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ENFORCEMENT OF ENVIRONMENTAL LAWS

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE GOVERNMENTS IN THE ENFORCEMENT OF ENVIRONMENTAL LAWS

JUNE 10, 1997

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ENFORCEMENT OF ENVIRONMENTAL LAWS

TUESDAY, JUNE 10, 1997

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 406, Senate Dirksen Building, Hon. John H. Chafee (chairman of the committee) presiding.

Present: Senators Chafee, Warner, Inhofe, Thomas, Sessions, Baucus, and Lautenberg.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good morning. As chairman of the Environment and Public Works Committee, I'd like to welcome everyone here to the committee's oversight hearing this morning on the relationship between the Federal and State governments in the enforcement of environmental laws.

A little over 4 years ago, the committee held an oversight hearing to examine the respective roles different levels of government should play in the implementation and enforcement of environmental laws. That was the first hearing at which Administrator Carol Browner testified as administrator of the EPA.

At that hearing, she emphasized the essential role States have to play in environmental enforcement. Since then, there have been other reports on the need for greater cooperation and communication between the States and EPA in implementation of the Nation's environmental laws.

In 1995, a report from the GAO found that while the relationship between EPA and the States was then on the upswing, it still had plenty of room for improvement. That same year, that was the GAO report, 1995, that same year, the National Academy of Public Administration issued a report calling for a redefining of the division of labor between EPA and the States.

Among other things, the Academy recommended that States which demonstrate superior environmental performance should be granted greater flexibility and autonomy in carrying out environmental programs. That recommendation, of course, leads to the question of how to assess the level of environmental for which a State is providing, in other words, how do you tell whether a State is doing a good job. It's more difficult than it seems.

That's because there's growing recognition that the more traditional methods of assessing State enforcement, such as by counting up the number of enforcement actions that have been filed, or the

number of penalties imposed, are not adequate. States that are trying to attain better results in administering environmental programs increasingly are experimenting with more carrots and fewer sticks.

During this transition period, the challenge is to derive new methods by which to evaluate, in a better fashion, whether innovative approaches—those undertaken by EPA or by the States—are working to achieve better results. To the extent the EPA and States are working on new modes of measurement toward this end, they're to be commended.

Now, there are several matters pending in which the EPA or the Department of Justice has overfiled against a particular company. So I'd like to say a word about pending actions. I would simply remind members who will hear the witnesses as the day goes on, that they should refrain from inquiring into details of any pending matters. The result of this hearing should not compromise the rights of parties to a pending matter, or to influence the outcome of any matter.

I would note, the legitimate policy of EPA and the Justice Department not to comment on pending matters. Their silence, or that of any other parties, with respect to a pending matter should not be construed as anything other than the exercise of prudent discretion.

We have three panels today. History shows that the first panel always gets lavish attention, the second panel gets a little less so, and the third panel is subject to a hurry-up because it's lunch time.

Now, I don't want that to occur. So with an attempt at total fairness, I'm going to restrict this first panel to 35 minutes and the other panels similar thereto. So everybody will get the same time.

The witnesses in the first panel are Ms. Lois Schiffer, assistant attorney general, from the Department of Justice; Steve Herman, assistant administrator for Enforcement at EPA; and Nikki Tinsley, acting inspector general of EPA. We'll take them in that order. Each will have 5 minutes, and then we'll have a chance for a question. The lights will go on, you can gauge by the lights. This means you've got a minute to go, when the yellow goes on.

We welcome you, Ms. Schiffer, and I've had the privilege of working with Ms. Schiffer for a good number of years. We're glad to have you here. Go to it.

STATEMENT OF HON. LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENTAL AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE

Ms. SCHIFFER. Thank you, Senator Chafee, for the opportunity to provide this committee with information about the environmental enforcement activities of our division.

As the Nation's Federal environmental law enforcement officers, we are the cops on the beat to protect the quality of our environment and the health of our communities. We carry out our important task working closely with our partners in the EPA and other Federal agencies, in the U.S. Attorneys' offices throughout the country, and with State Attorneys General and State environmental agencies. Today I will discuss the importance of a strong

and effective enforcement program nationwide, and how we have worked to enhance cooperative efforts with the States.

First, the importance of strong and effective enforcement: we handle cases referred to us from other Federal agencies including EPA, the FBI, the Coast Guard, and the Corps of Engineers. We bring criminal prosecutions and civil court enforcement actions to protect the environment, to remedy environmental harm, to punish wrongdoers, and to deter future violations. We support citizen suits as an important enforcement tool. Without vigorous enforcement, the health of our families, our community, our environment, and our economy, would all be compromised.

Environmental enforcement protects the economy in several ways. First, clean air, water and land are essential ingredients for a healthy economy. Pollution decreases land value and imposes serious health care costs and harms industries, such as fishing, tourism and recreation. Second, companies that fail to comply with our environmental laws put law abiding businesses at a competitive disadvantage. A strong enforcement program with penalties that recapture economic benefit and more to deter the violator is essential to fair and honest competition.

Environmental protection statutes promote and encourage voluntary environmental compliance, and vigorous enforcement drives such compliance. People comply with laws in part because, if they do not, they will get caught and sanctioned. As William Reilly, the Administrator of EPA between 1989 and 1993, stated while at EPA, "Enforcement of environmental laws is absolutely essential," and "is at the very heart of the integrity and commitment of our regulatory programs."

Environmental violations have real victims. Polluting an underground drinking water supply can threaten thousands of people. An oil spill that damages an entire ecosystem such as the Exxon *Valdez* spill in Alaska, may undermine the economic foundation of surrounding communities. This division's job is to ensure that the laws Congress has enacted to prevent such harms are respected and obeyed, so that these harms do not occur. This is a law and order program in a critical area. The American public repeatedly has made clear that it wants and expects environmental protection and strong enforcement.

Our environmental laws provide national minimum standards so that people all over the country have a level of environmental protection and health. These standards are particularly important to assure that States do not seek to attract industry by bidding for business through lower levels of environmental protection, and to protect all our citizens, because our Nation's air and water and contamination from our land can easily travel across State borders. State enforcement of environmental laws must be viewed in this context.

Third, cooperation with States: what steps have we undertaken to promote cooperation with State and local authorities? I'll mention eight.

First, several years ago, I appointed a counsel for State and local government affairs to act as a liaison and to assure better cooperation and communication with the States.

Second, we file and handle cases jointly with States. For example, today we are commencing a joint trial with the State of Ohio against a company that, for more than a decade, has exceed air emissions limits on particulates in operation of its boiler.

We work with Law Enforcement Coordinating Committees and task forces organized through a number of U.S. Attorneys' offices to use Federal, State, and local investigative and prosecutive resources most efficiently to fight environmental crime.

Fourth, we have a policy that our civil enforcers notify a State in advance of filing a suit in that State, absent exceptional circumstances, and invite the State's participation or cooperation in the action.

Fifth, we participate in a senior forum with State attorneys general, State environmental commissioners, tribal representatives, EPA's Steve Herman and me, to discuss environmental enforcement and compliance issues. Mark Coleman, on a panel later today, is a member of the forum. We meet regularly, and the meetings are productive.

Sixth, we work with State officials to train State and local prosecutors, investigators, and technical personnel in the development of environmental crimes cases.

Seventh, I meet often with State attorneys general, keep an open door and an open phone to their concerns and problems, and generally provide access and cooperation to discuss and address their concerns regarding cases, including enforcement.

Finally, we have worked to improve and solidify our relationship with the 94 U.S. Attorneys' offices across the country, which in turn have ongoing coordination with State and local agencies.

In conclusion, these steps help assure that we are using our enforcement resources in coordination with States to achieve effective environmental results. At the same time, we must assure that in those States where enforcement is not sufficiently vigorous—where the State does not obtain effective protection through injunctions, does not obtain penalties that recover economic benefit to assure a level playing field, and does not obtain penalties with a gravity component to assure deterrence—the Federal Government brings enforcement actions. A recent example is the Smithfield case in Virginia, which I'll talk about in the questions and answers, since I can see I'm out of time.

Again, thank you for this opportunity to describe our program as the Nation's environmental enforcement officers and the ways we work with the States to carry out this important mission. I welcome the opportunity to answer your questions.

Senator CHAFEE. Thank you, Ms. Schiffer. We'll finish the panel and then have questions for all the members of the panel.

Mr. Herman, who is assistant administrator for enforcement at EPA. Glad to see you, Mr. Herman. Go to it.

STATEMENT OF HON. STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

Mr. HERMAN. Thank you, Mr. Chairman. It's an honor to be here this morning, and thank you for the opportunity to testify about how EPA is working to protect public health and the environment

through a strong and vigorous enforcement and compliance program.

I would like to make three points in my testimony this morning. First, the environmental laws this committee has approved and the Congress has enacted are not worth much without a strong Federal enforcement program in which both EPA and the States do their part.

Second, our enforcement and compliance program is balanced and flexible. We have cut penalties that encourage environmental auditing and obtained better environmental results through settlements. Our compliance assistance services to industry have won praise from trade associations and a silver hammer award for their contribution to reinvention. These efforts co-exist with and are supported by a strong, aggressive and effective law enforcement program.

Third, we can and should give States more flexibility in their management of Federal programs. But Federal environmental law also requires States to assume certain responsibilities for both enforcement and public accountability.

Congress has authorized us to enforce environmental law. It is our responsibility to exercise that authority wisely but firmly, without fear or favor. As with any other law, the public, including responsible companies, expects that we will sanction those who violate the environmental laws we are all required to comply with.

Enforcement accomplishes three critical goals. First, it protects public health and the environment by assuring a speedy return to compliance, the elimination or prevention of pollution, and cleanup of environmental damage. Last year, polluters spent almost $1.5 billion correcting violations, cleaning up hazardous waste sites, and taking steps to improve the environment and prevent future problems.

Our settlements cut pollutant loading substantially, reducing nearly 200 million pounds of carbon monoxide, 16.6 million pounds of lead, and 7.7 million pounds of asbestos.

Second, it seeks to ensure fairness to the regulated community by ensuring that those who violate the law do not profit at the expense of those who comply. Penalties for serious non-compliance keep the playing field level. As the General Accounting Office pointed out in a 1996 report, which found that "penalties play a key role in environmental enforcement by deterring violators and by ensuring that regulated entities are treated fairly and consistently, so that no one gains a competitive advantage by violating environmental law."

Finally, it is universally accepted that the threat of enforcement sanctions does deter violations and encourages responsible self-policing. Ninety-six percent of respondents to a 1995 Price Waterhouse survey identified fear of inspections as a primary motivator for environmental auditing. Perhaps more surprising, enforcement pressure was cited as one of the most important drivers of pollution prevention among both large and small businesses in a 1996 study, sponsored by EPA.

A meaningful enforcement program, therefore, not only punishes, but also prevents harm. These are the reasons why we think it is essential for the Federal Government to maintain a vigorous and

aggressive enforcement presence, and why we are committed to doing so.

However, those who believe EPA's enforcement is solely preoccupied with counting of penalty dollars are fighting law year's war. We are proud of our innovations which fuse compliance assistance, auditing incentives and more traditional enforcement into a dynamic enforcement and compliance assurance program.

Let me give you four examples. First, we have established national compliance service centers to provide plain English assistance to printers, auto service stations, agricultural businesses and metal finishers. These centers are managed in partnership with trade associations and have earned a silver hammer award from the Vice President's National Performance Review.

Second, we have slashed and in most cases eliminated penalties for companies that audit and promptly disclose and correct violations. More than 150 companies and 400 facilities have disclosed violations already under this program. We've done this in the sunshine, without privileges for polluters, without indiscriminate amnesties, and without tying the hands of law enforcement officials.

Third, it is our policy to reduce penalties for companies that agree to innovative environmental projects as part of their settlement for non-compliance. These efforts have yielded more than $100 million in environmental projects that benefit local communities in fiscal year 1995.

And last but not least, we are working hard to tie all these efforts together by launching a national effort, and this addresses the point that you made, Mr. Chairman, that will culminate this fall to develop new measures of enforcement and compliance success. We are including the States, trade associations, industry and public interest groups in this effort. This is really a "put-up" or "shut-up" time for everybody to come forward with their ideas on the best ways to measure our success in this program, and for measuring compliance also.

Let me just conclude with a couple of words about the State partnership, since my time has expired. We share responsibility for environmental enforcement under the law. While that partnership, the State-Federal partnership is challenging, we believe joint jurisdiction is fundamentally sound and serves the public well. States conduct the lion's share of inspections, and are essential to maintaining an enforcement presence.

The Federal Government is needed where States lack authority, problems that transcend State boundaries or are particularly complex, and to discourage forum shopping by irresponsible companies, and to maintain level playing fields across the Nation.

We have taken a more flexible approach to our national environmental performance partnership grants and our performance partnership agreements, which we are working through. Occasional conflicts should not obscure the fact that our day-to-day working relationships with States on almost all matters is generally very good.

Federal law does establish certain responsibilities for States that manage Federal programs, just as they do for EPA. First, under Federal statutes and regulations, States must have the authority

to enforce the requirements of any Federal programs it administers. This includes the ability to obtain——

Senator CHAFEE. Now, Mr. Herman, in keeping with my stern injunction as we opened, we're going to have to wind up here.

Mr. HERMAN. I will conclude, then, and incorporate the rest of my information into answers to questions.

But I would say, though, Mr. Chairman, and I apologize for going over my time limit, is that in all partnerships, EPA and the States may have diverse views on issues. In fact, many States have diverse views. We need each other, we have to work together, and I think we are in fact trying to overcome these problems. Where there is a philosophical difference, figure out how we overcome that and do our job for the American public.

We are continuing to do that and will continue to do that.

Senator CHAFEE. Fine. Thank you very much.

Ms. Nikki Tinsley, Acting Inspector General of the EPA. We welcome you here.

STATEMENT OF HON. NIKKI L. TINSLEY, ACTING INSPECTOR GENERAL, ENVIRONMENTAL PROTECTION AGENCY

Ms. TINSLEY. Thank you. Good morning, Mr. Chairman and members of the committee.

I'm pleased to have the opportunity to discuss independent audits conducted by the Office of Inspector General dealing with issues related to environmental enforcement. EPA is working in partnership with States and sometimes local agencies to achieve environmental goals. I will discuss three aspects of a partnership that are essential if it is to work well.

First, mutually agreed-upon enforcement approaches. Second, clear agreement on responsibilities. And third, complete and accurate reporting of environmental data. I'll discuss these areas in light of our recent audits in the air and hazardous waste programs.

One generally accepted enforcement approach is that of escalating enforcement actions for repeat violations. A violator may initially be required to comply with an administrative order or be assessed a relatively small monetary penalty. If these actions don't bring about compliance, the violator could face civil or criminal judicial actions and progressively higher penalties.

We found numerous instances where this progressive enforcement approach was not employed. For example, during a 2-year period, a California glass manufacturing company was fined $1,000 18 times for excess particulate matter emissions. The fines were not increased, and the company did not move into compliance.

The second enforcement approach is that penalties should be large enough to negate any economic benefits of noncompliance. EPA regions we reviewed generally included an economic benefit component in their penalty assessment. But States generally did not. When economic benefits are not consistently calculated and collected, violators gain an economic advantage over those who comply with the law.

A third enforcement approach is that in order to be fair, penalties must be consistent relative to the seriousness of the violation. We found a great variance when we compared EPA and State penalties and when we compared penalties between States. For ex-

ample, penalties assessed against hazardous waste violators in a sample of 13 States varied from an average of about $7,000 in Maryland to almost $60,000 in Texas.

Inconsistencies in enforcement can result in varied levels of environmental protection that put public health and the environment at risk. The inconsistencies we identified were caused by factors such as limited State and local resources, State and local concerns that large penalties would result in industry relocating, and State and local preferences for different enforcement approaches.

For a partnership between EPA and a State agency to be successful, there must be common agreement about the activities each will perform. Our audits showed that EPA and the States frequently did not agree on program requirements. To illustrate, I'll discuss our audit of EPA and the Pennsylvania Air Enforcement program.

EPA expected Pennsylvania to report significant violators that it identified during inspections. In comparison to EPA, the State placed less emphasis on reporting violators. While Pennsylvania performed 2,000 inspections at major facilities in fiscal year 1995, it reported only 6 significant violators to EPA. We reviewed 270 of the inspections and identified 64 additional facilities that should have been reported.

Not reporting allowed the State to work with violators to achieve compliance without EPA involvement. Unfortunately, achieving compliance sometimes took years, during which the violators were emitting excessive pollution into the atmosphere. Because EPA was unaware of these violations, it was not able to exercise appropriate oversight.

Accurate and complete enforcement data is vital so that we as a Nation can judge the extent that industry complies with environmental laws, and so that States and EPA can target areas for increased enforcement. We found major omissions and inaccuracies in both the air and hazardous waste enforcement data systems. The Pennsylvania example I just described illustrates a data emission problem, along with the problem of EPA and the State not agreeing on responsibilities.

I've discussed three elements we believe are necessary for effective partnerships between EPA and the States. First, when voluntary compliance cannot be achieved, partners must agree on an enforcement approach that includes escalating penalties and considers economic benefit and the seriousness of the violations. Second, all partners must understand and accept their responsibilities. And third, data systems must contain complete, accurate and timely information on enforcement activities.

That concludes my remarks, and I'd be happy to answer questions.

Senator CHAFEE. Thank you very much, Ms. Tinsley.

I must say, I'm sympathetic to the problems you face. It's not easy.

First of all, we've got to consider that each State obviously supports the industries within its borders, and doesn't want to come down too hard on these industries. At the same time, if they do levy a fine, one of the problems that constantly comes up is, is the fine really fair and does it make up for the advantage that that

company had over an out-of-State competitor who was abiding with the rules the whole time, while enduring any extra costs that go with it.

In other words, did the offender get a competitive advantage that produced profits.

I don't understand the case you cited—that 18 times in a row the California company was only fined $1,000.

One of the things you mentioned, Mr. Herman, was experimentation—maybe have the States be laboratories for the enforcement of environmental laws. How do you do that, when there's the chill of the Federal Government coming in and overfiling, coming in on top?

Mr. HERMAN. I think, Senator, there's a couple of parts to it. I think it is very important for the States to have the opportunity to experiment, to try different approaches, to gear approaches to the situations in their own States. I think that's part of the framework that Congress in its wisdom has established.

In doing that, however, there are certain minimum standards which are in the Federal statutes, and which have to be maintained to guarantee that citizens all over the country have a minimum level of protection. So any experimentation has to go on within certain boundaries.

With regard to overfiling, in fact, we recognize that overfiling is something of an extraordinary action to take.

Senator CHAFEE. How many times do you think you overfile a year?

Mr. HERMAN. Last year, we had four overfiles.

Senator CHAFEE. In other words, you came in on top of—a State court action was proceeding, and you came in on top of that in the Federal Court?

Mr. HERMAN. That's correct. It's a little more interesting than that, actually. The State action is finished. My understanding is that in two of those four cases, we actually were invited in because the State was not able to get adequate relief from their statutes.

But in the previous 2 years, there were 15 overfiles. Again——

Senator CHAFEE. Per year?

Mr. HERMAN. No, total. Prior to that, there was an ECOS study which ECOS commissioned among the States, which showed that the States basically were not overrun by overfiles. We used that enforcement tool only when the result that the State got was insufficient or was not taken in timely fashion, where statute of limitations was going to run out, or the relief they got was insufficient. Recently, you may have read about a fairly extraordinarily overfiling case, which I'll——

Senator CHAFEE. Why don't you touch on that briefly.

Mr. HERMAN. That was the Smithfield Ham case, in Virginia. There were thousands of violations—horrible discharges into the water. The State was willing to settle for a very modest amount. EPA overfiled. We were challenged in Federal Court. Last week, a Federal district judge in a 75-page opinion upheld us on all points. Now the only issue is the amount of the penalty. All of the overfiling cases really have been where there's been gross disparity in the relief that is sought.

Senator CHAFEE. Let me just briefly ask a question of Ms. Schiffer. I was interested, Mr. Coleman, who's coming up in the next panel, is chairman of a council you have. Is he with the Attorney General in some State?

Ms. SCHIFFER. He's head of the environment agency in the State of Oklahoma.

Senator CHAFEE. OK. Well, he must be all right.

[Laughter.]

Senator CHAFEE. So, this group, this Environmental Council of States, is what—an organization of the enforcement people from the States?

Ms. SCHIFFER. I want to separate out two different groups. Mr. Coleman has been chair of something called ECOS, which is the acronym for the Environmental Council of the States. Mr. Herman can probably better address the operation and Mr. Coleman's role in ECOS.

We also have an informal group of people who are primarily enforcers, Federal and State. This group includes State attorneys general, and personnel from the Justice Department, and U.S. Attorneys' Offices.

Senator CHAFEE. So you're a member of that group?

Ms. SCHIFFER. I'm a member of that group.

Senator CHAFEE. And they come to what, advise you on whether these overfilings are creating chaos?

Ms. SCHIFFER. No. It's a group that's designed to just discuss issues that arise in enforcement. It's very informal and we discuss a range of issues on and off the record. It is an informal way to help us all be better enforcers.

Of course, one of the issues that we do discuss is overfilings. And I'd like to underscore what Mr. Herman has said, about the fact that they are few in number, the Smithfield case that Mr. Herman mentioned being a very good example of an overfiling where a company was discharging——

Senator CHAFEE. Well, I don't want to get into details of that.

Senator Thomas.

OPENING STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM THE STATE OF WYOMING

Senator THOMAS. Thank you, sir.

It seemed to me part of your message was that the rules need to be enforced. I don't think anybody objects to that idea. The question is, how do we best work with the local and State governments. Now, frankly, I wouldn't have guessed that was the topic from your conversations. You talked about what you needed to do and so on.

What do you think about moving more of the activities to the States on the premise that they are closer to it and can indeed do it better within the framework of the Federal legislation? I didn't think you talked much about that. Aren't we seeking to try and involve the State more? I got the impression you think things are great the way they are.

Mr. HERMAN. I think on many fronts, Senator, we are trying to do more. There are several things that have to be looked at, which I think most of the States would agree with. What are the States' capabilities in different areas. Some States, there's a wide range of

capability among the States, as everywhere. Different States have different strengths and different interests.

Where States can handle more, they are in fact handling more. And we see it all the time. States do most of the enforcement in our area, so I'll address enforcement. The overwhelming number of enforcement actions are taken by States in the country. In our criminal enforcement programs, a great portion of our resources and time are spent building capacity among State officials. The response of State, local sheriffs and district attorneys has been overwhelming—they want to get the resources and the support we provide.

Senator THOMAS. One of the difficulties with hearings, generally, is that you are the first panel and then by the time the other witnesses come, you may be gone. I think one of the future witnesses will say the crisis of environmental enforcement is now. Do you agree with that?

Mr. HERMAN. I don't know what that means.

Senator THOMAS. Well, it means that there's a crisis in environmental enforcement.

Mr. HERMAN. I think it's critical that we have strong——

Senator THOMAS. No, that's not what it means. It means there's a crisis in getting the job done, I believe.

Mr. HERMAN. I don't know if there's a crisis in getting the job done. I think some people question whether we should do it.

Senator THOMAS. No, this person will not question that, I am sure. I think he's saying it isn't being done properly.

Ms. SCHIFFER. Senator Thomas, I believe that all of us feel that we are working very hard to assure that companies and people in America comply with our environmental laws, and that enforcement is a very important and effective tool to helping move that along.

We are working cooperatively with States, but it really needs to be done in a combination with Federal and State enforcement in order to be effective. It is true that resources have been cut back with both some State agencies and all of us in the Federal Government are operating under some limited resources now. So that we don't always have complete resources to do the very most enforcement that we would like to.

But I think in terms of a crisis of environmental enforcement, what we have is many companies who will at least in private tell you that it is important that we enforce so that the companies that are stepping up to the plate and doing a good job aren't at a competitive disadvantage vis-a-vis companies that are not taking care of their pollution control obligations.

Senator THOMAS. These are folks who will say something later, when you all don't have a chance to respond. This one, I paraphrase, says, I think there is no EPA-State partnership in some areas. EPA's perspective seems to be they own the ranch and we're the hired hands. How do you respond to that?

Mr. HERMAN. My perspective is very different. We have reached out more toward the States than any other prior administration. We have brought the States into the planning of enforcement, trying to incorporate State and Federal priorities in all our regions.

We are dealing with some philosophical problems that we have to work through. So though I think there are problems, I also am absolutely confident that we are working them through. We have had some serious problems, as you know, with regard to the question of State audit laws. We have been negotiating and talking to States, we've reached agreements with States like Texas, Utah, Michigan and others, in terms of how we proceed, even though there is some disagreement.

We are doing the training of local people. We are trying to negotiate performance partnership agreements, specifically with regard to enforcement. Administrator Browner and Deputy Administrator Hanson are both former commissioners. They both welcome meeting with the commissioners and have had some very serious talks. I think we're going through some periods of major changes and looking at new ways of doing things.

I think as we do them, you don't get instant agreement. These are very, very tough problems and they're tough issues in terms of balancing different interests and different approaches. There are people who see the light and know the absolute right way to go. I think it's much more complicated than that, and that's what we have to have patience to work through with each other.

