

Florida State University College of Law

Scholarship Repository

Scholarly Publications

2000

The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality

David L. Markell

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the [Environmental Law Commons](#)

Recommended Citation

David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 *HARV. ENVTL. L. REV.* 1 (2000),
Available at: <https://ir.law.fsu.edu/articles/80>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

THE ROLE OF DETERRENCE-BASED ENFORCEMENT IN A "REINVENTED" STATE/FEDERAL RELATIONSHIP: THE DIVIDE BETWEEN THEORY AND REALITY

David L. Markell*

I. INTRODUCTION

Criticism of our nation's environmental regulatory scheme, and ideas for revamping this scheme, have come fast and furious in recent years. A contributor to a 1997 book, *Thinking Ecologically: The Next Generation of Environmental Policy*, refers to a "strong and growing consensus that we must reinvent . . . the legal tools used for environmental protection."¹ One prominent commentator captures this flurry of activity:

At present, there is a remarkable burst of interest in "rethinking" or "reinventing" the next generation of environmental regulations. More than a dozen major initiatives . . . are underway to help design new approaches to environmental policy.²

* Professor of Law, Albany Law School (on leave 1998–2000). Prior to joining the Law School faculty in 1992, Professor Markell served as director of the New York State Department of Environmental Conservation's Division of Environmental Enforcement, and previously worked for United States Environmental Protection Agency ("U.S. EPA") Region 1 and for the U.S. Department of Justice's Environmental Enforcement Section. The following individuals kindly reviewed one or more earlier drafts of this Article: Professors Kathryn Harrison, Craig Johnston, Robert Kuehn, Cliff Rechtschaffen, Richard Revesz, and Tom Tietenberg; Environmental Law Institute Senior Attorneys Linda Breggin and Suellen Keiner; and Gary Weiskopf of Weiskopf Consulting Services, also former Assistant Director, Nelson A. Rockefeller Institute of Government. These reviewers provided several helpful suggestions. Any errors are my sole responsibility. The views contained herein are my personal views only and should not be attributed to any of the organizations where I have worked.

1. E. Donald Elliott, *Toward Ecological Law and Policy*, in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 172 (Marian R. Chertow & Daniel C. Esty, eds. 1997). Criticisms of our environmental regulatory system and proposals for change are by no means unique to the 1990s. *See, e.g.*, Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 *STAN. L. REV.* 1333, 1337 (1985) (characterizing criticism of the traditional environmental regulatory scheme as an "indictment [that] is not idle speculation, but the product of years of patient study by lawyers, economists, and political scientists." (citation omitted)); Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine Tuning" Regulatory Reforms*, 37 *STAN. L. REV.* 1267, 1270 (1985) (noting that "there is widespread agreement that *some* alternative must be preferable to the current regulatory system." (emphasis in original)).

2. Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 *U. CHI. LEGAL F.* 159, 171 (1997); *see also Forum, What's All This About Reinvention?*, *ENVTL. F.*, Mar./Apr. 1997, at 34 ("Thanks to Al Gore, everyone has been talking

The federal government has been an active participant in this debate, rather than simply serving as the target for criticism.³ Government officials, from President Clinton and Vice President Gore on down, have offered numerous suggestions for improving the status quo.⁴ The federal Environmental Protection Agency ("EPA") has embarked on a series of reinvention initiatives intended to strengthen our environmental regulatory scheme.⁵

The jury is still out concerning the effectiveness of government initiatives to date. In EPA's March 1997 report, *Managing for Better Environmental Results: A Two-Year Anniversary Report on Reinventing Environmental Protection*, the Agency notes that "[t]he scope and magnitude of this activity [developing and implementing EPA's reinvention agenda] suggests that a transformation is taking place. In addition to achieving new efficiencies and better results, reinvention is creating an altogether new mind-set among Agency managers and staff."⁶ Taking a somewhat contrary view, the National Academy of Public Administration ("NAPA"), in its 1997 book *Resolving the Paradox of Environmental Protection: An Agenda for Congress, EPA, and the States* concludes that "EPA's reinvention experiments have not yet produced major changes in EPA's core programs; reinvention is operating at the margins."⁷

Two of the many areas that have been found wanting in environmental law are the approach to promoting compliance and state/federal relations.⁸ Some argue, with respect to government enforcement and

about reinventing government for the last four years").

3. See, e.g., AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS (1993).

4. See, e.g., Bill Clinton & Al Gore, *Reinventing Environmental Regulation*, March 16, 1995 (visited Nov. 16, 1999) <<http://www.epa.gov/reinvent/notebook/clinton.htm>>.

5. See U.S. EPA, MANAGING FOR BETTER ENVIRONMENTAL RESULTS: A TWO-YEAR ANNIVERSARY REPORT ON REINVENTING ENVIRONMENTAL PROTECTION 1 EPA 100-R-97-004 (1997) [hereinafter U.S. EPA, MANAGING FOR BETTER ENVIRONMENTAL RESULTS]. Among other actions, EPA has created an "Office of Reinvention." EPA's homepage on reinvention can be found online at <<http://www.epa.gov/reinvent/>>.

6. U.S. EPA, MANAGING FOR BETTER ENVIRONMENTAL RESULTS, *supra* note 5, at 5.

7. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION ("NAPA"), RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION: AN AGENDA FOR CONGRESS, EPA, AND THE STATES 1 (1997).

8. See generally Symposium, *Rethinking Environmental Protection for the 21st Century*, 1997 U. CHI. LEGAL F. 1 (1997) (featuring articles by several prominent observers). For a discussion of the need to improve prioritization among risks, see generally CONGRESSIONAL RESEARCH SERVICE ("CRS"), REPORT FOR CONGRESS, ENVIRONMENTAL RISK ANALYSIS: A REVIEW OF PUBLIC POLICY ISSUES (1998) [hereinafter CRS, REPORT FOR CONGRESS]. For the view that the EPA has focused "almost exclusively on the present and the past" and needs to engage in more "environmental foresight" in which it thinks more about the future, see SCIENCE ADVISORY BOARD ("SAB"), U.S. EPA, BEYOND THE HORIZON: USING FORESIGHT TO PROTECT THE ENVIRONMENTAL FUTURE 1, 2 EPA-SAB-EC-95-007 (1995) [hereinafter SAB, U.S. EPA].

Some commentators offer a partial defense of the existing regulatory scheme and EPA's efforts to refine it. See, e.g., Percival, *supra* note 2, at 176-78, 196 (defending the current scheme by claiming, inter alia, that "claims that environmental regulation has paid

compliance efforts, that government does not take enforcement sufficiently seriously and lets serious violators walk away with the equivalent of a slap on the wrist.⁹ This laxity, they suggest, rewards those who violate the environmental laws and penalizes those who comply, thereby undermining the credibility of our regulatory system and worsening environmental conditions.¹⁰

inadequate attention to cost considerations frequently are exaggerated, sometimes woefully," and suggesting that "[t]hose who make a serious effort to 'rethink regulation' ultimately will recognize that far more fundamental environmental progress could be accomplished by changing the nation's energy, agriculture, and transportation policies to make them more responsive to environmental concerns."). Nevertheless, at least one commentator suggests that "there has been a remarkable convergence of ideas on how the nation should improve its environmental protection system." Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,148, 10,148 (1999).

9. See, e.g., U.S. PUBLIC INTEREST RESEARCH GROUP ("PIRG"), *DIRTY WATER SCOUNDRELS: STATE-BY-STATE VIOLATIONS OF THE CLEAN WATER ACT BY THE NATION'S LARGEST FACILITIES* §§ 1-6 (1997) (suggesting that "the promise of Clean Water remains unfulfilled largely because the law has not been effectively implemented and enforced," indicating that "the problem of lax enforcement is getting worse, not better;" noting that some states are negotiating "sweetheart" deals with violators in order to shield such parties from citizen suits—"some states have undertaken slap-on-the-wrist administrative actions for the sole purpose of precluding citizen suits and protecting local industries;" finding continuing "unacceptable" levels of significant non-compliance with Clean Water Act permits; and recommending states adopt legislation containing new, much more stringent enforcement authorities along the lines of a law in place in New Jersey, to cure these perceived ills); Nancy S. Marks, *Key Environmental Issues in U.S. EPA Region II: The Role of Citizen Enforcement*, 1996 A.B.A. SEC. NAT. RESOURCES, ENERGY, & ENVTL. L. 1 (on file with the *Harvard Environmental Law Review*) (suggesting that "both state and federal efforts to enforce environmental laws have been chronically feeble"); David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552, 1558 (noting that, inter alia, government enforcement is problematic and weak: "[u]nfortunately, our system of public environmental enforcement is more fragile and overwhelmed than most people realize." (citations omitted)); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 879 (1985) (quoting a citizens' suit attorney as stating that "[t]he weakest link in the entire federal regulatory scheme always has been and always will be enforcement. Because you're just never going to have the resources.").

Professors Boyer and Meidinger, among others, note that dissatisfaction with government enforcement has led to enactment of citizen suit provisions that partially "deregulate" enforcement. See *id.* at 837; see also JEFFREY G. MILLER, *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* viii, 1 (1987). For a citizen advocate's perspective on deregulation, see MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* 1-10 to 1-11 (1991) ("Any thoughtful observer must be impressed with the level of governmental and private sector accountability that has been achieved through the device of the citizen suit. The simplicity and elegance of citizen law enforcement in a participatory democracy seems irresistible."). For a contrary view, see Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in *ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS* (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

10. See Hodas, *supra* note 9, at 1558, 1560; Boyer & Meidinger, *supra* note 9, at 840.

Others claim that government enforcement and compliance efforts are too often focused on assessing punitive sanctions.¹¹ They contend that the government should devote much more of its time and effort to proactive or preventative compliance assistance efforts and reserve significant enforcement actions and sanctions for the relatively rare bad actor.¹² They cite the extraordinary complexity of the environmental laws,¹³ their "overinclusiveness,"¹⁴ and changing (improving) attitudes on the part of the regulated community,¹⁵ among other reasons in support of this view.

Regardless of the side they take, many commentators would probably agree with Michael M. Stahl, EPA's Deputy Assistant Administrator

11. See Bruce M. Diamond, *Confessions of an Environmental Enforcer*, 26 *Env'tl. L. Rep.* (Env't L. Inst.) 10,253, 10,254 (1996). One commentator describes the traditional U.S. deterrence-based enforcement scheme as "the uniquely conflictual American approach to environmental regulation." Kathryn Harrison, *Talking with the Donkey: Cooperative Approaches to Environmental Protection*, J. INDUS. ECOLOGY, Summer 1999, at 52 (1999). Based on my reading of this article, Professor Harrison believes that the relatively adversarial United States approach may produce more positive results than other approaches she has studied. See *id.*

12. See Diamond, *supra* note 11, at 10,254 (noting that, *inter alia*, "traditional enforcement methods can actually stand as a barrier to enhancing regulated entities' understanding of what is required."); Elizabeth Glass Geltman & Andrew E. Skrobback, *Reinventing the EPA to Conform with the New American Environmentality*, 23 *COLUM. J. ENVTL. L.* 1, 31 (1998).

13. Many courts have highlighted this complexity, sometimes in quite colorful language. See, e.g., *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1421 (7th Cir. 1990) (characterizing the Resource Conservation and Recovery Act ("RCRA") as "Cloud Cuckoo Land"). Judicial decisions invalidating EPA penalties because the underlying regulatory structure supposedly was unduly complex for the regulated party to have "fair warning" of the terms of the regulation are in this vein as well. See, e.g., *Gen. Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). An EPA attorney noted in a recent article that EPA regulations are "complex and voluminous" and that they have increased to the point where they now "occupy more than two linear feet of shelf space." Walter E. Mugdan, *Federal Environmental Enforcement in EPA Region 2*, 10 *ENVTL. L. IN N.Y.* 49, 63 (1999).

14. See Boyer & Meidinger, *supra* note 9, at 881; Greve, *supra* note 9, at 113 (suggesting that because of the prescriptive nature of the environmental laws, among other reasons, aggressive enforcement in some cases likely results in "a lot of expensive treatment for treatment's sake that produces few, if any, environmental benefits"). More generally, many have raised concerns about the economic effects of the environmental laws and the limited environmental return on investment. See, e.g., CRS, REPORT FOR CONGRESS, *supra* note 8, at 2-3 (noting that, *inter alia*, "EPA functions under a number of environmental statutes, which differ greatly in the discretion they grant to consider risks and costs . . ." and continuing that "[s]ome [individuals] stress that federal regulations often require large investments by the regulated community for the sake of producing small improvements in environmental quality and human health protection."); PACIFIC RESEARCH INSTITUTE FOR PUBLIC POLICY, 1999 INDEX OF LEADING ENVIRONMENTAL INDICATORS 12-14 (1999) (suggesting that diminishing marginal returns of pollution control support re-evaluating current regulatory schemes).

15. See Diamond, *supra* note 11, at 10,254 ("even the most curmudgeonly old enforcer must recognize . . . that the general attitudes of the regulated sector have altered over time . . . [and that] the importance attached to compliance has increased"). Compare Harrison, *supra* note 11, at 68; see also LYNN SCARLETT & JANE S. SHAW, ENVIRONMENTAL PROGRESS: WHAT EVERY EXECUTIVE SHOULD KNOW 4-5 (PERC Policy Series Issue No. PS-15, 1999) (discussing, for example, the fact that many factors contribute to pollution reductions, including, *inter alia*, common law liability, concerns about reputation, public pressure, and changing attitudes).

of the Office of Enforcement and Compliance Assurance ("OECA"), that the importance of an effective compliance effort to the productive functioning of our environmental regulatory system is difficult to overstate:

The use of enforcement authority to ensure compliance with environmental statutes is one of the most important aspects of the current national dialogue about the scope of government regulation and the future of ecological protection.¹⁶

The federalism issue has been debated for more than 200 years in this country,¹⁷ and is not likely to be resolved any time soon. A "common theme" of many of the recent efforts to reinvent environmental regulation is the "desirability of devolving decisionmaking to the state and local level."¹⁸ Others suggest that many Americans view environmental quality as "an important national good that transcends individual or local interest . . .," and therefore a "top down approach is logical . . ."¹⁹

16. Michael M. Stahl, *Enforcement in Transition*, ENVTL. F., Nov./Dec. 1995, at 19. Deputy Assistant Administrator Stahl continues, "[o]ne of the most visible aspects of government's using its power to bring about compliance, [enforcement] is also one of the most contentious." *Id.*

17. ALICE M. RIVLIN, *REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES & THE FEDERAL GOVERNMENT* 8 (1992) (noting that "[t]he argument about which functions should be exercised by the federal government and which by the states has been going on for more than two hundred years").

18. Rena I. Steinzor, *Reinventing Environmental Regulation: Back to the Past by Way of the Future*, 28 ENVTL. L. REP. (ENVTL. L. INST.) 10,361, 10,363 (1998). See also SCARLETT & SHAW, *supra* note 15, at 23 (recommending decentralization in the environmental arena on the ground that, among other things, "most environmental problems are primarily local"). Some advocates of devolution are skeptical that it will occur. See, e.g., David Schoenbrod, *Legislating Ideals*, PERC REPORTS, March 1999, at 3, 4-5 (suggesting that "[t]he EPA won't loosen its grip on state and local government . . ."). A recent *New York Times* article nevertheless suggests movement in this direction. See John H. Cushman, Jr., *Clinton Backs Environmental Power-Sharing*, N.Y. TIMES, Jan. 31, 1999, at A1 (indicating that "[a]dministration officials said that the pattern [contained in the Clinton Administration's proposed budget request for 2000] showed a heightened commitment to shifting more power over environmental programs away from Washington . . ."). Efforts to devolve authority have, of course, ebbed and flowed over the past several decades. President Reagan, for example, pursued a "New Federalism," in which he sought to decentralize various programs. See James P. Lester, *New Federalism and Environmental Policy*, 16 PUBlius 149 (1986). The Unfunded Mandates Reform Act of 1995 is a relatively recent example of an effort to limit federal control over state activity. 2 U.S.C. §§ 658-658d, 1501-1504 (1994 & Supp. 1997).

For one widely cited analysis concerning why the existing significant federal role should be revisited, see Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1227 (1992) (suggesting, inter alia, that "a refutation of race-to-the-bottom arguments ought to lead to serious questioning of the overarching role that the [Clean Air] Act assigns to the federal government.").

19. Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 210 (1997) (also noting that local environmental controls might make the most sense because many environmental concerns are seemingly local in their effects); see also Geltman & Skrobback, *supra* note 12, at 2 (noting that "[e]nvironmentalism has become a part of the American consensus, an idea deeply fixed in the

The United States General Accounting Office ("GAO"), among many others, has highlighted the importance of state/federal relations to our environmental regulatory scheme:

[W]hile regulation is an important mechanism for the federal government to use to attain statutory objectives, its success often depends on the goodwill and cooperation of state and local governments in implementing these federal regulatory programs.²⁰

This Article, which focuses on federal/state relations in the environmental compliance and enforcement arena, begins, in Part II, by exploring the goals of EPA's compliance and enforcement program and the

firmament of values that define America's basic political beliefs." (quotation marks and citation omitted)). Some surveys reflect that while the American people favor reducing federal activity on some fronts, a strong demand remains for federal protection when it comes to the environment. See John H. Cushman, Jr., *Environment Gets a Push from Clinton*, N.Y. TIMES, July 5, 1995, at A1.

Other theories support federal regulation as well. See, e.g., Revesz, *supra* note 18, at 1217, 1222-24 (discussing the justification for federal regulation under the race-to-the-bottom, market failure and public choice theories). Professor Revesz challenges the notion that a "race" involving lowering of environmental standards necessarily is a "race to the bottom" because of the possibility that the lowering of such standards may not necessarily be socially undesirable. He suggests that, for example, "federal environmental standards can have adverse effects on other state programs" and that "[s]uch secondary effects must be considered in evaluating the desirability of federal environmental regulation." *Id.* at 1246; see also Thomas W. Merrill, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 ECOLOGY L.Q. 485 (1994).

For two suggestions that globalization may contribute to centralization of environmental law, see U.S. EPA SAB, *supra* note 8, at 17 (noting that "environmental issues rapidly are becoming an issue of strategic national interest" because of "international environmental and economic linkages"); Merrill, *supra*, at 485 (characterizing efforts to internationalize environmental law as the second bout of centralization environmental law has undergone in the past three decades); see also J. CLARENCE DAVIES & JAN MAZUREK, *POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM* 14 (1998) [hereinafter DAVIES & MAZUREK] ("International actions are increasingly likely to affect the directions and policies of EPA.").

20. U.S. GAO, REPORT TO CONGRESSIONAL COMMITTEES, *FEDERAL-STATE-LOCAL RELATIONS: TRENDS OF THE PAST DECADE AND EMERGING ISSUES* 3 GAO/HRD-90-34 (1990); see also *The Federal-State Relationship: A Look Into EPA Regulatory Reinvention Efforts: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 24-25 (1997) (statement of Peder A. Larson, Commissioner of the Minnesota Pollution Control Agency) [hereinafter Statement of Larson]; Robert R. Kuehn, Essay, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2384 (1996).

For a few samples of writings on various aspects of environmental federalism, see, e.g., Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7 (1990) (summarizing the history of cooperative federalism in the environmental enforcement arena); BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 5-6 (1981); Martin H. Belsky, *Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof*, 12 ECOLOGY L.Q. 1 (1984); Symposium, *Environmental Federalism*, 54 MD. L. REV. 1141 (1995); David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1, 4 n.3 (1993).

strategies it uses to achieve those goals. Part III reviews the key laws and policies that shape the relationship between the states and EPA, and that establish the expectations EPA has for state performance, in the compliance/enforcement arena. Part IV reviews several recent audits of EPA and state enforcement performance conducted by the EPA Office of Inspector General ("OIG") and the GAO, the central finding of which is that there appears to be fairly widespread disregard by EPA Regions and, particularly, the states (EPA's "partners") of EPA enforcement policies.²¹ Part V summarizes efforts during the past few years to "reinvent" government enforcement and compliance approaches. Finally, Part VI offers some observations about the great divide between the federal government's promise of a deterrence-based enforcement and compliance scheme applied consistently throughout the United States, and the much different reality found by OIG and GAO in their 1997 and earlier reviews, and concludes with a few possible strategies for bridging this divide.

II. AN OVERVIEW OF EPA ENFORCEMENT AND COMPLIANCE POLICIES

In many respects, EPA enforcement is in transition, although the core enforcement messages remain the same.²² In 1993, EPA changed (and substantially expanded) its headquarters enforcement office, as well as the name of the office.²³ The change in title, from the Office of En-

21. See JOEL MINTZ, ENFORCEMENT AT THE EPA 75-76 (1995) (noting that, in some instances, "national enforcement policies, widely acknowledged to be equitable and sound, were ignored or implemented in the breach by regional enforcement officials."). Professor Mintz identifies a partial, though not particularly compelling defense to the Regions' and states' failure to adhere to such policies that will resonate with those who have spent time in government, notably the overwhelming volume of EPA "guidance documents." He quotes one EPA headquarters attorney as stating, "[w]e in headquarters develop so many guidances that we cannot keep track of them." *Id.* at 75.

22. See Stahl, *Enforcement in Transition*, *supra* note 16, at 19; Barnett Lawrence, *Supplemental Environmental Projects: A New Approach for EPA Enforcement*, 26 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,174 (1996).

EPA is apparently preparing to embark on a "massive reinvention" of enforcement. See *EPA Set to Launch Massive "Reinvention" of Environmental Enforcement*, *INSIDE EPA WKLY. REP.*, Aug. 20, 1999, at 1, 6.

23. See *EPA Administrator Reorganizes Agency's Enforcement Operations*, *U.S. EPA ENVTL. NEWS*, July 22, 1993, at 1-2; Stahl, *Enforcement in Transition*, *supra* note 16, at 19, 21 (noting that in 1994, "EPA completed a reorganization of its enforcement program . . . , consolidating the Agency's five enforcement and compliance programs under one assistant administrator for enforcement and compliance assurance—a new 'strategic enforcement organization.'"). EPA's Regional offices have undergone their own metamorphoses as well and have reorganized their own enforcement programs. See Steven A. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, *NAT'L ENVTL. ENFORCEMENT J.*, Feb. 1997, at 3-5. EPA's Assistant Administrator for the OECA has characterized these Regional reorganization efforts as "[c]hallenging" and notes that they have been quite "far-reaching." Steven A. Herman, *EPA's FY 1996 Enforcement and Compliance Assurance Priorities*, *NAT'L ENVTL. ENFORCEMENT J.*, Mar. 1996, at 3 (emphasis omitted).

forcement to the Office of Enforcement and Compliance Assurance ("OECA"), signaled EPA's intention to be more inclusive in its use of tools to promote compliance.²⁴ EPA would, in short, give heightened emphasis to the "softer side" of compliance—notably, increased use of compliance assistance and compliance incentive approaches.²⁵

While expanding its menu of compliance-promotion approaches, EPA has routinely asserted its continuing commitment to the central role of "traditional, deterrence-based enforcement" as a compliance tool.²⁶ The Agency's 1999 *Annual Plan Request to Congress*, for example, states that "[a] strong and vital enforcement program is critical to the success of EPA's environmental programs."²⁷ Steven A. Herman, head of EPA's enforcement office, has sounded this theme on numerous occasions, including as follows:

24. See Herman, *EPA's FY 1996 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3. In 1995, the Federal Office of Technology Assessment ("OTA") prepared a helpful guide to environmental policy tools, including tools useful to promote compliance. See OTA, U.S. CONGRESS, ENVIRONMENTAL POLICY TOOLS: A USER'S GUIDE, OTA-ENV-634 (1995).

25. EPA's *Final FY 96/97 OECA Memorandum of Agreement Guidance*, which sets the groundrules for Headquarters/Regional agreements on enforcement activities, articulates this shift as follows:

This MOA represents a significant change in strategic direction, shifting from our traditional exclusive focus on media-specific formal enforcement activities, to a balanced program of compliance assistance and enforcement . . .

U.S. EPA, *Final FY 96/97 OECA Memorandum of Agreement Guidance 1* (1995); see also Herman, *EPA's FY 1996 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3, noting that:

[w]e now have a structure that allows EPA to pick and choose among a broad spectrum of enforcement and compliance tools and authorities in order to resolve violations in the most appropriate ways, as well as to work more closely with the regulated community to try to prevent violations from occurring in the first place

(citation omitted). Some state officials and others have claimed, however, that EPA is sending "mixed messages" concerning the appropriate roles for different compliance and enforcement approaches. See *infra* notes 284–286 and accompanying text.

EPA is by no means the first agency to use different models of enforcement. See, e.g., SECURING COMPLIANCE: SEVEN CASE STUDIES 3–5, 9 (M.L. Friedland ed., 1990) (noting, *inter alia*, "we do not know the relative effectiveness of the various possible interventions.").

26. Herman, *EPA's FY 1996 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3 (noting that OECA has "augment[ed] the agency's traditional 'deterrent based' enforcement approach with a complementary emphasis on compliance promotion employing . . . technical assistance (e.g., promoting pollution prevention and similar innovative processes), compliance assistance (especially to small businesses and communities), and compliance incentives"). This Article borrows EPA Assistant Administrator Herman's phrase "traditional, deterren[ce] based enforcement" in referring to formal law enforcement.

27. U.S. EPA, ENVIRONMENTAL PROTECTION AGENCY 1999 ANNUAL PLAN REQUEST TO CONGRESS, A CREDIBLE DETERRENT TO POLLUTION AND GREATER COMPLIANCE WITH THE LAW, Objective #1 Overview (1999).

We will continue our aggressive implementation of the enforcement and compliance assurance program One point should be crystal clear—OECA will adhere to the fundamental principle that formal law enforcement is the central and indispensable element of effective governmental efforts to ensure compliance.²⁸

This Part provides brief overviews of three critical elements of EPA's compliance and enforcement effort.²⁹ It first summarizes EPA's traditional, deterrence-based civil and administrative enforcement practices. Next, the Part discusses a series of "compliance incentive" policies that make EPA penalty assessment practices more flexible and represent a move toward the "softer side" of the continuum. Finally, the Part discusses "compliance assistance" approaches such as technical assistance, public education, and the like, which are even further down the "soft" side of the continuum.

28. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3, 5; see also U.S. EPA, *Policy on Civil Penalties*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,083 (1984). Many EPA programs have developed their own penalty policies, which are based on such an approach. See, e.g., U.S. EPA, *Hazardous Waste Civil Enforcement Response Policy*, 26 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,645 (Mar. 15, 1996); U.S. EPA, *Revised Interim Clean Water Act Settlement Penalty Policy*, [Fed L. Binder] *Env't. Rep. (BNA)* 21:0911 (Feb. 28, 1995). EPA issued a "framework" in 1984 for its programs to use in developing their penalty policies. See U.S. EPA, *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties*, 17 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 35,073 (1984); U.S. EPA, *ENFORCEMENT FOUR-YEAR STRATEGIC PLAN: ENHANCED ENVIRONMENTAL ENFORCEMENT FOR THE 1990's* i (1991) (statement of the Administrator and Deputy Administrator that "[a]ggressive enforcement is the key to effective EPA, State, local and international progress and a clean environment.").

29. Criminal enforcement, while not discussed in this Article, is a fourth basic element of this effort that is aligned with traditional, deterrence-based civil and administrative enforcement on the "aggressive end" of the compliance/enforcement tools continuum. EPA has noted that criminal enforcement is "perhaps our most powerful environmental enforcement sanction and creates the strongest deterrence." U.S. EPA, *CRIMINAL ENFORCEMENT ADDENDUM TO THE POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS* 1 (1993); see also U.S. EPA, *OPERATING PRINCIPLES FOR AN INTEGRATED EPA ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM* 5 (1996) [hereinafter U.S. EPA, *OPERATING PRINCIPLES*] ("Criminal prosecution is the strongest sanction that the government has to address violations."); Roger J. Marzulla & Brett G. Kappel, *Nowhere to Run, Nowhere to Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 *COLUM. J. ENVTL. L.* 201 (1991). Criminal enforcement of the environmental law has become an increasingly important, and visible, element of the federal government's enforcement scheme in recent years. EPA (and the federal government in general) has significantly increased its allocation of resources to undertake investigations of possible criminal conduct in violation of the federal environmental laws and its ability to prosecute such behavior. See generally Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 *GEO. L.J.* 2407 (1995); Milo Mason, *Snapshot Interview: Steven A. Herman*, 12 *NAT. RESOURCES & ENV'T* 286, 288 (1998) (noting that EPA has built an "elite group of two hundred specially trained agents and investigators.").

In its *Final FY 98/99 OECA Memorandum of Agreement (MOA) Guidance*, EPA lists its available enforcement and compliance tools and includes civil and criminal enforcement, compliance monitoring, compliance incentives, and compliance assistance. See U.S. EPA, *FINAL FY 98/99 OECA MEMORANDUM OF AGREEMENT (MOA) GUIDANCE* 3-10 (1997).

A. EPA's Traditional, Deterrence-Based Approach to Enforcement

As noted above, EPA has long held, and continues to hold, the view that traditional, deterrence-based enforcement is an essential element of an effective environmental regulatory scheme.³⁰ Key features of this scheme include sufficient compliance monitoring to identify violators, initiating formal enforcement actions against significant violators in a timely and appropriate way, requiring the violator to return to a state of compliance, and imposing monetary sanctions that penalize the violator by requiring it to pay a fine that exceeds its economic gain from the non-compliant activity.³¹

30. See *supra* note 28 and accompanying text; see also OECA, U.S. EPA, PROTECTING YOUR HEALTH & THE ENVIRONMENT THROUGH INNOVATIVE APPROACHES TO COMPLIANCE: HIGHLIGHTS FROM THE PAST FIVE YEARS 19 EPA 300-K-99-001 (1999) [hereinafter OECA, U.S. EPA, PROTECTING YOUR HEALTH] (noting that EPA will "continue to maintain a strong base enforcement program . . . [b]ecause strong enforcement remains critical to ensuring compliance by those who continue to violate the law despite opportunities to come into compliance"); U.S. EPA, OPERATING PRINCIPLES, *supra* note 29, at 2 (noting, *inter alia*, that "[f]ormal law enforcement surely will continue to be the central and indispensable element of effective governmental efforts to ensure compliance"). As one study conducted for EPA notes, "[t]he central assumption of deterrence theory is that compliance is promoted when the probability of detecting a violation, multiplied by the penalty imposed, exceeds the violator's benefits from noncompliance." BARRY BOYER, ET AL., THEORETICAL PERSPECTIVES ON ENVIRONMENTAL COMPLIANCE I-2 (1987) (on file with the *Harvard Environmental Law Review*). The authors of this study identify several qualifications concerning the use of deterrence theory. See *id.* See generally Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S.CAL. L. REV. 1181 (1998) (providing a recent review of the literature concerning deterrence theory and other theories underlying various compliance-promotion approaches). In fact, a number of factors influence regulated party compliance, including internal factors (e.g., corporate culture) and external factors. Government enforcement and compliance approaches are among the latter (as are, for example, the possibility of common law exposure, perspectives of the lending community and, especially for consumer-oriented companies, the views of the community-at-large) but they may also influence the former. See BOYER, ET AL., *supra* Parts III-IV. A recent EPA/Chemical Manufacturers Association report discusses a 1996-1998 collaborative effort to survey CMA members to identify the "root causes" of noncompliance and recommendations to improve compliance. See U.S. EPA AND CHEMICAL MANUFACTURERS ASSOCIATION, EPA/CMA ROOT CAUSE ANALYSIS PILOT PROJECT: AN INDUSTRY SURVEY EPA-305-R-99-001 (1999).

31. See, e.g., U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083; U.S. EPA, OPERATING PRINCIPLES, *supra* note 29, at 2 (noting that EPA's goal is to "bring about environmental protection through immediate, full and continuous compliance with all Federal environmental laws and requirements" and that this goal is "most likely to be achieved" when, *inter alia*, "[t]here is no economic advantage for violators compared to those who timely comply; there is a 'level playing field' and it does not pay to violate"); Stahl, *Enforcement in Transition*, *supra* note 16, at 19 (summarizing enforcement based on deterrence as consisting of "rigorous inspection, detection of violations, and the resulting sanctions and penalties [which have forced] companies . . . to correct violations and discouraged future noncompliance"); U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS 14 GAO/RCED-98-113 (1998) (noting that enforcement traditionally has involved "monitoring compliance . . . , ensuring that violations are properly identified and reported, and ensuring that 'timely and appropriate' enforcement actions are taken against violators when necessary"); Mugdan, *supra* note 13, at 61 (listing five phases of enforcement, including: (1) identifying

Deterrence-based enforcement produces several important benefits, in EPA's view. First, it promotes "specific deterrence," that is, it convinces the violator not to violate again.³² Second, it promotes "general deterrence," i.e., it convinces other parties not to violate.³³ Third, it promotes equity by ensuring that violators do not gain a competitive advantage by violating the law but instead suffer financially for their violations.³⁴ Finally, it enhances public trust in government. To quote EPA's Assistant Administrator for Enforcement, Steven A. Herman, once again:

Penalties and other sanctions for violations of environmental requirements play an essential role in our national enforcement program. They are a critical ingredient to creating the deterrence we need to encourage the regulated community to anticipate, identify and correct violations. Appropriate penalties for violators offer some assurance of equity between those who choose to comply with requirements and those who violate requirements. It also secures public credibility when governments at all levels are ready, willing and able to back up requirements with action and consequences.³⁵

regulated parties, (2) educating facility operators and providing compliance assistance, (3) monitoring compliance, (4) pursuing timely and appropriate enforcement response when violations are discovered, and (5) following up on former violators to evaluate whether they have returned to compliance).

32. See U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083; OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 19.

33. See U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083; OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 19.

34. See U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083; see OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 19.

Determining economic benefit is not necessarily a simple matter. See, e.g., *United States v. Municipal Authority of Union Township*, 150 F.3d 259 (3d Cir. 1998); *Pub. Interest Research Group of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 80-81 (3d Cir. 1990); Robert H. Fuhrman, et al., *Consideration of "Wrongful Profits" in Environmental Civil Penalty Cases*, 13 NAT'L ENVTL. ENFORCEMENT J., Oct. 1998, at 3.

35. Memorandum from Steven A. Herman, Assistant Administrator, to Assistant Administrators, et al., *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements 1* (July 20, 1993) [hereinafter 1993 Revisions] (on file with the *Harvard Environmental Law Review*). In a 1998 interview, Assistant Administrator Herman candidly acknowledged that measuring deterrence is extremely difficult but reinforced the importance of conducting inspections, pursuing enforcement cases, and recouping appropriate penalties:

I . . . think it's important to have a basic presence in the regulated community and the numbers of inspections, enforcement actions, and amounts of penalties all give you those indicators. They are very valid measures of what we're doing. They also provide deterrence, which we all know is very hard to measure. Measuring the number of violations that do not occur because of our actions is also very hard to determine, but we know that people often obey the laws because they fear being caught.

Mason, *supra* note 29, at 311.

EPA is not alone in holding the view that formal, deterrence-based enforcement is key to compliance. Marver Bernstein put the issue succinctly more than four decades ago:

The attitude of [a government agency] toward its enforcement responsibilities affects its entire regulatory program. Unless it demonstrates a capacity to enforce its regulations, they will be more honored in the breach than in the observance. Those who discover that violations go undetected and unpunished will have little respect for the [regulatory scheme] and will violate regulations with impunity if it is to their financial or commercial advantage.³⁶

More recently, U.S. Senator Joseph Lieberman highlighted the central role enforcement must play for the environmental laws to have their desired impacts, stating that without enforcement, "most of the rest of environmental protection lacks meaning, lacks truth, lacks reality."³⁷ Others, as noted above, have been critical of this approach.³⁸

36. MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 224 (1955). One commentator sympathetic to this point of view put it as follows: "all the laws on earth do not amount to much if they are not enforced, or if the enforcement lacks teeth." Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 5 (1995).

37. *Senate Committee on Environment and Public Works, Oversight of the Environmental Protection Agency's Enforcement Program: Hearings before the Subcomm. on Toxic Substances, Environmental Oversight, Research and Development*, 101st Cong. 2 (1989) (statement of Senator Joseph I. Lieberman); see also Mintz, *supra* note 21, at 9 (noting that, similarly, "[e]nforcement occupies a central place in the administration of regulatory requirements"); Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 ENVTL. L. 335, 338 (noting that "[v]igorous enforcement programs can and do have a dramatic impact on the amount of attention that regulated entities pay to environmental compliance matters. Consequently, they have significant effects on the total number of violations that occur."); U.S. PIRG Press Release for DIRTY WATER SCOUNDRELS: STATE-BY-STATE VIOLATIONS OF THE CLEAN WATER ACT BY THE NATION'S LARGEST FACILITIES 1 (1997) (concluding that "[w]ithout environmental cops aggressively on the beat, polluters have little incentive to clean up their act. When penalties rarely outweigh the profits gained from permit violations, it pays to pollute."); Mugdan, *supra* note 13, at 49 (noting that one of the "axiomatic observations [t]hat inform[s] the Agency's enforcement philosophy" is that "[c]ompliance with environmental regulations is often costly, sometimes extremely so, and the investments required generally do not enhance the profitability of the affected industry. Therefore, business will not voluntarily elect to comply with such regulations without powerful incentives."); Vicki Masterman, Jones, Day, Reavis and Pogue, Presentation at ALI-ABALELI Course of Study on Environmental Law, Washington, D.C., (Feb. 15, 1992), in Mintz, *supra* note 21, at 15.

(Enforcement [by EPA] is a very real problem for industry. Threats of imprisonment and high penalties strike the deepest chords of fear in corporate environmental managers From industry's perspective enforcement is key.).

38. See *supra* notes 11-14; see also Kathryn Harrison, *Is Cooperation the Answer? Canadian Environmental Enforcement in Comparative Context*, 14 J. POL'Y ANALYSIS & MGMT. 221, 221 (1995) (noting that, inter alia, "[w]ith respect to regulatory enforcement

Over the years, EPA has developed a series of general and program-specific response and penalty policies that outline EPA's philosophy toward enforcement as well as the enforcement approach EPA staff should follow in particular cases. These policies start with the fundamental tenet that for significant noncompliance,³⁹ violators should be penalized for their violations so that they do not gain financially from them. EPA makes this point in a 1996 policy, stating:

Penalties are most effectively used for noncompliance which adversely impacts the environment, the integrity of our regulatory framework, or the 'economic playing field.' Penalties must be substantial enough to erase the economic gain of noncompliance, and create specific and general deterrence.⁴⁰

The policies use the concepts of recoupment of a "benefit component" and collection of a "gravity component" as the tools to achieve this goal.⁴¹

EPA's penalties often go beyond merely recouping the benefits gained from noncompliance. At a minimum, EPA policy is to "remove any significant economic benefits resulting from failure to comply with the law."⁴² Additionally, EPA penalty policies direct EPA staff to impose a "gravity component" in calculating penalties in appropriate cases. EPA notes that "removal of the economic benefit . . . only places the violator in the same position as he would have been if compliance had been

. . . , frustration with the rigid, prosecution-oriented U.S. approach has led to growing interest among American authors in the more flexible, negotiated approach to enforcement practiced in other countries.").

