the requirements.

The new amendments to the Clean Air Act should allow us to promulgate regulations which allow self-monitoring to be as important to the air program as it is to the water program. For example, the acid deposition regulations will rely heavily upon self-monitoring for enforcement of the annual SO_2 and NO_x allowances. The Title 4 permitting program could incorporate items 3 and 4, above. Part of the new enforcement provisions under Title 6 could include a document such as water's EMS.

REGION IV CONTINUOUS EMISSION MONITORING ~~ENFORCEMENT PLAN~~

STATEMENT OF ISSUE

In order to ensure that sources with federally enforceable ~~excess emission reporting~~ requirements are in continuous compliance with their emission standards and are being properl operated and maintained, we have implemented the Region IV Continuous Emission Monitoring (CEM) Enforcement Plan (CEP) in FY-90.

BACKGROUND

On March 31, 1988, OAQPS issued a memorandum to the Regional Air Division Directors which stated the Agency's policy regarding the utilization of CEM data (excess emission reports) fo enforcement purposes. This memorandum concludes with the statement that "Evaluation of CEM data has been shown to be effective for identifying sources with continuous compliance problems and has allowed agencies to utilize their compliance monitoring resources more effectively."

On July 5, 1988, SSCD issued a memorandum to the Regional Air Division Directors which stated the Agency's policy regarding acceptable levels of continuous compliance for SO_2 sources. This memorandum contained targeting criteria and recommended follow-up action for sources that submit SO_2 excess emission reports. The policy allows the targeting criteria to be adjusted depending upon the availability of compliance monitoring resources.

In response to these memorandums, Region IV developed the CEP with input from our state and local agencies which have all agreed to implement the CEP in FY-90 through grant commitments. The goal of the CEP is to ensure that sources are in continuous compliance with emission standards in addition to properly operating and maintaining their facilities and CEMs. Sources with continuous compliance problems are being identified and are being returned to a continuous compliance status through enforcement actions. Enforcement actions include information requests and notices of violations. At a minimum, all problem sources are required to submit a corrective action plan to prevent reoccurrence of the excess emissions.

The CEP provides the targeting criteria for our state/local agencies to utilize when evaluating CEM data and recommends appropriate enforcement action for sources with excessive exceedances and CEM downtime. Although our targeting criteria is not as stringent as Headquarter's guidance because of the limited compliance monitoring resources, we believe that the CEP should result in reduced air pollution by sources remaining in continuous compliance. We anticipate that in FY-92 the CEP will be revised to realize Headquarter's targeting criteria.

In addition, we have encouraged our state/local agencies to substitute the review of CEM data for onsite inspections as allowed by Headquarter's Compliance Monitoring Strategy of March 31 1988 so that they can better utilize their compliance monitoring resources.

CURRENT SITUATION

The majority of our state/local agencies are implementing the CEP although albeit some reluctance because they lack experience with utilizing CEM data for enforcement purposes. Some state/local agencies desire that we issue the first notice of violation based upon CEM data within their jurisdiction so that future actions by them will be able to proceed through their system easier. We believe that this situation has occurred because an enforcement action based upon CEM data is viewed as imposing additional restrictions on industry. This is a common viewpoint of some agencies with regard to new enforcement plans.

Already one state (North Carolina) has issued a Notice of Violation to a utility boiler owner for excessive opacity which resulted in the state collecting a penalty and the owner initiating a corrective action plan to prevent the excessive opacity exceedances from reoccurring. Most state/local agencies have requested corrective action plans from identified problem sources and issued warnings to borderline sources.

We have requested two corrective action plans, one from a kraft pulp mill and one from a utility boiler which have resulted in the sources returning to a continuous compliance status. In both cases, neither source had written procedures for their operators to correct excess emissions.

Some state agencies are evaluating the substitution of the review of CEM data in lieu of performing onsite inspections. The substitutions should occur in FY-91. States that are not evaluating this believe that in order to maintain an enforcement presence, they must perform an annual onsite inspection. We believe that an enforcement presence in absentia will occur if appropriate follow-up actions are initiated after the review of the CEM data.

KEY CONTACT PERSON

Roger O. Pfaff, Chief, Air Compliance Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, 345 Courtland Street, NE, Atlanta, Georgia 30365
Telephone No.: 404/347-2904 or FTS: 257-2904

XIII. LIST OF REGIONAL AND HEADQUARTERS CONTACTS

Compliance Monitoring

R I	Carol Wood	617-860-4320
R II	Barbara Metzger	264-4019
R III	Robert Kramer	597-8173
R IV	Paul Reinermann	257-2904
R VI	Bob Reeves	255-6486
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
OA SSCD	Howard Wright	308-8668
OA Mobile	Marcia Ginley	321-6485
OW	Hans Waetien	260-4833
OFA	Jim Edward	260-3270
AEC Air	Justina Fugh	260-2864
OCE	Bruce Bellin	260-9662

Innovative Remedies

R I	Hugh Martinez	835-4526
R II	Walter Mugden	264-1618
R III	Robin Cole	597-4914
R IV	Rob James	257-2641
R V	Michael Smith	886-6823
R VI	Jim Turner	255-2125
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
OA SSCD	Rich Biondi	308-8666
OA Mobile	Rich Ackerman	260-2643
OW	Matt Charsky	260-9805
OFA	Bill McGovern	260-5052
AEC Air	Charles Garlow	260-7088
AEC Water	Susan Cary Watkins	260-2856
OCE	Bruce Bellin	260-9662

Multimedia Enforcement

R I	Sam Silverman	835-3443
R II	Walter Mugden	264-1018
R III	Peter Schaul	597-8334
R IV	Bill Phillips	257-2641
R V	Michael Smith	886-6823
R VI	Bennett Stokes	255-2120
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
OA SSCD	Mark Seigler	308-8673
OA Mobile	Marc Hilson	260-2938
OW	Debbie LeBow	260-6770
OFA	Jim Edward	260-3270
AEC Air	Charles Garlow	260-7088

Pollution Prevention

R I	Tim Williamson	835-1154
R II	Walter Mugden	264-1019
R III	James Hemby	597-8327
R IV	Betsy Shaver	257-7109
R V	Phyllis Reed	886-6018
R VI	Jim Turner	255-2125
R VII	Donald Toensing	276-7446
R IX	Fred Leif	484-1364
OA SSCD	Mark Siegler	308-8673
OA Mobile	George Lawrence	260-4412
OW	Peter Siebach	260-9849
AEC Air	Charlie Hendon	260-8542
OCE	Bruce Bellin	260-9662

Field Citations

R I	Tom Wholley	835-3233
R II	Karen Reed	264-6195
R III	Gary Bryant	304-233-1271
R IV	Betsy Shaver	257-7109
R V	John Connell	886-6832
R VI	Bob Reeves	255-6486
R VII	Bill Fairless	276-3881
R IX	Fred Leif	484-1364
OA SSCD	Maimi Miller	308-8666
OA Mobile	Ross Ruski	260-4410
OW	Reggie Cheatham	260-9360
OFA	Jim Edward	260-6920
AEC Air	Rachel Hopp	260-2859

Criminal Enforcement

R I	Andy Lauterback	835-3436
R II	Gary Nurkin	264-5341
R III	Bob Boodey	597-0122
R IV	Mike Newton	257-2641
R V	David Taliaferro	886-0815
R VI	Katherine McGovern	255-2110
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
OA Mobile	Marc Hilson	260-2938
AEC Water	Lourdes Bufill	260-8184
OCE	Bruce Bellin	260-9662

Legal Tools

R I	John Blunstein	835-3446
R II	Walter Mugden	264-1018
R III	Mike Vaccaro	597-8914
R IV	Bill Phillips	257-2641
R V	Timothy Thurlow	886-6625
R VI	Evan Pearson	255-2125
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
R X	John Hamill	399-1260
OA Mobile	Irv Pickell	321-6485
OW	Rick Colbert	260-4015
OFA	Jim Edward	260-3270
AEC Air	Charles Garlow	260-7088
AEC Water	Dave Drelich	260-2949
OCE	Bruce Bellin	260-9962

Alternative Dispute Resolution

R II	Doug Blazey	264-1017
R III	Mike Vaccaro	597-8914
R IV	James Sergent	257-2256
R V	Lynn Peterson	886-0556
R VI	Mike Schulze	255-2110
R VII	Robert Richards	276-7502
R IX	Fred Leif	484-1364
OA SSCD	Ron Shafer	308-8686
OA Mobile	Cathy Clark	260-4412
AEC Air	Charles Garlow	260-7088
AEC Waste	Batson/Ackerman	260-8173

Targeting

R I	Larry Brill	835-3484
R II	Walter Mugden	264-1018
R III	Robin Cole	597-4914
R IV	Tom Nesmith	257-7109
R V	Michael Smith	886-6823
R VI	Randy Brown	255-6745
R VII	Martha Steincmap	276-7010
R IX	Fred Leif	484-1364
OA SSCD	Howard Wright	308-8668
OA Mobile	Ross Ruski	260-4410
OW	Jim Woolford	260-8304
OPTS	Mike Wood	260-7835
AEC-Air	Elliot Gilberg	260-7089
OCE	Bruce Bellin	260-9662

Contractor Listing

R I	Sharon Welles	835-3318
R II	John Dollimar	264-5695
R III	John Machita	597-8989
R IV	Alan Dion	257-2335
R V	Steve Mendoza	886-6852
R VI	Miles Schulze	255-2110
R VII	William Ward	276-7285
R IX	Fred Leif	484-1364
R X	John Hamill	399-1260
OA SSCD	Jerry Kraus	308-8668
OW	Rich Kozlowski	260-8304
OFA	Jim Edward	260-3270
AEC Air	Justina Fugh	260-2864
AEC Water	Watkins/Bufill	260-4451
OCE	Bruce Bellin	260-9662
Other:GAD	Frank Dawkins	260-8028
CLS:	Tracy Gibson	260-8780

Environmental Auditing

R I	Toni Bandrowicz	835-3316
R II	Doug Blazey	264-1017
R III	Lori Reynolds	597-8221
R IV	Drew Peake	257-3973
R VI	Bennette Stokes	255-2120
R VII	Martha Steincamp	276-7010
R IX	Fred Leif	484-1364
OA SSCD	Ron Shafer	308-8686
OA Mobile	Lawrence Andrews	260-4412
OPTS	Mike Wood	260-7835
OFA	Jim Edward	260-3270
AEC Air	Charles Garlow	260-7088
AEC Waste	Schive/Keplinger	260-3098
AEC Tox	Mike Walker	260-8697
AEC Water	Susan Cary Watkins	260-2856
OCE	Bruce Bellin	260-9662

ENFORCEMENT IN THE 1990's PROJECT

PROVIDING COMPLIANCE INCENTIVES/LEVERAGE

WORKGROUP CONTRIBUTORS

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Commentators

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Donna Fletcher
Terrell Hunt
Craig Johnson
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ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE WORKGROUP ON COMPLIANCE INCENTIVE/LEVERAGE

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I. Goals and Objectives of the Project

Our Workgroup sought to identify and develop proposals that would increase the effectiveness of our existing enforcement resources. We recognize that the traditional civil enforcement process is essentially linear with the addition of technical and legal resources producing a proportionally greater set of enforcement results. Our goal was to develop mechanisms that would serve to leverage our enforcement resources so that proportionately greater levels of compliance could be achieved with the application of any given level of resources. This is not a new theme for the Agency as many individuals have devoted great effort to enhance the generally law abiding attitude of U.S. regulatees by increasing the deterrent effect of our actions and encouraging compliance through various incentives. For example, the significant and increasing commitment to the criminal program and our commitment to enforcement communications are clearly intended to be major disincentives to noncompliance. The TSCA self–confession program, various "good actor" provisions included in our penalty policies, and regional compliance recognition programs represent examples of incentives to compliance because they encourage compliance by allowing appropriate penalty consideration for the disclosing party, for good faith compliance efforts and for certain environmentally beneficial activities and offer praise for those with solid records of performance.

Our Workgroup sought to identify innovative additions to the incentives/disincentives arsenal. We have identified four concepts that we believe can significantly aid the EPA in deterring noncompliance. These are the escalation of environmental auditing to the baseline of expected performance with our civil penalty policies and requests for injunctive relief being adjusted accordingly; the increased use of the contractor listing and debarment/suspension programs; the active recognition of the affirmative role of citizen enforcement; and the enhanced use of the Agency's moral authority and public reputation to encourage compliance.

We also believe there are significant vehicles to increase the incentives to compliance. These include the already mentioned suggested modifications to our civil penalty policies and a carefully structured regional and national compliance recognition or awards program. We also recommend continued consideration of applying our technology transfer and education capabilities in direct aid of the compliance/enforcement process.

II. Process Leading to Recommendation

Our Work Group had five project leaders and five commentators. Each project leader accepted responsibility for one or more of our six projects and prepared draft white papers or activity reports that the other project leaders and commenters reviewed. The Workgroup leader managed the overall process by suggesting work schedules, targeting outputs and encouraging participation, and summarizing results.

Douglas R. Blazey was project leader for identifying a possible field test of regional leveraging in the context of the regional enforcement pilot projects and for developing the proposed cooperative enforcement pilot with citizens and other non-government organizations (developed in conjunction with William J. Muszynski, Deputy Regional Administrator, Region II and other Region II Division Directors). Bruce Diamond analyzed the potential benefits of establishing environmental auditing as the new "norm" for compliance performance and sought the appropriate incentives and disincentives to achieve that result. Allyn M. Davis, with the active support of Randall Brown, Susan McKinney and other Region VI staff, developed an integrated regional/national compliance recognition program utilizing broadbased agency surveys and draft proposals to shape the first agency–wide external compliance recognition proposal. Robert Heiss, with the active support of Kathy Summerlee and Susan Cary Watkins, reviewed existing Agency systems to implement the contractor listing and debarment/suspension programs and recommended several enhancements to increase the compliance incentive inherent in these powerful tools. Connie Musgrove assessed the potential for using environmental education and technology transfer in direct support of enforcement results. All project leaders benefited from the support of various EPA colleagues and our Workgroup commentators, William Dickerson, Donna Fletcher, Terrell Hunt, Craig Johnson (Department of Justice), and Cheryl Wasserman.

III. Summary of Recommendations

Although our Workgroup reviewed six separate projects, we believe that they "work" together to deliver the message that EPA expects regulatees to actively manage their environmental and pollution control activities or pay a higher price in terms of penalties and public disapproval for their noncompliance. On the other hand, we feel recognition and support are appropriate for those who seek a more cooperative relationship with EPA and State environmental departments and achieve consistent or even exemplary compliance with our environmental laws. Individual Recommendations related to each project are listed in Section IV with a more complete summary of each project appearing in the attachments to this report.

IV. Recommendations

A. ENHANCE THE UTILIZATION OF ENVIRONMENTAL AUDITING

1. Declare EPA's expectation that environmental auditing be used by regulatees. The good environmental manager should not be reactive to environmental regulation or pollution control problems but should be proactively assessing, maintaining and managing his or her production processes and pollution control systems to avoid infractions of permits or accidental spills or other releases. The performance of an environmental audit by a regulatee and the subsequent utilization of that audit report to actively manage the firm's regulated conduct and to maintain itself in compliance is to be expected of a properly managed facility.

2. Modify EPA penalty and enforcement policies to establish expectation that certain entities utilize environmental auditing. A manager who awaits an infraction before taking corrective action "allows" pollution and should be penalized more severely than one who has utilized environmental auditing in an effort to avoid noncompliance. If the proactive manager is to become the new norm, penalty policies must reflect this reality and impose heavier sanctions on those who ignore the expectation that they conduct and utilize environmental auditing. Implementation of this goal will occur as each program in consultation with OE revises its penalty regulations and policies. Exemplary performance by a regulatee in waste minimization or pollution prevention can receive additional penalty reduction recognition. However, the new base penalty calculation would assume the utilization of the environmental auditing process for the defined class of regulatees.

3. Encourage active environmental managers "to go the next step" and self-disclose their violations. An active manager seeks to prevent violations and to resolve those violations that do occur. True resolution of a violation involves paying the appropriate penalty. The existing TSCA self–confession program is a good model for the other media programs to consider when reviewing their penalty regulations and policies. Appropriate penalty recognition should be given to a regulatee who voluntarily steps forward and discloses its self-discovered violation. Because of valid concerns about ensuring the integrity of regulatees' conduct in this process, we recommend that each media program initiate in at least one regulatory area a pilot project to test and develop a self–disclosure concept similar to that used in the TSCA program.

B. STRENGTHEN THE USE OF CONTRACTOR LISTING AND DEBARMENT/SUSPENSION

1. Bring the contractor listing and debarment/suspension programs into the mainstream of EPA's decisionmaking regarding available enforcement responses to noncompliance. We need to distribute more widely within the Agency information

regarding these powerful and currently available leveraging tools and prepare additional guidance to assist field enforcement units to identify priority candidates for either Part 15 Contractor Listing or Part 32 Debarment and Suspension. This would include guidance on evaluating a firm's compliance with court or administrative orders that resulted in the listing to determine whether delisting is appropriate.

As a next step, the OE should prepare informational guidance that describes the debarment/suspension sanction, the statutory and regulatory prerequisites to its application and, in general, its availability to EPA and to enforcement officials. This guidance needs to be widely distributed to EPA enforcement officials.

2. Utilize as criteria for application of either Part 15 or Part 32 the utilization of environmental auditing; available self-disclosure programs and proactive abatement activities by the regulatee. Each enforcement tool, if networked, has the potential to strengthen the impact or utilization of other programs. A willingness to limit the application of these additional sanctions when a regulatee has utilized environmental auditing, self–disclosure the violation or demonstrates proactive abatement should encourage that environmentally beneficial conduct.

As a next step the Agency needs to develop a policy interpreting provisions of the contractor listing and debarment/suspension process with particular focus on activity by the candidate, such as self–disclosure or voluntary implementation of more active abatement procedures, and its relevance to the Agency's listing or debarment/suspension decision.

3. Leverage the enforcement potential of every litigation referral by reviewing the violation history contained therein and screening for listing or debarment/suspension candidates. Every litigation referral essentially contains a review of all the information required to make a listing or a debarment/suspension decision. Although it will take additional effort to organize and evaluate it for its listing or debarment/suspension potential, the leveraging potential is substantial.

OE should provide guidance requiring an Agency assessment of the applicability of these sanctions in connection with all enforcement actions.

4. Capitalize on EPA data that is better integrated to (1) identify cross-media noncompliance and (2) identify the extent and significance of the financial relationship between the government and a listing or debarment/suspension candidate. The Agency's data integration efforts can enhance the usefulness of existing Agency or public data in making determinations relevant to the appropriate case by case application of the contractor listing and debarment/suspension sanctions. With more information readily available to the agency, application of this sanction can become more routine and predictable, and its leveraging impact will most effectively be utilized.

5. Consider requesting legislative authority to expand the contractor listing program to other media. Currently, the contractor listing program is limited to those with air and water violations by virtue of the specific authorizations in the CAA and CWA. EPA should consider requesting authority in RCRA, TSCA, EPCRA and FIFRA to similarly "list" violating facilities in these media programs.

C. COOPERATE WITH CITIZENS AND OTHER NON-GOVERNMENTAL ORGANIZATIONS COMMITTED TO ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT

1. Field test or "pilot" a cooperative relationship with citizens and non-governmental organizations (NGO's) to determine whether improved compliance can be more efficiently achieved. EPA and State regulatory agencies seldom coordinate enforcement activities with citizens utilizing the citizen suit authority granted by Congress. There are examples of positive cooperation by citizens identifying possible violations and reporting them to EPA or State agencies. Given the limited resources of government and citizen organizations, increased coordination could yield increased enforcement impact just as do our own geographic or industry special initiatives.