Senator THOMAS. Thank you.

Senator CHAFEE. Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Chairman.

One of the questions that concerns me is letting States and companies know generally when and under what circumstances the Federal Government will overfile. That is, even though the State is proceeding at one level or another, that EPA, the Federal Government believes that the State enforcement action is inadequate.

It seems to me it would be helpful if there's a general understanding as to how the Federal Government decides to step in, and under what circumstances and when, etc., so that everyone tends to know when that might or might not happen.

So how do you decide when to step in? What are the rules and what are the guidelines? How well publicized are they, how well known are they? Are they agreed upon? Do they vary significantly so people don't know what the rules, standards, guidelines are? I'd like you to discuss that, please.

Mr. HERMAN. I'll start. Good morning, Senator Baucus.

There are guidelines. We have guidance called timely and appropriate guidance, which sets out sort of the reasonable amount of time within which an action should be brought and guidelines for penalties that should be given.

Senator BAUCUS. And these are well known?

Mr. HERMAN. They should be, yes. They've been out there for quite some time. And I think if you ask the State representatives that are going to testify after me, and I believe they were worked through with them in the late 1980's.

But let me say two other things. One is, in every case as far as I know that we overfile, we talk to the State first. We try not to have a surprise. We try and tell them what exactly is our problem

with what they're doing. And they will tell us why they think you shouldn't have a problem, or what the situation is, why what they're doing is fair.

Second, or third, the problem of overfiling, I think it's a small blip when you look at the numbers of actions that are taken by both the Federal Government and all of the States. The percentage of overfiles is absolutely infinitesimal. Last year, there were four. In 1994 and 1995, there were 15.

Prior to that, according to an ECOS survey, it was under 30 for several years. It's just not a large universe.

Now, we realize the seriousness of it. And as I said prior to your coming in, in some cases that I've mentioned, the States have actually asked us to come in, because they weren't able to get adequate relief under their laws.

But both Ms. Schiffer and I are firm believers in giving the States advance notice, trying to talk to them about it. Certainly if there's time, engaging in some serious discussions about whether we have to do it, do they want to join us, do they want to change course.

Senator BAUCUS. Ms. Schiffer.

Ms. SCHIFFER. Thank you, Senator Baucus.

I think the Smithfield case, which was ruled on last week by the district court in Virginia, is a very instructive example. There we had a company that was discharging wastewater from its meat packing operations into a tributary of the Chesapeake Bay over 5 years in complete violation of its permit limits. Its wastes included cyanide, excess nitrogen, and a variety of other extremely harmful things, including fecal coliform.

We talked to the State of Virginia about enforcement. The State of Virginia really took no real enforcement action. Then we notified the State of Virginia that we were going to file an enforcement action against this extremely serious violator, and 3 days later, without telling us, the State of Virginia filed a case in court asking for what were relatively modest penalties in the face of these enormous violations.

In fact, the court ruled last week that the Government's case was justified, and that there were serious violations here. The penalty issue has been deferred. The court also ruled that Virginia's program, which it may consider an example of experimentation, did not have adequate opportunity for public participation and had an administrative penalty system where someone could be assessed a penalty only if they agreed to it. The administrative process couldn't impose a penalty on people.

So the court said the State program was therefore not comparable to a Federal program, and actions taken by the State weren't going to get in the way of Federal action. That's an example of where we had what I think of as the three things. We needed serious injunctive relief here, so that the environment wouldn't be harmed any more. We needed a serious penalty that recovered economic benefit. That is what the company——

Senator CHAFEE. I tell you what. We just can't explore each of these cases by themselves.

Senator BAUCUS. I want her to give us just a one sentence summary of it, which she's doing right now.

Senator CHAFEE. Well, let's hear that one sentence, not too many commas in it.

[Laughter.]

Ms. SCHIFFER. I'll try. The penalty needs to be high enough to deter, so that a company doesn't think it can come in and wait until it's caught by a Government authority and then pay what it would have had to pay in the first instance.

Senator CHAFEE. That's a great sentence.

Senator BAUCUS. Thank you, Chairman.

[The prepared statement of Senator Baucus follows:]

PREPARED STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Thank you, Mr. Chairman. I'll cut right to the chase.

Twenty-five years ago, this committee made a profound decision. It established *national* standards for clean water, clean air, and other forms of environmental protection.

And measured by the improvements we see in our air and water, this policy has been a huge success.

But unless national environmental standards are backed up by a *national* enforcement policy, it's national in name only. Compliance can vary widely. And companies that play by the rules will be placed at a competitive *disadvantage* compared to companies in other states that break the law and get away with it.

So I believe that it is critically important to maintain a strong Federal enforcement *backstop*.

That said, we have to remember that our objective is not enforcement for it's own sake. Our objective is *compliance* to improve the environment.

So I remain interested in further steps that we can take to help companies understand and comply with the law, especially small businesses that can't afford lawyers, consultants, and audits.

I also am interested in trying to improve the *balance* between Federal and State *compliance* efforts, so that we focus our resources and use them as efficiently and effectively as possible.

It looks like we have good, balanced panels of witnesses and I look forward to hearing from them.

Senator CHAFEE. Senator Inhofe.

OPENING STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator INHOFE. Thank you, Senator Chafee. I was just a couple of minutes late, so I didn't get a chance to do an opening statement. So I'd like to submit at the beginning of this meeting my written statement into the record.

Senator CHAFEE. Let me just say, somewhere in here when I started, we're under somewhat of a time constraint. And as I mentioned, the first panel always gets a preferential amount of time, and so I want to make sure that each panel gets——

Senator INHOFE. I'll stay within my time. But I'd like to have that statement in the record, and also the two letters that I referred to in my statement entered in the record entered at the appropriate place.

Senator CHAFEE. Without objection, so ordered.

[The prepared statement of Senator Inhofe follows:]

PREPARED STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Mr. Chairman, thank you for calling today's hearing on the relationship between the Federal and State governments in the enforcement of environmental laws. This is a very important area and I am glad we are having this hearing today.

As the chairman of the Clean Air and Wetlands Subcommittee, I will be looking at the enforcement of these programs very carefully in the months to come. I am particularly concerned about the enforcement of several of the Clean Air regulations particularly the new "Credible Evidence Rule," the planned enforcement activities for the "enhanced monitoring rule," and the manner in which the EPA has been threatening to cutoff highway funds to the States. But these are issues I prefer to address in separate Clean Air hearings or in the ISTEA reauthorization process.

Today, I think it is important to address the overall enforcement program of the Federal Government. I have two main concerns that reach across all environmental laws.

(1) The States are in the best position to enforce the environmental laws and regulations.

The EPA should be limited to an oversight role for consistency only and for providing advice to the States. They should not be in the business of second guessing States or playing the big bully on the block. I realize that the majority of enforcement actions are taken by States, but we are now 25 years into our Nation's environmental programs and the States should take an even greater role. It is time for us to acknowledge that the States can and should take a greater role in environmental programs, and enforcement issues are an excellent example. The States can often accomplish activities in a more efficient manner.

I would like to highlight one example. While this is not an enforcement case, it is a Superfund cleanup case that I mentioned at our last Superfund hearing. It shows that the States are better equipped to clean up sites faster and more efficiently than the Federal Government, which in turn provides for a cleaner environment.

The example was two refinery waste sites in Oklahoma, Sand Springs and Vinita. Both are owned by the same company. The clean up at Vinita was directed by the State of Oklahoma, it cost almost one third as much as the Federal site *per cubic yard of waste* ($92 verses $262 per cubic yard) and only took 3 years verses 11 years at the Federal site in Sand Springs.

After I used this example, the EPA responded with a letter to members of the Committee explaining how I was wrong. I would like to offer the EPA letter as well as a response by the company into the record. As you can see by these letters, the EPA missed my point. *Comparing the cost of cubic yard to cubic yard for the same waste, the State site was faster and cheaper.* My point then, as it is today, is that there are some activities the States do more efficiently which should be left to the States.

(2) We should get away from enforcement action bean-counting.

I would like to hear some suggestions today on how to get away from enforcement bean counting. Imposing large fines on someone for failure to file a form properly does not help anyone including the environment, except as another notch on the belt of the inspector. We need to change the climate on enforcement-bean counting. I'm sure some of you will say it is changing or it has changed; but I disagree. The well-publicized news reports last fall about the Department of Justice complaining that the EPA had not referred enough cases in 1996 is proof that it is the quantity of cases that counts, not the quality. While this may very well be a result of Congressional budget influences, we need to get away from this.

If the Agency works out a program for the States to provide assistance to the regulated community to ensure compliance with the environmental laws, *and* quits measuring success by the number of cases filed, fines collected, or people jailed; then our environment will be protected and I will be the first to defend the Agency here in Congress.

I am glad to see Mark Coleman from Oklahoma here today, I welcome his testimony and that of the other witnesses.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, DC, March 12, 1997.

Hon. JAMES M. INHOFE,
U.S. Senate, Washington, DC.

DEAR SENATOR INHOFE: At the March 5, 1997 Senate Environment and Public Works Subcommittee on Superfund, Waste Control and Risk Assessment Oversight Hearing on S. 8, the Superfund Cleanup Acceleration Act of 1997, you raised a comparison of ARCO's cleanup costs and timeframes for two Oklahoma sites in your opening remarks. The Administrator promised we would follow up with you on this example.

As outlined below, it is quite clear that these two sites are in no way comparable other than the fact they are both in Oklahoma and are currently owned by the same corporation. The Agency is very concerned that "old horror stories" and the way the program was operated prior to 1993 continue to dominate the Superfund debate. The Superfund program is fundamentally different today—a point the Administrator emphasized at the hearing. To that end, we are pleased that you have given us the opportunity to demonstrate that not all sites are the same and that States tend to undertake the cleanup only at lesser contaminated sites. We have also included an example of how our Superfund Administrative Improvements have impacted Oklahoma—which we hope you will factor into any discussions of Superfund Reauthorization.

COMPARISON OF CLEANUPS AT SAND SPRINGS AND VINITA, OK

Site Comparison

While both of these sites are former Sinclair refineries, several differences exist that prevent a credible direct comparison of cleanup costs and timeframes between the two sites. The Sand Springs site was judged much more of a threat to public health and the environment and was listed on the NPL. The Vinita site was evaluated by EPA and referred to the State for action because it presented little health risk. Key differences include the following:

Volume of Waste Cleaned Up—The Sand Springs cleanup addressed nearly three-and-one-half times the volume of waste at Vinita.

Complexity of Wastes—After closing as a refinery, the Sand Springs site was used by several other industries, including a chemical recycler, resulting in a significant degree of contamination from chlorinated solvents and other chlorinated hydrocarbons at the site. As a result, 5000 cubic yards of Sand Springs waste had to be shipped offsite to a commercial hazardous waste incinerator. In contrast, the Vinita site contained refinery wastes only, which are much less expensive to remediate than chlorinated wastes.

Proximity to Population—The Sand Springs site is located in a populated area, adjacent to businesses, near to residences, and adjacent to the Arkansas River, which is heavily used for recreational purposes. Approximately 300 people work on, or adjacent to, the site. There are four schools, a hospital, an orphanage, and numerous restaurants within a mile of the Sand Springs site. The Vinita site is in a relatively remote area, nearly two miles from the town of Vinita.

Ground Water Use—Ground water is used within one-half mile of the Sand Springs site. There are no water wells within four miles of the Vinita site.

Air Emissions Safeguards—Due to the proximity of population and the chemical composition of the wastes, there was a major concern with controlling air emissions at Sand Springs. For example, there was a documented incident which indicated the presence of hydrofluoric acid gases within the sludge pits. Prior to EPA involvement, earthwork activities by the city of Sand Springs to construct a storm water retention basin adjacent to the sludge pits caused a significant release of gases which required the hospitalization of workers and the evacuation of nearby businesses. Due to this potential for an off-site release of air contaminants, EPA took extra precautions to protect the health and welfare of surrounding businesses and residents, including the Sand Springs Home for Orphans. EPA required extreme care to be taken during excavation activities, including emission controls and extensive air monitoring. Although expensive and time consuming, these protective measures were necessary to ensure the safety of the community. The more remote Vinita site, without the complications posed by chemical plant wastes, did not require this degree of protection .

Priority of Site—Due to the types of waste present, the proximity to population, and the sensitivity of ground water, the Sand Springs site ranked for NPL listing under the HRS, while the Vinita site fell far short.

Protectiveness of Disposal Cell—The Sand Springs site used a RCRA-caliber vault for disposal of the stabilized waste, whereas a simple clay-lined cell was used at Vinita.

Design Costs—Due to uncertainties as to whether the stabilization process would work effectively on the Sand Springs wastes within allowable air emission levels, ARCO proceeded with design of an incineration system so that they would have a fall-back treatment technology ready in case the stabilization did not work. This added significantly to ARCO's design costs at Sand Springs but was not a factor at Vinita. Furthermore, ARCO was able to utilize its extensive (and costly) initial stabilization process studies from Sand Springs to shortcut the design process at Vinita.

The following matrix compares some characteristics of the two sites:

Factor	Vinita	Sand Springs
Size of site	177 acres	200
Volume of waste	62,000 cu yds	213,000 cu yds
Volume of Chlorinated Hydrocarbons	0	5,000 cu yds
Population within 4 miles	6,582	15,000
Distance to nearest water well	>4 miles	<½ miles
HRS Score	0.94 (prescore)	28.86
Drums of hazardous materials removed	0	400

Sand Springs Touted as Ahead of Schedule and Under Budget

The Sand Springs remediation (construction) actually began in 1992 (not 1985) and took 4 years to complete. At an August 29, 1995 ribbon-cutting to celebrate completion of construction, ARCO stated that the remedy had been completed 1 year ahead of the Consent Decree schedule and $10 million under budget.

Impact of Administrative Reforms

In addition to the differences above, it must also be pointed out that the Sand Springs cleanup was conducted prior to the Superfund Administrative reforms. A much better example of how EPA is currently addressing the cleanup of abandoned refineries is the Fourth Street site in Oklahoma City. The Fourth Street site utilized on-site stabilization/solidification, neutralization, and off-site disposal as the remedy. The waste at the site was an acidic sludge containing high levels of lead. The remediation of approximately 43,000 cubic yards of sludge was completed on schedule, under budget, and with no lost time accidents, at a total cost of just under $5 million. The volume and type of waste addressed make Fourth Street a much more credible point of comparison to the Vinita site, even though Fourth Street is in a much more populated area.

I hope that this clarifies the differences between the sites. If you have any additional comments or questions please contact Kevin Matthews (202–260–5188) in my office or Ed Curran (214–665–2172) at our Regional Office in Dallas.

Sincerely,

ROBERT W. HICKMOTT,
Associate Administrator.

ARCO,
Los Angeles, CA 90071, April 2, 1997.

Hon. JAMES M. INHOFE,
U.S. Senate, Washington, DC.

DEAR SENATOR INHOFE: Several weeks ago, you were kind enough to forward to us a letter from EPA which responded to a comparison we had discussed with you earlier of costs at two ARCO managed Oklahoma remediation sites, Vinita and Sand Springs. The attached paper responds to the EPA assertions in that letter.

As you will see, we feel that the substantial differences in per cubic yard remediation costs at the two sites—$92 at Vinita, $263 at Sand Springs—must be laid principally at the door of the CERCLA statute itself. Roughly two thirds of the difference in cost was caused by the procedural complexity and remedy selection decisions driven by the law. One third of the difference, or less, is accounted for by differences in site location and waste.

What we draw from this experience is that CERCLA's fundamental design—the bones of the statute—are wrong. And as long as it remains as is, we can expect extravagant costs and lengthy delays of the sort we experienced at Sand Springs. Although EPA has recently made a strong effort to do as much as it can administratively to rationalize the process and choose more sensible remedies more quickly, it cannot alter the basic structure and commands of the statute.

We would be happy to meet with you to discuss further our experience at the Oklahoma sites or with Superfund generally. Again, we appreciate your efforts in seeking reform of this well meant but badly crafted program.

Very truly yours,

KENNETH R. DICKERSON,
Senior Vice President.

ATTACHMENT

COMPARISON OF SAND SPRINGS AND VINITA, OKLAHOMA SITES

The principal point we wish to make is that the wastes treated at the Vinita and Sand Springs site were very similar, but the Sand Springs waste cost more than *three times as much per cubic yard* to remediate. Moreover, the Vinita project took *3 years* to complete, the Sand Springs project *11 years*. These two comparisons speak volumes about the CERCLA process. State remediation, in this instance, was far more efficient, faster, cheaper, and protected the public health and the environment. As we will outline below, the differences between the two sites are far less significant than their similarities. Indeed, the chief difference is that Sand Springs was listed on the National Priorities List, and Vinita wasn't.

EPA's response to Senator Inhofe's March 5 hearing questions justifies the differences in remediation cost and duration at the two sites based upon a list of factors which at first blush seem a reasonable basis for differentiation. However, we differ in many respects with EPA's facts, characterizations, and conclusions:

Waste volumes—Sand Springs waste volume was about twice Vinita's (not three and one half times). Apart from that discrepancy, the real point here is that greater waste volumes should—and usually do—make unit costs significantly cheaper, not more costly.

Waste complexity—The Vinita and Sand Springs wastes were quite similar—refinery acid sludges—and the remedy eventually selected—solidification—was also the same. Vinita waste cost $92 per cubic yard to remediate; Sand Springs cost $263 per cubic yard. *The cost comparisons we have stated for cleaning up wastes at the two sites include only refinery waste.*

The chlorinated hydrocarbon wastes which EPA mentions were deposited in a totally separate and physically distinct area—the so called Glenn Wynn site. ARCO had placed no waste at the Glenn Wynn site. Regardless of the lack of physical or legal relationship, EPA combined the Sand Springs and Glenn Wynn sites and required ARCO to sign a consent decree agreeing to clean up both, this despite the existence of over 200 potentially responsible parties at the Glenn Wynn site, many of which were large, financially solvent firms. ARCO complied with the decree, cleaned up the Glenn Wynn waste, and was then forced to sue the responsible companies. ARCO collected its remediation costs, but lost $4 million in outside legal fees it was forced to expend in the collection effort (The U.S. Supreme Court has held that legal fees cannot be recovered in the absence of Congress amending CERCLA). Nor did ARCO recover compensation for the considerable inhouse management, legal, and executive time spent to recover the Glenn Wynn costs.

While we didn't include an extended discussion of the Glenn Wynn issues in our earlier paper, this matter raises collateral issues (collateral, that is, to remediation cost and timing problems) pointing to very serious statutory defects in CERCLA. These are, first, EPA's unfettered discretion to define NPL sites and require clean ups which unfairly burden individual parties and, second, the prohibition on recovery of legal fees in contribution actions brought by private parties who have done more than their share of the clean up.

Proximity to Population—It is true that the Vinita site is rural, and the Sand Springs site is located in an industrial district of the municipality, although both sites had people residing within one half mile of the site operations. We agree that particular care needs to be taken in clean ups where people, water or animals are close by. In fact, ARCO took scrupulous care to limit exposure to workers and releases to the surrounding environment in both clean ups, and happily adopted additional safeguards at Sand Springs because of the proximity to the community. The point the government seems to be making, though, is that the difference in the setting of the site accounted for the bulk of the difference in the remediation costs and timetables. We don't agree with that view, nor with the implication that the State of Oklahoma's program would inadequately protect its people and resources—for a Vinita or Sand Springs site.

Ground Water—It's not clear what point the government is making here. Protection of ground water was not a principal or express determinant of the remedy selected at either Sand Springs or Vinita. Each remedy was chosen for source control—keeping people from direct contact with the waste. The remedy was the same at both sites (solidification and capped containment). An additional target of the remediation process at each location was to isolate the solidified waste from surface runoff and ground water, and to ensure that if water ever did reach the waste, nothing harmful would leach from it. However, there is no drinking water well anywhere near the Sand Springs site which could be affected by the waste (the well EPA describes as a half mile away is crossgradient and more than a mile distant from any

waste). Moreover, the surface aquifer was contaminated by other industrial sources upgradient of the Sand Springs site.

Sand Springs costs *were* boosted considerably by EPA's requirement that the solidified (non-hazardous, non-leachable) waste be contained in a RCRA vault, but this was, in our view, an inappropriate decision justified by reference to CERCLA's statutory framework (requiring the use of applicable, relevant and appropriate requirements—ARARs—from other environmental laws and regulatory regimes), and not by groundwater concerns. We discuss this issue in more detail below.

Air Emissions Safeguards—As we noted above, ARCO willingly employs state of the art measures and safeguards to protect workers, nearby people and the environment. While the Sand Springs waste was somewhat more difficult to handle, and businesses were located immediately adjacent to the site, the protections employed in the Sand Springs and Vinita clean ups were quite similar, including air emissions controls, protective equipment, and monitors. In fact, the principal exposures in both projects were those presented to the remediation workers, who were excavating the acidic waste which emitted sulfur dioxide fumes before neutralization with lime. At both sites, perimeter air monitors were installed; and concentrations of sulfur dioxide seldom reached levels of concern at the property boundaries at either site.

It is true that Sand Springs city workers laying a sewer across the site dug into a lens of refinery acidic waste, which liberated sulfur dioxide—not hydrofluoric acid gases. This incident undoubtedly helped to propel the Sand Springs site onto the Superfund list, but added little to the cost differential between the sites—since both had similar waste and required the same kind of safeguards. We estimate that, at very most, the combined factors of more acidic waste and closer proximity to people and businesses may have accounted for a third or less of the difference in costs between the two sites.

Priority of Site—Whether a site qualifies under EPA's hazard ranking system for listing should be irrelevant to remediation timing and costs. Indeed, the fact that EPA regards a site as a priority should accelerate action and drive EPA to quickly find the most cost effective remedy that protects people and the environment—just the sort of thing that didn't happen here. In our experience it rarely ever happens in a CERCLA remediation setting.

Protectiveness of Disposal Cell—EPA required ARCO to construct a RCRA vault at Sand Springs which cost substantially more than a clay lined and capped cell of the sort which was used at Vinita. This accounted for about one third of the difference in costs. RCRA facilities are designed to be used for the containment of hazardous wastes which present a danger to ground and surface waters, not inert, non-leachable, non-hazardous wastes of the sort produced by the remediation processes at Vinita and Sand Springs.

While ARCO agreed to build the RCRA vault at Sand Springs, in our judgment it was excessive and neither cost effective nor legally warranted. EPA required the more costly containment option as a condition of dropping the incineration remedy which it had initially chosen. In fact, ARCO has cleaned up two other similar refinery waste (EPA-lead) NPL sites in different EPA regions for which capping—without a RCRA vault—was the remedy to which EPA agreed. This illustrates one of the clear statutory problems with CERCLA—the preference for treatment and ARARs, combined with EPA's enormous discretionary power, often and unpredictably leads to remedies which are excessive and which a PRP simply accepts rather than risk the extreme consequences of a challenge. This is another statutory problem which cries out for legislative change.

Design Costs—EPA is simply incorrect in asserting that ARCO itself chose to design an incineration remedy. ARCO advocated solidification as the remedy, which EPA refused to accept without extensive site specific testing. Accordingly, the incineration remedy was mandated by EPA in the Record of Decision and strongly objected to by ARCO. ARCO was forced to spend well in excess of $600,000 on the design of the incineration remedy before State and community opposition, test results, and other factors caused EPA to relent and approve the solidification alternative. Moreover, EPA is incorrect in asserting that Sand Springs studies reduced the cost of the Vinita remedy—in fact, Vinita was designed and finished before the Sand Springs solidification remedy was engineered. If anything, experience at the Vinita project lowered the Sand Springs cost.

The real cost differences between the two sites lay in three areas. First, construction of the RCRA vault and associated logistical difficulties accounted for perhaps one third of the cost difference. The endless rounds of studies, engineering and design approvals, and extensive oversight required by the CERCLA process accounted for at least one third of the total difference in per ton costs. The remaining third, and the only legitimate increase, was caused by the urban setting of the Sand

Springs site (most notably construction problems caused by lack of space) and its slightly different waste.

In the end, we are left with the conclusion that the two projects were—or should have been—remarkably similar—the only real difference was that Sand Springs was a Superfund site, and Vinita was not. Wastes and remedies were, but for the ill-chosen RCRA vault, quite similar. Yet each remediated yard of Vinita waste cost less than a third of what it took at Sand Springs; and Vinita was completed in 3 years while Sand Springs took eleven. *This sort of problem is endemic in CERCLA, and its source is the statute itself, not the people.*

EPA—including its site managers and hazardous waste program executives—are not the problem. In fact, after the initial skirmishes and disagreements with EPA during the first several years of the project, the Region VI team in charge of Sand Springs struggled constantly to bring rationality and speed to decisionmaking. They only partly succeeded. The difficulty lay—and still lies—in the commands and ambiguity of the law itself.

It is a statute whose design guarantees vicious litigation, agonizingly slow decisions, and unbelievably expensive remedies. It prevents reuse of old industrial property and revitalization of cities. It doesn't clean up the worst problems first. EPA has made some progress with its administrative reforms, but cannot fix the core of this badly conceived statute. Congress must act.