39. EPA's policies explain that penalties are warranted for several types of violations but not for all. EPA's program-specific enforcement response policies often seek to draw the line between violations warranting a penalty and those for which a penalty is not appropriate. See, e.g., U.S. EPA, *Hazardous Waste Civil Enforcement Response Policy*, *supra* note 28, at 35,465. In a substantial number of situations EPA responds to a violation by issuing a warning letter or another enforcement instrument that does not involve payment of a penalty. See U.S. EPA, *OPERATING PRINCIPLES*, *supra* note 29, at 4 (noting that "[a] written notice of violation . . . is best suited for minor, inadvertent, first-time violations" and also indicating that oral notices of violation "are rarely appropriate as the sole enforcement response"); see also Mugdan, *supra* note 13, at 65 (noting that EPA has a "wide range of enforcement tools" at its disposal, including "[i]nformal response[s] [in which] EPA can simply notify the source about its violation and request that it come into compliance, without taking any further formal legal action"). EPA's efforts to draw lines between "significant" and other violations have by no means gone unchallenged, as discussed *infra* note 183.

40. U.S. EPA, *OPERATING PRINCIPLES*, *supra* note 29, at 5.

41. See U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083.

42. *Id.* Recoupment of economic benefit "has been a cornerstone of EPA's penalty assessment process since 1984." Lawrence, *Supplemental Environmental Projects: A New Approach for EPA Enforcement*, *supra* note 22, at 10,175.

achieved on time"⁴³ and that this result will neither produce adequate deterrence nor produce a fair result:

Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition, the penalty's size will tend to deter other potential violators.⁴⁴

In sum, EPA believes its penalty policies serve to deter violators, increase the fairness of the environmental regulatory scheme, and promote government credibility.

B. Emergence of new Enforcement and Compliance Incentive and Assistance Strategies

In recent years EPA has adopted a series of enforcement policies that reflect the Agency's intent to build greater flexibility into its approach to preventing and responding to violations.⁴⁵ EPA and outside observers have generally put these new strategies into either of two categories, compliance incentive approaches⁴⁶ and compliance assistance strategies.⁴⁷

EPA's compliance incentive policies authorize EPA to deviate from its standard approach, discussed in the previous Part, of pursuing violators to obtain penalties that recoup economic benefit and include a gravity-based amount. EPA's Supplemental Environmental Projects Policy ("SEPs Policy"), its Self-Audit Policy, and the Small Business Compliance Assurance Policy, all discussed below, are recent examples of this genre.⁴⁸ In the words of EPA Assistant Administrator Herman, these poli-

43. U.S. EPA, *Policy on Civil Penalties*, *supra* note 28, at 35,083.

44. *Id.*

45. See U.S. EPA, *OPERATING PRINCIPLES*, *supra* note 29, at 5.

46. EPA defines compliance incentive policies as those policies that "encourage regulated entities to voluntarily discover, disclose and correct violations or clean up contaminated sites before they are identified by the government for enforcement investigation or response." *Id.* at 8.

47. Compliance assistance, in EPA's words, "consists of information and technical assistance provided to the regulated community to help it meet the requirements of environmental law." *Id.* at 9 (emphasis omitted). Compliance assistance falls into three broad categories, "outreach," "response to requests for assistance," and "on-site assistance." *Id.*

48. To some extent, placement of these policies into one category or another is a matter of semantics. For example, the SEPs Policy could reasonably be treated as a form of enforcement action, not as an "incentives policy," because it primarily offsets penalties through post-violation behavior. On the other hand, SEPs are intended to promote future compliance, i.e., EPA is willing to offset a penalty in order to create incentives for future compliance. For purposes of this Article, the key point with respect to the SEPs Policy is

cies “provide[] positive incentives for the regulated community to examine what it’s doing, see if there are problems, and correct them The incentives are an important component of our program, and we devote a significant amount of time to making them work.”⁴⁹ These compliance incentive policies are summarized below, followed by a brief review of EPA’s compliance assistance strategies.

1. EPA’s May 1, 1998 Supplemental Environmental Projects Policy

In April 1998, EPA issued the fourth iteration of its SEPs Policy.⁵⁰ The SEPs Policy defines SEPs as:

environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.⁵¹

The SEPs Policy elaborates on this definition’s key terms as follows:

“Environmentally beneficial” means a SEP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

that while it allows EPA to reduce penalty amounts in a way not contemplated by the traditional penalty policies, the SEPs Policy maintains the inviolability of the notion that penalties should recoup economic benefit.

Although not discussed in detail in this Article, EPA’s Small Community Amnesty Policy takes a similar tack. *See* U.S. EPA, POLICY ON FLEXIBLE STATE ENFORCEMENT RESPONSE TO SMALL COMMUNITY VIOLATIONS 1 (1995) (indicating that “States may provide small communities an incentive to request compliance assistance by waiving part or all of the penalty for a small community’s violations if the criteria of this Policy have been met. If a State acts in accordance with this policy . . . EPA generally will not pursue a separate Federal civil administrative or judicial action for penalties or additional injunctive relief.”).

For a survey of several other EPA “compliance incentive” policies, see OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30.

49. Mason, *supra* note 29, at 286–87. Congress has also gotten into the act of developing what might be characterized as “compliance incentive schemes.” *See, e.g.*, Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 223, 110 Stat. 857, 862 (1996) (addressing minor violations by small businesses).

50. U.S. EPA, *Memorandum Policy Document on Supplemental Environmental Projects*, 29 Env’t Rep. (BNA) 77 (1998) [hereinafter SEPs Policy]. The SEPs Policy was signed on April 10 and became effective on May 1, 1998. Previous versions were issued in 1991 and 1995. *See* OECA, U.S. EPA, INTERIM REVISED EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY (effective May 8, 1995); U.S. EPA, INTERIM POLICY ON THE INCLUSION OF POLLUTION PREVENTION AND RECYCLING PROVISIONS IN ENFORCEMENT SETTLEMENTS (1991); U.S. EPA, *Policy on the Use of Supplemental Environmental Projects in EPA Settlements*, 25 Env’t. L. Rep. (Env’t. L. Inst.) 35,607 (1991).

51. SEPs Policy, *supra* note 50, at 79.

"In settlement of an enforcement action" means: 1) EPA has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).

"Not otherwise legally required to perform means" [sic] . . . [the SEP] is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent is likely to be required to perform

SEPs may include activities which the defendant/respondent will become legally obligated to undertake two or more years in the future Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.⁵²

The key feature of SEPs for this Article's purposes is that they provide an opportunity for a violator to reduce the size of its payable penalty by reaching an agreement with EPA on an appropriate SEP. EPA has been careful to limit the reductions potentially available. In particular, EPA's policy mandates that EPA always recoup economic benefit.⁵³ The value of a SEP to a violator lies in its reducing the "gravity" component of the penalty.⁵⁴

Generally, EPA will not reduce the amount of a penalty by the cost of a SEP on a one-to-one basis. Instead, as a general guideline, the final "mitigation percentage should not exceed 80 percent of the SEP cost," though the percentage may be as high as 100 percent for "small busi-

52. *Id.*

53. *See id.* at 83.

54. Typically, in settlements that include SEPs, EPA also will recover penalties that, at a minimum, recover "the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater." *Id.* at 83.

The SEPs Policy indicates that EPA will use a five-step process to calculate how much of a penalty reduction a SEP warrants. First, the Agency will use its applicable penalty policies to calculate a penalty. *See id.* at 83. This calculation will include assessing both economic benefit and gravity. *See id.* Second, EPA will determine the "net present after-tax cost of the SEP." *Id.* EPA calls this the "SEP COST." *Id.* EPA has developed a computer model that it calls "PROJECT" to help it calculate the SEP COST. *See id.* The three types of costs that EPA enters into the PROJECT model are: (1) capital costs; (2) one-time nondepreciable costs; and (3) annual operation costs or savings. *See id.*

Finally, EPA will evaluate the benefits of the SEP, to determine what percentage of the net present after-tax cost to consider in establishing a final settlement penalty. *See id.* at 84.

nesses, government agencies or entities, and non-profit organizations”⁵⁵

In sum, the SEPs Policy represents a qualification of the Civil Penalty Policy approach because it reduces the penalty the Civil Penalty Policy would otherwise require. “All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.”⁵⁶ But the SEPs Policy is careful to maintain the inviolability of the notion that penalties should recoup economic benefit. EPA’s justification in the SEPs Policy for maintaining this form of sanction relies upon the same principles articulated in the 1984 Civil Penalty Policy concerning the importance of significant penalties to both deterrence and fairness:

In settling enforcement actions, EPA . . . seeks substantial monetary penalties in order to deter noncompliance. Without penalties, regulated entities would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time.⁵⁷

The other feature of SEPs is that they are, by definition, for activities that “the defendant/respondent is not otherwise legally required to perform.”⁵⁸ EPA acknowledges this forthrightly, noting that SEPs may be “particularly appropriate to further the objectives in the statutes EPA ad-

55. SEPs Policy, *supra* note 50, at 84.

56. *Id.* at 78. One commentator suggests that use of such projects “may . . . lead to inconsistent penalty assessments for comparable violations.” Mary Beth Arnett, *Risky Business: OSHA’S Hazard Communication Standard, EPA’S Toxics Release Inventory, and Environmental Safety*, 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,440, 10,477 (1992).

57. SEPs Policy, *supra* note 50, at 78.

58. *Id.* at 79. For an endorsement of the idea that EPA must be increasingly proactive in extending its vision and reach beyond the goal of compliance with existing norms, see, e.g., SAB, U.S. EPA, *supra* note 8, at 18, 21 (noting that EPA:

must develop a capacity to anticipate problems and respond to them long before their adverse effects are widely felt. The Agency must broaden its understanding of what causes environmental problems, and it must broaden its approach—both internal and external—to solving them EPA must begin to think more systematically about environmental problems that could emerge in the future This orientation to the future requires a broader vision at EPA. It calls for an Agency that goes beyond environmental regulation to environmental protection in its broadest sense, an Agency committed to anticipating possible future environmental problems as well as controlling present and future ones.).

ministers and to achieve other policy goals, including promoting pollution prevention and environmental justice.”⁵⁹

The SEPs Policy identifies five “legal guidelines” that EPA will use to ensure that proposed SEPs are within the Agency’s authority:

1. A project cannot be inconsistent with any provision of the underlying statutes.
2. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:
 - a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
 - b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
 - c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.⁶⁰

59. SEPs Policy, *supra* note 50, at 78. For a criticism of such projects when included in citizen suits, see Greve, *supra* note 9, at 110 (alleging that many citizen suit settlements involve SEP-type projects, and that many of these involve transfer payments to environmental groups). GAO has questioned EPA’s authority to enter into SEPs, at least in some circumstances. See Lawrence, *Supplemental Environmental Projects: A New Approach for EPA Enforcement*, *supra* note 22, at 10,176.

On the one hand, it might be surprising that an enforcement setting would be helpful for promoting SEPs, given its “adversarial backdrop and somewhat legalistic framework.” MASSACHUSETTS INSTITUTE OF TECHNOLOGY CENTER FOR TECHNOLOGY, POLICY & INDUSTRIAL DEVELOPMENT, REPORT SUMMARY PREPARED FOR THE EPA OFFICE OF ENFORCEMENT: RECENT EXPERIENCE IN ENCOURAGING THE USE OF POLLUTION PREVENTION IN ENFORCEMENT SETTLEMENTS 2 (1994) [hereinafter M.I.T. REPORT]. On the other hand, as MIT points out in its study:

the enforcement context has two distinct advantages. First, firms can be motivated to innovate, i.e., to overcome the barriers to pollution prevention innovation that often exist in firms, through penalty reduction improved relations with the [A]gency, and improved public relations Second, since the firm has committed to implement the innovative project in its consent agreement with the [A]gency . . . there is a strong incentive to stick with the project even when technical difficulties arise. Enforcement thus creates a “window of opportunity” in which options for technological change receive more serious consideration than usual.

Id. at 2.

60. SEPs Policy, *supra* note 50, at 80. The Policy notes that “[n]exus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic area.” *Id.*

3. EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP
4. The . . . “what, where and when” of a project are defined by the settlement agreement.⁶¹

Finally, a project may not be something that EPA itself is required to do.⁶²

In recent years, EPA has revised its SEPs Policy to further expand the use of SEPs.⁶³ The use of SEPs appears to be gaining in popularity.⁶⁴ EPA's Pollution Prevention Directory reports that EPA has entered into at least 66 settlements containing pollution prevention measures.⁶⁵

2. EPA's Self-Audit Policy

EPA's December 1995 Self-Audit Policy, formally entitled *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*,⁶⁶ is a second EPA policy that provides limited relief for regulated parties that violate environmental requirements.⁶⁷ Like the

61. *Id.*

62. See *id.* EPA identifies seven categories of projects that may qualify as SEPs: public health, pollution prevention, pollution reduction, environmental restoration and protection, assessment and audits, environmental compliance promotion, and emergency planning and preparedness. See *id.* at 80–82. Other types of projects are potentially allowable with advance approval by EPA's OECA. See *id.* at 82.

63. See Steven A. Herman, *EPA's Enforcement and Compliance Assurance Priorities for Fiscal Year 1995*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1995, at 5, 9, 10 (noting that the 1995 SEPs [P]olicy will “encourage the negotiation of future SEPs . . .”); Steven A. Herman, *EPA's Revised Supplemental Environmental Projects Policy Will Produce More Environmentally Beneficial Enforcement Settlements*, NAT'L ENVTL. ENFORCEMENT J., July 1995, at 9, 10.

64. See Lawrence, *Supplemental Environmental Projects: A New Approach for EPA Enforcement*, *supra* note 22, at 10, 174 (noting that EPA “has used SEPs in some form since the late 1970s, but used them sparingly until the last few years.”).

65. See U.S. EPA, POLLUTION PREVENTION DIRECTORY, 16 EPA-742-B-94-005 (1994); see also Herman, *EPA's Enforcement and Compliance Assurance Priorities for Fiscal Year 1995*, *supra* note 63, at 3, 5 (reporting that EPA negotiated “over 100 Pollution Prevention SEPs worth an estimated \$45 million” in EPA fiscal year 1992–1993). A 1994 report provides interesting summaries of 10 such settlements. See MIT REPORT, *supra* note 59, at 2. For an in depth discussion of one settlement, see James J. Periconi and David Nelson, *The Precedent-Setting Use of a Pollution Prevention Project In an EPA Enforcement Settlement: The First Dollar-for-Dollar Penalty Offset*, 24 Env't Rep. (BNA) 2049 (1994).

66. U.S. EPA, *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706 (1995) [hereinafter EPA's Self-Audit Policy]. This Policy supercedes EPA's 1986 Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (July 9, 1986), 60 Fed. Reg. 66,711. EPA issued an “interpretive guidance” for the Policy on January 15, 1997. See STEVEN A. HERMAN, U.S. EPA, *ISSUANCE OF AUDIT POLICY INTERPRETIVE GUIDANCE* (Jan. 15, 1997).

67. One of the more contentious areas of state/federal relations involves state audit privilege and immunity legislation. Such legislation, and EPA's approach toward it, is discussed *infra* at Part VI.

SEPs Policy, EPA's Self-Audit Policy allows violators to avoid paying a penalty determined by calculating "economic benefit" and a gravity component.⁶⁸ EPA's Self-Audit Policy, again like the SEPs Policy, does not provide for reduction in the economic benefit portion of a penalty and only allows reduction in the gravity component. The Agency defines gravity-based penalties as "that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than the portion representing a defendant's economic gain from non-compliance."⁶⁹ The difference between the policies is that the Self-Audit Policy allows for complete elimination of the gravity component in some cases, while the SEPs Policy's relief is more limited.⁷⁰

The primary purpose of the Self-Audit Policy is to enhance compliance with environmental laws by encouraging regulated parties to discover violations on their own, to correct them promptly and to report them to the government. It is intended to provide "additional incentives . . . to encourage voluntary disclosure and correction of violations uncovered during environmental audits."⁷¹ Put another way, the Self-Audit Policy is intended to "promote[] a higher standard of self-policing."⁷²

EPA developed its strategy of relaxing penalty amounts to promote higher levels of self-auditing based on a substantial outreach effort that included a "stakeholder" meeting and other attempts to obtain input.⁷³

68. EPA's Self-Audit Policy, *supra* note 66, at 66,706.

69. *Id.* at 66,711.

70. The Policy's "relaxation" of penalty recoupment applies only in the settlement context. EPA will not reduce a penalty in a case that goes to litigation. *See id.* at 66,712 (noting that the Policy is "not intended for use in pleading, at hearing, or trial"); HERMAN, ISSUANCE OF AUDIT POLICY INTERPRETIVE GUIDANCE, *supra* note 66, at vi, 12. *But see In re Bollman Hat Co.*, Emergency Planning and Community Right-to-Know Act ("EPCRA") Appeal No. 98-4, 29 Env'tl. L. Rep. (Env'tl. L. Inst.) 41,083 (1999) (rejecting EPA's appeal of an ALJ ruling in which the ALJ applied the Self-Audit Policy to reduce the penalty in a case that went to litigation).

EPA reported in 1999 that "over 318 companies have disclosed and corrected violations under the audit policy at more than 1,668 facilities." OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 14. It further noted that "[t]he rates of disclosing companies and corrected violations under the policy have increased every year since its effective date." *Id.* at 14.

The SEPs Policy and the Self-Audit Policy potentially may be used in the same matter. In cases in which a 75% gravity-based reduction is authorized under the Self-Audit Policy, the gravity component of the penalty may be reduced further if appropriate under the SEPs Policy. *See* HERMAN, ISSUANCE OF AUDIT POLICY INTERPRETIVE GUIDANCE, *supra* note 66, at 19. The Audit Policy requires recoupment of economic benefit: "As to economic benefit of noncompliance (EBN), the Audit Policy restates the Agency's longstanding position that recovery of any significant EBN is important in order to preserve a level playing field for the regulated community." *Id.*

71. EPA's Self-Audit Policy, *supra* note 66, at 66,706. Many share the view that environmental auditing promotes compliance. *See generally* U.S. GAO, ENVIRONMENTAL AUDITING: A USEFUL TOOL THAT CAN IMPROVE ENVIRONMENTAL PERFORMANCE AND REDUCE COSTS 4 GAO/RCED-95-37 (1995); PRICE WATERHOUSE, THE VOLUNTARY ENVIRONMENTAL AUDIT SURVEY OF U.S. BUSINESS 5-6 (1995).

72. EPA's Self-Audit Policy, *supra* note 66, at 66,706.

73. *See id.*

The Agency determined that the incentives it was offering would improve the “frequency and quality of . . . self-monitoring efforts.”⁷⁴ EPA reached this conclusion based in part on the fact that “[m]ore than half of the respondents to . . . [a] 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected.”⁷⁵

The Policy announces EPA’s intent to forgive entirely the gravity component of a penalty where violations are discovered “through voluntary environmental audits or efforts that reflect a regulated entity’s due diligence, and are promptly disclosed and expeditiously corrected.”⁷⁶ Self-monitoring efforts that fulfill this test are of two types. First, there are environmental audits, which EPA defines as “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.”⁷⁷ Second, there are “compliance management programs” that meet certain criteria for due diligence provided in Appendix B of the 1995 Policy.⁷⁸ EPA will forgive seventy-five percent of the gravity-based portion for violations “that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence.”⁷⁹

Section D of the Policy lists nine conditions a regulated party must meet to avoid gravity-based penalties, or to obtain a seventy-five percent reduction in such penalties, as the case may be:

1. The violation was discovered through: “a) an environmental audit; or b) an objective, documented, systematic procedure or practice reflecting the regulated entity’s due diligence in preventing, detecting, and correcting violations.”
2. The violation was discovered voluntarily, not through “legally mandated . . . requirement[s].”

74. *Id.* at 66,707.

75. *Id.*

76. *Id.* at 66,706.

77. EPA’s Self-Audit Policy, *supra* note 66, at 66,710.

78. *See id.* at 66,707, 66,710–11.

79. *Id.* at 66,706. The Self-Audit Policy indicates that EPA will generally not recommend criminal prosecution for violations discovered through voluntary environmental audits that meet the other conditions identified above; it makes no such representation as to this second category of voluntarily discovered and corrected violations. *See id.* EPA also notes that “[r]epeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy.” *Id.* at 66,706. Among other safeguards against abuse of the Policy, EPA also indicates that [c]orporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.” *Id.* EPA indicates that while it reserves the right to recover economic benefit, it may waive this component of the penalty as well “where the Agency determines that it is insignificant.” *Id.* at 66,707.

3. The regulated party disclosed promptly the violation.
4. The regulated party discovered and disclosed the violation independent of government or third party action.
5. The regulated party corrected the violation within 60 days, so notified EPA, and remediated any environmental or human harm due to the violation.
6. The regulated party agrees to take steps to prevent the violation from recurring.
7. The specific violations (or "closely related" violations) have not occurred within the previous three years at the same facility or within the previous five years at the facility's parent organization's other facilities.
8. The violation did not result in serious actual harm or present an imminent and substantial endangerment to human health or the environment, and it did not violate a judicial or administrative order or consent agreement.
9. The regulated party has cooperated with EPA to help EPA evaluate whether the policy applies to the violations at issue.⁸⁰

These conditions are intended to "deter irresponsible behavior and protect the public and environment."⁸¹ In particular, EPA articulates the balancing act as follows:

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions, and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements . . . [and it believes that] because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves . . . [and that] incentives offered in [its] policy will improve the frequency and quality of these self-monitoring efforts.⁸²

80. *Id.* at 66,711-12.

81. EPA's Self-Audit Policy, *supra* note 66, at 66,706.

82. *Id.* at 66,706, 66,707. EPA noted that it would conduct a study of the effectiveness of the Policy within three years. *See id.* at 66,706. On May 17, 1999, EPA published its evaluation in the Federal Register. *See* Evaluation of "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" Policy Statement, Proposed

EPA notes that its enforcement program “provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance” and that enforcement “has contributed to the dramatic expansion of environmental auditing.”⁸³ EPA cites the above-referenced 1995 Price-Waterhouse survey, which found that “90% of the corporate respondents . . . who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors.”⁸⁴

From EPA’s Federal Register notice explaining the Self-Audit Policy, it is clear that there was significant sentiment for abandoning the principle of recoupment of economic benefit in order to improve incentives for responsible self-policing.⁸⁵ EPA decided to retain economic benefit recoupment because it “provides an incentive to comply on time,” and “because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.”⁸⁶ EPA noted that many stakeholders supported retaining the concept of recovering economic benefit, including industry representatives.⁸⁷

3. EPA’s Interim Policy on Compliance Incentives for Small Business

On June 3, 1996, EPA went beyond the SEPs and Self-Auditing Policy by issuing its *Interim Policy on Compliance Incentives for Small Business*.⁸⁸ The Small Business Policy’s departure from the 1984 Civil Penalty Policy is more dramatic and complete than either the SEPs Policy or the Self-Audit Policy because it reflects EPA’s intent to forego penalties entirely (economic benefit recoupment as well as gravity) under certain circumstances. The circumstances are as follows:

1. The violator must be a “small business.”⁸⁹

Revisions and Request for Public Comment, 64 Fed. Reg. 26,745 (May 17, 1999). Some commentators suggest that meaningful evaluations of program effectiveness rarely occur. See, e.g., DAVIES & MAZUREK, *supra* note 19, at 1, 35 (noting that “[s]erious objective evaluation of public programs is a rare activity” and that “EPA has numerous management shortcomings but none is more damaging to the regulatory system as a whole than the absence of feedback and evaluation. This absence means EPA has no reporting system to tell whether its goals are being accomplished, whether any program is being made, or how much work is being done.”).

83. EPA’s Self-Audit Policy, *supra* note 66, at 66,706–07.

84. *Id.*

85. See *id.* at 66,707.

86. *Id.*

87. See *id.*

88. U.S. EPA, INTERIM POLICY ON COMPLIANCE INCENTIVES FOR SMALL BUSINESS, 26 Env’tl. L. Rep. (Env’tl. L. Inst.) 35,649 (June 3, 1996) [hereinafter U.S. EPA, INTERIM POLICY ON SMALL BUSINESS]. EPA also has issued a policy that provides additional flexibility in handling violations by small communities. See U.S. EPA, POLICY ON FLEXIBLE STATE ENFORCEMENT RESPONSE TO SMALL COMMUNITY VIOLATIONS, *supra* note 48.

89. U.S. EPA, INTERIM POLICY ON SMALL BUSINESS, *supra* note 88, at 35,649. EPA

2. The business "has made a good-faith effort to comply with applicable environmental requirements" either by receiving compliance assistance (and the violations are discovered during the compliance assistance) or by conducting an environmental audit and promptly disclosing violations discovered;⁹⁰

3. The violation: a) must be the business's first violation of the particular requirement and the business also must not have been subject to two or more enforcement actions for violations of environmental requirements in the past five years; b) must not involve criminal conduct; c) has not caused, is not causing, and does not present a significant health, safety, or environmental threat or harm; and d) must be remedied within 180 days after the violation is detected.⁹¹

EPA will not forego recoupment of economic benefit if the violator has "obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors."⁹² But EPA "anticipates that this situation will occur very infrequently."⁹³

The purpose of the Small Business Policy is to "promote environmental compliance among small businesses by providing incentives for them to participate in on-site compliance assistance programs and to conduct environmental audits."⁹⁴ EPA indicates that it will "defer to state actions . . . that are generally consistent with the criteria set forth in this Policy."⁹⁵ As was the case for the Self-Audit Policy, EPA commits to

defines a small business to be "a person, corporation, partnership, or other entity who employs 100 or fewer individuals (across all facilities and operations owned by the entity)." *Id.*

90. *Id.* The Small Business Policy is quite specific about the type of compliance assistance that qualifies (*e.g.*, on-site compliance assistance). *Id.* at 35,650.

91. *Id.* at 35,649-50. The 180-day "corrections period" may be extended to 360 days (*i.e.*, approximately one year) after discovery if the party will use pollution prevention measures to correct the violation. *See id.* at 35,650. Corrections that will take more than 90 days require special treatment (either the party's submission of a written schedule for completing the work or the Agency's issuance of a compliance order). *See id.*

92. *Id.*

93. U.S. EPA, INTERIM POLICY ON SMALL BUSINESS, *supra* note 88, at 35,650.

94. *Id.* at 35,649. The Small Business Policy builds on EPA's Clean Air Act Section 507 Policy and is "one of the twenty-five reinvention of environmental regulation initiatives announced by President Clinton on March 16, 1995" as well as a "major part of the implementation of the President's Executive Memorandum on the Waiver of Penalties and Reduction of Reports." Steven A. Herman, *New OECA Initiatives Policy, Metal Finishing National Assistance Center Will Enhance Compliance by Small Business*, NAT'L ENVTL. ENFORCEMENT J., Aug. 1995, at 9, 11. As noted in the text, the Small Business Policy also is an outgrowth of, and shares features with, the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 601 (1994 & Supp. III 1997). *See* U.S. EPA, INTERIM POLICY ON SMALL BUSINESS, *supra*, at 35,649.

95. U.S. EPA, INTERIM POLICY ON SMALL BUSINESS, *supra*, at 35,651.

study the effectiveness of the Small Business Policy within three years.⁹⁶ EPA Administrator Herman has characterized the Small Business Policy as a “tangible example” of OECA’s “balanced enforcement and compliance program”⁹⁷

4. Compliance Assistance

In recent years, EPA has launched a large number and wide variety of “compliance assistance” policies.⁹⁸ These policies are based, in part, on the premise that a significant reason for non-compliance is lack of knowledge on the part of the regulated community about their regulatory obligations and about how to comply.⁹⁹ EPA explained its approach as follows in a 1999 report:

Over the past five years, EPA has greatly increased its efforts to develop compliance assistance tools, particularly for small businesses, in different industry sectors. Why? Because most small businesses will do the right thing if they have the information that they need to comply. The key is to get information on environmental requirements into the hands of all businesses, small, medium and large, who want to comply.¹⁰⁰

Further, many believe that the level of government resources is far too low to enable the government to pursue traditional enforcement approaches effectively for regulatory schemes that impose obligations on a universe of thousands (or tens or hundreds of thousands) of small facilities. Therefore compliance assistance is likely to be far more efficient in promoting compliance.¹⁰¹

96. See *id.*; Proposed Modifications to the Policy on Compliance Incentives for Small Businesses and Request for Public Comment, 64 Fed. Reg. 41,116 (July 29, 1999).

97. Herman, *New OECA Initiatives Policy, Metal Finishing National Assistance Center Will Enhance Compliance by Small Business*, *supra* note 94, at 9, 11.

98. EPA has defined compliance assistance as “consist[ing] of information and technical assistance provided to the regulated community to help it meet the requirements of environmental law. First and foremost, compliance assistance ensures that the regulated community understands its obligation by providing clear and consistent descriptions of regulatory requirements. Compliance assistance can also help regulated industries find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.” HERMAN, FINAL FY 98/99 OECA MEMORANDUM OF AGREEMENT (MOA) GUIDANCE, *supra* note 29, at 3.

99. Stahl, *Enforcement in Transition*, *supra* note 16, at 19, 21; U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 22; OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 6.

100. OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 6.

101. See Stahl, *Enforcement in Transition*, *supra* note 16, at 19, 21; U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 22.

EPA's creation and funding of nine compliance assistance centers for various industrial sectors is one significant example of this new focus on compliance assistance approaches.¹⁰² EPA indicates that eight of the centers were selected to "serve sectors in which there are a large number of small businesses that can cause real environmental impacts depending on the processes and practices that they use."¹⁰³ The ninth center focuses on meeting the environmental information needs of local governments.¹⁰⁴ These centers are available through the Internet as well as via toll-free assistance lines.¹⁰⁵

EPA also has developed "sector notebooks" for twenty-eight major industries. These notebooks are intended to "help owners and operators of regulated industries understand their regulatory obligations through comprehensive plain-English guides."¹⁰⁶ EPA describes the contents of, and value added by, these notebooks as follows:

Each profile contains information on the overall compliance history of the industry, applicable federal laws and regulations, industrial processes, the amount and type of pollutants generated, applicable pollution prevention approaches, and current cooperative programs designed to improve the environmental performance of each industry. The notebooks are virtually the only government publication in which all of these cross-cutting environmental issues are presented in a single document per industry sector.¹⁰⁷

Among EPA's other compliance assistance approaches, the Agency has created "consolidated screening checklists" for various industries to help them to conduct self-audits; and it has prepared guidance for certain industries to promote compliance with particular regulatory requirements.¹⁰⁸

102. OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 6. This report provides summaries of each Center. *See id.* at 8-10.

103. *Id.* at 8.

104. *Id.* at 7.

105. *See id.* at 6.

106. *Id.* at 10.

107. *Id.* at 10.

108. *See* Mason, *supra* note 29, at 287-88; U.S. EPA, THE OFFICE OF COMPLIANCE: AN INTRODUCTORY GUIDE (1998); Steven Herman, *EPA's 1998 Enforcement and Compliance Assurance Priorities*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1998, at 3, 13. Compliance assistance approaches of the sort described in the text are only a small subset of the wide array of voluntary initiatives and other "reinvention approaches" EPA has experimented with in recent years, such as the Environmental Leadership Program, the Common Sense Initiative, and others. EPA's Web page contains considerable information on these initiatives. *See, e.g.*, <<http://www.epa.gov/reinvent>>.

C. Conclusions Concerning EPA Enforcement and Compliance Approaches

In conclusion, EPA continues to espouse a commitment to the principles articulated in the Agency's 1984 Civil Penalty Policy. These principles are that, among others, (1) a vigorous enforcement presence is needed to promote compliance, and (2) in appropriate cases, significant penalties that include both an economic benefit and a gravity component are required to get the job done.

EPA's SEPs Policy (and the expansion of this Policy over time), its Self-Audit Policy, and its Small Business Compliance Policy signal EPA's view that compliance, as well as "beyond compliance" environmental protection, may be maximized by creating some flexibility in the Agency's approach to penalty recovery. This flexibility, however, appears to remain quite limited based on the policy documents themselves. The SEPs and Self-Audit Policies both require recovery of economic benefit in appropriate cases and require recovery of at least a portion of the gravity component of penalties in many cases. It is only in the special case of certain small businesses that EPA has expressed a willingness to forego penalties entirely. Even here, EPA has been careful to circumscribe options for deviating from its traditional, deterrence-based approach. As noted above, a small business must be making good faith efforts to comply, with good faith defined fairly narrowly, and the violations involved cannot have produced a significant economic benefit for the business or a significant threat to the environment in order to be eligible for mild treatment. Thus, there appears to be considerable merit to the view expressed by one prominent commentator that while these policies are a step toward greater flexibility, to a significant extent they represent "tinkering around the edges of the traditional ways of doing enforcement business . . ."¹⁰⁹

Nevertheless, actual implementation of these policies may be worth a closer look to evaluate whether the policies actually have been applied as intended. A more liberal application of these policies than might be anticipated based on the language of the policies themselves might suggest that EPA is doing more than merely "tinkering around the edges." Certain factors might lead EPA to push the envelope in applying these policies so as to give violators a break. As discussed above, increasing the use of compliance incentive approaches has been a key element of EPA enforcement and compliance policy over the past few years and many influential voices on the outside have urged on the Agency's efforts

109. Diamond, *supra* note 11, at 10,256. As a general rule, EPA's compliance assistance approaches do not alter the enforcement calculus once violations are discovered, but are intended to minimize violations in the first place through education and other forms of assistance.

in this direction.¹¹⁰ Further, bureaucrats, like others, prefer to see their creative initiatives succeed and EPA regularly touts the volume of business it has done under these policies.¹¹¹ Finally, the Regions do not always "toe the line" in implementing Headquarters guidance.¹¹² As part of a review of these policies, it would be worth exploring the settlements negotiated under these compliance incentive policies to evaluate whether implementation has been consistent with the terms of the policies or whether some license has been taken in the actual cases in order to enhance the appeal of these policies to prospective settlers.

For example, under the Small Business Policy, one question worth investigating is whether EPA has applied the Policy so as to forego penalties entirely or whether it has imposed penalties of nominal amounts that do not approach recoupment of economic benefit, in situations in which violators do not meet the criteria in the Policy for such treatment. For the SEPs and Self-Audit Policies, by the terms of the policies only the gravity component of a penalty is to be reduced. It would be interesting to examine the economic benefit payment required of violators who settled under either of these two policies, to determine the amount recouped in an absolute sense and relative to comparable violators addressed under EPA's traditional enforcement approach.

Another focus for such a review would involve gauging the impacts of these policies on compliance with the law and levels of environmental protection. It would be worthwhile, for example, to investigate the impact differences in enforcement approach have had on whether the violator returned to compliance, the time it took for the violator to come into compliance, and whether the violator commits additional significant violations in the future. Further, review of the impact of different enforcement approaches on the extent of violators' "beyond compliance" efforts and achievements would be informative in terms of the relative effectiveness of different compliance strategies.

Of course, efforts to compare actions pursued under the incentive policies versus actions pursued using traditional enforcement will be difficult for several reasons. It will be challenging to create a "normalized" violator profile or profiles. There may, for example, be "good" violators and "bad" violators in terms of their predisposition to comply quickly and to remain in compliance. Quite possibly the former category is more likely to qualify for and to take advantage of the "incentive"

110. See *id.* at 10,254; Geltman & Skroback, *supra* note 12, at 31.

111. See *supra* note 65.

112. See U.S. GAO, ENVIRONMENTAL ENFORCEMENT: EPA CANNOT ENSURE THE ACCURACY OF SELF-REPORTED COMPLIANCE MONITORING DATA 40 (1993); see also DAVIES & MAZUREK, *supra* note 19, at 33 (observing that: "[I]ncreasingly in recent years, regional administrators have tried to exert control over regional personnel at the expense of control from the headquarters program offices" and "[t]wo of the regions . . . have recently reorganized . . . to give the regional administrator more control over regional personnel.").

policies. Thus, if it turns out that it takes longer for the average violator pursued using traditional enforcement to return to compliance than it takes the average violator pursued under one of the compliance incentive policies, it may be the nature of the violator rather than the enforcement tool used that accounts for the difference in outcome. While there are challenges involved, it nevertheless seems highly worthwhile to include in any study of the compliance incentive approaches an attempt to analyze the effectiveness of these tools in producing compliance in an absolute sense as well as relative to other available tools.

Another relevant question involves the transaction costs to government associated with using traditional enforcement versus settling under one of the incentive policies. Again, if the universe of violators can be normalized, it would be interesting to examine whether transaction costs are higher for addressing violators under the compliance incentive policies than under traditional deterrence approaches. On the one hand, evaluating whether a party qualifies under a particular compliance incentive policy takes time, but the lower penalties potentially may facilitate easier and shorter negotiations.¹¹³

A final point concerning these issues is that the different federal approaches really only scratch the surface concerning the tools used to conduct environmental enforcement in this country because most enforcement actions are conducted by the states. Though states are expected to follow some EPA enforcement policies, there appears to be a considerable gap between this expectation and reality, as discussed in detail below. Further, states have engaged in a wide array of experiments with different compliance-promotion approaches.¹¹⁴

113. EPA has recently issued evaluations of the Small Business and Self-Audit Policies as promised. See U.S. EPA, INTERIM POLICY ON SMALL BUSINESS, *supra* note 88, at 35,651 (indicating that EPA will evaluate its policy by 2001); U.S. EPA, Evaluation of "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" Policy Statement, Proposed Revisions and Request for Public Comment, 64 Fed. Reg. 26,745 (1999) [hereinafter Evaluation of Incentives]; Proposed Modifications to the Policy on Compliance Incentives for Small Businesses and Request for Public Comment, 64 Fed. Reg. 41,116 (1999). The evaluations generally do not address the types of issues raised in the text. In part, this absence appears to be because work on some of these issues is under way in connection with the National Performance Measures Strategy. See Evaluation of Incentives, *supra*, at 26,747. The self-audit evaluation contains some positive findings about the Policy, although the "User's Survey" only had about a 20% response rate. EPA reports, for example, that the Audit Policy User's Survey "indicates a very high satisfaction rate among the users of the Policy . . .," and it suggests that some users improved their environmental practices as a result of the Policy. *Id.* at 26,747, 26,751-52.

114. See David L. Markell, *States as Innovators: It's Time for a New Look to our "Laboratories of Democracy" in the Effort to Improve our Approach to Environmental Regulation*, 58 ALB. L. REV. 347 (1994) [hereinafter Markell, *States as Innovators*].