We recommend that either headquarters or a Regional office (in cooperation with headquarters and the Department of Justice) pilot an effort to identify areas for increased cooperation or coordination between government and citizen organizations dedicated to increased compliance with our environmental laws. A proposed Regionally based pilot is described in the attachment to this summary.

2. Endeavor to change what is often a negative relationship with citizens and NGO's into a positive one. While some government departments inevitably have conflicts with citizens and NGO's because of their Congressionally mandated, multiple use, resource development and management functions, EPA is more singularly devoted to environmental resource and human health protection. Consequently, the potential for mutually reinforcing conduct is real.

We recommend that EPA attempt to foster this new, more positive relationship, by exploring the opportunities for increased cooperation and coordination discussed in #1.

D. FIELD TEST THE LEVERAGING BENEFIT OF UTILIZING A REGIONAL ADMINISTRATOR'S AUTHORITY AND PUBLIC INFORMATION ACCESS

1. Utilize the Regional Administrator directly in the compliance and enforcement process in order to encourage cooperative behavior and discourage adversarial/litigative conduct. The EPA "norm" is that enforcement is targeted and developed by program and legal specialists. As good as these specialists are at developing a "case," EPA basically receives only linear benefits from the resources

employed. A Regional Administrator with the visibility and credibility of his/her office can command the attention of the senior executives in the regulated community and fully engage their desire to avoid "gray or black hat" status in this environmental age. Also, it is these senior executives who must decide whether to disengage from costly adversarial tactics (also very costly and inefficient for EPA) and engage in active environmental management and cooperative relations with EPA.

2. Field test the leveraging potential of the Regional Administrator's active involvement in the compliance/enforcement process. Although one can theorize about the leveraging potential of a Regional Administrator's "jawboning," its actual value could be assessed with some precision in the context of the Regional enforcement pilot project. Where a Region has selected a particular industry on which to focus enforcement attention, it should be possible to see how many of the regulatees respond to a direct invitation by the Regional Administrator to actively cooperate with EPA in achieving compliance. Those that do not choose to cooperate will receive the disapprobation of the Regional Administrator and the attendant public consequences. Both Regions VI's and X's enforcement pilot projects appear amenable to this field test, and both Regions are willing to participate.

We soon expect the proposed Regional enforcement pilots to take final shape after review by OE and the Deputy Administrator. Thereafter a leveraging support team composed of OE and DOJ representatives should be assembled and commence work with the Regional enforcement team to structure the RA leveraging component of each enforcement pilot. Other Regional pilot projects can be considered after the support team is formed and the most appropriate project selected for this demonstration.

E. IMPLEMENT ENVIRONMENTAL AWARDS

1. Initiate a multi-media compliance recognition program. Implementation of a multi–media Environmental Compliance Recognition Program would serve to augment the Agency's existing enforcement program using nontraditional, positive procedures. The goals and objectives of the program are threefold. First, to formally recognize facility management which has been consistently successful in meeting the federal and State environmental regulations. Second, to provide incentives for increased compliance with federal and State environmental regulations. Third, to encourage facilities to go beyond traditional regulatory requirements in providing increased protection of the environment. The proposed compliance recognition program includes three categories of environmental recognition: State–specific compliance recognition (Regional option); Region–specific compliance "plus" environmental recognition; and national compliance "plus" environmental recognition.

The program would originate at the State level recognizing municipal, industrial and federal facilities achieving consistent regulatory compliance in all

environmental media during the last two annual inspections. (Each EPA Region would have the discretion not to acknowledge the State "compliance only" winners but those state winners would automatically be candidates for the EPA regional compliance "plus" recognition program.) State award winners would then advance to compete for a Regional level award for organizations which have gone above and beyond the environmental regulatory requirements in their management practices; thus, the designation compliance "plus". Winners of the regional awards would become eligible candidates for a national award. The national award winners would be the exemplary industrial and federal organizations which have demonstrated a strong environmental ethic and a strong preventative environmental program. Note: The certificate or notice of any environmental award should state that its receipt is no defense to an action for any past or future conduct.

2. **Consider publicly identifying those facilities or entities with a verified history of significant noncompliance.** Because of the valid concerns about assuring the accuracy and fairness of this "watchlist" program, the Enforcement Management Council recommended against immediate adoption of a full program. Instead, we recommend a Region or national pilot program to identify facilities with poor compliance histories or environmental management practices and to develop the screening mechanisms to assure fairness. For example, the pilot project could identify those facilities with significant environmental violations (and not on a compliance schedule) in more than one media program for more than three years, having substantial negative environmental impacts. The pilot project could be on a Regional or national basis.

3. **Field test the environmental award program in Region VI.** A pilot project of the state and regional program was initiated in Region VI during FY 90. After a successful pilot, a national program could be implemented.

F. CONSIDER ENVIRONMENTAL EDUCATION AND TECHNOLOGY TRANSFER FOR ENFORCEMENT RESULTS

The Office of Enforcement, with the support of the Office of Cooperative Environmental Management, the Office of Technology Transfer, and other offices with responsibility for technology transfer, should review the opportunities for enhancing compliance and enforcement results through technology transfer activities. This review would first determine whether the basic idea is viable given the inherent complexities of the government identifying, in an adversarial context, remedial technologies to a regulatee. Assuming there are opportunities to utilize our information base more effectively, the review should result in guidance for compliance/enforcement personnel who would be conducting technology transfer activities and a quick list/short list of technology transfer resources within EPA that will allow Regional users easy access to this resource.

Note: There is considerable hesitation about conducting the effort. The Enforcement Management Council was narrowly against pursuing this project in addition to the tech transfer programs already operating or being developed.

ATTACHMENT A

A. Enhance the Utilization of Environmental Auditing

Policy Incentives Project

Introduction

This project is envisioned as having two components; first, a reevaluation of the role of environmental auditing in EPA'S response to environmental violations with particular emphasis on our various penalty policies; and second, an effort to maximize self-confessing among regulated entities. The fundamental premises of this project are, one; that EPA should recognize that environmental auditing is a proven, available and valuable compliance tool and accordingly encourage its use by publicly announcing that this practice will now be considered normal responsible behavior. A corollary of this premise is that regulated entities which do not fully utilize this tool will be presumed to have failed to make good faith efforts to comply, with appropriate negative implications for the amount of penalties they would be expected to pay as a result of enforcement actions. The second premise is that self-confessing to violations (where not otherwise required), should also be encouraged. However, this encouragement may require a more "carrot" - oriented approach.

A. Auditing

BACKGROUND

EPA has for some time encouraged the practice of environmental auditing. The most important statement of that support is the Environmental Auditing Policy Statement, published in final form at 51 F.R. 25004, (July 9, 1986). (An interim version of the policy was issued on November 8, 1985.) The final policy defined environmental auditing as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. "51 F.R. 25006. An appendix to the policy sets out the elements of effective environmental auditing programs. This appendix is attached to this report and will serve as a working definition of adequate environmental auditing.

The July 9, 1986 policy sets forth EPA's encouragement of auditing, for all regulated entities, including federal facilities. The policy does not promise that EPA will reduce inspection frequency or penalty amounts for facilities that audit, but points out that an effective audit program will tend to reduce violations and thus indirectly could lead to the possibility of fewer inspections as an entity becomes a lower priority for inspection. The policy also hints that an effective audit program which leads to efforts to prevent violations and prompt discovery and correction of violations, could lead EPA to "take into account" such actions as "honest and genuine efforts to assure compliance,"particularly if the violation was promptly and voluntarily reported. See 51 F.R. 25007.

The policy also discusses such matters as when EPA will request disclosure of audit reports and when audits will be included as a remedy for a violation.

In light of the environmental auditing policy statement and recent Agency experience there appears to be no need to fundamentally reevaluate EPA's views on the over-all usefulness or role of environmental auditing. But more guidance is needed on the subject of the role that pre-existing environmental auditing, or lack thereof, should play in assessing the gravity of violations and the amount of penalties to collect.

Environmental auditing has lost whatever aura of novelty it may once have had and is now a well-established, reasonably available and proven technique. Thus, while EPA still has very good reason to encourage the practice, whatever temptation may have existed to provide positive "rewards" for its use (such as lower penalties) are now clearly inappropriate. Instead, the time has come for EPA to state in clear terms as a general proposition that a violating entity which cannot demonstrate that, as of the time of non-compliance, it was fully utilizing */ environmental auditing shall be considered to have not made "good faith efforts to comply". */ The consequence for that entity would be an appropriate upward adjustment of the penalty to be imposed. Thus, full use of environmental auditing would be considered a component of the minimum standard of behavior we now expect of regulated entities. This policy posture, if clearly articulated and widely disseminated, would appropriately encourage use of environmental auditing, while not diminishing the overall deterrence impact of the penalties we impose.

Additional Issues

Having recommended the issuance of a general policy statement, a number of additional issues need to be addressed. This report will not attempt to answer all of these questions.

1. How to announce the policy? A number of vehicles could be chosen to do this, considering the connection both to the Environmental Auditing Policy Statement and the Agency's penalty policies. One method would be a formal policy statement issued by

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*/ "Fully utilizing" means more than just conducting good audits. It also means using audit results in a pro-active fashion to prevent as well as remedy compliance problems.

*/ Where a statute and/or its corresponding penalty policy uses different terminology the same basic concept would apply.
the AA for Enforcement which would also be deemed an addendum to both the environmental auditing policy and the penalty policies.

Specific changes to media-specific penalty policies could follow, if needed, in due course.

2. What exceptions to the general policy should be recognized? What makes sense for large (and, probably, medium-size) entities may not be appropriate for small entities. Newly regulated entities may be another area deserving different treatment.

3. What transition should be allowed to the new policy? Since the new policy looks to the prior behavior of the regulated entity (i.e., did the violator use auditing as of the time of violation) some discussion may be appropriate of how to apply the policy to behavior that occurred prior to its issuance. Prospective application may be appropriate here, with the policy only applying to violations occurring after its issuance.

4. Perhaps the trickiest issue involves the question of relevance. What if the violator can show that there is no connection between the violation at issue and the presence or absence of environmental auditing?

5. What is the State role in all this? Should we encourage States to adopt this policy?

6. How do we define "adequate" or "full" use of environmental auditing? It may be enough to use the criteria appended to the July 9, 1985 auditing policy, noted above, but some thought should be given to this question, especially as it relates to the ways we expect persons to use audit results.

7. There may be a relationship between this policy and the general policy to encourage pollution prevention/waste minimization. Should this be explored further?

Next Steps

If the Enforcement Management Council endorses the general recommendation of this report a drafting committee should be established to draft a policy statement. This could then be circulated to the Regions (and, perhaps, the States) for comment prior to being finalized.

Self-Confession

There are circumstances where confession can be good not only for the soul but for the environment. It is in EPA's interest to encourage voluntary self-confession of environmental violations (i.e. reporting of violations where such reporting is not legally required). Such self-confession allows EPA (and/or States) to assure that appropriate remedial and preventive actions are taken and to mete out sufficient punishment to achieve deterrent effect.

Unlike the previous discussion of our expectations for environmental auditing, it is probably necessary to encourage self-confession through a more "carrot" oriented approach. Self-confession which is not legally required cannot now be considered something we can expect to see as the norm for regulated behavior. Therefore, consideration needs to be given to adjusting penalties downwards in appropriate instances of voluntary confession of violations.

The TSCA enforcement program has utilized a "self-confessor policy" under Section 5 of the Act since 1985. This policy is viewed by Headquarters personnel as having achieved some significant success. A brief description of the policy is attached.

In light of the above considerations there may well be substantial value in expanding our use of self-confessor policies. However, it must also be recognized that there are valid and important concerns about insuring the integrity of this process and in carefully considering its potential impact on other enforcement objectives. Moreover, differences in statutory mandate must also be taken into account. Therefore, it is recommended that as an initial step each media program initiate at least one pilot project similar to the TSCA policy. This will allow us to test and further develop this concept under various circumstances.

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

DEC 15 1989

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: TSCA Self-Confessors

FROM: Connie A. Musgrove
Chief Executive Officer
Office of Compliance Monitoring

TO: Workgroup Members
(See Below)

Below is a sketch of the TSCA self-confessor program which has been operating since 1985. We intend to provide some more analytical "meat to the bones", such as enforcement trends, amount of industry traffic in the office, negotiation issues, applicability to other statutes we oversee, such as pesticides, EPCRA, as well as the impact on the overall TSCA enforcement program. We were affected by a bit of the "plague" which so many key staffers are at this time of the year, so we are slightly off schedule. We will be present at the December 20 meeting and would like your reaction concerning any additions, deletions or revisions at this time.

cc: Douglas R. Blazey

Work Group Members: Donna Fletcher (A-101F)
Richard Caspe (2WMD)
Fred Stiehl (LE-134P)
Bruce Diamond (OS-500)
Terrell Hunt (LE-134A)
Bob Heiss (LE-134W)
Allyn Davis (6HWMD)

Self-Confessor Policy

- Section 5 (a)(1) of the Toxic Substances Control Act (1976) states that no person may manufacture a chemical substance without submitting a notice (PMN-Premanufacturing Notice) to the Administrator of EPA at least 90 days before manufacturing such substance.

- Reason for Establishment of a Self-Confessor Policy: Section 16 of TSCA authorizes the asessment of a civil penalty of up to $25,000 per day for each violation of TSCA. Perhaps because the Enforcement Response Policy (ERP) provided for substantial penalties for Section 5 PMN violations (penalties may be in the plus million dollar range), a number of potential violators began coming into EPA to confess violations (around 1984).

- As an incentive to encourage more voluntary disclosures for Section 5 violations in particular, an automatic penalty reduction for self-confessors was officially established in a January 9, 1985 TSCA Section 5 Enforcement Response Policy (ERP) Supplement. This ERP:

  -provided for a penalty reduction of 25% for voluntary disclosure
    -to be eligible a firm must:
      -make the disclosure prior to being notified of a pending inspection
      -disclosure cannot be one that is required by TSCA Section 8(e) [8(e) requires that any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonable supports the conclusion that such substance presents a substantial risk of injury to health or to the environment shall immediately inform the Administrator of such information...]
      -disclosure cannot be one that is made after EPA has received information relating to the alleged violation
      -disclosure must be made to EPA when the company has a reasonable belief that a violation has occurred.

  -provided for an additonal 25% penalty reduciton for immediate voluntary disclosure (on or within 30 days of discovery).

- Final TSCA Section 5 Enforcement Response Policy issued on August 5, 1988 which incorporated a 25% penalty reduction (up to 50% for immediate disclosure within 30 days of having reason to believe that they may be in violation) for self-disclosure.

  -provided for additional penalty reductions for the following factors:

1) the penalty could be decreased 15% for the good faith attitude of the violator. Likewise, for bad faith efforts, the penalty could be increased up to 15%.
2) 15% for takes all steps reasonably expected/requested by EPA to mitigate the violation or for costs for environmentally beneficial expenditures.

-penalty reduction may be made prior to issuing the civil complaint
-Civil Complaint should state the original penalty and the reduced penalty and the reason for the reduction.
-the Agency will disregard the firm's prior history of violations for self-confessors

o Largest penalty imposed on self-confessor-BASF A.G., a company headquartered in West Germany.
-Final Order-$1,281,950 penalty
-TSCA Sections 5, 13, and 15 violations
-25 counts in complaint
-11 chemical substances involved

o other significant cases-AT&T
-Civil Complaint issued on May 8, 1987 with a proposed penalty penalty of $2,625,000.
-AT&T had manufactured and used two chemical substances not on the TSCA inventory
-Consent Agreement and Final Order (CAFO) was signed on June 30, 1987 for $1,000,000 (***largest penalty collected under PMN program)

o INFORMATION NEEDS FROM SELF CONFESSORS
-to be eligible for the maximum reduction in civil penalties, pre-filing documentation of violations must be acceptable and timely
-when a potential respondent contacts EPA, the EPA representative shall advise the self-confessor that the following information must be delivered to EPA or submitted within 21 days or sooner:
1) name of chemical(s) or chemical substance(s) including a chemical composition
2) the suspected nature of the violation, i.e. No PMN, no NOC, or late NOC (Notice of Commencement-NOC-Section 8 (b)(1) requires that the manufacturer of the chemical substance file a Notice of Commencement of Manufacture on or within 30 days of beginning manufacture)
3) number of batches produced
4) a complete description of how the violations were discovered. By whom? When?
5) Has manufacture, use or distribution of the illegal chemical(s) been stopped?

6) Has (have) the chemical(s) reached consumers or end users?
7) What is the existing inventory of the chemicals?
8) Where are the non-conforming chemicals being stored? Who is the responsible corporate official?
9) Will you be submitting any TSCA CBI? OCM/OECM/EPA will explain how to handle the submission and what can be claimed as CBI.
10) What is the size of the business? Gross sales? Will there be an ability to pay defense?

o REFERRAL TO REGIONS
-OCM will refer self-confessor violations that take place in Regions II, III, or V to those regions for case development and filing. Recently, OCM and OECM delegated the TSCA Section 5 & 8 program to the remaining seven regions. As these regions become experienced in these two programs, Headquarters plans to refer self-confessors to them.

o INFORMATION TO BE TOLD TO SELF-CONFESSORS
1) Every effort will be made to expedite review of the PMN and to develop the case.
2) the eligibility for the (up to) 50% timely and voluntary disclosure may be forfeited if further evidence comes to light that the violations were knowing or willful, that notice to EPA was not timely, or that the "self-confession" notification was in response to a scheduled inspection.
3) Inquiries involving the status of a pending PMN or enforcement investigation shall be directed to one person. EPA reserves the right to limit inquiries to written requests or one telephone call per day to minimize disruption to normal Agency operations.

o TERMS TO BE MET PRIOR TO ISSUANCE OF ENFORCEMENT DISCRETION LETTERS

-Prior to the exercise of enforcement discretion to allow the continued manufacture, use, sale or distribution in commerce of chemicals not in conformance with TSCA, the following conditions must be met
1) there must be a complete disclosure of the chemical identity of the subject chemical(s) including the submission of a complete PMN
2) there must be a complete submission to EPA of all production data, including batch records, dates, volumes sales records and customer lists. The submitter shall certify as to the accuracy of such information.
3) All use or manufacture of the chemical must have stopped at the time of voluntary disclosure.

4) No enforcement discretion letters can be issued without a complete health and safety review by OTS. Section 5 (e) and 5 (f) chemicals [the chemical restriction Sections of TSCA] are generally never eligible for enforcement discretion.

5) Complaint terms are not negotiable.

o SETTLEMENT WITH CONDITIONS(EXAMPLES)

-BASF CONSENT AGREEMENT

-Required purchase of 5 advertisements in national trade publicatons.

-required two seminars on TSCA compliance in West Germany, and submission of material to EPA

-required certification of TSCA compliance program for BASF Group exports, and submission of materials to EPA

-required adherence to audit agreement (will audit 151 facilities for TSCA violations post 4-1-87)

-AT&T CONSENT AGREEMENT

-Required preparation of an internal TSCA training manual

-conduct in-house training programs for employees

-company expended up to $4,000,000 for their TSCA compliance activities.

o HIGHLIGHTS FROM 1989 HQ SELF-CONFESSOR PROGRAM

-15 OF 21 HQ cases which were issued and settled were self-confessors accounting for $1,782,654 (97.5%) out of $1,827,654 collected as of October 1989.

-Several Significant Cases

1) Eastman Kodak-TSCA Section 5-Complaint issued on 9-16-88 for $1,260,000.
2) Dow Chemical Co-TSCA Section 5-Complaint issued on 6-16-89 for $1,013,000.
3) Union Camp-TSCA Section 5-Complaint issued on 12-5-89 for $285,000.
4) McCloskey Corp.-TSCA Section 5-Complaint issued on 2-16-89 for $1,353,000.

federal register

Wednesday
July 9, 1986

Part IV

Environmental Protection Agency

Environmental Auditing Policy Statement; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPPE-FRL-3046-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these or similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:

Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2726;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assessment) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it is important to communicate this fact to Agency and state personnel, and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its decretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "environmental problems" to refer to the underlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly related to regulated entities' environmental auditing programs.

EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities [1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing." EPA Report No. EPA-230-09-83-006. February 1984; "Annotated Bibliography on Environmental Auditing," Fifth Edition, September 1985 both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports [3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[5] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

[3] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other means, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expenditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(*1*), environmental management effectiveness(*2*), and other matters (*3*) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(*1*) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:
Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(*2*) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which; a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures:

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;

7. Incorporate environmental protection into written operating procedures;

8. Apply best management practices and operating procedures, including "good housekeeping" techniques;

9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;

10. Utilize best available process and control technologies;

11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (beyond minimum legal requirements);

12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;

13. Exploit source reduction, recycle and reuse potential wherever practical; and

14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

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Part IV

Environmental Protection Agency

Environmental Auditing Policy Statement; Notice

ENVIRONMENTAL PROTECTION AGENCY

[OPPE-FRL-3046-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these or similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:

Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2726;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

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General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assessment) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it is important to communicate this fact to Agency and state personnel, and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its decretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "environmental problems" to refer to the underlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly related to regulated entities' environmental auditing programs.

EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities [1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing." EPA Report No. EPA-230-09-83-006. February 1984; "Annotated Bibliography on Environmental Auditing." Fifth Edition. September 1985 both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports [3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[5] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

[3] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other means, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expenditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(*1*), environmental management effectiveness(*2*), and other matters (*3*) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(*1*) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:
Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(*2*) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures;

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;

7. Incorporate environmental protection into written operating procedures;

8. Apply best management practices and operating procedures, including "good housekeeping" techniques;

9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;

10. Utilize best available process and control technologies;

11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (beyond minimum legal requirements);

12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;

13. Exploit source reduction, recycle and reuse potential wherever practical; and

14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

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ATTACHMENT B

B. Contractor Listing and Debarment/Suspension

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

APR 3 1990

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Final Report on Contractor Listing and Debarment/ Suspension--Enforcement Leveraging Workgroup

FROM: Robert G. Heiss
Associate Enforcement Counsel
for Water

TO: Douglas R. Blazey
Regional Counsel, Region II

As a follow up to our conference call on March 28, I have made final additions to the preliminary report on this subject that we provided March 12, 1990. Further, as you are aware, responsibility for additional follow up on the contractor listing and debarment/suspension issue in connection with the Enforcement for the 90s project has been transferred to Cheryl Wasserman in connection with her work on innovative enforcement.

BACKGROUND

The Agency has two sanctions that can be used as incentives for compliance and as disincentives for violating environmental laws:

1. Contractor Listing under 40 CFR Part 15; and

2. Debarment and Suspension under 40 CFR Part 32.

The applications and potential uses of these sanctions to leverage our enforcement resources are outlined below. For the purposes of this project, we considered only the discretionary use of Part 15, not the mandatory listing required for criminal convictions under the Clean Water Act (CWA) or Clean Air Act (CAA). Part 32 is entirely discretionary. The effect of either of these sanctions is to prevent a firm that violates environmental laws from contracting for business with any agency in the federal government and from receiving any financial aid from the federal government.

USE OF SANCTIONS

Contractor Listing

Over the past three years, the Contractor Listing Official has received four to five referrals a year. Few of those referrals result in listing. The major benefit of the referrals seems to be shortening settlement negotiations, thus saving Regional resources.

Debarment/Suspension

The Grants Administration Division reviews contractor debarment/suspension recommendations about 100 times a year. About 70 percent of these recommendations end in settlement, usually of criminal enforcement actions, e.g., contract fraud. The Grants office uses debarment/suspension to leverage settlements to include compliance programs to ensure honesty in future dealings with the federal government.

Both Sanctions

Once a month, GSA publishes its "List of Parties Excluded from Federal Procurement and Nonprocurement Activities." This list is distributed to all government contracting offices and is accessible by computer. Government contracting officers are supposed to consult this list before awarding contracts or other financial aid. Further, every firm bidding on a government contract must certify that it is not on the GSA list.

EPA tracks the GSA lists to ensure that listed facilities are included. However, neither GSA nor EPA has any way of knowing whether a listed firm inadvertently wins a contract or is approved for financial aid.

COMPARISON OF SANCTIONS

A comparison of contractor listing with debarment/suspension is outlined below.

40 CFR Part 15

A. Sanction for violations of certain sections of the Clean Air Act and Clean Water Act only.

B. Sanction affects only the violating facility, not the entire firm.

C. Facility has the right to a listing proceeding to determine the propriety of the proposed listing before the listing is effective.

40 CFR Part 32

A. Sanction for violations of any federal laws, environmental or otherwise.

B. Sanction affects all of the debarred or suspended firm's facilities.

C. Respondent in a debarment/suspension action has an opportunity for a hearing to contest the proposed debarment or suspension.

D. Sanction can be used only in the public interest and to protect the federal government and not for purposes of punishment (§32.115(b).

RELEVANT INFORMATION ALREADY AVAILABLE IN ALL ENFORCEMENT CASES

40 CFR Part 15

Information supporting a Regional request that a facility be listed is already developed as a usual part of preparing a litigation report. The criteria for listing that the Regions could apply routinely while preparing an enforcement action are:

1. Whether the facility has been convicted under §113(c)(2) of the CAA;

2. Whether the facility has been convicted of a criminal offense by a state court;

3. Whether a federal or state court has issued a civil ruling, including an injunction, judgment or consent decree, as a result of noncompliance with CAA or CWA standards at the facility recommended for listing;

4. Whether the facility has violated an administrative order issued under certain sections of the CAA and CWA;

5. Whether EPA has issued an NOV under the CAA; or

6. Whether the Department of Justice has filed a civil judicial action in a federal court against the facility recommended for listing.

If one of the criteria above is present, the Assistant Administrator for Enforcement can make a determination as to whether the recommended facility has a "record of continuing or recurring noncompliance" and list that facility.

40 CFR Part 32

Information that Regional offices already collect in preparing litigation reports that also are criteria for debarment or suspension are:

1. Whether the firm or persons in the firm are subject to criminal conviction or civil judgment for falsification or destruction of records, or making false statements;

2. Whether the firm or persons in the firm are subject to criminal conviction or civil judgment for committing any other offense indicating a lack of business integrity that directly affects the present responsibility of those persons;

3. Whether persons in the firm willfully violated a statutory or regulatory provision or requirement applicable to a public agreement or transaction; or

4. Whether the firm or persons in the firm failed to pay a single substantial debt, or a number of outstanding debts (but not including sums owed to the IRS) owed to any federal agency, e.g., fines, civil penalties, stipulated penalties.

If one of the criteria above is present, the Director of the Grants Administration Division may impose debarment or suspension.

CONCLUSION AND RECOMMENDATIONS

The possibility of being listed, debarred, or suspended may be an additional incentive to violating firms to enter into a self-monitoring, self-confession, and self-assessment program. The Agency cannot use these sanctions to coerce firms into the program, but focusing the regulated community's attention on these sanctions may encourage the kind of self-monitoring that would leverage the Agency's resources as well as implement the government's policy of doing business only with responsible persons.

We make the following recommendations:

1. BRING THE CONTRACTOR LISTING AND DEBARMENT/SUSPENSION PROGRAMS MORE INTO THE MAINSTREAM OF EPA'S DECISION-MAKING REGARDING AVAILABLE ENFORCEMENT RESPONSES TO NONCOMPLIANCE. We need to distribute more widely within the Agency information about these powerful and currently available leveraging tools and prepare additional guidance to assist field enforcement units to identify priority candidates for either Part 15 Contractor Listing or Part 32 Debarment and Suspension.

This would include guidance on evaluating a firm's compliance with court or administrative orders that resulted in the listing to determine whether delisting is appropriate. As a next step, informational guidance is required that describes the debarment/suspension sanction, the statutory and regulatory prerequisites to its application and in general, its availability to EPA and to enforcement officials. Informational guidance on both contractor listing and debarment/suspension needs to be widely distributed to EPA enforcement officials.

2. UTILIZE AS A CRITERION FOR APPLICATION OF EITHER PART 15 OR PART 32 THE ACTIVE ENVIRONMENTAL MANAGEMENT OF THE REGULATEE THROUGH SELF-CONFESSION AND PROACTIVE ABATEMENT ACTIVITIES. Each enforcement tool, if networked, has the potential to strengthen the impact or utilization of other programs. A willingness to not apply these additional sanctions when a regulatee self-confesses or demonstrates proactive abatement should encourage that environmentally beneficial conduct. As a next step, the Agency needs to develop a policy interpreting provisions of the contractor listing and debarment/suspension process with particular focus on activity by the candidate, such as self confession or voluntary implementation of more active abatement procedures, and its relevance to the Agency's listing or debarment/suspension decision.

3. LEVERAGE THE ENFORCEMENT POTENTIAL OF EVERY LITIGATION REFERRAL BY REVIEWING ALL THE VIOLATION HISTORY CONTAINED THEREIN AND SCREENING FOR LISTING OR DEBARMENT/SUSPENSION CANDIDATES. Every litigation referral essentially contains a review of all the information required to make a listing or a debarment/suspension decision. Although it will take additional effort to organize and evaluate it for its listing or debarment/suspension potential, the leveraging potential is substantial. OE should provide guidance requiring an Agency assessment of the applicability of these sanctions in connection with all enforcement actions.

4. CAPITALIZE ON EPA DATA THAT IS BETTER INTEGRATED TO (1) IDENTIFY CROSS MEDIA NONCOMPLIANCE AND (2) IDENTIFY THE EXTENT AND SIGNIFICANCE OF THE FINANCIAL RELATIONSHIP BETWEEN THE GOVERNMENT AND A LISTING OR DEBARMENT/SUSPENSION CANDIDATE. The Agency's data integration efforts can enhance the usefulness of existing Agency or public data in making determinations relevant to the appropriate case by case application of the contractor listing and debarment/suspension

sanctions. With more information readily available to the Agency, application of this sanction can become more routine and predictable, and its leveraging impact will most effectively be utilized.

Additional recommendations may be appropriate as further experience and study of these enforcement leveraging tools occur.

cc: Edward E. Reich
Kathy Summerlee
Cheryl Wasserman
Donna Fletcher (A-101F)
Connie Musgrove (EN-342)
Richard Caspe (2WMD)
Fred Stiehl (LE-134F)
Bruce Diamond (OS-500)
Terrell Hunt (LE-133)
Allyn Davis (6HWMD)
Bill Dickerson (A-104)

ATTACHMENT C

C. Cooperation with Citizens and Other Non-Governmental Organizations Committed to Environmental Compliance and Enforcement

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

DATE: March 30, 1990

SUBJECT: Cooperation With Citizens and Other Non-Government Organizations Committed to Environmental Compliance and Enforcement

FROM: Douglas R. Blazey
Regional Counsel, ORC

TO: Donna Fletcher (A-101F)
Connie Musgrove (EN-342)
Fred Stiehl (LE-134P)
Bruce Diamond (OS-500)
Terrell Hunt (LE-134A)
Bob Heiss (LE-134W)
Allyn Davis (6HWMD)
Bill Dickerson (A-104)
Craig Johnson, DOJ

Those of us in government who manage the regulatory programs, encourage and require compliance, and apply enforcement when compliance is not forthcoming often forget that the Congress did not intend us to be the sole or exclusive repositories of enforcement authority. Congress envisioned that citizens and other non-governmental groups could affirmatively supplement the compliance and enforcement activities of the government and empowered such groups to bring enforcement actions when EPA declined to act after notification. This empowerment of citizens to act in lieu of the government is a concept virtually as old as the nation itself and has antecedents in the environmental area going back to the turn of the century in the Rivers and Harbors Act and its authorization of qui tam actions.

For many reasons government has historically not been an active cooperator with citizens and their various advocacy groups who wish to utilize their Congressionally authorized authority to undertake enforcement actions. Some of the reasons that cooperation has been limited are well founded in problems inherent in direct cooperation between government and citizens in this essentially governmental function. For example, information gathered by the Agency may be confidential and be required to be maintained as such in order to protect the integrity of our own anticipated enforcement, whether it be a civil or criminal action. In other cases, citizens groups may bring actions and seek relief inconsistent with national penalty or compliance policy.

Nonetheless, recent history also shows a substantial increase in citizen suit enforcement particularly for Clean Water Act (CWA) violations and now also for violations of the Emergency Planning and Community Right-to-Know Act (EPCRA). The Safe Drinking Water Act (SDWA), the Clean Air Act (CAA), the Toxic Substances Control

Act (TSCA), the Ocean Dumping Act and the Solid Waste Disposal Act (RCRA) all have citizen suit authority. We can expect the trend towards increasing use of citizen suit authority will only accelerate in the future due to the ever heightening environmental consciousness of the public and the resource "squeeze" on government that precludes us from addressing every violation. To the extent that citizens groups successfully undertake enforcement, a positive result has been achieved; namely, the availability of citizen suit remedies has served to leverage our scarce enforcement resources. More to the point, Congress has leveraged the scarce federal enforcement resources. Moreover, to the extent that the regulated community views citizens enforcement as unpredictable, an even greater deterent effect is achieved by the reality of active, broadly spread citizen suit enforcement as regulatees seek to achieve compliance to avoid not only federal and state prosecution but also to avoid independent citizen enforcement actions.

Given this background, can further incentives to compliance be achieved in this arena by some level of cooperation between government and citizen enforcers? Hopefully the answer is yes.

Traditionally, the government has accepted reports of violations and excursions from permit limits or other standards from citizens as an initial indication of a violation. The government agency then "follows up" by sending an inspector to further investigate the problem. The most sophisticated citizen compliance programs have involved river or air watches including formal monitoring programs where citizens in an organized fashion supplement the existing eyes, ears and nose of the Agency. However, we have seldom cooperated or inter-acted with citizens groups to target areas for combined federal, state and citizen enforcement or to stimulate additional, independent citizen enforcement to fill a gap in government coverage that we would not otherwise address.

We speculate that at the very least enhanced cooperation between the government and citizens groups should result in a more positive attitude toward the government by the citizens group. Citizens groups often now attack the Agency for dilatory or absent enforcement rather than compliment EPA and state agencies for what they do accomplish. To those of us active in the field, it is a truism that there are more violations that we can address, consequently, we do not think the failure to address every violation should subject us to criticism. Rather, we think we should be complimented for developing targeting and priority systems that allow us to direct our resources at the most "important" violations. This targeting unfortunately leaves a significant number of lesser violations unaddressed. We can only be pleased with any effort on the part of citizens groups that covers some of the arena we are unable to cover. However, our collective credibility would be enhanced if citizens viewed their activities as a cooperative venture with us in aid of the

general enforcement policy of the government rather than in the manner adversarial to us. We believe a field test or pilot project of a cooperative effort would allow us to explore all the pluses and minuses, costs and benefits, problems and opportunities associated with such a more interactive relationship.

To this end Region II has volunteered to develop and field test a paradigm of a cooperative EPA, state, citizen enforcement effort. The Deputy Regional Administrator is fully committed to this project and wishes to take an active part in it. We are aware that both headquarters and DOJ have an interest in such a project because of the complex legal and policy issues involved, and we would welcome their participation in this prototype. Given the fundamental and profound involvement of state government in virtually all of the basic enforcement programs, we would hope to enlist our states' active involvement in the prototype project. Our expected first step would be to invite each state to participate with us in an effort to establish a collaborative venture with the active citizens' groups in each jurisdiction. The stated purpose of the coordinated effort would include the following elements:

- To ensure maximum enforcement pressures are brought to bear on violators of federal and state environmental laws.
- To ensure that penalties and relief sought by citizens groups are at least as stringent as those that we would seek.
- To coordinate the efforts of federal, state and local governments with that of environmental citizens groups to avoid conflict, minimize duplication of efforts, and reach a common goal of maximizing compliance with environmental laws.
- To foster a greater spirit of understanding and cooperation between federal and state governments and citizens on environmental enforcement issues.
- To optimize the opportunity for pollution prevention and waste minimization in enforcement actions by all parties.

Assuming each state is willing to participate, we would plan for the first major meeting with citizens groups. We envision the first meeting to be quite general in tone to see if the basis for cooperation or an interest in cooperation exists. We do not expect to "jump" immediately into such hard issues as data sharing, data protection, or targeting. Issues related to confidentiality, data sharing, specific targeting, allocation of violations, and/or assignment of responsibility for certain types of violations would all be deferred. The initial session is to determine if the governments and the citizens groups can identify

benefits from the more cooperative approach. The benefits could be as simple as sharing general information on compliance/enforcement goals which would be useful to the other in developing a more active and coordinated relationship. Once it is established that there is a basis for cooperation, further meetings will be held to develop particular areas of cooperation and all of its ramifications. A tentative schedule to test this paradigm over several months is suggested below:

Start Month 1
a) Internal meeting with media Division Directors, OECM, headquarters compliance offices and DOJ to scope out issue/concerns and to develop discussion items for initial meetings with states and citizen environmental groups.

b) Discussions between EPA and state counterparts on the draft meeting proposal.

Month 2
a) Develop proposed agenda for the meeting of EPA, the state agency and the citizen environmental groups.

b) Assemble list of active groups.

c) Invite citizen environmental groups to an introductory meeting.

Month 3 Hold meeting with citizen environmental groups to solicit their interest in and comments upon the establishment of an ongoing, cooperative enforcement relationship.

Month 4 Additional meetings as necessary to develop working protocols of cooperation.

Month 5 Implement cooperative protocols.

A number of issues will have to be addressed in the process of developing cooperative protocols. They include:

- Procedures to increase effective utilization of publically available compliance information (information involving any criminal enforcement on the part of the federal or state governments will not be shared).
- Procedures to identify areas of enforcement emphasis and, as appropriate, possible enforcement targets.
- Commitment to respecting the confidentiality of the discussions.
- A statement must be included that recognizes that this agreement does not change our delegation agreement with our states.
- Any new relationships with citizens cannot restrict our statutory authorities.

ATTACHMENT D

D. Field Test the Leveraging Benefit of Utilizing a Regional Administrator's Authority and Public Information Access

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202

JAN 3 1 1992

MEMORANDUM

SUBJECT: Regional Enforcement Pilot Project

FROM: Robert E. Layton Jr., P.E. Robert E. Layton Jr.
Regional Administrator (6A)

TO: Gerald A. Bryan, Director
Office of Compliance Analysis and
Program Operations (LE-133)

I am herewith submitting the Region 6 Pilot Enforcement Project. This project was developed by our Regional Enforcement Council which I established under the Chairmanship of Deputy Regional Administrator Joe Winkle. The Council consists of the Division Directors and the Regional Counsel. The Council in turn established four workgroups which are more fully described in the Project description.

The Region is fully committed to the Project and we believe the environmental benefits to be obtained far outweigh the cost in resources and STARS commitment reductions. Our STARS commitments will be reduced approximately 10 - 15% as we shift up to 15% of our enforcement resources to this project.

We look forward to your early approval. If you have any questions, please contact Joe Winkle FTS 255-2110.

cc: F. Henry Habicht II, Deputy Administrator
James M. Strock, AA for OCEM

Region 6
Proposal for Regional
Enforcement Pilot Project

DESCRIPTION OF PROJECT/STATEMENT OF ENVIRONMENTAL PROBLEM

The focus of the Regional Enforcement Pilot Project (REPP) is a two prong approach that will attempt to obtain a reduction of risk from toxic chemicals emitted from industrial sources in Region 6. The first approach will initiate a review of selected sources identified in the recently released Headquarters Air Toxics Exposure and Risk Information System (ATERIS), also referred to as the "Waxman" list, to explore (1) the possibility of reducing toxic emissions (2) insuring compliance with all regulatory provisions and (3) conducting a complete multi-media risk assessment. The second approach will direct our attention to a specific geographic area in Region 6, the Baton Rouge - New Orleans corridor, well known for its high concentration of industrial sources emitting toxic chemicals. This second initiative will initiate a multi-media compliance investigation and subsequent multi-media risk assessment of selected sources in the target area to explore the potential for risk reduction. The term multi-media includes at a minimum the Regional air, water, hazardous waste, superfund, toxic substances, wetlands, groundwater, underground injection, underground storage tank and pesticides programs. Personnel from all Divisions within the Regional Office will be participating in this project.

