

THE STATE OF ENVIRONMENTAL ENFORCEMENT

**The Failure of State Governments to Enforce Environmental
Protections and Proposals for Reform**

Tony Dutzik

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1530 Blake St., Suite 220
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EXECUTIVE SUMMARY

Thirty years after the passage of the Clean Water Act and Clean Air Act, America is still dealing with severe pollution problems. At least 141 million Americans live in areas where the air is unsafe to breathe for at least part of the year, while about 40 percent of America's waterways remain unsafe for fishing or swimming.

The Clean Water Act and Clean Air Act — as well as the numerous other environmental laws passed in their wake — contain statutory authority to deal with these persistent problems. Yet, in many cases, the laws have not been aggressively implemented or enforced.

States have always played a central role in the enforcement of the nation's most important environmental safeguards. Over the last decade, the continued "devolution" of enforcement authority from EPA to the states has left state environmental agencies in charge of enforcing three-quarters of all delegable federal environmental programs.

The increasing authority given to states over environmental enforcement has led to increased scrutiny of state enforcement activities. Over the last several years, more than 20 reports have been published by state and federal auditors, the EPA, academics and non-profit organizations that cast a critical spotlight on state environmental enforcement efforts. These reports paint a bleak picture of pollution problems ignored, major environmental law-breakers escaping without fines, lapsed permits and shoddy inspections, and systems of record-keeping so flawed that no one can accurately determine just how bad the situation is.

Recent literature published about state environmental enforcement highlights problems in five areas:

Standards and permitting

- States have issued less than five percent of the waterway-specific pollution limits

needed to enforce a key provision of the Clean Water Act designed to restore polluted waterways to health, and only about 70 percent of the facility-specific permits required by the Clean Air Act.

- About one-fifth of all major water polluters are operating with outdated, expired permits. The amount of pollution allowed by discharge permits varies greatly from state to state — and even within states — allowing facilities in some areas to release more pollution than similar facilities in other locations.

Reporting and inspections

- Flaws in state reporting systems have caused state and federal environmental officials to ignore thousands of significant violations of the Clean Water Act and Clean Air Act.
- In some states, routine discharge reports submitted by industry have gone years without being reviewed or have been lost in poorly kept filing systems.
- Hundreds of significant violators of clean air and clean water laws have gone more than two years without inspection, while as many as one-third of state Clean Air Act inspections have lacked required tests or documentation.

Enforcement actions

- In many cases, significant violators of the Clean Water Act and Clean Air Act are either never fined at all, or face fines that are less than the economic benefit gained by polluting.
- State environmental enforcers sometimes take months — even years — to issue fines or formal enforcement orders to violators of environmental laws. Those fines that are assessed vary widely in their severity from state to state.

Follow-up

- Millions of dollars in penalties have gone uncollected by states. In addition, some states have failed to adequately follow up with violators to ensure that promised environmental improvements are made in a timely way.

Accountability

- EPA and state databases on enforcement activity are seriously flawed, leaving the EPA and the public without good, easily accessible information to assess the effectiveness of enforcement.
- Laws passed by several states also restrict the ability of the public to find out important information about the environmental performance of facilities in their area.

The reasons for this breakdown in state enforcement are varied: lack of money and staff, lack of effective enforcement policies, lack of accountability, and lack of political will.

To restore the public's confidence in state environmental enforcement — and to reduce the amount of illegal pollution being released into our water and air — states must take immediate action to bolster their enforcement efforts.

Specifically, states should take an enforcement approach that:

- **Sets pollution limits based on the needs of the environment and public health and enforces those limits through an efficient, comprehensive system of permitting and regulation.**

- **Holds polluters accountable through frequent, adequate inspections and consistent state review of self-monitoring reports.**
- **Takes timely enforcement actions against serious violators and assesses penalties that, at minimum, eliminate the economic benefit of polluting.**
- **Follows up appropriately to ensure that violators return to compliance with the law, pay penalties on time, and complete promised environmental improvements.**
- **Gives the public and the EPA the tools to hold states accountable for enforcement of the laws, including readily accessible, easily understandable information on the environmental performance of regulated facilities.**

To achieve these goals, state and federal governments must provide sufficient resources and staff to enforce environmental laws. In addition, states must rigorously evaluate “innovative” environmental enforcement programs to ensure that they adequately protect the environment and the public interest.

INTRODUCTION

Americans assume that environmental laws like the Clean Water Act and Clean Air Act protect all of us equally. In reality, however, Americans are today governed not by one Clean Water Act or one Clean Air Act, but by 50 sets of environmental laws and programs whose effectiveness is largely determined by those who enforce them.

When Congress created the nation's core environmental protections three decades ago, it sought to carve out a central role for the states in environmental enforcement. The idea was that the federal government, through the EPA, would establish basic pollution standards that would protect citizens across the country and ensure consistent enforcement of those standards. States would have the freedom to enact tougher standards and to pursue innovations that would improve enforcement of the laws.

Unfortunately, a combination of lax oversight by the EPA, the anti-enforcement attitudes of some states, and a chronic shortage of funds for implementation and enforcement of the nation's environmental laws has led to just the inequities Congress intended to prevent when it established nationwide environmental protections. While a few states have undertaken innovative enforcement strategies to prevent pollution, many others have used the leeway granted to them by EPA to avoid taking tough action against polluters who threaten the environment and the public's health.

It is no wonder, therefore, that 15 years after Congress' original goal for ending pollution discharges to surface water, more than one quarter of all major facilities still fail to comply with the Clean Water Act and hundreds of facilities continue to violate the Clean Air Act.¹

What is to be done? First, the federal government, through the EPA, must live up to its responsibility to guarantee a safe environment for all Americans. That means holding states accountable to their duty to enforce the minimum environmental and public health standards contained in federal environmental law. It also means helping states meet the financial burdens involved in enforcement of the laws.

But it is not necessary to wait for the federal government to take action in order to protect the environment and public health. States have the ability — and the responsibility — to identify and fix the flaws in their enforcement programs, allocate enough money and staff to carry out those programs, and reaffirm the need for a strong deterrent to illegal pollution.

Thankfully, much of the work to identify the flaws in state enforcement programs has already been done. Over the past several years, the General Accounting Office, the EPA, and various academics and non-profits have issued a stream of reports documenting the weaknesses in state environmental enforcement efforts.

A careful review of this literature points the way toward a set of principles for effective state enforcement programs. Many of these principles are already enshrined in federal environmental law and in EPA policy and guidance. The next step is for states to take the initiative in implementing those principles in their day-to-day enforcement of the nation's environmental laws.

OUR NATION'S ENVIRONMENTAL LAWS: PROMISES NOT KEPT

"It is the national goal that the discharge of pollutants into ... navigable waters be eliminated by 1985."

— Clean Water Act of 1972

The enactment of the Clean Air Act and Clean Water Act in the early 1970s marked a watershed moment in environmental protection. For the first time, Congress asserted the federal government's responsibility for protecting the air and water resources relied on by every American, and put in place the regulatory framework to achieve a cleaner environment.

The goals of the two laws were ambitious and unequivocal. The Clean Air Act of 1970 committed the federal government to establish and achieve ambient air quality standards protective of public health across the country by 1975.² The Clean Water Act of 1972 declared that "it is the national goal that the discharge of pollutants into ... navigable waters be eliminated by 1985" and "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."³

The passage of the Clean Water Act and Clean Air Act was followed by the enactment of a variety of other laws to protect America's environment and public health. Reforms such as the Resource Conservation and Recovery Act (which governs the disposal of hazardous and other waste), the Safe Drinking Water Act and the Superfund hazardous waste cleanup law were intended to alleviate longstanding dangers that had previously been unaddressed.

But more than 30 years after the passage of the first of these reforms, the results for America's environment are mixed. On the positive side, the first 25 years of the Clean Water Act saw the number of waterways safe for fishing and swimming nearly double.⁴ And the Clean Air Act has led to steep reductions in emissions of carbon monoxide, vola-

tile organic compounds, sulfur dioxide, particulate matter and lead.⁵

However, at least 141 million Americans still live in areas where the air is unsafe to breathe for at least part of the year due to high levels of ozone, or "smog." Particulate matter, or "soot," is estimated to cut short the lives of more than 30,000 Americans each year.⁶ About 40 percent of America's waterways remain unsafe for fishing or swimming, high levels of pollution forced more than 11,000 beach closings in 1999, and nearly every state has issued fish consumption advisories for at least some of its waters due to high levels of contamination.⁷

The Clean Water Act and Clean Air Act both contain statutory authority to address these problems. The Clean Water Act gave EPA the authority to set water quality standards for all contaminants in surface waters and to enforce those standards either through the issuance of permits or the review of state plans to improve water quality. The Clean Air Act empowered EPA to set air quality standards protective of human health for many key pollutants and to initiate actions to ensure that those standards are attained, on top of requiring EPA to set performance standards for cars, trucks, buses and major stationary source emissions.

The failure of the two laws to meet their goals is largely a failure of implementation and enforcement. EPA, as the agency ultimately responsible for enforcement of the laws, bears much responsibility for this failure. But it is not the only responsible party.

THE IMPORTANCE OF THE STATES

The Clean Water Act and Clean Air Act — as well as many other key environmental

laws — carve out a central role for the states. The laws allow EPA to delegate much of the authority for implementation and enforcement of the laws to the states or to regional bodies within states.

This practice of “devolution” of authority has some advantages. State governments presumably have a better understanding of local conditions, enabling them to develop strategies that prioritize the most important local environmental needs and to tailor compliance strategies to local conditions.

In practice, however, the performance of the states in enforcing the nation’s environmental laws has been inconsistent. While a few states have used their authority to craft effective pollution-reduction strategies, monitor environmental quality and penalize polluters, others have — either deliberately or due to budget or staff limitations — failed to fulfill their responsibilities.