III. THE STATE/EPA ENFORCEMENT RELATIONSHIP

A. A Brief History and Overview

In the 1970s and early 1980s, a flurry of Congressional activity led to the enactment of an alphabet soup of federal environmental legislation.¹¹⁵ The Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act ("CWA"), the Clean Air Act ("CAA"), the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the National Environmental Policy Act ("NEPA"), and other landmark statutes were adopted during this period.¹¹⁶ These laws were intended, in part, to establish federal norms that would slow ongoing pollution's degradation of our lands, waters, and air resources and promote cleanup of pollution from years past.¹¹⁷ Deterioration of our natural resources was becoming increasingly apparent to increasing numbers of Americans and there was growing skepticism that state and local government authorities were up to the task of arresting and reversing this despoliation.¹¹⁸

115. See generally PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 102-14 (1996).

116. Resource Conservation and Recovery Act of 1976 ("RCRA") 42 U.S.C. §§ 6901-6992 (1994 and Supp. III 1997); Federal Water Pollution Control Act ("Clean Water Act" or "CWA") 33 U.S.C. §§ 1251-1387 (1994 and Supp. III 1997); Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7671 (1994 and Supp. III 1997); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9665 (1994 and Supp. III 1997); National Environmental Policy Act of 1970 ("NEPA"), 42 U.S.C. §§ 4321-4370 (1994 and Supp. III 1997).

117. See generally E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, in AN ENVIRONMENTAL LAW ANTHOLOGY 68 (Robert L. Fischman et al. eds., 1996). One commentator describes the transformative nature of this flurry of federal legislative activity as follows: "The transformation of American environmental law during the 1970s was a product of a remarkable burst of federal legislation adopted in response to perceived inadequacy of the common law and frustration with the failure of decentralized approaches to environmental protection." Percival, *supra* note 2, at 160.

118. See Percival, *supra* note 2, at 165 (suggesting that "the federalization of environmental law was widely understood as a response to the abysmal failure of decentralized approaches to environmental protection"); PERCIVAL ET AL., *supra* note 115, §§ 2-5; FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW 1-3 to 1-7 (Matthew Bender 1998); Jeffrey Geiger, *Canary in a Coal Mine? Federalism and the Failure of the Clean Air Act Amendments of 1990*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 81, 84 (1995). More than one commentator has suggested that federalization was in part an effort to avoid a race-to-the-bottom by the states. See, e.g., Revesz, *supra* note 18, at 1210; Merrill, *supra* note 19, at 487.

Many commentators, this author included, have suggested that in recent years state capacity has increased, and that states are well suited to lead in establishing effective and innovative environmental protection policies. See, e.g., Markell, *States as Innovators*, *supra* note 114, at 410; WILLIAM R. LOWRY, THE DIMENSIONS OF FEDERALISM: STATE GOVERNMENTS AND POLLUTION CONTROL POLICIES 1 (1992) (noting that some scholars claim that state governments, with some qualifications, "now are arguably the most responsive, innovative, and effective level of government in the American federal system"); James P. Lester & Emmett N. Lombard, *The Comparative Analysis of State Environmental Policy*, 30 NAT. RESOURCES J. 301, 302 (1990) (indicating that states "have recently enhanced

Despite skepticism about states' capabilities to reverse the negative trend, Congress was careful in its enactments not to write off states' interests, as sovereigns, in protecting their people and serving as stewards for their environment.¹¹⁹ While many of the federal laws establish national norms and give the federal EPA ultimate responsibility for ensuring achievement of these norms,¹²⁰ the laws also generally reserve a prominent role for states interested in and able to perform adequately.¹²¹ Congress, for example, articulates in the Clean Water Act its intent to "recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution"¹²²

Many states have exercised their option to take on primary responsibility for implementing several of the environmental laws. In a recent article, the Director of Research for the Environmental Council of the States ("ECOS") describes the growing role of the states in the following way:

A remarkable, and largely unnoticed, change in environmental protection has occurred over the past five to 10 years. The States have become the primary environmental protection agencies across the nation.¹²³

their institutional capabilities to assure greater responsiveness for environmental management Presumably, states are no longer the 'weak link' in the intergovernmental system.").

119. One environmental treatise explains this reservation of rights to the states as follows: "The legislative process [which produced the federal environmental laws of the 1970s] . . . forced an uneasy and evolving compromise which recognized, on the one hand, the entrenched position of state pollution control agencies and the need to temper federal mandates with local implementation and flexibility and, on the other hand, the need for strong federal enforcement by EPA as well as by the state." ENVTL. L. INST., *LAW OF ENVIRONMENTAL PROTECTION* § 8.01(5) at 8-24 (Sheldon M. Novick ed., Clark Boardman Calloghan 1999) [hereinafter *LAW ENVTL. PROTECTION*].

120. See, e.g., ENVTL. L. INST., *FEDERAL OVERSIGHT OF AUTHORIZED STATE ENVIRONMENTAL PROGRAMS: REFORMING THE SYSTEM* 1 (1995) (noting that: "Congress developed a system for state implementation of the national environmental statutes. However, [in most cases] EPA remains accountable for implementation of the national standards.").

121. See, e.g., Off. St. & Local Rel., U.S. EPA, *Joint Policy Statement on State/EPA Relations* (visited Sept. 30, 1999) <http://epa.gov/regional/JPS_State_EPA/jps.htm> ("Most federal environmental statutes embrace the concept that states should have primary responsibility for operating regulatory and enforcement programs."); Stewart, *supra* note 19, at 200 (noting that the federal environmental statutes "often accord the states a substantial—albeit subsidiary and federally supervised—role in implementation and enforcement"); Humphrey III & Paddock, *supra* note 20, at 7; U.S. EPA, *REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY* 2 EPA-270-R-93-001 (1993) (noting that "[t]he concept that states should hold primary responsibility for the operation of regulatory and enforcement programs is inherent in most federal environmental statutes"); Markell, *The Federal Superfund program*, *supra* note 20, at 1, 26; ENVTL. L. INST., *COMPARISON OF FEDERAL-STATE ALLOCATION OF RESPONSIBILITY IN FIVE ENVIRONMENTAL STATUTES* (1995).

122. 33 U.S.C. § 1251(b) (1994 and Supp. III 1997).

123. R. Steven Brown, *The States Protect the Environment* (visited Nov. 3, 1999) <<http://www.sso.org/ecos/statesarticle.htm>>. ECOS is the "national non-profit, non-partisan association of state and territorial environmental commissioners." ECOS, *About ECOS* (visited Nov. 3, 1999) <<http://www.sso.org/ecos/bkgnd.htm>>.

ECOS indicates that the state role has increased dramatically in recent years, stating that "[b]y 1998, EPA had delegated 757 federal environmental programs to the states, an increase of 323 (nearly 75%) from five years prior."¹²⁴ A news release on the home page of ECOS reports that "[m]ore than 75% of the total number of the major delegable environmental programs have been delegated to or assumed by the States."¹²⁵ ECOS provides the following breakdown of delegated programs:

Air (CAA): 42 States
Water (CWA): 34 States
Waste (RCRA): 37 States
Drinking Water: 39 States
Pesticides (FIFRA): 39 States.¹²⁶

State predominance is the norm in the enforcement realm, among others. States conduct roughly ninety percent of the inspections in this country, and, according to leading state officials, they bring approximately eighty to ninety percent of all enforcement actions.¹²⁷

The substantial role states play in implementing the environmental laws creates a special challenge for the federal EPA, because it remains ultimately accountable for effective administration of these laws and for accomplishing their purposes.¹²⁸ This situation has led senior EPA officials and others to characterize the federal/state relationship, and in

124. ECOS, *Change in Environmental Programs Delegated to States 1993-1998* (visited Nov. 3, 1999) <<http://www.sso.org/ecos/delegate.htm>>.

125. ECOS, *The Environmental Council of the States* (visited Nov. 15, 1999) <<http://www.sso.org/ecos/>>.

126. See Brown, *supra* note 123, at 3. See also ECOS, *Change in Environmental Programs Delegated to States 1993-1998*, *supra* note 124. At the same time, the cost of administering programs and the reduced federal share of such costs has created some reluctance on the part of the states to become authorized to implement new programs. See, e.g., U.S. GAO, EPA AND THE STATES: ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 1 GAO/T-RCED-95-95-64 (1995).

ECOS's Director of Research notes that determining which level of government operates a program is complicated by the fact that most federal programs are delegated in a piecemeal fashion. See Brown, *supra* note 123, at 3. He continues, however, that "[n]evertheless, it has become clear that the delegation of environmental programs to the States has increased dramatically in the past five years." *Id.*

127. See, e.g., E. Donald Elliott, *Keynote Address*, 22 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,010, 10,011 (1992); Statement of Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality, *The Current Relationship between States and the Environmental Protection Agency 1* (1997) [hereinafter *Statement of Coleman*]. Robbie Roberts, Executive Director of ECOS, stated in April 1999 that states undertake 78% of all enforcement actions. See *General Policy: Environmental Protection Needs to Rest More With Local Governments*, NEPI Says, *DAILY ENV'T REP.* (BNA), Apr. 29, 1999, at A-6 [hereinafter *General Policy*]. Mr. Brown reports that during the ten-year period he studied, 1986-1996, States increased the size of their environmental staffs by almost 60%. See Brown, *supra* note 123, at 3. In 1986, state agencies spent about 38,000 work-years, while by 1996 they expended about 61,000 work-years. See *id.* at 3.

128. See OECA, U.S. EPA, *PROTECTING YOUR HEALTH*, *supra* note 30, at 19.

particular EPA oversight of delegated state performance, as being of "central importance" to the effective administration of the environmental laws.¹²⁹ As EPA put it in one report, "[t]he bottom-line lesson is that if the states fail, then EPA fails."¹³⁰

There is a need for a strong federal/state partnership in promoting compliance with these laws, as in other arenas. EPA's head of enforcement puts it as follows:

EPA and the states must work cooperatively and effectively to deliver a national enforcement system which protects the environment and the health of the American people. Neither side can do it alone.¹³¹

In a spring 1998 interview, he indicated that "forging an effective, cooperative relationship with the states on enforcement" is the "most significant" challenge he faces.¹³²

This challenge is greater now than at some points in the past because federal financial leverage appears to have diminished. Federal funds compose a significantly smaller percentage of state environmental spending than used to be the case. The Congressional Budget Office reports that in 1982, federal funds accounted for 49% of state air and water budgets, and 76% of state solid and hazardous waste budgets.¹³³ By 1986, federal funding had declined to 46% of state air budgets, 33% of state water budgets, and only 40% of state hazardous and solid waste budgets.¹³⁴

129. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 7. *See also* ENVTL. L. INST., *FEDERAL OVERSIGHT OF AUTHORIZED STATE ENVIRONMENTAL PROGRAMS: REFORMING THE SYSTEM*, *supra* note 120, at 1 (noting that:

Virtually all of the national environmental programs feature a dual federal-state system in which the federal government establishes baseline standards and states with approved programs carry out implementation and enforcement, subject to federal oversight. The oversight process is at the heart of federal-state conflict by its nature.).

EPA has stated that it has a responsibility to "enhance state capacity," and it has concluded that "[t]oday most states stand as competent environmental managers." U.S. EPA, *REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY*, *supra* note 121, at 2.

130. U.S. EPA, *REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY*, *supra* note 121, at 2.

131. Herman, *EPA's FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3, 7.

132. Mason, *supra* note 29, at 286.

133. *See* Gary Weiskopf & Jeryl Mumpower, *The Role of State Government in Environmental Policy Making and Implementation*, Working Paper 6 (on file with the *Harvard Environmental Law Review*) [hereinafter Weiskopf Working Paper] (citing CONGRESSIONAL BUDGET OFFICE ("CBO"), *ENVIRONMENTAL FEDERALISM: ALLOCATING RESPONSIBILITIES FOR ENVIRONMENTAL PROTECTION*, Staff Working Paper (1988).

134. *See id.* As noted in the text, declines in federal financial support of state programs are likely to reduce federal leverage over state performance. The Environmental

Steven Brown, who is director of research for ECOS, summarizes states' and EPA's respective financial contributions to environmental protection and natural resources as follows in his 1999 article:

In 1986 States spent about \$5.2 billion on environmental protection and natural resources. The EPA provided just over \$3 billion of that, almost 58 percent. But by fiscal 1996, a very different story had emerged. States spent about \$12.5 billion, with the EPA providing about \$2.5 billion, or about 20 percent. During the 10-year period from 1986 to 1996, State spending on the environment increased about 140 percent, while total EPA funding to the States decreased about 17 percent In 1996 the States spent nearly twice as much (\$12.5 billion) on environment/natural resources as the entire EPA budget (\$6.5 billion).¹³⁵

According to ECOS Executive Director Roberts, in 1998 "less than 20 percent of the money spent on state environmental programs came from EPA."¹³⁶ At least one audit has found that EPA's mid-1990s reorganization of its enforcement office has contributed to a decrease in federal leverage because it separated the EPA enforcement office from the office that gives grant money to the states.¹³⁷

Working Group suggests this connection in a recent report, noting that the Clean Air Act Title V permit program fees that states collect from permit holders will fund enforcement of Title V permits and EPA's diminished financial support role means that "[u]nder this new arrangement U.S. EPA will retain its oversight responsibility, but it will no longer be able to negotiate the terms of state enforcement of the CAA as a condition of federal funding for state enforcement programs." Environmental Working Group, *Above the Law: How the Government Lets Major Air Polluters Off the Hook* 16 (visited Nov. 3, 1999) <<http://www.ewg.org/pub/home/reports/abovethelaw/abovethelawes.html>>.

EPA Acting Deputy Administrator Peter D. Robertson has put a slightly different twist on the numbers:

Next year, the President's budget calls for additional financial support to the States through a \$200 million grant program to support clean air partnerships. These grants, along with operating program and State revolving loan fund grants, exceed \$3 billion, and represent 42 percent of EPA's proposed FY 2000 budget.

Peter D. Robertson, *Stronger Partnership: How States and EPA Can Improve Performance and Build Public Trust* (visited Dec. 1, 1999) <<http://www.sso.org/ecos/ECOstates.htm#epa>>.

135. Brown, *supra* note 123, at 4.

136. *General Policy*, *supra* note 127, at A-6. A recent ECOS report indicates that total EPA funding to states between 1986 and 1996 declined by 17%. Because this was not adjusted for inflation, the actual decline is greater. See Brown, *supra* note 123, at 4.

137. See John J. Fialka, *EPA Probers Find Big Flaws in Major Clean-Air Effort*, WALL ST. J., Dec. 28, 1998, at A16 (noting that EPA auditors "put some of the blame on a 1994 Agency reorganization that separated the enforcement branch from one that provides grant money to the states. That has left federal enforcement officials with little leverage to push states into compliance.").

Key questions that require attention in light of our federal approach to environmental law include the following: (1) What conditions does the federal government (Congress and the EPA) place on prospective state partners to ensure that only capable states are authorized to implement pieces of the federal environmental law infrastructure? (2) What tools does EPA have available to oversee and support state performance, and to act itself if state performance is inadequate? (3) Is the current scheme, in terms of both conditions for authorization of states, and oversight of delegated states, working effectively? and (4) Would changes in the infrastructure, or in its implementation, improve our environmental regulatory system and, if so, what changes are appropriate? This Part addresses the first two questions. The others are addressed in Parts IV, V, and VI below.

B. Conditions for State "Authorization"

States typically perform their role as partners in our federal system by adopting, and then administering, their own versions of federal environmental laws.¹³⁸ For example, a state will enact into state law its version of the federal Clean Water Act. After obtaining EPA's sign-off on the adequacy of the state program, including the corresponding state statute, the state then will implement its law. The primary alternative to this procedure is for states to receive delegation to apply federal statutes. But this approach has not seen wide use.¹³⁹

Under many environmental laws, EPA must authorize a state to administer its program in lieu of federal administration of the federal law if the state meets the criteria. The CWA and the RCRA,¹⁴⁰ for example, direct that EPA "shall" grant authorization if certain conditions are met, and courts have construed this language to mean that EPA must do so.¹⁴¹

States do not, however, gain this role as partners in implementing the federal environmental laws simply by asking. Congress has established criteria for EPA to use in determining whether to approve a state's

138. See generally Law Envtl. Protection, *supra* note 119, §§ 6, 8.

139. Cf. EPCRA, 42 U.S.C. §§ 11,001–11,050 (1994 & Supp. III 1997) (discussed in Humphrey III & Paddock, *supra* note 20, at 27). For a discussion of the difference between authorization and delegation, see, e.g., Markell, *The Federal Superfund Program*, *supra* note 20, at 78 n.200.

140. 33 U.S.C. §§ 1251–1387 (1994 & Supp. III 1997); 42 U.S.C. §§ 6901–6992 (1994 & Supp. III 1997).

141. See, e.g., *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998); *NRDC v. EPA*, 859 F.2d 156, 198 (D.C. Cir. 1988) (noting that the Clean Water Act "commands" EPA to approve the state permit program "once [the EPA Administrator] determines that the statutory requirements and administrative guidelines are met").

application to operate an environmental program. EPA has adopted regulations to flesh out these criteria.¹⁴²

The statutes vary concerning the showing states must make in order to gain primary responsibility for administering an environmental law.¹⁴³ Under the Clean Water Act and EPA's implementing regulations, the State must submit to EPA a "full and complete description of the program it proposes to establish and administer under state law . . . " and a statement from the State attorney general that the State's laws "provide adequate authority to carry out the described program."¹⁴⁴ The Clean Water Act and its implementing regulations establish a list of key compliance and enforcement-related authorities a state must have, including the authority to do the following:

- Issue permits;
- Terminate or modify permits for cause, including violations of permit conditions;
- Inspect, monitor, enter and require reports to the same degree EPA could exercise these authorities under the Clean Water Act;
- Abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.¹⁴⁵

Congress's and EPA's approach to authorization strikes a balance between a desire for uniformity and an interest in promoting state autonomy. As the United States Court of Appeals for the District of Columbia noted in *NRDC v. EPA* in reviewing EPA's authorization regulations under the Clean Water Act:

In fashioning its guidelines on . . . penalties, EPA endeavored to reconcile the competing objectives of regulatory uniformity and state autonomy by establishing a floor for . . . state enforcement

142. See, e.g., 33 U.S.C. § 1342(b) (1994 & Supp. III 1997) (authorizing EPA to delegate the permit program under the Clean Water Act); 40 C.F.R. pt. 123 (1998).

143. For a comparison of delegation provisions under several of the environmental laws, see generally ENVTL. L. INST., COMPARISON OF FEDERAL-STATE ALLOCATION OF RESPONSIBILITY IN FIVE ENVIRONMENTAL STATUTES, *supra* note 121.

144. 33 U.S.C. § 1342(b) (1994 & Supp. III 1997), 40 C.F.R. § 123.21-.23 (1998). Under some circumstances an attorney other than the Attorney General may provide the required statement. The State must also submit and enter into a "Memorandum of Agreement" with the relevant EPA Region. 40 C.F.R. § 123.24 (1998). This Agreement will, *inter alia*, specify "the frequency and content of reports, documents and other information which the State is required to submit to EPA." 40 C.F.R. § 123.24(b)(3) (1998).

145. 33 U.S.C. § 1342(b) (1994 & Supp. III 1997), 40 C.F.R. § 123.22, .26, .27 (1998).

authority, while ensuring that states have the maximum possible independence.¹⁴⁶

In its Clean Water Act authorization regulations, with respect to penalties in particular, EPA provides that states may receive authorization by adopting state legal authorities that are not nearly as powerful as EPA's. Federal civil penalties under the Clean Water Act are "not to exceed \$25,000 per day for each violation."¹⁴⁷ EPA requires states to be able to recover civil penalties for violations, but it considers to be adequate state authority to recover penalties of at least \$5,000 per day for each violation.¹⁴⁸

In its 1988 challenge to EPA's regulations for delegating primary authority to states to administer (and enforce) the Clean Water Act permit program, the NRDC contended that the regulations were invalid because they "do not compel the states to provide authority to levy the maximum penalties assessable in federal enforcement programs."¹⁴⁹ The Circuit Court rejected this challenge, holding that Congress did not intend that state requirements must necessarily mirror federal ones; instead, in its view, Congress intended to leave to EPA discretion to determine by regulation minimum acceptable State civil penalties.¹⁵⁰ The Court cited with approval EPA's balancing of the interests of consistency and state autonomy:

The Agency has determined that it is necessary to set specific minimum levels of fines and penalties which States must have the authority to recover in order to ensure effective State enforcement programs. Without such minimum levels, EPA would often be forced to take its own enforcement action in approved States because the State action imposed inadequate penalties. Such EPA action, while available as a backup, is not intended to be relied upon as the prime enforcement mechanism in approved States. Accordingly, the Agency has set minimum levels of fines and penalties. However, it has reduced the levels below those available to EPA based on the large volumes of comments from states requesting such relief.¹⁵¹

146. *NRDC v. EPA*, 859 F.2d at 174.

147. 33 U.S.C. § 1319(d) (1994 & Supp. III 1997).

148. *See* 40 C.F.R. § 123.27(a)(3)(i) (1998). The potentially significant disparity between EPA and state penalties is exacerbated by the federal government's decision to increase its statutory maximums based on the rate of inflation. *See* Debt Collection Improvement Act of 1996, 31 U.S.C. § 3720C(3) (1994 & Supp. III 1997); Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.1-4 (1999).

149. *NRDC v. EPA*, 859 F.2d at 179 (citing brief for petitioner NRDC at 91-92).

150. *See id.* at 180.

151. *Id.* at 181.

In sum, Congress has given EPA considerable latitude to determine whether to authorize a state to administer its version of the federal environmental laws. EPA has made the policy decision to tread relatively lightly on state autonomy interests. It has defined the "adequacy" required of state enforcement programs to mean much less than functionally equivalent enforcement authorities. Hence the Agency's "floor" is quite low compared to federal enforcement authorities.¹⁵²

There are other signs that EPA has been deferential to states by approving state programs that have less than equivalent enforcement authorities. For example, EPA has administrative enforcement authority under the CWA.¹⁵³ The Agency has been quite clear that administrative enforcement authorities are an important tool for effective enforcement, noting that they "provide faster and more efficient use of enforcement resources, when compared to civil judicial authorities."¹⁵⁴ Nevertheless, while EPA "strongly encourages" states to develop administrative penalty authorities, EPA does not require states to do so.¹⁵⁵

Similarly, EPA has approved state programs with quite convoluted enforcement provisions and processes that are likely to complicate effective enforcement. One environmental treatise offers three examples. First, "several states have erected significant barriers to the use of their criminal environmental laws, either by imposing substantial scienter requirements or by authorizing only minimal sanctions."¹⁵⁶ Second, various states have adopted significant preconditions to the initiation of enforcement actions that are likely to reduce the level of state enforcement activity, including elaborate civil referral processes,¹⁵⁷ the requirement that the Agency preliminarily notify the violator of its violations and provide an opportunity to "cure,"¹⁵⁸ and the use of independent "review boards."¹⁵⁹ Third, some states have judicial review provisions that "may provide cause for concern."¹⁶⁰

EPA's OIG has similarly noted that some states apparently are handicapped by relatively weak or cumbersome legal authorities, despite

152. For one view on an appropriate set of requirements, see Humphrey III & Paddock, *supra* note 20, at 38-39. In some situations EPA has shown signs of being strict in requiring states to meet various criteria, including citizen access to the courts. The major area of dispute in this arena involves state audit privilege and immunity legislation, discussed in Part IV below.

153. See 33 U.S.C. § 1319(g) (1994 & Supp. III 1997).

154. 1993 Revisions, *supra* note 35, at 2; see also James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 302 (1992) (suggesting that a critical impediment to effective enforcement of the Clean Air Act prior to the 1990 Amendments was the lack of administrative penalty authority).

155. 1993 Revisions, *supra* note 35, at 2.

156. Law Envtl. Protection, *supra* note 119, § 6.03[1][b].

157. See Part IV *infra*.

158. Law Envtl. Protection, *supra* note 119, § 6.03[2].

159. *Id.*

160. *Id.*

the fact that EPA is only supposed to authorize state programs that have adequate legal support. The OIG reports, for example, that “[o]fficials from Louisiana and Illinois believed that legal decisions and case law prevented them from calculating or assessing the economic benefit.”¹⁶¹ Another OIG audit reached similar conclusions concerning Wisconsin:

Wisconsin officials did not assess penalties, or the economic benefit component, for any of the cases in our sample. They had trouble collecting penalties because, like Illinois, they did not have administrative penalty authority. Enforcement staff had to go through Wisconsin’s Department of Justice to collect penalties from violators. Enforcement officials stated the Wisconsin Department of Justice typically did not accept air enforcement cases, so Wisconsin collected few penalties. Enforcement officials tried to obtain administrative penalty authority from the Wisconsin legislature, but the request was not approved.¹⁶²

An inescapable conclusion from this brief survey of conditions for authorization is that at least some states that are operating as the primary enforcers of our environmental laws are relying on legal authorities that appear to be far weaker from a deterrence standpoint than EPA’s authorities. Having surveyed the “front end” of the authorization process, we now turn to the “back end,” which concerns the framework EPA has established to oversee state performance in the enforcement/compliance arena.

C. EPA Oversight of State Enforcement and Compliance Activities

There is more to the story of state/federal enforcement relations than the question of threshold authorization standards. EPA is obligated under the federal environmental laws to oversee state enforcement activities and to ensure that they are “adequate.”¹⁶³ There has been at least

161. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III 25, 28 Audit No. E1GAE5-05-0169-7100306 (1997). See also U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS 15 GAO/RCED-91-166 (1991) (noting that “some states now face legal constraints that may keep them from adopting such a [penalty] policy . . .”).

162. OIG, U.S. EPA, REGION 5’S AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM, Audit No. 6,100,284 (1996).

163. States are obligated to provide various types of information to EPA to facilitate this review. The general National Pollution Discharge Elimination Program (“NPDES”) authorization regulations, for example, require states periodically to report to the relevant EPA Region instances of noncompliance by various types of dischargers; state efforts to ensure compliance; and the resolution of such instances of noncompliance. See 40 C.F.R. § 123.45 (1996).

some effort to use the back door of EPA oversight to demand more of states than might be anticipated from review of the authorization regulations and decisions alone.¹⁶⁴

EPA has established a "framework" for overseeing state enforcement performance known as the Revised Policy Framework for State/EPA Enforcement Agreements.¹⁶⁵ The Framework identifies eight elements for operating an effective compliance program: (1) develop an inventory of regulated sources; (2) establish clear and enforceable requirements for the sources; (3) include "accurate and reliable" compliance monitoring; (4) work toward high or improving rates of compliance; (5) provide "timely and appropriate" response to violations; (6) use penalty authorities to promote deterrence and contribute to equity among members of the regulated community; (7) maintain accurate records on source performance and enforcement response; and (8) maintain adequate staff and resources to implement the program.¹⁶⁶

A central tenet of the Framework is that state environmental agencies, like EPA, should recover appropriate penalties from violators in cases that warrant formal enforcement:

Civil penalties and other sanctions play an important role in an effective enforcement program by creating deterrence. Deterrence of noncompliance is achieved through: 1) a credible likelihood of detection of a violation, 2) a timely enforcement response, 3) the

EPA fills several roles in performing this oversight function. In EPA's words, EPA has a "long-standing responsibility to enhance state capacity." U.S. EPA, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY, *supra* note 121, at 2. The Task Force identifies a wide variety of strategies for achieving this objective. *See id.* In addition, EPA oversees state performance and initiates its own enforcement actions, including taking enforcement actions against violators already pursued by the state, if the state action is inappropriate. *See, e.g.*, 33 U.S.C. § 1319 (1994 & Supp. III 1997); 1993 Revisions, *supra* note 35, at 9 (asserting that EPA has "parallel enforcement authority") & 11 (noting that EPA may take action to recover a penalty "[f]or types of violations identified in national program guidance as requiring a penalty or equivalent sanction . . . if a State . . . has not assessed a penalty or other appropriate sanction . . . or if an assessed penalty is inappropriate"). The case law concerning EPA's authority to use this "parallel enforcement authority" is currently in flux. *See infra* note 338 (discussing recent court decisions). EPA also may withdraw the program if the situation warrants. *See, e.g.*, 40 C.F.R. § 123.63 (1996).

Several commentators and others have questioned EPA's capacity to perform these functions effectively. *See, e.g.*, John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190, 1216 (1995) (discussing limitations on EPA's ability to withdraw programs from states due to federal resource constraints); Flatt, *supra* note 36, at 4 (suggesting that federal resource constraints have a pervasive impact on EPA's ability to play these roles).

164. As noted previously, there is some support for the idea that EPA has tightened its authorization standards in recent years.

165. *See* 1993 Revisions, *supra* note 35. For a summary of the development of the Framework, see Mintz, *supra* note 21, at 63.

166. 1993 Revisions, *supra* note 35, at 8-17.

likelihood and appropriateness of the sanction, and 4) the perception of the first three factors within the regulated community.¹⁶⁷

The Framework, as revised in 1993, establishes clear expectations concerning the appropriate level of penalties states (as well as EPA) should obtain. In the words of Steven Herman, EPA's Assistant Administrator for the Office of Enforcement Compliance and Assurance, "a common goal for penalty assessments at the federal, state and local levels" is that "penalties should seek to recover the economic benefit of noncompliance at a minimum where appropriate plus a portion reflecting the gravity of the violation."¹⁶⁸ The Framework itself is clear on this point:

To remove economic incentives for noncompliance and establish a firm foundation for deterrence, EPA, the States, and local agencies shall endeavor, through their civil penalty assessment practices, to recoup at least the economic benefit the violator gained through noncompliance.¹⁶⁹

The Framework recognizes that even in cases warranting recovery of a penalty, there are circumstances in which it is not appropriate to insist on recouping the full economic benefit of noncompliance, such as cases in which the economic benefit is nominal, or the violator cannot afford a significant penalty.¹⁷⁰

The State/EPA Enforcement Framework, in sum, reflects EPA's judgment that: (1) there are a number of compliance tools; (2) formal enforcement cases seeking payment of a penalty are one such tool; and (3) for violations for which a penalty is appropriate, states generally should follow penalty assessment practices comparable to EPA's with respect to obtaining a penalty that recoups economic benefit.¹⁷¹

167. *Id.* at 1.

168. *Id.* at 5.

169. *Id.* The 1993 Revisions make clear that "EPA Regions are required to follow written Agency-wide and program-specific penalty policies . . .;" that these policies require recoupment of economic benefit at a minimum; and typically require a penalty to include recovery of a gravity component as well. *Id.* at 2, 5. While the 1993 Revisions do not similarly obligate states to follow such policies, the Revisions on their own establish EPA's expectation that states will pursue enforcement actions that recoup economic benefit and a gravity component, as the quote in the text reflects.

170. *Id.* at 5-6.

171. The 1993 Revisions also appear to contemplate that states' penalties will include a gravity component based on an approach similar to that used by EPA, noting that "[a]n additional amount reflecting the seriousness of the violation should also be assessed." *Id.* at 6.

Elsewhere in the Framework, EPA arguably draws a distinction between EPA Headquarters' oversight practices with respect to its Regions compared to its oversight of state performance. The Framework provides that "EPA Headquarters will oversee Regional penalties to ensure Federal penalty policies are followed. This oversight will focus both on

State environmental regulators recognize the role of the Framework in formulating state policies. Oklahoma Executive Director Coleman of the Oklahoma Department of Environmental Quality acknowledges that the Framework gives EPA a "clear role to assure that we [the states] do our jobs," including bringing its own enforcement actions in some cases.¹⁷² He notes that the Policy Framework is "intended to ensure that clear oversight criteria [are] set, procedures for advance consultations and notification [exist], and [that] there [is] adequate State reporting to ensure effective oversight."¹⁷³

EPA recognizes that there is a tension between its deference to state autonomy and the Framework's policies. While the Policy Framework expects that states will routinely calculate and recoup economic benefit from violators, the broad autonomy EPA gave states in adopting legal authority for state programs may make such recoupment impossible in some cases. The Agency's response is twofold: (1) EPA "expects" states with limited penalty assessment authorities to do their best to recoup economic benefit, and (2) EPA will help states overcome these limitations on the scope of possible recoupment:

Where state or local statutory authority would not specifically authorize recovery of economic benefit, EPA still expects States to make a reasonable effort to calculate economic benefit and to attempt to recover this amount in negotiations and litigation EPA recognizes that some State statutes do not support the equivalent of the collection of the full economic benefit of noncompliance because of the limitations imposed, such as penalty caps. In such instances, EPA will work closely with the States to assist them in overcoming these limitations.¹⁷⁴

Perhaps EPA's strategy represents its effort to make the best of a difficult situation. The limitations in state enforcement authorities discussed above, however, together with deficiencies in state will (interest in recouping economic benefit) and capacity (having the resources to pursue

individual penalty calculations and Regional penalty practices and patterns." *Id.* at 7. In discussing its oversight of state penalties, EPA indicates that "[w]hile individual cases will be discussed, . . . EPA will review and evaluate state penalties in the context of the State's overall enforcement program and environmental compliance goals." *Id.* Nevertheless, the expectations are the same.

172. Statement of Coleman, *supra* note 127, at 1.

173. *Id.* at 2. The Policy Framework appears to have continuing influence in shaping the state/EPA relationship as that relationship evolves through the NEPPS process, discussed below. See, e.g., U.S. EPA, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, THE TIMELY AND APPROPRIATE (T & A) ENFORCEMENT RESPONSE TO HIGH PRIORITY VIOLATIONS (HPVs) 3 (1998) (noting that "[i]n accordance with the revised Policy Framework for State/EPA Enforcement Agreements . . . , this national policy will serve as the framework for State specific agreements reflecting the parties' mutual expectations").

174. 1993 Revisions, *supra* note 35, at 6.

the cases), have led to the reality that several states rarely follow the Policy Framework's penalty assessment practices, according to a series of audits recently conducted by EPA's Inspector General and the GAO.¹⁷⁵ The next Part reviews this reality in more detail.

IV. ASSESSMENTS OF EPA AND STATE ENFORCEMENT

A. An Overview

The U.S. GAO and EPA's OIG have conducted a substantial number of evaluations of state and EPA enforcement and compliance activities in recent years.¹⁷⁶ The fundamental conclusion of the auditors is that much is amiss with our government enforcement approaches and with the results these approaches are producing. EPA has acknowledged some, but not all, of these shortcomings in performance and outcome, as have some of the states.

The GAO and OIG auditors identify the following five enforcement policy and practice deficiencies:¹⁷⁷

175. Penalty assessments are not the only arena in which EPA does not insist on consistency between federal and state approaches. Recall that adequate inspection capacity is commonly considered to be an essential element of an effective compliance and enforcement scheme. *See supra* note 31 and accompanying text. As one leading EPA attorney has stated:

A . . . key element of an effective compliance monitoring strategy is the adequate training of inspectors Detection of a violation requires a thorough understanding of the regulatory program involved and the industrial process under observation In view of the rapidly increasing need for sophistication in their inspection personnel, EPA has instituted extensive, mandatory inspector training requirements and is providing the courses to its staff. These courses cover both legal and technical aspects of the enforcement program.

Mugdan, *supra* note 13, at 63. Regional Counsel Mugdan continues that "EPA is also encouraging state agencies to adopt similar inspection training programs." *Id.*

176. This Part highlights some of the significant findings of these audits. A comprehensive review of this extensive body of work is beyond the scope of this Article.

177. Two shortcomings not discussed in the text are a failure to publicize adequately enforcement actions and an absence of adequate coordination of compliance assistance activities. *See, e.g.,* OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at iii, iv, 18–24, 38–41 (reviewing various compliance activities and finding an absence of adequate coordination, and assessing use of publicity with respect to enforcement actions and finding it lacking); OIG, U.S. EPA, REGION 6'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM 2 E1GAF5-06-0056-6100309 (1996) (noting that Region 6 and Louisiana did not adequately publicize their enforcement actions).

1. Inadequate Monitoring of Regulated Parties¹⁷⁸

Problems exist in both the quantity and quality of monitoring conducted. For example, in a March 1998 audit the OIG found that "[o]ver one-third of the major facilities in New Mexico had not received an inspection in more than 7 years."¹⁷⁹ It observed that "in the absence of inspection coverage of all major sources, EPA and the State cannot assure adequate and timely identification of all significant violators."¹⁸⁰ In its review of Washington State's air enforcement program, the OIG found flaws in the quality of inspections. Two of the four state "Air Quality Authorities" the OIG investigated were "not identifying SV's [significant violators] consistent with EPA's compliance and enforcement guidance."¹⁸¹ The OIG found that 55 percent of inspections needed improvement and because of this deficiency "SV's might go undetected for long periods before corrective action is taken."¹⁸²

2. Failure to Pursue "Timely and Appropriate" Enforcement Against Significant Air Violators

The OIG identified substantial deficiencies in states' enforcement actions against significant violators ("SVs"). In audits of Pennsylvania, Arkansas, and Texas, for example, the OIG found that "enforcement actions against SVs were not timely."¹⁸³ An April 1997 EPA Region II news release indicates that EPA's OECA:

178. For a discussion of different types of compliance monitoring, see U.S. EPA, OPERATING PRINCIPLES, *supra* note 29, at 6-7 (listing "surveillance," "inspections," "investigations," "record reviews," and "targeted information gathering").

179. OIG, U.S. EPA, AIR ENFORCEMENT: REGION 6'S OVERSIGHT OF NEW MEXICO AIR ENFORCEMENT DATA 11 E1GAF7-06-0032-8100078 (1998).

180. *Id.*

181. OIG, U.S. EPA, REGION 10'S OVERSIGHT OF WASHINGTON STATE'S AIR COMPLIANCE AND ENFORCEMENT PROGRAM 2 E1KAF7-10-0015-8100094 (1998).

182. *Id.* at 4, 8. For other audits finding problems with air enforcement-related monitoring, see, e.g., OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA 33 E1KAF6-03-0082-710015 (1997) (noting that "PADEP's inspection program needs improvement. Some . . . inspections were not thorough enough to determine whether a facility was complying with state and federal regulations.").

Monitoring problems exist in other programs as well. For example, although EPA has an oversight system in place to monitor state RCRA inspections, it has not been effectively implemented. In addition to not conducting the target number of oversight inspections set by EPA headquarters, Regional oversight inspectors are not identifying violations being missed by state inspectors nor documenting state inspection program inadequacies in their inspection reports. See U.S. GAO, ENVIRONMENTAL ENFORCEMENT: EPA CANNOT ENSURE THE ACCURACY OF SELF-REPORTED COMPLIANCE MONITORING DATA 2 GAO/RCED-93-21 (1993) (noting that "[b]ecause of insufficient or inconsistent controls and the generally low priority assigned to data quality assurance, EPA and many authorized states cannot ensure that all facilities subject to regulation are identified or that sampling results are representative and free of error or falsification").

183. OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at Executive Summary (finding that Pennsylvania

asked all of the Agency's ten [R]egions to carefully review each state's significant violator program for air violations after [the] audit of Pennsylvania's program revealed that Pennsylvania was not running its significant violator program properly.¹⁸⁴

The Region II release indicates that the Region reviewed New York's program and determined that the State had been deficient in reporting significant violators to EPA and that the State "did not take timely and appropriate enforcement action in any of these cases."¹⁸⁵

3. Failure to Recover Economic Benefit in Appropriate Cases

In a 1997 air enforcement audit of several states and Regions, the OIG noted that EPA "Regions and a few delegated agencies used the economic benefit component of penalties to deter companies from violations, in accordance with EPA's Penalty Policy. Most delegated agencies, however, did not consistently consider or appropriately assess the eco-

failed to "[t]ake aggressive enforcement action to bring all violating facilities into compliance" and that "[p]ast audit reports have also identified concerns with . . . aspects of EPA's oversight of state air enforcement programs such as . . . untimely completion of enforcement actions"; OIG, U.S. EPA, REGION 6'S OVERSIGHT OF ARKANSAS AIR ENFORCEMENT DATA 2 E1GAF7-06-0014-7100925 (1997) (noting that enforcement actions against significant violators were not timely); OIG, U.S. EPA, REGION 6'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM, *supra* note 177, at 1 (noting that "Region 6 and [Texas] were not timely in completing enforcement actions against significant violators for any of the cases reviewed").