Senator INHOFE. Mr. Chairman, as the chairman of the Clean Air and Wetlands Subcommittee, I'm very interested in the enforcement. I would really like to mention a couple of things, one was brought out by Senator Thomas when he talks about the States being in a better position and how difficult it is in some of these hearings. Because we'll make a point, to you, and then you are out of here. The next group comes up and they repeat everything you say.

I would only recall to the chairman's memory the statement that I made, that proved the point to me, anyway, that the States do a more effective job, and I used several examples. The example I used before your committee just a short while ago had to do with Superfund sites. I compared two sites in Oklahoma, one at Vinita, OK, and one at Sand Springs, OK, by the same company. And the one that was done by, directed by the State of Oklahoma cost one-third as much as the Federal site, per cubic yard of waste. In other words, it was $92 a cubic yard cost to clean up the site that was under the supervision of the State of Oklahoma, as opposed to $262 a cubic yard of the Federal Government-supervised cleanup. The State took 3 years, the Federal Government took 11 years.

I see example after example after example, and I'm sure that Administrator Browner is getting tired of me using all these examples.

So anyway, later after that meeting, they refuted that, and I have letters that I will insert in the record here in the appropriate place that shows I was exactly on target.

The other area of concern is having to do with what they call bean counting. You said, Mr. Herman, that that was last year's war. When was the war over?

Mr. HERMAN. The what?

Senator INHOFE. This is on measuring performance by the number of arrests or the number of prosecutions, the number of fines.

Mr. HERMAN. I think this is an extremely important question. The traditional method for EPA to measure its success in enforcement was referrals of cases to the Justice Department, numbers of inspections, that type of thing. Which I will say in a minute, I do think have some value.

We recognize, though, that that alone was not enough to show what the program was doing in terms of the environment or possibly even in deterring violations. We have taken several, and I think this probably came out in my confirmation hearing 4 years ago, because I think Senator Chafee may have brought up the beans back then.

But this is what we have done. One, we have started determining what are the environmental impacts——

Senator INHOFE. Mr. Chairman, I see we're going to have a problem here if he's on No. 1 and we have several things we're going to be talking about. I just asked the question, when was the war over?

Mr. HERMAN. I don't know if the war is over. What we are doing is, we are trying to solve the problem.

Senator INHOFE. Let me get another question out, then. Because I don't want to go over my time, here. The Reason Foundation issued a study just last summer, well, first of all, I think the Justice Department actually made a request that you get into more cases, which might indicate there are fewer of them out. This was just last fall, as I understand it, that the Justice Department came out in a report that the EPA had not referred enough cases in 1996.

But I look at that as proof that it's the quantity of cases, not the quality of cases.

The four recommendations that came from the Reason Foundation were: No. 1, more precise language in laws and regulations; No. 2, restoring criminal intent as a necessary condition of criminal prosecution; No. 3, measuring enforcement success in terms of environmental improvement rather than numerical standards; and No. 4, respecting the bill of rights. They specifically talk about which elements of the bill of rights.

Are you familiar with this report, and are you attempting to meet some of these recommendations?

Mr. HERMAN. I have not seen this report. Although a gentleman from the Reason Foundation did testify at our hearing on developing new measures, which we held last month in San Francisco.

Senator INHOFE. In writing, Mr. Chairman, I'd like to give him a copy of this report and ask that he respond to this.

Senator CHAFEE. Is that a Region I report?

Mr. HERMAN. The Reason Foundation, I believe, is in Region IX, San Francisco.

Senator INHOFE. It's in California.

Senator CHAFEE. OK, if you can respond to that, Mr. Herman.

Senator INHOFE. Thank you.

Senator CHAFEE. Is the question clear?

Mr. HERMAN. You're going to give me the report and you want us to comment on the recommendations?

Senator INHOFE. That's correct, these four questions which I just read into the record.

[NOTE: EPA did not submit a response for the record.]

Senator CHAFEE. Thank you. We'll have a chance, we'll have a wind up soon on this panel.

Senator Lautenberg.

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman.

Mr. Herman, I want to ask you, how many matters might have presented an opportunity for overfiling in the period during which the four overfilings took place? That was last year, was that the calendar year or fiscal year?

Mr. HERMAN. That's correct, the fiscal year.

Senator LAUTENBERG. It was the calendar year. How many matters, do we have any idea how many were filed?

Mr. HERMAN. It's up in the, counting State actions and our actions, we're in the realm of 10,000 probably, or more. Those are administrative, judicial.

Senator LAUTENBERG. So there were four times when the EPA intervened?

Mr. HERMAN. That's correct.

Senator LAUTENBERG. Has EPA threatened to remove delegation for various environmental programs from States that have strong privilege protection laws and in how many instances might that have occurred?

Mr. HERMAN. There are four or five instances, Senator, where citizens have filed petitions specifically bringing State programs to our attention, in which the allegation has been made that the passage of the audit or the audit privilege immunity bill takes away from the State the necessary enforcement authority that they need.

We have looked into those matters and in some cases we have determined that if the law were left as it were that the State wouldn't have the necessary authority required under Federal law. Now, what I'm talking about by necessarily Federal authority is the ability to get injunctive relief, the ability to get penalties, the ability to respond when there's an emergency, the ability to prosecute criminals.

In several cases——

Senator LAUTENBERG. That's sufficient, Mr. Herman. Our time is running short, and I appreciate the answer. I think that kind of clarifies what it is we're talking about.

I for one want to say clearly for the record that I support cooperation and working with the State governments, with the environmental protection departments, whatever they call them, within the States. But by no means do I think that we ought to step aside, and when we see something that violates the intent to clean up the environment, which I believe is EPA's principal purpose, at times it is suggested that your mission is harassment and there's some sinister plot to nag and pester companies.

But I would submit for the record an editorial done by the *Washington Post* this past Sunday and an article from the *Washington Post* talking about the Smithfield Foods violation. I look at this as an example so egregious that one can't ignore it. It says, there were 164 times they were late reporting violations, and violated clean water laws by as many as 5,330 times by discharging pollutants containing such things as fecal coliform bacteria, cyanide, phosphorus into the Pagan River.

Now, that feeds into the Chesapeake. That's our water. It's our body of water. It's where striped bass, rockfish, develop. That's one of the best spawning areas that we have.

So it belongs to all of the citizens in this country. And for us to stand by, and these articles clearly identify a weakness and a willingness from the State of Virginia to cooperate with this polluter. Slap on the wrist and walk away from it.

I would submit that you have no right to forget your assignment to protect the environment. You have to enforce the laws whether you choose to or not. If you've done it 4 out of 20,000 times, I ask you, why so many times in that ratio—I mean, you're just harassing the devil out of those innocent people.

I thank you, Mr. Chairman.

[The news articles follow:]

[From the Washington Post, June 8, 1997]

CLEAN WATER, POLITICAL HOGWASH

Gov. George Allen's disdain for Federal water cleanup policy runs deep. Labeling the Environmental Protection Agency as an interloper, he talks the talk of enforcement by weakens any serious action against polluters. A Federal judge has so ruled in a case involving Virginia's largest port producer—also the fattest contributor to the governor's efforts to elect Republican legislators. Smithfield Foods has been found liable for repeatedly dumping illegal levels of hog waste into a Chesapeake Bay tributary over a five-year stretch—5,330 violations, many of which the governor's environmental regulators chose to overlook or underrate.

Gov. Allen insists that Virginia, not the EPA, can best rule the State's waters. But in finding Smithfield liable, U.S. District Judge Rebecca Beach Smith in Norfolk dismissed the company's claim that Virginia is the appropriate enforcement authority. Judge Smith said that Federal authorities were entitled to seek fines because State law had fewer "teeth."

That is the shortcoming of Virginia's law and policies. Inadequate sanctions and go-easy inspections did worsen water quality and endanger public health. Lois J. Schiffer, assistant attorney general for the environment and natural resources division of the Justice Department, notes the importance of States having uniform water-quality protections. Businesses should not find room to shop for States with weak standards.

Judge Smith found Smithfield was late in reporting violations at least 164 times and repeatedly had violated clean-water laws by dumping pollutants into the Pagan River. At one point, State officials signed an agreement to exempt the company from some pollutant limits until Smithfield's plants could be hooked up to a regional sewage treatment plant. Even if that agreement legally exempted Smithfield—which Judge Smith said was not clear—it was reached without any opportunity for public comment.

For three of the past 4 years, Virginia has ranked last among 10 States in the region in collecting fines from water polluters. Gov. Allen commented last year: "I guess what they would prefer, these people who are carping and whining, is we just shut down these businesses, run them out of the State and all the people who work for them lose their jobs."

Only a day after the latest ruling, Gov. Allen fired 29 senior managers and staff members of the State's environmental agency. His aides called it a "realignment" opening the way for employees to apply for newly created posts. But a diverse coalition, including the Virginia Chamber of Commerce, the Virginia Manufacturers Association, the Sierra Club and State's Municipal League, called "unwarranted and poorly timed" and a hindrance to efforts to protect Virginia's environment. Leave it to the States? Not to Virginia under Mr. Allen.

[From the Washington Post, June 3, 1997]

SMITHFIELD FOODS LIABLE FOR DUMPING HOG WASTE

(By Ellen Nakashima and Spencer S. Hsu)

FEDERAL JUDGE SIDES WITH EPA IN VIRGINIA CASE

RICHMOND, June 2—A Federal judge has found Smithfield Foods Inc. liable for dumping illegal levels of hog waste into a Chesapeake Bay tributary for 5 years in the 1990s, exposing the giant pork producer to up to $133 million in fines in one of the largest cases brought under the Federal Clean Water Act.

In a case that has come to symbolize Virginia Gov. George Allen's permissive environmental policies, the U.S. Environmental Protection Agency sued Smithfield in December, arguing that the State was "not doing the job" despite a decade of violations by the company. In turn, Allen (R) has attacked the EPA for its criticism of State policies toward corporate polluters.

U.S. District Judge Rebecca Beach Smith, in Norfolk, sided with the EPA. In a 75-page ruling released today, Smith found that Smithfield was late in reporting violations at least 164 times and violated clean-water laws as many as 5,330 times by discharging pollutants containing such things as fecal coliform bacteria, cyanide and phosphorus into the Pagan River. Smith left for a later, penalty phase of the court proceeding a formal determination of the number of violations, each of which can carry up to a $25,000 penalty.

"It is the defendants, and not the public, who are discharging into the Pagan River," Smith wrote. "It is defendants, and not the public, who should pay the price for the damage to the environment."

EPA Region III Administrator W. Michael McCabe, who led the criticism of the State's inaction, called the decision "a complete, unqualified victory."

"It's important to us that the citizens of Virginia have the same water quality protections as people in every other State in the country," Assistant U.S. Attorney General Lois J. Schiffer said.

The judge dismissed Smithfield's claim that Virginia, not the EPA, is the proper policer of pollution in the State. In a separate action, Virginia's Department of Environmental Quality sued Smithfield in a State court in August for related violations, but for far less, estimated at up to $2 million.

Environmentalists welcomed Judge Smith's ruling. It "proves that Smithfield Foods is not an innocent corporation getting beat up by greedy widows and orphans," said Albert Pollard, spokesman for the Virginia chapter of the Sierra Club.

Joseph H. Maroon, Virginia executive director of the Chesapeake Bay Foundation, praised the decision for "once again showing that the Federal government as well as the State has an important role to play in the protection of Virginia's environment."

Smithfield attorney Anthony F. Troy said the company "in all likelihood" will appeal the ruling. Troy said Smithfield still believes it was in the right.

"There's a difference between discharging of a pollutant and pollution," he said. "Even if you have discharged in exceedance of the [state water pollution] permit, have you polluted? Have you harmed the river? The evidence suggests, in fact, that the Pagan has been improving in quality over the years."

In her ruling, Smith criticized Virginia environmental laws as virtually toothless, noting that the State can impose civil fines only when a polluter consents. "A penalty provision requiring the consent of the violator does not have the same 'teeth' to encourage enforcement" as the Federal law, the judge wrote.

Senator CHAFEE. Thank you.

Senator Sessions.

OPENING STATEMENT OF HON. JEFF SESSIONS, U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman.

I think cooperation is the way to go in all law enforcement. I was elected attorney general of Alabama in 1994. We formed an environmental crimes working group: EPA, the three U.S. attorneys, the Attorney General, Coast Guard, State District Attorneys, Alabama Department of Environmental Management. We met regu-

larly to decide who best might handle the kind of case that came up, and we would discuss them and that sort of thing.

I think that is a good model. I would like to ask you, in that line, it seems to me that the role of EPA might be developing somewhat like the FBI, which has a very limited number of agents within every State. The primary day to day work of law enforcement is done by the police and the sheriffs and the district attorneys.

But when cases of special expertise are needed, cases of perhaps special national interest or only Federal laws are involved, then they are involved. How do you see that as a model for the EPA?

Mr. HERMAN. Senator Sessions, I couldn't agree with you more. We serve, as you mentioned, we serve on task forces all over the country, with the Justice Department and with local attorneys general. In fact, in some States, we actually share the office. We are in the State attorneys generals offices or the local DA's office. They meet exactly as you said, discussing cases and deciding who has the best authorities or the best resources to carry out a specific task.

We have 200 Federal agents, the EPA has 200 criminal agents. Almost all of them are out in the country. There is a very small headquarters——

Senator SESSIONS. Not one in Alabama. I think there are only four per State, but there's not a lot of them.

Mr. HERMAN. Some States have more than four. But I will look into that.

But their primary job, while they do some primary investigating, there is an enormous amount of capacity building and partnering with their State and local officials. We have developed film, training films for sheriffs, one was volunteered to us by the actor, Harrison Ford. That's been very well received by police around the country.

It's terrific, and this is the way to go.

Senator SESSIONS. I think it is. But I would point out that even though you may not have overfiled but four times, there is a tremendous power in EPA when they threaten to overfile. If a settlement has been reached, or a good faith between a prosecutor and so forth, if the Environmental Protection Agency or the Department of Justice says, well, we don't care, we don't think that's sufficient, we're going to file a separate case, then a lot of hard work can be undermined. I think you should show respect, and I trust you will, in those cases.

Let me ask something specifically. I have observed as a Federal prosecutor, primarily, great delays in getting chemical analyses done of sites in order to build a case for prosecution. I've seen that repeatedly. It seems to me one of the roles that EPA could do is have the kind of chemical experts that could promptly and efficiently go to a site, determine what chemicals have been dumped there, and get an analysis and be prepared to testify in a matter of months, instead of sometimes a year or more, is my recollection.

Don't you think that's an appropriate role for PEA, to help the States and local prosecutors?

Mr. HERMAN. Absolutely, Senator. We try to offer that service. And maybe we could get together with your staff and hear some

of the experiences you've had, and if they still exist, try and correct it. I'd be glad to do that.

Senator CHAFEE. Thank you. I must say, it's very helpful to have Senator Sessions here, because he's had a lot of experience in these matters from the Federal Government, U.S. Attorneys' Office. We're very glad to hear your thoughts. I think this testing thing is important.

Senator Warner.

OPENING STATEMENT OF HON. JOHN W. WARNER, U.S. SENATOR FROM THE COMMONWEALTH OF VIRGINIA

Senator WARNER. First, Mr. Chairman, thank you for scheduling this hearing. My State has been the subject of some discussion this morning, and we're very fortunate to have Ms. Dunlop, who will come up and speak on behalf of my State. I'll reserve my comments for later today.

Unfortunately, I'm chairing another hearing of the Senate this morning, as you are. So I won't be able to stay, as much as I'd like.

First, Mr. Herman, I want to just talk generally about consent orders and ask you how important are they to getting people to comply with the laws.

Mr. HERMAN. I think that a properly crafted consent order is very important.

Senator WARNER. The key words are "properly crafted." The ability of your agency to stick by those consent orders, once they're given, is another matter. I'm currently involved in several cases involving constituents in my State, one in the furniture industry, another in the meat-packing industry.

There seems to be a feeling in the community, not only in my State, but elsewhere, the only way you can get people to comply is to literally threaten them with financial penalties. Would you talk about that a little bit?

Mr. HERMAN. Well, I think, Senator, as my written statement shows, our view is that you can get people to comply in various ways.

Senator WARNER. Enumerate those ways.

Mr. HERMAN. Pardon.

Senator WARNER. Enumerate those ways.

Mr. HERMAN. One is, we try and give information to people ahead of time, so that they know what to do. Another is, we ask people to come in and ask for help. A third, however, sometimes that doesn't work. We have had instances, and Ms. Tinsley gave the examples, where companies were given a chance. Somebody went to them from the State, they identified a problem and the company didn't fix it.

I would say that, depending on what that violation was, that the next time around that company should be fined.

We found a similar situation, which was identified by the inspector general, in Pennsylvania, where the State's policy at the time was basically just compliance, no penalties. Companies, when not faced with penalties, they basically said, well, we can wait. We don't have to fix this emission device. The illegal emissions kept pouring out of the factory.

I think you have to look at the situation and then determine what is the appropriate response, which is what any law enforcement or regulatory authority has to do if they're carrying out their job in a responsible way.

Senator WARNER. The consent orders that were issued prior to the proposed new regulations on air quality, how are the industries that entered into good faith in those consent orders going to handle consent order given that now there's a proposal for difference in regulation?

Ms. SCHIFFER. Senator Warner, what we clearly look at in case after case is, did the company have the opportunity to know what it was supposed to do to comply with the law. In the environmental area, as in every other area of the law, ignorance of the law is not a defense. We all learn that right at the very beginning of law school.

So when we are dealing with environmental matters, we want to be sure that people have an opportunity to know what they're supposed to do and then when they have an opportunity to know what they're supposed to do, they need to do it.

I know that sometimes companies say, "we didn't have a chance to know, or somebody told us something differently." We look at those facts case by case. We can't obviously address the specific cases you have in mind. We don't know what they are.

But in general, that's the approach we take when we're looking at what are the obligations of companies to comply with the law in this area.

Senator WARNER. Well, supposing a group of companies, say an industry had gotten together and negotiated a consent order or a letter of understanding, or the various types of things you have, under the old air regulation, and along come the new proposed air regulation. Of what value is that previous agreement, and they relied on it to invest considerable capital and go about the expansion and modernization of their plants. Now they're faced with potential of a new order which frankly is in conflict with their ability, given the various steps that they took under the previous order.

Mr. HERMAN. Senator, without knowing the specifics, what I can say is that I do know in some instances, in situations like that, people have made investments or relied on a consent or whatever, or grandfathered in in certain ways, or there is a sliding schedule whereby you can phase into something, and there are situations——

Senator WARNER. You will give recognition, then, to the validity of those previous understandings?

Mr. HERMAN. Pardon.

Senator WARNER. You will give some recognition, in the event that these new regulations——

Mr. HERMAN. In certain cases, that has been done. Just like with penalties, you know, a company's ability to pay, for instance, is taken into account, going to your first question.

Senator WARNER. All right. Thank you very much.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you.

Now, we want to thank this panel. Does anybody have a quick question? All right—Ms. Schiffer, one more sentence.

[Laughter.]

Ms. SCHIFFER. Two very quick sentences.

Senator CHAFEE. We've got two panels after this. I want to treat them fairly.

Ms. SCHIFFER. I'll be quick.

First, there's been some discussion of philosophical differences that the Federal Government may have with States. What we do find, though, is that when you work case-by-case with the State and get off the philosophy and look at the actual cases, we have a great deal of success getting along with the States. It doesn't mean we always see eye to eye, but it does mean we as a practical matter are doing a very good job of handling cases and enforcing our environmental laws together.

Second, I just wanted to underscore and appreciate Senator Sessions' remarks about our law enforcement coordinating committees where we get everyone together in the States. They have been very successful vehicles for really making the best use of everybody's abilities and laws and resources. I'd like to thank you for acknowledging that that's such an effective way for us to enforce our environmental laws.

Finally, in response to Senator Inhofe's statement that it's frustrating when you hear later panels, we don't have an opportunity to reply, it's a little frustrating for us, too. I would welcome the opportunity, if we could, as we hear what the later panels have to say, if we could submit some information for the record in response.

Senator CHAFEE. I would stress what Senator Sessions said. The power of these overfilings, it isn't just the number of the overfilings, it's the threat of the overfilings that is a very powerful tool, I suspect.

Thank you all very much.

Now we'll have the next panel come up. Mr. Mark Coleman, who's previously been mentioned, and Ms. Becky Norton Dunlop of Virginia, Ms. Patricia Bangert from Colorado, Mr. Christophe Tulou from Delaware, and Mr. Joseph Rubin from Connecticut. If each of you would take your places, please.

Senator SESSIONS. Mr. Chairman.

Senator CHAFEE. Yes, Senator.

Senator SESSIONS. If I may have a moment of personal privilege, I'd like to introduce Mr. Craig Canizel, the chief of the environmental section of the Alabama Attorney General's Office. He's served under a half dozen attorneys general, founded the environmental crimes section. He remains as head of that today. There's few people in this country who are more knowledgeable and experienced in environmental work.

Craig, if you'd stand up, I'd like to welcome you. I'm delighted to see you here today.

Senator CHAFEE. Well, thank you very much, Senator. We're delighted to see such a distinguished citizen of Alabama here.

Senator INHOFE. Mr. Chairman.

Senator CHAFEE. Senator Inhofe.

Senator INHOFE. The same request. We're honored to have Mark Coleman here today, from Oklahoma. He is the chairman of the Compliance Committee of the Environmental Council of States. Mr.

Chairman, I will have to leave for 20 minutes, until about a quarter after. So I'm hoping I won't miss your testimony during that time. And if I do have to leave, I'll be right back.

Senator WARNER. Mr. Chairman, if I might have the opportunity to recognize Secretary Dunlop.

Senator CHAFEE. I must say, these witnesses were judicially selected.

[Laughter.]

Senator WARNER. Well, I asked the chairman, and you very thoughtfully granted the participation in this important hearing by this very outstanding public servant. She has been in the current position from the very beginning of Governor Allen's administration. Prior thereto, she had her own distinguished career in the private sector, as well as other State and Federal offices.

We also recognize in the audience her husband, George Dunlop, who has served the Senate for very many years in the capacity of staff director of the Senate Agriculture Committee.

Senator CHAFEE. Thank you.

Senator LAUTENBERG. Mr. Chairman, in Senator Lieberman's absence, he asked that I convey a welcome to Mr. Rubin, who is from Connecticut, and who's a law professor now at Tulane Law School. He wanted to say that he's sorry he couldn't be here, but he is an Armed Services Committee meeting. So he says hello.

Senator CHAFEE. Well, in the spirit of equality, on behalf of Senator Allard, I'll welcome Ms. Patricia Bangert, from the State of Colorado. We're delighted you're here, and I know Senator Allard would want to extend a warm welcome if he could be here.

Now if we'll proceed, Mr. Coleman, please. Each of you have 5 minutes.

STATEMENT OF MARK COLEMAN, EXECUTIVE DIRECTOR, OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY; CHAIRMAN, COMPLIANCE COMMITTEE, THE ENVIRONMENTAL COUNCIL OF STATES

Mr. COLEMAN. My name is Mark Coleman, I'm the executive director of the Oklahoma Department of Environmental Quality. I've been responsible for the environmental programs in Oklahoma since 1975.

I'm the chairman of the Compliance Committee of the Environmental Council of States.

Senator LAUTENBERG. I have to correct the record. Mr. Rubin has nothing to do with Tulane. He is from the Office of the Attorney General from the State of Connecticut. I was wondering why Lieberman was sending greetings to Tulane.

Senator CHAFEE. All right.

Mr. Coleman.

Mr. COLEMAN. The Environmental Council of States is a national, non-partisan, non-profit association of State and territorial environmental commissioners. I appreciate the opportunity to testify before you today regarding the enforcement relationship between the States and the EPA.

In keeping with Congressional intent, the vast majority of enforcement in America is done by State government. State governments bring 9 out of 10 of the Nation's enforcement actions each

year. States have been delegated the Federal programs involving tens of thousands of permits, and have direct and continuous interface with both the regulated community and the public.

EPA also has a clear role. That role is to assure that we do our jobs.

I'm pleased to report that although there are many factors that place strain on the existing enforcement relationship, the States and EPA are still committed to strengthening the partnership. One of the most recent endeavors to improve the bond was the formation of the State EPA enforcement forum, which held its first meeting about 2 weeks ago. All 10 EPA regional administrators, a State representative from each region, and the primary EPA enforcement headquarters personnel are represented.

EPA has largely delegated responsibility for national programs to the States, including the primary role of enforcement. There's general consensus on the basic allocation of enforcement responsibilities.

However, when EPA brings a direct enforcement action, notice I said a direct enforcement action, not just an overfiling, any time EPA brings an action in a State wherein the State has jurisdiction, there is a major opportunity for disagreement.

There's often concern that the principles setting forth the primary role of the State has been violated. This issue is perhaps the starting point at which the relationship breaks down. It's my belief that if EPA does not first give the States an opportunity to act, in all enforcement matters in which the State has jurisdiction, the fragile relationship will weaken.

States believe that enforcement is a tool, not a goal. Compliance itself is a goal, but not a main goal. Our main goal is and should be reaching the environmental quality goals that you have set and that our own legislatures have set. No amount of enforcement and compliance activity measures will tell us anything about whether we have or have not met that goal.