The result is that, in many places, the intent of our nation’s environmental laws is being undermined. Rather than guaranteeing a safe environment for all Americans, ineffective state enforcement has subjected many Americans to unjustified environmental harm.

To understand how such inconsistency in state enforcement came to be, it is necessary to understand how states participate in the enforcement the Clean Air Act, Clean Water Act and other environmental laws. These laws are complex, but the philosophies guiding them are similar.

Delegation of Authority

Under laws such as the Clean Water Act and Clean Air Act, states may receive authority from the EPA to enforce federal environmental laws — provided that they possess the proper legal framework and adequate resources. That authority is subject to conditions and can be taken back. The EPA may also

choose to issue its own enforcement actions, should states fail to do so, or, in some cases, impose sanctions on states whose enforcement programs do not fulfill the intention of federal law.

The Clean Water Act provides a good illustration of how these state/federal dynamics play out. The Clean Water Act empowers EPA to set standards for point source pollution based on technologically achievable levels, as well as water quality standards protective of the environment and human health for a variety of pollutants. States that are delegated authority to enforce the Clean Water Act must enforce those minimum standards and issue permits to point source polluters that limit pollution to levels stipulated either by the EPA’s minimum standards or those imposed by the states. Municipalities and industries must also apply to the states for permits for their stormwater discharges to waterways.

In addition, states are required to designate appropriate uses — e.g. drinking water, recreation, and wildlife protection — for waterways and adopt water quality standards that protect the waterways’ ability to sustain those uses. States must identify and prioritize waterways that do not meet their designated uses and allocate “total maximum daily loads” (TMDLs) of pollutants among point and non-point sources in keeping with the water quality standards.

Over the last decade, EPA has been increasingly willing to delegate its authority over enforcement. According to the Environmental Commission of the States — an organization of state environmental commissioners — the number of environmental regulatory programs delegated to the states increased 73 percent between 1993 and 1999.⁸ Yet, despite the consistent record of lax enforcement shown by some states, EPA has traditionally been loath to recall enforcement power once it has been delegated.

ENVIRONMENTAL ENFORCEMENT: FIVE KEY PROCESSES

There are five key processes that must take place efficiently and effectively in order for states to succeed in the implementation and enforcement of environmental laws.⁹

- **Standards and Permitting** — The first step in enforcing clean air and clean water laws is to determine what levels of pollution can be allowed without compromising the environment or public health, and then to implement those standards either through permits granted to individual polluters or by other regulatory means. These decisions cannot be stagnant, but must evolve over time as environmental conditions and pollution-control technologies change. As a result, processes must be in place to continually review whether existing clean water and clean air standards are adequate and whether individual polluters should be required to reduce their pollution further.
- **Reporting and Inspection** — Once standards have been set and permits and regulations have been issued, environmental enforcers must be able to accurately evaluate whether polluters are complying with the law. In the case of major polluters with discharge permits, this requires facilities to accurately report the amount of pollution they are releasing, issue those reports on time, and face sanctions if they fail to report or issue false information. To ensure that industries' self-reports are accurate and that the terms of permits are carried out, states must conduct inspections of sufficient depth and quality as to determine compliance with the law.

- **Enforcement Action** — Enforcement officials must have a strategy for ensuring that violations of the law detected through reporting and inspections cease and have a penalty structure in place that acts as a deterrent to future violations. Compliance strategy can have a number of elements including “compliance assistance” to regulated industries and the capacity to seek criminal, civil and/or administrative penalties from violators. At minimum, however, polluters must have an incentive to comply with the law, and must have the understanding that if they fail to comply, they will face negative consequences.
- **Follow-up** — To ensure that enforcement actions are taken seriously, enforcers must have the capacity to obtain prompt payment of monetary penalties and ensure that promised steps to reduce pollution are implemented.
- **Public Accountability** — The public plays a critical role in environmental enforcement. The public must be permitted to have meaningful input in the setting of environmental standards and the issuance of permits. In addition, citizens should have the power to use the courts to compel compliance with the law when federal or state officials fail to do so. Finally, environmental agencies must make public accurate information on enforcement activity so that the public can ascertain how well those agencies are doing their jobs.

As the following chapter demonstrates, state environmental enforcement efforts have been inconsistent in their conduct of all five processes. While a few have excelled, many others have suffered systematic failures that leave the fate of the nation's environment in jeopardy.

FAILURES OF STATE ENFORCEMENT

As environmental enforcement authority has increasingly been delegated to the states, government auditors and non-governmental organizations have placed state enforcement efforts under increasing scrutiny. What they have found in many cases is shocking — pollution problems ignored; major polluters escaping without fines and continuing to break the law; shoddy inspections and outdated permits; and a system of record-keeping that makes it impossible for environmental officials or the public to ascertain whether the environment is actually getting cleaner and whether polluters are complying with the law.

STANDARDS AND PERMITTING

In order for states to hold polluters accountable for their actions, they must first have in place a framework of enforceable standards, permits and regulations. Unfortunately, in many states, these enforceable standards and permits either do not exist or are woefully out of date.

Clean Air Act Permits

The Title V permit program, which was written into the 1990 version of the Clean Air Act, required major air polluters, for the first time, to be issued enforceable permits detailing the levels of pollution they are allowed to discharge as well as any steps they are required to take to monitor or reduce their pollution. The 1990 Clean Air Act envisioned that state and local air pollution control authorities would issue all of their required Title V permits by late 1997.

As of December 2001 — four years after the original target date — a substantial number of Title V permits had yet to be issued. A 2002 EPA audit found that 30 percent of the estimated 18,000 permits required under the program had not yet been issued, with ten

states having issued less than half the number of permits required.¹⁰ As of March 2002, only three states — Florida, South Dakota and Oregon — and the District of Columbia had issued such permits to all major air polluters in their states.¹¹ (See Appendix B for full list of states.)

The delay in the issuance of Title V permits has two consequences. First, more than a decade after Congress saw the need for comprehensive, enforceable permits for major air polluters, more than 5,000 facilities nationwide still do not have such permits in place. Second, with the first round of Title V permits due for renewal beginning this year, the continuing backlog in the issuance of initial permits could lead to delays in the renewal process, setting up the possibility of a damaging backlog of expired permits similar to that plaguing the clean water permit program. (See below.)

Moreover, criticism has been leveled at some states for their implementation of the Title V program. Citizen groups in at least 19 states have filed petitions with EPA noting deficiencies in state Title V programs ranging from the failure to include adequate monitoring and reporting requirements to the failure to list all the relevant pollution control requirements pertaining to each facility.¹²

Illustrative of these shortcomings are the situations in Georgia and Ohio. A petition filed with EPA in 2001 identified 16 major shortcomings in Georgia's Title V process including inadequate public participation and education efforts, the failure to include compliance schedules in permits, and limitations on the use of credible evidence in determining whether a facility has violated its permit. One major example of the program's deficiencies has been in the case of three old, large power plants that had been "grandfathered" under the original Clean Air Act and permitted to operate for decades without tough limits on their emissions. In 1999, the EPA found

EPA concluded that the violation of the New Source Review requirement in Georgia and other southern states had “resulted in the release of massive amounts of sulfur dioxide, nitrogen oxides and particulate matter into the environment.”

In one case, a facility was legally allowed to discharge 775 times more mercury than another facility of a similar size in the same state.

that the three power plants had violated the Clean Air Act’s New Source Review provision, which was intended to ensure that grandfathered facilities install modern pollution control equipment whenever they are expanded or undergo renovations that would extend their useful lives. In its formal Notice of Violation, EPA concluded that the violation of the New Source Review requirement in Georgia and other southern states had “resulted in the release of massive amounts of sulfur dioxide, nitrogen oxides and particulate matter into the environment.”¹³

The Clean Air Act requires that Title V permits include compliance schedules for facilities that are in violation of any of the Act’s requirements — including New Source Review — ensuring that the government or citizens could bring enforcement actions if the facilities fail to make progress toward compliance with the law. Yet the Georgia Environmental Protection Division did not include compliance schedules for the three power plants in their Title V permits and has thus far rebuffed a citizen petition to reopen the permits. Division officials have stated that they do not believe the owners of the power plants have violated any rules — a direct repudiation of EPA’s own findings.¹⁴

A 2001 EPA review of Ohio’s environmental enforcement programs found significant problems with the state’s Title V permitting program, including the failure to implement a federally mandated acid rain program and the failure to obtain versions of Title V permits appropriate for public review. If not rectified, EPA found, these and other problems “may require initiation of withdrawal proceedings for Ohio’s Title V program.” The review also found that the state might be inappropriately modifying some air permits at the administrative level without seeking additional public comment.¹⁵

Clean Water Act Permits

Discharge permits are the centerpiece of the Clean Water Act’s approach to regulating discharges from point sources. A facility’s permit sets limits on the amount of pollutants a facility may discharge into a waterway. The Clean Water Act provides for renewal of permits every five years, allowing states or the EPA to tighten pollution requirements as pollution-control technology improves and environmental conditions dictate.

As noted above, the original intent of the 1972 Clean Water Act was that direct discharges to the nation’s waterways would cease by 1985. Despite this requirement, toxic chemicals continue to be discharged at alarming rates into the nation’s waters. In 1997, major industrial facilities and sewage treatment plants released more than 270 million pounds of toxic chemicals into waterways, an increase of 18.7 percent over the year before.¹⁶

A major reason for these continued discharges is the refusal of state environmental officials to ratchet down pollution levels when permits come up for renewal and, in many cases, their failure to renew or even issue permits at all in a timely manner. As a result, many polluters are permitted to release significantly more pollution than they should.