Pennsylvania disagreed strongly with several of the OIG's conclusions. *See* OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at 23-24, app. A. Others have criticized the nature of the distinctions EPA draws between major and minor cases, and other features of the significant non-compliance ("SNC") definitions. *See* Environmental Working Group, *supra* note 134, at 11; *see also* EPA May Redefine "Significant" Air Violator Based on Size, Toxicity, ENVTL. POL'Y ALERT, Mar. 11, 1998, at 18 (reporting that some states complained EPA policy "makes every violation a priority, no matter how minor"). In December 1998, EPA issued a policy entitled *The Timely and Appropriate ("T & A") Enforcement Response to High Priority Violations (HPVs)*. This Policy supercedes previous policy documents relating to significant violators under the Clean Air Act. *See id.* at 1. Among other things, this Policy substitutes the term "High Priority Violation" for "Significant Violation." For a discussion of some of the risks associated with evaluating agencies based on their performance in terms of significant or high priority violations, *see* ENVTL. L. INST., REPORT OF THE COLLOQUIUM ON FEDERAL-STATE RELATIONS IN ENVIRONMENTAL ENFORCEMENT 30-31, 57 (1991) (noting that, *inter alia*, the SNC methodology depends on the degree of success in identifying noncompliers and that, paradoxically, weak agencies may appear strong and strong agencies weak because, for example, the former may fail to identify the full extent of noncompliance in its jurisdiction).

While many states have complained that the SNC definitions are too broad, others claim they are too narrow. *See, e.g.,* U.S. PIRG, DIRTY WATER SCOUNDRELS, *supra* note 9, § 4 (arguing that EPA's SNC definition "represents only the 'tip of the iceberg' regarding the problem of illegal water pollution").

184. U.S. EPA, REGION II NEWS RELEASE 1 (Apr. 30, 1997).

185. *Id.*

conomic benefit.”¹⁸⁶ An OIG 1997 audit of RCRA civil penalty practices similarly found a need to improve penalty recovery practices, especially by the states, noting that “[i]mprovements are needed in both state and EPA programs in calculating and recovering economic benefits of non-compliance for RCRA penalties. However, there were more problems in this area in the state programs we reviewed, than in the Regional programs reviewed.”¹⁸⁷ The OIG continued, “[w]e observed that the states are generally much less strict than EPA when administering penalties for RCRA violations.”¹⁸⁸

4. Inconsistency in the Approaches Used to Pursue Enforcement and Compliance and in the Level of Enforcement Activity

The 1997 OIG RCRA audit found considerable variability in state performance in the area of enforcement, noting that “there were inconsistent penalty practices between states that can result in inconsistent enforcement of RCRA-regulated facilities from one state to another.”¹⁸⁹

186. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT & COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 25–27, 29 (auditing EPA Regions 5, 6, and 9, and the states of Michigan, Indiana, Texas, Louisiana, and California, and several California air quality districts, and finding that “Regional officials considered the economic benefit of violations when resolving enforcement actions. When the economic benefit was applicable, they assessed it.”). The OIG indicated that “[w]hile EPA encourages delegated agencies to follow its penalty policy, it does not require them to do so,” and noted that Michigan was one state that assessed economic benefit. *Id.* at 4; *see also* OIG, U.S. EPA, REGION 6’S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM, *supra* note 177, at 1 (stating that neither Texas nor Louisiana formally computed economic benefit when assessing fines); OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at Ch. 1 (noting that “[p]ast audit reports have also identified concerns with . . . aspects of EPA’s oversight of state air enforcement programs such as inadequate penalty calculations . . .”).

187. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES ii Audit No. E1DSF6-11-0002-7100146 (1997). The audit covered EPA Headquarters, Regions 3, 6, and 7, and the states of Maryland, West Virginia, Louisiana, and Nebraska. *See id.* at 4. Among other things, the audit found that Maryland and West Virginia do not document the calculation of economic benefit of noncompliance. *See id.* at 7.

188. *Id.* at 5.

189. *Id.* at 15. One observer lays much of the blame for inconsistent state approaches on inconsistencies among EPA’s Regions. *See* John J. Fialka, *EPA Probers Find Big Flaws in Major Clean-Air Effort*, WALL ST. J., Dec. 28, 1998, at A16 (citing William Becker, head of the State and Territorial Air Pollution Program Administrators Association, as “blam[ing] the EPA’s 10 Regional offices,” which were inconsistently applying the program in their interaction with the states). Others have observed apparent significant variability in EPA Regions’ approaches and performance in numerous contexts. *See, e.g.,* THOMAS W. CHURCH ET AL., CLEAN SITES, WHAT WORKS? ALTERNATIVE STRATEGIES FOR SUPERFUND CLEANUPS (1991) (finding significant variations in approach and in results obtained with respect to Superfund cleanups in three Regions and that remedy selection seems to depend at least in part upon which EPA Regional office is in charge of a given site); U.S. GAO, ENVIRONMENTAL ENFORCEMENT: EPA CANNOT ENSURE THE ACCURACY OF SELF-REPORTED COMPLIANCE MONITORING DATA, *supra* note 112, at 40 (noting that Region 5 required close monitoring of laboratories when fewer than 80% of analyses dur-

In the auditors' view, this lack of consistency creates an unlevel playing field, and it undermines compliance because of the failure of many states, and some Regions, to obtain penalties that disgorge economic benefit. In its 1997 RCRA audit, for example, the OIG noted "[s]ince the states are the primary implementers of the RCRA enforcement program, it is critical that states' penalties are consistent in order to deter noncompliance and ensure equitable treatment of regulated facilities."¹⁹⁰ In its 1997 consolidated air enforcement audit, the OIG noted that a jurisdiction's failure to recoup economic benefit made companies in that jurisdiction "more likely to ignore emission limits and continue polluting the environment."¹⁹¹

The OIG suggested that "[a]t a minimum, the [enforcement] program should ensure that like violations are treated similarly in enforcement responses, regardless of location or Agency boundaries."¹⁹² The auditors believe, in short, that "it is critical that the enforcement programs within authorized states are at least as strict as the EPA program," and that obtaining strong monetary penalties is a "critical component" of effective environmental enforcement programs.¹⁹³

The GAO and OIG's auditors have made several suggestions for addressing these inconsistencies. The GAO recommended that EPA Headquarters "institute . . . internal controls necessary to ensure that the [A]gency's uniform civil penalty policy is followed."¹⁹⁴ It urged EPA Headquarters to require the EPA Regions to meet the penalty policy requirements, to document such, and to "require states . . . to adopt economic benefit policies that are based on EPA's uniform civil penalty policy," documenting adherence to such policies as well.¹⁹⁵ Similarly, the OIG suggested that EPA seek state "buy-in" for "strengthened and more

ing a two to three year period were conducted correctly, while Region 6 allows labs to achieve 50% accuracy and labs must generally show a history of violations before the Region will reject use of them); Cf. Flatt, *supra* note 36, at 5 (noting that "differing enforcement patterns never have been proven to exist numerically and the implications never have been analyzed").

190. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, *supra* note 187, at 15.

191. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 25. Cf. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, *supra* note 187, at iii (indicating that in this audit, the OIG sought to evaluate the relationship between penalty amounts and facility compliance. It "did not find a significant positive relationship between penalty amounts and facility compliance," but indicated that "further study would be necessary to determine why these facilities [that received relatively high penalties] did not return to compliance or were subsequently found out of compliance.").

192. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at ii.

193. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, *supra* note 187, at 5.

194. U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 16.

195. *Id.* at 8, 16.

consistent RCRA penalties, including the recovery of the economic benefit of noncompliance . . . ,” and it should “encourage the EPA Regions to work closely with the states to achieve state implementation of the RCRA Civil Penalty Policy.”¹⁹⁶

5. Problems with Enforcement and Other Data

The audits identified several problems relating to deficient data management.¹⁹⁷ In a 1997 air enforcement audit, the OIG concluded that “[s]everal Regions and delegated agencies . . . need[] to improve the quality of their data in the [air enforcement data base].”¹⁹⁸ It found at least three problem areas. First, it found that agencies applied different data definitions when tracking enforcement data; some states, for example, used a different definition of “significant violator” than did EPA, and only reported the significant violations as defined under state law.¹⁹⁹ Second, agencies had difficulty entering data into national federal databases. Third, in some cases agencies did not use or maintain data in the national federal database, instead developing their own Regional or state databases.²⁰⁰ The OIG also noted that “[t]he data quality problems primarily consisted of missing data . . . [and] incorrect data.”²⁰¹

196. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, *supra* note 187, at 21.

197. In addition to the specific audits discussed in the text, a May 1998 GAO audit of EPA/state enforcement efforts raises a series of issues relating to data concerns. The GAO identified the absence of baseline performance data for both traditional and alternative strategies, the inaccessibility of key data to evaluate programs’ successes, and the inherent difficulty of quantifying certain results, as some of the challenges to developing results-oriented performance measures. See U.S. GAO, ENVIRONMENTAL PROTECTION: EPA AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 34. For another general acknowledgement of deficiencies in data, see Mugdan, *supra* note 13, at 80 (noting that “[e]stablishing a widely accepted and generally applicable methodology for determining compliance rates has . . . proven to be very difficult Even assuming that this question can be satisfactorily answered, there is also an obvious need for completely accurate and timely compliance data—something which EPA and the states cannot currently assure.”).

198. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 31.

199. *Id.* at 3. One EPA guidance defines a significant violator as “any major stationary source of air pollution that violates emission, monitoring, or substantial procedural requirements; is a repeat or chronic violator; violates federal or state administrative or judicial orders; or constructs or performs major modifications without a permit.” OIG, U.S. EPA, U.S. EPA OFFICE OF INSPECTOR GENERAL AUDIT REPORT, AIR ENFORCEMENT: REGION 6’S OVERSIGHT OF NEW MEXICO AIR ENFORCEMENT DATA 6 E1GAF7-06-0032-8100078 (1998).

200. See OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 31, 34. See also OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at 9 (indicating that Pennsylvania failed to report all significant violators to EPA and noting that “past [OIG] reports disclosed that data submitted by the states through AIRS was incomplete, inconsistent, and untimely”).

201. OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COM-

The June 1997 Congressional testimony of EPA's acting inspector general, Nikki L. Tinsley, summarizes the findings of the OIG air and RCRA audits, reinforcing several of the points made above.²⁰² Acting Inspector General Tinsley highlighted the deficiencies the audits uncovered as follows: there has been a breakdown in performance of "partnership responsibilities" in terms of maintaining the infrastructure needed to monitor the effectiveness of enforcement and other compliance-related actions. OIG audits showed that EPA and the states frequently did not come to agreement on program requirements, and commitments made were not fulfilled. To illustrate the problems:

EPA expected the State of Pennsylvania to report all significant violators so that EPA could carry out its oversight role and take necessary enforcement actions Pennsylvania . . . in fiscal year 1995 . . . only reported six significant violators to EPA. We reviewed 270 of the [2000] inspections and identified 64 additional facilities that should have been reported Because EPA was unaware of these violations, it was unable to exercise appropriate oversight

[One] enforcement concept is that penalties should be large enough to negate any economic benefits of noncompliance. For the most part, EPA [R]egions included an economic benefit component in their penalty assessments, but the states we reviewed generally did not

[Another] enforcement concept is that compliance with rules and regulations should be enforced consistently across the country, including the assessment of penalties. Our audits . . . found a great

PLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 32; *see also*, OIG, U.S. EPA, SEMI-ANNUAL REPORT TO THE CONGRESS APRIL 1, 1997 THROUGH SEPTEMBER 30, 1997, 8 EPA-350-R-97-002 (1997) (summarizing data-related problems in Massachusetts's and Maryland's air enforcement programs); REGION 6'S ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM, *supra* note 177, at 2 (noting that Region 6 air enforcement data in AFS was incomplete, inconsistent, and untimely); *IG Testimony on Enforcement Activities, Hearing Before the Senate Comm. on Env't and Pub. Works*, 105th Cong. 3 (1997) (testimony of Nikki L. Tinsley, Acting Inspector General, U.S. EPA) [hereinafter Testimony of Tinsley] (stating that the OIG had found "major omissions and inaccuracies in enforcement data systems of both the Air and Hazardous Waste Programs"). Tinsley indicated that in the Air Program, "enforcement actions were often underreported and inaccurately characterized." *Id.* at 3.

Improved data management has long been a goal of EPA's. It has spent considerable sums in an effort to improve data quality and reporting. *See, e.g.*, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S PLANS TO IMPROVE LONGSTANDING INFORMATION RESOURCES MANAGEMENT PROBLEMS 2 GAO/AIMD-93-8 (1993) (noting that in Fiscal Year 1993, EPA expected to spend "nearly \$270 million on computer and communications resources"). Nevertheless, problems persist. *See, e.g.*, U.S. GAO, HAZARDOUS WASTE: BENEFITS OF EPA'S INFORMATION SYSTEM ARE LIMITED 6 GAO/AIMD-95-167 (1997) (finding that "RCRA data are not reliable").

202. Testimony of Tinsley, *supra* note 201, at 1-4.

variance when we compared EPA and state penalties, and when we compared penalties between states. In both the Air and Hazardous Waste Programs we found that penalties assessed by states were much less than those assessed by EPA

These inconsistencies were caused partly by such factors as limited resources, including a lack of administrative or legal support. Another reason for varying enforcement actions is because federal, state, and local agencies have preferences for different enforcement approaches

We found major omissions and inaccuracies in enforcement data systems of both the Air and Hazardous Waste Programs. In the Air Program, enforcement actions were often underreported and inaccurately characterized.²⁰³

A December 1998 *Wall Street Journal* article reports EPA Deputy Assistant Administrator for OECA Sylvia Lowrance's reaction to the audit results as follows: "We found a whole series of problems. Frequently, the states weren't fulfilling their inspection commitments."²⁰⁴ The article continues, "those that did inspect, according to the EPA audits, frequently didn't log violations into the EPA's national database, used to track air-quality problems."²⁰⁵

Not all of the states welcomed the outcomes of these audits with open arms. Bill Becker, head of the State and Territorial Air Pollution Program Administrators Association, noted that "[s]ome states are livid" about the OIG reports.²⁰⁶ Among other complaints, states charged that some Regions had "signed off" on the approaches taken by the states, including deviations from national guidance.²⁰⁷ The above-referenced *Wall Street Journal* article, for example, indicates that the chief of compliance of Idaho's Division of Environmental Quality took this view:

"Idaho made it clear" to that EPA[] [R]egional office, "that we wouldn't be able to adhere to rigors of national policies because of resource problems and because we didn't think it was needed to get the job done." . . . EPA's [R]egional office agreed to the arrangement, but then denied it after Idaho was accused by the EPA's inspector general of failing to report violators, not issuing substantial

203. Testimony of Tinsley, *supra* note 201, at 2-3. In October 1998, EPA consolidated its information activities into a new office, the Center for Environmental Information and Statistics. See U.S. EPA, REINVENTING ENVIRONMENTAL PROTECTION: 1998 ANNUAL REPORT 16 EPA 100-R-99-002 (1999).

204. John J. Fialka, *EPA Probers Find Big Flaws in Major Clean-Air Effort*, WALL ST. J., Dec. 28, 1998, at A16.

205. *Id.*

206. *Id.*

207. *Id.*

penalties, and failing to report 23 out of 24 violations in a timely manner.²⁰⁸

B. Observations

The issues the 1997 and 1998 audits raise are not new. For example, in a 1991 report covering air, water, and RCRA enforcement, entitled *Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators*,²⁰⁹ the GAO found that neither states nor EPA were doing a good job of applying EPA penalty policies or recovering economic benefit. Concerning EPA, “in nearly two out of three penalty cases concluded in fiscal year 1990 in EPA’s air, water, hazardous waste, and toxic substances programs, there was no evidence that . . . economic benefit had been calculated or assessed.”²¹⁰ States were even less likely than EPA’s Regional offices to comply with EPA penalty policies:

State and local enforcement authorities . . . do not regularly recover economic benefit in penalties In our 1990 review of enforcement in the stationary source air pollution program, we found that over half of the more than 1,100 significant violators that states and localities had identified in fiscal years 1988 and 1989 had paid no cash penalties at all.²¹¹

208. *Id.* The article cites the Secretary of Pennsylvania’s Department of Environmental Protection for the same complaint, notably that EPA’s Regional office and the State had reached an accommodation that included deviations from national policy.

209. U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161.

210. *Id.* at 1–2; *see also* OIG, U.S. EPA, CAPPING REPORT ON THE COMPUTATION, NEGOTIATION, MITIGATION, AND ASSESSMENT OF PENALTIES UNDER EPA PROGRAMS 5, Audit E1G8E9-05-0087-9100485 (1989) (noting that “[a]ppropriate penalties were either not calculated and assessed at all, or inadequately calculated” and that such failures as well as insufficient documentation to support penalty reductions “greatly raises the potential for fraud or abuse in EPA’s penalty program.” The OIG also noted that the Agency “did not obtain maximum deterrence and fair and equitable treatment of the regulated community in all cases. These violators may have gained an economic and competitive advantage over those who complied with the Agency’s regulation.”).

211. U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 1, 6; *see also* OIG, U.S. EPA, CAPPING REPORT ON THE COMPUTATION, NEGOTIATION, MITIGATION, AND ASSESSMENT OF PENALTIES UNDER EPA PROGRAMS, *supra* note 210, at 6 (noting that “[I]n some cases our issued reports covered state activities related to the computation, negotiation, mitigation, and assessment of penalties. To a large degree, we found that states were not properly administering either EPA’s or their own penalty policies for cases we reviewed.”); Robert H. Wayland III, Building an EPA/State Relationship for the Changing Management of Environmental Programs, ALI-ABA Course of Study, Dec. 1, 1988, at 96 (listing under the

In recent years, EPA has made an effort to address several of these shortcomings, including achieving increased compliance with the Agency's national penalty policies, and it has had some success, especially with the EPA Regions.²¹² In its September 1994 follow-up review to the 1989 "capping report" described above, the OIG found that EPA took several actions in the early and mid-1990s to strengthen its enforcement program:

EPA had successfully taken actions to address the findings and recommendations in our 1989 report. Region 5 adequately documented penalties, and reductions complied with penalty policies. Assessed penalties also recovered the economic benefit gained by noncompliance, when applicable.²¹³

heading "Problems in EPA Guidance and Monitoring Have Been Reported," deficiencies such as:

recent EPA Regional office evaluations of states and EPA headquarters evaluations of [R]egional offices show that state performance is inconsistent. The evaluations identified such problems as insufficient state staffing, inadequate state response to permit violations, a backlog of permits to be reissued, and not enough state inspections.).

212. EPA has long recognized that problems exist in the state/federal relationship in the enforcement arena and it has taken several steps in an effort to address them. Its 1993 Addendum to the Policy Framework is one such effort. *See* 1993 Revisions, *supra* note 35, at 61-63. Another such step, taken early this decade, was to convene a Colloquium on Federal-State Relationships in Environmental Enforcement to begin "reevaluating the roles and enhancing the effectiveness of federal, state, and local governments in environmental enforcement." ENVTL. L. INST., REPORT OF THE COLLOQUIUM ON FEDERAL-STATE RELATIONS IN ENVIRONMENTAL ENFORCEMENT, *supra* note 183, at 1. The author, one of roughly 50 participants in this Colloquium, participated in his capacity as Director of the Division of Environmental Enforcement for the New York State Department of Environmental Conservation. *See id.* at 2. The Colloquium was convened by ELI and sponsored by EPA. *See id.* at 1. The *Report of the Colloquium* indicates that the purpose was to "identify the issues that deserve attention now—those areas that offer possible improvements over current approaches to enforcement relationships" and not to "construct a whole new enforcement framework." *Id.* at 3.

213. OIG, U.S. EPA, FOLLOW-UP REVIEW, MITIGATION OF PENALTIES 1 E1GMG4-05-6009-4400107 (1994). This is not to suggest that EPA's performance is beyond reproach. The auditors suggest that considerable problems remain. *See, e.g.*, OIG, U.S. EPA, REGION 10'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM 7 Audit No. E1HWF7-10-0012-81000076 (1998) (concluding that the Region was doing an inadequate job in reviewing and issuing required permits, maintaining a reporting system to track dischargers, inspecting all of the major dischargers it had committed to assess, or "respond[ing] in an appropriate or timely manner to violations by dischargers that were in SNC with NPDES permit conditions." In particular, the Region failed to take any enforcement action whatsoever against 19 of the 25 dischargers who were in SNC between 1994 and 1996; and its enforcement response for three of the six dischargers that were targeted for enforcement action apparently failed to meet EPA guidance requirements directing timely initiation of enforcement actions (within two months after identifying the violation). Thus, the Region apparently took timely and appropriate enforcement action with respect to three of the 25 significant noncompliers, or in 12% of the cases.).

A 1997 RCRA enforcement audit states that EPA's Regions improved considerably in their implementation of EPA enforcement policies during the decade, noting that "[w]e found that the Regions we visited showed considerable improvement in documenting penalty calculations and the justification for any penalty adjustments."²¹⁴

Progress on the state front appears to have been slower. As discussed in Part III, in 1993 EPA issued its revised State/EPA Framework, in which EPA and the states established a clear expectation that states would recoup economic benefit.²¹⁵ One EPA official went so far as to say that the 1993 Revisions were the "final steps towards harmonizing penalty policies at the federal and state levels."²¹⁶ Even though one state environmental Agency head, who also serves as the Chair of the Compliance Committee of ECOS, called the Revised Policy Framework "the foundation for current State/EPA roles in enforcement matters,"²¹⁷ this revision has obviously not had its intended effect in several states, as the audits summarized above reflect.

The OIG and GAO identified a variety of reasons why states have not been falling over themselves to conform their enforcement policies and practices to EPA directives. Some states' programs attempt to achieve compliance by working cooperatively with facility owners and operators rather than assessing penalties, in hopes that this approach will bring a larger number of facilities into compliance.²¹⁸ Business pressures, notably the concern that "high penalties might jeopardize local business, result in unemployment, and dissuade businesses from locating in the state,"²¹⁹ also play a role. Resource constraints,²²⁰ as well as state con-

214. OIG, U.S. EPA, FURTHER IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF RCRA CIVIL PENALTIES, *supra* note 187, at 4, 22. The OIG found that despite this progress, considerable room exists for additional improvement. *See id.* at 9 (discussing Regions 3, 5, and 7).

215. *See supra* notes 168 and 169.

216. Cheryl Wasserman, *Oversight of State Enforcement*, in Law Envtl. Protection, *supra* note 119, § 8.02[3] at 8-139.

217. Statement of Coleman, *supra* note 127, at 2. He continued that the Framework "ensure[s] that clear oversight criteria [are] set"

218. *See* Mintz, *supra* note 21, at 23. In his book on EPA enforcement, Professor Mintz indicates that the existence of different philosophies should come as no surprise. He states that when EPA was first created and began to develop enforcement capabilities, "[m]ost state officials bitterly resented the involvement of the EPA's young staff . . . in what they still viewed as their own domain. A number of state pollution control managers viewed EPA's assertive new enforcement program as unnecessarily stringent and overly aggressive." *Id.* at 23. He continued that when EPA adopted a civil penalty policy, "[m]any states resented the Agency's attempt to subject them to a uniform policy regarding civil penalties and some flatly refused to abide by its terms." *Id.* at 31.

219. U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 8.

220. *See* OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 14.

cerns about whether they have the legal authority to pursue EPA's policies, also are relevant.²²¹

Finally, it may well be that EPA Headquarters has not "pushed hard enough" and that EPA's Regions have not been consistent in their efforts to secure the cooperation of the states within their respective jurisdictions. Concerning the former, the auditors found that "EPA did not push the states to adopt penalty policies providing for recoupment of economic benefit, even though EPA had the legal authority to do so."²²² Several commentators have suggested that there are significant variations in Regional expectations and demands of states.²²³

Regardless of the reasons for the apparent state shortfalls in performance vis-a-vis EPA expectations, the bottom line, as one commentator has put it, is that "[b]oth the [GAO] and the [OIG] have criticized the states for lax enforcement in recent years, drawing an embarrassing picture of incompetence and even willful neglect of state responsibilities in this crucial area."²²⁴

The seemingly substantial disregard of EPA enforcement policies has been accompanied by a continuing concern that rates of compliance

221. See *supra* notes 156-161, especially 160, 161.

222. U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 2, 12-13, 16. In another sign of deference, while EPA believes it has the authority to "overfile" (*i.e.*, to take its own action in cases in which state actions are either not timely or inappropriate), EPA rarely does so. See *id.* at 15; see also *infra* note 338 and accompanying text.

EPA appears to be following a similarly deferential path in its approach to the newer measures discussed in more detail in Part V below. See OECA, U.S. EPA, MEMORANDUM: IMPLEMENTING THE NATIONAL PERFORMANCE MEASURES STRATEGY (1999). This memo was issued after completion of this Article. While noting that the new measures are expected to be quite valuable in enhancing EPA's enforcement and compliance assurance program, it notes: "It should be noted that the measures developed under the National Performance Measures Strategy are intended to apply only to EPA's . . . enforcement and compliance assurance programs. No new reporting requirements are imposed on state programs through these measures." *Id.* at 3.

223. See *supra* note 189 and accompanying text; see also OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at Ch. 2 (noting that "[p]ast audit reports have also identified concerns with . . . aspects of EPA's oversight of state air enforcement programs such as inadequate penalty calculations . . .").

The failure of some EPA Regions to adhere to national policy is likely partially responsible as well. One audit pointed out that states are unlikely to follow EPA policy if their EPA Region fails to do so. See OIG, U.S. EPA, REGION 10'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM, *supra* note 213, at 10; OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161, at 8-11, 13-14 (finding, *inter alia*, considerable variation among EPA Regions in terms of their enforcement practices).

Another factor is the significant autonomy the EPA Regions traditionally have enjoyed. In the context of EPA/state relations, in short, it is important to recognize that we are not talking about monoliths on either end. There is considerable variability in approach and results among EPA's Regions and the same is true among states.

224. Rena I. Steinzor, *Reinventing Environmental Regulation through the Government Performance and Results Act: Are the States Ready for the Devolution?* 29 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,074, 10,082 (1999).

with the environmental laws are not where they should be. A March 1996 GAO audit's review of compliance of "major" facilities²²⁵ regulated under the water permit program concludes that such "major facilities have frequently violated their permits."²²⁶ The GAO notes that "[f]or fiscal year 1994, for example, our analysis indicates that about 1 in 6 of the . . . major regulated facilities significantly violated the discharge limits in their permits."²²⁷ The GAO's analysis of EPA's compliance data for the fiscal years 1992 through 1994, "shows that from 18 to 27 percent . . . of the major regulated facilities were in significant noncompliance."²²⁸

EPA's enforcement office, OECA, appears to believe that compliance rates are not what they should be. Assistant Administrator Herman has apparently advised the states that there is a continuing problem with the lack of stringency of state enforcement efforts.²²⁹ OECA identifies several concerns regarding such rates in its April 28, 1998, letter to the GAO in connection with a draft GAO audit of state and federal enforcement. In its draft report, GAO included a statement that "large [pollution]

225. The GAO notes that "EPA classifies facilities . . . as major or minor, depending on the risk to the environment posed by the pollutants being discharged . . . ; the volume of pollutants being discharged; and, in the case of municipal wastewater treatment facilities, the size of the population being served." U.S. GAO, WATER POLLUTION: MANY VIOLATIONS HAVE NOT RECEIVED APPROPRIATE ENFORCEMENT ATTENTION, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE 1 GAO/RCED-96-23 (1996).

226. *Id.*

227. *Id.* at 1–2. These numbers reflect that the percentage and absolute number of facilities in SNC increased significantly over the three-year period. Of the 1917 facilities in SNC in 1994, 63% "qualified" because of effluent limit violations while the remaining 37% had violated compliance schedules or reporting requirements. *See id.* at 5.

While "significant noncompliance" is a term of art, and has been subject to change and debate over the years, the basic idea is that "[c]ases of significant noncompliance are the more severe and chronic violations of the discharge limits or monitoring requirements established in a facility's discharge permit." *Id.* at 3. *See, e.g.*, OIG, U.S. EPA, VALIDATION OF AIR ENFORCEMENT DATA REPORTED TO EPA BY PENNSYLVANIA, *supra* note 182, at Ch. 2 (Pennsylvania comments, criticizing the definition of SNC); U.S. EPA, EXPANDED SIGNIFICANT NONCOMPLIANCE (SNC) DEFINITION IMPLEMENTATION—IDENTIFYING NEW SNC FACILITIES 1 (1996) (reflecting the evolutionary quality of definitions of SNC—in this case, expanding the definition of SNC for NPDES to include certain non-monthly average limit violators).

228. U.S. GAO, WATER POLLUTION: MANY VIOLATIONS HAVE NOT RECEIVED APPROPRIATE ENFORCEMENT ATTENTION, *supra* note 225, at 4. The GAO indicated that this range of percentages was likely misleadingly low in depicting actual levels of significant violations of permit discharge limits—that the actual number of significant violations of discharge limits may be nearly twice as high because of shortcomings in EPA's criterion for screening violations. *See id.* at 2. Others believe that the definition of significant noncompliance is far too broad, as noted above. *See supra* note 183. The percentage of major facilities that committed any violation at all was much higher, as might be expected.

229. *See Agency Enforcement Chief Acknowledges "Serious Disconnects" in State Collaboration*, 27 Env't Rep. (BNA) 2320 (1997). As discussed elsewhere, the states have been quite upset by EPA's perspective. *See supra* notes 183, 189, and 206–208. Several articles published in 1999 suggest that some states challenge the quality of the underlying data relating to compliance. *See infra* note 245. EPA appears to maintain its concerns in the face of such challenges. *Id.*

sources are mostly in compliance and can be de-emphasized as [enforcement and compliance] targets.”²³⁰ EPA’s comment on this positive statement about the state of compliance is that “there is little or no empirical basis for [this] assumption”²³¹ With respect to the water permit program in particular, EPA notes that “[a] review of Significant Non-compliance (“SNC”) data under the Clean Water Act does not indicate an improved compliance trend over the past several years.”²³²

EPA’s concerns about current compliance efforts are also reflected in its critique of Clean Air Act compliance. EPA notes that “[a]nalysis of Clean Air Act Title V permit applications (in which sources certify compliance status) . . . suggests significant levels of noncompliance with emission control requirements.”²³³ Further, EPA states that its own investigations raise concerns ‘about possible widespread noncompliance with Clean Air Act . . . permit requirements.’²³⁴ Finally, a letter dated April 28, 1998, from EPA to GAO notes that the OIGs audit of Pennsylvania’s air enforcement effort “suggests that some states are generally not properly identifying significant violations, and recent data suggests an increase in unaddressed violations.”²³⁵

A February 1999 presentation by the Principal Deputy Assistant Administrator of OECA, Sylvia Lowrance, entitled *Innovations in EPA’s Compliance and Enforcement Program*, echoed this message from EPA’s April 1998 letter to the GAO. One overhead from the presentation indicates that more than fifty percent of all Clean Water Act NPDES major facilities were in SNC or resolution of non-compliance (“RNC”) in Fiscal Year 1998. More than twenty percent of the majors were in significant non-compliance.²³⁶ According to the presentation, these majors represent only the tip of the iceberg in terms of facilities in the Clean Water Act universe.²³⁷ As of January 1999, there are 6749 NPDES majors, 82,560 NPDES minors, an estimated 30,000 pretreatment significant industrial

230. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 71.

231. *Id.* at 71.

232. *Id.* at 72. See also U.S. GAO, WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS i GAO/RCED-84-53 (1983) (finding that noncompliance with permit limits was “widespread, frequent, and significant”); U.S. PIRG, DIRTY WATER SCOUNDRELS, *supra* note 9, § 1 (containing a quite critical review of Clean Water Act compliance levels, noting that “[t]he Clean Water Act turns 25 years old this year, and yet one in every five major water polluters remains in serious, chronic violation of the law The findings of this report . . . confirm that non-compliance with the Clean Water Act remains consistently and unacceptably high.”).

233. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 72.

234. *Id.*

235. *Id.*

236. See Sylvia Lowrance, *Innovations in EPA’s Compliance and Enforcement Program*, Presentation to EPA Office of Enforcement and Compliance Assurance, 8 (Feb. 3, 1999).

237. See *id.* at 6.

users, an estimated 200,000 stormwater dischargers, and 6600 large animal feeding operations.²³⁸ The presentation acknowledges that EPA has compliance data in its national database only for the majors and that it lacks information concerning the extent to which facilities other than the majors are inspected.²³⁹ Thus, the majors are by far the most scrutinized dischargers from a regulatory standpoint, and yet the noncompliance rate for these facilities is quite high.²⁴⁰

In the same presentation, EPA indicated that for "Clean Air Act majors" (significant sources in terms of regulatory treatment), the national data system shows seven percent are in significant violation but that the percentage is "probably higher" because of an "upward trend as identification and reporting to national systems improves" and because "detailed investigations show dramatically higher rate[s] [of noncompliance.]"²⁴¹ A January 1999 EPA *Enforcement Alert* carries the subtitle *EPA Concerned About Noncompliance with New Source Review Requirements* and notes that "[e]vidence suggests that violations of the major NSR requirements are widespread."²⁴² The same *Enforcement Alert* continues, "[w]hen EPA looks closely at an industry sector, usually it discovers a high rate of noncompliance."²⁴³

238. *See id.*

239. *See id.* at 5.

240. *See id.*

241. *Id.* at 8.

242. Off. of Reg. Enforcement, U.S. EPA, *Compliance with Permitting Critical to Clean Air Act Goals: EPA Concerned About Noncompliance With New Source Review Requirements*, ENFORCEMENT ALERT, Jan. 1999, at 1. The EPA document continues, "lax implementation in some states can make it more difficult for others to insist that permit standards be met." *Id.* at 2.

243. *Id.* at 4. As might be expected, environmental non-governmental organizations ("ENGOS") are monitoring the concerns with compliance rates under the Clean Air Act, among other areas, and sounding the call for more aggressive enforcement. *See, e.g.*, Environmental Working Group, *supra* note 134, at 1 (stating:

An Environmental Working Group analysis of recently released enforcement records from the U.S. Environmental Protection Agency (U.S. EPA) reveals a persistent pattern of 'significant violations' of the Clean Air Act (CAA) in five major industries . . . [T]here has been little effort by state or federal officials to bring even the most flagrant offenders into compliance with current statutory requirements.).

The Environmental Working Group reports that, among other signs of significant non-compliance,

[m]ore than 39 percent (227 out of 575) of all major U.S. facilities in auto assembly, iron and steel, petroleum refining, pulp manufacturing, and the metal smelting and refining industries violated the CAA between January 1997 and December 1998.

Id. It continued that

[a]ll of these infractions fit the U.S. EPA definition of "significant" violations of the law. Only about one-third (36 percent) of the 227 facilities violating the

For RCRA, EPA indicated that for facilities inspected in FY 97 or FY 98, the national data system showed "approximately 21% of combusters and 28% of Land Disposal Facilities in SNC."²⁴⁴

Some states have taken issue with EPA's (and GAO's and OIG's) conclusion that compliance rates are not what they should be and have asserted that compliance rates are good.²⁴⁵ One commentator has pointed out that "[t]hese statistics were not accompanied by materials that would

law have been fined by the U.S. EPA or state environmental regulators. According to EPA, only two percent of the violations reported are paperwork violations.

Id. The Environmental Working Group's conclusion: "Without question, the Clean Air Act is not being effectively enforced by state environmental agencies. In turn, EPA oversight of state enforcement is virtually non-existent." *Id.* at 2. To preview a theme sounded in Part VI of this Article, notably that a public spotlight on government enforcement performance might prove to be an effective strategy to improve such performance, the Environmental Working Group indicates that "[o]ne of the main constraints to strong enforcement is that the public has no easy way of knowing about the scope of environmental violations, the specific identity of local violators, the consequences of the violations, and the non-performance of state enforcement agencies [W]ith the public in the dark, chronic violations of environmental laws and lack of enforcement rarely emerge as public issues. As a result, there is no pressure on industry or government to improve their performance." *Id.* at 13.

244. Lowrance, *supra* note 236, at 8.

245. See *The Relationship Between Federal and State Governments in the Enforcement of Envtl. Laws: Hearing Before the Senate Comm. on Env't and Public Works*, 105th Cong. 36-38 (1997) (statement of Christophe A.G. Tulou, Secretary, Delaware Department of Natural Resources and Environmental Control); *States Blast EPA Handling, Release of Enforcement Data*, REINVENTION REP., Aug. 11, 1999, at 6-7 (reporting that ECOS is "blasting EPA's handling of state enforcement and compliance data, complaining the [A]gency's information is incomplete and inaccurate and had led to false charges that states are incapable of adequately enforcing environmental laws" and indicating that "[A]gency sources have said that while some of EPA's data may be less than perfect, many states are nevertheless not adequately enforcing the majority of environmental laws"); *EPA Tells States Enforcement Data is Reliable Despite Flaws*, REINVENTION REP., Aug. 25, 1999, at 3 (reporting that "EPA argues that despite 'mathematical errors' in recently released enforcement reports that indicated drops in state enforcement activity, the [A]gency's national enforcement data are essentially reliable"); *Internal EPA Review Finds State, Regional Enforcement Activity Slumping*, INSIDE E.P.A. WKLY. REP., May 14, 1999, at 1, 11-12 (reporting that "[a] series of internal reports by EPA headquarters suggest state enforcement activity nationwide has plummeted over the past five years," and that, "[i]n response to the reports, state officials vehemently deny the charge that they have dropped the ball on enforcement, attributing the decline suggested by the activity counts to a range of causes, including a renewed emphasis on compliance assistance, confusion caused by shifting priorities from headquarters, or simple errors in EPA's interpretation of the data."). The article continues that "some [R]egions admit some difficulties in overseeing state programs, complaining that they have little clear guidance from headquarters about what to review and how to handle recalcitrant states." *Id.* The article indicates that "states argue that EPA's conclusions are flawed because the data is bad—and then they admit they submitted the data." *Id.*; see also *EPA Criticism Prompts Renewed Enforcement Oversight in Region X*, INSIDE E.P.A. WKLY. REP., May 14, 1999, at 15 (indicating that "[a]n EPA review of environmental enforcement in Region X suggests that the region has essentially stopped overseeing its states. Regional officials accept headquarters' criticism").

allow them to be verified.”²⁴⁶ States have also challenged the quality of the underlying data.²⁴⁷

While compliance rates in some programs in some states are undoubtedly impressive, and while questions clearly exist concerning the data, much of which is state-generated, the findings by EPA, OIG and GAO warrant follow-up. At a minimum, they call for more comprehensive work to develop common definitions of compliance rates and to evaluate systematically compliance rates in different authorized and non-authorized programs. Such work should be clear in identifying data quality concerns as well as gaps in data maintained or entered by the enforcing agency, whether it be a state or an EPA Region, that renders it impossible to determine reliable compliance rates.