This pilot project will be referred to as the Toxic Release Reduction Project. In addition, the ATERIS initiative will be called PHASE I, while the Baton Rouge/New Orleans initiative will be referred to as PHASE II. In general both approaches will be on a parallel track, but the PHASE I initiative is expected to move quicker into the negotiation phase because of the work that has already been done by Headquarters offices.

In the PHASE I initiative target facilities for the initial group will be those with a recalculated individual risk of 10^{-4} or greater, as indicated on the revised ATERIS list of January 2, 1990, of which there are five in Region 6. These facilities are the following:

- Texaco, Port Neches, Texas
- Mobil, Beaumont, Texas
- Shell Oil, Deer Park, Texas
- Ameripol Synpol, Port Neches, Texas
- American Chrome, Corpus Christi, Texas

Although several Headquarters offices have initiated some contact with three of the above facilities, the Regional office will coordinate its activities in concert with those Headquarters initiatives. The Regional review will address all media, while the current Headquarters initiatives are addressing a specific air pollutant emission situation.

A key feature of the PHASE I initiative will be a meeting between the Regional Administrator, State Officials, and Company CEOs; who have not already met with EPA to discuss reductions to reduce the risk identified by the ATERIS data and regional analysis of TRI data. Multi-media inspections and analysis will also be conducted to insure facility compliance and assess other media risk problems, if any, at the five target facilities. Enforcement actions will be initiated as appropriate.

The PHASE II project study area will be the parishes or parish along the Mississippi River starting at Baton Rouge, Louisiana downstream to New Orleans. A risk screening will be performed on the facilities reporting under SARA Section 313 which will consider the relative toxicities of the chemical emissions as well as the quantity of emissions. A number of facilities will be chosen for multimedia investigations based on this screening, compliance history review and other data available to the regional office.

PHASE I and II initiatives will focus on reductions of toxic chemical emissions which have exhibited a demonstrable or predictable effect on public health and the environment and will seek facility alterations through the following mechanisms.

- Formal Enforcement Actions - Multimedia statutory provisions would be utilized to achieve compliance with existing provisions of regulations and permits. Negotiated settlements could include reductions in unregulated emissions.

- Review of Existing Permits - To be considered by all media where results of inspections reveal a need to revise existing permits to address a problem which would not result in an enforcement action.

- Non-traditional Methods to Effect Emissions Reductions - This could include such techniques as a meeting between the Regional Administrator and selected facilities to discuss voluntary plant-wide emission reductions. Another possible technique would be to utilize existing authorities such as the RCRA permit program or the Superfund program to obtain reductions in unregulated air and water emissions

- Use of Imminent and Substantial Endangerment provisions of the various media regulatory authorities. This might be necessary for high risk facilities where there is an urgent need for

significant EPA action to reduce the risks to the public health and environment.

- Environmental Awards Program - Continue regional environmental awards program for facilities which are in compliance with all environmental regulations in an exemplary fashion. Consider additional criteria for eligibility such as voluntary participation by facilities in this pilot project to lower total emissions by at least 90%.

- Voluntary Compliance - When facilities agree to voluntarily exceed current regulatory requirements to lower emissions at facilities, and/or implement pollution prevention measures consider incentives such as decreasing EPA surveillance and inspections and only require self auditing to encourage voluntary compliance.

- Voluntary Reporting - To encourage facilities to report and correct violations, consider incentives such as agreement to not initiate criminal prosecution for the violations a facility voluntarily reports which EPA is not aware of.

- Reduction In Penalties For Enforcement Actions - Consider incentives for facilities to lower emissions of unregulated chemicals at facilities such as agreement to lower penalties proposed for violations detected during multimedia evaluation of the facility.

Multi-media inspections will be conducted along with multi-media information requests for data and waste management practices. A keystone of the pilot project will be to review the potential for pollution prevention.

A significant activity to support this project is integration of data from all existing sources into one system, such as the Geographic Information System (GIS). A GIS database will be developed to support this project. The purpose of this GIS will be:

- spatially integrate compliance, release, ambient, and population data,

- conduct geographic analyses of the proximity pollutant sources to human populations and sensitive habitats,

- provide a frame work for facility specific and area wide characterization, and

- track and display the progress and results of the project.

The GIS will be developed in ARC/INFO on the Regions's GIS computer. Environmental data will be pulled from several EPA databases. Digital data will be secured from USGS, The State of Louisiana, the Census Bureau and other available sources. A survey of applicable program and other Regions and EPA offices will be conducted.

ENVIRONMENTAL RESULTS YOU EXPECT TO DEMONSTRATE

Reductions in the release of toxic pollutants resulting in reduced risk to human health and the environment. In addition, improved compliance with all environmental regulations applicable to the facility.

RESOURCES TO BE APPLIED TO THE PROJECT

In general, up to 15% of the Region's Enforcement Resources (including field support; such as inspectors) will be devoted to this project. Additional assistance from public affairs and state grant personnel will also be required. This project will also require a significant amount of the Regional programs' data support and GIS resources. A more detailed analysis will be provided by each media prior to March 31, 1989.

ORGANIZATIONAL IMPLICATIONS

A Regional Enforcement Council drawn from the senior managers and chaired by the Deputy Regional Administrator has been formed to oversee and direct this project. Existing organizational structure has not been changed but four workgroups have been formed to do the planning and coordinate the implementation of the project. These workgroups are the following:

- Enforcement Integration Workgroup - To nominate the pilot project and integrate existing enforcement activities and explore new enforcement initiatives. This workgroup includes all Enforcement Branch Chiefs to facilitate coordination of the multimedia focus of the project. After the initial planning of the Regional Pilot Project, it is expected that this workgroup will be divided into two workgroups, one dealing with the PHASE I initiative and one dealing with the PHASE II initiative.

- Data Integration Workgroup - To integrate selected data from existing sources into one system to support the requirement of the regional enforcement pilot project.

- State Relations Workgroup - To define the role of the state in the regional enforcement pilot project and seek active state participation.

- Enforcement Communications Strategy Workgroup - To develop a communication strategy dealing with the regional enforcement pilot project and related actions that result from the pilot.

To implement the project, specific enforcement teams will be developed across media programs and will if possible, include both State and EPA personnel. Ideally a team will be assigned to each target facility and will be responsible for coordinating the activities associated with the project at that facility. Each team will be headed by a workgroup member. Team members will be designated by each media. Depending on the situation, an individual may serve on more than one team.

Although the pilot will be implemented through existing organizational structure, one of the sub-elements of this pilot will be to review the need for any organizational change in order to fully implement a multi-media enforcement effort.

STATE AGENCY INVOLVEMENT/ISSUES

The state relations workgroup will be responsible for effecting the support from, and coordination with, appropriate state agencies in Louisiana and Texas. Region 6 will actively seek the State's participation. Upon finalization of this proposal, a briefing will be conducted for both Texas and Louisiana to inform them of our specific plans. Issues to be resolved with the State include:

- Willingness of state agencies to participate in this pilot. Additional funding if any, from EPA Region 6 to support activities or tradeoffs with existing activities will have to be negotiated with state agencies and MOUs/grants amended.

- Degree of Participation by state agencies could vary from none to full participation in all areas. This will also have to be negotiated with state agencies.

- Coordination with ongoing State activities and special initiatives will need to be addressed to avoid duplication.

- The State will at a minimum have to be kept fully informed of all EPA Region 6 activities of this pilot program.

Assuming State agreement to participate, we recommend a joint announcement with the State of implementation and accomplishments of the pilot project.

SUPPORT/ASSISTANCE REQUIRED FROM ENFORCEMENT MANAGEMENT COUNCIL, HEADQUARTERS OFFICES, AND/OR NEIC.

Since several Headquarters offices have initiated discussions with several of the sources on the ATERIS list, the Region will need to work with those offices to insure an effective agency approach for dealing with those facilities. Likewise, Headquarters offices should keep the Regional office informed of its dealing with the sources in the project.

The region will inform Headquarters Program Offices on changes to National STARS targets currently committed to by the Region. These will be specifically identified in the March 31, 1990, Quarterly Report and it is anticipated that there will be a reduction of 10-15% of targeted measures as a result of this project.

Specific assistance from various Headquarters Offices may be required in the facility risk determination phase of the Pilot. These requests will be made on an as needed basis.

TRADEOFFS WITH OTHER PROGRAM OUTPUTS

There will be some reduction in EPA inspections and enforcement actions in other geographic areas. Headquarters offices will be notified of specific STARS reductions per Mr. Habicht's December 15, 1989, memo. Also review of new permit applications may be impacted by review of existing permits in the pilot project areas. The benefits of this pilot project should outweigh the tradeoffs and allow the enforcement effort to be more focused in an area and against sources with higher risks from emissions.

PROJECTED COMPLETION DATE/INTERIM STEPS

The Regional Enforcement Pilot Project is envisioned to last three to five years. Provided below is an indication of activities for the first two years. An annual update will be provided each year.

YEAR ONE

Initial Planning/Organization	Dec. 1989
Develop Pilot Proposals and Submit to Headquarters	Jan. 1990
Meet with States and identify level of State participation	Feb. 1990
Develop detailed Regional Workplan	Feb. 1990

PHASE I

Review TRI data and develop, with ATERIS data, plant risk situation	Mar. 1990
Meet with CEOs to discuss plan to reduce risk	Apr. 1990
Receive reduction plan	Jun 1990
Evaluation of facilities for compliance, reduction plan and multi-media risk	Aug-Sept. 1990
Initiate enforcement as appropriate	Oct. 1990
Annual project evaluation	Dec. 1990

PHASE II

• Select target facilities, using TRI data, and other Regional information	Mar. 1990
• Send information requests	Apr. 1990
• Receive responses	May 1990
• Evaluate responses	Jun 1990
• Multi-Media inspections	Jul-Aug 1990
• Evaluation of compliance	Sept-Oct 1990
• Finalize information for determination of total risk assessment	Oct-Nov 1990
• Initiate enforcement as appropriate	Nov. 1990
• Annual project evaluation	Dec. 1990

YEAR TWO

PHASE I		PHASE II	
• Follow-up on residual risk at targeted facilities	Jan. 1991	• Meet with companies to discuss reductions of risk	Feb. 1991
		• Submit Reduction Plan	May 1991
• Review ATERIS list for additional sources at 10-3 risk for further investigation	Feb. 1991	• Conduct multi-media inspections to review reduction and residual risk.	Jun-Jul 1991
• Repeat year one activities for new target sources.	Feb-Sept 1991	• Select additional sources and repeat process.	Oct. 1991
• Annual project evaluation	Dec. 1991	• Annual project evaluation	Dec. 1991

Quarterly reports will be submitted to Headquarters on March 31, June 30, September 30, and December 31.

(2) Formal Enforcement Actions could take significant amounts of time.

REGION 10

PROPOSAL FOR REGIONAL ENFORCEMENT PILOT PROJECT

Description of Project/Statement of Environmental Problem

Project Title: Data Link Approach for Targeting and Prioritizing Multimedia Compliance Inspection/Investigations

Each media program has a focused program specific approach for issuing permits and conducting compliance inspections on permitted facilities; consequently environmental problems associated with other media programs at those facilities have not been included. Also missing in the "single compliance program" approach is the potential combined adverse environmental impact of multimedia violations (some of which may be individually minor, but collectively critical).

EPA, nationally, has initiated a data linkage project which will have the capability of combining Agency compliance and facility information now located in individual computer data files. This combined information will eventually be used to evaluate facility "compliance" and "potential release" status on a multimedia basis. An Agency steering committee and workgroup have been established to develop the approach and methodology to accomplish this complicated task. Although some of the work is scheduled to be completed in calendar 1990, the final goals are not expected to be achieved until 1993 or later.

Region 10 proposes to develop a less complex data link of Regional data bases which focuses on the permits violation history of all Regional facilities. The following compliance data bases will be included in the data link: Water (NPDES–PCS), Air (CDS), TSCA (FATES–Asbestos), RCRA (RCRIS), FIFRA, CERCLA (CERCLIS), and all legal cases which are tracked in DOCKET. The proposal includes creation of a summarized data base which will draw upon the data bases described above to extract selected data (e.g., permit violations, location, name, etc.) and generate summaries by source to provide a multimedia compliance assessment for all sources within Region 10.

In addition, for selected geographical area(s) (possibly up to state level), the facility multimedia compliance violation summaries will be combined with other Regional data (i.e., EPCRA Section 313 Toxics Release Inventory, population density and environmental and recreational resource data) on the Region's GIS. These summary data displays would then form the basis for applying "Risk Screening" techniques wherein the health implications of the pollutants, the quantities of pollutants emitted and the geographic area would be utilized to rank, at least in a relative sense, the risks associated with the releases. The effort could then be utilized to prioritize multimedia compliance inspections/ investigations and enforcement actions for:

1. Specific industries
2. Geographic areas
3. Pollutant(s) of most concern

This proposal will provide a nearterm "real–world" application of the national data link approach at the Regional level and will allow the Region to focus on facilities that may have critical environmental impacts at the local and state level but may otherwise not appear to be important when viewed nationally. This information should be valuable to the national data link workgroup while they are still in the developmental stage of the project.

PROPOSAL FOR REGIONAL ENFORCEMENT PILOT PROJECT

Description of Project/Statement of Environmental Problem

Responsibility for regulating waste emissions from pulp mills is fragmented among many EPA programs. This situation wastes agency resources and may inadvertently encourage cross-media shifts of pollution rather than overall pollution reduction.

Region 10 proposes multi-media inspection of pulp mills focusing on toxic emissions. We would plan to use EPA and state inspectors and LOE contractors. Other staff would begin the project by reviewing available data, including CEM reports and Toxic Release Inventory (TRI) data. We would start by selecting mills in a high priority, environmentally sensitive geographic area. The project would be closely coordinated with two pollution prevention initiatives targeted at the pulp industry: (1) a Pulp Mill Pollution Reduction Initiative focusing on identifying all toxic releases to the environment and identifying ways of reducing the toxics generated; and (2) a recently funded Pacific Northwest Pollution Prevention Research Foundation which supports needed research and surfaces related policy issues.

Environmental Results Expected

Improved air and water quality because remaining toxic pollutants would be effectively regulated. It would lead to corporate-wide multi-media pollution control strategies and consent decrees with enforceable limits and stipulated penalties.

Resources Applied to the Project

LOE contract funds of $10,000 and EPA staff from divisions.

Organizational Implications

Coordination of inspections among various staff and LOE contractor shouldn't be a problem as we have the precedent of Federal facility multi-media inspections.

State Agency Involvement/Issues

Anticipate participation by state staff, therefore we will need to market the concept to them. Again, we have some precedent so it shouldn't be a problem.

Support/Assistance Required from the Enforcement Management Council, HQ Offices, and/or NEIC

Support may be required in pursuing multi-media enforcement actions from the EMC and/or HQ. The NEIC may be needed to document night-time violations at the mills (use of LIDAR truck).

Environmental Results Expected

This project will allow multimedia industrial inspections to be targeted and performed based upon criteria of "most important sources and greatest potential environmental impact" first.

Resources Applied to the Project

Most data bases are now available or will be during FY 90; therefore approximately $30,000 will be needed to hire a contractor to provide the link programming and to QA facility data. In addition approximately 1/2 FTE will be needed to provide GIS support. Approximately 0.1 FTE within the compliance program will be necessary during FY 90 for the purpose of supporting the data link activity.

Organizational Implications

No major organizational implications are anticipated. However, an individual (contractor or FTE) will be needed on an ongoing basis to keep the system updated so that a current focus on compliance status and environmental results can be maintained. In addition, a multimedia permit/compliance committee should be formed to evaluate combined data and reach consensus on facility prioritization for multimedia activity.

State Agency Involvement/Issues

No active state involvement is expected in FY 90 other than to familiarize them with process and goals. In FY 91, the Region would invite them to combine data bases (through the state data management project) and make joint decisions regarding multimedia compliance activity.

Support/Assistance Required From EMC, Headquarter Offices, NEIC

Contract dollars to fund in-house data management contractor, support (either dollars or personnel) in providing additional data bases to GIS system, possibly some inspection support from NEIC in FY 91.

Tradeoff with Other Program Outputs

It is anticipated that actual permit writing and compliance inspection support will not be shifted from the current FY 90 plans until late in the FY. At that time some of the existing commitments for compliance inspections will have to be either reduced or allowed to be modified in favor of the new multimedia compliance approach.

Projected Starting Date - Completion Date

Start: Feb. 1990
Completion: September 1990 for the data link portion of the project

ATTACHMENT E

E. Environmental Awards

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202

April 20, 1990

MEMORANDUM

Subject: Draft Final Report on Compliance Incentives/
Leveraging Project

From: Allyn M. Davis
Director
Hazardous Waste Management Division (6H)

To: Douglas R. Blazey
Regional Counsel (20RC)

In response to your memorandum dated April 18, 1990, and our telephone conversation , I have attached the revised project document for the Environmental Awards project. This document is to be included in the overall report.

If you have any questions, please contact me or Randy Brown at FTS 255-6745.

Attachment

STATE ENVIRONMENTAL COMPLIANCE RECOGNITION PROGRAM

BACKGROUND

The State Environmental Compliance Recognition Program, initiated at the discretion of each Region, is intended to formally recognize facility management which has been consistently successful in meeting the Federal and State environmental regulations. This is an annual, multi-media award presented to facilities in each State which meet the requirements of more than one environmental regulatory program. The multi-media awards will be presented to industrial (i.e., manufacturing), municipal, and Federal facilities, as appropriate.

The majority of facilities are inspected periodically by EPA or EPA-authorized States to determine their compliance with the regulatory requirements of the environmental regulations. Each of these programs have complex requirements, and facilities which have met all of the requirements over the two year period are deserving of some type of recognition.

CRITERIA

The criteria for a State Environmental Compliance Recognition Program will require that the facility have annual inspections for the last two years, is in compliance with applicable State and Federal environmental regulations and is multi-media. In addition to compliance status, the facilities will be further evaluated for non-regulated environmental activities(i.e, noise, odor), as well as public perception as a good corporate citizen.

SCREENING PROCESS

In order for a facility to be eligible for an award, compliance inspections must have been performed for the last two years or as required by the media programs. This inspection must be a complete review of the facility for each media program. A partial inspection will not be considered as an annual review. The inspection may be conducted by EPA, the State or their contractors. If certain types of facilities do not require an annual inspection, then the reviewer will look at the most recent applicable inspections.

A determination by EPA Regional staff will be made regarding the facility's compliance status. A facility must meet the requirements in more than one media and be in physical compliance with all media regulations for two years, to be eligible for consideration. A checklist will be completed by EPA Regional staff on each facility noting the compliance status for all environmental regulations. State program staff will also review the list of facilities for compliance with State regulations that go beyond Federal requirements.

SELECTION PROCESS

An Award Selection Committee will be established in each State, and be comprised of representatives of elected officials, public interest and environmental groups, media, the regulated industry and trade associations. Members should be knowledgeable of environmental programs. Each State Environmental Program will be requested to provide names for membership in the State Environmental Compliance Recognition Selection Committee.

REGIONAL ENVIRONMENTAL COMPLIANCE "PLUS" RECOGNITION PROGRAM

BACKGROUND

The Regional Environmental Compliance "Plus" Recognition Program is being initiated by the EPA to formally recognize management which has been consistently successful in meeting the Federal and State environmental regulations while implementing innovative solutions to environmental problems, thereby, demonstrating strong environmental ethics with a strong preventative program. This is an annual, multi-media Regional award presented to organizations which meet the requirements of more than one environmental regulatory program.