A 1996 General Accounting Office report found wide discrepancies between states — and even within states — in the amounts of pollution permitted from wastewater treatment facilities. In one case, a facility was legally allowed to discharge 775 times more mercury than another facility of a similar size in the same state. States also took vastly different approaches to the types of controls imposed in their permits, with some states — such as North Carolina — imposing a numerical discharge limit whenever controls appeared to be needed while other states — such as New Jersey and Oregon — almost always imposed less-aggressive monitoring requirements instead.¹⁷

These differences can sometimes cause problems between states that share a waterway but do not share the same standards. The 1996 GAO report cited a case in which a Pennsylvania facility challenged a discharge limit for arsenic because the state's standard for arsenic was 2,500 times more stringent than the standard in neighboring New York, into which the discharge flowed. Pennsylvania eventually agreed to reissue the permit, substitute a monitoring requirement for the discharge limit, and revise its own water quality standards to reflect the less-stringent limits, which were not as protective of public health.¹⁸

Another example was highlighted in a 1999 *Washington Post* series on the poultry industry on the Delmarva Peninsula (the peninsula shared by the state of Delaware, and the eastern shore regions of Maryland and Virginia). Permits for the region's slaughterhouses have traditionally failed to limit total water discharges of nitrogen—a nutrient that can cause eutrophication of waterways and toxic algae blooms. Nitrogen emissions from poultry plants have ballooned to such a degree that both Maryland and Delaware had pledged to impose nitrogen limits on their slaughterhouses as permits came up for renewal. But the third state on the peninsula — Virginia — resisted such limits, leading to the possibility of continued water quality problems in waters shared by Virginia and Maryland.¹⁹

Problems can also ensue when states fail to renew permits promptly upon expiration. Generally, as long as a facility files a renewal application on time, the terms of an expired permit continue to be in effect until the new permit is issued. This means that facilities can continue to operate for months — sometimes years — under outdated pollution limits.

According to statistics compiled in early 2002 by the EPA, more than one out of five of the nation's major water polluters were operating without up-to-date permits govern-

ing their discharges. In six states — Indiana, Minnesota, Louisiana, Nebraska, Oregon and Washington — more than 40 percent of all permits for major water polluters were expired.²⁰ (See Appendix B for full list of states.)

Government auditors have found similar problems:

- The Colorado State Auditor found that, as of December 1999, 45 percent of the major discharge permits and 36 percent of the minor permits in Colorado were backlogged.²¹
- A review by the Minnesota Office of the Legislative Auditor found that 54 percent of Minnesota's major facilities with federal water quality permits and 41 percent of all permitted facilities were operating with expired permits.²²
- In Louisiana, a state audit found that 69 percent of permits for major water pollution sources and 49 percent of permits for minor sources were expired. In addition, Louisiana officials had failed to issue 66 percent of the water permits they had committed to EPA that they would issue when they took control of clean water enforcement in 1996.²³
- A recent interim report by EPA's Region 5 found that Michigan has not moved to identify concentrated animal feeding operations (CAFOs) — large agricultural operations, some including thousands of animals, that are required to receive permits for their discharges to waterways. The report found that the Michigan Department of Environmental Quality "does not conduct inspections to determine compliance by CAFOs with permit application and other program requirements," in essence, allowing about 12 facilities — including seven that had discharged pollution to surface water — to operate without discharge permits.²⁴

“The officials told us that if the permits were to be formally reopened, the state would be obligated to adopt EPA-imposed water quality standards for the metals. Arkansas officials believe these standards are too stringent ...”

— U.S. General Accounting Office

In 1998, the percentage of rivers and streams monitored and assessed by states ranged from zero to 100 percent, with 39 states monitoring less than half of their rivers and streams. State officials reported to GAO that more extensive monitoring would lead to the identification of more impaired waters.

- According to a 1996 GAO report, Arkansas state officials refused to impose discharge limits or monitoring requirements for municipal discharges of five toxic heavy metals. “State officials are allowing these facilities to continue operating under ‘old’ permits rather than reissuing them,” the GAO found. “The officials told us that if the permits were to be formally reopened, the state would be obligated to adopt EPA-imposed water quality standards for the metals. Arkansas officials believe these standards are too stringent ...”²⁵

In the Arkansas case, the EPA noted that it does not have the authority to issue permits in a state when a state simply declines to reissue them. “EPA’s only recourse,” the GAO noted, “would be to take back responsibility for the program — an unlikely option.”²⁶

Total Maximum Daily Load Program

When the original Clean Water Act was passed in 1972, Congress included provisions for how to clean up waterways that do not support their designated uses even after other regulatory programs are applied. The Total Maximum Daily Load (TMDL) program requires states to:

- Identify impaired waters that do not support their designated uses.
- Prioritize those waters for cleanup.
- Determine the maximum daily load of pollutants that would allow the waterways to support those uses.
- Apportion those loads among the various contributors to pollution in the waterway and develop a plan for reducing pollution to those amounts.

Despite the legal mandate, the EPA did not issue a rule to implement the TMDL require-

ment until 1985. Even so, many states did not proceed, as required, to identify their impaired waters and develop cleanup plans. By the end of Fiscal Year 1999, EPA had received and approved only about 1,300 of the estimated 40,000 TMDLs needed to enforce the program.²⁷

After years of non-compliance, citizens and environmental organizations began to lose patience with state environmental authorities and the EPA for failing to implement the law, and launched a strategy of using litigation to compel enforcement of the program. The EPA is currently under court order or consent decree to develop and enforce TMDLs in 21 states and the District of Columbia if states refuse to do so. (See Appendix B for full list of states.) Litigation is pending with regard to the TMDL programs in another five states.²⁸

Government auditors have also challenged the process by which states identify waterways that are “impaired.” A 2002 General Accounting Office report found wide variations in the processes used by states to identify waterways that do not meet their designated uses. For example, in 1998, the percentage of rivers and streams monitored and assessed by states ranged from zero to 100 percent, with 39 states monitoring less than half of their rivers and streams. State officials reported to GAO that more extensive monitoring would lead to the identification of more impaired waters.²⁹ (See Appendix B for list of percentage of waterways assessed by states.)

The failure of states to develop and enforce TMDLs represents a widespread abdication of their responsibilities under the Clean Water Act. While EPA has demonstrated a lack of leadership on the issue, states bear large responsibility for the fact that, 30 years later, a core program of the original Clean Water Act remains unenforced.

REPORTING AND INSPECTION

In order to enforce the law, environmental officials must know when and where violations occur and have the ability to verify polluters' compliance status through inspections. When data systems for the tracking of environmental compliance break down — or when inspections are too few or inadequate — states are incapable of identifying those who break the law.

Reporting and Tracking Systems

A 2001 EPA audit of state clean water enforcement programs highlights the importance of good systems to collect and track information on environmental compliance. The audit found that the national system used by EPA and states to track clean water compliance was “incomplete, inaccurate and obsolete,” and that state systems had not filled the information gap. Of particular concern were:

- The failure of state and federal officials to track the compliance status of hundreds of thousands of smaller dischargers that contribute to water quality problems. Two of the three states studied by EPA had no system for evaluating compliance with the law by so-called “minor” facilities. The audit also cited a Louisiana study that found that minor facilities had failed to submit 21 percent of their required self-monitoring reports and that the state was not reviewing the reports that had been submitted.
- The failure of the systems to identify violations of toxicity standards for wastewater as “significant,” despite the potential of such violations to impair aquatic life. The audit suggested that, during a 15-month period of 1998 and 1999, states may have failed to designate as many as 5,900 such violations as

significant — a designation that may have triggered enforcement action. One North Carolina facility, for example, failed 27 out of 36 toxicity tests, yet none of the violations were reported as significant.

- The failure of state officials to identify significant violations by major polluters. A review of the records of nine major California polluters found three significant violations that had been missed by state officials.³⁰

Similar problems have been discovered with relation to reporting of violations of the Clean Air Act. A 1998 EPA audit of six states' clean air programs found more than 100 significant violations of the Clean Air Act that had not been reported by the states during fiscal year 1996. During that year, the six states reported only 18 significant violations. A subsequent review by staff at EPA's Region 4 uncovered more than 300 significant violations that had not been reported by states.³¹

In some cases, reports of air emissions submitted by industries have not even been reviewed by state officials in a timely manner. An EPA review of Idaho's clean air enforcement program found that, of 142 monitoring reports measuring stack emissions, 97 had not been reviewed. Thirty-three of those reports had awaited review for between two and six years. As a result, violations of the law were not detected.³²

In other cases, some states have demonstrated an inability to keep adequate track of monitoring records. An investigation of Louisiana's Department of Environmental Quality noted that 26 percent of water discharge monitoring reports and 22 percent of air compliance reports filed by polluters could not be found in the agency's files. More than a third of the missing reports had been marked as “received” in the agency's computer databases.³³

The audit found that the national system used by EPA and states to track clean water compliance was “incomplete, inaccurate and obsolete.”

In the four states the [EPA] evaluated, more than one out of three inspections designed to document compliance with the Clean Air Act lacked required tests or documentation.

Inspections

Many of the nation's largest water and air polluters — even those with long track records of environmental violations — continue to operate without regular, thorough inspections by state environmental officials.