To sum up, the structure of the EPA/state relationship in the enforcement and compliance arena, discussed in Part III, is relatively straightforward. States authorized by EPA to administer the state version of a given national environmental program have primary responsibility for implementing the program. The Policy Framework for the State/Federal Enforcement Relationship establishes clear expectations for state enforcement, notably that states will identify significant violators, pursue “timely and appropriate” enforcement actions, and assess penalties in appropriate cases that recover the economic benefit of noncompliance plus a portion reflecting the gravity of the violation.²⁴⁸ EPA’s role is to ensure that states authorized to administer the national environmental program have the requisite legal and other capacity to meet these expectations. EPA’s complementary responsibility is to ensure that authorized states actually operate compliance and enforcement programs that are adequate and “effective.”²⁴⁹ Steve Herman, EPA Assistant Administrator

246. Steinzor, *supra* note 224, at 10,082 n.78.

247. *Internal EPA Review Finds State, Regional Enforcement Activity Slumping*, INSIDE E.P.A. WKLY. REP., *supra* note 245, at 11.

248. The auditors, as well as EPA’s OECA, have routinely expressed the view that these elements are necessary for an effective compliance and enforcement program. The auditors, like EPA enforcement officials, believe that these elements create the deterrence necessary to encourage compliance, promote fairness, enhance credibility of government regulation, and permit the management oversight necessary to minimize opportunities for fraud and abuse. See U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 14–15; Herman, *EPA’s FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 3, 5 (expressing OECA’s view that “formal law enforcement is the central and indispensable element of effective governmental efforts to ensure compliance”).

249. See *NRDC v. EPA*, 859 F.2d 156, 181 (D.C. Cir. 1988); see also 40 C.F.R. § 123.22 (1998), 40 C.F.R. §§ 123.45 and 123.63(a)(3) (1998) (describing state reporting obligations to the EPA), and 40 C.F.R. § 271.22(3)(ii) (1998) (requirements for authorization of state RCRA regulations); Memorandum from Steven A. Herman, Assistant Administrator, Off. of Compliance Assurance, U.S. EPA et al. to Regional Administrators (Feb. 14, 1997) (noting that under federal environmental laws, “states must have adequate authority to enforce the requirements of any federal programs they are authorized to administer”).

for OECA, concisely summed up the governments' respective roles in testimony before Congress:

States conduct the lion's share of inspections, and are essential to maintaining an enforcement presence. The Federal Government is needed where States lack authority, problems transcend state boundaries or are particularly complex, and to discourage forum shopping by irresponsible companies, and to maintain an enforcement presence.²⁵⁰

As this Part has demonstrated, the State/EPA Policy Framework has not been fully realized in reality. Instead, reviews of state performance have found a pattern of state disregard of these EPA expectations,²⁵¹ and they have found that EPA has failed to provide the necessary "oversight" to narrow the gap between expectation and reality. Commentators have catalogued the likely reasons for this state of affairs, and this Article has alluded to several of them: (1) the lack of EPA Headquarters' control of its Regions or the states; (2) fundamental disagreements between EPA and some state officials as to the appropriate role for, and approaches to, enforcement; (3) subtle disagreements on issues such as definitions of significant non-compliance and the size and appropriateness of penalties

250. *The Relationship Between Federal and State Governments in the Enforcement of Envtl. Laws: Hearing Before the Senate Comm. on Env't and Public Works*, 105th Cong. 4-7 (1997) (statement of Steven A. Herman, Assistant Administrator, OECA, U.S. EPA) [hereinafter Statement of Herman].

251. This general statement needs to be qualified in at least three ways. First, there were variations in state performance and some states fared relatively well under the audits. See OIG, U.S. EPA, CONSOLIDATED REVIEW OF THE AIR ENFORCEMENT & COMPLIANCE ASSURANCE PROGRAMS III, *supra* note 161. Second, the audits are, of course, incomplete in the sense that they only cover some states and, indeed, only certain programs within those states. There is a risk of inappropriate generalization in extrapolating given the variations among and, indeed, within states and among EPA Regions. As EPA has noted:

There are dozens of program components that . . . are delegated to states. Currently, the extent of delegation is uneven and performance of these delegated programs is also uneven. The national program is, in fact, a mosaic of situations, even within a single state. Thus, the 'state/EPA relationship' is really a complicated series of relationships that can only be described accurately on a program-by-program and state-by-state basis.

U.S. EPA, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY, *supra* note 121, at 6.

Finally, it is difficult to gauge from some of the reviews the extent to which some of the purported failings are "paper" deficiencies—a state may have engaged in certain activities but failed to document such for the files.

A more comprehensive review of state programs would seem to be in order given the central role states play and the variations in performance. As one commentator has observed, "the statistics reported in the GAO and EPA IG reports may be the tip of the iceberg, or they may reflect anomalies that merely signify a few bad apples in an otherwise sound barrel. To know for sure requires a more extensive investigation of state capacity . . ." Steinzor, *supra* note 224, at 10,083.

in particular cases; (4) federal reluctance to "strain" relations with the states; and (5) resource constraints on both sides, are on this list, among others.

The final piece of the puzzle concerning federal/state relations is the ongoing effort to "reinvent" these relations.²⁵² With Parts II–IV having provided the necessary backdrop, i.e., a summary of enforcement policies, practices, and outcomes over the past several years, Part V now turns to these recent efforts to reinvent the federal/state relationship in the enforcement area.

V. A SUMMARY OF THE "REINVENTION" OF THE STATE/EPA ENFORCEMENT RELATIONSHIP

The world of state/federal relations is one of many spheres touched by the "reinvention of environmental regulation" discussed in Part II. EPA and the states adopted the National Environmental Performance Partnership System ("NEPPS") in 1995 as the centerpiece of their reinvention effort.²⁵³ EPA characterizes NEPPS as "a framework for defining the future State/EPA relationship."²⁵⁴ The Environmental Law Institute has characterized NEPPS as "the most substantial nation-wide reform in the EPA-state relationship since those relationships were first established over twenty-five years ago."²⁵⁵

252. See *supra* Part II and *infra* Part VI; see also Stahl, *Enforcement in Transition*, *supra* note 16.

253. See OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT COMMITMENT TO REFORM OVERSIGHT AND CREATE A NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM 1 (1995). EPA indicates that the NEPPS was developed jointly by EPA and the States. See Off. of St. & Local Rel., U.S. EPA, *Performance Partnership System Frequently Asked Questions* (last modified June 9, 1998) <<http://www.epa.gov/ocirpage/pps/faq.htm>>.

254. *Id.* at 5.

255. ENVTL. L. INST., AN INDEPENDENT REVIEW OF THE STATE-FEDERAL ENVIRONMENTAL PARTNERSHIP AGREEMENTS FOR 1996 11 (1996) [hereinafter INDEPENDENT REVIEW]; see also OFF. OF STATE & LOCAL REL., U.S. EPA, JOINT STATEMENT ON MEASURING PROGRESS UNDER THE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM 1 (1997) (describing NEPPS as "creating an enhanced partnership between states and EPA for protecting our environment and operating the nation's environmental protection programs"); Memorandum from Fred Hanson, Deputy Administrator, Off. of St. & Local Rel., U.S. EPA, to Assistant Administrators et al. (July 15, 1996) (stating that "[t]he Administrator and I consider performance partnerships to be central to the Agency's reinvention efforts"); Steinzor, *supra* note 224, at 10,078 (noting that "[i]f this [EPA] rhetoric is to be believed, NEPPS represents a fundamental change in the Agency's posture toward the states, leaving the states significantly expanded discretion to decide which federal regulatory programs they will fully implement"). EPA had finalized performance partnership agreements with 33 states as of the end of 1998. See U.S. EPA, REINVENTING ENVIRONMENTAL PROTECTION: 1998 ANNUAL REPORT, *supra* note 203, at 26. Forty-three states had performance partnership grants ("PPGs"). See *id.*

A key area of future research involves parsing the NEPPS agreements and following up on their actual implementation in the field. Significant differences exist among the Agreements. For example, Minnesota noted that its second performance partnership

NEPPS's goals have considerable intuitive appeal. NEPPS is to produce improved environmental protection by, *inter alia*, (1) enabling states to focus on priority environmental concerns, (2) giving states increased autonomy to design strategies to address those concerns, and (3) enhancing state accountability for results. EPA and the states intend, in short, that NEPPS will "strengthen [EPA and state] protection of public health and the environment by directing scarce public resources toward improving environmental results, allowing states greater flexibility to achieve those results, and enhancing our [EPA and state] accountability to the public and taxpayers."²⁵⁶

EPA appears to be prepared to give more than lip service to the idea of increased state autonomy, the second of the three strategies listed above. EPA's leadership has embraced the notion that states should be encouraged to serve as laboratories and experiment with alternative approaches. The May 1998 Joint EPA/State Agreement to Pursue Regulatory Innovation,²⁵⁷ for example, signed by EPA Administrator Carol Browner, EPA Deputy Administrator Fred Hansen, and others, champions the theme that states have great value as laboratories:

States are a natural laboratory for testing new ideas. State and local environmental professionals are closest to environmental problems and communities, and can often develop the most practical solutions.²⁵⁸

agreement was in many ways "so significantly and fundamentally different from the first agreement that it could be considered the 'first of its kind' for Minnesota." MINNESOTA POLLUTION CONTROL AGENCY, U.S. EPA, MINNESOTA ENVIRONMENTAL PERFORMANCE PARTNERSHIP AGREEMENT OCT. 1, 1997-JUNE 30, 1999 1 (1997). A recent GAO report makes this point as well. *See* U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM 23-24 GAO/RCED-99-171 (1999) (noting that "States . . . vary considerably in terms of the detail and content of their partnership agreements. Senior officials in EPA's Office of State and Local Relations explained that the Agency has not attempted to impose uniformity on the development of partnership agreements at this early stage of the NEPPS process and has, therefore, refrained from issuing guidance on how partnership agreements should be structured. Hence, the agreements vary widely in content and emphasis, reflecting individual state's conditions and priorities, and their negotiations with their respective EPA Regional offices.").

256. OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT COMMITMENT TO REFORM OVERSIGHT AND CREATE A NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 253, at 1; *see also* U.S. GAO, ENVIRONMENTAL PROTECTION: CHALLENGES FACING EPA'S EFFORTS TO REINVENT ENVIRONMENTAL REGULATION 26 GAO/RCED-97-155 (1997) (noting that "[a] key element of the partnership system is the Agency's commitment to give states with strong environmental performance greater flexibility and autonomy in running their environmental programs").

257. 63 Fed. Reg. 24,784 (1998).

258. *Id.* at 24,785. Many believe that states are in the vanguard in providing environmental protection because of their capacity to serve as laboratories, among other reasons. Virginia Wetherell, Secretary of Florida's Department of Environmental Protection, suggests that "[a]cross the country, states are leading a change in how we manage and

Further, as discussed above,²⁵⁹ EPA has embraced a much broader vision of appropriate enforcement and compliance tools. Having a wide assortment of tools from which to choose inherently will increase states' flexibility in deciding when to use a particular tool.²⁶⁰ As might be expected, while EPA has eagerly embraced such a broader vision, states' enthusiasm for increasing use of a broad array of compliance assistance and compliance incentive approaches is at least as great as EPA's, as others have observed.²⁶¹

measure environmental protection programs." Virginia Wetherell, *Counting Results*, ENVTL. F., Jan./Feb. 1998, at 21; *see also* Geltman & Skrobach, *supra* note 12, at 2 (noting that states have been in the forefront in identifying ways to reinvent environmental regulation, though acknowledging this effort is in its infancy); EVAN J. RINGQUIST, ENVIRONMENTAL PROTECTION AT THE STATE LEVEL: POLITICS AND PROGRESS IN CONTROLLING POLLUTION xiii (1993); U.S. GAO, REPORT TO CONGRESSIONAL COMMITTEES, FEDERAL-STATE-LOCAL RELATIONS: TRENDS OF THE PAST DECADE AND EMERGING ISSUES, *supra* note 20, at 3; Markell, *States as Innovators*, *supra* note 114, at 354 (noting that states "have progressed . . . to a period in which they are touted as key innovators").

259. *See supra* Part II.

260. *See, e.g.*, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS *supra* note 31, at 3, 7, 21, 24-25 (discussing types of alternative compliance strategies). The idea that compliance assistance and compliance incentive strategies should be used as well as deterrence-based enforcement approaches has considerable intuitive appeal. For example, it seems indisputable that smaller facilities benefit from compliance assistance programs that help them understand what is required and how to comply with legal obligations. *See, e.g.*, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra*, at 22 (indicating that "state and EPA officials consistently told [GAO staff] that . . . [smaller] facilities were often willing but unable to comply with numerous, often complex regulations," and one state official indicated that compliance assistance programs were created in his state "because the [governments] recognized that small businesses do not generally have the technical expertise or resources to understand what requirements apply to them and what they need to do to comply").

This intuitive appeal has some support in the limited empirical evidence, though much more analysis is needed to develop a better sense of the types of situations in which different compliance and enforcement approaches will be most effective. *See, e.g.*, Kathryn Harrison, *Is Cooperation the Answer? Canadian Environmental Enforcement in Comparative Context*, J. POL'Y ANALYSIS & MGMT., Winter 1995, at 221, 240 (concluding that a case study of the pulp and paper industry "suggest[s] the need for more critical examination of the effectiveness of cooperative regulatory regimes"); Kathryn Harrison, *Talking with the Donkey: Cooperative Approaches to Environmental Protection*, J. OF INDUS. ECOLOGY, Summer 1998, at 51, 55 (noting that "[q]uantitative comparisons of actual rates of compliance in response to different enforcement regimes are few and conflicting"); OECA, U.S. EPA, PROTECTING YOUR HEALTH, *supra* note 30, at 11 (briefly discussing results from various initiatives). There are studies that conclude that a deterrence-based approach is effective. *See, e.g.*, W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65, 90 (1989) (discussing a statistical study of enforcement of U.S. pulp and paper regulations).

261. *See, e.g.*, Rechtschaffen, *supra* note 30, at 1184 (noting that states have been "leading the charge" to modify enforcement practices in this direction). *See also* U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 14 (noting that several states have "generally maintained that a wider array of 'tools' is needed to help achieve environmental compliance and that they should be held accountable for this desired outcome—environmental compliance—rather than for the number of times they take traditional enforcement

In the context of this Article, the key question is whether enhancing state autonomy is likely to improve state adherence to EPA expectations for deterrence-based enforcement. As illustrated in the previous Parts, several states already do not toe EPA's line in conducting deterrence-based enforcement in an environment in which their autonomy was relatively confined. The intuitive answer is that enhancing state autonomy is likely to lead to a further decline in deterrence-based enforcement, given states' lack of interest in conducting such enforcement and the other factors identified above.

The final key feature of NEPPS is the notion of enhanced accountability. The NEPPS documents recognize that the opportunity for enhanced autonomy carries with it the responsibility of greater accountability.²⁶² There are several issues worth touching on here. First is the question of what a state should be accountable for—what is it expected to do and to accomplish? EPA has invested considerable effort in refining measures of performance in the enforcement and compliance arena, as have many states.²⁶³ The governments have agreed to a substantially revised set of measures for evaluating enforcement and compliance performance as part of the general notion of enhancing accountability.²⁶⁴ The governments, in a 1997 joint statement, “reaffirm[ed] [their] commitment to use core performance measures as tools to track progress in achieving environmental results.”²⁶⁵ The governments agreed to use a mix of traditional “output” measures as well as relatively innovative “outcome” and “indicator” measures.²⁶⁶ The bottom line is that EPA and the states intend

action”).

Part II discusses EPA's increased emphasis on compliance assistance and compliance incentive strategies as part of federal reinvention efforts. *See supra* Part II.B–C.

262. *See supra* notes 256–259.

263. In 1997 EPA's OECA initiated an effort to “develop and implement an enhanced set of performance measures for EPA's enforcement and compliance assurance program.” OECA, U.S. EPA, FINAL REPORT OF THE NATIONAL PERFORMANCE MEASURES STRATEGY I (1997). The Agency engaged in an extensive research and outreach effort and issued its National Performance Measures Strategy in December 1997. *See id.* at 1–9. Florida is one of the states that has invested considerable effort in refining measures of performance. *See infra* note 404.

264. *See Memorandum from Fred Hansen, Deputy Administrator, U.S. EPA & Harold F. Reheis, President, Env'tl. Council of the States* (last modified Aug. 20, 1997) <<http://www.epa.gov/regional/pps/memo.htm>> (noting that a key element of NEPPS is the commitment to “focus on desired environmental outcomes and devise measures which will help us gauge how our programs are doing to achieve those outcomes”).

265. OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT STATEMENT ON MEASURING PROGRESS UNDER THE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 1.

266. *Id.* The governments adopted a three-layered hierarchy of performance measures: (1) environmental indicators (at the top), (2) outcome measures (in the middle), and (3) output measures (at the bottom). *See id.* Environmental indicators are linked to environmental objectives, i.e., to a “quantitative measure over time of progress toward achieving environmental objectives, expressed as changes in ambient concentrations of pollutants, in pollutant uptake or body burden, or in health, ecological, or other effects of pollutants.” OFF. OF ST. & LOCAL REL., U.S. EPA, DEFINITIONS AND KEY CHARACTERISTICS OF

to shift from focusing on the nature of government activity to the environmental outcomes of that activity.

An effort to reinvent measures of performance seems quite appealing. There is much promise in supplementing traditional "output" measures, which "don't really tell us much about whether the environment is getting better, or if pollution is being reduced,"²⁶⁷ or if compliance or enforcement initiatives are having their intended effect, with new measures that focus on outcomes and environmental results. Thus, at least conceptually, most observers would endorse a "reinvention" of environmental enforcement and compliance that expands tools and improves measures of performance.²⁶⁸

KEY TERMS IN THE "SMART FRAMEWORK" 2 (1996). Outcome measures are defined as a "quantitative measure of external behaviors by the public or regulated community that are caused, at least in part, by government programs. These measures are expressed as actions by pollutant sources or by changes in emission or discharge quantities." *Id.* at 3. Output measures are defined as "[q]uantitative or qualitative measure[s] of program activities that are important work products or actions taken by states or EPA during a defined time period." *Id.*; see also Memorandum from Michael M. Stahl, Deputy Assistant Administrator, U.S. EPA, EPA's National Performance Measures Strategy, NAT'L ENVTL. ENFORCEMENT J., Dec. 1997/Jan. 1998, at 3, 5. For a discussion of the evaluation of the core measures, see U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 25-32.

ELI's 1996 review noted that these terms have proved confusing to many. See ENVTL. L. INST. INDEP. REV., *supra* note 255, at 28 ("In its research . . . ELI has encountered substantial confusion about the meaning of terms in common use . . . Terms such as goals, measures, indicators, outputs, inputs and objectives frequently are used interchangeably or seem to change meaning in different contexts.").

The enforcement and compliance performance measures for FY 1998, intended to be a transition year, include four "outcome measures" and four "output measures." OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT STATEMENT ON MEASURING PROGRESS UNDER THE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 1 (noting that "FY 98 is the beginning of a transition in the shift of emphasis to outcome-based measures"); see also Memorandum from Michael M. Stahl to Assistant Admin. et al., Enforcement and Compliance Assurance Measures in Performance Partnership Agreements and State-EPA Agreements 2 (Sept. 26, 1997).

267. Tom Looby, *ECOS and the National Environmental Agenda*, ECOSTATES, Sept. 1997, at 3, 6.

268. See, e.g., U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 42 (noting that "broad agreement . . . exists . . . on the desirability of moving toward a system that . . . systematically measures progress on how well [desired] outcomes are being achieved" and suggesting that "EPA should be doing more to . . . facilitate states' efforts to develop effective program measures . . ."). One review of EPA Region 9's experience with NEPPS found that both EPA and the states "identified the [NEPPS] focus on environmental goals and indicators as a principal benefit of NEPPS" and they "noted that the NEPPS process has hastened their efforts to develop meaningful environmental performance measures." OFF. OF ST. & LOCAL REL., U.S. EPA, REGION 9 REVIEW OF PPS, 1-2 (1998). One of the major areas for future research in this area will involve review of the implementation of the measures that have been developed. The Minnesota Environmental Performance Partnership Agreement notes, "[h]istorically, the two agencies [EPA and the Minnesota Pollution Control Agency] have focused on the measurement and reporting of program outputs, such as the number of permits issued or the number of enforcement actions taken." MINNESOTA POLLUTION CONTROL AGENCY, U.S. EPA, *supra* note 258, at 1. The Agreement continues that the NEPPS Agreement "places a greater emphasis on the environmental outcomes of

What remains to be determined is whether expanding these measures will affect states' deterrence-based enforcement efforts.²⁶⁹ There is at least some reason to anticipate that the new measures will widen the gap between EPA expectations concerning such enforcement and state performance. The picture painted in Part IV is that some states paid relatively little attention to EPA expectations concerning enforcement outputs even when they were the main measures of performance. The fact that such measures are "one among many," and disfavored compared to the others, raises questions concerning how seriously states and EPA will take these measures in the future.²⁷⁰ This is particularly the case because

the work of the MPCA and EPA." *Id.*

269. These new measures raise a host of other issues as well. For example, there are issues concerning the governments' ability to implement these new measures. Related, there are issues relating to evaluation of the new enforcement and compliance tools that are much in vogue. EPA is well aware that much needs to be done to realize its goal of moving to a broader set of performance measures. As EPA's then Acting Deputy Administrator Peter D. Robertson noted in an October 19, 1998, Memorandum concerning implementation of the Core Performance Measures:

[A] review by EPA's NEPPS Senior Management Team revealed that there is still confusion about terminology, the purpose of the measures, what flexibility is available for adjusting the measures to individual State circumstances, and how the States should collect and report the data. In their own review, States found inconsistency in how different Regions implemented the measures, and they want EPA to intensify efforts to reduce State reporting burden.

Memorandum from Peter D. Robertson, Acting Deputy Administrator, to members of Office of State and Local Relations 2-3 (Oct. 19, 1998) (on file with the *Harvard Environmental Law Review*). EPA's Schaeffer testified in June 1998 that:

EPA and the states are finding it difficult to move beyond counting activities or outputs to measure actual results or outcomes that can be attributed to enforcement and compliance assurance programs Our experience to date is that very few states are able to report any outcome data to us, presumably because such [outcome-based] measures have not yet been implemented

Hearings Before the Subcomm. on Oversight and Investigations of the House Committee on Commerce, 105th Cong. 5 (1998) (statement of Eric V. Schaeffer, Director, Office of Regulatory Enforcement, U.S. EPA) [hereinafter Statement of Schaeffer]. GAO discusses some of the reasons for this difficulty and the fact that overcoming these challenges will not be easy, in its report, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 34 (concluding that there are "inherent limitations" in measuring outcomes and environmental impacts and that "[t]hese limitations suggest that while performance measurement is necessary, expectations for performance measurement should recognize that some challenges will be difficult to overcome").

270. It also remains to be seen how seriously states will take the "outcome-type" measures. EPA's apparent view is that states have been quite lax in seeking to overcome barriers to accountability concerning the effectiveness of these new approaches. In its April 1998 comments on the draft of the May 1998 GAO report, EPA is critical of the actual level of state effort to become accountable for the use of the new compliance tools, noting that: "States have largely ignored the outcome measures and failed to provide EPA existing data about measures such as results of compliance assistance initiatives In fact . . . States as a whole have resisted efforts to make progress on measuring such programs." U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S & STATES EFFORTS TO FOCUS ENFORCE-

traditional "output" measures rank at the bottom of the hierarchy for evaluating program performance. In the 1995 NEPPS agreement the governments state that, "[u]nder the traditional system, too much attention has been directed to the number of permit reviews, inspections, and enforcement actions taken by a state, rather than to the outcomes and value of those actions and to alternate actions that might be pursued to achieve the same objective."²⁷¹

States' understandable resistance to increases in their reporting burden raises additional questions here.²⁷² As EPA and the states note in their August 1997 *Joint Statement on Measuring Progress Under the National Environmental Performance Partnership System*, "[a]s we start using more outcome measures, we want to insure that we do not ultimately increase the overall state reporting burden. We are committed to . . . reduc[ing] the overall reporting burden placed on states, especially that created by reporting on outputs."²⁷³ Thus, one of the questions with respect to deterrence-based enforcement is whether EPA will reduce states' reporting burden in terms of providing information necessary for EPA to evaluate deterrence-based enforcement efforts.

The other point concerning accountability under NEPPS that deserves mention involves the notion of "differential oversight." A central tenet of NEPPS is that EPA will reward "strong" states by allowing them to operate with relatively greater leeway.²⁷⁴ Thus, NEPPS is founded upon the premise that states are not monolithic in nature; instead they differ significantly in capability and motivations, and their level of responsibility and the nature of EPA oversight should reflect these differences.²⁷⁵ The premise is, in part, that states prefer less oversight. Thus, a

MENT PROGRAMS ON RESULTS, *supra* note 31, at 80. EPA said that the GAO report "takes a very charitable view of state efforts to grapple with the technical and other problems which make outcome measurement such a challenge." *Id.* at 79. EPA cites a statement by Mark Coleman, Commission of Oklahoma's Department of Environmental Quality and Chair of the ECOS Compliance Committee, that it is not appropriate for states to have performance measures for enforcement and compliance assurance programs. *See id.* at 80.

271. OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT COMMITMENT TO REFORM OVERSIGHT AND CREATE A NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 253, at 5.

272. *See* U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS *supra* note 31, at 52-55 (noting that several states have complained about the extent of the reporting burden they face and that they are concerned that new reporting associated with new measures will simply be added onto traditional reporting requirements).

273. OFF. OF STATE & LOCAL REL., U.S. EPA, JOINT STATEMENT ON MEASURING PROGRESS UNDER THE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 2.

274. *See* U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 14 (noting that under NEPPS, "strong state programs were to be given leeway to . . . manage their own programs—allowing EPA to concentrate more effort, oversight, and technical assistance on weaker programs").

275. *See, e.g.*, U.S. EPA, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE

carefully designed and implemented differential-oversight scheme could encourage states to conduct deterrence-based enforcement more in line with EPA expectations. The possible use of this strategy is discussed in more detail in Part VI below.

To conclude regarding NEPPS, predicting the impact that NEPPS will have on state deterrence-based enforcement is difficult. At a minimum, key features of NEPPS raise doubts as to whether NEPPS will lead states to invigorate their deterrence-based enforcement efforts so that they approach or meet EPA expectations. Enhanced state autonomy, an expanded menu of enforcement tools, and the revamped measures of performance, all of which are central to NEPPS, seem likely to facilitate states' movement in the opposite direction.²⁷⁶ Careful review of the NEPPS agreements, and the implementation of these agreements, are needed to assess the actual impacts of NEPPS on state enforcement activity.

VI. WHERE DO WE GO FROM HERE?

There are a variety of tools potentially available to EPA as it faces the significant challenge of integrating the traditional and new approaches to enforcement and compliance in a way that supports EPA's continuing commitment to a central role for deterrence-based enforcement.²⁷⁷ The picture the GAO and OIG audits paint highlights the

FUNCTIONS 4 (1996); *see also* U.S. GAO, ENVIRONMENTAL PROTECTION: STATUS OF EPA'S INITIATIVES TO CREATE A NEW PARTNERSHIP WITH STATES 3, 5 GAO/T-RCED-96-87 (1996) (statement of Peter F. Guerrero, Director, Environmental Protection Issues, Resources, Community, and Economic Development Division) [hereinafter Statement of Guerrero]. State environmental programs differ structurally. *See, e.g.*, Weiskopf Working Paper, *supra* note 133, at 21–22 (discussing the “three main organizational models for implementing environmental programs—departments of health, little EPAs and superagencies” and noting that today approximately “seven agencies use a department of health model, 24 have little EPAs, and 19 utilize a superagency structure”).

276. *See* Steinzor, *supra* note 224, at 10,078 (indicating that “[e]arly analysis indicates that aggressive states have won significant concessions from their federal supervisors and that devolution has eclipsed the search for national uniformity”).

277. This Article assumes such a continuing commitment and this Part focuses on options for fulfilling it. The issue of whether EPA should maintain its continuing commitment to a central role for deterrence-based enforcement is beyond the scope of this Article, although it obviously is relevant to the Article's focus, which is on the challenges facing EPA in achieving this objective, and is addressed in that limited context. As noted above, EPA officials have stated on numerous occasions the importance of deterrence-based enforcement as part of an integrated enforcement and compliance scheme. *See supra* notes 26–28 and 30 and accompanying text; *see also* Statement of Schaeffer, *supra* note 269, at 3 (noting that “EPA firmly believes that alternative compliance strategies will be most effective when they are used as part of an integrated program which maintains a strong compliance monitoring and enforcement presence among regulated entities [A] vigorous enforcement effort is vital to the success of alternative compliance strategies”).

EPA is not alone in its view that a strong deterrence-based enforcement presence is essential to an effective enforcement and compliance scheme, as noted above. *See* OFFICE OF TECHNOLOGY POLICY, U.S. DEPARTMENT OF COMMERCE, MEETING THE CHALLENGE: U.S. INDUSTRY

significance of this challenge. The GAO and OIG appear to conclude that parts of the country currently lack an adequate enforcement presence, at least as measured against the standards contained in the State/EPA Policy Framework and various EPA enforcement policies.²⁷⁸ EPA's ability to address this challenge effectively is complicated by a confluence of two realities discussed above: first, states are the primary enforcers of environmental law in this country and, second, some states do not share EPA's commitment to a significant role for deterrence-based enforcement.²⁷⁹ The expansion of "acceptable" enforcement and compliance ap-

FACES THE 21ST CENTURY: THE U.S. ENVIRONMENTAL INDUSTRY 121 (1998) (noting that "industry leaders" suggest the need for "a firm regulatory baseline . . . with strong enforcement, to define the 'floor' for environmental progress" (emphasis in original)); see also Peter K. Krahn, *Enforcement Versus Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented by the Pacific and Yukon Regional Office of Environment Canada 1983 to 1998*, in FIFTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 25 (1998) (finding from a case study in Canada that "compliance promotion combined with progressive use of stronger enforcement tools leads to compliance with federal environmental legislation," while "[t]he sole reliance on voluntary compliance was demonstrated to be ineffective . . . in achieving even a marginally acceptable level of compliance or benefit to the environment").

As noted at the outset, however, there is a great deal of uncertainty concerning the "appropriate" level of enforcement. See Mugdan, *supra* note 13, at 79 (noting that this issue has "bedeviled criminal and civil enforcement authorities for generations"). Further, there is considerable sentiment that it is time to dramatically reduce use of traditional enforcement approaches and embrace a new, more cooperatively oriented philosophy and set of practices. See *supra* notes 9–15 and accompanying text; see also Sumit K. Majumdar & Alfred A. Marcus, DO ENVIRONMENTAL REGULATIONS RETARD PRODUCTIVITY? EVIDENCE FROM U.S. ELECTRIC UTILITIES (U. Mich. Bus. School Working Paper No. 98,008 1998) (suggesting that laxity at the state level is a good idea). Perhaps not surprisingly, attorneys representing members of the regulated community argue that the push for voluntary compliance programs "may be on a collision course" with rigorous enforcement. *Companies Say EPA Enforcement Policy Collides with Voluntary Audit Programs*, 25 Env't Rep. (BNA) 416 (1994). Also not surprisingly, these attorneys raise the concern that the move to the "next generation of environmental compliance" approaches will be slowed by aggressive enforcement. *Id.* at 417.

278. See Part IV *infra*. In addition to the problems found by the GAO and OIG in the audits discussed in Part IV, many officials suggest that there has been a significant decline in state enforcement and other problems over the past few years. See *supra* notes 235 and 245; Peter Eisler, et al., *Lax Oversight Raises Tap Water Risks*, U.S.A. TODAY, Oct. 22, 1998, at 16A (quoting Robert Perciasepe—EPA's top water official up until August 1998, and now its top air official—as stating that "[i]n the last three of four years, we began to see (enforcement) actions on the part of the states drop off dramatically, and that was tremendous cause for concern."). Further, some commentators have alleged that states sometimes enter into "sweetheart deal[s]" with violators to block citizen suits. See, e.g., U.S. PIRG, *supra* note 9, § 2; Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc. 890 F. Supp. 470, 495 (D.S.C. 1995), *reh'g denied*, 1995, *sum. judgment motions argued*, Friends of the Earth v. Laidlaw Envtl. Services, 956 F. Supp. 588 (D.S.C. 1997), *vacated by*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999). Concern over state enforcement cutbacks prompted EPA Administrator Carol Browner to conclude that EPA is "fighting the same fight that we fought over the Contract with America, but unfortunately the battle has moved down to the states." John H. Cushman, Jr., *States Neglect Pollution Rules, White House Says*, N.Y. TIMES, Dec. 15, 1996, at 6A.

279. In 1988, Bob Wayland, an EPA employee at the time, explained the dilemma this by no means new phenomenon creates for EPA:

EPA recognizes that effective state enforcement is a major factor in the extent to which national environmental goals and objectives are achieved. EPA also

proaches adds to this as well. EPA Director Schaeffer candidly acknowledges that "[t]he challenge of integrating assistance, incentives, monitoring, and enforcement has been difficult for both EPA and state programs" ²⁸⁰

This Article offers five basic options for maintaining (or in some cases establishing) a deterrence-based presence nationwide in light of these challenges. First, EPA could strengthen deterrence-based enforcement nationwide by making it clearer to states that they must meet EPA expectations in terms of establishing a deterrence-based enforcement presence. Second, EPA could expand its use of a range of tools, such as "differential oversight," to establish a "reward/penalty" scheme to create incentives for states to strengthen their use of deterrence-based enforcement. Third, EPA could enhance its own, limited, direct enforcement presence in order directly to enhance deterrence-based enforcement and indirectly to lead states to move in this direction. Fourth, EPA could apply the never-used strategy of withdrawing state authorization under appropriate circumstances, and taking on statewide direct enforcement responsibilities itself. Finally, EPA could place a public spotlight on state and federal enforcement practices as a way to improve such practices. These options are not mutually exclusive and could be integrated in a variety of ways. ²⁸¹ The fourth option in particular, could involve a significant recasting of the state/federal relationship. ²⁸²

knows that it is ultimately accountable to the President, the Congress, and the public for meeting legislative requirements and program objectives This creates an inherent tension within EPA between trying to delegate programs and give states flexibility, while trying to monitor and control state performance.

Wayland, *supra* note 211, at 89. Other "realities" intrude as well, such as Regional variations. See *supra* note 211 and accompanying text.

280. Statement of Schaeffer, *supra* note 269, at 5. EPA Director Schaeffer's June 1998 Congressional testimony contains a good summary of this challenge:

EPA and most states are now in the early years of operating enforcement and compliance assurance programs which have changed significantly. Instead of programs which have two major tools (compliance monitoring inspections and enforcement actions), our programs now have added two additional tools . . . compliance assistance and various compliance incentive approaches. Implementing these expanded programs has presented two difficult challenges—how can we integrate most effectively the four tools we now have available, and how can results from these tools be measured in the most meaningful way?

Id. at 5.

281. See TOM TIETENBERG & DAVID WHEELER, EMPOWERING THE COMMUNITY: INFORMATION STRATEGIES FOR POLLUTION CONTROL (Frontiers of Environmental Economics Conference, Oct. 23–25, 1998).

282. Government officials, as well as scholars and other commentators, have given considerable thought to the rationales for federal involvement in the environmental arena, as well as to the issue of how best to divide responsibilities between the federal and state governments. See *supra* notes 18–20 and 119–122. See also Thomas W. Merrill, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*,

A. Clarifying EPA's Message and Expectations

EPA Director Schaeffer testified in June 1998 that a cure for the "inappropriate[] de-emphasi[s]" of compliance monitoring and enforcement is to send a clear message that enforcement is critical:

21 *ECOLOGY* L.Q. 485, 486 (1994) (discussing three arguments in support of centralization of controls identified by Professor Richard Stewart, among others: (1) the notion of "spillover" or interstate impacts as warranting federal involvement; (2) the rights-based argument that there is a right to a healthy environment and that the universality of this right supports attaching this right to the broadest political jurisdiction capable of protecting it; and (3) the economic protectionism or race-to-the-bottom argument). In discussing the basis for the federalization of environmental laws in the U.S., Professor Merrill suggests that "the foremost factor driving the federalization of environmental law is the desire to protect existing shares of industrial output, jobs, and tax revenues. A secondary factor is the belief by many that there should be a right to a healthy environment, and the concomitant assumption that this means federal rather than state or local protection." *Id.* at 491.

Considerable thought also has been given to possible frameworks for dividing responsibility between the federal and state governments. In the environmental enforcement arena in particular, the consensus and objective has long been that states should serve as primary enforcers and implementers. *See, e.g.,* Wayland, *supra* note 211, at 99 (citing a 1984 Memorandum by then Administrator William Ruckelshaus that the states "are to interpret and apply national standards through day-to-day program actions"); Eisler et al., *supra* note 278, at 16A (noting that one reason for a significant state role is that, as an EPA official noted, "It's awfully hard to be overseeing" regulated parties from the relatively dispersed Regional offices), while EPA remains ultimately responsible for "program delivery" and retains several "core functions." *See, e.g.,* U.S. EPA, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE FUNCTIONS, *supra* note 275 (identifying nine such core EPA functions: setting national priorities; monitoring compliance on a national basis; assuring national consistency in the implementation and enforcement of federal environmental requirements; taking enforcement actions against corporate violators with significant noncompliance at facilities in several States, or where States do not address particular violations; offering incentives for violators to come into and remain in compliance; conducting compliance assistance for high-priority sectors and federally implemented programs; evaluating State performance; capacity building; and fostering a "beyond compliance" ethic and innovation).

EPA views concerning this general division of responsibility do not appear to have changed much over the years. *Compare, e.g.,* Steven A. Herman, *Innovations in Environmental Enforcement and Compliance*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1999, at 3, 5 (noting that a strong partnership requires, inter alia, joint planning and priority setting; that states have primary responsibility for implementing and enforcing national environmental programs; and that the federal government has primary responsibility for establishing baseline national standards for public health and the environment, and taking action to ensure that these standards are implemented and enforced fairly and consistently throughout the country) with Wayland, *supra* note 211, at 85 (noting that EPA has been working to put in place a relationship that "involves: 1) a clear and appropriate division of authority and responsibilities, 2) state involvement/participation in goal-setting, policy formation, and planning, and 3) reporting and other oversight mechanisms that provide the control and evaluative information that EPA needs."). *See also* Kuehn, *supra* note 20, at 2373 (discussing the advantages and disadvantages of devolving authority for environmental enforcement to the states); David L. Markell, *The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship*, 18 WM. & MARY J. ENVTL. L. 1 (1993) (briefly summarizing the federalism issue and its application to environmental law); DAVIES & MAZUREK, *supra* note 19, at 45-46 (discussing the appropriate division of labor between the federal and state governments and identifying interstate impacts, economics, politics, and capability as relevant factors).