Let me give you an analogy. If I were to tell you that the number of detentions and expulsions in our Nation's high schools had doubled last year, would you then conclude that our Nation's students were better educated than before? I don't believe so.

Similarly, no State would deny that enforcement is an important and a necessary tool. We all believe that. But I can also make the case to you that such an increase in enforcement actions would mean a terrible breakdown in communications between Government and the regulated communities had occurred. Such a breakdown would mean that there was little chance of improvement in environmental quality.

There are also the issues of delegations of programs and direct accountability. First, program delegation in theory is not an issue. It's clear that EPA has delegated programs to the States. In delegating this responsibility, they have also delegated the primary enforcement responsibility. If and when EPA strays from this practice, then the question of whether or not the delegation is true comes up.

State officials feel that once a program is delegated, EPA should be most concerned with overall program effectiveness, and not about the details of how States choose to handle an individual en-

forcement matter. It's not to say that EPA does not have a strong oversight role. They do. Oversight should be there to see to it and to assure that States have effective compliance and enforcement programs.

That brings us to the second part of the equation, and that's accountability. Although EPA is delegated responsibility for administering national programs to the States in keeping with Federal law, EPA has the view that you, Congress, expect them to have an ever-increasing number of direct Federal enforcement actions.

These direct enforcement actions are reportedly viewed by Congress and the public as a measuring stick of how well EPA is performing. On the one hand, the message is to give the States the first opportunity to act. But on the other hand, the message is to keep the enforcement numbers up. This perceived pressure for direct EPA enforcement may be the source of much of the conflict with the statutory principle of deferring to the States.

Overfiling is also an important piece of the enforcement relationship. Although the instances of EPA overfiling are relatively few, the possibility of overfiling and the use of overfiling comes at great cost, as you have noted.

The potential for overfiling leads to mutual wariness, and if not done with extreme care, it can rapidly damage the enforcement relationship. The success of EPA is not measured by the number of enforcement actions it takes, but by the effectiveness of its oversight role.

The basic problem between the States and EPA as it relates to enforcement is that in recent times, the role assignments have become less clear. Changes in administration at both the State and Federal level and the natural maturation of programs have resulted in uncertainty and thus inconsistent action.

In my view, the solution to these conflicts is to reaffirm the established roles. In doing so, we can focus the limited resources that we have toward these roles and accomplish the goal that we all share in protecting the environment.

Federal enforcement personnel should lead in research and standard setting and oversight and technical support, and in national information collection. The States should perform their lead duties in direct program administration, including direct enforcement. Neither party should seek to pick off choice plums from the other's role.

We're not so far from the goals of both levels of Government effectively working together. States already do well over 90 percent of the enforcement action within the country. Perhaps with your help, efforts to reduce frustration and unnecessary loss of resources and credibility due to public disagreements can be significantly reduced. We are working toward that end.

Thank you for your efforts in this regard, and for inviting me to represent the views of the States.

Senator CHAFEE. Thank you very much, Mr. Coleman.

Ms. Dunlop, we welcome you.

STATEMENT OF BECKY NORTON DUNLOP, SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA

Ms. DUNLOP. Thank you, sir. Mr. Chairman, I'm pleased to be here and have the opportunity to testify. Senator Warner, thank you for being here this morning. I would like to thank the other Senators for their interest in this matter.

I also would like to ask, Mr. Chairman, that a full copy of my statement be inserted in the record.

Senator CHAFEE. That will be true for you and each of the witnesses who wish.

Ms. DUNLOP. Thank you so much.

Well, I'm here today because we're very proud in Virginia about what we have done to improve the quality and condition of the environment in our Commonwealth. There's no question in our mind that the role and the purpose and the goals of environmental policy are not how effective is your enforcement, or how effective is your compliance, but rather, are you improving the quality and condition of the air, the water, the soil, the flora and fauna, that make up our environment.

That is our goal in Virginia in the environmental area.

We find it really quite surprising that EPA still believes that their principal role has to be enforcement, and that the role of environmental policy for EPA seems to have little to do with improving our natural resources and our environment, but much more to do with enforcement outcomes: how much are you fining people, how much litigation is there, and how many permit restrictions have you imposed.

In Virginia, we believe that the Virginia way is the best way. In the area of enforcement, that is compliance first. We made that very clear when Governor Allen took office and I became Secretary. About a year after we made clear that this was our State policy, the President of the United States, who was Bill Clinton, came to northern Virginia and announced he had a new policy. It was called, compliance first.

The Virginia way is a science-based approach which uses all the resources of State agencies, other government agencies and entities of the private sector to help and assist companies and local governments and municipalities to reduce site and situation specific emissions which can harm the environment and have a harmful effect on people and other resources.

Of course, in Virginia we also have in our "kit bag," as we talk about this, the tool of enforcement. Enforcement is important when it is necessary.

If there are willful polluters, if there are people who have 20 instances of continuing the same practice without making any attempt to improve it, we call them bad actors, in the Commonwealth of Virginia. We are vigorous in going after these bad actors to bring them into compliance, so that our goal can be realized, which is improving the quality and condition of our natural resources.

Of course, the Department of Environmental Quality does not have the authority to take legal action, other than the consent orders that were discussed earlier. We, for civil actions in the courts, must refer cases to our attorney general, which we do. For criminal prosecutions, we refer the cases to the Commonwealth's attorney,

who then works with the U.S. Attorney to decide who is best able to bring the action.

I did find it interesting that the Environmental Protection Agency this morning talked about the possibility that there are 20,000 cases where they could overfile, and yet in 1 year they chose only four. I think this very well points out that there is some selection process and perhaps some political nature to their decisions.

We also believe in Virginia that we have taken a leading role in changing the way the improvements to the natural resources and environment can be managed. Pollution can be prevented and cleanup of polluted sites can be accomplished.

We believe that this is very important. The way we have restructured our Department of Environmental Quality is organizing by functions rather than the separate media. So now, in each of our six regional offices, instead of having separate divisions of air, waste, and water, we have a permits division, where we have people with expertise in each of these media working together. Corporate citizens, small businesses and indeed, municipalities, can come and work with one team of people on permitting, compliance and enforcement that covers across the media.

We also have decentralized the Department of Environmental Quality in Virginia. I noted, in going through some records, that this is something that Carol Browner did in Florida when she was Secretary of Environment. They're now doing it again in Florida, so I guess there were some intervening years when someone thought recentralizing was important.

We have moved our primary activity out to the six regions of Virginia, so that the people in our regional offices can work closely, more effectively and more directly with the entities that they regulate and be sensitive to the needs and concerns of the people in the very communities where they live and work.

We also have set up a new mechanism in Virginia to work more cooperatively with locally elected officials, again, the governments that are closest to the people. We've great success doing this with our tributary strategy in Virginia, where we're working to improve the water quality in the tributaries of the Chesapeake.

Speaking of the tributaries of the Chesapeake, I do hope I have the opportunity to discuss briefly, in response perhaps to a question, the Smithfield case which seems to have attracted so much attention and comment this morning.

The changes in the way Virginia has done business seems to have caused EPA to take actions to put themselves in conflict with the States. Their approach still is enforcement first.

In every public appearance I make with Michael McCabe, the Region III director, his only point recognizing the quality and condition of Virginia's natural resources, is the amount of the fines that we have levied in Virginia. He makes no reference to the fact that we had four non-attainment areas for air quality ozone, and three of those have now reached attainment in the past 3 years and qualified for redesignation.

He makes no reference to the fact that in northern Virginia, which is our one remaining non-attainment area, the Environmental Protection Agency has in fact approved our plan to improve the way we do tailpipe emissions in garages, and that the air qual-

ity in northern Virginia indeed is improving, and our policy is working very well.

Senator CHAFEE. Ms. Dunlop, could you wind it up, please?

Ms. DUNLOP. Yes.

We find that EPA has continued its top-down approach. There have been some improvements, but basically, EPA still views itself as in charge. This partnership with the States is something that they handed out with the left hand and then the next thing you hear, the Deputy Administrator of EPA is pulling back the partnership with the right hand.

They have overseen failed programs such as Superfund and States like Virginia have had to come up with voluntary remediation programs to try to make sure we are cleaning up sites in the Commonwealth.

Finally, I would say, Mr. Chairman and members of this committee, we believe that the issue really here before us is, is government to be a helpful servant or a fearful master. When George Washington finished his term as President, he warned the American people about this potential conflict in the future.

I joined State government and I served in the Federal Government because I believe government should be a helpful servant in administering the laws of our land, not a fearful master. We appreciate the opportunity to be here to share with you our commitment in Virginia to being a helpful servant in improving the quality and condition of the natural resources and the environment in our State.

Senator CHAFEE. Thank you very much, Ms. Dunlop.

And now, Ms. Bangert.

STATEMENT OF PATRICIA S. BANGERT, DIRECTOR OF LEGAL POLICY, OFFICE OF THE ATTORNEY GENERAL FOR THE STATE OF COLORADO

Ms. BANGERT. Thank you, Mr. Chairman and members of the committee. My name is Trish Bangert. I'm the director of Legal Policy for the Attorney General's Office in the State of Colorado.

I want to thank the committee very much for the opportunity to present our views on the EPA-State relationship. I also would like to submit my written remarks for the record.

I want to address two topics in this oral testimony. The first is the reality of the EPA-State relationship. And second are some suggestions that might make that relationship work more smoothly.

As to the reality of the relationship, don't be fooled by EPA hype. In some enforcement areas, the EPA-State partnership is a total fiction.

Senator CHAFEE. Is a total fiction?

Ms. BANGERT. Is a total fiction, yes, sir. The reality is, and I think Senator Thomas alluded to this testimony earlier, very often EPA thinks they own the ranch and we're the hired ranch hands.

For example, I don't see any compromise or cooperation in the area of self-audits.

Another reality that I want to address here is the effectiveness of State enforcement efforts in the State-Federal enforcement scheme. EPA charges that some States, especially those with self-audit programs, are failing to protect the environment.

The reality of the situation, however, is that those charges simply are not true. States like Colorado are working very hard to protect the environment. EPA's complaint in reality is that we aren't doing it in exactly the way they would do it.

EPA loves its own image. In fact, it would like to go into the various States and create a mirror image of itself.

Look at EPA's January 1997 audit policy update: "U.S.-EPA Regional Administrator John H. Hankinson, Jr., in a letter dated September 26, 1996, applauded the State of Florida for adopting a policy modeled on EPA's." The reality is, however, that just because a new program differs from the EPA model, it doesn't mean that that program weakens enforcement in the State.

One such new program is environmental audit. Twenty-two States, as you know, have passed some sort of legislation to encourage companies to audit their environmental compliance and correct violations found, either through a privilege or an immunity or both. Colorado is one of those States.

Now, remember here, we're talking about violations that probably would not have been found by the companies, and certainly would not have been found by the enforcers absent the audit. We're talking about the positive environmental gain in many instances. Not only are companies becoming more aware and sensitive to environmental compliance, but problems are being corrected. In addition, companies and State regulators are working together in a cooperative as opposed to an adversarial fashion.

What is EPA's response to these innovative State laws? Over the past 5 years, the agency has engaged in a systematic program to kill the self-audit movement. After trying unsuccessfully to persuade States not to pass the laws, the agency began a program of intimidation against companies and States utilizing self-audit laws.

For example, in Colorado, several of the companies that have utilized the immunity provisions have received requests from EPA for information about disclosures. In addition, EPA has threatened to overfile in those cases.

What does EPA's response mean to the audit programs? Well, we might as well throw them out the window. If a company comes forward with evidence of an environmental violation, it's providing a blueprint to EPA. In addition, it's impossible to measure the success of environmental audit programs when companies are discouraged from using them.

EPA's response and practice nullifies State laws. Now, think about that for a moment. Not only has EPA spent a lot of public money to advance its own policy perspective, but without even having to do a public rulemaking or a formal hearing, EPA can dictate the content of laws to sovereign States.

EPA's obsession with self-audit laws appears to stem in large measure from its obsession with numbers. EPA has always measured success in protecting the environment largely by the number of enforcement actions brought.

In Colorado, we have one quick example in Colorado. We have a very good school in Colorado called the Colorado School of Mines. The School of Mines had some grounds on which there was a research institute. That research institute experimented with different mining ores. The result was a waste pile.

A water-main break caused EPA to have to come in and remove that waste pile. In the removal, they laid down a lining. The pile was put on top the lining, the lining was put there to protect the ground, and that is to prevent water from going through the waste pile into the ground.

EPA ordered the State to remove the pile. The State did that. After the pile was removed, the State started to build a softball field where the pile was formerly located.

In the process of building that softball field, the workers breached the lining. Now, remember, this is the lining that was under the pile that's no longer there.

Even though they breached a liner that lined nothing, EPA ordered the State to repair the lining and to pay civil penalties. In the end, the State paid thousands of dollars to repair a liner that lined nothing, and in civil penalties, thousands of dollars that could have been spent actually removing threats to the environment.

Senator CHAFEE. Ms. Bangert, we're going to have your whole statement in the record. I wonder if you could move on to your suggestions here, because I think they'd be helpful to us.

Ms. BANGERT. I sure can, Senator, thank you.

Three suggestions today. First, is that we recognize that EPA is very often caught in between its legislative mandates and a desire to work with the States. We would suggest that there be a short-term task force or a commission that might be created to review present laws with an eye toward identifying those provisions that prevent EPA from allowing States to put their own programs into effect.

Second, we want to make sure that we identify methods of measuring success. As long as we stick with the number of enforcement actions models, we're not going to be able to have innovative approaches.

Senator CHAFEE. Yes, that is a difficult one.

Ms. BANGERT. It is. So we'd recommend a study of this issue which might ultimately result in some sort of recommendations for changes.

The final recommendation that we would have is, there does need to be greater certainty about overfiling. There may be guidelines to penalties, but as far as I know, there are no guidelines to when EPA actually overfiles.

Senator CHAFEE. Good. That's very helpful.

Thank you, Ms. Bangert, for those. As I say, your whole testimony will be in the record. We appreciate your thoughts on that.

Mr. Tulou, from Delaware.

STATEMENT OF CHRISTOPHE A.G. TULOU, SECRETARY, DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

Mr. TULOU. Thank you, Mr. Chairman and members of the committee.

My name is Christophe Tulou and I have been the Secretary of the Delaware Department of Natural Resources and Environmental Control since March 1993.

I appreciate the opportunity to join you today to discuss Delaware's enforcement relationship with the Federal Environmental

Protection Agency. The amount and quality of discourse between EPA and the States is greater today than it has ever been. We are sharing perspectives on environmental goals for the country, providing suggestions on EPA's goals and objectives under the Government Performance and Results Act and helping develop performance measures to evaluate our success under the National Environmental Performance Partnership System.

EPA and the States are not that far apart in terms of a shared vision for our Nation's environment. Enforcement and the related issue of regulatory flexibility are the areas of greatest disagreement between us. Our environmental management challenges are diverse and complex, and our Federal laws and regulations are often stiff and constraining. Finding room for common sense is tough.

Delaware's enforcement relationship with EPA Region III, however, is quite good. Though the relationship continues to be positive, our development of a performance partnership agreement with Region III has created some friction regarding the role of enforcement and environmental management. We are proud that Delaware was the second State to adopt a performance partnership agreement.

We wanted to take advantage of EPA's promise to work in partnership with Delaware to build the capacity necessary to meet our environmental priorities. We sought a relationship that recognized that States are at the forefront of environmental management, and that the fastest way to our mutual goals is through partnership, not paternalism.

Working very closely with Region III and with the strong support of regional administrator Mike McCabe, we jointly developed a model partnership agreement. We agreed to move away from case-specific reviews of our activities toward a more holistic consideration of the State's environmental enforcement programs, encouraging innovation and creativity and achieving our environmental goals. To that end, the agreement focuses on outcomes more than activities or processes.

Despite these assurances in our agreement, I fear that EPA will insist on greater reliance on enforcement specific activities, focusing on enforcement for enforcement's sake. We have argued since the beginning of the performance partnership agreement process that enforcement should be a part of all our environmental goals, not a standalone end unto itself.

In short, we view enforcement as an important tool to achieve our environmental goals, not a goal in its own right. That disagreement continues.

We also contend that compliance is a more relevant and important programmatic goal than enforcement. We should be striving through whatever means to get all our polluters in compliance. This distinction between compliance and enforcement is crucial in determining what States and EPA should be measuring and reporting.

If enforcement is the goal, then we should continue to count beans, such as penalty dollars collected or enforcement actions taken. If compliance is the goal, then we should be measuring and reporting who is in and who is out of compliance. The traditional

measures of dollars and enforcement actions are less important if compliance is the true goal.

Measuring compliance is feasible and relevant. Last year, just over 70 percent of facilities in Delaware complied with hazardous waste regulations at the time of inspection. Within 30 days of the inspection, the percentage rose to 85 percent. Within 180 days, 100 percent of facilities were in compliance.

Overly aggressive and ill-timed enforcement is a dare. It inspires polluters to assume an adversarial relationship with their environment and regulatory agencies and to challenge enforcers to discover their misdeeds. Neither States nor EPA can afford that cat and mouse approach to environmental management. Neither can our environment.

Nonetheless, enforcement is critical. In fact, in Delaware and other States, attempting to inject common sense into the regulatory process, this stick must be bigger than ever. Those polluters who choose not to participate in our compliance assistance efforts and those who continually violate environmental obligations should face the full force of public indignation and legal recourse. In this context, States and EPA can forge a powerful partnership that combines the benefits of compliance and deterrence.

Making the philosophical point about compliance and enforcement, and arguing the failings of traditional enforcement measures is not enough. States have an obligation to work with EPA to identify clearly the appropriate role for enforcement and how best to measure our success in getting polluters into compliance and keeping them there.

The State and EPA Region III have initiated a process to identify which measures of compliance and enforcement would be more useful and appropriate than those that are currently in use. I would mention that Becky Norton Dunlop and the folks from the Commonwealth of Virginia have been active participants in that process, and I think we'll be successful as a result of our partnership there.

Our goal is to make recommendations for inclusion in the Region III EPA headquarters enforcement memorandum of understanding, which will be finalized July 1. I understand similar efforts are underway in other EPA regions. As Steve Herman and Mark Coleman have indicated, there is a relationship between the Office of Enforcement Compliance Assurance and the States to develop a better relationship.

EPA should and I hope will continue to be a crucial enforcement partner. We will continue to rely on EPA to assist with our bad actors, help with transboundary pollution problems, set protective national standards, and assure that all States live up to their end of the environmental protection bargain.

We will also continue to work with EPA through performance partnership agreements and other means to build the capacity we need to meet Federal and State environmental goals. We need EPA just as EPA needs the States. That is what partnership is all about.

Thank you again, Mr. Chairman.

Senator CHAFEE. Thank you very much, Mr. Tulou.

Mr. Rubin from Connecticut.

STATEMENT OF HON. JOSEPH RUBIN, ASSISTANT ATTORNEY GENERAL, STATE OF CONNECTICUT

Mr. RUBIN. Thank you, Mr. Chairman, members of the committee.

As the head of the Environment Department of Connecticut Attorney General Dick Blumenthal's office for the past 7 years, I've participated closely in many aspects of the State-Federal environmental enforcement relationship. Overall, I've found that relationship to be cooperative and productive.

I would like to focus my remarks on two particular aspects of that relationship, which I think provide good examples of the relationship at work. The first is a model State-Federal working group on water enforcement, and the second is a current EPA review of some of Connecticut's State enforcement programs.

To begin with the model working group, almost 3 years ago, we began monthly meetings, including the Connecticut DEP water enforcement staff, our attorney general's office, and EPA enforcement and legal staff. This group is composed completely of working level staff. It has no bureaucratic structure. It doesn't operate under any guidance documents. It doesn't have any protocols. It doesn't have any memoranda of understanding. It's simply a group that instead of making pronouncements or fighting about turf sits down and works together on enforcement.

In fact, I think its lack of bureaucratic structure is critical to the group's success. What it means is that at each meeting we can discuss current and potential enforcement cases that have come from anywhere, from inspections, from citizen complaints. Together, the group can come to an informal consensus about whether a particular problem merits a significant enforcement response or not, and if it does, together the group can determine which approach will be most efficient and effective.

In reaching this determination, we consider who has the best legal tools, who has the available staff, who has the discovery tools, whose laws would be effective, who has the technical resources. It's important to say, this isn't an all or nothing decision. Often, for instance, we'll determine that EPA will use its discovery tools and then perhaps a State enforcement action will result. Or perhaps the governments will work together. In rare cases, we'll decide that a case is important enough that it should be prosecuted jointly by State and Federal authorities.

This group accomplishes several very important goals. It maximizes the effectiveness of overall enforcement efforts. It eliminates unknowing duplication of effort, so everybody can best use all of their resources. It reduces inter-agency competitiveness, and replaces it with cooperation. In effect, by providing each government with the peer review of the other government, it provides a real stimulation for everyone to do high quality work. In sum, I submit, it gives all taxpayers more bang for their environmental buck.

A second example, and one which is somewhat more controversial, is the current ongoing series of reviews, or audits, of State environmental enforcement efforts, which has been produced by EPA Region I. Region I just completed a draft review of Connecticut DEP's enforcement programs about 6 months ago. They expect to complete their final report this month, any day now.

I submit that this periodic review process represents an excellent compromise and an excellent approach to oversight. Rather than reviewing every case as it happens and creating an impression on the part of the State that EPA is trying to direct everything the State does, instead EPA has initiated a peer review process on a periodic basis. I think that necessarily has positive results.

In the first place, any peer review process is likely to produce positive results, because some outside review always helps to identify strengths and weaknesses. In addition, at least in Connecticut's case, our DEP has already taken significant steps in response to the draft report to improve areas where problems were identified. I think among the results we're going to see from that are better documentation and therefore more consistency and more fairness in enforcement actions and some redirection and increase in staff in certain areas where a particular need was identified.

The report has also very appropriately identified situations where the DEP effort was strong. Now, of course, no peer review is painless. And maybe in some cases, EPA failed to recognize some of DEP's efforts in the first draft. But overall, the review process has been very effective and beneficial.

These two examples are certainly not comprehensive. But I think they do provide a fair snapshot of successes in the State-Federal enforcement relationship. In my experience, they are exemplary of the success in that relationship between Region I and Connecticut.

I would urge this committee to continue to encourage the unfettered and unencumbered growth of these cooperative efforts. I think a national presence is important. We have one environment. We need to maintain national standards. I think through cooperative efforts such as those that I have described, we are making real progress in that direction.

Thank you.

Senator CHAFEE. Thank you very much. It sounds like Connecticut's got a very common sense approach to this.

Senator Warner has to leave, and on my time I'll permit him to ask one question.

Senator WARNER. Mr. Chairman, I very much appreciate that. I just want to see what the reaction of the various State officers are to this question of the effectiveness of the consent order as a tool to implement what I believe the goals should be under our environmental laws, that is compliance, rather than just the financial penalties.

I wonder if you could, just each of the State officers give us your personal and professional opinion as to the use of this tool in discharging your responsibilities to your respective States. Why don't we start off with Colorado.

Ms. BANGERT. I think the compliance order certainly can be an effective tool. But I think that history has shown that command-and-control is in large part inadequate by itself to achieve environmental improvement, and that we need other compliance mechanisms, such as self-audit.

Senator WARNER. Delaware.

Mr. TULOU. We use them quite a bit, and they generally are very effective. What we try to caution people is that that is not something to be expected under all circumstances. For bad actors who

have violated previous consent agreements, another option would be appropriate.

Senator WARNER. Connecticut.

Mr. RUBIN. Senator, I agree that consent orders are effective in many situations. But they have a major weakness. If we rely only or usually on consent orders without penalties then it's not clear what incentive industry has to comply before we get to them this time with this problem. If there is no deterrence in addition to a consent order, you run a risk that you're never going to get broad industry-wide compliance.

Nevertheless, they are valuable in many circumstances.

Senator WARNER. And Virginia.

Ms. DUNLOP. Senator Warner, the fact of the matter is, we think consent orders are very valuable. We don't use consent orders to the exclusion of fines, as you know. We don't use consent orders to the exclusion of the environmental audit program. We think these are all tools that need to be considered.

But consent orders have an important value. One, we sit down, our Department of Environmental Quality professionals sit down with parties and agree on what the mechanism needs to be put in place to fix the environmental problem. The money that needs to be invested to solve, upgrade, improve the way things are run, so that the outcome is an improvement in environmental quality.

Oftentimes in Virginia, the consent orders that are negotiated are accompanied by fines. Sometimes those fines then can be suspended if the company or the municipality in many instances meet the consent order agreements.

The bottom line, of course, is that for the major entities, EPA also has the opportunity to review the consent orders.

Senator WARNER. That's my second—a part——

Senator CHAFEE. Well, now, Senator, we——

Senator WARNER. Just a second, Mr. Chairman, otherwise, the question dangles.

What value are these tools if in fact the EPA then can somewhat circumvent your ability to follow through with a course of action laid down by the State and assess unilaterally, so to speak, their own penalties? Because that's the issue.