A 2000 study found that 560 “high priority violators” of the Clean Air Act — defined as major industrial facilities that had previously committed serious violations of the law — went uninspected by states in the two-year period ending October 1999. More than half of these facilities were in just six states: Ohio, Indiana, Wisconsin, Illinois, Michigan and Tennessee. (See Appendix B for full list of states.) Similarly, 283 significant violators of the Clean Water Act went uninspected in the same two year period, with more than half of those uninspected facilities located in just four states: Texas, Ohio, Michigan and Missouri.³⁴

A 1998 EPA audit of New Mexico's air enforcement program found a similar lack of inspection coverage. The audit found that more than one-third of the major facilities in the state had not received an inspection in more than seven years.³⁵ Similarly, in Minnesota, only 12 percent of the state's 1,400 point source water dischargers were inspected in 2001, down from 17 percent the year before and 32 percent in 1995.³⁶

The quality of many state inspections has also been called into question. A 1998 EPA audit noted that that, in the four states the agency evaluated, more than one out of three inspections designed to document compliance with the Clean Air Act lacked required tests or documentation. In one case in Maryland, for example, a facility for painting diesel truck engines operated two unpermitted pollution sources — one for six years and one for 18 years — despite numerous visits by state inspectors.³⁷

A 2001 General Accounting Office report looked at the ability of routine inspections to

detect violations of the Clean Air Act. The report contrasted the findings of routine inspections — which identified significant violations at 12 percent of the large facilities studied by GAO — with the results of intensive, sector-specific inspections undertaken by EPA that found 92 percent of pulp and paper facilities and 76 percent of wood products facilities significantly violating the law.³⁸

The failure of states to receive and track compliance reports from industry — coupled with the widespread failure to carry out state inspection responsibilities — demonstrates that, in many cases, states (and, by extension, the EPA) are unaware of many violations of the law with potentially significant environmental consequences.

ENFORCEMENT ACTIONS

The lack of enforceable standards, up-to-date permits, and good information about who is violating environmental laws prevents states and the EPA from taking action against many polluters. However, even when polluters are known to have broken the law, states are often incapable of or unwilling to take enforcement actions that would stop the violations and deter others from engaging in illegal pollution.

In most cases, states already give polluters significant opportunities to bring their facilities into compliance with the law before even considering a formal enforcement action that could result in a penalty. However, when a polluter fails to correct problems over a long period of time, or fails to respond to informal efforts to deal with the pollution, a formal enforcement action — which always requires compliance with the law and can include fines or other penalties — becomes necessary. EPA has issued guidelines stipulating that states should, at a minimum, set penalties that recover the economic benefit gained from violating the law; a provision designed to ensure

that polluters do not receive financial gain by breaking the law. These guidelines are frequently ignored.

Timely Actions Not Taken

The first step in evaluating the effectiveness of enforcement actions is to determine whether action is taken at all and, if it is, whether it is taken in a timely manner.

In Wisconsin, a 2001 study by a non-profit group found that only 10 percent of municipal and industrial facilities in significant non-compliance with their water discharge permits were sent notices of violation — the first step in the formal enforcement process — by the state's Department of Natural Resources between 1990 and 1998. Of that number, only one-quarter were referred for prosecution.³⁹

A 2001 EPA report that examined three states' water enforcement programs found that the states often took more than a year after the violation occurred to take enforcement action. In North Carolina and Utah, 100 percent of enforcement actions were late, with the states taking between 12 and 41 months to take action. The report cited the case of a California municipality that missed a 1997 deadline to replace its obsolete sewage treatment plant. No penalties were assessed, and the old plant continued to pollute the Pacific Coast for four more years until it was replaced in 2001.⁴⁰

In New Mexico, EPA's 1998 audit of the state's air enforcement program found that the state averaged 155 days to issue notices of violation, compared to the 45 days set forth in EPA guidance. The state was late in addressing 14 of the 28 significant violations by major facilities analyzed in the audit.⁴¹

Louisiana officials studying the performance of the state's Department of Environmental Quality found that 31 percent of all minor facility inspections that detected violations were not met with any enforcement

action at all — not even a warning letter. Of the formal enforcement actions studied, 32 percent were issued more than a year after the violation took place.⁴²

In 1999, EPA took a look at the state of Virginia's enforcement of the Resource Conservation and Recovery Act (RCRA), which governs hazardous and other wastes. The review found that Virginia's Department of Environmental Quality took delayed enforcement action against 13 of the 94 facilities studied, with delays ranging from 180 to 1395 days. The report documented one case in which a facility stored pentachlorophenol — a hazardous substance that can affect the liver, kidneys, blood, lungs and several bodily systems — without a permit for nine years. In 1994, the state discovered that the substance had leaked into a nearby creek. Yet the state continued to delay taking enforcement action for another several years.⁴³ A similar review of Montana's RCRA enforcement record found that it took environmental officials there an average of 229 days from the discovery of a violation to initiate formal enforcement action.⁴⁴

The EPA's review of Idaho's clean air program found a similar pattern. Of 24 significant violations of the Clean Air Act discovered by state officials, only six met with initial or escalated enforcement action. Moreover, only one of the violations was addressed or resolved within 150 days of its designation as a significant violation.⁴⁵

Penalties Assessed Sporadically

When violations do meet with enforcement actions, states have widely varying policies as to the amount of penalties that should be assessed. In many instances, states do not follow the intention of EPA that penalties should exceed the economic benefit gained by polluting.

In the case of two significant violations of the Clean Air Act in Idaho, EPA investigators

The Attorney General ... returned as a "good faith gesture" a \$3,200 check sent in by the owner as partial payment for numerous violations of the law. "As a result," the EPA Inspector General concluded, "the owner achieved the economic benefit of intermittently operating the mill while avoiding any financial penalty for violating air quality standards over a period of about 1½ years."

found that state officials assessed penalties of \$89,400 — about 57 percent of the penalties that could have been assessed under EPA policy. Regulators then engaged in negotiations with the polluters, proposing to reduce the fines to less than \$15,000, despite the fact that the facilities had been out of compliance with the law for more than 500 days.⁴⁶

In another Idaho case, a major air pollution source with a long history of violations concluded that it could not operate in compliance with the law, but that it would operate anyway on an intermittent basis. The matter was referred to the Attorney General's office for civil action. However, the Attorney General, after securing an assurance from the owner that the plant would not be operated, actually *returned* as a "good faith gesture" a \$3,200 check sent in by the owner as partial payment for numerous violations of the law. "As a result," the EPA Inspector General concluded, "the owner achieved the economic benefit of intermittently operating the mill while avoiding any financial penalty for violating air quality standards over a period of about 1½ years."⁴⁷

A 1997 EPA audit found wide variation among state and regional air quality programs in the penalties assessed to violators, with Michigan assessing an average penalty of \$68,000 versus an average penalty of just \$270 for one California air quality district. The review found that, while Michigan consistently sought to recover the economic benefit gained by polluting, Indiana and Illinois only occasionally used economic benefit as the basis of their penalty assessments, while Texas officials did not consider economic benefit in any of the penalty calculations studied.⁴⁸

Penalty assessments under RCRA have experienced similar variation. A 1997 EPA audit of programs in three regions found that average RCRA penalties varied from a low of just under \$7,000 in Maryland to a high of

nearly \$60,000 in Texas. In every case, the average penalties assessed by EPA regional officials were significantly higher than the average penalties assessed by state enforcers. Maryland officials, for example, issued a mere \$5,000 penalty to a large federal storage facility that had been improperly storing PCB-contaminated and other toxic wastes and had not documented the completion of other required environmental improvements.⁴⁹

A 2001 study by a North Carolina State University researcher found similar variation among penalties issued by states and the EPA under RCRA from 1986 to 1999. His research found that states generally assessed penalties about half as large as the EPA assessed under the same circumstances, and that state penalty levels had remained stagnant over time while those assessed by EPA had generally increased. Moreover, he found great variation among the states, with 13 states assessing significantly lower penalties than would be expected.⁵⁰

Clean Water Act violators generally receive no more consistent treatment. A 2000 study on clean water enforcement in three states found that, of 38 major facilities found to be in non-compliance with the Clean Water Act during a two-year period, only two (both in Ohio) had received fines by the end of the study period.⁵¹

FOLLOW-UP

An important, but often neglected, facet of environmental enforcement is the follow up that takes place after fines have been issued and corrective actions have been ordered. Does the money assessed in penalties actually get collected? Are promised environmental improvements actually made? And do violators receive additional penalties when they fail to follow through on their commitments?

In several states, the record shows that the elementary task of following up on penalties and corrective actions fails to take place.

In Louisiana, state auditors found that environmental officials had not collected more than 75 percent of the penalties assessed between fiscal years 1999 and 2001, a total of \$4.5 million.⁵² In Washington State, a May 2001 analysis by Public Employees for Environmental Responsibility found that 46 percent of the penalties assessed by the Washington Department of Ecology had gone uncollected, a total of more than \$2 million.⁵³ Similarly, a 2000 state review of North Carolina's environmental enforcement programs identified \$3.4 million in penalties that had gone uncollected from 1996 to 1999. The report noted, however, that some of the penalties may no longer be collectable due to bankruptcy or other circumstances.⁵⁴

Maryland auditors investigated the resolution of 13 consent orders negotiated between state environmental officials and Clean Water Act violators. In five cases, the violator failed to take promised corrective action, yet state officials did not levy additional penalties. In one case, a polluter agreed to submit a plan for corrective action by the fall of 1997 and pay a fine of \$100 per day for each day the plan was late. The discharger did not submit the plan and the state did not assess the fine. The facility went on to register 13 more violations of its discharge limits over the next two and a half years before the state finally took additional enforcement action in 2000.⁵⁵

In recent years, many states have begun to advocate Supplemental Environmental Projects (SEPs) during penalty negotiations with polluters. SEPs are environmentally beneficial projects violators agree to undertake to offset or eliminate monetary penalties. However, audits in Texas and Louisiana have documented that some SEPs in those states have included activities that benefited the business itself or had little relation to the vio-

lation. A 2000 review by the Texas Sunset Advisory Commission found that "no controls exist to ensure that SEP money is properly spent for the benefit of the environment."⁵⁶

PUBLIC PARTICIPATION AND ACCOUNTABILITY

The public has a major role to play in environmental enforcement. Citizen complaints can, and often do, lead to the discovery of violations of environmental laws. Citizen participation in the permitting process is vital to ensuring that the concerns of those living near polluting facilities are represented. And in instances when enforcement agencies fail to do their job, citizen involvement can bring political, and in some cases, legal pressure on agencies to fulfill their responsibilities.