Overcoming this phenomenon [of de-emphasized monitoring and enforcement] requires constant reaffirmation of the principle that an enforcement presence is an indispensable element of an integrated and effective program.²⁸³

Many state officials report receiving a "mixed message" from EPA concerning the continuing vitality of deterrence-based enforcement and the extent to which it is acceptable to abandon or minimize such enforcement in favor of the new "reinvention-based" approaches.²⁸⁴ The GAO, for example, notes that:

While EPA's policy is that compliance assistance should be accompanied by a strong and credible enforcement deterrent, state officials have noted that the inconsistent manner in which this policy has been interpreted and implemented by different EPA offices has led to confusion about the appropriate balance between traditional enforcement and other compliance tools. Specifically, officials from each of the 10 states contacted maintained that a fragmented and inconsistent approach among different EPA offices on the appropriate use of alternative compliance strategies has made it difficult to devise a coherent, results-oriented approach acceptable to all key EPA stakeholders.²⁸⁵

283. Statement of Schaeffer, *supra* note 269, at 5.

284. Most of the EPA materials reviewed relatively consistently expressed the view that deterrence-based enforcement remains a critical element of an effective compliance and enforcement scheme. EPA emphasized this point in its comments concerning the May 1998 GAO audit, U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 41, 71-75. EPA has issued a number of documents that are intended to explain EPA's integrated approach and how it should work. See, e.g., U.S. EPA, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE FUNCTIONS, *supra* note 275; Memorandum from Steven A. Herman, Assistant Administrator, U.S. EPA, *Operating Principles for an Integrated Enforcement and Compliance Assurance Program* (Nov. 27, 1996).

Nevertheless, there were some apparent "outliers," even from EPA high-ranking enforcement officials. See, e.g., Stahl, *Enforcement in Transition*, *supra* note 16, at 19, 20 (suggesting that "when used as the predominant . . . approach to ensuring compliance, deterrence has several serious shortcomings" and suggesting, *inter alia*, that a "confusion over means and ends . . . pervades the deterrence approach . . ." and noting that "enforcement is moving beyond its adversarial and antagonistic beginnings"). Deputy Assistant Administrator Stahl cites a variety of reasons for the problems with using deterrence as the predominant compliance tool, including: (1) definitions of success used in connection with this approach; (2) its reactive nature; (3) its focusing largely on punishment and not on "enhancing or rewarding voluntary compliance;" and (4) its resource-intensive nature. *Id.* at 19-20. Some state officials assert that EPA's Regions supported experiments with non-enforcement-oriented approaches, but then turned on the states when criticisms were raised that state enforcement had declined. See *supra* note 208.

285. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS 7, 8 GAO/RCED-98-113 (1998) (also noting that "enforcement officials from the 10 states . . . expressed the unanimous view that states are still receiving inconsistent messages from different EPA offices . . ." The report recommended that EPA "provide greater consistency in what has become a fragmented and inconsistent message . . .

Consequently, a clearer message might help convince states to devote more effort to deterrence-based approaches. The importance of clear expectations has certainly long been thought to be an important element of an effective federal/state relationship.²⁸⁶

Two issues warrant mention concerning the relationship between a clearer message and EPA achieving its goal of a nationwide enforcement/compliance scheme with deterrence-based enforcement as a central element. The first is whether the much touted NEPPS mechanism is likely to clarify EPA's message. EPA's Regions have a central role in developing NEPPS agreements, and there is evidence that the Regions march to their own drummers in some situations.²⁸⁷ Thus, the Regions will not necessarily negotiate agreements under NEPPS that send a clear message that states should give deterrence-based enforcement a central place in their enforcement and compliance toolboxes. There is a possibility, in other words, that even if the original message from EPA headquarters is clear, this clarity may get lost in translation.²⁸⁸

Furthermore, it is unclear whether the structure and orientation of NEPPS make it a likely vehicle for sending the message that states should give deterrence-based enforcement a central role. A combination of three features of NEPPS casts doubt on the suitability of NEPPS for this purpose. First, NEPPS anticipates greatly increased autonomy for states to determine how best to accomplish agreed-upon goals. Second, NEPPS embraces an expanded enforcement toolbox that includes non-deterrence-oriented approaches. Finally, NEPPS adopts an expanded set of measures of enforcement, diminishing the importance of traditional

on states' efforts to employ a wider array of tools in achieving environmental compliance." The GAO noted that the messages confused the states and Regions and also sowed distrust in the regulated community). See also Statement of Coleman, *supra* note 127, at 5 (suggesting that changes in the actors, natural maturation of the programs, and other factors have created confusion about EPA's expectations: "The basic problem between the States and EPA as it relates to enforcement, is that in recent times role assignments have become less clear."); *Internal EPA Review Finds State, Regional Enforcement Activity Slumping*, *supra* note 245, at 11 (reporting that state officials claim, *inter alia*, "confusion caused by shifting priorities from headquarters . . .").

286. See Wayland, *supra* note 211, at 102 (noting that the Policy Framework, and the EPA/state agreements adopted pursuant to it, attempt to "ensure clear oversight criteria, specified in advance, for EPA to assess good state—or regional—compliance and enforcement program performance; clear criteria for direct federal enforcement in delegated states; and adequate state reporting to ensure effective oversight"). William Ruckelshaus made the intuitively obvious point that clear expectations are a key element of an effective federal/state partnership in a 1984 Memorandum in which he indicated that EPA must "modify its way of doing business with states by . . . providing states with a clear understanding of [A]gency expectations as to what constitutes a quality program after delegation . . ." *Id.* at 100 (summarizing Ruckelshaus).

287. See, e.g., CHURCH ET AL., *supra* note 189.

288. There is some question concerning Headquarters' substantive goals concerning NEPPS, and in the context of this Article, its goals concerning deterrence-based enforcement. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255. The originators of NEPPS wanted to promote considerable innovation, but the cost has been a lack of clarity regarding the results the NEPPS process was intended to produce.

"output" measures. Director Schaeffer's June 1998 Congressional testimony suggests that the reinvention efforts' expanded vision of enforcement and compliance is likely to widen the divide between EPA's intended place for deterrence-based approaches and reality. This larger vision has led some to abandon or de-emphasize compliance monitoring and enforcement:

[T]he introduction of assistance and incentives into our programs is often misinterpreted by program personnel and regulated entities as an abandonment of the traditional monitoring and enforcement approach. As assistance and incentive approaches become operational, some state and EPA offices inappropriately de-emphasize monitoring and enforcement.²⁸⁹

Because of these issues, NEPPS agreements need to be closely evaluated regarding the extent to which they incorporate EPA's expectations that deterrence-based enforcement is to be an important element of government's enforcement and compliance efforts.²⁹⁰

The second overall issue regarding the "clearer message" strategy is that sending a clear message that deterrence-based enforcement is important, at least taken alone, is not likely to be strong enough to produce the desired effects. As EPA and others have observed, states' reluctance to rely heavily on deterrence-based enforcement stems in part from a difference in philosophy, not simply from miscommunication. In its April 1998 letter commenting on the draft of GAO's May 1998 report concerning state alternative compliance strategies, EPA put the issue succinctly:

The [GAO] report should acknowledge that the concern about EPA's message is not so much that it is inconsistent, but that EPA's emphasis on the need to use enforcement to address serious non-compliance is a message with which many states disagree.²⁹¹

EPA also notes in the letter that:

The report provides no discussion of the fundamental concept that enforcement actions protect the environment and public health by

289. Statement of Schaeffer, *supra* note 269, at 5.

290. Actual implementation of these Agreements needs to be reviewed carefully as well. EPA and others have noted that the Agreements have evolved considerably since their inception. See U.S. EPA, REINVENTING ENVIRONMENTAL PROTECTION: 1998 ANNUAL REPORT, *supra* note 203, at 27 (noting that "refinements made in 1998 will enable EPA and states to measure and report on progress even more effectively in the future").

291. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 78.

detering violations of pollution standards, and by requiring those who do violate the law to return to compliance. Yet that is at the heart of the current debate between EPA and some states. Both EPA and the States agree on the importance of compliance assistance; our concern is that some states do not place equal emphasis on an effective compliance monitoring and enforcement program which is necessary to maximize compliance and make assistance efforts more effective.²⁹²

And again, a little later in its letter, EPA notes:

EPA believes, and has stated repeatedly, that a strong enforcement presence which creates a credible deterrent is an indispensable element of an integrated program that utilizes the full range of tools to improve compliance and protect the environment. The tensions between EPA and the States are over the extent to which enforcement is valued and used in state programs, and the creation and use by states of assistance, incentive, and amnesty approaches which actually reduce the motivation to comply and/or impede legal authorities which deter violations.²⁹³

As a result, even if EPA tries to use NEPPS Agreements and other mechanisms to send a clear message that a strong deterrence-based enforcement presence is critical, there are real questions as to whether such efforts will cause states to establish such a presence. More aggressive action is likely to be needed.²⁹⁴

*B. Using "Differential Oversight" and Other Tools to Encourage
Invigorated State Enforcement*

EPA considers oversight of state enforcement performance to be a core EPA function. In a February 1996 Memorandum entitled *Core EPA Enforcement and Compliance Assurance Functions*, EPA indicates that one of its responsibilities is to:

Provide appropriate oversight where needed to improve [state] performance and strengthen [state] programs, and for States that do not

292. *Id.* at 73.

293. *Id.* at 78.

294. Concerns about the adequacy of state legal authorities, among other factors, similarly raise questions concerning whether a clearer message alone will lead to the desired results. See *supra* notes 156-161.

fulfill commitments in State/EPA agreements (including the Environmental Performance Agreements).²⁹⁵

The states also recognize this need for EPA oversight.²⁹⁶ Thus, although considerable gray area exists concerning the appropriate nature of EPA oversight, an essential part of the landscape is that there is room for a federal oversight function.

A second critical point is that EPA has enormous flexibility to tailor its relationships with states based on the interests and capabilities of particular states. NEPPS embraces the notion that EPA should use differential oversight and tailor its role to the needs and capacities of individual states.²⁹⁷ In fact, EPA lists "differential oversight" as one of the seven key components of NEPPS.²⁹⁸ In one of the NEPPS documents, EPA makes clear its flexible oversight policy, indicating that EPA should: "[p]rovide less oversight for delegated State programs where States are actually

295. U.S. EPA, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE FUNCTIONS, *supra* note 275, at 4.

296. See, e.g., 1993 Revisions, *supra* note 35, at 7.

297. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 9–10. As one commentator puts it, "NEPPS foresees the creation of an elite group of state agencies that would receive significantly diminished federal oversight, 'freeing up federal resources to address problems where state programs need assistance.'" Steinzor, *supra* note 224, at 10,077 (quoting NEPPS). Future research efforts would find much fertile ground in examining the nature of, and reasons for, EPA de facto tiering of states in fulfilling its oversight responsibilities.

EPA is pursuing a parallel approach with the regulated community. The Agency is considering "launch[ing] a new regulatory reinvention policy that could offer tailored compliance incentives to almost all companies The effort is aimed at maximizing the results of the [A]gency's myriad regulatory reform initiatives and foster[ing] continuous environmental improvement in the regulated community." *EPA Considers New Policy to Better Target Compliance Incentives*, ENVIRONMENTAL POLICY ALERT, Feb. 25, 1998, at 33. EPA dubs this concept the "'performance ladder,' a general framework for voluntary compliance incentive programs that would essentially assign industrial facilities to 'rungs' or 'levels' based on their performance and offer tailored compliance incentives accordingly." *Id.* This Article cites EPA staff stating that a performance ladder approach could be similar to OSHA's Voluntary Protection Program ("VPP"). *Id.* Under the VPP, the highest level of performers receive relief from OSHA's programmed inspection lists; facilities in lower rungs are eligible for mentoring from top facilities and to test new methods for addressing concerns.

298. Off. of St. & Local Rel., *Performance Partnership System: Frequently Asked Questions* (last modified June 9, 1998) <<http://www.epa.gov/regional/pps/faq.htm>>. EPA notes that NEPPS contemplates that "[s]trong State performance [will be] rewarded with substantially reduced oversight . . ." *Id.* at 1. In a June 1997 "Quick Reference Fact Sheet," EPA noted that NEPPS will give strong state programs "more leeway" while "concentrating EPA oversight and technical assistance on weaker programs." U.S. EPA, *Office of State and Local Relations, Flexible Funding for States & Tribes* (last modified Dec. 4, 1997) <www.epa.gov/ooaujeag/notebook/ffst.htm>.

The idea of differential oversight was by no means unknown prior to NEPPS. For example, a 1993 report by a Task Force constituted to review state/federal issues noted the appropriateness of such an approach. U.S. EPA, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY, *supra* note 121, at 10 (identifying several factors as relevant to the "appropriate" level of oversight and noting that some programs may require greater oversight than others).

meeting the environmental and program performance measures of the National Environmental Performance Partnerships System.”²⁹⁹

Because states prefer less rather than more oversight,³⁰⁰ an EPA “differential oversight” scheme that rewards states that meet EPA expectations by limiting oversight of such states, and that penalizes “laggard” states by increasing oversight, holds considerable promise. It remains to be seen, however, whether EPA will be able to develop and implement a “differential oversight” scheme that works, i.e., one that induces states to maintain strong deterrence, based enforcement programs. The NEPPS is still in its infancy, but there are a number of things to watch for as part of future analyses of the System concerning this issue, including:

- Can EPA establish clear parameters for different levels of oversight on a national basis? That is, will EPA make it clear that certain levels of state performance trigger particular types and levels of oversight? Will it create clear expectations in this area, and then follow through?³⁰¹
- What are the respective roles that EPA’s Regions and Headquarters offices will play in determining and performing the appropriate level of oversight for particular states? Obviously, to the extent that the Regions effectively make the decisions, there may be a cost in terms of national coherence with respect to the level of oversight provided for different levels of state performance. This leads to the question, is EPA capable of implementing a scheme of differential oversight with some semblance of national consistency?³⁰²

299. U.S. EPA, CORE EPA ENFORCEMENT AND COMPLIANCE ASSURANCE FUNCTIONS, *supra* note 275, at 4. See also Statement of Guerrero, *supra* note 275, at 3, 5 (discussing tailoring level of oversight to states’ ability to fulfill their environmental obligations and noting that the NEPPS provides opportunities for less oversight of state programs that exhibit high performance in certain areas and that EPA’s NEPPS initiative institutes different levels of oversight based on the states’ conditions and performance).

300. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 37.

301. One of the many issues involved here is the ability to establish adequate performance measures. The GAO seems to identify the need for a nationwide strategy for differential oversight in a recent audit. See *id.* at 62–63 (noting that GAO “continue[s] to believe . . . that nonbinding national guidance . . . would be useful in introducing objective parameters to be considered by regional and state negotiators as they seek agreement over this sensitive issue [of oversight]”). The GAO report also indicates, however, that EPA and many states have “agreed that a formal system implementing differential oversight, whereby the merits of a state program would be evaluated based on certain standards or criteria to determine whether it qualifies for reduced oversight would be both controversial and difficult to implement.” *Id.* at 37. The GAO report suggests that, perhaps because of the controversy involved, a formal system for implementing differential oversight is not likely to be developed or implemented anytime soon. See, e.g., *id.* at 62–63, 65.

302. See *id.* at 47. The nature of oversight currently provided is one of many areas that would benefit from sustained, comprehensive research. My instinct is that EPA’s Regions apply different levels of oversight depending on the quality of the state program involved, among other factors. It would be interesting to examine the nature of oversight

- Will the overall theme of moving from case-specific to program-wide oversight influence the level of oversight generically? In other words, if EPA and the states have reached a consensus to shift from a case-specific review model to a program-wide review model,³⁰³ what impact will this shift have on EPA's willingness and ability to exercise close case-specific review even for "weak" states? To borrow a concept from the academic world, will NEPPS usher in a form of "grade inflation," with the level of case-specific oversight gradually diminishing over time? A somewhat related question is whether EPA is prepared to exercise close scrutiny of state performance in light of traditional deference to states. The GAO and others have found that to date EPA has put relatively little pressure on states to conform their practices to EPA enforcement policies.³⁰⁴ The question is whether EPA is prepared to implement a differential oversight scheme that places some states on the "heavy oversight" end of the continuum and whether it is prepared to exercise significant oversight of enforcement practices in such states.³⁰⁵ Two com-

actually provided to develop a better understanding of such oversight in both an absolute and relative sense. The key point for purposes of this Article, though, is that while Regions may apply an ad hoc form of differential oversight, there is no nationally consistent approach for doing so.

303. See Statement of Guerrero, *supra* note 275, at 3, 5 (noting that "EPA's oversight under the new [NEPPS] system is supposed to focus on program-wide, limited, after-the-fact reviews, rather than on case-by-case intervention"). The FY 1998-1999 EPA Region 5/Indiana Department of Environmental Management (IDEM) Environmental Performance Partnership Agreement indicates that EPA's use of differential oversight is "moving toward the goal of increasing its use of periodic 'system level' reviews and reducing 'real time' reviews of individual actions." IDEM/Region 5, U.S. EPA, *Environmental Performance Partnership Agreement* (visited Nov. 23, 1999) <www.ai.org/idem/opa/enppa98ii.html>. Delaware's 1997 Agreement similarly indicates that the "intent of this Agreement is to move away from case-specific discussion/review towards a more holistic consideration of the State enforcement programs . . ." U.S. EPA, ENVIRONMENTAL PARTNERSHIP AGREEMENT BETWEEN DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AND US EPA, REGION III FOR FEDERAL FISCAL YEAR 1997 26 (1996). This is the most recent Delaware Agreement listed on the EPA NEPPS home page as of May 10, 1999. Later in the Agreement the State and EPA similarly note that "EPA and Delaware are committed to implementing a shift to program-wide, limited after-the-fact reviews, rather than case-by-case intervention in Delaware's federally delegated programs." *Id.* at 27.

304. See, e.g., U.S. GAO, ENVIRONMENTAL ENFORCEMENT: PENALTIES MAY NOT RECOVER ECONOMIC BENEFITS GAINED BY VIOLATORS, *supra* note 161, at 12 (noting that EPA had not pushed states very hard to adopt penalty policies even though the federal Agency had authority to do so).

305. For example, with respect to the Indiana and Delaware Agreements identified *supra* in note 303, no explanation is provided as to whether this shift corresponds to changes in oversight generically or whether these states are being treated differently from other states. Similarly, no information is provided as to the quality of either state's enforcement performance or whether either state's performance in any way influenced this intended shift in approach. In the case of Indiana, the Agreement provides for an apparent reduction in oversight even though EPA and IDEM acknowledge that while they have agreed to certain enforcement measures, IDEM is unable to provide data concerning some of these measures because of "limitations of current information systems." IDEM/Region

mentators suggest that “[t]he core concept of the [NEPPS] system was reduced EPA oversight based on states’ actual performance in improving the environment.”³⁰⁶

- Will the expansion of EPA’s and the states’ shared vision of appropriate enforcement and compliance tools complicate EPA’s effort to apply a differential oversight scheme? This question involves determining the appropriate substantive parameters for differential oversight. It also raises the issue of whether EPA will be able to develop parameters that are effective in achieving the Agency’s goal of producing state performance that meets EPA expectations concerning deterrence-based enforcement.

The bottom line is that differential oversight is a tool that holds great promise in the abstract for inducing states to upgrade their deterrence-based enforcement programs. States value reduced oversight and increased autonomy. A carefully tailored system could create incentives sufficient to cause at least some states to upgrade their deterrence-based efforts so that they meet or approach EPA expectations. The question is whether EPA will be able to employ this tool to anywhere close to its full potential in light of various institutional and other constraints discussed above. Some of the key questions will involve whether, at the macro level, EPA succeeds in developing a differential oversight scheme that contains a sufficiently wide range of oversight options to induce states to strongly prefer one over another, and whether states think EPA is serious about implementing such a scheme consistently. Related to both of these questions is whether EPA will succeed in laying out the continuum of oversight possibilities with sufficient clarity so that the states (and implementing Regions) know what to expect for different levels of performance. Also related to these questions is the degree of state receptivity to active EPA oversight. Pressures to limit oversight are likely to be powerful. Capturing the likely perspective of some states, one commentator recently noted that “[c]learly, most State programs have reached a level of operation where close federal involvement and oversight is unnecessary and even unwanted.”³⁰⁷ The NEPPS Agreements, and implementa-

5, U.S. EPA, *supra* note 303, at 3. There may well be good reasons for reducing oversight despite this concern but such reasons are not provided in the Agreement itself. It would seem to be worth a review of the PPA’s to determine the extent to which EPA and the states have developed a consistent, coherent plan for implementing a differential oversight approach. Such an approach seemingly would need to include, as basic elements, a continuum of levels of oversight, and a continuum of levels of state performance and/or capability that would trigger oversight along this first continuum. A 1999 GAO report appears to conclude that reductions in oversight have been limited to date. It also appears to conclude that efforts to develop a consistent, coherent plan for differential oversight have not yet borne fruit. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255 at 37, 39–47.

306. DAVIES & MAZUREK, *supra* note 19, at 41.

307. Barry Tonnig, *U.S. EPA and the Empty Nest Syndrome*, ECOSTATES, Summer

tion of these Agreements, are worth close attention to explore the actual use and effectiveness of this tool, including how effective EPA's scheme proves to be in light of the questions listed above.

EPA financial grants to states present a similar opportunity for EPA to induce states to improve their use of deterrence-based enforcement. States prefer "block-type" grants in which money is provided with relatively few strings attached to grants that spell out the precise uses to which federal funds must be put.³⁰⁸ There appears to be a move in this "desired" direction of greater flexibility.³⁰⁹ The goal would be to structure use of this tool, again, to encourage states to maintain the type of enforcement programs EPA believes is appropriate. EPA would use the prospect of greater grant flexibility as an inducement for states to upgrade their enforcement capabilities and performance.³¹⁰ Again, it would be of great value to pursue research concerning the approaches to grant flexibility used to-date and to examine possible strategies to structure grants so as to maximize states' incentives to maintain deterrence-based enforcement programs that pass muster under EPA enforcement policies.³¹¹

1999, at 21 (Mr. Tonning is a Senior Analyst for the Environmental Policy Group at The Council of State Governments. Mr. Tonning continued that "States don't want the US EPA to go away, they just want it to continue to adapt to its changing mission."). *Id.* at 21. See also DAVIES & MAZUREK, *supra* note 19, at 40-41 (noting the "alienation of the states by the mid-1990s" and suggesting that states had appreciated having a federal enforcement presence in the 1970s because of the "gorilla in the closet that states could use as a threat against polluters" but that "[s]tates began to resent federal oversight of their actions as they become more competent and professional, as federal funding became less important to state pollution control agencies, as political currents increasingly favored decentralization, and as the most egregious pollution problems were brought under control and attention turned increasingly to small dispersed sources").

308. The Performance Partnership Grants ("PPG"), initiated in the mid-1990s, are a tool available to states that wish to consolidate "two or more categorical grants into a single, more flexible grant." Off. of St. & Local Rel., U.S. EPA, *Performance Partnership System Frequently Asked Questions*, *supra* note 253, at 5. For additional information concerning PPGs, see U.S. EPA, *Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance* (last modified Nov. 10, 1998) <www.epa.gov/OW/PPG/ppgguide.html>. The GAO reports that some EPA Regions expressed concern that enhanced grant flexibility undermines EPA oversight, while others did not seem to share this concern. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 54.

309. For one discussion of limitations in such flexibility, see Statement of Guerrero, *supra* note 275, at 4.

310. These are, as may be expected, not new ideas. In a 1988 article, one commentator refers to a May 1985 EPA "Policy on Performance-Based Assistance." The commentator indicates that the Policy is "aimed at establishing an Agency-wide approach to tying financial assistance to state performance." Wayland, *supra* note 211, at 19.

311. Grants appear to hold significant promise as a lever, at least for some states. Despite the relative reduction in federal contributions to environmental protection over time, see *supra* notes 127-128, a 1998 EPA study reports that "state and local dependence on intergovernmental [financial] assistance is significant A recent study found that, among fifteen representative state air quality programs, federal funds provided between 8 percent and 52 percent of total program funding." U.S. EPA, FINANCING ENVIRONMENTAL PERMIT, COMPLIANCE, AND ENFORCE-

In short, EPA should structure its oversight, and its funding support, to maximize states' incentives to operate consistently with EPA expectations. EPA policy should be to provide relatively substantial oversight for states with deterrence-based approaches that are deficient as viewed through the lens of EPA's priorities. Similarly, EPA grants to such states should be tied to successful efforts to alter performance so that it satisfies EPA policy requirements. On the other hand, states whose performance EPA considers good will benefit from reduced oversight and increased flexibility in terms of use of federal funds. EPA should, in short, establish a systematic scheme that rewards states that do well, and creates improvement incentives for those whose performance is lacking.

Finally, any differential oversight or grants structure must be dynamic in nature. Such a structure must be tailored to recognize that governments' respective capabilities change over time and to reward those states that make solid progress.³¹² In the words of ELI, "enforcement allocation [is] a dynamic process, subject to frequent reexamination and renegotiation."³¹³ As ELI points out, "it may be that there is no permanently optimal allocation," since changes in political administrations, economic conditions, and public concerns trigger a periodic need to re-examine allocation of enforcement roles.³¹⁴ Thus, an essential feature of any incentive scheme designed to encourage states to maintain credible enforcement presences would be periodic review of state performance and adaptation of this scheme to reflect changes.

C. Enhancing EPA Enforcement in Authorized States

A third major option available to EPA to influence state behavior is to enhance EPA's own enforcement presence.³¹⁵ This Part discusses two

MENT PROGRAMS: CAPACITY BUILDING SUPPORT DOCUMENT INTERNATIONAL TRAINING WORKSHOP 2-19 EPA-315B-98-003 (1998); Statement of Larson, *supra* note 20, at 4 (noting that states provide 80% of the funding in the country for environmental protection).

One of the issues that deserves investigation involves the location of control over the grant purse strings at EPA. It would be worthwhile to review whether there is any correlation, for example, between the degree of control OECA has over various types of grants and the extent to which such grants are used effectively as leverage to inspire enhanced state enforcement efforts. If, for instance, OECA-allocated, or OECA-influenced, grants have a superior track record for leveraging enhanced state enforcement efforts than grants largely under the control of various EPA mediated programs, such a finding might be relevant to basic issues of EPA's organizational structure and division of responsibility and authority, including division of control over the grant process.

312. The notion that systems should be dynamic rather than fixed is summarized well in Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L. REV. 791 (1994).

313. ENVTL. L. INST., REPORT OF THE COLLOQUIUM ON FEDERAL-STATE RELATIONS IN ENVIRONMENTAL ENFORCEMENT, *supra* note 183, at 6.

314. *Id.*

315. In using this option, EPA also obviously enhances the overall level of deter-

of EPA's options for expanding its enforcement role. One option involves EPA's taking on a subset of enforcement duties through a division of responsibilities with the various states. Another involves EPA's increasing the number of "overfilings."³¹⁶

1. Dividing the Enforcement/Compliance Universe Systematically

NEPPS contemplates joint planning and priority-setting between EPA and the states.³¹⁷ It further appears to contemplate the possibility of an active EPA enforcement presence.³¹⁸ The idea is that the Regions and states will mutually determine their priorities and the resources available, and then divide responsibilities accordingly. The 1994 Joint Policy Statement on State/EPA Relations, for example, reflects an intent to establish clear roles and responsibilities, and to assign such to EPA and the states "utiliz[ing] the comparative advantages and inherent strengths that each party brings to the relationship."³¹⁹ In the Policy Statement, EPA and the states continue that "[w]e need to ensure that we take full advantage of the wealth of resources and creativity that exists at all levels of government."³²⁰ Thus, as part of joint planning efforts, EPA Regions and states could agree to divide enforcement responsibilities in various ways.³²¹

rence-based enforcement directly, assuming the Agency follows its own policies. In light of the picture painted by the OIG and GAO reports, this would seem to have the important, salutary effect, in its own right, at least in some states, of narrowing the divide between EPA expectations and reality.

316. These are not EPA's only options. EPA could, *inter alia*, use its enhanced criminal capability to induce states to reassess their lack of deterrence-based enforcement. Devotion of a substantial portion of these resources to states that have essentially abandoned pursuit of deterrence-based enforcement, and adoption of a formal policy reflecting that EPA has made such a decision, might be an effective way to get the attention of states and regulated parties alike. Because of the constraints limiting when criminal actions are filed, however, additional federal criminal enforcement activity is not a good vehicle to pressure states to increase their deterrence-based enforcement. More generally, there are a number of legitimate questions about the appropriate scope of criminal enforcement of environmental laws, many of which are raised and discussed quite insightfully by Professor Richard Lazarus. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995). See also *infra* Part VI.C.2 for a discussion of overfilings.

317. See, e.g., OFF. OF ST. & LOCAL REL., U.S. EPA, *Performance Partnership System: Frequently Asked Questions*, *supra* note 298; U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 51.

318. See *id.* at 51 (indicating that EPA and states are to "work together, each according to their strengths").

319. See Off. of St. & Local Rel., U.S. EPA, *Joint Policy Statement on State/EPA Relations* (last modified June 9, 1998) <http://www.epa.gov/regional/JPS_State_EPA/jps.htm> (signed by EPA Administrator Browner and six state officials).

320. See *id.*

321. EPA, for instance, might take on some or all of the regulated parties in a state under a particular program. See, e.g., Hodas, *supra* note 9, at 1587.

Use of a joint planning approach would cause the Region and State to consider a host of issues in deciding how best to divide the enforcement pie between EPA and a particular state. To offer a few examples, individual states and EPA Regions would need to determine: (1) the key priority areas (e.g., industries in which levels of non-compliance are unacceptably high and in which violating sources are causing significant, adverse environmental impacts); (2) the interest and capacity of EPA and the relevant state in addressing the particular areas of concern (e.g., the number of inspectors compared to the size of the regulated party universe, the number of lawyers available to bring cases, etc.); and (3) strategic considerations that might favor federal or state primacy in particular situations (e.g., the value of reserving EPA for a “gorilla in the closet”-type role that the state could use to leverage appropriate settlements).

There are several potential benefits to operating through a joint planning approach that contemplates a division of enforcement responsibilities. Coordinated action based on mutually agreed-upon priorities is likely to be more effective in advancing environmental protection than is uncoordinated, ad hoc action that fails to target priority concerns. Further, each sovereign could choose those responsibilities it is most committed to fulfilling and for which it is best suited, or at least discussions could pursue such an outcome.

It is worth investigating the implementation of NEPPS to evaluate the extent to which the vision of a partnership is producing substantial joint planning and priority-setting and a significant EPA direct enforcement role. There are transaction costs associated with such joint efforts. Further, at least some officials suggest that EPA’s record in pursuing joint planning has not been impressive, and that such collaboration would represent a significant departure from traditional approaches.³²² A 1999 GAO report agrees that substantially improved collaboration is possible and suggests that progress is being made, based on its recent study of NEPPS in six states.³²³ Thus, it would be worthwhile to assess the nature and extent of the joint planning and priority-setting that is occurring under NEPPS.

A second issue involves the extent to which EPA has the resources to play a meaningful role as a direct enforcer. The basic statistics concerning EPA and state resources demonstrate that the states have far sur-

322. See, e.g., Statement of Coleman, *supra* note 127, at 3.

323. U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 44, 51–52 (noting, *inter alia*, that EPAs “recently-issued” guidance indicates that EPA is “addressing states’ concerns about joint planning and priority-setting . . . by identifying this as a management focus area to be addressed by each Region in the fiscal year 2000/2001 [Memorandum of Agreement] process” [cite omitted] and further noting that some officials reported that NEPPS had improved communications between EPA and the states on priorities and key issues).

passed EPA in commitment of funds and personnel.³²⁴ Thus, it is also worth investigating the extent to which EPA has invested, and is prepared to invest, federal resources to implement a joint planning effort by enhancing its direct enforcement efforts in order to complement state enforcement.

Further, the extent to which states are interested in sharing the role of direct enforcer with EPA is also unclear. Some states may view any direct federal presence as an affront to state sovereignty and as undercutting the sacrosanct notion of state primacy.³²⁵ States may also discourage a more active federal enforcement presence because they believe that a deterrence-based approach will make the state a less friendly place for regulated parties and thereby harm the state's competitive position. States may believe that the enhanced enforcement presence that would be delivered by an enhanced federal direct enforcement role is not likely to be effective. For all these reasons many, states may not welcome a greater direct federal enforcement presence. Thus, this consideration should be among those assessed in evaluating the extent to which the NEPPS agreements provide for, and have resulted in, such a presence.³²⁶

A final point concerning the possible division of enforcement responsibilities is that any such division must be structured so as to minimize confusion between the governments and between government and regulated parties.³²⁷ For instance, there will be a greater likelihood that regulated parties will need to deal with two sovereigns. Unless coordination is seamless between compliance assistance efforts and enforcers (which is not always the case now and inevitably will be even less the case if different sovereigns are responsible for different functions), regulated parties may get different answers as to what is required for compliance and what the consequences are of failing to comply. As a result, there may be additional situations in which regulated parties invoke state advice to defend against federal enforcement.³²⁸ Similarly, as discussed

324. See *supra* notes 123–128, 134–137.

325. See, e.g., Statement of Coleman, *supra* note 127, at 2 (suggesting that current tensions in the state/federal relationship are due, in part, to EPA overzealousness in initiating its own enforcement actions. He indicates that “when EPA brings a direct enforcement action in a state, there is often concern [presumably by the state] that the principle setting forth the primary role of the state has been violated.”).

326. At an anecdotal level, the author is aware from his own experience of situations in which EPA has pursued direct enforcement actions without state objection. GAO did not cite any examples of EPA/State negotiations that produced an agreement that EPA would be responsible for direct enforcement in its discussion of the extent to which NEPPS had resulted in a direct EPA role. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 55–56.

327. See, e.g., *Harmon Indus. v. Browner*, 19 F. Supp. 2d 988, 995 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999) (noting that “[t]he concept of co-existing enforcement powers . . . would predictably result in confusion, inefficiency, duplicative Agency expenditures and would thwart the public policy of early and non-judicial dispute resolution”).

328. See, e.g., *General Elec. Co. v. U.S. EPA*, 53 F.3d 1324, (D.C. Cir. 1995), *as corrected*

above, some state voluntary compliance initiatives, such as the audit privilege and immunity laws, may compromise governments' ability to enforce.³²⁹ Thus, if EPA accepts responsibility for undertaking some deterrence-based enforcement, the Agency may need to place limits on state creativity to ensure that state initiatives do not handcuff EPA in identifying or pursuing significant violators.³³⁰

2. Increasing the Number of "Overfilings"

Overfilings are a strange breed of direct EPA enforcement action. They involve EPA's filing suit against an alleged violator even though the state already has initiated its own enforcement action against that party.³³¹ Overfiling involves the initiation of a federal enforcement action after state enforcement action has already begun. One commentator provides a slightly more elaborate definition:

Overfiling is the term used to describe the following scenario: (1) the state commences an enforcement proceeding against an operator of a pollution source alleging violation of an environmental law; (2) after negotiations or a court or administrative hearing, a final settlement or verdict is reached; and (3) following this resolution, EPA files a complaint against the operator alleging the same violations that were ostensibly resolved by the earlier state settlement or court order.³³²

EPA initiates such a seemingly extraordinary federal enforcement proceeding when in its view the state action is an inadequate enforcement response.

The apparent lesson from the OIG and GAO audits discussed in Part IV is that EPA has ample opportunity for overfilings. There are significant numbers of cases in which state enforcement action has been entirely inadequate when measured against EPA standards. Yet, EPA only rarely overfiles, as EPA Assistant Administrator Steven Herman makes clear in June 1997 testimony:

(June 19, 1995). Another type of confusion might emerge if EPA takes responsibility for a subset of regulated parties within a state, even if the governments make a concerted effort to create a clean division.

329. See *infra* notes 364–367 and corresponding text.

330. See, e.g., U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 47–48, 51.

331. The different environmental statutes give somewhat different treatment to overfiling. See *id.* at 15 (discussing the Clean Water Act, Clean Air Act, and RCRA).

332. E. Blaine Rawson, *Overfiling and Audit Privileges Strain EPA-State Relations*, 13 NAT. RESOURCES & ENV'T 483 (1999).

Statistics show that overfiling is in fact a rare event. As reported by a state-by-state survey conducted by ECOS, the [A]gency overfiled on about 30 cases or 0.3% of all federal enforcement action during fiscal years 1992 through 1994. During fiscal years 1994 and 1995, the [A]gency overfiled on a total of 18 cases or about 0.1% of state enforcement cases. From October 1995 through September 1996, there was a total of four overfiling cases.³³³

There are many reasons for the reality that few overfilings occur despite a plethora of cases in which such federal action might be warranted.³³⁴ "Double-teaming" violators is problematic from a government resources perspective. Further, overfilings create a basic "fairness" issue from the perspective of the regulated community.

Finally, overfilings, by their very nature, place considerable stress on the much-touted notion of a strong EPA/state partnership.³³⁵ They represent a clear federal rebuke of state performance and therefore are embarrassing to the states. Oklahoma Executive Director Coleman's June 1997 Congressional testimony captures states' distaste for federal overfiling practices:

Overfiling, the term used to describe when EPA pursues lead enforcement action in a state, is also an important piece of the enforcement relationship. Although the instances of EPA overfiling are relatively few, the possibility of overfiling and the use of overfiling comes at a great cost. The potential for overfiling leads to mutual wariness and if not done with extreme care it can rapidly damage the enforcement relationship.³³⁶

Indeed, beyond complicating the EPA/State partnership, an EPA policy to increase the number of overfilings might lead some states to support ef-

333. Statement of Herman, *supra* note 250, at 7. During the same hearing, Lois Schiffer, Assistant Attorney General, echoed Assistant Administrator Herman's point that overfilings occur rarely, noting that overfiling is "both misunderstood as a concept and exaggerated as an occurrence." *Enforcement of Environmental Laws: Hearings Before the Senate Comm. on Environment & Public Works*, 105th Cong. 1 (1997) (statement of Lois Schiffer, Assistant Attorney General, U.S. Department of Justice).

334. The Eighth Circuit's Sept. 1999 decision in *Harmon Industries*, discussed *infra* at note 338, may influence EPA overfiling strategy as well.