CRITERIA

Organizations eligible to receive the Regional Environmental Compliance "Plus" Recognition award are multi-media industrial and Federal facilities. The organizations must have more than one facility in the region and one must have been a winner of a State Compliance Recognition award. In the event that a Region is not implementing a State Environmental Compliance Recognition Program, candidates will be nominated for this award based on the screening criteria below. In addition, all facilities owned or governed by the same organization in one or more States within the region must be in compliance with applicable State and Federal multi-media regulations. The organization must also demonstrate its commitment to enhancing and preserving the environment, for example: having a history of compliance for greater than two years; establishment of corporate goals to reduce pollution within specific timeframes; institutionalization of pollution prevention practices by changing processes to eliminate and recycle wastes; support of an environmental education effort in the workplace and community; and a reward system for employees with innovative ideas in environmental protection.

SCREENING PROCESS

A checklist will be completed by EPA Regional staff on each organization which meets the basic criteria noting the compliance status for all of the environmental regulations and a synopsis of the compliance history of all other facilities owned by the same organization, within the region. State program staff will also review the organizations for compliance with State regulations. Any information in the State files which will enhance the "Plus" activities of an organization, will be submitted to EPA for review. Letters will be sent to all organizations meeting the criteria, requesting that they submit information on their activities that go beyond compliance with the regulations.

SELECTION PROCESS

An Award Selection Committee will be established in each Region, and be comprised of representatives of elected officials, public interest and environmental groups, media, the regulated industry and trade associations. Members should be knowledgeable of environmental programs. Each State will be requested to provide names for membership in the Regional Environmental Compliance "Plus" Recognition Selection Committee. The Committee will meet at the Regional Office and review the eligible organizations.

The State Selection Committees will screen the final list of facilities identified by EPA and State environmental personnel as eligible, discussing any public concern from, or contributions of a facility's management to, the local communities. Following their screening and discussion, the Committee will formally vote by ballot to select the facility or facilities best exemplifying compliance and conscientious environmental management practices.* Each State Selection Committee will select one facility in the following categories: industrial, municipal, and Federal. This is contingent upon facilities qualifying in each category.

RECOGNITION PRESENTATION

Following the Selection Committee's decision on facility selection, an appropriate presentation date will be established for the recognition ceremony at the State Office or State Capitol. The presentation will be conducted by the Regional Administrator and Governor. Letters of announcement and invitation to the presentation ceremony will be sent to State and Local Officials and Selection Committee members.

Presentation

1. Introduction of Special Guests
   a. Selection Committees - Air, Hazardous Waste, Water
   b. State and Local Officials
2. Explanation of State Environmental Compliance Award, multi-media
3. Present award to facilities

Press releases will be prepared for distribution prior to the ceremony explaining the Program and its significance to the regulated community and to the local population. It is anticipated that the presentation ceremony will be covered by the local media.

Each facility will receive a plaque and a specially-designed flag to be flown over the facility. The plaque will specify the timeframe of compliance which was reviewed.

The winners of the State Environmental Compliance Recognition Program will then be eligible to compete for the Regional Environmental Compliance "Plus" Recognition Award. Each State may or may not have facilities eligible to compete for the "Plus" award.

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

NATIONAL ENVIRONMENTAL COMPLIANCE "PLUS" RECOGNITION PROGRAM

BACKGROUND

The National Environmental Compliance "Plus" Recognition Program is being initiated by the EPA to formally recognize organization management which has been consistently successful in meeting the Federal and State environmental regulations while implementing innovative solutions to environmental problems, thereby, demonstrating strong environmental ethics with a strong preventative program. This is an annual, multi-media national award presented to organizations which meet the requirements of more than one environmental regulatory program. The multi-media awards will be presented to one industrial and one Federal facility each.

The National Environmental Compliance "Plus" Recognition Award Program will be coordinated in EPA Headquarters (HQ), with input from the regional office staff.

CRITERIA

In addition to being a Regional Environmental Compliance "Plus" Recognition award winner, the criteria for receiving a National Environmental Compliance "Plus" Recognition award is that the organization must have facilities in more than one region and all facilities in more than one region must be in compliance with all media regulations. The organization must also have established nationwide environmental initiatives to address environmental issues.

SCREENING PROCESS

The organizations eligible for the National Environmental Compliance "Plus" Recognition Award will have been screened at the Regional level and are the Regional Environmental Compliance "Plus" Recognition winners.

SELECTION PROCESS

An Award Selection Committee will be established by Headquarters. They will be comprised of representatives of national elected officials, public interest and environmental groups, media, the regulated industry and trade associations. Members should be knowledgeable of environmental programs.

The Selection Committee will screen the list of eligible organizations, discussing any public concern from, or contributions of a organization's management to, the local communities. Following their screening and discussion, the Committee will formally vote by ballot to select the organization or organizations best exemplifying conscientious environmental management practices.* National Awards will be presented to one industrial and one Federal organization. Runners-up will also be recognized.

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

The Selection Committees will screen the final list of eligible facilities, discussing any public concern from, or contributions of a facility's management to, the local communities. Following their screening and discussion, the Committee will formally vote by ballot to select the facility or facilities best exemplifying conscientious environmental management practices.* Regional Awards will be presented to one industrial and one Federal facility. This is contingent upon facilities qualifying in each category.

AWARD PRESENTATION

Following the Selection Committee's decision on facility selection, an appropriate presentation date will be established for the award ceremony at the Regional Office. The award ceremony will be conducted by the Regional Administrator. Letters of announcement and invitation to the award ceremony will be sent to local facility managers, Corporate Chief Executive Officers, Federal Agency Executive Officers, the appropriate U.S. Congressional and Senate delegations, State Governors, State Legislative delegations, local Mayors, State Agency Directors, as well as to the Selection Committee members.

Press releases will be prepared for distribution prior to the ceremony explaining the Award and its significance to the regulated community and to the local population. It is anticipated that the award ceremony will be covered by State-wide media.

Each facility receiving an award will receive a plaque, which will specify the timeframe of compliance which was reviewed, and a flag.

The winners from each Regional Environmental Compliance "Plus" Recognition Award will then be eligible to compete for a National Environmental Compliance "Plus" Recognition Award.

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

REGIONAL LIST OF TOP 10 NON-COMPLIANT FACILITIES

BACKGROUND

Each Region may consider publically indentifying those facilities which have a verified history of significant noncompliance with multi-media Federal and State environmental regulations. These are facilities which have demonstrated a consistent lack of commitment to protecting the environment.

The majority of facilities are inspected periodically by EPA or EPA-authorized States to determine their compliance with the regulatory requirements of the environmental regulations. Each of these programs have complex requirements and facilities which are consistently non-compliant with the requirements should be made known to the public.

This project could be implemented on a regional or national basis.

CRITERIA

Facilities will be reviewed for multi-media compliance for a minimum of three years. Their non-compliance status will be determined based on the following: non-compliance in more than one media for more than three years (significant EPA violations); length of time out of compliance, (such as time from violation determination to settlement to compliance); number of civil enforcement actions; number of violations per outstanding enforcement action; penalties assessed, (considering amount, mitigation required, lack of good faith efforts); environmental damage indicators and risk, (such as quantity of emissions/discharge, magnitude of environmental impact/degradation, public health implications); and negative non-regulatory problems, (such as odor and noise). Facilities will also be checked for compliance with environmental regulations and their significance/impact on States and/or City/Counties ability to meet specific environmental requirements i.e., National Ambient Air Quality Standards, Maximum Contaminant Level or Maximum Concentration Limit, etc.

SCREENING PROCESS

Each media program will prepare a list of at least 10 facilities which have been non-compliant for the last three years and not on a compliance schedule. To insure the accuracy of this list, the facility files will be reviewed to supplement the data tracking system used by the programs. As necessary, State files will will also be reviewed. Potential non-compliant facilities will be further checked further checked to see if other facilities in the Region, under the same Organization are non-compliant for significant violations. A checklist will be completed by each media program for each potential facility noting the compliance history.

This effort will be coordinated by one office in each region. Those facilities which have significant violations in more than one media program will be submitted to the Selection Committee for their review.

AWARD PRESENTATION

Following the Selection Committee's decision, an appropriate date will be established for the award ceremony in Washington, D.C. The award ceremony will be conducted by the EPA Administrator or designee. Letters of announcement and invitation to the award ceremony will be sent to Corporate Chief Executive Officers, Federal Agency Executive Officers, the appropriate U.S. Congressional and Senate delegations, State Governors, and the Selection Committee members.

Press releases will be prepared for distribution prior to the ceremony explaining the Award and its significance to the regulated community and to the Nation. It is anticipated that the award ceremony will be covered by the national media.

Each facility receiving an award will receive a plaque, which will specify the timeframe of compliance reviewed, and a flag.

SELECTION PROCESS

The Selection Committee, composed of EPA regional staff, will screen the list of facilities, and formally vote, by ballot, to select the facilities to appear on the Regional List of Top 10 Non-Compliant Facilities. Those selected will not be ranked, rather they will be listed alphabetically as the Top Ten Non-compliant Facilities in the Region.

PUBLIC NOTIFICATION

Following the selection, the list will be made public through a regional press release.

	STATE	REGIONAL PLUS	NATIONAL PLUS	NON-COMPLIANCE LIST
Municipal, Federal, industrial facility	X			X
Industrial and Federal Facility		X	X	
Two annual inspections in more than one media	X	X	X	
Compliance with all Federal regulations in all media for the last two inspections	X	X	X	
Compliance with all State regulations in all media for the last two inspections	X	X	X	
No non-regulatory problems	X	X	X	
Positive environmental impact	X	X	X	
More than one facility in the Region		X		
Facility is a winner of a State Compliance Recognition Award or a Regional nominee		X		
Facilities owned or governed by the same Organization in the Region are in compliance		X		
Organization commitment to enhancing and preserving the environment		X		
Facilities owned and governed by the same Organization in more than one Region			X	
Organization is a winner of a Regional Compliance Plus Award			X	
Facilities owned and governed by the same Organization in the Region are in compliance			X	
Nationwide environmental initiatives			X	
Three annual inspections in more than one media				X
Non-compliant in more than one media for more than three years				X
Length of time out of compliance				X
Number of civil enforcement actions				X
Number of violations				X
Penalties assessed				X
Negative environmental impact				X
AWARDS -- Flag and plaque	X	X	X	

CRITERIA

STATE ENVIRONMENTAL COMPLIANCE RECOGNITION AWARD

1. Facility must be either municipal, Federal, industrial

2. Two annual inspections in more than one media

3. Compliance with all Federal regulations in all media for the last two inspections

4. Compliance with all State regulations in all media for the last two inspections

5. No non-regulatory problems (i.e. noise, odor, public perception)

6. Positive environmental impact (i.e. pollution reduction/prevention, corporate and community environmental education efforts)

NOTE: Compliance is defined throughout this program as no significant EPA violations (e.g. Class I or high priority violators of RCRA regulations, significant non-compliers of water regulations, significant violators of air regulations)

CRITERIA

REGIONAL ENVIRONMENTAL COMPLIANCE PLUS RECOGNITION AWARD
(ORGANIZATION AWARD)

1. The organization must have more than one facility in the region

2. One facility must have been a winner of a State Compliance Recognition Award (Federal, industrial) for the current year, or, in Regions not implementing a State Compliance Award, the facility must be nominated by Regional staff based on screening criteria

3. All facilities owned or governed by the same organization in one or more States within the region must be in compliance with applicable State and Federal multi-media regulations to be eligible for this award

4. Organization commitment to enhancing and preserving the environment (i.e. pollution reduction/prevention, organization and community environmental education efforts, history of organization compliance greater than two years)

CRITERIA

NATIONAL ENVIRONMENTAL COMPLIANCE PLUS RECOGNITION AWARD (ORGANIZATION AWARD)

1. The organization must have facilities in more than one region

2. The organization is a winner of a Regional Compliance Plus Award for the current year

3. All facilities owned or governed by the same organization in more than one region are in compliance with all media regulations

4. Nationwide environmental initiatives to address environmental issues (i.e. pollution reduction/prevention, organization/community environmental education efforts, history of organization compliance greater than two years)

CRITERIA

LIST OF TOP 10 NON-COMPLIANT FACILITIES

1. Non-compliant in more than one media for more than three years (non-compliant being defined as having significant EPA violations)

2. Length of time out of compliance (e.g. time from violation determination to settlement and return to compliance)

3. Number of civil enforcement actions

4. Number of violations (per outstanding enforcement action)

5. Penalties assessed (e.g. amount, mitigation required, lack of good faith efforts)

6. Environmental damage indicators/risk (i.e. quantity of emissions/discharge, magnitude of environmental impact/ degradation, public health implications)

7. Negative non-regulatory problems (i.e. odor, noise)

PROCESS

REGIONAL ENVIRONMENTAL COMPLIANCE PLUS RECOGNITION AWARD

EPA regional staff will determine status of physical compliance for each media as well as a organizational commitment to enhancing and preserving the environment

EPA will determine whether there is more than one facility within the Region for individual organizations

State programs provide names for membership in award selection committee

EPA regional staff will establish an award selection committee in each state

Award selection committee screens eligible facilities based upon facility compliance and non-regulatory criteria and advises EPA

Award selection committee selects by ballot one facility in each category*

EPA regional staff will establish award presentation date

EPA regional staff will transmit letters of announcement and invitation to federal, state, and local officials, U.S. Congressional and Senate delegations

EPA regional staff will prepare a press release

Awards ceremony conducted by the Regional Administrator will be conducted at the Regional Office

Each facility will receive a flag and plaque

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

PROCESS

STATE ENVIRONMENTAL COMPLIANCE RECOGNITION AWARD

EPA regional staff/state staff/contractors perform periodic inspections at appropriate facilities

EPA and State personnel review applicable inspection reports

EPA regional staff completes checklist on facility compliance status

EPA regional staff will determine status of physical compliance for each media

State staff will determine status of compliance with State multi-media environmental regulations

State program provides names for membership in award selection committee

EPA regional staff will establish an award selection committee in each state

Award selection committee screens and advises EPA of eligible facilities

Award selection committee selects one facility in each category *

EPA regional staff will establish award presentation date

EPA regional staff will transmit letters of announcement and invitation to federal, state, and local officials

EPA regional staff will prepare a press release

Awards ceremony conducted by the Regional Administrator and Governor will be conducted at the State office or State Capitol

Each facility will receive a flag and plaque

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

PROCESS

NATIONAL ENVIRONMENTAL COMPLIANCE PLUS RECOGNITION AWARD

EPA Headquarters staff will coordinate and develop the program, and with regional support, will evaluate the status of physical compliance for each media as well as the sensitivity the organization has exhibited for environmental concerns

EPA Headquarters staff, with regional staff assistance, will determine whether the organization has facilities in more than one Region

EPA Headquarters staff will establish an award selection committee

Award selection committee screens eligible facilities based upon compliance and environmental initiatives

Award selection committee selects by ballot one facility in each category*

EPA Headquarters staff will establish award presentation date

EPA Headquarters staff will transmit letters of announcement and invitation to Chief Executive Officers, U.S. Congressional and Senate delegations, State Governors

EPA Headquarters staff will prepare a press release

Awards ceremony conducted by the EPA Administrator and will be conducted in Washington, DC

Each facility will receive a flag and plaque

*Note: This process is currently under review for accordance with the requirements of the Federal Advisory Committee Act.

PROCESS

REGIONAL LIST OF TOP 10 NON-COMPLIANT FACILITIES

EPA regional staff/state staff/contractors perform periodic inspections at appropriate facilities

EPA staff reviews applicable inspection reports

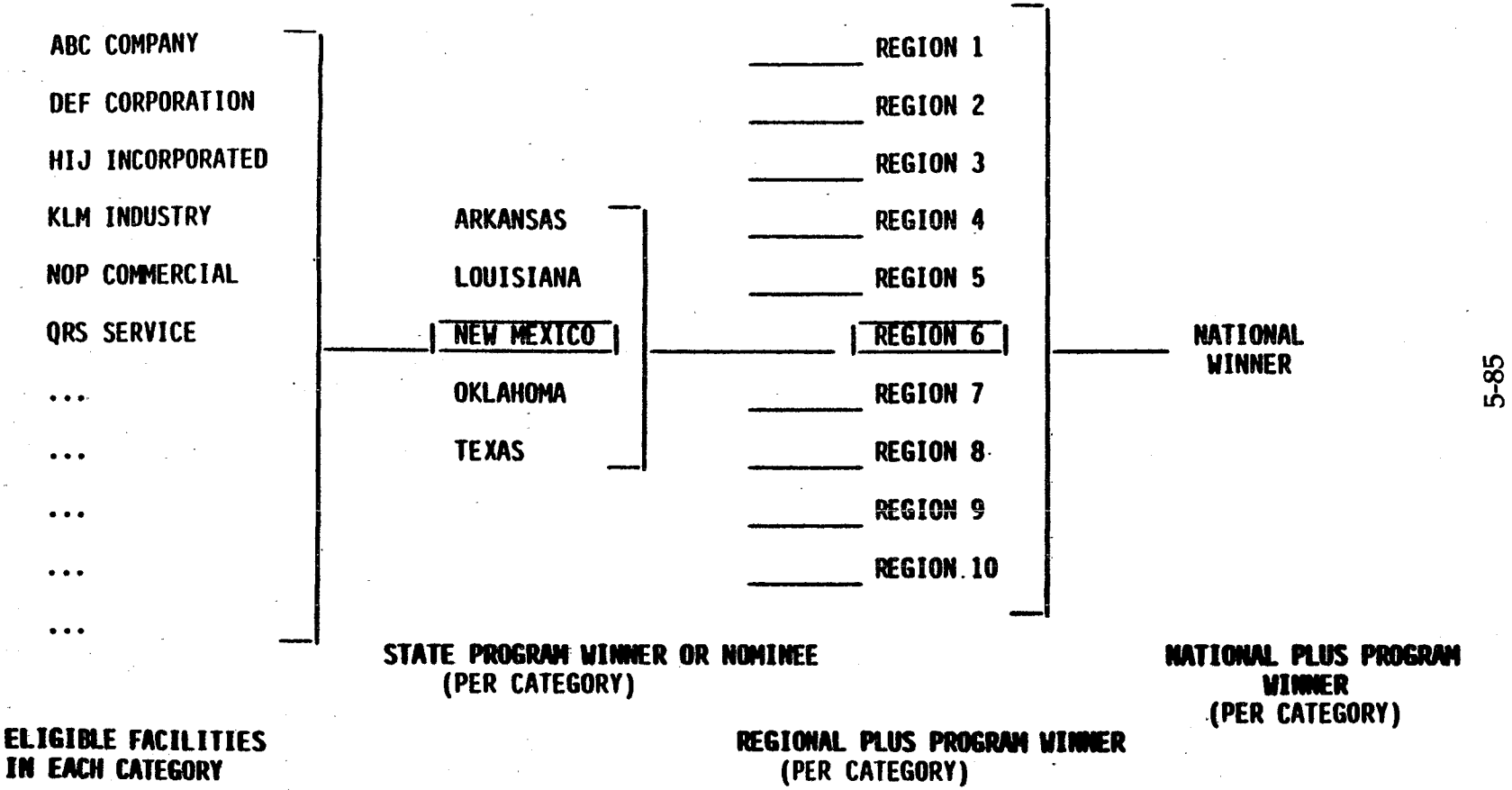
EPA regional staff completes checklist on facility compliance status

EPA regional staff will determine status of non-compliance for each media

EPA regional staff will select the 10 facilities to appear in alphabetical order on the list

EPA regional staff will prepare a press release

ENVIRONMENTAL COMPLIANCE RECOGNITION PROGRAM SCHEMATIC



5-85

EXAMPLE IN REGION 6: STATE OF NEW MEXICO

ATTACHMENT F

F. Environmental Education and Technology Transfer for Enforcement Results

SUBJECT: Environmental Education and Technology Transfer for Enforcement Results

FROM: Douglas R. Blaze
Regional Counsel, 20RC

TO: Donna Fletcher (A-101F)
Connie Musgrove (EN-342)
Fred Stiehl (LE-134P)
Bruce Diamond (OS-500)
Terrell Hunt (LE-134A)
Bob Heiss (LE-134W)
Allyn Davis (6HWMD)
Bill Dickerson (A-104)
Craig Johnson, DOJ

It is almost axiomatic in the Agency that we do not offer "advice" on technologies that might be utilized to achieve compliance. However, the Agency does identify available technology in development documents. This information is generally available in published form and not localized to a particular problem. When the Agency confronts the particular problem either in the permitting context or when faced with a compliance inquiry or an actual enforcement action, we tend to deliver officially a clear and uniform message. Namely, we provide the number or standard which you are expected to meet, but it is up to you how you achieve it. In other words, except for those aspects of each program that are based on a particular technology, such as, for example, the LEAR, NSPS, BPT, BAT or BACT, we tend to have a black box approach to compliance.