Too often, however, the role of the public in environmental enforcement is short-changed.

Information on Enforcement is Incorrect/Unavailable

In order to hold states accountable for their role in environmental enforcement, citizens must first be able to assess how well enforcers are doing their jobs. However, due to poor data management systems, infrequent or misleading reports to the public, and laws that restrict public access to environmental information, it is often difficult for the public to make this crucial distinction.

- **Poor data management** — States and the EPA share responsibility for the widespread inaccuracy of the data available to the public on permitting and enforcement. Central EPA databases for the tracking of permits and compliance are widely acknowledged to be incomplete, inaccurate and difficult to use. A 2001 EPA audit, for example, found that less than four percent of

A 2000 review by the Texas Sunset Advisory Commission found that "no controls exist to ensure that [Supplemental Environmental Project] money is properly spent for the benefit of the environment."

“Due to the difficulties with existing activities data, the current debate over the adequacy of states’ enforcement of national environmental laws is impossible to resolve.”

— National Academy of Public Administration

The states evaluated did not have “adequate or consistent” systems for tracking citizen complaints about stormwater discharges. “Without consistently tracking when and how citizen complaints were resolved, there was no evidence that states addressed the complaints,” the EPA report found.

stormwater and concentrated animal feeding operation (CAFO) permits under the Clean Water Act had been entered into the EPA’s Permit Compliance System database — the central repository of compliance and enforcement data nationally. In addition, many states do not adequately track the compliance of so-called “minor” dischargers through the system. “Although many states are developing their own (data) systems,” the audit concluded, “these systems did not fill the information void.”⁵⁷

A similar audit of state air enforcement efforts found numerous inaccuracies and missing pieces of information among data input by states into EPA’s AIRS (Aerometric Information Retrieval System) Facility Subsystem (AFS). The report noted that many states and regions had created their own systems to better meet local needs. However, the audit noted that because EPA posted the AFS data on the Internet, “(c)itizens who access the data could receive inaccurate information.”⁵⁸

The EPA and many states are making efforts to improve the quality of information available to the public on environmental enforcement. But, as of now, there is no accurate source of information that would enable citizens to compare the enforcement records of various states and assess the status of environmental enforcement nationwide.

The importance of such data cannot be underestimated. The National Academy of Public Administration, in a 2001 review of EPA and state environmental data, went so far as to say that “(d)ue to the difficulties with existing activities data, the current debate over the adequacy of states’ enforcement of national environmental laws is impossible

to resolve.”⁵⁹ This situation is clearly unacceptable.

- **Follow-up on citizen complaints** — The 2001 EPA audit mentioned above also noted that the states evaluated did not have “adequate or consistent” systems for tracking citizen complaints about stormwater discharges. “Without consistently tracking when and how citizen complaints were resolved, there was no evidence that states addressed the complaints,” the report found.⁶⁰

Louisiana state auditors found that the state Department of Environmental Quality failed to address more than one-third of citizen complaints within five days — the agency’s goal for timely response. Eight out of ten complainants reached by auditors said they were dissatisfied with DEQ’s handling of their complaint.⁶¹

An EPA Region 5 review of Michigan’s regulation of water discharges from concentrated animal feeding operations (CAFOs) highlighted a policy in Michigan law that “imposes a penalty on anyone who brings more than three unverified complaints against the same farm or farm operation within a three-year period.” The review noted that a complaint could still be determined to be “unverified” even if the facility were violating Michigan environmental law and that the law does not define what is meant by a “complaint.” EPA concluded that the provision may “chill the right of individuals to file complaints with the State of Michigan concerning CAFOs.”⁶²

- **Audit privilege/immunity laws** — Another development that has limited public access to information on environmental violations is the widespread adoption of audit privilege and immunity laws, which grant polluters the

right to keep secret information discovered through environmental “self-audits” and protect them from prosecution based on that information. As of 2002, 26 states had some form of audit privilege or immunity law on the books.⁶³

In theory, state audit privilege laws are designed to encourage industries to review and address their own environmental problems. However, EPA and many environmental advocates have criticized the laws, noting, as EPA does on its Web site, that “audit privilege laws are anti-law enforcement, impede public right-to-know, and chill public reporting of illegal activity to law enforcement agencies ... (T)o immunize serious violations — including those where there is criminal conduct, imminent and substantial endangerment, and actual harm — is wrong.”⁶⁴

Moreover, audit privilege laws do not seem to achieve their primary goal: encouraging industry to conduct more audits. A 1998 study by the National Conference of State Legislatures found that there was no difference in the number of facilities conducting audits between states that have audit privilege laws and those that do not. Moreover, the study found no difference in the percentage of facilities disclosing environmental violations, refuting the position that granting industries immunity for self-disclosed violations of the law would lead to greater disclosure.⁶⁵

Citizen Suits

Recognizing that, even under the best of circumstances, state and federal enforcement activity would not address all violations of environmental laws, Congress gave indi-

vidual citizens the power under the Clean Water Act and Clean Air Act to initiate their own enforcement actions through the courts.

The laws, however, generally preclude citizen suits in cases in which state agencies have “diligently” enforced the law. Such enforcement activity can come during the 60-day window between a citizen’s filing of a notice of intent to sue and the actual commencement of the lawsuit. While the diligent prosecution provision has been interpreted differently by different courts, it opens up the possibility that states could prevent citizen suits by taking enforcement actions that — while meeting legal standards of diligence — are lax when compared to the penalties polluters could pay as a result of a citizen suit.

In one case in Arkansas, for example, the state fined a large chemical company \$1,000 for 30 violations of the Clean Water Act over four years. When a citizen’s group notified the company of its intent to sue over those and other violations, the state “corrected” its consent order with the company to include the violations in the notice letter without increasing the fine. The state similarly revised its consent order three times after the suit was filed to include ongoing violations by the facility. A district court found in 1993 that these actions constituted diligent prosecution and dismissed the suit.⁶⁶

While it is far beyond the scope of this report to analyze the complex law surrounding citizen environmental lawsuits, it is clear that states should avoid undertaking weak enforcement actions that would serve to protect polluters from citizen enforcement through the courts.

WHY STATE ENFORCEMENT FAILS

The Environmental Council of the States estimates that a total of \$500 million was cut from state environmental budgets in Fiscal Years 2002 and 2003. Those cuts have come at the same time that the Bush administration has proposed cutting about 100 jobs from the EPA's enforcement division.

State enforcement of environmental laws breaks down for a variety of reasons. In some cases, state officials earnestly attempt to enforce the law, only to be impeded by a lack of resources, poor state policies, and confusing or conflicting EPA guidance. In other cases, however, state officials actively avoid taking aggressive enforcement action against polluters due to political pressure or philosophical aversion to a deterrence-based compliance strategy.

LACK OF BUDGET AND STAFF

Over the past decade, states have increasingly sought — and obtained — responsibility for the enforcement of key federal environmental statutes. At the same time, the number and complexity of the pollution sources regulated by those statutes has increased.

Funding for state environmental programs, however, has not kept pace with the additional responsibilities. While state spending on the environment and natural resources conservation increased by 50 percent between 1986 and 1994, it has barely increased over the eight years since. State spending on the environment actually declined between 1996 and 2000, from \$13.82 billion per year to \$13.6 billion.⁶⁷

The Environmental Council of the States (ECOS) estimates that states require between \$1.54 billion and \$1.68 billion per year to fully implement the federal Clean Water Act. Yet, federal and state governments allocate only between \$722 million and \$805 million for that purpose, leaving a “resource gap” of approximately \$800 million.⁶⁸ ECOS also estimates funding gaps of approximately \$100 million in air programs and \$100 million in drinking water programs.⁶⁹

The federal government and the states have failed to step in to close that gap. From 1986 to 2000, federal funding for state envi-

ronmental programs increased by only about 4 percent, while the percentage of state environmental spending provided by EPA and other federal agencies dropped from 52 percent to 33 percent.⁷⁰

More recently, however, it has been states — rather than the federal government — whose pace of spending on environmental programs has slowed. From 1994 to 2000, the amount of state environmental funding provided by the federal government increased from \$3.73 billion to \$4.46 billion — an increase of 20 percent — while funding from state sources, including user fees, increased only 4 percent.⁷¹ Over just the last three years, EPA grant assistance to states and tribes has increased 29 percent, from \$2.7 billion in 1999 to \$3.5 billion in 2001.⁷²

The recent recession — and the strain it has placed on state budgets — has led to further cuts in state environmental spending. ECOS estimates that a total of \$500 million was cut from state environmental budgets in Fiscal Years 2002 and 2003.⁷³ Those cuts have come at the same time that the Bush administration has proposed cutting about 100 jobs from the EPA's enforcement division and reducing funding for civil enforcement and compliance monitoring. A similar proposed cut in federal enforcement spending for Fiscal Year 2002 was rejected by Congress.