In other words, it comes down to this question of sovereignty, Mr. Chairman, the ability of these State officers, to enforce the national laws and the State laws and at the same time, how can industry put any reliance? Suppose a man or a company went out, a woman, a CEO of a company, and bought $10 million worth of air equipment to meet the clean air standards. Then they're putting it in the plant and all of a sudden EPA comes around and decides, oh, no, that's not going to work out.

Do you want to have Virginia lead off and have each State——

Senator CHAFEE. No, we can't do that.

Senator WARNER. Well, you asked——

Senator CHAFEE. Senator, you asked for some time. You can ask for the question in writing. But we've got to move along here. You asked on my time, you've used my time up totally.

Senator WARNER. I would ask them to put it in writing, then.

Senator CHAFEE. That's fine.

[Information to be supplied follows:]

SUPPLEMENTAL TESTIMONY OF BECKY NORTON DUNLOP, SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA

This question arises because of an opinion issued by the U.S. District Court E.D. Va. (Hon. Rebecca Beach Smith), on May 20, 1997. The Court granted the United States' Motion for Partial Summary Judgment in its case against Smithfield Foods. The opinion states that:

> Because the Court concludes that Virginia law is not comparable to Section 309(g) [of the Federal Clean Water Act], and thus does not bar the United States from pursuing an independent penalty action against the defendants, the court need not address whether the Commonwealth is diligently prosecuting an administrative action against the defendants.

I will not comment on the legal merits of the Court's opinion, but only on its practical effects. Under this interpretation of the law, the EPA will be prohibited from overfiling only if a State enforcement scheme essentially mirrors the provisions of the Federal Clean Water Act. Thus, a State has two choices: (1) adopt the enforcement scheme contained in the Federal law, or (2) obtain EPA approval of each and every administrative resolution of enforcement cases. In my view, this offends State sovereignty, and makes a mockery of State delegation of EPA programs.

As to the regulated community, the effect is also clear. If the State clean water law differs from the Federal one, even in relatively minor ways, then companies or local governments must independently obtain the concurrence of both the State and the Federal authorities for any proposed resolution of a violation.

Note that in the Smithfield case, the Court did not reach the question of whether Virginia was doing a diligent job of enforcing the law. A State that is doing a first-rate job can still find itself undermined by EPA overfilings.

The EPA has testified that it has decided to overfile in only a handful of the thousands of cases in which it could do so. Based on our experience in Virginia, the EPA decisions seem arbitrary, and perhaps politically motivated.

A chronology of events in the Smithfield case is attached. As you will see, the Commonwealth has been attending to violations of Smithfield's water discharge permit for a number of years, under a number of Governors. The consent orders in question were negotiated under democratic Governors Baliles and Wilder. EPA had no objection to them at the time. During the Allen administration these consent orders were reviewed, and found to be sound solutions to the problems at Smithfield. We have honored and enforced these consent orders, so that very soon Smithfield's discharges to the Pagan River will be reduced—not just to the level required by Federal and State law, but to zero. At the same time, Virginia has aggressively pursued any discharges or other violations that are outside the bounds of the consent orders. And yet, it is only during the Allen administration that the EPA has seen fit to object to the consent orders with its own lawsuit. Whether or not it is lawful, such behavior is damaging, irresponsible, and suspect.

CHRONOLOGY OF MULTIPLE ENFORCEMENT ACTIONS AGAINST SMITHFIELD FOODS, INC. AND SUBSIDIES

Governor Godwin:	
February 1977	State Water Control Board Directive issued to Smithfield Packing for permit limit violations.
December 1977	Consent Order approved by State Water Control Board for ITT Gwaltney, Inc. for permit limit violations.
Governor Dalton:	
February 1978	Smithfield Packing referred to Attorney General for litigation with a request to seek civil penalties for continued permit limit violations.
May 1978	Civil settlement of Smithfield action previously referred to Attorney General, including payment of a $100.00 civil penalty and payment of $25,000.00 to the oil spill emergency fund.

CHRONOLOGY OF MULTIPLE ENFORCEMENT ACTIONS AGAINST SMITHFIELD FOODS, INC. AND SUBSIDIES—CONTINUED

Governor Robb:	
September 1983	Smithfield Packing referred to Attorney General for violations of Total Kjeldahl Nitrogen (TKN) limits in permit.
January 1984	Isle of Wight Circuit Court orders injunctive relief against Smithfield for TKN violations.
June 1984	Gwaltney of Smithfield referred to Attorney General for violations of TKN limits in permit.
December 1984	Isle of Wight Circuit Court fines Smithfield $40,000.00 for violation of January 1984 court order.
June 1985	Gwaltney of Smithfield, Inc. is fined $1,285,322.00 in a citizen's suit brought by the Chesapeake Bay Foundation.
Governor Baliles:	
May 1986	Consent Order with Smithfield Foods granting interim TKN limits while they do monitoring and modeling to determine if permit limits may be relaxed.
January 1988	Consent Order Amendment requiring modeling to be done based on previous sampling to recommend waste load allocations for the Pagan River.
Governor Wilder:	
March 1990	Consent Order requiring Smithfield Foods to study phosphorous removal and evaluate connection to Hampton Roads Sanitation District (HRSD).
November 1990	Consent Order Amendment requiring Smithfield to participate in an HRSD feasibility study.
May 1991	Consent Order Amendment which required Smithfield to tie their discharge to HRSD once the line was constructed and made available to Smithfield, and to drop their legal challenge to the phosphorous standard.
Governor Allen:	
May 1994	Owners of three (3) permitted wastewater treatment facilities contact the Board of Professional and Occupational Regulation (BPOR) to claim that their signatures had been forged on Discharge Monitoring Reports by Terry Rettig, their contract wastewater treatment operator. BPOR forwards copies of the complaints to DEQ.
October 1994	Following careful investigation, DEQ concludes that Rettig submitted false data on behalf of eight (8) different facilities, including Smithfield Foods.
November 1994	Consent Order Amendment which granted Smithfield interim relief from new limits for ammonia, cyanide and Carbonaceous Biological Oxygen Demand (CBOD) until the connection to HRSD was accomplished.
	DEQ notifies the Commonwealth's Attorney of Surry County that the County may have been defrauded by Rettig.
	Federal Bureau of Investigation (FBI) notifies DEQ that they have been contacted by the Surry County Commonwealth's Attorney and have taken over investigation of the Rettig matter.

CHRONOLOGY OF MULTIPLE ENFORCEMENT ACTIONS AGAINST SMITHFIELD FOODS, INC. AND SUBSIDIES—CONTINUED

December 1994	DEQ turns over documents from its investigation of Rettig to the FBI. In accordance with long standing policy and at the request of the U.S. Department of Justice (DOJ), further civil enforcement action is suspended pending investigation and resolution of the criminal case.
September 1995	FBI requests the assistance of DEQ in reviewing and evaluating files regarding Rettig's activities at all eight (8) facilities.
October 1995	DOJ obtains subpoenas for multiple permittees, including Smithfield Foods, who had dealings with Terry Rettig.
February 1996	DOJ releases DEQ to continue to pursue civil enforcement action against Smithfield Foods. DEQ resumes preparation of the civil enforcement case.
April 1996	DEQ's Tidewater Regional Office (TRO) notifies Smithfield Foods of the pending DEQ enforcement action, which includes the potential referral of Smithfield to the Attorney General.
	HRSD notifies Smithfield that hookup will be available in June 1996. (Smithfield must connect to comply with its 1991 Order.) DEQ is informed that Smithfield may refuse to connect to HRSD.
	DEQ Central Office of Enforcement suggests that the referral to the Attorney General be temporarily deferred in order to determine which specific violations of the permit are unrelated to the prior orders and to determine whether Smithfield will violate the May 1991 order by refusing to connect to HRSD in June.
June 1996	Smithfield connects its discharge to the HRSD line as required by the May 1991 order. TRO, Central Office and the Attorney General continue to develop the enforcement case.
August 1996	DEQ discovers that EPA has referred Smithfield to DOJ for civil enforcement action without notifying Virginia.
	Virginia files suit against Smithfield Foods for multiple violations of Virginia's State Water Control Law.
December 1996	The United States files suit against Smithfield Foods for multiple violations of the Clean Water Act, including alleged phosphorous "violations" which are appropriate only under the interim limits provided in the State Water Control Board Orders.
June 1997	Smithfield activates the second hookup and begins diverting waste to HRSD, as required by the Commonwealth's 1991 Consent Order. When this hookup reaches full capacity, Smithfield's discharge to the Pagan river should be reduced to zero.

RESPONSE BY JOSEPH RUBIN TO SENATOR WARNER'S REQUEST FOR ADDITIONAL INFORMATION

Senator Warner has asked me to address his concern that EPA enforcement actions following State consent decrees could undercut the States' sovereign authority

and industry's reasonable reliance upon settlements with the States. My practical response to this concern is that I have never seen this problem arise. In my experience, EPA has not overfiled or taken separate additional enforcement action after a State has taken appropriate action. In addition, in my experience, when a business has a good faith concern as to whether a settlement with a State will also satisfy EPA's concerns, the business can obtain an answer from EPA. In fact, I have recently heard Mr. Herman, who is in charge of EPA enforcement, State affirmatively that it is EPA's policy to answer such questions.

Of course, our Federal system, with dual sovereigns, is always in some degree of dynamic tension. That tension is inherent in our chosen system of government. I have seen no practical problems, however, where EPA's enforcement efforts have undercut appropriate State enforcement activities. In sum, I see no major problems with present practices regarding the interplay of the State and Federal enforcement systems. As I explained in my testimony, I do see excellent examples of a strong cooperative working relationship between EPA Region 1 and the State of Connecticut.

Senator CHAFEE. Senator Baucus is next.

Senator BAUCUS. Very quickly, Mr. Chairman. I assume that all of you agree there are appropriate circumstances when overfiling is appropriate? Does anybody disagree with that statement?

Or I'll State it differently. Is there anyone who believes that overfiling is never appropriate?

[No response.]

Senator BAUCUS. There is no one who believes that overfiling is never appropriate. So you all agree that there are cases when overfiling is appropriate?

Mr. COLEMAN. There are also cases where direct Federal action is appropriate.

Senator BAUCUS. Correct. I'm just now addressing overfiling.

Ms. DUNLOP. We agree in Virginia that there are not only cases where it possibly is appropriate, but that the law provides that. We do think, however, that when EPA talks about partnerships, that it would be appropriate for them to consult with the State before they take that step.

Senator BAUCUS. Absolutely. I don't think anybody has any quarrel there.

No further questions, Mr. Chairman. But I would just hope that frankly some of these outfits, and you've talked about some commissions, some studies, Ms. Bangert, do help work with EPA and establish guidelines when overfiling would occur, I suppose, or not occur, so there's a little better understanding.

Senator CHAFEE. I must say, Mr. Rubin's testimony indicated there is some cooperation which seems helpful. I think Mr. Coleman's involved with that himself.

Mr. COLEMAN. Yes, sir.

Senator CHAFEE. Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman. I'm sorry, I had to leave for just a few minutes there, and I don't want to ask any questions that have already been asked. But just let me address, to our Oklahoman, Mr. Coleman, a couple of things. You were here when the previous panel was here, weren't you, Mr. Coleman?

Mr. COLEMAN. Yes, sir.

Senator INHOFE. I made the comment, and it was responded by the different representatives of the EPA that that was last year's war, they're referring to the policy of measuring performance by the amount of fines and cases. Do you think that was last year's war?

Mr. COLEMAN. No, sir.

Senator INHOFE. You feel that's still going on? There's some evidence there in Oklahoma, of course, you represent, you chair a national board in this.

Mr. COLEMAN. That's correct. That issue remains an issue.

Senator INHOFE. Let me ask you another question. I'm going to be, I'm the chairman of the subcommittee of this committee called the Clean Air, Property Rights, Wetlands and Nuclear Safety.

As you know, Administrator Browner came out with her changes in the national ambient air quality standards recommendation, and if that should become a reality, I've often said in the five committee meetings we've had that I would consider that to be an unfunded mandate. The response we get is, well, it's not an unfunded mandate, because we wouldn't be emanated, we would merely be saying to the States, you have to come up with a program that is going to bring your State into attainment.

Now, how do you view that from an enforcement position? Would you consider that to be an unfunded mandate? Share with us what your thoughts would be in terms of Oklahoma. Should these rules that she's suggesting become a reality, I believe it's July 19?

Mr. COLEMAN. We have worked very hard, as you're aware, in Oklahoma, to come state-wide into compliance with the clean air standards. The new Federal Clean Air Act is a very encompassing law. It's an Act that I hope at some time that you all take up the opportunity to look at in some detail.

But if the standards were changed and we were to fall into nonattainment, the actions that we would have to take would be such that we would be dipping very deeply into the common, everyday activities, of everybody in our State. We've done everything we know how to do already.

Senator INHOFE. Let me ask you this. Would you be able, from an enforcement perspective, let's take the particulate matter, if that were to drop down to $PM_{2.5}$, is the science there and your ability there to offer some type of enforcement?

Mr. COLEMAN. At this point, we don't know enough about the sources of the particulates to figure out where we would take actions. That is something as far as we're concerned that's very, very nebulous in terms of the science that exists to determine what type of enforcement actions we'd need to take.

Senator INHOFE. Mr. Coleman, I see we're getting real close to running out of time here, but in Oklahoma, I've heard a lot of things about your compliance assistance program. Could you real quickly explain to the committee how it works? Because it's gotten some national attention.

Mr. COLEMAN. Yes, sir, thank you. About 5 years ago we introduced what we call a customer assistance program. We were the first State to use that term and develop that program. I believe virtually every State, and I know every EPA region and obviously headquarters now also uses that term, where there's some attempt to reach out to those that we regulate and try to help them come into compliance.

Not that we didn't do that in some limited way before. But certainly, particularly as the new Clean Air Act comes into play, and as we realize the far-reaching impacts of the regulatory net, par-

ticularly as it relates to small business, the only way we can help those people to ever have a chance of attainment is for them to know what they need to do. Our customer assistance program is designed to tell people what it is they need to do.

Senator INHOFE. Yes, it's working very well. Thank you very much.

Senator CHAFEE. Thank you, Senator.

Regrettably, I have to go. The majority leader has asked me to come over to a meeting. Senator Baucus is kind enough to——

Senator INHOFE. I don't mind staying for a little while here.

Senator CHAFEE. Senator Baucus will preside, and I want to express my regrets to the third panel. If I can get back, I certainly will.

But meanwhile, Senator Lautenberg has a chance for questions. I want to thank everybody on this panel and express, as I say, express my regrets to the next panel. Senator Baucus, thank you very much.

Senator BAUCUS [assuming the chair]. Senator Lautenberg.

Senator LAUTENBERG. Thank you very much, Mr. Chairman.

Mr. Coleman, in response to Senator Baucus' question before, about when if at all the Federal actions are necessary, you said that they indeed are at times. I read your statement here, State officials feel that once a program is delegated, EPA must, should be most concerned with the overall program effectiveness, and not about the details how a State handles each individual enforcement.

So there is a role for Federal action, if the State doesn't enforce the environmental obligation as we understand it.

Mr. COLEMAN. Yes, sir.

Senator LAUTENBERG. One of the things I think we fail to recognize here, at least fail to discuss at times, is the fact that when there's an assault on the environment, whether it comes from Colorado, where my son lives and makes his living, or any other place, the fact is that if you dump into a river that feeds any of the neighboring State's activities, possibly drinking water or fishing and so forth, that you ought not to have the right to spoil my environment just because I'm one of the eastern-most States in the country and the prevailing winds are west and the air pollution carries very well through the air.

So if we can agree on that, and I sense that the mission of some of the witnesses is to paint EPA as a sinister force trying to embrace all the powers that are relegated to the States, and their whole mission is to sneak around and punish.

As far as I'm concerned, I can tell you, I want them out there enforcing the law. I want them to clean the environment for my grandchildren. Because if there's one thing that I want to leave my grandchildren, it's a clean environment. I want my grandson to be able to go fishing and know that there are still fish in the streams, fish in the streams or fish in the ocean.

Ms. Dunlop, you suggested in your comments most directly that there might be something of a political nature in the few cases that had Federal intervention as an overfiling. What I sensed is you wanted them out on one hand and you wanted them in on the other.

So they're damned if they don't file more cases, because you said, well, these four maybe had a political reason for EPA's involvement. Then you complained in your earlier remarks about too much involvement by the Federal Government. Do you want more or less? I'm not exactly sure what you're talking about.

Ms. DUNLOP. First of all, my comments were pointed at Mr. Herman's remarks, where he talked about what a great record they have of only overfiling in four instances when they had 20,000 opportunities.

Senator LAUTENBERG. I didn't say he was boasting. He was reporting. I asked him how many cases there were.

Ms. DUNLOP. Yes, he was reporting. I will tell you, Senator, that in the instance that the previous panel spent considerable time on this morning discussing, in Virginia, the Smithfield case, we do think there was something political about that. I'd be happy to share with you some of the details of that case, without getting into the——

Senator LAUTENBERG. I'm going to help refresh everybody's memory. This is a report, this is written in a newspaper, so it could very well be wrong. It says that Smithfield was late in reporting a violation at least 164 times, violated clean water laws as many as 5,330 times, the pollutants they dumped in there were fecal coliform bacteria, cyanide and phosphorus. I wouldn't like that in my cocktail, I'll tell you that.

The judge later left for a penalty phase to the court proceeding a formal determination of the number of violations, each of which can carry $25,000 penalty.

It's the defendants, the judge wrote, and not the public, who are discharging into the Pagan River.

Did the judge, by the way, in this case, issue a wrong opinion, in your judgment?

Ms. DUNLOP. No, we think the judge will have another opportunity in August to take a look at the Virginia case and perhaps have some different comments.

Senator LAUTENBERG. So there is an inference that the judge didn't exactly come down, in your view, with the right decision, if the suggestion is that she'll have a chance to review it later on. Does that suggest it will correct some of the impressions?

Ms. DUNLOP. There's no question, Senator, that the EPA does have a right to overfile and the facts of this cases were well noted by the judge. There are——

Senator LAUTENBERG. Are you satisfied with the action that the environmental department in Virginia took with Smithfield?

Ms. DUNLOP. Yes. I think the Department of Environmental Quality has taken the proper action. As you probably know, having studied this case, the consent order was agreed to by appointees of former Governor Robb and former Governor Baliles, it was negotiated by former Governor Doug Wilder's administration in 1991 and approved by a sitting Democrat attorney general, the lieutenant Governor of the Commonwealth at the time was a Democrat and had no comment on it.

This was in 1991.

Senator LAUTENBERG. So what you're pointing out is that this was largely political.

Ms. DUNLOP. No, what I'm——

Senator LAUTENBERG. I asked you if you were satisfied not with the performance of Democrats or Republicans, I asked you if you were satisfied with the performance of the State of Virginia in curbing this dumping, this pollution.

Ms. DUNLOP. Yes, but what I'm telling you, Senator, in 1991, the offices of all these Democrat appointees in Virginia, elected Democrat officials, agreed upon a consent order with Smithfield to clean up the river. The Environmental Protection Agency over——

Senator LAUTENBERG. I didn't suggest it was Republican. Why do you persist in identifying them as Democrats? I don't care who it was, Democrats or Republicans, they have no right to cooperate or conspire with a company to dump into that river.

Ms. DUNLOP. They did not conspire with the company. They came to an agreement on the cleanup. The consent order was reviewed by the Environmental Protection Agency, as all major consent orders are, in 1991. There was no action by the Environmental Protection Agency on this case until 1996.

Senator LAUTENBERG. Right. They depended on the company and on those in Virginia who were responsible for administering the law, for enforcement, to clean up their act.

Ms. DUNLOP. That was happening, sir. The consent order was being complied with just as it was written. The terms of the consent order were that the DEQ in Virginia and the attorney general would file a civil action and require payment in fines and other terms once the hookup was completed to take care of all those actions that occurred from 1991 on. I think that's what will be brought out in the subsequent court case.

Senator LAUTENBERG. For 3 of the past 4 years, Virginia has ranked last in the 10 States in the region in collecting fines from water polluters.

Thank you very much.

Ms. DUNLOP. Thank you.

Senator BAUCUS. I just have a general question of all of you. We live in a very complex country. I'm sorry, Senator, did you have a question?

Senator INHOFE. Just a couple.

Senator BAUCUS. I apologize.

Senator INHOFE. It's funny how you can get two different inferences hearing the same person talk. I think Ms. Dunlop, when I heard your references to Democrat and Republican, I got the impression you were showing it was not partisan, as opposed to being partisan.

Ms. DUNLOP. Yes, sir, Senator. That was my intention. We in the Allen administration who are Republicans reviewed the consent order that had been negotiated by previous Democrat office holders, and agreed that it was the right track to take and the river was being cleaned up. We had no input from EPA indicating, in 1994 when we took office, that they disagreed with this consent order. We did not hear from EPA until they announced publicly that they were filing suit, which was after we announced that we were filing suit.

Senator INHOFE. Well, that's exactly the message I got. I have to make one comment, if I could, Mr. Chairman, about the reference

made to the Gestapo tactics. I can assure you that there are Gestapo tactics by the EPA. I think of the story I've told so many times, I have about 20 of them that Administrator Browner gets tired of hearing.

One was the guy that owned the lumber company in Oklahoma who had disposed of his crankcase oil legally 10 years ago to a licensed contractor, licensed by the Federal Government and the County of Tulsa and the city of Tulsa and the State of Oklahoma. Only to come back and receive a letter from the EPA saying that they're going to invoke fines of $5,000 a day because some of that was traced to a Superfund site.

Now, recognizing that they can't go through with that, it's the idea, the tactic, the fear that is instilled in these people who are out there and are the law-abiding taxpayers, who are paying for all this fun we're having up here. Just a thought, Mr. Chairman.

Senator BAUCUS. I'd like to ask you as a panel whether you don't think that still, by and large, this system works pretty well. We have a very complex, very large country. It's not 50 countries, it's 50 States in one country—a federalist system. It's very complicated. Each State is different. Each region is different. Each company is different.

This is not an easy matter. I think most people who serve in the State capacity or Federal capacity are trying to do a good job, as each person sees it. Of course, there's a little bit of localism, people tend to see the world from their perspective.

I'd like to ask you generally if you think the system, for all of its warts, still works pretty well. Are the bad actors disciplined? Most people aren't bad actors. They may slip here and there, but by and large, most people, most companies, most independent operators, probably do a pretty good job.

Do any of you agree with my assessment? If you disagree, where would you like the laws to be significantly changed? I'm not talking about working around the edges. I'm talking about a major change in the law.

Mr. TULOU. Mr. Chairman, I'd just like to say that I generally agree with you. I think what we're dealing with here is less a statutory issue than it is a cultural issue. I think the environmental movement is phasing into a quiet revolution. We've gone through 20 or 25 years of command and control where we had to do a lot of aggressive activity in order to get peoples' attention.

I think the educational process has gone a logical course. I think we at the States and EPA are in the process now of trying to figure out how to go from here. I think we need to shift some gears. I think we need to think in terms of broader environmental goals, shoot for those environmental goals, worry a little less about the bureaucratic and programmatic objectives that we might have, and rely a little bit more on the understanding of their responsibility that our industrial constituents have and work in partnership better to try to find the best way to get to compliance.

Senator BAUCUS. But I sense that you all are trying to do that.

Mr. TULOU. We are. I think we're struggling right now because I think there are pockets in State government and EPA where that mind shift is not taking place. I think that's a source of a lot of the problem.

Senator BAUCUS. It's important to point out some of the problems. But I think it's much more important to look for some of the solutions here. I think you're focusing on that.

A few years ago, I think it was 1994, I asked Administrator Browner what grade she would give to the Federal-State relationship. She gave it then, in 1994, a B. I'd like to ask you what grade you'd give it, at least with respect to enforcement. Any of you.

Ms. BANGERT. On behalf of Colorado——

Senator BAUCUS. Now, remember, this works both ways. We're talking about the relationship, we're not talking about EPA. We're talking about the relationship.

Ms. BANGERT. I think the relationship in Colorado right now, and this can change, sometimes from month to month, sometimes from year to year.

Senator BAUCUS. Just generally during the last year or so.

Ms. BANGERT. I'd say a C.

Senator BAUCUS. Anybody else? Mr. Rubin?

Mr. RUBIN. Senator, I'd say it's been an A in Connecticut.

Mr. TULOU. B plus.

Mr. COLEMAN. I'd say it depends on what part of the agency you're talking about. If you're talking about the upper levels, like the assistant administrator for enforcement, Mr. Herman, he's certainly a man, and his immediate staff are people that are highly committed. They believe in what they're doing and I think they're trying to effect a change. There's a need for a change.

Our programs have matured. Our programs are not like they were when the acts were first passed. Our most recent act is the Clean Air Act.

Senator BAUCUS. Just roughly, today. The Clean Air Act passed a long time ago. I'm talking about now.

Mr. COLEMAN. In terms of which act needs to be attacked first——

Senator BAUCUS. No, generally, the enforcement relationship, Federal-State relationship with respect to enforcement, just generally.

Mr. COLEMAN. Generally, it's probably still a B. It's probably an A with the top, it's probably a C with some of the rest.

Senator BAUCUS. Ms. Dunlop.