Nonetheless, the Work Group thought of various examples where a regulatee for a variety of reasons needed "help" in achieving compliance. The examples range from people-based problems where an operator of a facility lacks adequate training or competence and therefore does not have the skills to respond to influent qualities and treatment technologies applicable to them in the context of a local waste water treatment plant or water treatment facility to more complex questions regarding technologies available to capture and control VOCs, air toxics and other types of air fugitive emissions, or to treat toxics or control color in waste water treatment systems. The culture of EPA has both encouraged and even required that our compliance and enforcement personnel remain neutral when regulatees ask for assistance even if the request for assistance is the request for general guidance, direction or insight into possible technologies or to sources of technical help or expertise in given areas.

The basic rationale for not suggesting technical information to regulatees is twofold. First, as public employees we have a general obligation to remain neutral and not to favor or appear to favor one purveyor of equipment or services over another. Second, we do not want to be "responsible" for any regulatee's failure to achieve compliance by virtue of installing a technology we recommend. The first reason is based less on legal constraints than on policy; the second reason has significant enforcement policy concerns underlying it. Namely, we have always been concerned that equitable defenses, such as estoppel, lack of clean hands or detrimental reliance, will be raised against our compliance demands if technology that we "suggested" does not work. It is difficult enough to compel a regulatee whose control strategy has failed to go back to the drawing board and start all over again without the added complication of the regulatee complaining that EPA sent him "barking up the wrong tree."

One could generally describe our posture as being "risk averse" in this arena. The consequence of being risk averse is that the accumulated, collective technical expertise of the Agency has not funneled itself systematically through our compliance and enforcement offices to the regulated community. Our expertise finds its way into general circulation through regulatory development, general tech transfer and research and scholarly activities, but not through our enforcement effort. A noteable exception was the air enforcement effort during the 1970s against the steel industry where a few EPA experts pushed the steel industry to frontier technology in order to abate very serious fugitive and direct emissions.

Our committee believes that with properly structured guidelines and clear caveats about the ultimate responsibility for compliance resting with the regulatee, we could enhance the transfer of technology to the regulated community and encourage earlier and more certain compliance by making available through our compliance and enforcement offices information regarding, and directories of, technology resources and their availability. We should authorize our personnel to disclose to regulatees those things that might be useful to them as they search for practical and relevant solutions to their problems.

The Work Group therefore suggests that the technology transfer groups in existence simply adopt as an additional goal for their existing efforts the development of the necessary guidance and protocols to insure that the compliance and enforcement offices can participate fully in this important program. We believe that the Office of Technology Transfer working in conjunction with the Office of Enforcement and Compliance Monitoring would develop the necessary protocols and policy guidance for field use. To achieve this goal we would suggest the following activities:

- Identify the tech transfer resource in each media program and ask them to review with OECM and the Office of Technology Transfer the opportunities and vehicles for compliance/enforcement tech transfer outreach assistance.

- Create for Agency use a quick list/short list of tech transfer resources within the Agency that will allow regional users easy access to this resource.

- Request for each AAship to establish, if not already undertaken, a compliance/enforcement tech transfer focal point in headquarters and within each regional office.

- OECM (in consultation with AA compliance offices) develop guidance/protocols.

- Prepare a formal Agency statement of this policy.

ENFORCEMENT IN THE 1990's PROJECT

UTILIZING

LOCAL

GOVERNMENT

WORKGROUP CONTRIBUTORS

Susan Herrod
Lee Paddock
Sebastian Patti
H. Lee Holden
Gregory B. Lie
Josh Baylson

ENFORCEMENT IN THE 1990's PROJECT

RECOMMENDATIONS OF THE WORKGROUP ON LOCAL ROLE IN ENVIRONMENTAL ENFORCEMENT

==========

I. Introduction

Historically, the focus of environmental regulations has been on controlling discharges from large facilities which represent the most significant sources of pollution. However, the scope of many environmental programs has expanded to a large number of smaller facilities with the realization that compliance by large sources alone has not provided adequate protection against health and environmental risk.

The vast increase in the regulated universe raises questions about the potential contribution local government can make to enforcement. Although EPA has not assessed whether local governments can be effective environmental enforcers on a broad basis, in certain specific regulatory areas, some local governments have stepped forward to assume an extremely valuable role.

Based on extensive discussion with the states, EPA needs to foster an expanding local government role as we face tighter resources and regulatory responsibilities. Our role should be to encourage greater involvement by: 1) identifying regulatory areas amenable to local government participation: 2) articulating a range of functions local government could perform to advance environmental enforcement; 3) developing guidance in identifying local governments which might play a greater role; 4) developing local, stand-alone institutions to aid local governments; 5) developing training for supporting institutions to identify environmental crimes; and 6) fostering greater DA criminal prosecutions.

Four programs which include a role for local government have been chosen as case studies because of the broad range of resources and expertise they represent as enforcement models. These programs (UST, EPCRA, Pretreatment, SQG) offer lessons to guide us as we examine the factors which affect successful enforcement by local governments, and the institutions which local governments may use in an enforcement effort.

If we want the expanded role of local governments to be successful, we need to promote greater involvement of District Attorneys in criminal prosecutions. DAs represent a valuable resource that give "teeth" to local programs. To make effective use of their unique contribution, we need to examine the obstacles which impede greater involvement and offer ways of overcoming these obstacles.

II. Goals and Objectives of the Project

The objective is to determine the circumstances under which it is feasible and beneficial to broaden the role of local government in environmental enforcement, and to identify the opportunities and limitations for doing so. Based on this analysis, recommendations will center on whether and how we might foster further local involvement in environmental enforcement. These recommendations reflect our ideal position for EPA over the next five to ten years as a promoter and facilitator of greater local responsibility for environmental programs.

II. Process Leading to Recommendations

First, the work group identified four programs with a range of both opportunities for and experiences with local government involvement:

- Underground Storage Tanks (UST);
- Pretreatment;
- Small Quantity Hazardous Waste Generators; and
- EPCRA (SARA Title III).

These four programs were studied in depth to determine 1) current level of local involvement, 2) resources and tools used, 3) obstacles to implementation, 4) benefits from their involvement, and 5) ways to foster greater local responsibility. Interviews were carried out with Headquarters program offices, regional and state environmental offices, and local government officials and associations. The recommendations in this report stem from lessons learned in these programs and interviews.

IV. Findings

A. LOCAL GOVERNMENT CAN SERVE IN THREE GENERAL ROLES TO AUGMENT FEDERAL AND STATE EFFORTS AT ENVIRONMENTAL ENFORCEMENT.

Local entities can serve in one or all of the following capacities: as reporters of violations (or "eyes and ears") to state and federal officials; as evidence gatherers; as enforcers of regulations. (For examples within the four programs, see Table 1 on page 6-10.)

The daily contact often necessary to detect violations makes local government effective as "eyes and ears". For instance, fire and police are frequently the observers of midnight dumping or the illegal transport of hazardous waste. In the northeastern States over the period of a year, most hazardous waste violations were uncovered through reports by police, fire and private citizens reporting suspicious

activity. Under EPCRA, the Local Emergency Planning Committees (LEPCs) are most often the ones who uncover violators of reporting requirements and notify the State Emergency Response Committees (SERCs) of the noncomplying facilities.

Local governments have also contributed significantly to state and federal enforcement by gathering evidence against violators. Fire and police are frequently the evidence gatherers against noncompliers. Firemen, building code inspectors, or local health departments are used to inspect facilities for compliance with EPCRA. The information they glean may be used by SERCs to bring enforcement actions against facilities. Health departments are also frequently used as evidence gatherers. They may inspect for compliance with UST and SQG requirements. Their laboratory services and investigative support are used by States and EPA in enforcement cases.

Finally, some local governments take enforcement actions against violators. Local officials or Sewer Authorities enforce against industrial violators of pretreatment. In the UST program, some counties, such as Dade County (Dept. of Environmental Resources Management) and Suffolk County (Dept. of Health Services), perform civil and criminal enforcement activities as well as expedited enforcement (tickets) for simple violations. LEPCs take enforcement actions against noncompliers under EPCRA, although this authority is just beginning to be exercised. Some county governments enforce the SQG requirements, where they have the authority to do so. The Ramse County SQG program not only takes enforcement actions but has also used the following resources to gather evidence for its own enforcement cases: local police, the local sheriff, the Department of Transportation, laboratories of the Department of Health and the Bureau of Criminal Apprehension, as well as the County Attorneys. Although criminal cases have been rare, felony and misdemeanor cases have been successfully prosecuted.

The examples above illustrate that local governments are taking enforcement actions, but enforcement authority may restrict this role somewhat, especially among smaller local governments. Authority to enforce environmental regulations can be either exclusively state or permissively local. Exclusively State statutory authority allows federal programs to be formally delegated only to States, then States may or may not delegate programs to local governments. Permissively local statutory authority allows federal programs to be formally delegated to States and local governments. (Local governments may be within authorized or unauthorized states.) For example, pretreatment is permissively local. EPA may deal directly with local pretreatment programs as well as with State programs. UST, SQG, and EPCRA are all EPA programs dealing exclusively with States. In these, EPA authorizes the State program and then the State may either retain the program or pass laws requiring local governments to handle the program.

Local governments have played a valuable part in enforcement in all three areas mentioned above, but most of the local entities who participate have been the

larger metropolitan areas. Because a certain level of personnel and resources are required to play even an "eyes and ears" role, smaller local governments are unlikely to play much a substantial enforcement role in the next five to ten years. This is particularly true for local government involvement in the initiation of enforcement actions, since not only are substantial resources required, but often enforcement authority must be provided through local ordinances. Therefore, enforcement actions as well as reporting and evidence gathering will reside primarily with the larger cities.

B. NO CRITERIA EXIST FOR IDENTIFYING REGULATORY PROGRAMS THAT MAY BENEFIT FROM DIRECT LOCAL GOVERNMENT INVOLVEMENT.

The need to develop a guide for expanding local government's enforcement role is illustrated by noting the differences between the EPCRA and Pretreatment programs, both of which are models for a strong local role:

- Facilities subject to EPCRA requirements are in the hundreds of thousands. Minnesota has 10,000 facilities required to report. In one county alone, Cuyahoga County (Ohio), 650 facilities are subject to EPCRA.

  There are approximately 1,500 local Pretreatment programs.

- EPCRA requires minimal training of police, firemen or building inspectors in order to identify barrels of hazardous materials unreported by a facility, or potential chemical hazards.

  Pretreatment often requires full time, skilled technicians with proper laboratory equipment in order to detect industrial waste streams with traces of illegal chemicals.

- Single personal computers may be used by LEPCs to manage all of the data for EPCRA reporting.

  Pretreatment requires a sophisticated data management system and huge memory storage to maintain all necessary data.

The burgeoning number of facilities subject to environmental regulations indicate EPA's need for additional resources to provide specific deterrence. However, the differences in programs described above show that the tools, resources and expertise required of a regulation must to be carefully considered as we look at local government's capabilities and desire to participate in enforcement.

Two areas should be considered together when deciding whether to expand the role of local government: first, the statutory/ regulatory scheme being implemented

and the nature of its enforcement requirements; and secondly, the resources, culture, and infrastructure of the local government. The programs examined in this report, (UST, EPCRA, Pretreatment, SQG), provide information on the issues which should be considered in both areas when deciding whether to open the door to wider participation by local governments. The issues or factors identified in considering these two areas may be grouped into eight categories:

Statutory/Regulatory Scheme

1. Characteristics of regulated universe
2. Program requirements for implementation
3. Administrative burden in establishing program

Infrastructure

4. Expertise available at local level
5. Resources of local government
6. Demographic and economic conditions of community
7. Social environment of local government
8. Political environment of local government

Statutory/Regulatory Scheme

One of the first considerations when reviewing a regulatory scheme is the **character and scope** of the regulated universe. Programs that regulate large numbers of small facilities are difficult to administer at the federal or State level. For instance, in the UST program, effective monitoring and oversight require review of building plans and supervision of construction. With almost 2 million USTs to regulate at about 750,000 facilities, local governments provide the site-specific compliance assistance and oversight functions which State programs or the Federal government can not provide.

The program requirements, the ease of detecting violations, and the administrative burden placed on the regulatory entity also impact the effectiveness of local government participation. Unless the means of accomplishing their expected function is offered to local governments, enforcement is likely to be ineffective. Where these factors prohibit involvement of a program that otherwise would be best handled at the local level, higher levels of government (i.e. EPA or the States) should explore creative means of providing assistance, such as technical expertise, peer exchanges, public partnerships, or training.

For example, local governments found that computer hardware and software were necessary to run an effective SARA Title III program. Without this equipment,

information submitted by hundreds of industries would remain in boxes in a totally unusable form. Local governments with largely volunteer staffs often had neither computer equipment nor staff to input data. In some instances, creative use of fee systems and grants helped solve the problem. In other cases, private industry provided funds to purchase equipment. One industry even donated personnel to input the data.

Infrastructure

Expertise at the local level is a pivotal factor to consider in identifying the role of a local entity. Technically sophisticated programs (such as the Pretreatment program) cannot be enforced effectively by a local entity which lacks the commensurate skills. If these do not match, EPA ultimately enforces against the local government. Additional training may be required before it is feasible to have a local government assume a traditional enforcement role.

Resources and **organizational entities** available at the local level should be used whenever possible. This avoids the cost and bureaucratic struggles which arise in forming new organizations. The SARA Title III program has made successful use of such local resources as fire marshals, building inspectors, local police agencies, fire departments, and health departments in performing program and enforcement responsibilities, (see Table 1 on page 10). Programs that are complex in nature, such as those requiring significant laboratory testing, may be best enforced at the state level, unless laboratory facilities can be made available for use by the local units of government. Some counties have turned to private laboratories because no other laboratories were available, but the cost of doing so is usually prohibitively high.

The **demographic and economic** conditions of each community should be considered. The term "local government" encompasses cities or counties from over one million people down to towns of only 1000. The community income, size, access to financial markets, access to technical services, urban v. rural nature of the community, and funding sources vary immensely and affect the ability of local governments to play a role in environmental enforcement.

The **social** and **political** environment of local governments is important. Communities whose citizens are knowledgeable and concerned about an environmental problem will encourage and promote local participation. Elected officials often seek to provide leadership on an issue where public support is apparent. However, if there is no perception of a problem and support is lacking, local government units may not effectively or successfully participate. For instance, where citizens perceive that they are directly dependent upon groundwater as a source of drinking water, as is the case in Minnesota and Florida, extensive hazardous waste and underground storage tank programs have been developed at the local level.

These factors are not to be considered in isolation, but together. The degree of the positive (or negative) presence of factors, as well as the number of positive (or negative) factors present will indicate a local government's ability to handle an increased role successfully. (For a detailed list of factors within these eight categories, see Appendix I.)

C. LOCAL GOVERNMENTS HAVE MANY INTERNAL INSTITUTIONS AND OUTSIDE ORGANIZATIONS WHICH CAN MATERIALLY CONTRIBUTE TO THEIR EFFECTIVENESS IN HELPING TO MONITOR OR ENFORCE ENVIRONMENTAL STANDARDS.

We can increase local government's ability and willingness to play a greater role in environmental enforcement by enlisting the aid of existing local institutions whose responsibilities parallel those required by environmental regulations. As more regulations cover numerous small facilities and stretch already thin resources, using all existing local institutional support will become critical. Examples below illustrate the type of support local institutions can offer.

- **Local law enforcement agencies** and **fire departments** are invaluable as a source of information in detecting environmental crimes ("eyes and ears") and gathering evidence against violators. For instance, municipal police, fire and other local regulatory officers have observed hazardous waste criminal activities during the course of their normal investigative or monitoring responsibilities which have resulted in violators brought to trial. Such incidents as early morning motor vehicle activity at disposal sites, burning wastes, the discovery of abandoned drums, and in one instance, the release of waste through the rear spigot of a moving tank truck have been discovered by local police and firemen. EPA has not taken full advantage of the aid police and fire officials can give to environmental enforcement, and has not systematically pursued them as an additional resource for providing effective enforcement.

- **Building Code Regulators** and **Housing Inspectors** are an effective source of local oversight of asbestos exposure in schools and commercial/public buildings, or asbestos exposure from demolition and renovation projects. They could also note PCB leaks from electrical equipment, and the absence of PCB fire walls.

- **Health departments** are another excellent source of information on potential violators. Health inspectors may detect violations of EPCRA or SQG in their routine inspections of facilities for health regulations. In the SQG program, public health and safety authorities most often are the agencies used to monitor and enforce compliance with

regulations. In the future, Health departments may be the natural agency to assist in monitoring compliance with the medical waste regulations.

- **Ambulance crews, Hazmat teams, Fire** and **Police** are all important for detecting and collecting evidence of violations (for all four programs examined) where environmentally-related emergencies have occurred. Accidents have been the source of discovery of a number of criminal cases. Some examples are explosions at landfills, highway waste spills caused by improper vehicle loading of wastes, and chemical burning of sanitation workers.

- **Local Emergency Planning Commissions** are an excellent example of using a broad range of institutions to carry out environmental programs, detect violations and gather evidence. LEPCs have used building code inspectors and firemen to do routine inspections. These Local Emergency Planning Commissions have also identified parties who fail to report according to EPCRA. LEPCS may be made up of members of **emergency management, industry, environment, city attorneys, health departments, media, EMS, Red Cross, elected officials, police, fire, civic organizations, and the National Guard.** LEPCs are now beginning to take enforcement actions against those who fail to report.

- **Hospitals** are also potential "eyes and ears" for detecting violators. Reports of workers overcome by releases of poisonous gases can lead to discovering industrial violators of pretreatment or other regulations. Hospitals may also provide important information on possible violations through reports of injuries caused by industrial accidents or explosions.

- **Game Wardens** and **Fish and Wildlife** Agencies are also a good source of information regarding illegal discharge of a hazardous chemical or midnight dumping. Information about fish kills, pollutant loadings in shell fish, game fish or wildlife may first be detected by these agents. Such data may suggest violations of pretreatment or SQG regulations.

Nature clubs, special interest groups, insurance companies, and banks are other institutions whose potential support remains untapped. The National Association of Towns and Townships (NATaT) is negotiating with insurance companies now to develop a pilot project where insurance representatives would assist in environmental enforcement.

As a note, not many enforcement actions were taken at the local level in the programs we examined, except in isolated instances, or in pilot projects with EPA

regional offices (EPCRA). The focus of inspections has been on education about the regulations. Some of the programs are beginning to turn toward enforcement, but the change is slow. For a breakdown of the groups which play or can play enforcement functions for all four programs, see the chart on the following page.