The result of the confluence of increasing state responsibility for enforcement and decreasing spending has been the tendency to spread environmental enforcement activities ever thinner across the regulatory landscape. For example, a General Accounting Office survey of states found that 75 percent reported that their staffing levels in fiscal year 1999 were inadequate to enforce provisions of the Safe Drinking Water Act effective in that year. More than 90 percent said their level of staffing would be inadequate as new provisions of the law took effect.⁷⁴

The preliminary results of an EPA investigation of the Ohio EPA's environmental enforcement programs found that the state employed just over half as many people as it had indicated it would need to run its air enforcement program. Instead of the 399 employees Ohio estimated it would need once the program was fully implemented, as of 2001, the state employed only 222. The review also found that Ohio lacked a systematic training program for those employees. The study noted that there has been a decline in recent years in Ohio EPA air inspections, enforcement case conclusions, complaint investigations, and collected penalty amounts.⁷⁵

In addition, a series of surveys of state environmental enforcers by Public Employees for Environmental Responsibility has found that front-line enforcement officials do not believe they have the resources to do their jobs effectively. Only 15 percent of Florida environmental enforcement officers surveyed felt they possess adequate funding and resources to enforce environmental laws. Just 3 percent of Massachusetts Environmental Police said they believe their division receives sufficient funding to fulfill its environmental mission. And only 26 percent of Montana Department of Environmental Quality employees and 19 percent of Connecticut Department of Environmental Protection employees reported that they receive sufficient funding.⁷⁶

To enforce environmental laws effectively, there must be enough "cops on the beat" to review self-reports from industry, conduct inspections, and issue and follow up on enforcement actions. The strain on state enforcement budgets, the increasing demands on enforcement agencies, and the threat of a new round of budget cuts to come all limit the ability of states to perform their duties under the law.

LACK OF EFFECTIVE ENFORCEMENT POLICIES

In many cases, state environmental enforcement activity has been hamstrung by the efforts of state legislatures to limit the regulatory "burden" faced by polluters. In addition to the audit privilege and immunity laws noted above, several states have adopted "grace period" laws that enable certain classes of polluters to avoid penalty if they rectify minor violations within a certain period of time — for example, 30 to 90 days.⁷⁷

In some cases, state laws and policies are clearly inadequate to ensure proper enforcement of the law. Some states possess policies that fail to authorize the collection of penalties that exceed the economic benefit of polluting, set inappropriate limits on the amount of penalties that can be sought, or fail to authorize the collection of administrative penalties at all. For example, a 1999 EPA review found that the state of New Hampshire is barred by state law from assessing administrative penalties that exceed \$2,000 per violation. While the state is able to seek higher penalties by referring cases for civil enforcement, the cap may preclude enforcers from directly seeking administrative penalties that recover the economic benefit of polluting.⁷⁸

By contrast, New Jersey and California have enacted strong state enforcement laws that set mandatory minimum penalties for serious or chronic violations of clean water laws. Evidence suggests that tough state penalty policies act as a powerful deterrent to pollution. The New Jersey Department of Environmental Protection reported in 1998 that the state's tough Clean Water Enforcement Act had led, at least in part, to 80 to 90 percent reductions in the number of total violations, serious violations and instances of significant non-compliance.⁷⁹ New Jersey also ranked 46th among 47 states, the District of Columbia, and two U.S. territories in the per-

centage of facilities in significant non-compliance with the Clean Water Act during a recent 15-month period.⁸⁰

To do their jobs effectively, states need to have environmental enforcement laws and policies on the books that are at least as strong as the policies and guidance set forth by the EPA. When state legislatures or environmental officials issue guidelines that arbitrarily limit enforcement actions or penalties, the ability of state enforcement officials to bring facilities back into compliance with the law is reduced.

LACK OF POLITICAL WILL

In some cases, states have consciously chosen to de-emphasize enforcement of environmental laws either due to philosophical disagreement with the concept of aggressive enforcement or blatant political pressure.

In recent years, many states have chosen to focus increasingly on providing “compliance assistance” to regulated entities. There is no doubt that compliance assistance can play a crucial and beneficial role in the implementation of environmental laws. Those facing regulation by state or federal governments deserve, at minimum, to understand what the laws are and what they are required to do to comply with those laws. Ideally, states should also provide technical assistance to help industries prevent pollution before it occurs.

In some states, however, compliance assistance has come to be seen as a *substitute* for enforcement activities. States sometimes encourage industries to comply with the law after violations have been discovered — a strategy that delays enforcement action and sets a poor example for other would-be polluters.

An EPA audit of Idaho’s clean air programs concluded that “(a)n adequate enforcement program had not been implemented in

the State because DEQ focused on compliance assistance rather than enforcement to bring sources back into compliance. However, when compliance assistance failed to timely bring the sources into compliance, appropriate enforcement actions were not taken.”⁸¹ The report found that Idaho’s Department of Environmental Quality used enforcement actions only as a “last resort” and, in some cases, even modified (weakened) permits to allow polluters to avoid penalties.

EPA also cited an undue emphasis on compliance assistance in its review of Virginia’s RCRA enforcement program. The EPA’s audit found that “lengthy enforcement delays occurred because DEQ emphasized ‘compliance assistance’ to violators.”

A 1999 review of New Hampshire’s environmental enforcement efforts found that the state relied heavily on informal enforcement practices and that penalties were sought against only a few of the worst violators each year. The review found “an institutional reluctance to pursue formal enforcement” in the state’s water pollution control program.⁸²

The decision to focus on compliance assistance can be seen as subject to legitimate philosophical debate over the best way to get facilities to comply with the law — despite the lack of evidence that such a policy leads to improved compliance versus a deterrence-based policy of strict enforcement. But, in some cases, the decision to avoid strict enforcement appears to be based on more blatant political concerns.

A 1997 EPA audit of air enforcement activities found that officials at six out of 12 EPA regions and delegated agencies cited a political climate that did not favor enforcement as one of the three top barriers to their programs. Among the sort of overt pressures placed on enforcement officials:

- “In an enforcement action against a copper mine in the upper peninsula of

Michigan, local politicians tried to convince the Michigan Attorney General's office not to enter a lawsuit.... This political involvement made it difficult for Michigan staff to pursue the enforcement action."

- "According to officials from two California air districts, their Boards did not always support aggressive enforcement actions, because the Boards feared industries might move to other locations if faced with aggressive enforcement."
- "In Texas, an official stated that the changes in the political climate from one election year to the next were a problem, because the program was expected to be consistent even though the political climate had changed."⁸³

Political pressures also trickle down to front-line environmental enforcers. Public Employees for Environmental Responsibility's surveys of state environmental employees provide a disturbing view of the way these pressures affect enforcement.

- Only 40 percent of Massachusetts Environmental Police, in a 2001 PEER survey, reported that management of the force was committed to the enforcement of environmental laws. More than half believed that the force focused disproportionately on small violators and 30 percent reported that they fear retaliation from their chain of command for advocating strong environmental enforcement.⁸⁴
- More than two-thirds of managers and employees at the Rhode Island Department of Environmental Management reported in 2000 that the agency's "decision-making is based more on politics than science." Sixty-five percent of managers and 49 percent of employees surveyed believed that "the regulated community excessively influences

decision making." More than one-fifth of employees reported that they "have been directed by a superior to ignore an environmental regulation."⁸⁵

- In Michigan, 70 percent of Department of Environmental Quality employees surveyed in 1998 agreed with the statement, "The regulated community excessively influences permitting decisions at DEQ." More than one in four employees reported that they had personally been ordered by a superior to change or disregard a permitting policy or procedure based on non-scientific reasons, while another quarter said they knew of instances in which the regulated community had been able to choose which DEQ employees would handle their case. Finally, more than half of DEQ employees reported that they knew of a situation in which management had reassigned or changed the job responsibilities of a staffer for doing their job "too well."⁸⁶
- More than half of Ohio EPA employees surveyed in 2002 believe the agency places more weight on serving the regulated community than on serving the general public. Nearly three-quarters agreed that the agency's decisions are "overly influenced by political considerations," while nearly one-third said they or someone they know had been instructed to ignore an environmental law, regulation or violation in the last four years.⁸⁷

Clearly, one prerequisite for enforcing laws well is to want to enforce them. In some states, this desire does not seem to be present. Moreover, without the availability of good, current information on the status of environmental enforcement activities, the public is unable to exert its own pressure on state officials to uphold and enforce the law.

"According to officials from two California air districts, their Boards did not always support aggressive enforcement actions, because the Boards feared industries might move to other locations if faced with aggressive enforcement."

— U.S. EPA Inspector General

More than one in four employees reported that they had personally been ordered by a superior to change or disregard a permitting policy or procedure based on non-scientific reasons, while another quarter said they knew of instances in which the regulated community had been able to choose which [Michigan] DEQ employees would handle their case.

“[S]tates either did not want to report violators or the inspections were inadequate to detect them. ... States and even EPA regions disregarded Agency requirements or were uncertain whether enforcement documents were guidance or policy. As a result, the effectiveness of air enforcement programs suffered.”

— U.S. EPA Inspector General

LACK OF ACCOUNTABILITY

Of course, state officials aren't the only ones with influence over how states enforce environmental laws. The EPA has the power to compel states to fulfill their responsibilities under the law, or to take back those responsibilities.

Unfortunately, the EPA has exerted little leadership in improving enforcement by the states, despite ample evidence that states have frequently ignored or refused to comply with the EPA's enforcement policies and directives.

- In a 1998 report that documented the failure of state environmental officials to identify many significant violators of the Clean Air Act, the EPA Inspector General concluded that “this occurred because states either did not want to report violators or the inspections were inadequate to detect them. ... States and even EPA regions disregarded Agency requirements or were uncertain whether enforcement documents were guidance or policy. As a result, the effectiveness of air enforcement programs suffered.”⁸⁸
- The EPA's 1997 consolidated review of air enforcement programs found that most state and local agencies enforcing the Clean Air Act failed to consistently consider the economic benefit gained by polluters when calculating and assess-

ing penalties, as is stipulated by EPA's penalty policy.⁸⁹

- A similar review of state Clean Water Act enforcement found that many enforcement actions taken did not meet the EPA's criteria for timeliness and failed to recover the economic benefit gained by polluting.⁹⁰

States realize that the EPA has few effective tools with which to hold states accountable for their enforcement of the law. As noted earlier, the EPA has been reluctant to revoke the enforcement authority of state agencies — a move that would cause significant logistical and political disruption — emphasizing instead the development of partnerships with states. Other accountability tools, such as “overfiling” (in which the EPA takes its own enforcement action in a state with delegated enforcement authority) have been ineffective or, in the case of overfiling, challenged in the courts.