Ms. DUNLOP. I guess I came through public schools when grades were tougher. I would say a C. By and large, our technical people have an excellent working relationship with EPA. But I think average is what we're looking at now. I think States are——

Senator BAUCUS. Well, what needs to be done to improve it without blaming somebody?

Ms. DUNLOP. I don't know that—well, let me just say this. First of all, the Environmental Protection Agency needs to focus the same and perhaps more resources on the Federal Government facilities in States which in many instances are the cause of most of our serious pollution problems, at least in the Commonwealth of Virginia. And they need to be more cooperative with the other Federal agencies.

For instance, on this Smithfield case, Senator, we held up our filing at the request of the Department of Justice.

Senator BAUCUS. What must States do to improve cooperation? What must Virginia do to improve the cooperation?

Ms. DUNLOP. I think we need to continue to have these exchanges of information. The Connecticut experience I think is one that can be more greatly utilized in Virginia.

Senator BAUCUS. That's good.

Thank you very much, all of you. We appreciate your help.

We'll now move to our third panel, which consists of Mr. Todd Robins, environmental attorney at U.S. Public Interest Research Group; Professor Robert Kuehn, law professor at Tulane; and Mr. Robert Harmon, chairman of the board of Harmon Industries, Blue Springs, MO.

Mr. Harmon, why don't you proceed.

STATEMENT OF ROBERT E. HARMON, CHAIRMAN OF THE BOARD OF DIRECTORS, HARMON INDUSTRIES, INC.; ACCOMPANIED BY: TERRY J. SATTERLEE, ESQ., LAW FIRM OF LATHROP & GAGE L.C., KANSAS CITY, MO

Mr. HARMON. Mr. Chairman and members of the committee, my name is Robert E. Harmon. I'm chairman of the board of Harmon Industries, Inc.

I appreciate the opportunity to appear before the committee this morning to discuss important issues of Federal-State relations in enforcement of the environmental laws. I am accompanied today by Harmon's attorney, Ms. Terry J. Satterlee, of Lathrop & Gage of Kansas City.

With your permission, I would like to read a brief statement explaining the reasons for Harmon's interest in this important issue.

Harmon Industries is a leading supplier of railroad signal and train control and related equipment for use in the railroad industry. The company is headquartered in Blue Springs, MO, and has assembly and manufacturing facilities across the country. My father founded the company, which is now Harmon Industries, in 1946. Today, Harmon employs more than 1,500 workers throughout the United States had sales of more than $175 million in 1996. The company stock is publicly traded on the NASDAQ national market system.

I believe that Harmon's case well illustrates the way in which conscientious, regulated industries who are seeking in good faith to comply with their obligations under the environmental laws can be whipsawed by the EPA's claimed "overfiling" authority. If the EPA has this authority, regulated industries cannot negotiate binding agreements with authorized State agencies since the EPA may later disagree with and completely override the State's resolution.

One of Harmon's facilities is located in Grain Valley, MO, which is a rural, agricultural area outside of Kansas City. The Green Valley plant assembles circuit boards for use in railroad control and safety equipment.

As was common practice in our industry, prior to 1987, Harmon employees used small amounts of organic solvents to remove soldering flux from the circuit boards they were assembling. The solvents were kept at the employees' work benches in small jars. Residues were collected in a 3 to 5 gallon pail and, unfortunately dumped by Harmon maintenance employees approximately once

every 1 to 3 weeks on the ground outside the back door of the Grain Valley plant. This practice probably began in the late 1970's.

Harmon's management was unaware that the employees were disposing of used solvents until the practice was discovered during a routine internal safety inspection in November 1987.

In December 1987, while its investigation was ongoing, Harmon changed its assembly process to a State-of-the-art technology using non-hazardous cleaning material rather than organic solvents to remove soldering flux from the equipment being assembled. As a result of these changes, Harmon ceased generating hazardous waste at the Grain Valley facility. These changes had an initial cost of $800,000, and Harmon incurs an ongoing cost of $125,000 a year as a result.

Since 1988, the MDNR reported the status of the ongoing investigation to the EPA during quarterly program meetings, and promptly provided the EPA with copies of significant correspondence, plans and other documents concerning the MDNR's dealing with Harmon. In the end, Harmon's environmental consultants concluded that the contamination at the Grain Valley plant was limited and posed no threat to human health and the environment.

In a State court consent decree, negotiated between Harmon and MDNR, MDNR imposed regulatory sanctions on Harmon, but agreed not to seek monetary penalties against Harmon based on its voluntary self-reporting and its prompt action to investigate and remedy any contamination.

Senator BAUCUS. Mr. Harmon, your 5 minutes have expired. How much farther do you have to go?

Mr. HARMON. I'm very close.

Senator BAUCUS. That's in the eye of the beholder. How about, can you wrap up in 1 minute?

Mr. HARMON. The decree specifically provides that Harmon's compliance with the consent decree constitutes full satisfaction and release from all claims arising from allegations contained in the plaintiff's petition. The consent decree provides in paragraph 23(a) that it will terminate when, among other things, the MDNR issues a post closure part (b) permit. This condition was satisfied on July 31, 1996.

Even though MDNR has been authorized by EPA to run the RCRA program in Missouri, and despite Harmon's extensive dealings and settlement with MDNR, after the entry of the State court decree, the EPA continued to pursue a separate Federal administrative action, seeking over $2.7 million in RCRA penalties. The EPA sought these penalties for exactly the same conduct that Harmon was the subject of Harmon's State court decree with the MDNR.

I will stop at that. I have a few more paragraphs.

Senator BAUCUS. Thank you.

Professor.

STATEMENT OF ROBERT R. KUEHN, PROFESSOR, TULANE LAW SCHOOL, NEW ORLEANS, LA

Mr. KUEHN. Good morning, Mr. Chairman and members of the committee. My name is Robert Kuehn, and I'm a professor at Tulane Law School in New Orleans. I teach classes in environ-

mental enforcement, environmental advocacy and hazardous waste regulation.

I'd like to discuss the results of some research I published last year of the appropriateness of devolving all or most enforcement of Federal environmental laws in the hope it might aid you in reviewing the Federal-State enforcement relationship. Part of my work focused on utilizing the non-ideological public policy criteria of effectiveness, efficiency and equity to compare federally run enforcement programs with State-run programs.

Focusing on effectiveness, as you've heard today, one problem in trying to compare Federal and State enforcement is, there is no consensus on how to define and measure effective enforcement, since it could be characterized by enforcement outputs, such as the number of enforcement actions or outcomes, for example, to increase compliance or lessen pollution.

When they did look at some of the available effectiveness evidence, the General Accounting Office found that the track record of States in assessing penalties and recovering the economic benefits of non-compliance "is even more disappointing than the record of EPA." Such data, however, is complicated by the fact that while EPA may impose larger penalties, its cases do tend to focus more on serious offenses. In addition, as numerous speakers today have noted, penalty amounts alone do not necessarily define effective enforcement.

We do know, however, that historically, when the Federal Government has reduced enforcement and increased State responsibilities, States have also tended to reduce their regulatory activities. Therefore, reducing Federal enforcement could even decrease the effectiveness of States.

Turning to efficiency, lack of data prevents a conclusion on the relative efficiency of Federal and State enforcement programs. It is clear, though, that Federal enforcement is actually a source of revenue for the Federal Government, taking in $3 to $25 for every dollar spent on enforcement.

While the overlap that occurs because of the existence of both Federal and State enforcement programs, or from overfiling cases, would appear to be inefficient, this dual enforcement can have significant deterrent benefits that are otherwise not available alone. In fact, the mere threat of Federal enforcement clearly enhances the success of State programs, but makes it difficult to judge the efficiency or effectiveness of State programs in the absence of the threatened release of what has often been referred to as the EPA gorilla waiting in the closet.

Finally, pragmatic devolution of enforcement requires that it be vested in a level of Government that can assure equitable treatment of businesses and citizens. As markets for goods and services have become increasingly national, a centralized enforcement program is in a unique position to provide consistent, nationwide enforcement.

Only a significant Federal program can ensure that a company operating in a State with lax enforcement does not obtain a competitive advantage over a firm operating in a State with more rigorous enforcement Consistent Federal enforcement therefore main-

tains a level playing field and minimizes market imbalances that may result from an equal enforcement among the States.

In addition, if the rationale for the national standards that are legislated by Congress is that each citizen has a right to the same level of environmental quality. Many citizens could lose this uniform level of protection if there were no Federal enforcement to ensure that all States provide fundamental environmental protection.

In conclusion, although the data is limited, if we take a pragmatic approach to devolution of enforcement, there is still a need for Federal enforcement and little support for dramatic devolution of Federal enforcement. This is not to say that the Federal-State enforcement relationship could not be improved. I commend EPA and the States for their efforts in developing oversight reform proposals, such as the new enforcement performance measures, differential oversight and greater use of block grants.

I hope the committee will encourage the States to gather additional data on effectiveness and efficiency, so that disputes over the proper mix of Federal and State enforcement can be resolved on sound public policy grounds. I also hope that you will encourage Federal and State officials to continue to cooperate on enforcement so that the public will receive what they want and need, a Government program, whether Federal, State or both, that effectively, efficiently and equitably enforces Federal environmental laws.

Thank you.

Senator LAUTENBERG [assuming the chair]. Thank you very much, Professor.

Mr. Robins.

STATEMENT OF TODD E. ROBINS, ESQ., ENVIRONMENTAL ATTORNEY, U.S. PUBLIC INTEREST RESEARCH GROUP

Mr. ROBINS. Thank you.

Good morning, Mr. Chairman and members of the committee. My name is Todd Robins. I'm an environmental attorney with the U.S. Public Interest Research Group, the national lobbying office for the State PIRGs, which are non-partisan, non-profit watchdog organizations active in 30 States around the country with nearly a million citizens members.

I also chair the enforcement work group of the clean water network, a national coalition of more than 900 groups.

I would like to say at the outset that I believe many of today's speakers share the same goal, which is compliance with the law in the first instance, in order to achieve the objective of a cleaner environment. I am here today to demonstrate that the way we get there is not by voluntary approaches that rely on little more than industry's good intentions, but instead, by creating a constructive partnership between EPA, the States, and citizens that maintains a genuine, firm a predictable threat of serious consequences for those who choose to violate our pollution laws.

Specifically, I'd like to make three points. The first is that the failure or unwillingness of States to enforce the law has encouraged widespread violations of our environmental laws and promoted an atmosphere in which it simply pays to pollute. The second is that despite important instances of Federal intervention, the EPA is not doing enough to ensure the integrity of the programs it oversees.

Finally, the no-nonsense approach to Clean Water Act enforcement that we have seen in New Jersey since 1990, characterized by mandatory minimum penalties for serious violations, has been remarkably successful, and should serve as a national model for enforcement of the Clean Water Act and other Federal environmental statutes.

Recently, representatives of polluting industries have made the claim that environmental compliance is the rule, not the exception. Our research, however, tells a very different story. In March of this year, U.S. PIRG released our dirty water scoundrels report, in which we found that nearly 20 percent of the largest water polluters in this country were listed by EPA in significant non-compliance with the Clean Water Act in at least one quarter from January 1995 through March 1996.

What's more, these EPA numbers are probably just the tip of the iceberg. When we looked at industry's self-reported discharge data for the first quarter of 1996, we found that the number of large, industrial polluters that exceeded their pollutant limits by 50 percent or more was more than three times the number that EPA had listed in significant non-compliance for that quarter.

So not to rain on the parades of those who assert that compliance and environmental quality are not necessarily connected, but the latest statistics also show that 40 percent of our waters remain unsafe for fishing and swimming. We think that these findings, when taken together, as well as those of the EPA inspector general regarding air violations in Pennsylvania, demonstrate gross and unacceptable levels of noncompliance with our environmental laws.

The question then is why are serious and chronic violations so widespread. The answer, to us, is obvious. Environmental laws are not being enforced effectively. This problem of inadequate State enforcement is not a new one. But in many States, it appears to be growing worse. A significant number of States around the country have explicitly reduced or even dismantled already weak and underfunded environmental enforcement programs, with the promise that voluntary, handholding compliance assistance efforts will achieve compliance more efficiently.

Our research shows that that promise has been broken. We have compiled evidence from around the country showing that while numbers of inspections, enforcement actions and penalties have declined rapidly and dramatically in many States, rates of noncompliance have remained persistently high, and in some States, have worsened.

While this evidence is presented comprehensively in my written statement, brevity requires that I share just a few brief examples of go easy State enforcement that may be of interest to members of the committee. For example, in Oklahoma, the State Department of Environmental Quality has collected a total of $1,000 for water pollution violations in the past 3 years. Meanwhile, approximately 26 percent of the largest water polluters in Oklahoma were listed by EPA in significant noncompliance at least once during that same 3 year period.

In Florida, penalties assessed by the State Department of Environmental Quality are down in some areas by 90 percent. Yet 87 different facilities in Florida were listed by EPA in significant non-

compliance with the Clean Water Act in 1995 and 1996. What is worse is that a substantial number of those polluters were violating out-of-date permits. Forty-one percent of Florida's major industrial facilities are currently operating with expired permits, according to EPA.

While these examples represent only a sampling, what they illustrate is alarming. Weak enforcement at the State level encourages noncompliance. Without a credible, predictable deterrent that makes it more expensive to break the law than to comply with it, polluters have little incentive to clean up their acts, and law abiding companies who take their environmental responsibilities seriously are disadvantaged.

Given the eagerness of many States to turn their backs on enforcement, we believe that EPA must step up to the plate to ensure the integrity of the programs it oversees. While a non-intrusive oversight role may be appropriate when State enforcement is functioning as it should, under current circumstances in some States, it is critical that EPA act to guarantee that minimum national standards are met.

Some recent cases, including the Smithfield Foods case, indicate that Federal intervention can provide the bottom line in protecting public health and the environment, when States fail to fulfill their delegated responsibilities. However, EPA could be and should be doing more. Despite complaints about EPA overfiling by State officials, the EPA enforcement presence, if anything, has dwindled. Clean water inspections are down 31 percent. Safe drinking water inspections are down 42 percent. Pesticide inspections are down 80 percent.

Administrative enforcement actions for all statutes, are down 41 percent. Civil referrals from EPA to the Department of Justice are down 44 percent in clean water cases, 50 percent in clean air cases since 1994.

To people in communities downstream——

Senator BAUCUS [resuming the chair]. I'll have to ask you to wrap up, Mr. Robins.

Mr. ROBINS. I just want to say that to people in communities downstream or downwind from unaccountable polluters, who are frustrated by unresponsive State agencies, EPA's waning commitment to step into the void is troubling. From our perspective, the New Jersey clean water enforcement act that has shown dramatic drops in violations as well as fewer enforcement actions, is a remarkable success story. Everybody wins.

The industry wins by paying lower penalties and enjoying a level playing field. The State wins by producing better compliance more efficiently. And most importantly, the public wins by having a more accountable system as well as a cleaner environment.

So building on this success story, U.S. PIRG and the Clean Water Network strongly supports Senator Lautenberg's and Senator Torricelli's Clean Water Enforcement Act, S. 645, as a tough, pragmatic and proven way to improve environmental enforcement.

Senator BAUCUS. Thank you very much.

Mr. Harmon, I don't know the specifics of your case, obviously, but you seem to be saying that even though things were worked

out to some degree between your company and the appropriate authority in Missouri, that then the Feds came in.

Mr. HARMON. That's right.

Senator BAUCUS. Over the top. Do you think that's unfair? I'm just asking, generally, do you think the general proposition, there should never be overfiling by the Fed? The Fed should not step in? Or is it just wrong in this case. I'm just trying to get a sense of where you are.

Mr. HARMON. I don't know that I'm in a position to make that judgment, from where I sit. But certainly in our case, where we voluntarily turned ourselves in for a situation that was not hazardous to anybody's health, and we volunteered to clean it up at our cost, and we had a court order, consent decree from the State, certainly I think the actions by the EPA were a little bit aggressive in that regard.

Senator BAUCUS. When did EPA first become aware of your actions or the State.

Mr. HARMON. It was about the same time that the Missouri Department of Natural Resources, I think they communicate with each other on a quarterly basis. So my assumption would be that as soon as we turned ourselves in to the Missouri Department of Natural Resources, they in a very timely manner informed the EPA of what was going on, and they kept them informed.

Senator BAUCUS. Were you under any illusion, or were there any discussions as far as you're aware of between either EPA and the Missouri enforcement authority and yourself as to what EPA would or would not do or might or might not do? What did EPA say?

Mr. HARMON. I think it was a surprise to them as well as us.

Senator BAUCUS. A surprise to whom?

Mr. HARMON. To the Missouri Department of Natural Resources, that there was an overfiling.

Senator BAUCUS. Did anyone ask EPA whether there might be an overfiling, or what action EPA took?

Mr. HARMON. I'm not aware. Counsel says that the EPA informed MDNR, but the MDNR did not inform us.

Senator BAUCUS. I see.

Mr. HARMON. We were operating in good faith, cleaning up the contamination and thinking that our consent decree was going to be adhered to. All of a sudden, we found that not to be the case.

Senator BAUCUS. I don't want to prolong this, but did you or your counsel think about directly asking EPA that question, whether EPA might be interested in an enforcement action?

Mr. HARMON. During the administrative law judge hearing, we asked him what we should have done differently. He said we should have communicated with the EPA, both of them together. Clearly, that was not our understanding in the very beginning. I don't think that's the way it should be done.

In other words, it's our understanding that the authority rested in the Missouri Department of Natural Resources in this particular case.

Senator BAUCUS. Again, I don't know the specifics of your case, so it's hard to comment on it.

Mr. HARMON. The litigation is still ongoing. We're 10 years into this thing, and millions of dollars. And we've got it cleaned up. But we're still——

Senator BAUCUS. Mr. Robins, I was curious to hear your testimony. You're saying not very much is being done. Why?

Mr. ROBINS. Mr. Chairman, our research, U.S. PIRG has been conducting research into EPA's compliance.

Senator BAUCUS. Is there a trend? Is there a fall-off?

Mr. ROBINS. What we've been doing is tracking our compliance rates under the Clean Water Act for many years. What we're seeing consistently is persistently higher rates of noncompliance and violation levels. But at the same time, where we're seeing a change is in the commitment on the part of both States and EPA to enforce the law effectively.

Senator BAUCUS. A reduction?

Mr. ROBINS. A reduction. We're seeing several States just slashing environmental budgets, enforcement budgets, enforcement staff. We've seen it in the southeast, we've seen it in Rhode Island. In doing that, they've been doing it with a philosophy, we've heard it discussed several times today, a philosophy of compliance assistance, let's not enforce the law, let's focus on compliance, as if enforcement is a dirty word.

Our feeling is that helping small businesses to understand and comply with complex environmental laws is absolutely a justifiable and important thing to be doing, but only with a bottom line, underlying deterrent that provides an incentive for companies to abide by the law and does not allow companies to reap economic benefits from pollution.

Senator BAUCUS. Right. Now, in your judgment, long with the decline in enforcement, has there also been an increase in pollution levels or not? Or have you measured that?

Mr. ROBINS. Well, it's an interesting question. People in the public and members of citizen groups are interested in that information. People in communities who are interested in knowing what's being dumped into their waters and spewed into their air would like to know that, we feel like we have the right to know.

In some areas, there is improving access to information like the toxics release inventory. On the water side, which is where my area of expertise lies, unfortunately it's hard to tell what is the quality of our water and whether it's improving or not. We have statistics that show that 40 percent of our Nation's rivers, lakes and coastal areas remain unsafe for fishing and swimming.

However, that data is based upon inventories conducted by the States every 2 years and submitted to EPA and to Congress. Unfortunately, States on average assess about 17 percent of their waterways when they do these surveys, even though the Clean Water Act enacted 25 years ago requires them to survey all of their waters.

So honestly, water quality is anybody's guess. I think in some cases, the water is indeed getting dirtier.

Senator BAUCUS. My time's expired.

Senator Lautenberg.

Senator LAUTENBERG. Yes, very briefly, Mr. Chairman. I wanted to ask Mr. Robins whether, if there were mandatory minimums

that established a kind of universal level for penalties for those who violate the laws, do you think that might serve as a substitute for such things as overfilings or different approaches by the States? Might that clear up a lot of the problems? Would it be a total substitute?

Mr. ROBINS. I think it's an absolutely important substitute that we advocate. I think the experience in New Jersey since 1990 proves that out. In New Jersey in 1990, the State enacted the Clean Water Enforcement Act which requires the agency in New Jersey to impose mandatory minimum penalties for serious violations and instances of significant noncompliance.

What we've seen, and the New Jersey Department of Environmental Protection has recently concluded, and we agree, is that the deterrent value and the certainty of that swift and regular response, when there are serious violations, has caused permit holders to take their permits more seriously. So what you're seeing is violations dropping by a significant amount, while the numbers of enforcement actions and penalties that the agency has to pursue is also dropping.

So they're getting better results for the environment wish fewer resources, and it's important to note that there have been no instances of Clean Water Act overfiling by EPA in New Jersey as a result. The agency is doing what it's supposed to. Enforcement is working the way it's supposed to, and so what you have is EPA playing a much more constructive and peripheral oversight role, as opposed to feeling the need to step into the void of State inaction to protect bottom line standards.

Senator LAUTENBERG. So it would be one of several tools? You wouldn't abolish the opportunity for overfiling if it was called upon?

Mr. ROBINS. No, absolutely not. The fact of the matter is, our waters and our air do not respect political boundaries. And there are cases when national interest would require that EPA step in. There are also cases, and the States have acknowledged this, where there is a benefit, a strategic benefit to EPA from a farther distance coming in and taking a stronger action.

Senator LAUTENBERG. I would just ask a curious question of Mr. Harmon. There's another Harmon company in the stereo and hi-fi—is that——

Mr. HARMON. Not related.

Senator LAUTENBERG. OK. I was curious, because I know they're in other locations.

Mr. HARMON. We get a lot of their mail from time to time.

Senator LAUTENBERG. Do you get any of their bills?

Mr. HARMON. Probably.

[Laughter.]

Senator LAUTENBERG. Mr. Chairman, there are lots of questions that this panel and the others provoke, but unfortunately time flies, and I hope that we'll be able to, if necessary, submit questions and get written answers.

Thank you very much.

Senator BAUCUS. Yes, thank you, Senator. The hearing record will be open through Friday for additional questions and for witnesses to respond to points made by other witnesses.

Hearing is adjourned.

[Whereupon, at 12:15 p.m., the committee was adjourned, to reconvene at the call of the chair.]

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF LOIS J. SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION

I. INTRODUCTION

Mr. Chairman, I am pleased to have this opportunity to meet with you and the Members of this Committee to discuss how the Environment and Natural Resources Division—working closely with our partners at the U.S. Attorneys' Offices, the EPA, other Federal agencies, and the States—protects the quality of our environment and the health of our communities. We are the Nation's environmental cops on the beat. Through tough and fair enforcement, our job is to ensure that all citizens can breathe clean air, drink pure water, and enjoy clean lakes and streams; that law-abiding businesses have a level economic playing field on which to compete; and that environmental bad actors know they will be punished. I am pleased to report that our environmental enforcement efforts are strong and effective—due largely to cooperative relationships we have fostered with United States Attorneys, State attorneys general, State agencies, and local prosecutors and investigators throughout the country.

I would like first to say a few general words about the Environment Division. I will then discuss some of our enforcement goals; how we have worked to enhance cooperative efforts with our partners in the States; recent initiatives to make our enforcement program more effective; and the results we have achieved.

A. The Environment and Natural Resources Division

The Environment and Natural Resources Division is responsible for representing Federal agencies in environmental and natural resources litigation before Federal and State courts. We bring affirmative cases and defend challenges to agency actions. Together with our colleagues in the 94 U.S. Attorneys' Offices, we work closely with client agencies to enforce and defend the Nation's environmental and natural resources laws.

The Division, once known as the Land and Natural Resources Division, was created in 1909. From the start, the Division represented Federal agencies in matters related to Federal lands, water issues, and Indian disputes. Over time, our responsibilities have grown to include defensive and affirmative litigation concerning the protection and use of the Nation's natural resources and public lands; wildlife protection; Indian rights and claims; cleanup of hazardous waste sites; acquisition of private property for public purposes; defense of environmental challenges to government activities; and civil and criminal environmental law enforcement.

Our enforcement work has a long history. The Rivers and Harbors Act, for instance, dates back to 1899. Many of the statutes we enforce were adopted in the 1970's, and were adopted or amended on a bi-partisan basis, often under Republican administrations. Our mission is to enforce these laws—and to represent the interests of the United States—fairly and effectively. To succeed, we work closely with a wide variety of individuals and groups, including our client agencies, the U.S. Attorneys' Offices, and local and State governments.

B. Sections in the Environment and Natural Resources Division

The Environment and Natural Resources Division is divided into ten sections, each with its own expertise. Four sections have responsibility for affirmative environmental enforcement:

1. The *Environmental Enforcement Section* conducts affirmative civil litigation to control and abate pollution. This Section is responsible for judicial enforcement of most of the pollution abatement statutes and rules that regulate discharges into the Nation's air and water and that govern pesticide operations, hazardous waste, and drinking water. Finally, the Section brings natural resource damage actions on behalf of Federal trustees (including the Departments of Agriculture, Commerce, Defense, Energy, and the Interior), and claims for contribution against private parties for contamination of public lands and the recovery of money spent to clean up certain oil spills on behalf of the Coast Guard.