Some problems exist in using these local institutions to aid in monitoring and enforcement. First, because these groups have important public health and welfare responsibilities already, added environmental tasks may be given a low priority. Even more difficult is the fact that many potential support personnel are volunteers, (80 percent of the firemen across the country are volunteer), whose volunteer services are in addition to their full time jobs. Adding further tasks may be difficult, if not impossible.

Second and third, necessary training is often unavailable or at least difficult for the local government to provide, and coordination of the different agencies may be difficult. Appropriate responsibilities need to be matched with the tasks already performed by the support personnel from the respective institutions.

Fourth, liability is a concern among institutions who assist in an enforcement role. Protective legislation may need to be passed at the State level in order to encourage greater participation by local institutions.

Finally, critical to success of efforts to use these resources is education about the importance of protecting our environment and training on recognizing environmental crimes. EPA needs to assist in developing these organizations as tools by designing "key indicator" training courses. These courses would help local participants identify specific indicators of violations for each regulation and provide instructions on how to make such information available to appropriate federal or State officials.

TABLE 1 - ROLES IN ENFORCEMENT

ROLE	EPCRA	SQG	UST	PRE-TREATMENT
"Eyes and Ears"	Yes	Yes	Yes	Yes
	Fire Police Hazmat Team Ambulance Pers Build. Insp. LEPCs Citizen Groups	Health Dept. Environmental Agency Fire County Sheriff Build. Insp. Transp. Dept.	Health Dept. Environmental Agency Police Fire	Sewer Line Crews Police Hospitals Police Fire Labor Boards Fish & Wildlife Citizen Groups
Evidence Gatherer	Yes	Yes	Yes	Yes
	Fire Build. Insp. LEPCs Citizen Groups	Health Dept. Environmental Agency County Sheriff Fire Build. Insp. Transp. Dept.	Health Dept. Environmental Agency Fire Police	Sewer Line Crews Regional Sewer Authority or Public Works Dept. Police
Enforcement Actions	Yes	Yes	Yes	Yes
	LEPCs SERCs Citizen Groups	Health Dept. Environmental Agency	Health Dept. Environmental Agency Fire Police	Elected Officials Regional Sewer Authority or Public Works Dept. Citizen Groups

D. DISTRICT ATTORNEYS CAN PLAY AN IMPORTANT ROLE IN BRINGING CRIMINAL ENFORCEMENT ACTIONS AGAINST THOSE WHO KNOWINGLY VIOLATE ENVIRONMENTAL LAWS.

Millions of facilities across the country, both large and small, handle environmentally hazardous materials which can present significant risks to human health and the environment. When criminal violations occur, District Attorneys provide an important resource in prosecuting these violators and deterring further criminal acts. However, training, laboratory and technical resources, and lack of information hinder DA involvement in environmental crimes.

Greater DA involvement in criminal prosecutions would provide a faster response to environmental crimes, reducing environmental risk or damage. Prosecution by DAs also deters criminal behavior within a class of violators too numerous for EPA and the States to reach. The seriousness of committing environmental crimes is reinforced with the public. In addition, operations can be tailored to indigenous community conditions to meet community needs and cooperative relationships can be built between local, state and federal agents to form task forces necessary to investigate and prosecute environmental crimes efficiently and effectively.

Despite their growing involvement in environmental crimes, District Attorneys continue to face three barriers. First, only a small number of investigators and attorneys have been trained in techniques and procedures required for successful prosecution of environmental crimes. Current training capacity is limited and access to training is sometimes difficult. The Hazardous Materials Investigation Training Program at the Federal Law Enforcement Training Center provides excellent training, but the number to be trained is constrained by the limited amount of experts available to staff the courses. The Regional Hazardous Waste Projects are another good source of training, but they must meet the needs of a broader audience in their training courses. Expanding courses for District Attorneys might occur at the expense of other necessary training. Also, local governments in remote areas often find it too expensive or logistically difficult to reach training centers where needed courses are offered.

Second, adequate laboratory and technical resources are frequently unavailable. Sometimes private labs are employed, but they are prohibitively expensive. Local Health Departments are often used, but they are rarely trained in the forensic procedures necessary to properly test and preserve evidence and maintain the chains of custody necessary to make that evidence admissible at trial.Third, no information on pollution prosecutions is being exchanged on a nationwide basis. There is no federal support for the national dissemination of information to provide assistance in the prosecution of environmental crimes. Even local convictions are not systematically documented, cataloged and analyzed.

The situation at the local level is often characterized by a lack of trained investigators and prosecutors who are unable to develop evidence sufficient for prosecution. Court administration may also present a problem, causing prosecution documents to be misdirected. Not only are inexperienced investigators and prosecutors a problem, but the court's unfamiliarity with environmental laws can present difficulties. For instance, in one county, a case was dismissed after a plea of guilty had been entered at arraignment, apparently due to the court's unfamiliarity with the concepts presented.

If these barriers are not addressed, then DA involvement in criminal prosecutions will grow at an extremely slow rate, and we will fail to take full advantage of a valuable resource. The National District Attorneys Association is pursuing a solution to these obstacles now. They are beginning to negotiate with DOJ to develop comprehensive training programs and a national computer system. EPA should be a participant, if not a lead in these efforts.

Recommendations presented in the following section address the obstacles uncovered in this project and provide a way of expanding local government involvement as a whole, as well as enhancing the role of local prosecutors in enforcing environmental crimes.

V. Recommendations

A. Expanding the Enforcement Role of Local Government

1. EPA SHOULD ARTICULATE A SET OF CRITERIA FOR EXPANDING LOCAL GOVERNMENT'S CURRENT ROLES WHICH FOCUS ON THE NATURE OF THE REGULATORY PROGRAM.

- Develop criteria more fully with program offices and states to identify types of regulatory programs which are amenable to local government assistance in enforcement.
- Issue criteria to program offices and states.
- Require periodic review of criteria by states and program offices.

In considering how to expand local government's role in environmental enforcement, one should first examine the statutory and regulatory structure. The number of facilities regulated is a crucial factor which affects the appropriateness of local government involvement. Some regulatory programs cover huge numbers of small facilities which are difficult to monitor at the State or federal level. The complexity and technical expertise required under the regulation, as well as the equipment and laboratory support necessary may limit local government's role.

These factors should be examined for a successful expansion of the local government's role in regulatory programs.

PROPOSED ACTION: A set of criteria should be issued to program offices and States for planning use.

2. EPA SHOULD ARTICULATE A SET OF CRITERIA FOR EXPANDING LOCAL GOVERNMENT'S CURRENT ROLES WHICH FOCUS ON THE INFRASTRUCTURE OF THE LOCAL GOVERNMENT.

- Develop criteria more fully with States and selected local governments to identify characteristics that local entities should exhibit to assist in environmental enforcement.
- Issue criteria to States.
- Require periodic review of criteria by States.

Not only must we examine the nature of the regulatory program, but we must also examine the characteristics of the local government. Local governments may not be effective environmental enforcers on a broad basis. They vary widely in size, capability, environmental awareness, political independence and will, and resources. The local government infrastructure needs to be examined against the articulated criteria to determine whether the nature of the regulation and the local government infrastructure both support an expanded local role. The necessary requirements suggest that EPA should focus on the large metropolitan areas for greater involvement.

PROPOSED ACTION: Along with the criteria above, this set of criteria should be issued to states for planning use.

3. EPA SHOULD WORK WITH THE STATES AND LOCAL GOVERNMENTS TO USE EXISTING SPECIALIZED UNITS WITHIN AND OUTSIDE LOCAL GOVERNMENTS TO THEIR FULLEST ADVANTAGE.

- Work with states to promote use of specialized units within the existing institutions of local governments and outside in compliance and enforcement.
- Develop "key indicators" training for support personnel.
- Initiate pilot projects with selected local governments which use or extend use of existing institutions and outside organizations for enforcement and compliance.

- Promote exemplary projects among all local governments.

We should work with States and local governments to develop and promote the assistance of organizations for compliance and enforcement tasks. Greater assistance from existing units of local government and outside organizations may enable them to participate more effectively in environmental programs. Assistance is not difficult for some institutions who perform parallel tasks or functions which may be easily expanded to include compliance and enforcement responsibilities. Some of these "inside" institutions are police, fire, health, and housing. Some of the outside organizations which may be used are insurance companies and lending agencies. These agencies represent a resource which should be tapped as we look at expanding local government's role.

PROPOSED ACTION: Pilot projects should be initiated, followed by training development.

4. EPA AND/OR THE STATES SHOULD DEVELOP INCENTIVES TO ENCOURAGE LARGER LOCAL GOVERNMENTS TO PLAY AN EXPANDED ROLE.

Few municipalities or local governments may want to increase their administrative and resource burden by taking on a larger role in environmental enforcement. However, their involvement in some programs may be necessary for successful enforcement. The potential for greater local involvement could be encouraged by exploring incentives such as technical assistance, guidance, training, partnerships, and other tools.

PROPOSED ACTION: Incentives should begin to be investigated with a goal of marketing existing ones to local governments in FY 1992 and developing new ones by FY 1995.

B. Expanding the Role of DAs in Enforcing Environmental Crimes

1. EPA IN COOPERATION WITH THE DEPARTMENT OF JUSTICE SHOULD DEVELOP A NETWORK WITH STATE DISTRICT ATTORNEY ORGANIZATIONS, REGIONAL ENVIRONMENTAL ORGANIZATIONS, NDAA, NAAG, AND OTHER INTERESTED PARTIES.

- Use network to explore:

  1) establishing criteria for screening cases;
  2) developing an environmental crime profile; and
  3) conducting exemplary practices projects.

Environmental cases are only a priority to a minority of District Attorneys. Consequently, the value of handling such cases is not widely known, nor do DAs have much expertise in managing environmental criminal prosecutions. In order to broaden their interest and ability in handling environmental crimes, EPA and DOJ need to establish a network for communication and development of tools to assist District Attorneys.

PROPOSED ACTION: The network should be built using NEEC, the Steering Committee, and FLETC.

2. EPA SHOULD EXPAND CURRENT TRAINING CAPACITY FOR DAs AND INVESTIGATORS, IN ASSOCIATION WITH OTHER LAW ENFORCEMENT ORGANIZATIONS.

- Develop national training program in investigating and prosecuting environmental crimes in association with other interested organizations; steps will include:

  1) Analysis (needs assessment, job/task analysis, student profiles);
  2) Curriculum design;
  3) Development of delivery system;
  4) Implementation; and
  5) Evaluation.

Only a small number of investigators and attorneys have been trained in techniques and procedures required for successful prosecution of environmental crimes. The Hazardous Materials Investigation Training Program at the Federal Law Enforcement Training Center provides excellent training, but staffing and resources limits capacity. Through such organizations as FLETC, Regional Hazardous Waste Organizations, DOJ, NAAG, NDAA and other interested parties, the Office of Enforcement will explore the expansion and coordination of environmental enforcement training. Efforts are already underway by NDAA to develop a national training program. We may begin to build the group who will oversee training development now.

PROPOSED ACTION: Curriculum should be designed in FY 1992, implementation should be completed by FY 1995, and evaluation of training and delivery should be ongoing.

3. EPA SHOULD EXPAND TRAINING OF SUPPORT PERSONNEL, IN ASSOCIATION WITH OTHER LAW ENFORCEMENT ORGANIZATIONS.

- Develop standardized cross-media screening training for inspectors and police (other than environmental police investigators).

- Market to state agencies for inclusion in police academies.

- Work with interested parties to provide chain-of-custody training to alternative laboratory personnel.

Where DAs are active in environmental prosecution, they are already facing the problem of inadequate laboratory and technical support. To meet these needs, DAs have sometimes employed private labs, but these tend to be prohibitively expensive. Local Health Departments are often used, but they are rarely trained in the forensic procedures necessary to properly test and preserve evidence and maintain the chains of custody necessary to make that evidence admissible at trial. If we want to involve more DAs in criminal investigation, we need to expand the laboratory and support personnel trained in proper forensic procedures.

PROPOSED ACTION: NEIC could develop the delivery plan for chain-of-custody training. Cross-media screening training should be developed by FY 1993.

4. EPA SHOULD ASSIST IN DEVELOPING A METHOD FOR COLLECTING CRIME STATISTICS AND PROVIDING INFORMATION ON TECHNICAL AND LEGAL ISSUES CONCERNING CRIMINAL ENVIRONMENTAL CASES.

- Assist in developing standard definitions for environmental crimes.

- Assist in promoting model statutes for adoption by states.

- Assist in developing centrally located computerized system to collect national crime statistics and establish profiles of environmental criminals.

No method is currently in place for gathering and disseminating data on criminal cases brought at the local level, or for disseminating technical and legal information to assist DAs in prosecuting cases. To begin collecting crime statistics, standard definitions for environmental crimes and model statutes need to be developed first. Then options for the maintenance and use of information can be explored, such as through a national statistical database modeled after systems in other law enforcement areas. NDAA is examining the possibility of a centrally located computerized system now.

PROPOSED ACTION: NEIC, the Regional Hazardous Waste Organizations, NDAA, NAAG, DOJ, and other interested parties could form a planning group immediately to begin the development of an information system.

C. Broader Contribution of Local Government

1. EPA SHOULD ENCOURAGE LOCAL GOVERNMENTS TO MANAGE THEMSELVES IN A MORE ENVIRONMENTALLY SOUND WAY AND TO TAP INTO THE GOODWILL OF THE CITIZENRY THROUGH ENVIRONMENTALLY SOUND PROJECTS.

- Promote compliance in municipal government operations through use of environmental auditing and program methods.

- Promote communication and adoption of exemplary environmental projects among local governments (see specific recommendations below).

Local governments can play a significant role in reducing pollution in their communities, both by their own practices and by projects which take advantage of citizens' greater awareness and eagerness to clean up the environment. The city of Toronto has initiated projects oriented toward this goal. They offer a good example of what local governments can do to bring about better environmental practices.

Examples of the type of environmental leadership that a local government can offer include:

- Studying the local government's use of small vehicles with the following objectives:
  - Reducing the number of such vehicles used by the local government;
  - Improving maintenance programs on these vehicles;
  - Replacing high energy consumptive vehicles with low energy consumptive vehicles;
  - Implementing an auto-trip reductions strategy to reduce the need for such vehicles; and
  - Providing city bicycles rather than city cars for short trips.

- Calling upon all companies in downtown areas to take steps to reduce the use of automobiles by their staff for commuting to work;

- Instituting comprehensive energy audit program;

- Contributing to reforestation projects; solicit participation by Boards of Education;

- Instituting shade tree planting program to reduce adverse effects of local warming and reduce need for air conditioning;

- Increasing city parking rate to meet private sector rates; use proceeds from parking revenues for purpose of reducing environmental consequences of automobile traffic;
- Providing more bicycle trails to promote cycling; and

- Initiating a home retrofitting program for energy efficiency in home appliances and light fixtures.

APPENDIX I

CRITERIA FOR EXPANDING THE ROLE OF LOCAL GOVERNMENTS
LOCAL GOVERNMENT PROJECT
ANALYTICAL PROJECT OF THE 1990's PROJECT

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STATUTORY/REGULATORY SCHEME

1. **Characteristic** of regulated universe is retail rather than manufacturer (i.e. numerous small facilities)

2. **Administrative Burden** in establishing program:

   - Information system requirements not significant
   - Not many personnel required to staff new jobs or additional responsibilities
   - New, expensive equipment not required
   - Training requirements, where necessary, are light

3. **Program Requirements** for implementation:

   - Amount and difficulty of training required is minor
   - Amount and availability of technical assistance not critical
   - Able to incorporate multiple sources or agencies in program implementation and staffing
   - Regulations are clear
   - Little oversight of program is needed

LOCAL GOVERNMENT INFRASTRUCTURE

4. **Expertise** is available at the local level

5. **Resources** of existing local government

   - Full time, experienced personnel rather than volunteers
   - Full time personnel from support agencies rather than volunteers (for example, fire fighters)
   - Enforcement authority exists at local level
   - Similar programs exist which require similar structure and expertise
   - Appropriate equipment and training available

6. **Demographic and Economic Conditions** of the community

   - Larger size and population density of community (economies of scale and scope)

- More Income (able to afford environmental enforcement)
- Good management of local government (good access to financial markets)
- Good location (good access to technical services)
- Current amount of environmental burden not significant (not currently investing an above average amount of resources to combat existing pollution problems)
- Funding sources available to local government

7. Social Environment of local government

- Perception of environmental problem and need for program
- High priority, relative to other problems
- Historical relationship with the community more regulatory rather than "service" mentality

8. Political Environment of local government

- Interest in complying with law
- Ability of local government itself to comply with program regulations
- Visibility of benefits over costs
- Good economic conditions of the community
- Little influence of noncompliers on other members of the community and on local government officials

APPENDIX II

BACKGROUND

The Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986 lays the groundwork for a coordinated effort to identify potential chemical hazards for individuals and community leaders and to develop a comprehensive state, district and local strategy to respond to hazardous materials accidents. The Act addresses planning for chemical emergencies, notifying proper authorities of chemical accidents and releases, reporting hazardous materials inventories, and reporting routine or planned toxic chemical releases.

The required emergency planning is carried out by Local Emergency Planning Committees (LEPCs), which have been organized at a district or county level by State Emergency Response Committees (SERCs). Larger cities and in some instances towns themselves, have been designated a separate planning district with their own LEPC. But in the vast number of states outside of New England, small and rural communities function as sub-units within a State-designated Title III planning area.

Local planning committees must include the following: representatives of elected state and local officials; law enforcement officials, civil defense workers, and fire fighters; first aid, health, hospital, environmental, and transportation workers; representatives of community groups and the news media; owners and operators of industrial plants and other users of chemicals, such as hospitals, farms, and small businesses.

STRUCTURE

Tools

LEPCs use a variety of tools for planning, information gathering, and training. To obtain information on facilities required to report, inspections are conducted via local planning and zoning ordinances or fire codes. Information may also be requested from facilities directly. Other sources have been local tax rolls, phone books, State Underground Tank registration listings, Trade Associations, Business Coalitions, public interest groups, State Manufacturers Association, and State Department of Labor Right-To-Know listings.

Training

The required training is coordinated by the LEPCs. Sources for training have been local industries who have their own in-house emergency responders, and training

grants from the National Institute of Environmental Health Science, the Federal Emergency Management Agency, and EPA. Other federal agencies have offered courses fulfilling EPCRA requirements, such as the Coast Guard and the U.S. Department of Transportation. Local academic institutions have also been sources for training. All fire and rescue institutes have appropriate course offerings, such as State Fire Fighters Schools who offer hazard recognition and personal protective equipment. "Train the Trainer" courses are also offered through the joint cooperation of EPA, FEMA and DOT. Finally, a fairly new method of training in use now is Video Conferencing.

An example of using a variety of training resources is the Pampa, Texas LEPC. They take advantage of free training for their hazardous material specialists, which include courses hosted by EPA, DOE and the State of Texas. For more hands-on training, hazard material specialists are sent to the Houston Fire Department to work with their hazmat team which sometimes responds to as many as three incidents per day. Another training resource is the Santa Fe Railroad, which offers training on handling railroad accidents.

Funding

Funding for LEPCs has come from SERCs, county or city budgets, and donations from individuals and industry. One example of creative funding is Calhoun County, Alabama which received donations from Monsanto Corporation and the City of Anniston to purchase equipment (computers). Monsanto also donated the time of an employee to provide word processing assistance.

Compliance Efforts

Compliance efforts by LEPCs have been mostly directed toward educating facilities about the need to report, rather than taking enforcement actions. Inspections are conducted primarily to educate businesses on their reporting and planning requirements under EPCRA. Typically, these inspections are conducted by volunteer firemen. For instance, the Pampa Fire Department inspects all businesses within the city limits for fire hazards at least once per year. A hazardous materials specialist now accompanies the fire inspection officer on these inspections to assist with implementing Title III and provide information on Title III requirements.