335. Oklahoma Executive Director Coleman indicates that overfiling, "if not done with extreme care . . . can rapidly damage the enforcement relationship." Statement of Coleman, *supra* note 127, at 5. He suggests that overfiling should rarely occur if EPA has clearly explained to states what is expected of them: "If EPA has clear communications of what is expected, including notice of EPA's expectations and the intent of overfiling if these expectations are not met, then EPA overfiling should rarely occur." *Id.*

336. *Id.*

forts to derail such a strategy.³³⁷ Some states potentially could join forces with regulated parties to attack the legality of these practices.³³⁸

Despite the cost, there may be upsides to a strategy of increasing the number of overfilings.³³⁹ Overfilings are likely to get the attention of the regulated community very quickly. Being sued once for a set of alleged violations is not particularly pleasant. Ending up on the receiving end of a second lawsuit aimed at the same set of violations is likely to raise the anxiety level of the alleged violator. A substantial portion of the regulated community is likely to take notice of the increased prospect of multiple suits for significant violations for which a state enforcement response is mild by EPA standards. Thus, an EPA policy of increasing its number of overfilings is likely to have a ripple effect in the regulated community that extends well beyond the particular alleged violators targeted. This is particularly true because EPA's penalty demands are likely to be much higher than those of the state.³⁴⁰ The concept that a settlement

337. An October 29, 1998, ECOS resolution perhaps signals a state effort to narrow the universe of situations in which overfiling is even possible. The resolution expresses grave concern regarding overfilings and suggests they be limited to situations where: (1) the state has abused its discretion in carrying out its enforcement authority by failing to take the necessary steps to bring the alleged violator into compliance; (2) the alleged violation involves a significant interstate pollution impact; (3) serious and irreparable harm will occur to the public health and/or environment unless immediate action is taken; or (4) the state requests enforcement assistance from EPA. See Rawson, *supra* note 332, at 483. Obtaining an inadequate penalty, no matter how inadequate, would not be a basis for overfiling under ECOS's construct.

338. The case law is currently somewhat unsettled concerning EPA's capacity to overfile. While several cases have held specifically that overfiling is authorized under the environmental statutes, see, e.g., *EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991), there is precedent the other way as well, including the Eighth Circuit's recent decision in *Harmon Industries, Inc. v. Browner*, 19 F. Supp. 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894, 899 (8th Cir. 1999), *petition for reh'g en banc filed*, (8th Cir. Nov. 15, 1999) (in affirming, the Court of Appeals concluded that an authorized state program "supplant[s]" the federal program "in all respects including enforcement . . ."). The Court continued, however, that EPA may initiate an action if a state fails to do so. The Court also held that principles of *res judicata* precluded EPA's action.

This decision was issued as this Article was well along in the editing process. On a first read of the case, however, at least two aspects of it warrant special mention. The first involves whether the Court is right on the merits and, related, whether it properly applied *Chevron* in determining the degree of deference to give to EPA's analysis. See generally *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). The second involves the appropriate definition of enforcement action assuming the Court's analysis is correct. The Court seems to leave open the possibility that EPA may bring an action in an authorized state, so long as the state itself has not yet acted. Although I have not had an opportunity to review the file, it appears from the Court's decision that EPA may have filed the first formal enforcement action. It appears that the State had been working informally with Harmon to address the violations, but it is not clear that the State initiated an enforcement action before EPA launched its suit. If those are the facts, the Court's dismissal of the EPA suit despite the lack of an earlier filed formal state enforcement action suggests a narrow window for EPA to initiate actions in authorized states. It remains to be seen how much contact between a state and a regulated party will suffice in the Eighth Circuit to foreclose EPA action. See also *U.S. v. ITT Rayonier, Inc.*, 627 F.2d 996, 1001-02 (9th Cir. 1980).

339. It may not be possible to use this strategy in the Eighth Circuit given the decision in *Harmon*, *supra* note 338.

340. See *supra* Part IV.

needs to be credibly tough in order to avoid a possible overfiling situation would resonate with sophisticated members of the regulated community and might produce outcomes more in line with EPA expectations than if no meaningful prospect of an overfiling existed.³⁴¹

Further, because overfilings are anathema to states, an EPA policy to increase the number of overfilings may lead states to upgrade their efforts in order to limit EPA "interference." Some states may reassess their own practices to respond to inevitable pressure from regulated parties concerned about the emergence from the closet of an EPA gorilla that is much more fearsome than the state enforcement arm. States' own public embarrassment due to the public attention may also contribute to such a reassessment.³⁴² One commentator reasons that the lack of overfilings means that "no effective check exists for states that assess little or no penalties on CWA violators. EPA's heralded policy of threatening direct action if a state has not assessed a penalty or if the penalty assessed is grossly deficient has never been used successfully."³⁴³ An invigorated overfilings policy might serve as such a check and cause states to revisit their practices.

Whether EPA should increase its number of overfilings depends on one's views on a series of other issues, such as the seriousness of the potentially substantial divide between the expectation and reality of deterrence-based enforcement, and the likelihood that an increased use of this tool will cause states to change their strategies. EPA is unlikely to ever engage in a sustained, nationwide campaign that includes a significant increase in overfilings. One option short of this would be for EPA to consider "pilot testing" increasing the number of overfilings in one or two states with particularly dismal enforcement records as part of an experiment to determine the impacts of such a strategy.

The variation of reinvention of enforcement embodied in NEPPS raises one final issue concerning EPA's use of overfilings as a tool to improve state performance. The NEPPS preference for programmatic, rather than case-specific, reviews will seemingly undermine EPA's ability to use overfiling because EPA will be less likely to be aware of instances in which it should overfile. As suggested above, research into the nature of

341. On the other hand, it could cause regulated parties with potentially high profile cases (significant violations, significant economic benefit) to seek EPA sign-off (or at least a signal that an overfiling will not follow). This could cause delay. At least one private practitioner has suggested this consequence. See Rawson, *supra* note 332, at 484 (suggesting that "[o]ne important and problematic consequence of overfiling is the increased reluctance of regulated entities to deal with state enforcement officials").

342. An EPA overfiling, and even more likely a public EPA decision to overfile in specified states on a regular basis because of purported deficiencies in state enforcement practices, is likely to place a spotlight on such practices. The notion of a spotlight is discussed in more detail below. Such a spotlight may mobilize environmental non-governmental organizations to focus on states' performance in this area.

343. Hodas, *supra* note 9, at 1588-99. Professor Hodas notes, "EPA action because of an inadequate state penalty is essentially nonexistent." *Id.* at 1588.

the oversight EPA is performing would help to answer the question of whether EPA is to some extent abandoning overfiling because of shifts in its oversight practices.³⁴⁴

D. Withdrawal of State Program Authorizations

The three options discussed above for strengthening deterrence-based enforcement nationwide share the common premise that overall, states should maintain primary enforcement responsibility.³⁴⁵ The fourth option discussed here, the possibility of EPA withdrawal of state program authorization, departs from this common premise. It contemplates that EPA will take over the primary enforcement role in affected jurisdictions.³⁴⁶

To put the option in context, at least one obvious strategy that demands consideration in the context the GAO and OIG have described (i.e., EPA remains ultimately accountable for enforcement performance, states are the primary direct enforcers, and direct enforcement is not being done to standard) is for EPA to change the identity of the direct enforcers by taking over the direct enforcement role in appropriate circumstances.

There is an argument that we are at this juncture now. The history of the EPA/state relationship, including recent history according to the GAO and OIG reports, is one of states' generally *not* pursuing deterrence-based enforcement effectively, at least as measured against the criteria established in EPA policies. Further, this record of performance strongly suggests that states are not likely to change their enforcement philosophies or practices to align them with EPA's if they have not done so already. The image of EPA as "Sisyphus," engaged in the never-ending, and never successful, effort to push the rock up the hill, perhaps captures this view.³⁴⁷

There is a related argument that the "reinvention" phenomenon discussed in Part V may well make matters worse because it will divert attention from traditional enforcement. GAO's May 1998 report on EPA and state efforts to focus state enforcement programs notes that states

344. A related issue, alluded to *supra* in note 341, is whether specific terms of particular agreements negotiated between the EPA Regions and states will condition use of overfilings as a tool.

345. A significantly enhanced EPA direct enforcement presence arguably represents a challenge to this premise to some extent.

346. As discussed above, program withdrawal also arguably supports the premise of state primacy in one sense, notably that the threat of withdrawal might serve as an incentive for states to upgrade their enforcement in order to avoid the threat.

347. Webster's Ninth New Collegiate Dictionary (Merriam-Webster 1988) (noting that Sisyphus is a "legendary king of Corinth condemned to roll a heavy rock up a hill in Hades only to have it roll down again as it nears the top").

have complained about continued use of enforcement-related "output measures" as "unduly emphasizing punitive measures when . . . more cooperative strategies are needed to increase compliance . . ."³⁴⁸ EPA's letter to the GAO on the draft version of this GAO report does so as well. It asserts that states not only have disinvested in deterrence-based enforcement programs, but they have "justified their disinvestment in [such] enforcement programs" by claiming that, *inter alia*, compliance assistance programs are more effective than conventional enforcement approaches.³⁴⁹ The "reinvention" focus on results (which are problematic to measure, at least at this point),³⁵⁰ in short, may diminish the importance of using particular means, such as deterrence-based enforcement.³⁵¹

The lesson to be drawn from this record, according to this view, is that continued attempts to enlist states in the effort to establish a consistent deterrence-based enforcement presence throughout the U.S. are destined to fail.³⁵² As a result, it is not worth it to pretend that a sea change in state performance is imminent. Alternative strategies are needed to get the job done.³⁵³ EPA should abandon the futile exercise of pursuing a fed-

348. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 3, 14 (also noting that states have "sometimes replace[d]" traditional enforcement activities with more cooperative approaches). According to the GAO's May 1998 audit, enforcement numbers are down nationwide and in several major states in particular in terms of the number of penalties assessed and the dollar value of penalties collected. *Id.* at 30-31 (discussing Pennsylvania, Texas, Washington, and Florida, and citing an EPA statement that "states as a whole reported taking 17 percent fewer formal enforcement actions in 1996 than in 1994").

349. U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 72. EPA's view is that these state assumptions "will be adopted as facts although there is little or no empirical basis for them. In fact, EPA's data and experience does not support these sweeping statements." *Id.* at 71.

350. See *supra* note 269 and accompanying text.

351. See *supra* note 261 and accompanying text. See also Hausker, *supra* note 8, at 10,153 (noting that "next generation" reports "are explicit in stating that the appropriate information systems are a precondition of adopting performance-based regulation or other policy tools" and that "[n]ext generation authors recognize that the information and data systems that have served the bedrock regulatory system of the last decades are not up to the task of addressing the environmental problems that lie ahead. They acknowledge that better information and data systems will not be built overnight and require a long-term commitment from both public and private sectors.").

352. See Hodas, *supra* note 9, at 1574 (noting that "[h]eavy reliance on state enforcement is a double-edged sword. When we 'deputize' the states to implement national environmental laws, we shift the government's discretionary enforcement power to state and local officials, who may not be interested in, or able to carry out, federal goals").

353. A related point is that history reveals that the chance is remote that EPA will hold up its end of the bargain and begin vigilantly to oversee state performance based on the criteria in the State/EPA Framework and penalize states that do not measure up to these standards or step in routinely and initiate enforcement actions if they do not. EPA's failure to fill this role after the series of GAO and OIG studies in the late 1980s and early 1990s (and before), which established that many states do not routinely practice "enforcement" in a manner consistent with the basic tenets of EPA national enforcement policy, suggests that EPA is unlikely to turn things around in response to the more recent round of reviews. EPA has long known that many states prefer to work cooperatively with violators rather than pursue formal enforcement. See OFF. OF ENFORCEMENT, U.S. EPA, ENFORCEMENT IN THE 1990'S PROJECT: RECOMMENDATIONS OF THE ANALYTI-

eralized approach complete with resource-intensive oversight, capacity-building, and initiation of the occasional federal case, and instead itself fill the vacuum of deterrence-based enforcement left by the states. EPA should, in other words, develop the capacity, and the will, to implement a deterrence-based approach to enforcement in states that are not interested in implementing, or able to implement, such an approach themselves.

The response to an argument for such a potentially dramatic shift has several components. First, EPA and other criticisms of state enforcement over the past several months have been met by a great deal of sound and fury, some of it directed at challenges to the data underlying EPA's concerns.³⁵⁴ EPA needs to be confident that it has a comprehensive understanding of the landscape and satisfy itself that the concerns raised by the GAO and OIG are widespread, before launching what is likely to be an initiative that will test the federal/state relationship.

Furthermore, as noted above, some states might argue that they re-oriented their compliance efforts to diminish the importance of deterrence-based enforcement with EPA's blessing.³⁵⁵ Therefore, the results do not reflect a lack of state capacity. Instead, they are the outcome of a mutual decision to shift focus and direction. Withdrawing authorization is an inappropriate and unnecessary "cure" in such situations. Better communications concerning expectations will suffice.

A practical response is that EPA simply lacks the resources to fill the vacuum left by the states.³⁵⁶ EPA Administrator Browner testified in 1993 that "[t]here are some States that have seriously considered returning primacy to the Federal government. I will be very honest with you, we don't have the resources to manage even one major State if primacy were to be returned."³⁵⁷

CAL WORKGROUPS 2-13 (1991); *see also* Kuehn, *supra* note 20, at 2388.

354. This sound and fury evidences the differences of opinion that have been voiced concerning state performance. *See supra* note 245.

355. *See* U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 24.

356. *See supra* note 269; *see also* Friends of the Earth v. Laidlaw Envtl. Servs., 890 F. Supp. 470, 495 (D.S.C. 1995), *reh'g denied*, (1995), *sum. judgment motions argued*, Friends of the Earth v. Laidlaw Envtl. Servs., 956 F. Supp. 588 (D.S.C. 1997), *vacated by*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (1999).

357. Rena I. Steinzor & William F. Piermattei, *Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?*, 28 Envtl. L. Rep. (Envtl. L. Inst.) 10,563, 10,573 n.105 (1998). A number of commentators have made this point. *See, e.g.*, Hodas, *supra* note 9, at 1586 (citing an EPA official for the notion that 'even if only a small number of delegated states returned their programs to EPA, [EPA's] enforcement program would not be able to cope with the new responsibilities. Ultimately, there would be less enforcement, not more'); Kuehn, *supra* note 20, at 2384 (noting that "the federal government cannot handle all, or even most, enforcement"); Steinzor, *supra* note 18, at 10,364; Hausker, *supra* note 8, at 10,150 (noting that "[n]ext generation authors generally share the view that EPA and the states have mandates that greatly exceed their resources . . ."); Steinzor, *supra* note 224, at 10,079 (indicating that "[b]ecause EPA's own funding shortfalls make it difficult for the Agency to threaten to withdraw state delegations with any credibility, federal regulators remain on the

Further, there is the notion that EPA policy and allocation of resources should pursue realization of Congress's goal that states serve as the primary direct enforcers with EPA to play a support and oversight function.³⁵⁸ Hence, EPA's efforts and resources should be devoted to strengthening state capacity where it is weak. EPA should create a parallel direct enforcement capability only where its efforts to promote state capabilities have demonstrably failed and are unlikely to produce sufficient improvement in the future. A number of strong policy arguments support states' primacy as direct enforcers as well, as discussed above.³⁵⁹ This list of arguments is long and compelling to many.³⁶⁰

Finally, the idea of bringing the EPA gorilla out of the closet with considerably more frequency than occurs today, particularly through program withdrawal, indisputably cuts against the grain of much of the reinvention thinking. For example, Professor Robert Kuehn suggests that current trends favor a more limited role for federal enforcement:

Environmental enforcement's gorilla is facing extinction or, perhaps more accurately, execution or starvation [F]ederal environmental agencies find themselves subject to increasing calls to reduce dramatically, or even eliminate, their enforcement roles. Once seen as a gorilla in the closet whose threatened release could persuade violators to comply with the law, many politicians and commentators now view federal enforcement as an unwarranted intrusion into the efforts of capable state enforcement agencies.³⁶¹

What weight should EPA give these arguments concerning its program withdrawal authority in the face of the type of enforcement record the GAO and OIG have described? Should EPA ever exercise the option of program withdrawal?³⁶² If EPA does exercise this option, under what

defensive, caught between a Congress demanding proof of its accomplishments and states demanding to be left alone").

358. See *supra* note 121 and accompanying text.

359. See *supra* notes 11 and 121 and accompanying text. See also U.S. EPA, REPORT OF THE TASK FORCE TO ENHANCE STATE CAPACITY: STRENGTHENING ENVIRONMENTAL MANAGEMENT IN THE UNITED STATES 17 EPA-270-R-93-001 (1993) (Such a strategy arguably would be at odds with the recommendation of this 1993 Task Force, which found that "[m]aximum delegation of national environmental programs to states is essential for achieving a collaborative federal/state/local system of environmental protection.").

360. See generally Markell, *States as Innovators*, *supra* note 114 (summarizing several of these arguments, including the following: States are closer to the problems that need to be solved and hence, are better positioned to solve them. States also may be more nimble than the federal government. Further, because of their practical experience, states' ideas may be more reality-tested. Finally, they are well suited to serve as "laboratories" that can experiment with different policy approaches. This is particularly valuable when we are still early on in the learning curve in gauging what works).

361. Kuehn, *supra* note 20, at 2373.

362. As discussed in Part III, EPA is also the entity charged with deciding at the outset whether to give a state authorization to operate a program. See *supra* notes 279 and 282. The idea

circumstances and how should it proceed? A reasonable answer is that these “constraints” on EPA direct enforcement should lead to caution, not paralysis. The GAO and OIG reviews should spawn, at the very least, an EPA review of performance in the apparently more problematic states. Such a review should include a candid evaluation of the expectations created in such states. Assuming EPA’s findings corroborate those of the GAO and OIG in one or more states, and EPA’s message to the state(s) that strong deterrence-based enforcement was expected had been clear and consistent, there is a strong argument that EPA should finally “bite the bullet” and withdraw a state program if its performance is truly deficient and prospects for marked improvement seem unlikely.

Because of EPA resource constraints and the strong presumption of state primacy, program withdrawal is not a decision to be taken lightly. Indeed, EPA has never exercised this authority in any of its programs. Nevertheless, EPA has threatened to withdraw program authorization in a number of instances over the years.³⁶³

that EPA should be more vigilant in ensuring that a state has adequate enforcement capabilities in its initial review of state requests for program authorization has received some attention in recent years. A 1991 ELI report concerning a colloquium of federal and state enforcement officials, among others, observed that EPA must “pay particular attention to determining enforcement capability in making state program authorization decisions.” ENVTL. L. INST., REPORT OF THE COLLOQUIUM ON FEDERAL-STATE RELATIONS IN ENVIRONMENTAL ENFORCEMENT, *supra* note 183, at 7. ELI indicated government officials’ concern that there may be significant deficiencies in the nature of EPA’s review of program authorizations, and that inadequate reviews have resulted in authorizations without adequate assessments of enforcement capabilities:

Perhaps the most interesting issue for further discussion . . . was the participants’ focus on the need for improved enforcement-related criteria for program approval that would ensure that programs with inadequate enforcement capabilities would not be approved as, participants asserted, had occurred in the past. EPA should define the enforcement criteria for program approval carefully, they concluded, because oversight cannot easily fix an inadequate state program after its approval

Id. at 53 (emphasis in original).

[S]taffing levels, the implications of weak administrative structures, the enforcement impacts of review boards and other institutions, and the effects of state procedures are not always thoroughly understood. Participants suggested that EPA authorization procedure should be reexamined to assure that it is capable of assessing state enforcement capabilities.

Id. at 7.

For a brief overview of the conditions for authorization under the Clean Water Act, the Clean Air Act, and RCRA, see U.S. GAO, ENVIRONMENTAL PROTECTION: EPA’S AND STATES’ EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 15.

363. GAO reports that EPA has “taken the highly unusual step of initiating proceedings to withdraw primacy from programs in eight states . . . but has not carried through on those threats.” U.S. GAO, EPA AND THE STATES—ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP 18 GAO/RCED 95-64 (1995). One report indicates that Texas and Utah revised their environmental audit and immunity laws in response to an EPA threat to withdraw program authorization. See *States Change Laws at the Behest of the EPA*, CHEMICAL WK., Apr. 9, 1997, at 1. On Dec. 15, 1996, EPA warned several states it might revoke their authority to enforce

The prospect of program withdrawal has perhaps been most in the spotlight recently in the context of the more than 20 states that have adopted audit privilege/immunity legislation over the past few years.³⁶⁴ EPA has concluded that, as a matter of law, it must withdraw state program authorization if state law contains specific deficiencies relating to the audit privilege issue.³⁶⁵ EPA's rationale is that some such laws place a

laws like the Clean Air Act, or withhold federal grants that help states enforce the laws, unless they change their practices concerning enforcement. See John H. Cushman, Jr., *States Neglect Pollution Rules, White House Says*, N.Y. TIMES, Dec. 15, 1996, at 1. EPA apparently threatened to withdraw Rhode Island's water permitting authority in 1997 unless the State restored cuts to its environmental budget. See *EPA to Increase Federal Enforcement Presence in Rhode Island*, ENVTL. POL. ALERT, Feb. 12, 1997, at 39.

364. See, e.g., E. Lynn Grayson & Christina M. Riewer, *EPA's Audit Policy and State Audit-Privilege Laws: Moving Beyond Command and Control?*, 27 ENVTL. L. REP. (ENVTL. L. INST.) 10,243 (1997); Bertram C. Frey & Jennifer K. Harr, *A Review of Environmental Grace Period and Amnesty Laws*, 29 ENV'T REP. (BNA) 51, 53-58 (1998) (containing a chart identifying such state laws in effect as of March 1998); U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at App. III (identifying the states with such legislation as of March 1998).

One goal of such legislation is to improve compliance and environmental conditions by giving regulated parties immunity and/or a privilege for conducting self-audits and correcting environmental problems discovered through these. There is widespread consensus that regulated parties should be encouraged to monitor their own operations, for a variety of reasons. Government lacks the resources to look over the shoulder of every regulated party and, as a result, self-evaluation is necessary to complement government oversight; related, compliance is much more likely if parties internalize the obligation to comply; and further, self-auditing will enable regulated parties to identify, and correct, violations or other potential concerns earlier than would otherwise occur. See, e.g., U.S. GAO, ENVIRONMENTAL AUDITING, *supra* note 71, at 3-4; Scott Lansdown, *The Audit Privilege: An Overview*, SONREEL NEWS, May/June 1995, at 11 (noting that "[w]hile some dispute the desirability of the audit privilege, it does not appear that anyone disputes the value of internal audits as a means of ensuring EHS [Environmental Health and Safety] compliance"). Indeed, as discussed in Part III above, EPA has adopted its own compliance incentive policy seeking to create incentives for regulated parties to conduct self-audits. One recent survey found that "the existence of environmental audit privilege and immunity laws or audit policies does not appear to influence the level of audit activity." Nat'l Conf. of St. Legislatures, *State Environmental Audit Laws and Policies: An Evaluation, Executive Summary* (visited Dec. 2, 1999) <<http://www.hcsl.org/programs/esnr/auditsum.htm>>. The survey found that 80% of facilities contacted (988 manufacturing facilities) were conducting audits. See *id.*

365. See, e.g., U.S. EPA, STATEMENT OF PRINCIPLES: EFFECT OF STATE AUDIT IMMUNITY/PRIVILEGE LAWS ON ENFORCEMENT AUTHORITY FOR FEDERAL PROGRAMS 4 (1997); Nancy K. Stoner, *EPA Memo on Addressing State Audit, Immunity Laws and Legislation*, 28 ENV'T REP. (BNA) 1435 (1997); *EPA Says Oregon Audit Law Threatens Integrity of Environmental Programs*, ENVTL. POL. ALERT, July 15, 1998, at 32 (reporting that "EPA is threatening to block Oregon's bid to run federal environmental programs because of concerns over the state's environmental audit and self-disclosure law"); *EPA to Review Whether State Amnesty Laws Undercut State Enforcement*, ENVTL. POL. ALERT, Dec. 31, 1997, at 28 (reporting that "EPA has launched a review of state amnesty laws across the nation to determine whether these laws may undercut state enforcement authority and serve as an impediment to the delegation of federal environmental programs"); *Maintaining Water Program Authority Linked to Changing Audit Law, EPA Tells Governor*, 28 ENV'T REP. (BNA) 2039 (1998) (indicating that EPA notified Colorado that it "must amend its audit privilege law to maintain authority over its Clean Water Act program"); Cushman, Jr., *States Neglect Pollution Rules, White House Says*, *supra* note 363, at 1 (reporting that EPA has warned "Michigan, Idaho, and Texas that their recently enacted laws may jeopardize their authority to issue permits under Title V of the Clean Air Act").

EPA notes that it will be "particularly concerned" with whether a state has the ability to "recover civil penalties for . . . significant economic benefit . . ." U.S. EPA, STATEMENT OF

state on the wrong side of the authorization line—that is, the state no longer meets the basic conditions under the federal environmental law for being authorized to administer the environmental program in its state.³⁶⁶ The Agency has stated its intention to “determin[e] whether states with audit laws have retained adequate enforcement authority for any authorized or delegated federal programs.”³⁶⁷

In short, in addition to various ad hoc efforts, EPA has adopted a national policy that answers affirmatively the issue raised above as to whether it will ever contemplate use of the program withdrawal tool. This national policy casts EPA in the role of an active reappraiser of state legal authorities for the purpose of reviewing whether deficiencies in states’ legal authorities requires program withdrawal. It will be important to monitor EPA’s implementation of this policy. How strictly will EPA assess the adequacy of state authorities? What will EPA do if it identifies significant deficiencies and the states involved fail to correct them? Will EPA follow through with withdrawal of authorization? What types of conditions and timetables for improvement will EPA set if and when it finds deficiencies? Similarly, state responses to this national policy bear close scrutiny. What types of individual state responses will EPA’s policy trigger? To what extent will states refine their laws to address EPA’s concerns?

Finally, there are a number of uncertainties concerning the nature of the collective state response to this national initiative. Are states coalescing to support or undermine the initiative? Are there EPA approaches that receive states’ support and others that seem to precipitate state opposition and intransigence? This national initiative offers fruitful soil for research concerning a large variety of questions regarding EPA’s imple-

PRINCIPLES: EFFECT OF STATE AUDIT IMMUNITY/PRIVILEGE LAWS ON ENFORCEMENT AUTHORITY FOR FEDERAL PROGRAMS, *supra*, at 2.

366. See Herman, *EPA’s FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 5; U.S. EPA, STATEMENT OF PRINCIPLES, *supra* note 365, at 1; Stoner, *EPA Memo on Addressing State Audit, Immunity Laws and Legislation*, *supra* note 365, at 1435.

367. Stoner, *EPA Memo on Addressing State Audit, Immunity Laws and Legislation*, *supra* note 365, at 1435; see also Herman, *EPA’s FY 1997 Enforcement and Compliance Assurance Priorities*, *supra* note 23, at 5 (noting that the federal government will “strenuously oppose the adoption of privilege or immunity laws which shield violators from legitimate sanctions and which fail to protect the public’s right to know. We will increase the resources devoted to this subject and track and analyze the impact of such legislation on the ability of states to effectively implement their delegated responsibilities.”). The Agency’s position as a matter of “policy” is that it “opposes all state audit privilege/immunity laws in any form,” Stoner, *EPA Memo on Addressing State Audit, Immunity Laws and Legislation*, *supra* note 365, at 1435. A December 1998 article by Steven Herman suggests that EPA’s views on this issue are not likely to change in the near term. See Steven A. Herman, *NCSL Study Finds That State Environmental Audit Laws Have No Impact on Company Self Auditing, and Disclosure of Violations*, NAT’L ENVTL. ENFORCEMENT J., Dec. 1998/Jan. 1999, at 18 (stating that the National Conference of State Legislatures (“NCSL”) study “dispels the premises underlying state environmental audit privilege and immunity laws.” EPA Assistant Administrator Herman continues: “NCSL’s study concludes that state audit privilege and immunity laws do not encourage facilities to begin auditing, to increase the number of audits they perform, or to disclose more violations to regulators.”).

mentation of its oversight responsibilities in a particular context, and the states' reaction, individually and collectively, to this federal review.

State audit laws are not the only aspect of state enforcement performance that should be potentially subject to federal scrutiny and, ultimately, possible federal withdrawal of state authorization if performance is sufficiently deficient. Conceptually, there is no reason why EPA should limit its reappraisal of the adequacy of state legal authorities to the context of audit privilege/immunity legislation. It seems hard to argue with the notion that EPA should periodically review state authorities to ensure states have the legal authority Congress dictated they must possess to warrant EPA's suspending its operation of the national program within their jurisdictions. Since state laws are dynamic, an initial assessment and determination of adequacy of legal authorities should be followed by periodic reassessments at regular intervals. This Article identifies several state programs whose legal authorities appear to raise questions about their adequacy.³⁶⁸

There is also, conceptually, no reason why EPA should confine reappraisals to legal authorities. EPA has the authority to reappraise actual state performance. In the view of at least one commentator, review of actual enforcement practices rather than legal frameworks are where EPA needs to spend its time if it is serious about uncovering state deficiencies. Professor Flatt suggests that states have engaged in a "race to the bottom" because of a lack of federal vigilance in oversight and indicates that "this time, [states] did not race [to the bottom] with the laxity of laws, but with the lack of zeal of enforcement of laws—a competition that is much more hidden and insidious"³⁶⁹ The deficiencies in state enforcement found by the GAO and OIG also suggest such a review would be worthwhile.³⁷⁰ As another commentator puts it:

The findings of federal investigators who have audited state enforcement programs contradict all of these arguments [referring to state arguments that they are achieving high levels of compliance]. Both the GAO and OIG have criticized the states for lax enforcement in recent years, drawing an embarrassing picture of incompetence and even willful neglect of state responsibilities in this crucial area [T]he statistics reported in the GAO and IG reports may be the tip of the iceberg, or they may reflect anomalies that merely

368. See *supra* notes 156–162 and accompanying text. See also Robin Greenwald, *An Environmental Prosecutor's Caution About Electronic Transmissions of Environmental Reports*, NAT'L ENVTL. ENFORCEMENT J., Sept. 1998, at 3, 4 (noting that some state officials acknowledge that "their states bring few or no criminal cases for environmental violations").

369. Flatt, *supra* note 36, at 5.

370. See *supra* Part IV. For practical reasons, EPA may need to phase in such reappraisals.

signify a few bad apples in an otherwise sound barrel. To know for sure requires a more extensive investigation of state capacity³⁷¹

Such an EPA approach would represent the type of "performance-based" strategy many support.³⁷²

The option of program withdrawal and tightened scrutiny for future authorizations in the first instance involves strengthening EPA's vigilance and capacity as "gatekeeper."³⁷³ EPA would provide program authorization only to states that have the requisite legal authorities to maintain a reasonable enforcement presence. EPA would also periodically assess authorized states to ensure that their legal authorities remain adequate and that they exercise such authorities consistent with EPA expectations. EPA would work with states that are deficient to help them meet necessary requirements in a timely way, as it appears to be doing in the audit legislation context.³⁷⁴ EPA has a variety of options when it finds significant deficiencies, ranging from "pep talks," to capacity building, to more intensive oversight, to a division of enforcement responsibilities as described above. In cases in which extreme shortcomings exist and prospects for improvement are minimal, complete program withdrawal should be an option on the table.

The impact of EPA's announcement, and implementation, of a formal policy of revisiting states' legal authorities and enforcement performance is impossible to predict. On the plus side, the use of such a "stick" may increase the motivation of such states to improve their legal authorities and enforcement performance. A withdrawal proceeding will be embarrassing to state officials. It represents a public statement by EPA that the state's performance is entirely inadequate. The prospect of being

371. Steinzor, *supra* note 224, at 10,082-83.

372. See, e.g., Clinton & Gore, *supra* note 4.

373. For a discussion of EPA's role as a "gatekeeper" in the Superfund context, see David L. Markell, "Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund Reform Act of 1994's Approach to Intergovernmental Relations, 24 ENVTL. L. 1055, 1067 (1994). These reappraisals do not have to be of the "one size fits all" variety. EPA could tailor its reappraisals to the circumstances of individual states. In this way it could borrow from evolving approaches to permit renewal. For the past several years, New York, among other states, has prioritized its permit renewal work in an effort to allocate resources where they are most needed. See, e.g., Markell, *States as Innovators*, *supra* note 114, at 377. Thus, permit renewal applicants whose discharges are "okay" from a legal and environmental perspective receive relatively little scrutiny at the renewal stage. In contrast, dischargers for whom significant concerns exist receive far more intense review as part of the permit renewal process. EPA also should incorporate a meaningful public role into such reviews.

374. See U.S. EPA, *Statement of Principles: Effect of State Audit Immunity/Privilege Laws On Enforcement Authority for Federal Programs*, *supra* note 365, at 4 (noting that EPA has launched a national "state-by-state plan" to "work with states to remedy any problems" associated with them); Stoner, *EPA Memo on Addressing State Audit, Immunity Laws and Legislation*, *supra* note 365, at 1435.

branded in this way might well serve as strong motivation to state officials to avoid being put in such a position.

Further, a withdrawal threat or proceeding might enlist strange bed-fellows within at-risk states in the common cause of improving state capacity and performance, including the regulated and environmental communities and states' rights proponents, among others. Such a proceeding is likely to send an alarm signal to members of the regulated community. To some extent, members of the regulated community are likely to prefer the "devil they know," particularly if the reason for the withdrawal is that the state has been lax on enforcement. The obvious message is that EPA intends to bring a more aggressive attitude to significant violations of the environmental laws. Sophisticated state-level environmental non-governmental organizations ("ENGOS") are likely to recognize that such an EPA initiative is an opportunity to make the case that something is seriously amiss in their state and to win political support for invigorating the state infrastructure. Possibly this sort of strong medicine from an outsider, the federal government, may serve as a focal point for disparate state-based forces to coalesce in favor of enhancing state capacity even if their motivations for supporting such an upgrade may differ. A carefully structured EPA approach to withdrawal that includes appropriate contacts with important state actors could help to create and mobilize such a coalition.³⁷⁵

Threat of program withdrawal carries risks as well, such as the "be careful what you wish for" phenomenon. A targeted state could always acquiesce and return the program to EPA. There also is the possibility of a snowball effect in which states use a variety of strategies to send a mes-

375. EPA would need to avoid running afoul of anti-lobbying restrictions. *See* 40 C.F.R. § 35.4045(b)(3) (1998). In addition to interacting with ENGOS of various persuasions in states in which enforcement performance is lacking, EPA also should consider upgrading its contacts with state Attorneys General. EPA contacts with states tend to rely on the state environmental agency as the hub, at least based on my limited experience. It would be worthwhile to examine more comprehensively the nature of EPA's contacts with different state agency actors. In most states, the Attorney General is an independently elected official. An Attorney General in a state that EPA believes is lax on enforcement potentially has much to gain from "being part of the solution" of enhancing such enforcement. Such an Attorney General can point to EPA concerns about the lack of enforcement and take the position that his/her office is doing something about making sure that pollution does not pay. Further, such an Attorney General can minimize criticism associated with taking an aggressive stance on enforcement by suggesting that his/her office will keep the federal government out and thereby produce better, more home-grown solutions to the problems violators face and are causing. Finally, at least intuitively, on balance, Attorneys General are likely to be more receptive than agency officials to the theme that enforcement of the deterrent-based variety is important because the focus of Attorney General offices is on enforcement rather than on compliance assistance-type activities. It might be worthwhile to examine whether this is the case, perhaps by surveying the respective positions that ECOS and the National Association of Attorneys General ("NAAG") have taken on various issues, among other approaches. In short, it may well be that separately elected Attorneys General in "deficient" states will have the political motivation to enhance state enforcement, and they will be sympathetic to the importance of doing so.

sage to EPA that EPA intrusions into the states' domain will not be welcome but, instead, will prove counterproductive. For example, some non-targeted states might decide to return selected programs to EPA and use a withdrawal proceeding as cover or a pretext for doing so. A coordinated state reaction of the latter variety would test and could conceivably overwhelm EPA's capacity to implement the programs it is withdrawing.

The possible reaction of individual states as well as state organizations such as ECOS is an important variable to consider. They could line up behind EPA's action by endorsing the principle that actions bring consequences and that demonstrated, sustained, deficient state performance leaves EPA with little choice given its national responsibilities for program delivery. On the other hand, there undoubtedly would be considerable sentiment to support the targeted state in order to send a message that federal encroachment on state primacy will be fought vigorously at every turn. The temptation to line up on this side would be strong, especially given the philosophical divide that exists between EPA and many states concerning the need for a strong deterrence-based enforcement presence. Thus, EPA would have to consider strategically how best to approach such a withdrawal proceeding in order to maximize support for its action from state organizations and minimize the negative fallout.

To summarize, program withdrawal is clearly a powerful tool. Its use sends a very strong signal and is likely to trigger strong reactions. GAO and OIG's findings over the years of persistent failures of state performance to meet EPA expectations raise questions about the efficacy of EPA's traditional strategies to address such deficiencies. Particularly if EPA finds that such deficiencies are widespread, it may want to send a message that these results are unacceptable and will not be tolerated. Program withdrawal is one way to send such a message.

E. Using the Public Spotlight to Invigorate State Deterrence-Based Enforcement

A final option for strengthening deterrence-based enforcement, and state deterrence-based enforcement in particular, is also a marked departure from EPA's traditional strategies for addressing deficiencies in enforcement performance. It takes the tack of using a public spotlight, including perhaps a scorecard, to facilitate public scrutiny of enforcement-related government performance in order to motivate improvements. The brief discussion of this concept here has the limited purpose of planting a seed that this disclosure strategy is an idea worth exploring.³⁷⁶ While the

376. See generally TIETENBERG & WHEELER, *supra* note 281. For a more in-depth discussion of "informational regulation," see Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999). For a

public spotlight approach holds considerable promise, implementing it will by no means be hurdle-free. This Part reviews some of the likely advantages of such an approach as well as some of the hurdles.

There are at least three major advantages to the strategy of strengthening government enforcement by placing a spotlight on such practices. First, this is a performance-based approach—what is being spotlighted is the performance of government institutions—and such an approach ties in perfectly with the current mantra of accountability. This mantra has been embraced by a wide range of stakeholders inside and outside of government, including, importantly, state officials themselves. The NEPPS documents are replete with references to the importance of accountability.³⁷⁷ Thus, from an optics perspective this approach should win endorsements based on its status as a performance-based mechanism.³⁷⁸ Creating a spotlight cannot be labeled a “command and control” approach. Again, from an optics perspective, this should gain such an approach a favorable reception and support in many quarters.³⁷⁹

Second, a spotlight approach marries the paradigm of a performance-based approach with the similarly popular notion of increasing transparency in government. The concept of promoting transparency, because it is a useful public policy tool to influence environmentally related behavior for the better, and because it is the “right thing to do” in an open society, has gained strong support in recent years.³⁸⁰ It has probably

discussion of “sunshine” approaches used throughout the world, see EDITH BROWN WEISS & HAROLD K. JACOBSON, *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ACCORDS*, 542–46 (1998).

377. See, e.g., OFF. OF ST. & LOCAL REL., U.S. EPA, JOINT STATEMENT ON MEASURING PROGRESS UNDER THE NATIONAL ENVIRONMENTAL PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 1.

378. EPA has embraced the notion of accountability internally and has also been directed to pursue the notion by Congress. See generally Government Performance and Results Act (“GPRA”), 5 U.S.C. § 306, 31 U.S.C. §§ 1115–1119, 9703–9704; 39 U.S.C. §§ 2801–2805 (1994 & Supp. III 1997).