Let me tell you about just one of the Section's notable recent victories, in which we completed a landmark enforcement action against General Motors Corporation. We alleged that GM had installed "defeat devices" in more than 470,000 Cadillacs since 1990 in violation of the Clean Air Act. These defeat devices overwhelm the

car's catalytic converter and emissions control system, causing carbon monoxide emissions of up to *three times* the legal limit. We estimate that the Cadillacs have been responsible for the illegal emission of 100,000 tons of carbon monoxide, which can impair vision, learning ability, and work capacity. Carbon monoxide is especially threatening to people suffering from cardiovascular disease.

Working with the EPA and the U.S. Attorney's Office, the Justice Department achieved a $45 million settlement with GM. GM will recall and repair 470,000 Cadillacs, pay a fine, and spend $7 million to offset the pollution caused by its violations. And recognizing California's unique status under Section 209 of the Clean Air Act, the Department of Justice and EPA closely coordinated the negotiation and implementation of the General Motors settlement with the California Air Resources Board.

2. The *Environmental Crimes Section* plays two primary roles: First, its attorneys investigate and prosecute criminal violators of Federal environmental statutes. Second, the Section acts as a resource for U.S. Attorneys, the FBI and the EPA, and State and local investigators and prosecutors. The Section provides highly trained and experienced prosecutors to assist in resource-demanding trials; offers advice and expertise to Assistant U.S. Attorneys and agents in their cases; provides training and policy development to improve the environmental criminal enforcement program; and works with U.S. Attorneys' Offices on coordinating committees and on task forces with our State and local law enforcement counterparts.

We bring environmental criminal cases for the same reasons the Department brings other criminal cases: to promote respect for the law, to achieve adequate deterrence, to provide just punishment, to ensure restitution for victims, and to remedy the harm caused by offenses. Our environmental crimes program is an essential part of our program to protect human health, the environment, and our natural resources. For example, in 1995 a Federal grand jury in Ohio returned criminal indictments against a barge company, M/G Transport Services, Inc., and some of its employees, including a former vice president and two tow boat captains, charging Oil Pollution Act and Clean Water Act violations for illegal pollution into the Ohio River, and of conspiracy to violate the Oil Pollution Act. Following trial, in December 1995, an Ohio jury returned guilty verdicts in the case. In the year following this indictment and the resulting convictions, the number of unidentified, or "mystery," oil sheens on the Ohio River system reported to the National Response Center decreased significantly.

The Department's criminal enforcement program has long benefited from close cooperation with and support of State and local authorities. For example, in 1994, Giacomo Catucci was convicted of the illegal disposal in Rhode Island of PCB's from an electrical transformer and failure to notify authorities of the release of that hazardous substance. The case, prosecuted by an Assistant U.S. Attorney, was investigated entirely by the Rhode Island Department of Environmental Management. The State continued its close support of the prosecution all the way through trial.

3. The *Environmental Defense Section* defends legal challenges to Federal agencies' rulemakings, regulatory decisions, and permit actions under Federal statutes that protect the public against pollution. The Section's clients include the EPA, the Department of the Interior, the Army Corps of Engineers, and the Coast Guard. Since Federal agencies generally have the same obligations as private parties to comply with the environmental laws, the Section also represents agencies sued by States and citizens groups for violations of environmental laws. In addition, the Section has responsibility for affirmative enforcement of the wetlands laws.

4. The *Wildlife and Marine Resources Section* is responsible for both civil and criminal cases arising under the Federal fish and wildlife conservation statutes. Litigation under these statutes can play out in any of three different contexts: defense of Federal agencies whose programs are challenged as inconsistent with Federal conservation statutes; civil enforcement, usually to enjoin persons from violating Federal conservation statutes; and criminal prosecutions.

Each year, approximately $5 billion in illegal wildlife shipments is traded from country to country. The global illegal trade in wildlife is said to generate more profit than illegal arms sales. It constitutes a worldwide black market second in size only to the drug trade. The Wildlife Section, with local U.S. Attorneys' Offices, brings criminal prosecutions to stop international wildlife smuggling, interstate trafficking in protected species, and Federal wildlife violations such as eagle poisonings and migratory bird sales.

Some of you may have read about Tony Silva, an internationally prominent writer and lecturer on the plight of endangered parrots in the wild. Last year, Mr. Silva pled guilty to a far-reaching conspiracy to smuggle into this country highly protected species of birds trapped in the wild in South America. The smuggling conspiracy lasted 5 years, and involved rare Hyacinth Macaws worth more than $1 million.

These birds are so rare that they have the highest level of protection under the Convention on International Trade in Endangered Species (CITES). CITES, which regulates trade in species actually or potentially threatened with extinction, boasts 136 member Nations. Through international cooperation, the treaty furthers member States' goal of protecting endangered species and reflects an international consensus that trade in wild fauna and flora must be done legally, sustainably, and without further detriment to wild populations. As a result of our effort to stop Mr. Silva's smuggling conspiracy, a Federal court sentenced him to 82 months in prison. He is appealing the court's refusal to let him withdraw his guilty plea.

Silva was charged as part of Operation Renegade, a U.S. Fish and Wildlife Service probe of the illegal international smuggling of protected exotic birds or their eggs from South America, Africa, Australia and New Zealand. The operation has resulted in convictions of 37 people, over half of whom have been sentenced to prison terms, making it among the most successful wildlife law enforcement initiatives ever undertaken. In other recent cases, we have prosecuted smugglers who transported rare snakes and tortoises out of Madagascar by hiding them in airline passenger baggage; a black marketeer who tried to bring an entire tiger skeleton into the United States; and an individual who smuggled into the country hundreds of endangered tarantulas. In that case, the court received evidence that depletion of this species by international smuggling had impaired the search for a cure for Alzheimer's and Parkinson's diseases.

5. The *Division's other sections* work on a broad range of issues that reflect the diversity of our clients and of the Federal environmental and natural resources laws:

- The *General Litigation Section* defends agencies sued under statutes that govern management of National Forests and other public lands, and under the National Environmental Policy Act (NEPA). The Section also litigates claims filed by Indian tribes against the government and defends against takings claims in the Court of Federal Claims.
- The *Indian Resources Section* litigates on behalf of Native Americans pursuant to the United States' trust responsibility.
- The *Land Acquisition Section* handles the acquisition of property by the process of eminent domain for congressionally authorized public purposes.
- The *Appellate Section* handles appeals in cases originating in the litigating sections, and assists the Solicitor General when the Division's cases reach the United States Supreme Court.
- The *Policy, Legislation, and Special Litigation Section* provides counsel to the Assistant Attorney General, has responsibility for correspondence and Freedom of Information Act matters, and serves as the Division's ethics advisor and Alternative Dispute Resolution coordinator. The section also coordinates the Division's legislative and international work.
- The *Executive Office* provides administrative support services for the Division.

C. The Division's Clients

Civil cases, and many of the criminal cases, litigated by the Environment Division are referred by other Federal agencies—either when those agencies request the Division to file an action, or when they have been sued. The Division's principal clients include the EPA and the Departments of Agriculture, Commerce, Defense, Energy, the Interior, and Transportation. However, we have represented virtually every Federal agency and currently have more than 12,000 pending cases and matters.

II. ENVIRONMENTAL ENFORCEMENT GOALS AND ACCOMPLISHMENTS

A. Overall Goals

With that introduction to the Division's varied work, let me turn to the Justice Department's goals for its environmental enforcement program. We bring criminal prosecutions and civil enforcement actions to protect the environment, to remedy environmental harm, to punish wrongdoers, and to deter future violations. Our law enforcement efforts protect our lakes and streams, our drinking water, the air we breathe, our food supply, the land our children and grandchildren will inherit from us, and even the ozone layer that protects us from harmful ultraviolet rays. Without vigorous enforcement of our environmental laws, the health of our families, our communities, our environment, and our economy would all be compromised.

How does environmental enforcement protect the economy? First, clean air and clean water are essential ingredients for a healthy economy. Pollution decreases land values, can impose steep health care costs, and harms industries, such as fishing, tourism, and recreation, that depend on robust natural resources. Second, bad actors—be they international chlorofluorocarbon (CFC) smugglers or companies that

do not install required pollution control equipment—put law-abiding businesses at a competitive disadvantage. For example, a national alliance of major chemical companies that have invested in CFC alternatives repeatedly has expressed strong support for the Department's efforts to stop the illegal import of this ozone-depleting refrigerant. One of this Division's jobs is to make sure that any company breaking the law is brought into compliance, that no competitor gets an unfair head start from illegal conduct, and that everyone is playing on a level economic field. A strong and effective compliance program is essential to even-handed application of the environmental laws and to fair and honest competition.

Environmental protection statutes promote and encourage voluntary environmental compliance, but it is a vigorous enforcement program that drives such compliance. While many people comply with the law for the good of the community, there are many people who would not send their tax checks to the IRS next April if tax violations carried no penalty. They comply with the tax laws in part because they may get caught, and sanctioned, if they do not. So, too, we cannot expect voluntary compliance with environmental laws unless those laws are enforced, and enforced vigorously. As William K. Reilly, the Administrator of EPA between 1989 and 1993, stated during his tenure at EPA, the "enforcement of environmental laws is absolutely essential" and "is at the very heart of the integrity and the commitment of our regulatory programs." *See* Reilly, "The Future of Environmental Law," 6 Yale J. on Reg. 351, 354 (1989).

Environmental violations have real victims. Polluting an underground drinking water supply can threaten thousands of people. An oil spill that damages an entire ecosystem—such as the Exxon Valdez spill in Alaska—may undermine the economic foundation of surrounding communities. The risk of harm can sometimes span the globe, as it does when criminals illegally smuggle chemicals that damage the protective stratospheric ozone layer. The harm from environmental violations may extend far into the future, affecting the health of generations yet unborn. Damage to natural resources can be permanent, as where a species is lost, a precious wetland is destroyed, or a drinking water aquifer or fishery is polluted beyond repair. This Division's job is to ensure that the laws Congress has enacted to prevent such harms are respected and obeyed.

B. Working to Foster Cooperation With State and Local Authorities

Cooperation with our colleagues in State and local law enforcement is critical to achieving our goals. As a former local prosecutor, Attorney General Reno is keenly aware of the importance of State and local law enforcement to the effective implementation of Federal law. This Division works in partnership with the States and the subdivisions because we share a common mission with State attorneys general, State environmental agencies, and local authorities. Cooperative enforcement often maximizes the chances of success, maximizes resources, and avoids duplication and misunderstandings.

1. Goals of the Federal Relationship With State and Local Authorities

Our Federal environmental laws seek to assure all people in our Nation a basic level of environmental protection. These laws are implemented through a working Federalism that is critical to successful environmental compliance. The Federal, State, and local governments all have important roles. States are primary implementers of our environmental laws, and may have more direct access to information concerning polluters and their impacts on the local environment. Local governments often are the most directly affected by environmental violations. The Federal Government has special expertise across the spectrum of environmental issues. We also have the depth to handle especially large cases, and the reach to address pollution that spills from one State into another. The national government has the unique perspective and responsibility to stop industry from pitting one State against another in a race to lower environmental protections for short-term economic advantage at long term cost to our environment, public health, and the economy. Finally, this Division can help to ensure that protections for all people are enforced if a State cuts its environmental budget or personnel.

Two elements are essential to an effective working federalism: strong State programs that include strong enforcement, and cooperation among Federal, State, and local government. In a moment, I would like to tell you about steps this Division has taken to strengthen its relationships with our colleagues in State and local government. But first, let me illustrate the good results that those cooperative efforts have brought.

2. Recent Examples of Cooperative Federal-State-Local Relationship

Our working relationship with States generally has been a very cooperative one. It unquestionably has resulted in better environmental protection. A few examples:

a. Today, as we are speaking, the Environmental Enforcement Section and the State of Ohio are scheduled to commence trial of a Clean Air Act case against a lumber manufacturer in New Knoxville, Ohio. For more than a decade, Hoge Lumber Company has been operating a wood-fired boiler in violation of the State and Federal emissions limits for particulates, which can lead to respiratory complications. The Ohio EPA unsuccessfully sought time and time again to get Hoge to install additional control devices that would halt its unlawful emissions. Last year, the State joined our Federal action. Cooperating closely, we filed a joint trial brief, have coordinated on witnesses, and are proceeding at trial together.

b. In *United States* v. *Marine Shale Processors Inc.,* lawyers from my Division and the Louisiana Department of Environmental Quality (LDEQ) shared the counsel table at trial. The defendant accepted hazardous waste, claimed to recycle it into "aggregate," and then sold it to the public. The company marketed incinerator ash for $1 a ton; ash that was high in heavy metals (including lead) was used on roads, in driveways, and under a house in the community. After an LDEQ inspection revealed numerous environmental violations, the State referred the matter to EPA for enforcement.

As a result of our joint efforts with the State, a Federal court enjoined Marine Shale from selling its ash to the public. The company will have to pay a large civil penalty. Marine Shale is now shut down, and the Federal and State governments are working to ensure compliance with the environmental laws if and when the facility reopens.

c. Just 2 weeks ago, the State of California and the United States lodged a joint consent decree resolving claims against Pacific Gas & Electric Company ("PG&E"). The consent decree requires PG&E to support environmental enhancement projects to protect estuaries near Morro Bay and involving the State's Mussel Watch Program. We alleged in the complaint that PG&E had violated the Clean Water Act and its discharge permits by submitting and failing to correct incomplete and inaccurate reports. The PG&E reports purported to show that the cooling water system at PG&E's Diablo Canyon nuclear power plant complied with the Clean Water Act by employing available technology to minimize adverse environmental impacts. Information PG&E left out suggested otherwise. For example, up to 90 percent of the larval fish in the cooling water system perish. The State took the lead in investigating the facts. At the State's invitation, State and Federal officials joined forces to prepare for litigation and settlement negotiations. Working together, we negotiated a precedent-setting settlement that protects the environment and demonstrates the importance of accurate self-reporting.

d. In *United States* v. *ARCO Pipe Line Co.,* we worked closely with the States of Indiana and Ohio to resolve claims arising when an oil pipeline ruptured and discharged approximately 30,000 gallons of diesel fuel into an agricultural field in Dekalb County, Indiana. The oil flowed through a drainage ditch into Fish Creek, a tributary of the St. Joseph's River and, among other injuries, severely harmed fish populations. One species, the white cat's paw pearly mussel, is so rare that Fish Creek is the only place in the world where it is known to exist. Approximately seven miles of the Creek were impacted by the spill. Under the decree, defendants ARCO Pipe Line Company and NORCO Pipeline, Inc., will spend $2.5 million to improve the water quality in Fish Creek, to bring back fish, mussel and wildlife populations to pre-spill levels, to implement local education programs, and to protect the waterway from future harm.

e. In a case developed with the Commonwealth of Virginia through the Tidewater Environmental Crimes Task Force, George Madariaga last year pleaded guilty to knowingly discharging spent sandblast abrasives into the Elizabeth River. Madariaga's employees at the Virginia Dry Dock Company, acting under his direction, regularly discharged sandblast abrasives by, among other things, shoving the materials directly into the water. The company did not stop its unlawful conduct even after the Virginia Department of Environmental Quality (DEQ) penalized it. As part of his plea agreement, Madariaga agreed personally to pay the balance of the State's civil penalty, which the company still had owed to the DEQ.

As these examples illustrate, we have a good relationship with our partners in the States. Indeed, since the beginning of Fiscal Year 1996, we have entered into 25 settlements in which States were co-plaintiffs and in which we split penalties with the States. All told, States have collected almost $12 million from our joint enforcement actions during that period.

3. Initiatives to Foster Cooperative Federal-State-Local Relationship

Federal-state-local cooperation stems partly from steps this Administration has taken to foster better communications with State and local officials, closer intergov-

ernmental cooperation, and more efficient efforts. Let me describe a few of our other initiatives:

First, near the beginning of my tenure as Assistant Attorney General, I created a new position, the Counselor for State and Local Environmental Affairs. My Counselor works with State and local officials and attorneys in our Division to maximize environmental enforcement through cooperative efforts, and to act as liaison with our colleagues in the States and with State organizations.

Second, we have established a policy that our Environmental Enforcement Section will notify the State in advance of filing a suit in that State, absent exceptional circumstances, and will invite the State's participation or cooperation in the action. This policy encourages cooperation and information exchange with the State, and ensures that the States do not learn about our actions from reading the newspaper. Just a few days ago, we received a letter from a State Attorney General's office thanking us for sending these notices.

Third, we have developed particularly productive relationships with State and local law enforcement personnel through environmental crimes task forces and Law Enforcement Coordinating Committees (LECCs) across the country. The Environmental Crimes Section has worked closely with U.S. Attorneys' Offices to support these groups. For example, we have supported the Environmental Crime Task Force in the Eastern District of Missouri, which includes members from all Federal, State and local law enforcement agencies that have responsibility for the detection, investigation, and prosecution of environmental crimes in that jurisdiction. That task force has been very successful in coordinating and prosecuting environmental crimes. Because the State of Missouri has only misdemeanor penalties for violations of State environmental law, most cases are brought in Federal court. The Missouri Attorney General has designated two assistant attorneys general to handle cases in Federal court through the U.S. Attorney's Office. Similar task forces are thriving in many other States.

Fourth, in 1994, then-Attorneys General Tom Udall of New Mexico and Deborah Poritz of New Jersey joined with a number of State environmental commissioners, tribal representatives, EPA Assistant Administrator Steve Herman, and me to establish a senior forum for the discussion of environmental enforcement and compliance issues. The forum first met in 1994, and has met as many as several times a year since then. We have been very pleased to join in this process, which facilitates coordination and discussion among policymakers in State and Federal Governments and allows us to share ideas as well as concerns. We participate in many other such cooperative efforts, and have met often with the National Association of Attorneys General and the Conference of Western Attorneys General. Indeed, when I leave this hearing, I will be heading to address a meeting of the National Association of Attorneys General.

Fifth, for a number of years, Department attorneys—including those in this Division and in the United States Attorneys' Offices—have worked with State officials to train State and local prosecutors, investigators, and technical personnel in the development of environmental crimes cases. Much of that work occurs at the Federal Law Enforcement Training Center in Brunswick, Georgia. Department attorneys have helped to develop the basic curricula and regularly teach as faculty. Our attorneys also assist as faculty and otherwise for State and local training done by the National Association of Attorneys General, by the four regional State and local environmental enforcement organizations, and for a wide variety of other training efforts at the State and local level. Such instruction frequently is a weekly routine for our Crimes Section attorneys.

Finally, we have worked vigorously to improve and solidify our relationship with the 94 United States Attorneys' Offices around the country. These relationships are vitally important to us, and are critical to the optimal functioning of both the Division and the U.S. Attorneys' Offices. We work jointly with Assistant U.S. Attorneys on many of our cases. In other instances, the U.S. Attorneys' Offices take full responsibility for cases and call upon us only for our special expertise. In January 1997, I sent a letter to all U.S. Attorneys reaffirming our practice and re-extending our invitation to participate in any pending or future civil environmental enforcement cases in their districts. I encouraged those who had not previously taken advantage of this invitation, to act as lead counsel, co-lead, or as local counsel. I have received a number of letters from district offices expressing appreciation for this outreach effort.

4. Overfiling

a. Overfiling Myths and Reality

I have heard concerns expressed about "overfiling." Overfiling is both misunderstood as a concept and exaggerated as an occurrence. Overfiling happens where the Federal Government files an enforcement action after the State has brought an enforcement action for the same violations. There are reasons—good reasons—for us to bring these cases, which I will describe. And where there are misunderstandings or disagreements, we are committed to working to establish the best possible communications.

But let me first point out that overfiling does not happen often. We bring such cases only after a careful review by EPA and this Division. In the past 12 months, the Justice Department filed only two complaints in an environmental matter where the State previously had brought an enforcement action for the same violations. In the first case, against Westinghouse, the Commonwealth of Pennsylvania previously had entered into consent agreements with Westinghouse, but agreed with our enforcement action, joined as a plaintiff-intervener, and was a party to our consent decree. The second was the case of *United States* v. *Smithfield Foods, Inc.* (E.D. Va.), which I will be discussing.

Second, when we do overfile, often we do so at the invitation of the State. In 1995, the Environmental Council of the States (ECOS), released a report on overfiling within the prior 3 years. That report even included cases in which the Federal Government took administrative or civil enforcement action against a polluter for environmental violations broader in scope than those addressed by any prior State action. Even using that broad definition of overfiling, the ECOS report did not find widespread concern. More than half of the States that responded reported no overfiling within the previous 3 years. Further, the States reported that, in most cases of overfiling, the Federal Government had provided notice and engaged in extensive prior discussions with the States. Most States reported positive relationships with Federal regional enforcement staff. Thus, overfiling hardly is the bugaboo some might claim.

We also must recognize the significant and appropriate role for Federal enforcement. Our cases often assist the States. Indeed, State enforcers tell us that the possibility of Federal enforcement enhances the negotiating posture of State environmental agencies as they seek to obtain compliance. The threat of Federal enforcement is a powerful deterrent to violators. For example, one State reported in the ECOS survey that, "in more than one case, EPA's threat of overfiling has helped the [state] gain a favorable settlement." That threat, like most threats, is effective only because we can and will deliver as promised.

Some people have suggested that *any* Federal enforcement in a delegated State constitutes overfiling. That is not accurate. As I have explained, Federal enforcement serves essential functions and often is invited or welcomed by the States.

This Division also will vigorously defend against challenges by States that want to weaken environmental protections. We recently prevailed against challenges by Virginia and Missouri to EPA requirements for an effective Clean Air Act program in those States. Once again, it is our task to ensure that all people enjoy a basic level of environmental protection; that all businesses enjoy a level economic playing field; and that industry does not pit one State against another in a bidding war to attract industry by compromising environmental standards.

b. *United States* v. *Smithfield Foods, Inc.*

As I noted, this Division has filed only two civil judicial enforcement actions in the past 12 months for violations that previously were the subject of a State enforcement action. In one case, the State agreed with our action. The other case, brought against Smithfield Foods, Inc., is still pending. The following information is all based on the public record.

The Smithfield case demonstrates the important role the Federal Government plays when a State has been unable to bring a recalcitrant company into full compliance with the law. Subsidiaries of Smithfield Foods, Inc., operate two wastewater treatment plants in Smithfield, Virginia. These plants treat wastewater generated during hog-slaughtering and meat-processing operations, and collectively discharge approximately three million gallons of effluent per day into the Pagan River. The Pagan is part of the James River estuary, which connects to the Chesapeake Bay. The companies' discharges are subject to the terms and conditions of a water permit issued by the Virginia Department of Environmental Quality.

From October 1991 through the present, Smithfield Foods, Inc. and its subsidiaries committed at least five thousand violations of its discharge permit. Over and

over again, the companies violated effluent discharge limitations, including limitations on fecal coliform, phosphorous and nitrogen. The River has been closed to shellfish harvesting due to fecal coliform contamination, and the companies' discharges have contributed to that contamination. Similarly, the companies' excessive phosphorous and nitrogen discharges, which at times accounted for 80 percent of the phosphorous in the Pagan River, contributed to the nutrient loading that has decreased the health and productivity of Chesapeake Bay. The companies' violations were serious enough that the United States filed both a criminal and a civil case.

On September 24, 1996, the United States charged the former head operator of the Smithfield companies' two wastewater treatment plants with 23 crimes. Eight of the charges—including illegal discharge of fecal coliform into the Pagan River, false statements, falsification of reports, and destroying records—were for offenses committed at the companies' plants. On October 22, 1996, the operator pleaded guilty, without a plea agreement, to all 23 counts. On January 16, 1997, he was sentenced to 30 months imprisonment. He is presently incarcerated.

The Federal Government also filed a civil case, against the companies rather than the individual operator. That is the overfiling case. This Federal action was necessary because, despite the seriousness of Smithfield's violations, the Commonwealth was taking no action to assess penalties against the companies. Rather, in the face of threats by the Smithfield Companies to leave the Commonwealth of Virginia if a phosphorus limit was imposed on their facilities, the Commonwealth of Virginia entered into a series of agreements allowing the Smithfield Companies to discharge uncontrolled amounts of phosphorus into the Pagan River for 5 years in return for the Smithfield Companies' agreement to hook up to a publicly-funded sewer line when it was constructed and to dismiss the Companies' challenge to the phosphorus limit. In fact, in May 1996, the State Water Control Board specifically directed the Department of Environmental Quality to enforce the consent agreements but to take no penalty action. Recognizing that the State had not succeeded in halting Smithfield's violations of the law, EPA referred the matter to this Division for enforcement. Just last week, the district court ruled for the United States, finding the company liable for effluent limitation violations, and thereby resolving many of the issues in this case.