The EPA's failure to hold states to a high standard in evaluating enforcement and to provide accurate information to the public on the enforcement of environmental laws has contributed to states' ability to be lax in enforcing the law. State enforcement officials must be held accountable — both to the public and to the EPA — if enforcement is to succeed.

FIVE PRINCIPLES FOR EFFECTIVE ENVIRONMENTAL ENFORCEMENT

While much criticism has been levied at state enforcement of environmental laws, there are several reasons why states are as much the solution to environmental enforcement as they are the problem.

First, some states have provided innovative approaches to environmental enforcement. Laws such as those in New Jersey and California that established tough mandatory minimum penalties for severe violators of the Clean Water Act are among those innovations. The devolution of enforcement responsibility to the states need not necessarily provoke a “race to the bottom;” it could just as easily enable a “race to the top” provided that the political will and resources exist in the state to make it so.

Second, even if the current system of state enforcement were to be considered fatally flawed, there is little chance it will be going away any time soon. Throughout its history, the EPA has expressed its reluctance to take back enforcement powers from the states once they have been delegated. As a result, much more attention must be paid to the effectiveness of state environmental enforcement activities by citizens, environmental advocates, public officials and the media.

In so doing, the success of state environmental enforcement efforts should be measured according to a set of five basic principles.

1. Pollution limits should be set based on the needs of the environment and public health and be enforced through an efficient, comprehensive system of permitting and regulation.

In theory, Clean Water Act and Clean Air Act permits are supposed to guarantee that pollution levels do not result in significant damage to the environment or public health.

However, as noted earlier, at least one study has demonstrated the wide variation in permitted pollutant levels from similar facilities, even within the same state.

One important step would be to complete the process of issuing Total Maximum Daily Loads (TMDLs) for impaired waterways. When properly set and administered, TMDLs can give states the knowledge to set limits on discharges to waterways in keeping with the levels of pollution the waterways can safely sustain. As a result, TMDLs represent a powerful tool to ensure that the water quality goals envisioned by the Clean Water Act 30 years ago are met.

While setting strong initial permit levels for pollution is important, it is also important that states continue to revise those permits on a regular basis. The zero discharge goal of the Clean Water Act should remain the long-term goal of environmental programs in the states and nationally. In revising pollution permits, the presumption should be that permitted discharge levels will be consistently reduced over time in keeping with new technologies and better understanding of ecological conditions.

The five-year renewal period for clean water and clean air permits is an essential safeguard to ensure that permits are regularly brought before the public for review and revision. While the five-year renewal requirement does impose burdens on state environmental agencies and limit regulatory flexibility, only the maintenance of a hard and fast timeline will enable the public to accurately evaluate whether permit review and revision is taking place appropriately.

Similarly, states must complete the process of issuing Title V Clean Air Act permits expeditiously. While the EPA should take action to clarify its rules and guidance for permit issuance, there is no good excuse for states to

still have a significant backlog of permits nearly five years after the date by which Congress expected all the permits to be issued. In addition, states should ensure that Title V permits are complete and are issued with the maximum amount of public participation.

2. Polluters should be held accountable through frequent, adequate inspections and consistent state review of self-monitoring reports.

Studies have shown that the existence of a strong enforcement presence “in the field” leads to improved compliance with the law. State enforcement officials must commit to conducting at least the minimum number of inspections with the appropriate amount of detail, as required by EPA policy. At the same time, states should streamline the gathering of self-reporting data by initiating electronic reporting systems.

In addition, states should ensure that they have adequate systems in place to review and evaluate discharge reports submitted by polluters — particularly those for minor facilities, whose violations of the law tend to go unnoticed.

3. States should take timely enforcement actions against serious violators of the law and assess penalties that, at minimum, eliminate the economic benefit of polluting.

Every state that has been delegated environmental enforcement authority should have a clear penalty policy that provides for the calculation and assessment of penalties that exceed the economic benefit gained from polluting. The estimated amount of economic benefit should be made public, along with the amount of the penalty assessed, so that the public can evaluate whether this is taking place.

However, the recovery of economic benefit is not sufficient to deter pollution. Polluters who break the law must also be required to pay additional penalties based on the “gravity” of their violation — an assessment that should take into account the degree of damage done to the environment or public health.

States such as California and New Jersey have enacted frameworks that set mandatory minimum penalties for serious or chronic violations of the Clean Water Act. Such penalty guidelines can be effective deterrents — especially since they guarantee that those facilities engaged in such violations *will* be fined. However, states with such policies must exercise care to assure that the minimum penalty is high enough to act as an effective deterrent and that the mandatory minimum penalty does not, in implementation, effectively become a maximum penalty.

State enforcement actions should, at minimum, be carried out in a timely manner as defined by EPA policies and guidance. States should be encouraged to experiment with the issuance of immediate fines through “field citations,” which allow inspectors to issue small fines to violators during the course of an inspection.

4. States must follow up appropriately to ensure that violators return to compliance with the law, pay the penalties they have been assessed, and complete promised environmental improvements.

States should make greater efforts to improve their monitoring of compliance schedules and completion of supplemental environmental projects negotiated through consent orders. Such orders should stipulate penalties for missing key enforcement deadlines.

In all cases, monetary penalties assessed to violators should be collected promptly. State enforcement guidelines should stipulate

the assessment of additional penalties — or the ratcheting up of enforcement actions — for violators who fail to meet their commitments.

5. The public and EPA must have the tools to hold states accountable for enforcement of the laws.

States should improve the quantity and quality of information available to the public about enforcement of environmental laws. Citizens should be able, using the Internet, to look up all relevant information about pollution permits in their neighborhood, assess the compliance history of permitted facilities, and trace how the state has enforced the law.

In addition, states should publish annual reports on enforcement listing the number of enforcement actions taken, the number of significant violations recorded, and the impact of state enforcement actions on the environment. While some have criticized the accumulation of data on enforcement actions, inspections and penalties as “bean counting,” such data is important to ensure that states are fulfilling their basic functions under the law. It is true, however, as “bean-counting” critics suggest, that such measures are not sufficient to truly evaluate the success of enforcement efforts. More information must be collected and made available to the public on rates of compliance with environmental laws and on how the activities of regulated entities affect the environment.

Similarly, regulated entities should not be granted blanket permission to withhold information about their environmental performance. States should not grant privileged status to information gleaned from environmental self-audits or grant immunity for self-auditing companies.

Citizens must be kept involved in all aspects of the enforcement process — from permitting to identification of violators to the bringing of enforcement actions and the

evaluation of enforcement programs. States should aggressively seek out public opinion on permits and rectify deficiencies in processes for handling citizen complaints. In addition, states should consider measures to ease the process and reduce the cost to citizens of challenging permits.

While Congress (and to a lesser extent, EPA) has the power to remove barriers to citizen enforcement suits, states can play a role in allowing these suits to go forward by refusing to engage in meaningless enforcement actions for the purpose of enabling violators to avoid a citizen suit. In addition, states can craft statutes that allow citizens to bring suit in state courts to enforce provisions — such as the non-point source components of the Total Maximum Daily Load program — that are not enforceable at the federal level.

Finally, EPA should be less hesitant to revoke the enforcement authority of states that fail to adequately enforce the law. At the federal level, EPA should clarify and tighten its revocation criteria so as to give states better guidance for what is expected of their enforcement programs. The findings of the numerous EPA, GAO and other reports cited in this paper document that some states have clearly failed to properly enforce the law. Revoking the enforcement authority of the poorest performing state enforcement programs would send a message to all states that their enforcement programs will be held accountable to national standards. Without such accountability, there is little way to assure that all Americans benefit from the baseline level of environmental protection guaranteed by federal law.

THE IMPORTANCE OF ADEQUATE RESOURCES

Funding for enforcement activity is clearly inadequate. State environmental officials estimate that an approximate \$1 billion “re-

source gap” exists in their clean water, clean air and drinking water programs.

Both the state and federal governments have a role to play in closing this resource gap. As noted above, the proportion of state environmental spending provided by the federal government has shrunk over the past decade and a half, although federal support has risen in recent years. Funding of state-level environmental enforcement must become a federal priority — though not at the expense of cutting funding for federal enforcement activity at the EPA, which provides critical oversight and direction in the enforcement of the nation’s environmental laws.

States must also step up and provide enough funding for basic environmental enforcement. At minimum, states should have enough enforcement employees to meet their commitments under federal law, give those employees enough training to do their jobs effectively, and create an atmosphere that supports and encourages the work of front-line environmental enforcers.

Finding resources to support environmental enforcement at a time of fiscal uncertainty is a challenge. However, states do have access to one source of funding not generally available to the federal government: permit fees. Permit fees should be set high enough to pay for the bulk of environmental enforcement activity and states should experiment with other ways to ensure that polluters — not taxpayers — pay the lion’s share of the cost of enforcing the law. One possible way to ensure this is by dedicating money collected through penalties to enforcement programs.

EVALUATING “INNOVATIVE” ENFORCEMENT APPROACHES

In recent years, state and federal environmental officials have engaged in a search for

“innovative” new approaches to improving compliance with environmental laws and overall environmental quality. The motivations behind this drive for innovation are often genuine, including the desire to attain better environmental performance, the need to curtail as-yet-unaddressed sources of pollution, and the desire to save money. Moreover, one of the benefits of the federal system is the opportunity it creates for allowing states to experiment with new approaches to societal problems — approaches that can then be adopted in other states or nationally.

However, innovation merely for the sake of innovation is not beneficial to the environment — and it can even be injurious if undertaken without proper care. This is especially the case when innovative strategies replace, rather than augment, traditional enforcement practices.