379. The literature is replete with criticisms of command-and-control approaches. See, e.g., Elliott, *Toward Ecological Law and Policy*, *supra* note 1, at 171–73; Sunstein, *supra* note 376, at 616, 625 (suggesting that “informational regulation . . . has substantial advantages” over command-and-control approaches).

380. The notion of open government has a long history in the United States. The Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (1994), (the Administrative Procedure Act’s requirement for openness in the rulemaking process), and the Federal Advisory Committee Act’s (“FACA”) requirements for transparency, see 5 U.S.C. Appendix §§ 10–11, 13 (1994), are only a few examples. Of course, there are opportunities for obfuscation and withholding of information, but there is a rich historical tradition that governments are to be open with the people they are to serve. See, e.g., David P. Clarke & Katy E. Kunzer, *A New Right to Know*, ENVTL. F., May/June 1999, at 22 (noting that “[w]e have heard that phrase [right to know] repeated so often in the environmental and regulatory debates of recent years that, arguably, one could describe the past decade as ‘the right to know era’ of our evolving environmental protection system”); Sunstein, *supra* note 376, at 613, 616 (noting that “informational regulation, or regulation through disclosure, has become one of the most striking developments in the last generation of American law[.]” and that “disclosure of information has become a central part of the American regulatory state—as central, in its way, as command-and-control regulation and economic incentives” (emphasis in

received greatest attention in the context of the Toxics Release Inventory ("TRI") program,³⁸¹ where many commentators and government officials have touted pollution reductions achieved by requiring regulated parties to disclose the levels of their waste generation, emissions, and discharges.³⁸² EPA officials have embraced this concept, and the related notion of fostering transparency whenever possible, in a range of contexts.³⁸³ The Sector Facility Indexing Project ("SFIP") is intended to make transparent regulated parties' performance in terms of compliance status, among other things.³⁸⁴ It seems only fair that EPA should consider making governments' performance in the enforcement and compliance arena equally transparent.³⁸⁵

Third, there appears to be a wide variety of possible vehicles for implementing a spotlight approach. The Internet is an exceptional vehicle for disseminating information. EPA has made impressive strides in recent years in taking advantage of this tool to improve accessibility of a wide variety of information and analyses.³⁸⁶ The Agency has considerable po-

original)).

381. 42 U.S.C. § 11023 (1994).

382. See, e.g., ENVTL. L. PRACTICE GUIDE §18A (Michael B. Gerrard ed., Matthew Bender 1995). While not everyone shares this view, it is widely believed. See, e.g., Sunstein, *supra* note 376, at 622 (characterizing this program as "an exceptional success story . . .").

383. See, e.g., OECA, U.S. EPA, *Sector Facility Indexing Project Introduction and Overview* (last modified May 7, 1999) <<http://es.epa.gov/oeca/sfi/overview.htm>> (noting that the Sector Facility Indexing Project ("SFIP") is a "pilot project that makes it easier for the public to access a wide range of environmental information about regulated facilities"). See also 63 Fed. Reg. 27,281 (May 18, 1998) (announcing Internet availability of data in the SFIP). EPA notes that it "anticipates that improved public access to data will provide an additional incentive for companies to maintain exemplary environmental records, and may encourage some companies to improve their performance and solve existing problems without government intervention." *Id.* at 27,281. Similarly, one of EPA's reasons for opposing state audit privilege laws is that such laws reduce transparency, i.e., public access to compliance-related information. See *supra* note 370 and accompanying text. Another example of EPA's push for transparency is the Environmental Monitoring for Public Access & Community Tracking ("EMPACT") program. This initiative is intended to deliver accurate, timely, and useful environmental and public health information directly to communities and individuals. See generally U.S. EPA, *EMPACT—A New Approach to Providing Timely Environmental Information to Communities Across the Nation* (last modified September 16, 1998) <<http://www.epa.gov/empact/factsht.htm>>.

384. See, e.g., OECA, U.S. EPA, *Sector Facility Indexing Project Introduction and Overview*, *supra* note 383.

385. Indeed, a 1999 GAO report suggests that "[a] key intended benefit and one of the seven principal components of NEPPS . . . is the opportunity to share information with the public on state . . . performance EPA and state officials told us that increased public participation and involvement remains a principle benefit of the EPA-state NEPPS process, but its full potential is largely unmet." U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 56.

386. EPA's creation of the Center for Environmental Information and Statistics ("CEIS") is likely to lead to easier access to information in EPA's database. See U.S. EPA, *Center for Environmental Information and Statistics* (last modified June 15, 1999) <<http://www.epa.gov/ceisweb1/cesi>> for an overview of CEIS. Advances in electronic reporting are likely to help as well. See TIETENBERG & WHEELER, *supra* note 281, at 2

tential to continue to refine and enhance its use of this extraordinary tool for public disclosure and dialogue in the future. One option is to make data relevant to the key barometers of state enforcement performance accessible through the Internet.

Further, a variety of tools to organize and disseminate information in the enforcement context already exists. EPA's *Enforcement and Compliance Assurance Accomplishments Report*³⁸⁷ is perhaps EPA's best vehicle for systematically reporting on EPA and state enforcement and compliance achievements and challenges.³⁸⁸ EPA publishes these reports annually. They are intended to provide a relatively comprehensive picture of government enforcement and compliance-related activity and accomplishments.³⁸⁹ State "State of the Environment" reports are another vehicle that are worth tapping as a mechanism for communicating important information to the public, including information relating to enforcement and compliance performance. Increasing numbers of states have begun to develop such reports in recent years. A discrete report modeled after the TRI reports, in which states and EPA Regions would be listed in order of their performance under specific benchmarks, is another possibility, as is a scorecard that takes the next step of rating performance.

In the view of many observers, a carefully structured spotlight may be effective in promoting improved performance. In fact, EPA is already implementing a version of this idea through the SFIP initiative. EPA seems convinced that the spotlight it is placing on regulated parties through the SFIP initiative will cause such parties to improve their performance, including their compliance with legal requirements.³⁹⁰ As noted above, the TRI program has been widely credited with producing significant reductions in pollution releases.³⁹¹ The authors of one recent article that evaluated a variety of "disclosure strategies" used throughout the world concluded that they "can be effective in motivating environ-

(noting generally that the increasing role for disclosure strategies "seems to emanate from the increasing perceived need for more regulatory tools . . . ; the falling cost of information collection, aggregation and dissemination; and the rising demand for environmental information from communities and markets. Rising benefits and falling costs imply that public disclosure merits a close look, even if it has been perceived as inefficient in the past.").

387. The FY 1994 report indicates that the title was revised that year from Enforcement Accomplishments Report to reflect the changed mission of EPA's OECA, which was created that year. U.S. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1994, EPA-300-R-95-004 (1995).

388. In addition to this annual report, EPA's OECA maintains a part of EPA's Web page and regularly provides helpful information through this and other mechanisms.

389. The reports contain some information on state performance but the focus is on federal activity. The FY 1997 report introduction notes that it is "designed to provide an overview of the significant achievements by EPA's headquarters and [R]egional offices during the past Fiscal Year." U.S. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1997 1-2 EPA-300-R-98-003 (1998).

390. See *supra* note 384 and accompanying text.

391. See *supra* note 382 and accompanying text.

mental improvement.”³⁹² Some have labeled such strategies the “third wave” of pollution control policy.³⁹³

Despite its advantages and apparent promise, several hurdles exist to making such a public spotlight a reality. First, it is a natural human tendency to prefer not to be judged and have one’s “warts” placed in the public spotlight. The content of the EPA annual reports is revealing. To say that EPA emphasizes the positive would be a substantial understatement. The 1996 *Enforcement Accomplishments Report*, for example, concludes that government enforcement efforts are having considerable success in discovering violators and requiring them to resolve their violations:

When EPA and the states combine efforts and present a unified enforcement approach, Americans can be assured that those violating environmental laws and endangering health and the environment will be discovered, and the problems will be fixed The . . . data indicate that the Agency is focusing efforts on the most serious pollutants and potential risks, making the polluter pay for noncompliance and securing settlements that have a “real world” impact on protecting health and the environment.³⁹⁴

Along the same lines, EPA notes in the Report that its compliance and enforcement programs “ensure the overall quality of environmental performance remains high. These programs ensure that all regulated entities comply with their environmental requirements, regardless of their specific sector, size, or location.”³⁹⁵ This statement, as EPA itself has made abundantly clear elsewhere,³⁹⁶ depicts a level of compliance with environmental legal requirements that is quite removed from reality.

The most recent *Enforcement Accomplishments Report* at the time this Article was prepared, the 1997 report, takes a similar tack. As the Report Introduction puts it, “[t]his accomplishments report documents

392. TIETENBERG & WHEELER, *supra* note 281, at 25.

393. *Id.* at 2; see also Shakeb Afsah, et al., *Regulation in the Information Age: Indonesian Public Information Program for Environmental Management* (last modified May 25, 1999) <http://www.worldbank.org/nipr/work_paper/govern> (suggesting that there is considerable potential to the idea that the “regulator can gain important leverage through programs such as public disclosure which harness the power of communities and markets,” based on an Indonesian program in which the Indonesian Environmental Ministry, *inter alia*, created an evaluation scheme for regulated parties, rated the parties, and reported the evaluations to the press); Sunstein, *supra* note 376, at 625–26 (discussing strengths of “informational regulation,” including its “primary virtue,” notably that it “triggers political safeguards and allows citizens a continuing oversight role” Professor Sunstein recognizes that informational regulation may be inferior to other forms of regulation in some cases. See *id.* at 626–29).

394. OECA, U.S. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1996 2-1 & 2-9 EPA-300-R-97-003 (1997).

395. *Id.* at 3-20.

396. See *supra* notes 228–244 and accompanying text.

the achievements of the past Fiscal Year These programs and policies work in concert to bring measurable results to the American people—cleaner and healthier air, water, and land.”³⁹⁷ In describing the results during FY 1997, EPA states that it “continu[ed] to effectively use its three primary tools—enforcement, compliance incentives, and compliance assistance” and it touts the fact that it “again achieved records in actions taken and completed, and penalties assessed and collected.”³⁹⁸

This positive tone characterizes much of EPA’s public position on enforcement and other matters.³⁹⁹ At least some commentators have suggested that this positive gloss is counterproductive. They point out that if things are going well, the need for change seems less urgent and change, accordingly, is less likely to occur even if needed.⁴⁰⁰ Yet raising concerns about the quality of government performance is a sure strategy to invite scrutiny relating to the government practices at issue. Many would suggest that the current political modus operandi is to stay one step ahead and not disclose all, avoiding exposure of one’s warts to public display and criticism. Thus, EPA’s willingness to provide a balanced picture of its enforcement and compliance program—warts as well as beauty marks—is in issue.

States sensitive about their performance are not likely to jump at the prospect of having such performance made easily accessible to the populace, or to being “graded” based on such performance. The concerns many states express regarding EPA’s SFIP initiative likely is the harbinger of the reaction to an EPA initiative to spotlight government enforcement and compliance practices.⁴⁰¹ The SFIP, as noted above, provides for dissemination of compliance-related information concerning regulated parties. Many states urged a slow approach for this initiative on a variety of grounds.⁴⁰² States undoubtedly would bring these arguments to the table once again, and their level of concern would inevitably be much greater because their own performance would now be directly under the spotlight.

397. U.S. EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1997, *supra* note 389, at 1-1.

398. *Id.* at 2-1.

399. See, e.g., Herman, *Innovations in Environmental Enforcement and Compliance*, *supra* note 282, at 3 (noting that: “[t]he principal building blocks of an integrated enforcement and compliance assurance strategy are now in place—and we can see many positive results;” noting with respect to the state/EPA relationship in particular that “[b]ecause of the vital role states play in implementing environmental programs, one of our most important efforts has been establishing more effective partnerships with states to improve our collective compliance and enforcement capacity;” and noting again, “[t]his three-prong approach—enforcement, compliance incentives, and compliance assistance—is reaping great dividends in terms of protecting the public and the environment”).

400. See Steinzor, *supra* note 18, at 10,363.

401. See ECOS, RESOLUTION NUMBER 97-5: SECTOR FACILITY INDEXING 1 (1997).

402. See *id.*

Data-related issues are another hurdle to developing and implementing a responsible spotlight approach. As discussed in detail in Part IV, data quality and quantity problems exist with respect to enforcement and compliance information. EPA would need to treat this issue in its creation of a spotlight on government enforcement practices, as it has tried to do in the SFIP context, in which similar issues were raised.⁴⁰³ In

403. See *EPA Will Place Facility-Specific Enforcement Data Online*, REINVENTION REP., Aug. 11, 1999, at 9 (reporting that EPA plans to place facility-specific enforcement and compliance data on the Internet in an effort to “boost the public’s access to information” and, hopefully, to “boost . . . compliance with environmental laws . . .” and noting that “industry officials . . . are wary of the effort, arguing that EPA’s enforcement data is grossly inaccurate and could create major headaches for the regulatory community and state enforcement officials”). Similar complaints are inevitable with respect to efforts to publicize government enforcement performance.

One study of compliance with various air regulatory requirements recently reported by the EPA concluded that “it would be misleading or useless to attempt to compare compliance rates across states” because of a series of problems, including “[t]he lack of accurate, reliable, commonly accepted compliance indicators, including concerns over differences in facility size and complexity, levels and quality of inspections, severity of non-compliance, practices for resolving violations informally, etc.” OFF. OF PLANNING & POLICY ANALYSIS, U.S. EPA, COMPLIANCE INFORMATION PROJECT: LITERATURE SUMMARIES 44–47 (1999) (summarizing Woodward-Clyde International Americas, Colorado Compliance Study (Aug. 1, 1997)); see U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 25–26, 43–44 (noting, *inter alia*, that “Florida officials . . . told us that their recent environmental reports showing industry-wide compliance rates generally have a baseline of 1997 or 1998, because past information is unavailable or unreliable;” “quantifying industry-wide compliance rates and other outcomes has been complicated by the difficulty of deciding both how to define a compliance rate and how to calculate it;” and “[t]hese challenges have led some state officials to note that it may be exceedingly difficult to achieve comparability from state to state, both in what is being measured and the methodology used in gathering data.”). GAO continued that “states presently do not have the data to support their contentions that environmental compliance is still being achieved in cases where their enforcement activity has been curtailed . . .” *Id.* at 43. ECOS’s Director of Research acknowledges deficiencies in this area in a recent article:

Many States have . . . emphasized “compliance” over enforcement. Methodologies for counting compliance assistance activities appear to still be inadequate and are a matter of current research by EPA and the States. As a result, it appears EPA and many States themselves do not track compliance assistance efforts that States undertake. Unfortunately, this means that States and EPA [and the public] may not be able to count some of the most important “enforcement actions” that States undertake.

R. Steven Brown, *The States Protect the Environment*, ECOSTATES, Summer 1999, at 3, 5; see also *EPA Tells States Enforcement Data Is Reliable Despite Flaws*, *supra* note 245, at 4 (noting that there remains a “lack of state resources and desire to institute new, performance-based enforcement measurement systems”). Despite its leadership in the effort to improve compliance data, see, e.g., *Internal EPA Review Finds State, Regional Enforcement Activity Slumping*, *supra* note 245, at 15 (citing one EPA headquarters official’s statement that Florida is “doing some really good things” in developing alternative performance measures), Florida apparently is one of the states that conceded this reality to GAO:

Florida officials . . . told us that the number of penalties assessed, and dollar value of penalties collected, under its federally delegated programs decreased

doing so, EPA would want to maximize incentives for improved data gathering, analysis, and reporting, and to minimize opportunities for mischief on any of these fronts.⁴⁰⁴ Any self-reporting scheme would need to contain quality control measures to promote data reliability as well as public confidence. The use of government auditors in appropriate ways, and the potential for a third party auditing scheme, are among the options that could be considered.

Another hurdle involves the substance of the information to be placed in the spotlight. On the positive side, the ongoing initiative to move to a performance-based system, and the shared value that such measures are an important area of focus, creates opportunities for EPA to create a spotlight approach. This initiative, however, also poses challenges for EPA's ability to ensure that any spotlight puts adequate attention on deterrence-based enforcement practices. Further, despite the progress made on the measures front it will be difficult to establish criteria to evaluate performance.⁴⁰⁵

EPA's challenge in shaping the ongoing measures approach—incorporating adequate information to review states' performance in conducting deterrence-based enforcement in light of EPA expectations—should not be underestimated. Much of the effort in the measures context has been to expand them beyond the types of activities traditionally associated with deterrence-based enforcement. Further, as noted above, many states oppose a focus on the latter and strongly favor alternative approaches to promoting compliance. Finally, the strong move to reduce state reporting to EPA may complicate EPA's ability to compile the information necessary for evaluation of states' performance concerning

from 1994 to 1996, and that questions were raised as to whether these decreases resulted, at least in part, from a greater emphasis on the use of assistance to achieve compliance. In fact, newspapers in the state subsequently published articles questioning whether the state was letting violators continue to pollute without fear of punishment. Florida officials told us that their major investment in measuring the results of their enforcement and compliance assistance efforts was undertaken, in part, to determine whether these concerns were well-founded.

U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 44.

404. Electronic reporting is one of the emerging tools that may help. Some are hopeful that EPA's recent reorganization of its information efforts will contribute to improved handling and management of data as well. Concerning these opportunities and the challenges that exist in using them effectively, see, e.g., John Chelen, *Erasing the Data Deficit*, ENVTL. F., Jan./Feb. 1998, at 46 (noting that EPA's new information Office "promises a new era for advanced environmental information systems and services" and that "[a]lthough we have faced a myriad of conflicting data standards and isolated systems in the past, we can look forward to an integrated 'information backbone' that will support the Agency's most critical regulatory, enforcement, and analytical missions").

405. See U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 38, 61.

deterrence-based enforcement of the sort EPA identifies as important in its enforcement and response policies.⁴⁰⁶

In implementing a spotlight approach, three areas would seem to be central among those included in any annual or other systematic review of enforcement and compliance activities:

(1) the need for enforcement in particular jurisdictions—the number and severity of violations and, related, compliance rates and the nature of the environmental harm or risk resulting from non-compliance in the jurisdiction;

(2) the extent of enforcement—information relating to the level of monitoring activity, such as the number and quality of inspections, information relating to the level of government enforcement such as the numbers of cases, and information relating to the quality of government enforcement, such as the extent of compliance with EPA policy requirements;

(3) the accomplishments of enforcement—compliance rates, the additional pollutant loadings resulting from violations, the harm being caused or threatened by such violations, and the extent to which enforcement has reduced such illegal loadings and diminished such threats.⁴⁰⁷

A final challenge, in addition to determining the appropriate focus of any spotlight, is to determine the types of rewards/sanctions or grading system to use. TRI is simply a list of regulated parties that release various pollutants. The goal of a regulated party under the TRI system is not to be on the list or, if that is unavoidable, not to be at the top. EPA may simply want to report or provide information as it does for TRI and leave it to the NGOs to create scorecards or variations on such a theme. Alternatively, EPA may want to include an assessment of performance, through use of a scorecard or similar device.⁴⁰⁸

406. See, e.g., *U.S. EPA-State Partnership on Burden Reduction*, DAILY ENV'T REP. (BNA), Apr. 13, 1999, at E-1.

407. Compliance rates can, of course, be defined in many different ways and based on many different methodologies. See, e.g., OFF. OF PLANNING & POLICY ANALYSIS, U.S. EPA, COMPLIANCE INFORMATION PROJECT: LITERATURE SUMMARIES, *supra* note 403, at 21, 24 (discussing a Massachusetts approach that measures compliance trends based on the "percentage of non-compliant pollutant load discharged" and a Florida strategy that measures compliance rates based on "the number of facilities inspected found to have no significant violations divided by the total number of facilities inspected"); U.S. GAO, ENVIRONMENTAL PROTECTION: COLLABORATIVE EPA-STATE EFFORT NEEDED TO IMPROVE NEW PERFORMANCE PARTNERSHIP SYSTEM, *supra* note 255, at 26. EPA has started to provide information in recent years concerning the volumes of pollutants reduced through enforcement actions, but it has not provided key contextual information, such as the total volume of illegal pollution created, at least so far as I am aware.

408. See, e.g., Afsah, *supra* note 393 (discussing an Indonesian program that rated the environmental performance of factories through use of a simple color-rating scheme). As two commentators who reviewed this program conclude, data from the program suggest that it was highly successful, especially concerning plants that were rated as below average. See TIETENBERG & WHEELER, *supra* note 281, at 18. These commentators report that

The bottom line is that it is time for EPA to begin to have a conversation with the states and other key stakeholders concerning these issues if EPA is serious about shoring up deficiencies in deterrence-based enforcement.⁴⁰⁹ The federal government has certain expectations in the context of deterrence-based enforcement. To a significant extent it relies upon states to meet these expectations, and it is accountable for their doing so. With the strong interest in and acceptance of the principles of accountability and transparency, it seems appropriate to consider using strategies based on the latter to achieve the former.⁴¹⁰ This is particularly the case where traditional strategies do not appear to have had great success in accomplishing their intended goal of creating a nationally consistent set of policies and practices for using deterrence-based enforcement.⁴¹¹

the success of this Indonesian rating scheme has led several other countries to try it, including the Philippines, Mexico, and Colombia. *See id.* at 19. These commentators also highlight the importance of the type of spotlight used to the effectiveness of the program. *See id.* at 18, 23.

409. This proposed approach certainly has potential applicability beyond the immediate focus of this Article, which is developing a strategy or suite of strategies to achieve goals in terms of deterrence-based enforcement.

A recent article by Peter D. Robertson, Acting Deputy Administrator of EPA, contains some rhetoric that suggests an interest in pursuing this approach generally. Acting Deputy Administrator Robertson indicates that a "Joint ECOS/EPA Information Management Work Group," created in Jan. 1998, has adopted the following "vision":

The States and USEPA are committed to a partnership to build locally and nationally accessible, cohesive, and coherent environmental information systems that will ensure that both the public and regulators have access to the information needed to document environmental performance, understand environmental conditions, and make sound decisions that ensure environmental protection.

Robertson, *Stronger Partnership: How States and EPA Can Improve Performance and Build Public Trust*, *supra* note 127.

Acting Deputy Administrator Robertson suggests that "[b]etter environmental information—and better use of that information—will be a cornerstone for improving public health and environmental protection in the future." *Id.*

410. There is at least the possibility that being forthright and straightforward may win credibility with the press and public, and that this credibility may help government deal with some of the tough spots they need to address in the effort to upgrade enforcement. For one view that such an approach is a good strategy, see, e.g., David Grann, *The Hero Myth*, *THE NEW REPUBLIC*, May 24, 1999, at 24, 30 (describing Senator John McCain as "blunt and open" and explaining that "McCain seems to understand that, in an age in which the press will find you no matter where you hide, candor can become the only form of guile").

411. A final challenge would be to encourage states to serve as "laboratories of democracy." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Markell, *States as Innovators*, *supra* note 114, at 353. EPA would, among other things, presumably not want to demand success up front for state-initiated experiments. See generally, U.S. GAO, *ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS*, *supra* note 31, at 31 (suggesting that EPA has taken such an approach in some situations and citing EPA Region 10's approach to declines in Washington State pesticides enforcement. Washington apparently had informed EPA that the State had increased technical assistance efforts, thereby reducing the need for enforcement. The GAO reports that the Region was unconvinced "in the absence of hard data

VII. CONCLUDING THOUGHTS

Let us begin this conclusion by reviewing the ground we have traveled. What is known about the federal/state relationship in the world of environmental enforcement? The basic landscape of this relationship as it enters the 21st century is clear. There appear to be at least four central elements to this relationship. First, there is a network of federal environmental laws that are intended to protect human health and our environment from various forms of pollution, and the Congress has made the federal EPA responsible for implementing these laws and ensuring that appropriate enforcement is taken when violations occur. Thus, ultimate accountability for enforcement of the federal environmental laws rests with EPA.⁴¹²

Second, in fulfilling this responsibility EPA has established the following two objectives, among others. It is striving for a basic level of national consistency, so that there will be a relatively level playing field for regulated parties regardless of where in the United States they operate. EPA intends that a central feature of this nationally consistent landscape should be the existence of a strong deterrence-based enforcement presence. EPA expects that regulated parties that commit significant violations of the environmental laws should be punished appropriately. Further, EPA has defined an "appropriate" level of punishment to include penalties that disgorge significant violators' economic benefit of non-compliance and include an additional penalty to put violators in worse shape financially than if they had complied. The putative benefits of such a national enforcement and compliance strategy include: (1) promoting specific deterrence, (2) promoting general deterrence, (3) creating a level playing field, and (4) enhancing credibility of the environmental regulatory system. While EPA has tinkered with this formula around the edges in recent years through a variety of compliance incentive policies, the Agency still appears committed to the formula as national policy when significant violations occur. EPA's launch of a wide variety of compliance assistance strategies to minimize violations through educational outreach and other approaches similarly does not appear to have altered this formula when violations occur.

The third key feature of the federal/state relationship is the division of responsibilities between EPA and the states. While EPA is accountable

supporting this claim," and EPA informed the State that "until EPA is assured that through comprehensive compliance data that technical assistance results in compliance comparable to traditional enforcement, EPA will require that enforcement efforts be maintained."); Statement of Larson, *supra* note 20, at 11, 13 (indicating that requiring a showing of success up front is likely to discourage experiments that hold substantial promise).

412. The extant laws mandate federal oversight both in authorizing state programs in the first instance and in reviewing state performance. Thus, EPA does not have the option under current law to say "go to it states, you're on your own." Instead, it is obligated to oversee state performance to ensure it is adequate.

for producing results and has the authority to establish national policy direction, the Congressional vision embodied in our national environmental legal framework is that EPA would rely on qualified and interested states to do most of the real implementation and enforcement work, rather than perform these functions itself. One of the developments over the past quarter century is that states have increasingly seized this opportunity and now conduct the vast majority of enforcement in this country. Thus, EPA is increasingly reliant on state performance in order to accomplish national objectives. The related development in this area is that EPA's leverage over the states appears to have diminished over the years. Many state programs have grown and become more professional and expert over the past two or three decades. With this maturation at the state level, state agencies are increasingly feeling their oats; they have gained confidence in their abilities to set policy as well as implement it. States are increasingly dissatisfied with a role as EPA dependents or subordinates and increasingly insist on changing the terms of this relationship to one of partners. Further, states are much less reliant on federal financial support than in the past, buttressing their case for a more equal role and reducing federal influence over state behavior.

The fourth key feature of the EPA/state relationship is that there is a great deal of disagreement over the appropriate government strategies to promote compliance. Many states disagree with EPA's vision that deterrence-based enforcement must be a central part of a government enforcement and compliance program. They urge, instead, that more flexible and regulated party-friendly approaches are superior. They argue that carrots work better than sticks and that enforcement and compliance policy needs to evolve to reflect this reality. Further, they seize on Justice Brandeis' famous notion that states are the U.S.'s "laboratories of democracy"⁴¹³ to urge that states be given the flexibility to explore various strategies to promote compliance rather than be locked into EPA's one-size-fits-all, command and control approach.

Moving from the elements of our system of environmental laws to the results it has produced, our federalized system, in which shared values concerning the appropriate role of deterrence-based enforcement are lacking, appears to be characterized by significant gaps between federal expectations and the results produced primarily through state effort. The picture the GAO and OIG paint in their series of audits over the past few years indicates an enormous divide may exist between the federal government's rhetoric concerning deterrence-based enforcement and the goal of a level playing field nationwide, and the reality produced by several state enforcement efforts.⁴¹⁴ It is, of course, important to test these

413. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

414. See Part IV *supra*.

findings concerning various states' performances and determine whether they are anomalous or representative.⁴¹⁵

EPA has several options in its search for strategies to narrow this apparent divide. First, EPA could, of course, eliminate much of the gap by changing its expectations. EPA's leadership, however, has reaffirmed on many occasions the Agency's intention to retain deterrence-based enforcement as a central part of its compliance and enforcement scheme. As a result, as noted above, this Article does not focus on or analyze the merits or likelihood of EPA's changing its tune on this front.⁴¹⁶

Second, the Agency has the option of pinning its hopes on NEPPS, the still-evolving operating framework for the reinvention of the state/federal relationship, as a mechanism that will be effective in bridging the gap between EPA expectations and state performance. NEPPS articulates several themes that could help to accomplish this goal. Perhaps most significantly, it embraces the notions of differential oversight and divisions of direct enforcement responsibility. The former has significant promise as a tool to create an appropriate set of rewards and sanctions to motivate states to perform to EPA expectations. The latter has promise on this front as well, and also provides a mechanism for us-

415. The value of such reviews would be enhanced by including an independent analysis of various underlying issues referred to above, such as data quality and the reasonableness of definitions of significant violators. *See supra* notes 183, 197-201, and 245.

416. As suggested above, one reason for changing its vision could be that EPA becomes convinced that "softer" approaches to promoting compliance are as effective as, or even more effective than, traditional, deterrence-based strategies. There are other reasons as well. For example, EPA could embrace "enforcement flexibility" as a de facto strategy to inject a degree of reasonableness into laws that it believes overreach in one way or another. *See, e.g.,* Union Elec. Co. v. EPA, 427 U.S. 246 (1976) (insisting that certain regulatory requirements be met regardless of how unreasonable they may be, but ultimately acceding to the possibility that exercise of discretion in the enforcement arena might delay compliance). One commentator identifies a variety of other reasons as well in a somewhat different but analogous context:

It is also important to acknowledge that to some degree interest in cooperative approaches may have little to do with the effectiveness of regulation in achieving environmental objectives. Governments routinely balance multiple policy objectives in choosing policy instruments. The choice of cooperative approaches thus may be driven more by concerns about the impacts of inflexible regulations on industrial competitiveness than by a desire to achieve a higher level of environmental protection. Alternatively, governments placing a high priority on deficit reduction may embrace voluntary cooperative approaches simply because they can no longer afford to pursue regulatory programs in the face of budgetary restraint

Politicians may embrace cooperative non-regulatory approaches because they are unwilling to impose the costs of regulation on powerful business interests. The fact that cooperative approaches can be adopted for reasons that have little to do with environmental or other policy objectives . . . provides all the more reason to carefully evaluate the effectiveness of these new approaches to environmental protection.

Harrison, *Talking with the Donkey: Cooperative Approaches to Environmental Protection*, *supra* note 11, at 53.

ing federal resources to supplement state enforcement efforts in a strategic way so as to strengthen deterrence-based enforcement where such is most needed.⁴¹⁷

NEPPS also, however, carries seeds for complicating EPA's efforts to have states meet EPA expectations in terms of deterrence-based enforcement. Since at least 1993 (and the amendment of the State/EPA Framework), a key goal has been to "harmonize" EPA and state performance in the enforcement arena. The intended substantive outcome of this harmonization was consistent performance in pursuing deterrence-based enforcement. It is difficult conceptually, and it may prove impossible in the real world, to combine this goal of harmonization with several key tenets of NEPPS. Enhanced state autonomy is a central theme of NEPPS and would seem to decrease the likelihood that states will follow the letter of EPA enforcement policies, including the State/EPA Framework and EPA's penalty and enforcement response policies. NEPPS' embrace of both an expanded menu of enforcement and compliance tools, and a revamped set of performance measures is, similarly, likely to diminish the importance of deterrence-based enforcement as a focus of state/EPA discussions. NEPPS also may lead to a shift in the nature of EPA oversight from case-specific to more programmatic. These features of NEPPS are likely to reduce EPA's leverage to push states to strengthen their deterrence-based enforcement efforts to conform to EPA expectations and benchmarks. State efforts to conduct deterrence-based enforcement under the "reinvented" state/federal partnership as operationalized in the NEPPS agreements will need close attention. This Article does not take a position as to whether state "shortfalls" in this area represent a good or bad outcome; it does suggest, however, that these core features of NEPPS may lead to such an outcome.

More generally, with regard to the issue of options or strategies to narrow the divide between EPA expectations and government performance, the Article offers a basic conceptual framework for considering how best to upgrade state enforcement and deterrence-based enforcement within the context of NEPPS or otherwise. It identifies a variety of strategies to achieve this goal. These strategies range from EPA's making clear to states its expectation that states will operate deterrence-based enforcement programs that conform to the guidelines contained in the state/EPA Policy Framework and various EPA enforcement response and penalty policies, to an oversight scheme tailored to promote desired state

417. It will be important to monitor the NEPPS process to evaluate the extent to which these tools are used effectively to upgrade state deterrence-based efforts and deterrence-based enforcement in general. With respect to differential oversight, for example, it will be important to examine whether EPA establishes clear benchmarks of state performance that trigger different levels of oversight, whether EPA follows through on any such benchmarks, and whether the details of any differential oversight scheme are structured so as to create meaningful incentives for states to engage in deterrence-based enforcement.

behavior, to a more active EPA direct enforcement role intended both to induce desired state behavior and to contribute to the existence of a consistent deterrence-based presence nationwide (direct enforcement options include overfilings, a division of enforcement responsibilities, and the "nuclear bomb" of program withdrawal). The Article also suggests the possibility of a public spotlight on government enforcement performance as a strategy to improve such performance.

This Article closes by suggesting that EPA, and others, would be particularly well-served by devoting renewed energy to developing and implementing a "spotlight" strategy. A myriad of factors makes this a propitious time to pursue such a course, including the growing popularity of "spotlight" approaches, and increasing receptiveness to the notions of transparency and government accountability.⁴¹⁸ It may well be that if EPA

418. See *supra* notes 376–386; see also Joint EPA/State Agreement to Pursue Regulatory Innovation, 63 Fed. Reg. 24,785, 24,788 (May 5, 1998) (in which the signatory states agreed that accountability must be an essential feature of innovative efforts: "Innovations must be based on agreed-upon goals and objectives with results that can be reliably measured in order to enable regulators and stakeholders to monitor progress, analyze results and respond appropriately."); U.S. GAO, ENVIRONMENTAL PROTECTION: EPA'S AND STATES' EFFORTS TO FOCUS STATE ENFORCEMENT PROGRAMS ON RESULTS, *supra* note 31, at 30 (noting states' agreement that there is a need to show "accountability to the public and the media . . ." who otherwise would likely be critical of a state's enforcement record if "traditional measures" of enforcement showed declines in activity and results, and similarly noting that "without tangible, measurable proof that the [new, compliance-oriented] strategy maintained or improved either compliance or environmental quality, [states] found themselves vulnerable to criticism that they were 'going soft on polluters.'" *Id.* at 6).

Increasing government accountability in this way could, at least potentially, increase public confidence in government. Many thoughtful officials have noted that such confidence is likely to be an essential commodity in the struggle to "reinvent" environmental regulation. See, e.g., *Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 3 (1997) (prepared statement of Langdon Marsh, Director, Oregon Department of Environmental Quality) (noting that "trust—by industry, state, and federal agencies, and the public—is a fundamental ingredient for meaningful reform"); see also *More Dialogue with Stakeholders*, BUSINESS AND THE ENVIRONMENT, Nov. 1998, at 5 (citing the statement of Jeroen van der Veer, a Shell Managing Director, that "[a]n institution or an enterprise cannot just say '[t]rust me' and expect instant acceptance The constant demand is: 'Tell me, show me, I'll judge for myself.'"). This may well be especially the case with respect to environmental enforcement. There already appears to be considerable skepticism concerning government enforcement efforts. The *New York Times* has published a number of articles on this topic. See, e.g., John H. Cushman, Jr., *E.P.A. and States Found to be Lax on Pollution Law*, N.Y. TIMES, June 7, 1998, at 1; John H. Cushman, Jr., *Virginia Seen as Undercutting U.S. Environmental Rules*, N.Y. TIMES, Jan. 18, 1997, at A1; John H. Cushman, Jr., *States Neglecting Pollution Rules, White House Says*, N.Y. TIMES, Dec. 15, 1996, at A1. *U.S.A. Today* published a "special report" on Oct. 22, 1998, in which it was highly critical of the lack of enforcement under the Safe Drinking Water Act. See Eisler et al., *supra* note 278, at 15A (finding, inter alia, that "the federal and state programs charged with enforcing the nation's safe drinking water laws aren't working, undermined by inadequate funding, inaccurate data, a soft regulatory approach and weak political support," and noting that 47% of respondents to a U.S.A. TODAY/CNN/Gallup Poll "won't drink water straight from the tap." *U.S.A. Today* described the system as follows: "States are supposed to enforce the rules with their own oversight programs, empowered to go after lawbreaking water systems with orders, fines and lawsuits. The EPA is supposed to take action when a state does not—and take over a state's water program if it consistently fails to do its job. It's not happening." *Id.* at 16A.). See also Traci Watson, *Study: 4 of 10 Factories Violated Clean Air Act*, U.S.A. TODAY, May 20, 1999, at 3A (opening with the statement that "[a]most four of every 10 factories tracked in a federal data-base were

is unwilling or unable to hold states, and itself, publicly accountable for a certain level of deterrence-based enforcement performance, then perhaps the writing is on the wall that the EPA lacks the capacity to create and administer a national deterrence-based enforcement and compliance system under our federalized structure.

guilty of significant violations of clean-air rules over a two-year period" The article continues that the report on which it is based "blames problems in part on the states, which are responsible for enforcing federal rules. It also blames the EPA for poor oversight." *Id.*)

Indeed, the perception in some quarters that states sometimes act to shield violators from citizen suits highlights the challenge the government faces in engendering the desired sense of trust. *See supra* note 9 and accompanying text; *see also* Peter Lehner, *To Relieve Unfunded Mandates and Enhance Local Autonomy: Enact a "Municipal Empowerment Act,"* 25 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,205, 10,206 (1995) (suggesting that "targeted defendants [in citizen suits] often seek the protection of a state consent order from citizen action"). A concern that recent court decisions have weakened this "third key leg" of environmental enforcement, citizen actions, may well raise the level of apprehension about the entire enforcement apparatus. *See Hodas, supra* note 9, at 1560-61 (discussing the "triangular structure of federal, state, and citizen enforcement" and concluding that the governments' collective efforts "will forever be unable . . . to cope effectively with the constant flood of environmental law violations . . . [and that] only extensive use of citizen suits . . . can safeguard the enforcement system from collapse and prevent states from using lax environmental enforcement as an economic development tool"); Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Environmental Law*, 68 *LAND ECON.* 28 (1992) (discussing the relationship between citizen suits and public enforcement); William Glaberson, *Novel Antipollution Tool is Being Upset by Courts*, *N.Y. TIMES*, June 5, 1999, at A1 (noting that, *inter alia*, "[a] quarter-century after Congress gave citizens broad powers to enforce environmental laws through private lawsuits, judges across the country are cutting back on those suits so deeply that environmental groups have lost much of their power in court, legal experts on both sides of the issue say The trend, some experts say, is one of the least noted but most profound setbacks for the environmental movement in decades."). Media attention is likely to increase with the issuance of reports like that published on June 24, 1999 by the Georgetown University Law Center Environmental Policy Project, entitled *BARELY STANDING: THE EROSION OF CITIZEN "STANDING" TO SUE TO ENFORCE FEDERAL ENVIRONMENTAL LAW 1* (1999) (reiterating the theme suggested by the report's title, providing that "[t]he ability of American citizens to vindicate their legal rights to a clean and healthy environment is rapidly eroding").