In a few cases, LEPCs participate in enforcement actions. In Wisconsin, the SERC is in the process of adopting formal compliance and enforcement procedures. The LEPC and individual citizens will act as "eyes and ears" by notifying the SERC of noncomplying facilities. The LEPC then acts as the "evidence gatherer" by contacting the facility after the facility has been notified of the complaint and Title III

requirements. If the facility fails to respond within a specific time, the case is referred to the state for prosecution.

Citizen Suit Provisions

Additional enforcement authority is available through the citizen suit provisions under Title III of the Superfund Amendments and Reauthorization Act (SARA), though they have not been used extensively. Citizen suits provide an additional, cost-effective tool in the enforcement of this Act, but only a few organizations, such as the Atlantic States Legal Foundation and the Environmental Action Foundation, are making use of these provisions to uncover noncomplying facilities.

BENEFITS

Programs run at the local level offer a variety of benefits not reaped when States or the federal government run the same programs. First, information is disseminated more thoroughly at the local level. Articles in local newspapers and public service announcements are often used. Local hospitals have even offered free luncheons to businesses where panels of local officials discuss Title III requirements.

Second, having programs implemented at the local level multiplies EPA's available resources, even though most of these resources are voluntary. To accomplish program requirements, LEPCs have built on cooperative relationships which are already established and have facilitated new relationships. Many communities have gained from handling Title III programs as well. For instance, LEPC members cited local responsibility for EPCRA as creating mutually beneficial relationships between fire departments, local officials and businesses.

Third, locally run programs provide means for citizens to participate in programs and provide needed information previously unattainable by States and EPA. In Fairfax County, citizens now look to the LEPC for answers to their concerns about particular chemical hazards in their community. With representatives who are responsible at the local level, citizens are more likely to report violations than they were previously.

Fourth, locally run programs not only allow for more complete identification of those who fail to report under EPCRA, but they also prevent duplication of efforts. For instance, LEPCs can maintain consistency with emergency plans being done for different hazards, thus saving limited resources.

OBSTACLES

The political make-up of LEPCs has been an obstacle in enforcement of EPCRA.

Although the programs run extremely well at the local level, enforcement has not been pursued actively, except in limited cases where Regions assisted in pilot projects. Since both business and local government officials must participate on the planning committees, enforcing the requirements of the law could mean enforcing against neighbors, employers, business partners, or the local constituency. Sometimes LEPC members even view enforcement against local businesses as economic suicide.

Another obstacle to enforcement is the voluntary status of most LEPC members. Work done by and for LEPCs is voluntary, whether it be inspections done by LEPC members or by the local fire department. Enforcement requires substantial time commitment beyond potentially burdensome training and outreach responsibilities.

Lack of centralized information dissemination is also an obstacle. Information provided by businesses to the State and LEPCs is not enough to determine whether enforcement actions should be taken. This information should be combined with permit information available from EPA to determine whether businesses are in compliance.

In addition to the obstacles mentioned above, funding is difficult to obtain for planning and enforcement. Although LEPCs are composed primarily of volunteers, a stable basis of funding must be established to ensure secure local administration.

Finally, an obstacle local governments face is lack of expertise necessary to understand the reporting forms and the significance of the information being reported by industry.

SMALL QUANTITY HAZARDOUS WASTE GENERATOR PROGRAM

BACKGROUND

EPA's small generator regulations are an extension of regulatory authority over the generation, transport, treatment, storage, and disposal of hazardous wastes which was established in 1976 under the Resource Conservation and Recovery Act (RCRA). In recent years, public attention has focused on the potential for environmental and health problems that can result from mismanaging even small quantities of hazardous waste. With the passage of the Hazardous and Solid Waste Amendments of 1984, Congress extended the regulation of hazardous wastes to facilities generating less than 2,200 pounds of hazardous waste in a month.

Federal law allows states to set their own requirements for small quantity generators, provided that the state requirements are at least as strict as federal requirements. A number of States (at least fifteen) have their own small quantity generator programs. Under these programs, the role of local governments has ranged from advisor for other small quantity generators in the community to enforcement agent.

STRUCTURE

Tools

An assortment of tools are available for monitoring and enforcing compliance with regulations. To obtain information on facilities required to report, local authorities cross-reference SIC codes of local businesses with EPA data on the typical hazardous wastes generated by various types of businesses. Information on nonbusiness small generators are sometimes obtained from local landfill operators and trash haulers. Full-scale surveys of local waste generators had also been done to find local small quantity generators. In order to reach all SQGs in the area, local officials from one New York State community notified all the lawyers and insurance companies and invited them to a regional meeting.

Public health and safety authorities most often monitor and enforce compliance with the regulations covering small quantity generators at the local level. City public health, building, and fire departments are used to provide a force of officers to make the inspections. Generally, these inspectors receive additional training to deal with the technical side of monitoring and enforcing compliance with hazardous waste regulations. Using experienced inspectors from other programs not only saves valuable resources but also speeds up the training process.Emergency response planning for small quantity hazardous waste generators is included in local emergency plans required by Title III of SARA. All of the tools and resources available for responding to chemical emergencies under EPCRA are available for responding to SQG emergencies. Local agencies, particularly fire departments and health departments, provide a response mechanism as well as an inspection force.

Ramse County, Minnesota has groups or agencies which assist in performing both in an "eyes and ears" function and as active assistants in gathering evidence. These assistants are the County Sheriffs, Commercial Laboratories, the State Health Department Laboratory, the State Bureau of Criminal Apprehension Laboratory, County attorneys, the Attorney General, the local Sewer Authority, the city Fire Housing and Building Departments, and the State Department of Transportation.

Training

Training is difficult to get at the local level for the SQG program. Ramse County has sent some of their inspectors to Denver for the RCRA training course. The rules are complex, lengthy, and technical, and proper interpretation and application is difficult. Sources for training are few, though growing. The Regional Hazardous Waste Projects offer hazardous waste investigative training courses. The U.S. Department of Transportation may be an additional source of training, as well as local academic institutions (e.g., courses offered through the University of California).

Funding

Funding for the SQG program may come from county or city budgets. Ramse County's technical licensing and inspection program is now financially self-sufficient through funding from generator license fees and facility license fees. Grants may also be available from EPA on a limited basis.

Compliance Efforts

Very few SQG programs exist at the local level. Those local governments that do have programs have focused primarily on obtaining compliance through education

and technical assistance.

Two of the more advanced programs are found in Ramse and Hennepin Counties in Minnesota. Minnesota Statutes enable hazardous waste programs at the county level. These counties are involved in all aspects of environmental enforcement for each category of waste handlers except transporters. Though their civil authority is limited at the county level, they do have authority to suspend or revoke licenses, sue for reclamation of expenses, and seek injunctions. The counties assist the State as "evidence gatherers" in civil cases through inspection reports, licensing files, and joint inspections. Criminal enforcement has not been a focus in the past. There have only been six criminal cases state-wide. However, these two counties are turning their attention to criminal enforcement.

BENEFITS

Involvement of local government can provide benefits through the additional resources available to supplement Federal and State prevention and enforcement efforts. Federal, and in many cases, state efforts concentrate on the largest volume generators. The amount of small and exempt quantity generators is far too numerous to deal with at these levels. However, small generators are a significant source of environmental pollution. For instance, in Minnesota, 60 percent of the waste generated is from SQGs. Many county and municipal agencies have or can develop the manpower to provide additional regulatory, educational and enforcement support.

Another advantage is that local governments can more thoroughly identify and educate businesses which qualify as small quantity hazardous waste generators. Local governments are closer to the individual businesses that make up the bulk of the regulated SQGs and they know the most productive means of reaching the public.

Local government also has a vested interest in running an effective SQG program, since managing the wastes from small generators leads to a "cleaner" refuse stream, which in turn leads to a "cleaner" wastewater treatment plant and "cleaner" landfills. A good hazardous waste management program will reduce the likelihood of illegal dumping, thus reducing the threat to public health and safety in the local community and helping to ensure the economic viability of local small businesses.

Operating a program at the local level also means that with the growth in the public's awareness of hazardous wastes and efforts to manage small quantities generators, they will be more likely to report violations. Where small spills may have gone unreported in the past, citizens will now be more willing and able to act as "eyes and ears" to the local government.

Finally, local government is perceived by the regulated community as more responsive and fair. Generally, they are able to respond more quickly and geographical proximity to the regulated community makes them more effective.

OBSTACLES

One obstacle is local government's difficulty balancing the need to educate the regulated community to the basic concepts of the regulations with the need to enforce the rules. These tensions often produce conflicting goals. If the primary emphasis of the program is enforcement and prosecution at the expense of education and assistance, public and political opposition may occur. If, on the other hand, education and assistance is the primary emphasis at the expense of enforcement, then the program will be perceived as ineffective and lacking "teeth". Compliance will be sporadic and practiced only by those who have other reasons for doing so.

Political pressure and budget constraints are additional obstacles. Of these, political pressures may be the most difficult. Local government is more accessible to the regulated community than are Federal officials. Each regulated entity has more impact on local officials than on State or Federal office holders because the entity represents a larger percentage of the total vote pool. Likewise, local officials may exert more influence on program policies and staff due to the smaller bureaucratic buffer between the office holder and the program staff.

A final and significant obstacle is the lack of trained investigators and prosecutors able to uncover violations and bring offenders to trial. Unfamiliarity with court administration has some times led to the misdirection of prosecution documents.

UST

BACKGROUND

Local government involvement in the Underground Storage Tank program (UST) varies dramatically from State to State. Some States are attempting to delegate the program to local governments, such as California, while others are running the program at the state level.

UST programs have two components: prevention and clean-up. These components may either be located in the same State agency or in different agencies. Programs administered at the local level may house the prevention responsibilities in the Fire Marshal's office, while the State environmental agency may continue to handle corrective action responsibilities.

In general, statutory authorities and regulations do not allow a formal delegation of

the federal UST program to local governments, although States may do so. Oversight of local programs will be approved on a State-by-State basis during the state program approval process. A wide variety of approaches toward delegating all or parts of the program to local authorities is expected.

STRUCTURE

Tools

Organizationally, UST programs are found in a wide variety of institutional homes, including: public health departments, Fire Marshals' offices, State Police offices, environmental agencies, such as departments of environmental protection, services, or conservation. Inspectors for this program are often responsible for conducting inspections for several other programs, which may include hospitals, restaurants, and SARA Title III facilities.

In Suffolk County, New York, underground storage requirements are enforced through the local sanitary code passed by the County Board of Health. Field personnel from the Inspection Services Unit of the County Board of Health perform multi-media inspections, which include hazardous materials storage and handling, NPDES, sewage treatment plants, and emergency response.

Training

EPA provides Emergency Response Training and an Inspector Training manual for UST inspectors. Additional training may be tailored to the agency where the program is housed. For instance, in Suffolk County, UST inspectors receive Sanitarian training (since the program is administered by the County Board of Health), ongoing Safety training provided in-house, and on-the-job training, in addition to emergency response training.

Funding

No funding is available directly from EPA to local governments. Funding to local governments would require negotiating grants with 3,000 counties and many more municipalities. EPA interests are better served by focusing resources on program elements that cut across local boundaries, such as working with the States to develop training programs and program implementation tools for local agencies.

New York's Suffolk County Board of Health funds its program entirely through County or State funds. Resources to administer the program are from taxes, state aid, Registration and Plan Review Fees, and penalties.

Compliance Efforts

Enforcement authority is delegated to local governments by State legislation or regulations, although authority may also come from a variety of local codes, especially fire codes. Criminal actions have been taken at the local level in the UST program, although this is a rare event. For the most part, the enforcement philosophy of local agencies is to educate the regulated community. Because the program is relatively new, the effort has been on teaching compliance. Exceptions to the educational approach may be seen in organizations such as the Fire Marshall's office or the State Police office which have either arrest authority or the ability to revoke a building occupancy permit. In these cases the initial enforcement response tends to be more assertive.

An example of a local government involved in all levels of enforcement in the UST program is Suffolk County. The County Board of Health handles compliance conferences and consent hearings through civil and criminal proceedings. Inspectors use tickets for simple violations. Criminal cases are referred to District Attorney Environmental Crimes Unit, which enforces the State conservation laws. When cases are referred, the County Board of Health provides support through investigative and lab services, records, and witnesses. All lab services are under the Medical Examiner's Office and investigative services are usually done jointly with police investigators.

BENEFITS

One of the largest benefits Local Government involvement provides is site-specific compliance assistance and oversight functions. With such a large number of facilities to monitor - almost two million regulated USTs at about 750,000 facilities - centralized state programs or the Federal Government could not provide the necessary level of monitoring and oversight. For the UST program to be effective, building plans should be reviewed and construction should be supervised.

Another benefit to local involvement is the increase in the number of "eyes and ears" monitoring compliance with environmental regulations. A higher rate of compliance is possible among the local population, resulting in improved environmental quality for all.

Finally, state programs operate as an umbrella, assuring a minimum standard. Local programs, which are often more stringent, provide additional environmental protection. Therefore, local involvement in implementing part of an UST program furthers EPA's goal of protecting human health and the environment.

OBSTACLES

The most common obstacle to Local Government involvement is lack of resources to implement the program. Some States, such as Michigan, are now beginning to charge tank permit or license fees to fund inspectors or regulatory positions at the local level.

Another major obstacle is that many local governments lack the authority to enforce state regulations, or lack commensurate local codes. For example, the local agency may not be able to issue administrative orders without going through the DA's office, and it may not be able to assess penalties.

Often, the organizational structure of the local authority running the program may also be an obstacle. When a program is located in an agency or organization with a broader mission, environmental enforcement may be a relatively low priority and may be under-funded.

Political obstacles are also present. Prosecuting violators of UST regulations may be difficult because they are primarily small operators who are known in the community. Aggressive prosecution by elected DAs could be politically unattractive because of the violator's position in the community or because environmental enforcement may have a low priority relative to fighting drugs or prosecuting felonies.

Conflicting goals may also be present at the local level. The economic consequences of enforcing regulations may be in direct conflict with pursuing environmental compliance, particularly when it may mean, as in the UST program, forcing small businesses to close.

Finally, personnel shortages at the local level present an obstacle to implementing the UST program. Because a key element to an effective program is close supervision of plans and construction, staffing may be too short to provide the necessary oversight. Management should be at the lowest level able to implement the program and have the necessary intimate contact. The most efficient way to staff the program is to use other program inspectors, but no incentives are present to create a willingness among inspectors to increase their load.

PRETREATMENT

BACKGROUND

The General Pretreatment Regulations require all large POTWs (publicly owned treatment works) and smaller POTWs with significant industrial discharges to establish local pretreatment programs. Large POTWs are those which are designed to accommodate flows of more than 5 million gallons per day. Approximately 1,500 POTWs are participating in the National Pretreatment Program by developing local programs. The local programs must enforce all national pretreatment standards and may enforce more stringent discharge requirements to prevent disruption of the sewage treatment system, adverse environmental impacts, or disruption of sludge use or disposal. Thus, the National Pretreatment Program consists of approximately 1,500 local programs designed to meet federal requirements and to accommodate unique local concerns.

Federal, State, and local government agencies all have a hand in establishing pretreatment programs. The federal government requires that states develop pretreatment programs; the States, in turn, review, approve, and oversee the programs of local POTWs. However, the specifics of pretreatment program development and approval vary from state to state, depending on the status of the State's program to control direct discharges--the National Pollutant Discharge Elimination System (NPDES).

Implementing a Pretreatment program at the local level requires legal authority, a professional staff, funding, and an information base on the industrial dischargers. Effluent limitations must be established for industrial users that enforce federal standards and protect local interests. Then POTWs must implement their effluent limits through notification, permit administration, inspection, monitoring, and enforcement. In addition, Pretreatment programs must include a data management system and must provide mechanisms to allow the public to have access to information about the program and to comment on program elements.

STRUCTURE

Tools

A variety of tools are available for monitoring and enforcing compliance with regulations. Local **police departments** provide an excellent source of expertise about proper procedures for gathering evidence of violations, devising methods to assess fines, and preparing cases for civil litigation and criminal prosecutions. Many Control Authorities have police officers trained to recognize pretreatment violations (e.g., evidence of illegal discharges to manholes) and have found their assistance to be invaluable in conducting criminal investigations.

Sometimes area **hospitals** are requested to report injuries caused by industrial accidents to the Control Authority (prompting investigations to determine whether spills or illegal discharges may have also occurred). Similarly, area **fire departments, labor boards, fish and wildlife agencies, and building inspectors** may also be consulted for any information related to possible discharge violations.

Local programs sometimes rely on **sewer line crews** or other field personnel to conduct compliance sampling and inspections. In other cases, Control Authorities have trained their own personnel to conduct the sampling and inspections.

Sources who play an "eyes and ears" role include local and state police departments, fire departments, environmental control departments, industry employees, laboratories conducting discharge analysis, and industrial competitors. Final decisions to bring enforcement actions against industries most frequently rests with elected officials, such as mayors or city managers.

Training

Most training has been conducted by EPA Regional offices and State agencies. These include technical and legal courses. Municipal Pretreatment coordinators at the regional offices arrange the courses and are beginning to expand course offerings to enforcement investigation training.

Funding

The primary way of funding the Pretreatment program is through charging the costs of the program to the industrial users themselves. It is also possible that POTWs would absorb the costs, but no instances of this have been found.

Compliance Efforts

Enforcement efforts have been minimal. Municipalities have had more of a "service" mindset toward the industrial users, rather than a view of themselves as a regulatory agency. Thus EPA has been forced into the position of taking enforcement actions against municipalities because of their inaction toward violators.

BENEFITS

Having enforcement authority for the pretreatment program at the local level is useful for three reasons. First, POTW officials are familiar with their industrial users. They usually know the location, wastewater flow, and pollutant loadings of

the industries they serve. They may already have mechanisms to regulate their industrial clients, such as permits or contracts. These documents may contain agreements concerning both the nature and volume of industrial discharges and fees for the service. Thus, POTWs already have administrative mechanisms and client relationships in place on which to base enforcement of the pretreatment program.

Second, POTWs are better able to understand and to correct problems within their own treatment systems. Therefore, they can tailor discharge requirements in pretreatment permits to preclude interference with their particular treatment system. The POTW is also in the best position to understand other problems that must be considered in formulating pretreatment permits, such as the hazard of explosions or corrosion in the sewage system and the treatment plant.

Finally, the POTW is the level of government best able to respond to emergencies in the treatment system. The unexpected discharge of pollutants by an industrial user could result in the discharge of untreated wastes by the POTW itself, violating federal standards and presenting an environmental hazard. In many cases, the POTW can quickly pinpoint the cause of the problem and take corrective action.

OBSTACLES

The obstacles toward having effective local programs are many. First, the resources required to implement a program can be enormous. A sophisticated, expensive information system is required to track and store all of the data. Professional, highly trained staff are needed to monitor a pretreatment program. Many municipalities do not have the funds to train or even employ such personnel.

Second, the technical and scientific requirements of the Pretreatment program are substantial. Extensive knowledge and a great deal of time is often necessary to identify the problem areas or violators. Sophisticated laboratory techniques and technical expertise are required to identify the substance and the industrial source of that substance violating the law.

A third obstacle is the mindset among most municipalities of service to the industrial users, rather than regulators of the users. The prevailing attitude has been one of providing the service of waste treatment to customers rather than viewing POTWs as "investments" which need to be protected. This may be due to the fact that many treatment plants were constructed with primarily State and Federal monies, and relatively little local contributions. Because of this mindset, many localities have avoided focusing on becoming enforcement agencies.

Fourth, political obstacles also stand in the way. Pretreatment monitoring and enforcement can be costly to a community's economic base. Often, political leaders

do not want to invest large dollars to enforce against local businesses who make up the economic foundation of the community.

Finally, the Pretreatment program generally holds a low priority in a municipality's budget. Water supply and pollution control are often the largest dollar amounts in the budget. When placed against other pressing social problems requiring lower commitments of funds, Pretreatment tends to be the lowest priority line item in the budget.

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