For example, compliance assistance programs are generally recognized as an important part of any effort to improve compliance with environmental laws. Regulated entities deserve to know how environmental laws affect them, and deserve help in understanding how best to comply with those laws. Workshops, “plain English” guides to environmental regulations, and technical assistance for regulated businesses can all be beneficial. These strategies can be especially beneficial when they promote real pollution prevention activities. States such as Massachusetts have pioneered pollution prevention strategies that reduce the use of toxic chemicals — a move that often saves money for industries and reduces the risk of non-compliance with environmental laws.

In some states, however, compliance assistance appears to be seen as a substitute for traditional enforcement activity. In its most damaging manifestations, compliance assistance is emphasized even after facilities have seriously violated the law — an attitude that reduces the motivation for polluters to com-

ply with the law by removing the threat of effective sanctions for violations.

Innovative environmental enforcement strategies, therefore, must be evaluated in the proper context. We suggest five criteria by which such programs should be evaluated:

Does it assure environmental “results”?

Less-costly enforcement approaches that yield the same, or greater, environmental benefits as traditional approaches are clearly to be preferred. But the bottom line for evaluation of such programs must be whether they ensure that facilities will meet their requirements under the law and protect the environment and public health. As noted above, some popular “reforms” — such as audit privilege and immunity laws — have been shown to have little or no quantifiable environmental benefits and have come at the expense of other benefits. When benefits cannot be quantified or guaranteed, states should stick with a traditional, deterrence-based enforcement approach.

Does it ensure accountability?

The ability to release pollution into the water and air is a privilege, not a right. Polluters granted that privilege must understand that violations of the law will be met with swift, certain and significant punishment.

Innovative approaches to permitting and reporting — such as self-monitoring and self-certification requirements — can be effective, but only if they are backed up by a system of inspections and enforcement sufficient to identify and punish those facilities that break the law. Repeat or serious violators of the law should not be eligible for technical assistance or other regulatory benefits. No facility that has violated the public trust by repeatedly breaking environmental laws should expect

additional help or “flexibility” from government.

Does it result in undue harm to specific local communities?

Ordinary citizens care less about whether toxic releases nationwide are going up or down than whether the polluter in their neighborhood is dumping toxics into the local river or stream. One of the most important benefits of the Clean Water Act and Clean Air Act is the promise that citizens in all parts of the country should enjoy a clean and healthy environment.

However, some recent regulatory developments — such as the increased use of general water discharge permits and the growing popularity of market-based pollution trading schemes — threaten these protections. General permits — which cover entire classes or groups of facilities — may or may not be sufficiently flexible to meet the local needs of individuals in a given community. Similarly, pollution trading schemes can allow individual polluters to emit much more pollution than they would under existing law, putting nearby communities at risk. Pollution trading also comes dangerously close to enshrining the ability to release pollution as a legally enforceable “right,” undermining the premise that such releases are privileges that can be bestowed or removed by society.

Does it unduly shift costs or responsibilities from regulated entities to the public?

While compliance assistance should be an important part of any enforcement program, there is a danger that such programs can become free, taxpayer-supported consulting services benefiting industry. Again, that is not to say that all such programs are unwise. Indeed, the use of enforcement power and government assistance to drive real pollution pre-

vention activities can result in a true “win-win” situation for both the permitted facility and the environment. However, businesses that receive technical assistance from the government should be called upon to “pay for” those benefits by producing exceptional environmental performance.

Similarly, states should impose greater oversight over programs such as Supplemental Environmental Projects to ensure that these projects — which violators undertake in lieu of paying penalties — are completed in a timely fashion and benefit the environment, not the polluter.

Does it promote public involvement and guarantee citizens’ right to know?

Ultimately, environmental enforcement efforts should be accountable to the public. Any policies that allow regulated entities to keep environmental information secret, avoid public involvement in the permitting process, reduce accountability to the public for environmental performance, or obviate citizens’ ability to use the existing regulatory framework to bring enforcement actions against violators are undesirable.

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APPENDIX B: SUMMARY OF STATE PERFORMANCE ON CITED ENFORCEMENT MEASURES

	AIR				WATER								
	Pct. of Title V permits issued (1)	Rank	Pct. of major air pollutants not inspected FY1997-99 (2)	Rank	Court order to implement TMDLs (3)	Pct. of Rivers and Streams Assessed, 1998 (4)	Rank	Pct. of Lakes, Reservoirs and Ponds Assessed, 1998 (4)	Rank	Pct. of major facilities in significant noncompliance with Clean Water Act (5)	Rank	Pct. of expired major permits (6)	Rank
Alabama	98%	5	10%	42	Yes	5%	45	94%	12	38%	11	4%	43
Alaska	48%	45	57%	3	Yes	0%	50	0%	45	16%	33	7%	40
Arizona	38%	47	24%	27		5%	45	22%	41	23%	25	4%	43
Arkansas	95%	11	11%	41	Yes	10%	37	69%	20	19%	29	14%	30
California	62%	35	19%	32	Yes (part)	8%	43	44%	34	NA	NA	22%	20
Colorado	90%	12	42%	9		27%	21	36%	37	15%	36	33%	10
Connecticut	51%	42	18%	33		16%	28	42%	36	46%	7	14%	30
Delaware	89%	13	9%	43	Yes	95%	5	94%	12	4%	46	26%	18
Florida	100%	1	26%	26	Yes	10%	37	48%	32	22%	26	16%	28
Georgia	83%	17	30%	22	Yes	12%	34	94%	12	13%	39	1%	48
Hawaii	100%	1	20%	31	Yes	100%	1	0%	45	5%	45	18%	24
Idaho	27%	50	55%	4		11%	36	0%	45	19%	29	9%	37
Illinois	60%	37	63%	1		33%	19	61%	22	17%	31	17%	25
Indiana	82%	19	42%	9		24%	22	32%	39	49%	5	44%	6
Iowa	70%	29	31%	20	Yes	14%	31	52%	30	26%	24	16%	28
Kansas	74%	23	34%	17	Yes	12%	34	100%	1	41%	8	2%	47
Kentucky	52%	40	32%	19		19%	26	96%	8	21%	27	5%	41
Louisiana	67%	32	23%	28	Yes	9%	42	35%	38	29%	20	54%	2
Maine	56%	39	37%	16		100%	1	100%	1	29%	20	28%	15
Maryland	72%	25	5%	45		39%	17	27%	40	8%	42	19%	23
Massachusetts	36%	48	58%	2		18%	27	56%	27	35%	16	27%	16
Michigan	72%	25	21%	29		40%	15	55%	28	36%	14	17%	25
Minnesota	69%	31	NA	NA		13%	33	77%	18	15%	36	49%	4
Mississippi	97%	7	14%	37	Yes	47%	12	58%	24	40%	10	12%	33
Missouri	86%	15	16%	35	Yes	42%	14	100%	1	32%	19	32%	12
Montana	97%	7	31%	20	Yes	10%	37	94%	12	16%	33	37%	8
Nebraska	52%	40	53%	6		5%	45	45%	33	36%	14	54%	2

	AIR						WATER						
	Pct. of Title V permits issued (1)		Pct. of major air pollutants not inspected FY1997-99 (2)		Court order to implement TMDLs (3)	Pct. of Rivers and Streams Assessed, 1998 (4)	Pct. of Lakes, Reservoirs and Ponds Assessed, 1998 (4)	Pct. of major facilities in significant noncompliance with Clean Water Act (5)	Pct. of expired major permits (6)	Rank	Rank	Rank	Rank
	Rank	Rank	Rank	Rank									
Nevada	33%	49	29%	23		1%	60%	23	20%	28	30%	13	
New Hampshire	76%	21	50%	7		24%	95%	11	37%	13	17%	25	
New Jersey	50%	43	34%	17		59%	44%	34	3%	47	39%	7	
New Mexico	72%	25	42%	9	Yes	4%	15%	43	38%	11	9%	37	
New York	89%	13	38%	13		100%	100%	1	27%	23	4%	43	
North Carolina	74%	23	14%	37		89%	100%	6	33%	18	33%	10	
North Dakota	98%	5	38%	13		22%	97%	7	8%	42	0%	49	
Ohio	65%	34	54%	5		10%	0%	45	41%	8	27%	16	
Oklahoma	70%	29	21%	29		14%	57%	26	34%	17	5%	41	
Oregon	99%	4	3%	46	Yes	47%	94%	12	8%	42	67%	1	
Pennsylvania	81%	20	14%	37	Yes	15%	0%	45	17%	31	25%	19	
Rhode Island	42%	46	0%	47		54%	75%	19	48%	6	12%	33	
South Carolina	96%	10	15%	36		65%	58%	9	16%	33	30%	13	
South Dakota	100%	1	0%	47		32%	18%	20	10%	41	14%	30	
Tennessee	86%	15	29%	23	Yes	88%	100%	7	54%	3	8%	39	
Texas	66%	33	38%	13		7%	50%	44	57%	2	21%	21	
Utah	71%	28	28%	25		10%	96%	37	61%	1	0%	49	
Vermont	83%	17	0%	47		16%	7%	28	NA	NA	3%	46	
Virginia	61%	36	7%	44	Yes	39%	93%	17	11%	40	21%	21	
Washington	75%	22	12%	40	Yes	98%	53%	29	15%	36	45%	5	
West Virginia	57%	38	18%	33	Yes	24%	96%	22	29%	20	34%	9	
Wisconsin	50%	43	49%	8		40%	65%	15	NA	NA	10%	36	
Wyoming	97%	7	39%	12		87%	0%	8	54%	3	12%	33	

Italic indicates states in which the EPA has primary responsibility for permitting and enforcement under the Clean Water Act.

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