When the case was referred to the Department of Justice on August 27, 1996, EPA had notified Virginia of the referral. EPA regional officials held several conference calls with State officials, and invited the Commonwealth to join the Federal case. EPA provided the Commonwealth with information on Smithfield's violations. As the court later said, "[t]he Commonwealth declined the EPA's invitation to join the Federal action. Although the Commonwealth never mentioned its plan to file its own enforcement action to EPA, on August 30, 1996, the Commonwealth filed an action against Smithfield." For the first, time, the Commonwealth sought penalties, although in amounts far lower than sought by EPA.

Given our efforts to develop a cooperative relationship with the State, we were surprised by Virginia's unilateral action, which might have undercut our enforcement action. When we filed our complaint on December 16, 1996, the Smithfield companies argued that our action was barred by the Commonwealth's recent suit and/or consent orders. The court's recent decision rejected that defense. In a thorough, 75-page opinion, the district court held that Virginia's action did not bar ours, in part because Virginia law does not authorize the imposition of administrative penalties and because Virginia had failed to provide adequate procedures for public participation.

C. Environmental Crimes Bill

One very important initiative of this Administration that will benefit State, local and tribal governments is the "Environmental Crimes and Enforcement Act of 1997," which has been introduced in the House as H.R. 277, and which we hope soon will be introduced with bipartisan support in the Senate. This bill will enhance environmental criminal enforcement under a wide range of statutes. It was developed to reflect the needs of and is designed to support law enforcement officials throughout the country.

The legislation strengthens Federal, State, local, and tribal partnerships by authorizing courts to order convicted criminals to reimburse States, localities, and tribes for their costs in assisting Federal environmental prosecutions. The bill also provides for increased punishments when police officers, firefighters, other State and local officials, or anyone else suffers death or serious injury as a result of an environmental crime, and extends the statute of limitations where a criminal has taken steps to cover up or to conceal an environmental crime. The bill adds an "attempt" provision to environmental statutes, similar to those found in more than 170 other Federal criminal statutes, so that we may prosecute the criminal even when

we stop a crime in progress. This provision will remove a major obstacle to environmental investigations by allowing law enforcement personnel to use environmentally benign substitutes for hazardous materials in undercover operations. Finally, the bill will clarify the authority of the courts to provide for restitution in environmental crimes cases, and to issue orders to ensure that those charged with environmental crimes do not hide or dispose of assets needed to pay restitution.

D. Some Success Stories

Now I would like to offer a few additional examples that show why our cases are important; how they address complex and resource-intensive enforcement needs; how they have a real, direct impact improving the environment; and how they deter future violations.

1. Multi-State, Multi-Facility Enforcement

Many of our cases are extremely complex, involving multiple facilities in several States. We recently settled an enforcement action against Georgia-Pacific Corporation for Clean Air Act violations at 19 wood product facilities in Alabama, Arkansas, Florida, Georgia, Mississippi, North Carolina, South Carolina and Virginia. Under the settlement, Georgia-Pacific will take steps that will remove 10 million pounds (5,000 tons) of volatile organic compounds ("VOCs") from the atmosphere annually—an estimated 90 percent reduction at many facilities. VOCs, a precursor to ground-level ozone, can migrate in the atmosphere for hundreds of miles and are a particular problem in the southeast United States, where these facilities are located. The United States worked in close cooperation with each of the State environmental agencies in order to bring about this complex settlement.

2. Comprehensive Injunctive Relief and Environmental Enhancement

Many of our recent cases show the effectiveness of Federal enforcement in securing, in addition to penalties, comprehensive relief to protect and enhance the environment when it is harmed by unlawful pollution.

a. In *United States* v. *Jefferson County, Alabama,* (N.D. Ala.), the United States sued Jefferson County, Alabama, and the Jefferson County Commission for annually discharging 2.2 billion gallons of raw and partially treated sewage into the Cahaba and Black Warrior Rivers. The Cahaba is the source of one fourth of the drinking water for the State, and the Black Warrior runs through downtown Birmingham. The case was settled by a consent decree that requires the County to cease its illegal discharges, rehabilitate its treatment plants and collection system, pay a $750,000 penalty, and spend $30 million for the acquisition of riparian lands to help restore water quality in the rivers.

b. Last January, the Sherwin Williams Company and LTV Steel agreed to settle separate actions for serious violations of Federal public health and environmental protections in the southside of Chicago. We alleged that Sherwin Williams had failed properly to control emissions that impair breathing and had discharged high levels of organic solvents that created a risk of fire or explosion. We alleged that LTV Steel had, for years, emitted unlawful levels of coke oven gas. Those gases are highly toxic and can lead to heart attacks, asthma, and cancer. Under the consent decree, Sherwin Williams will clean up and restore an old and abandoned industrial site identified by the City for commercial redevelopment, restore wetlands and protect habitat near Indian Creek and Lake Calumet, install pollution abatement equipment, and pay a penalty. In the second settlement, LTV Steel will undertake environmental enhancements to reduce its air emissions below the Federal requirements and will pay a penalty.

c. In another significant action, the United States sued the Tenneco Oil Company on behalf of the Sac and Fox Nation of Oklahoma to obtain a fresh water supply, as well as compensatory and punitive damages. Our complaint alleges that Tenneco's oil production on Sac and Fox lands had destroyed the Sac and Fox Nation's groundwater supply. We have reached a settlement in principle with Tenneco, under which the company will fund construction of water wells to supply water in tribal areas; purchase 120 acres of land to be placed in trust for the tribe; and make a cash payment for purposes including cleaning, restoration, and reforestation of a pecan grove.

3. Environmental Crimes Have Real Victims

Environmental crimes have real victims, as our recent prosecution of one particularly egregious case demonstrates. Last fall, the State of Mississippi requested EPA's assistance in the investigation of widespread pesticide misuse along the State's gulf coast. EPA set up a task force that included Federal agents, environmental and health agencies in Mississippi, Louisiana, and Alabama, and local health officials, as well as Justice Department attorneys. The investigation identi-

fied two Mississippi residents, Dock Eatman, Jr., and Paul Walls, Sr., who were operating unlicensed exterminating businesses and using the highly toxic pesticides methyl parathion and permethrin to treat homes, day care centers, motels, and restaurants. Methyl parathion and permethrin are restricted by EPA for agricultural use in uninhabited fields, and exposure to methyl parathion causes serious illnesses. To protect people from methyl parathion poisoning, homes and businesses contaminated by Eatman and Walls were evacuated or closed. By May 16, 1997, EPA had relocated more than 1500 people from 399 homes along the Mississippi Gulf coast. The cost to evacuate and clean up contaminated homes and businesses is expected to exceed $70 million—of which $60 million has come from the Superfund. We prosecuted Eatman and Walls under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). At trial, we showed that both defendants had been trained in the legal and safe use of restricted-use pesticides and had been warned repeatedly that their application of pesticides to homes and businesses was illegal. Numerous individuals whose homes had been treated by the defendants described illnesses they and their families suffered; some of the victims had been hospitalized. On March 13, 1997, a jury in Biloxi found Dock Eatman Jr., guilty on 21 counts of pesticide misuse. On May 2, 1997, a jury in Hattiesburg found Paul Walls, Sr., guilty on 48 FIFRA counts. Sentencing is scheduled for July 7, 1997.

As I mentioned, we recently have been targeting the illegal importation of ozone-depleting CFCs. CFCs are used primarily as refrigerants, solvents, and propellants. Unfortunately, once in the stratosphere, CFCs destroy the ozone layer that protects us from ultra-violet radiation; that can cause increased skin cancer, retard growth in plants and animals, and even disrupt the human immune system. In January 1996, the United States imposed a ban on most CFC importation, although existing stockpiles can legally be used. After the phase-out began, a black-market in illegally imported CFCs developed in the United States. Our nationwide Federal offensive has resulted in significant jail terms and criminal fines for the smugglers. In the past 2 years, more than two million pounds of CFCs have been seized, with a street value of more than $18 million.

In another case, we assisted the U.S. Attorney in prosecuting Consolidated Edison when an explosion in a Con Ed steam manhole in New York City released 200 pounds of asbestos into a crowded city neighborhood. Con Ed quickly learned of the explosion and the asbestos release. To protect the public, our environmental laws required Con Ed to report the release immediately. Con Ed did not report it for 4 days, during which time many people were exposed, while Con Ed falsely assured everyone, including its own employees working on repairs, that no asbestos had been released. The corporation and an assistant vice president were convicted.

4. Protecting Children's Health

Protecting children from environmental health risks is a high priority for the Clinton Administration. Some of this Division's largest and most successful enforcement cases have addressed the health and safety of children. As the President stated in his recent Executive Order concerning Protection of Children from Environmental Health Risks and Safety Risks, a growing body of scientific knowledge demonstrates that children may suffer disproportionately from environmental health risks. These risks arise because children's neurological, immunological, digestive and other bodily systems are still developing; they eat more food, drink more fluids, and breathe more air in proportion to their body weight than adults; and they are less able to protect themselves from environmental hazards. Executive Order 13045 directs Federal agencies to improve research to protect children and to ensure that new safeguards consider special risks to children.

In many of the Environment Division's Superfund cases involving mining wastes, such as *Bunker Hill* in Idaho, *Sharon Steel* in Utah, *Leadville/Cal Gulch* in Colorado, the *ABEX Site* in Portsmouth, Virginia, and *NL Industries* in Illinois, young children are subject to disproportionate exposure and risk. In these cases, lead and other heavy metals hazardous to young children had been left in mine waste and are easily accessible to children, who may live and play on the waste piles. As a result of these cases, the companies that benefited from the mining operations are required to assist in removing the toxic soils from the yards and playgrounds where the children live and play in the old mining towns of the Silver Valley of Idaho, Midvale, Utah, Leadville and Aspen, Colorado.

Enforcement efforts under the Safe Drinking Water Act, Clean Air Act and other environmental statutes also protect children's health. After working in close cooperation with the State, we recently entered a consent decree in *United States* v. *Rio Bravo Farms,* which involved the Cuna del Valle (Cradle of the Valley) "colonia" in El Paso County, Texas, near the Rio Grande River. Colonias are rural settlements of generally substandard housing along the U.S.-Mexican border, which frequently

lack basic infrastructure, such as potable water, sanitary waste disposal systems, electricity, and paved roads. The United States alleged that Rio Bravo's concentration of low income residents at the colonia created an imminent and substantial endangerment because the residents used shallow water wells to obtain water for household consumption, but the residents also had no choice but to dispose of fecal material at the colonia in a manner that could contaminate the well water with disease-causing bacteria and viruses found in human feces. Many colonia residents are new families with young children. Children, the elderly and others with weakened immune systems are particularly vulnerable to the enteric diseases that are caused by the consumption of water contaminated with bacteria and viruses associated with human feces. Under the consent decree, the defendants have constructed and will maintain a temporary water station at the Cuna del Valle colonia to provide potable water to residents until the El Paso County Lower Valley Water District Authority has extended water service lines through the colonia in late 1997, and residents are able to obtain potable water from the local public water authority. When this occurs, the defendants will pay any costs associated with connecting the residents to the water lines.

We also bring criminal cases to punish and deter violations that harm children. The prosecution in *United States* v. *William Recht Co.* (M.D. Fla.) involved two 9-year-old boys who died after playing in a dumpster in which the defendants had illegally disposed of toluene wastes. Two Recht employees were convicted of two counts of illegal treatment, storage, and disposal of hazardous waste under RCRA and were sentenced to 27 months in prison. The corporation entered a guilty plea to the charge of violating RCRA by knowingly endangering the lives of others.

E. Alternative Dispute Resolution

Although one of our primary responsibilities is to litigate cases to protect public health and the environment, we seek to avoid litigation where possible. In April 1995, Attorney General Reno issued an order on Alternative Dispute Resolution (ADR) to promote the use of ADR in appropriate cases. Pursuant to that order, the Environment Division issued a policy concerning criteria to be used in identifying cases appropriate for ADR and concerning ADR training for all attorneys. The Division ADR policy calls upon our attorneys to use ADR techniques in their cases whenever ADR may be an effective way to reach a consensual result that is beneficial to the United States.

We have used ADR with particular success in multiple party Superfund litigation. In those cases, mediation on allocation issues, such as allocation of the costs incurred by the government for cleanup of a Superfund site among various parties that are jointly and severally liable for costs, avoids protracted litigation and may resolve those allocation issues without waiting for further litigation. Two good examples of this are *United States* v. *Allied Signal, et al. (D. N.J.)* and *United States* v. *American Cyanamid et al., (S.D.W.VA.)*, both Superfund cost recovery cases. Mediation in those cases also resolved contribution litigation filed against the United States as a defendant.

ADR also is useful in cases or disputes that involve more than one governmental body or sovereign (e.g., the Federal Government, a State government, and an Indian Tribe), such as water resource cases. ADR may provide an efficient and cost-effective solution to such disputes and may resolve the whole dispute—rather than just the portion presented in litigation. For example, mediation in *Wisconsin* v. *Illinois*, a Supreme Court original action, led to an agreement to resolve a 90-year water allocation dispute involving eight States and the United States, and will avoid years of litigation that could have cost the taxpayers millions of dollars.

From our experience in the Environment Division, we are learning that ADR can help to resolve cases or to narrow issues, which in turn may lead to settlement. Where appropriate, we hope to foster and develop alternatives to the traditional adversarial techniques used to resolve civil legal disputes involving the United States.

III. CONCLUSIONS

This Division's job is to protect our Nation's environment, to protect our people's health, and to ensure a level playing field through firm, but fair enforcement. I am proud to say that the attorneys in our Division—working in close cooperation with our colleagues in our client agencies, the U.S. Attorneys' Offices, and in State and local government—are doing a great job and getting visible results.

RESPONSE OF LOIS SCHIFFER TO ADDITIONAL QUESTION FROM SENATOR CHAFEE

Question 1. Several members have expressed their concern with the reluctance of Federal agencies to recognize a State's interest in managing the restoration of principally State environmental assets. One case in point is the restoration of the Fox River, in Wisconsin. Wisconsin, as I understand it, has not only expressly sought lead responsibility but has actually initiated agreements for restoration.

If the goal ultimately is clean up, why is it so difficult for the Federal resource agencies and the Justice Department to allow States to take a lead role?

Answer. The United States is committed to ensuring the most effective cleanup and restoration of our Nation's waters. In doing so, the United States has developed close and constructive relations with State trustees at most sites that implicate both Federal and State interests. Even at sites where some of the natural resources at issue are the responsibility of Federal trustees, the United States often has agreed that the relevant State should carry primary responsibility and the lead role for damage assessment and restoration. Such decisions are made on a site-by-site basis. The United States, however, has a responsibility to restore and protect the resources of the American people.

The restoration of the Fox River *cannot* be viewed simply as the restoration of one State's environmental asset. With each passing year, another 600 pounds of PCBs are flushed from the river into the Green Bay—Lake Michigan environment. The PCBs have contaminated the food chain in both the river and bay, and fish consumption advisories have been in place continuously for more than 20 years. Once the PCBs leave the river, they are for all practical purposes beyond any clean up or other remedial option. Only by addressing the contamination in the river can the United States protect significant resources under Federal management, such as: National Wildlife Refuge lands, nationally significant Great Lakes fish stocks (e.g., lake trout, yellow perch, walleye), lake trout in Lake Michigan stocked from Federal hatcheries, and migratory birds. Without Federal involvement, the interests of other States on Green Bay and Lake Michigan and the American people could be compromised.

Although the State of Wisconsin has taken some important steps with regard to the Fox River, we have reluctantly concluded that those steps will not readily produce the river-wide restoration needed for the State, tribal, and Federal natural resources that have been damaged and that remain at risk. For many years, the Federal Government has deferred to the voluntary, consensus approach advocated by Wisconsin to address the Fox River. No meaningful cleanup plan has been developed, and no cleanup has taken place. Despite these many years and millions of Federal dollars spent studying the river, the January 1997 interim agreement between the State and several companies—the agreement mentioned in this question—neither secures, nor even contains a commitment to secure, a river-wide cleanup. Rather, it provides principally for the companies to furnish an unspecified mix of funding and work for demonstration projects. The companies apparently made even that limited agreement only after the United States increased its involvement.

We will continue to participate in discussions and negotiations over the river because the United States is responsible for the affected, federally-managed resources. EPA's recent proposal to list this site on the National Priorities List likely will increase the Federal interest and concern for the river. Acknowledging that the goal of all sovereign parties is to ensure a comprehensive clean up of the Fox River and to restore injured Federal, tribal and State natural resources, the Federal and tribal trustees, EPA, and the State of Wisconsin have recently made substantial progress in defining a process by which these parties will work together cooperatively to achieve this ultimate goal.

RESPONSES OF LOIS SCHIFFER TO ADDITIONAL QUESTIONS FROM SENATOR ALLARD

Question 1. Define what an overfiling is, both administratively and legally.

Answer. There is no one definition of "overfiling," but we use the term to refer to the situation in which the Federal Government brings a civil or administrative enforcement action after a State civil or administrative enforcement action against the same defendant for the same violations.

Question 2. What are the guidelines for overfiling? Please forward to me those guidelines and indicate where they can be found.

Answer. Generally, prior to initiation of litigation by the Environment and Natural Resources Division, proposed Justice Department cases are reviewed and referred by the appropriate regulatory agency, such as EPA, the U.S. Army Corps of Engineers, or the Department of the Interior, and are subject to each agency's own

guidelines. Once a case is referred, this Division's practice generally is to look at three questions before deciding to file the lawsuit:

• First, is the earlier enforcement effort securing timely compliance with the law, including appropriate mitigation of any threat to human health or the environment? Successful enforcement must return a polluter to timely and continuous compliance with the law, and effective remediation of any wrongful pollution.

• Second, did the earlier enforcement effort recoup the economic benefit that the defendant gained by breaking the law? Bad actors should not profit from their illegal conduct, and law-abiding competitors should not be put at an economic disadvantage.

• Third, did the earlier enforcement effort secure a penalty large enough to deter the violator, and its competitors, from future violations? The penalty must persuade the violator and similarly situated parties that compliance with the law is in their best interests and that penalties for non-compliance are not just a cost of doing business. Absent special circumstances, the enforcement effort should recover a penalty significantly greater than the economic benefit that accrued from noncompliance. The penalty secured also must account for any recalcitrance shown by the violator and for any increase in risk posed to human health or the environment.

To date, application of these criteria to cases referred from EPA and other agencies has resulted in only infrequent overfiling.

Question 3. I'm aware that in Texas there was a Clean Air Act overfiling involving Hoechst-Celanese. In this instance the Texas Air Control Board advised Hoecht-Celanese (HCC) that they were exempt from the benzene National Emissions Standards for Hazardous Air Pollutants (NESHAP) rule and in December 1984 wrote a letter to the Hoecht-Celanese to that effect and copied the Region VI Administrator of EPA of their ruling.

On or about 1995 EPA filed a benzene CAA enforcement against Hoechst-Celanese.

My questions are as follows;

(A) *Are the facts above accurate?*

Answer. The facts assumed by the question are incomplete. The United States has filed a Clean Air Act enforcement action against Hoechst Celanese Corporation ("HCC") for violations of the fugitive benzene emissions NESHAP regulation at its Bishop, Texas plant. Texas has never brought an enforcement action for these violations, and therefore the United States case does not involve an overfiling. The United States' action has been stayed pending the outcome of another Federal benzene NESHAP case brought in South Carolina for violations at a different HCC plant. The district court in the South Carolina case upheld EPA's interpretation of the regulation, but held that no penalties could be assessed against HCC because it allegedly did not have fair notice of EPA's interpretation. EPA and HCC have both appealed to the U.S. Court of Appeals for the Fourth Circuit. See *United States* v. *Hoechst Celanese Corp.,* 1996 WL 898377 (D.S.C.), appeal pending, Nos. 96–2003, 96–2051 (4th Cir.).

It is true that the Texas Air Control Board (TACB) sent HCC a letter on December 7, 1984, concurring with the company's conclusion that its Bishop, Texas Plant was exempt from the requirements of the benzene NESHAP regulation, and that EPA was copied on that letter. However, as explained below, EPA did not learn until later that the TACB's interpretation of the regulation deviated from EPA's interpretation, because the TACB letter agreed with HCC's conclusion without stating the TACB interpretation of the regulation.

(B) *If the facts are accurate how could HCC know it was in violation of the CAA?*

Answer. Internal company documents, submitted with our summary judgment papers in the South Carolina action, show that HCC knew at that time how EPA interpreted the exemption. HCC also knew that the Bishop Plant would not be exempt under EPA's interpretation. For example, the company in September 1984 received a copy of a letter that EPA had sent to a different facility, explaining EPA's interpretation; that EPA letter was circulated widely within the company, and one employee at the Bishop Plant wrote "Read it and weep" at the top.

HCC should have asked EPA if HCC had any doubt about the scope of the exemption it claimed. EPA has consistently applied its interpretation of the regulation to plants, such as the Bishop Plant, that recycle benzene. If HCC had written to EPA and asked for a determination of how the regulation applied to its facility, as other companies did, the company would have learned that it was indeed subject to the regulation. Instead, HCC did not seek such a determination from EPA for any of its plants, including facilities in States where TACB had no regulatory authority.

(C) *Why did it take so long for an overfiling to occur given that EPA had notice of the written opinion of the TACB in December, 1984?*

Answer. EPA did not file the enforcement action sooner because TACB's December 7, 1984 letter did not explain TACB's interpretation of the benzene NESHAP regulation. Therefore, EPA did not know that TACB was using an inappropriate method of calculating HCC's use of benzene and did not know that the State's interpretation was inconsistent with EPA's. Indeed, the TACB copied EPA shortly thereafter with a letter it sent to a member of the regulated community expressly informing the regulated party of EPA's interpretation of the same provision at issue here. Therefore, EPA had no reason to believe that TACB's letter to HCC was based on any different interpretation. EPA learned about the TACB's interpretation and the Bishop Plant's violations of the benzene NESHAP only after EPA commenced enforcement against HCC's South Carolina facility in 1989.

(D) *Is it the opinion of EPA that tardiness in reacting to State actions is beneficial to the State/Federal relationship?*

This was not an instance where EPA was immediately aware of the company's violations or HCC had put EPA on notice of the company's violations. Once HCC's unlawful conduct came to EPA's attention, the Agency took action. The Department of Justice believes that companies that violate the law should be penalized.

(E) *Why was it appropriate to overfile against Hoecht-Celanese, and please include the guidelines EPA used when the decision was made to overfile? Who made this decision?*

As noted above, this case was not an overfiling, because the State of Texas did not file an enforcement action against HCC. EPA referred the case to our Division, and I approved the filing of the complaint, based on the factors explained above, in the answer to Senator Allard's Question 2.

Question 4. How many overfilings has the EPA taken against companies, municipalities, or other entities based upon activities that were approved by States under delegated authority previous to 1993?

Answer. We defer to EPA to answer this question.

Question 5. In reply to Mr. Herman's comment that, "out of 20, 000 cases EPA has only overfiled in four" in fiscal year 1996, Patricia Bangert of the Colorado AG's office replied that in Colorado alone there have been 3 overfilings this year. Is that accurate, and if not why? If so please forward those cases to my office.

Answer. We defer to EPA to answer this question.

Question 6. Is it true that EPA wrote State legislatures urging them not to pass environmental self audit bills? If so please include a copy of one of those letters in your reply for the record.

Answer. We defer to EPA to answer this question. The Attorney General has strongly opposed environmental audit privilege and immunity legislation as contrary to the public interest by providing secrecy for those who violate the law and impeding law enforcement. The Department of Justice supports EPA's December, 1995, audit policy, not laws that would create radically new privileges and immunities for polluters.

Question 7. Can you explain what measures EPA uses to measure success of delegated environmental programs?

Answer. We defer to EPA to answer this question.

Question 8. Would the Administration support a commission to study measures of success of environmental laws?

Answer. The Department of Justice supports development of additional measures of environmental results, and indeed is working with EPA to do just that. One EPA task force, on which the Department of Justice participates, is exploring new ways to look at measures of environmental compliance and performance, and to develop such measures. Part of the impetus for that group's work is the Government Performance and Results Act of 1993. The task force, which plans to have a proposal out by the fall, has already conducted a number of meetings around the country with industry and environmental groups, States, other Federal agencies, and other interested stakeholders. The Department of Justice understands that EPA would be happy to share the results of this work with the Committee.

RESPONSE OF LOIS SCHIFFER TO A QUESTION FROM SENATOR BAUCUS

Question. At the hearing, Virginia Secretary of Natural Resources Becky Norton-Dunlop testified about the "unfair" action taken by the Federal Government against Smithfield Foods. Within the limitations of the Department's pending matter policy,

please describe why, in your view, the United States' Clean Water Act action against Smithfield Foods was an appropriate case in which to overfile.

On May 30, 1997, the United States District Court for the Eastern District of Virginia held Smithfield Foods, Inc., and two subsidiaries liable for unlawful pollution and reporting violations at two wastewater treatment plants. *See United States* v. *Smithfield Foods, Inc*., No. 2:96cv1204 (E.D. Va.). The court held that the Smithfield companies had violated effluent limitations for phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids. *See* slip op. at 34–35. The court's opinion is enclosed. This answer is based on matters in the public record and the court's opinion.

The Smithfield companies' plants discharged about three million gallons of effluent each day to the Pagan River, part of the James River estuary, which connects to the Chesapeake Bay. Since 1970, the Pagan River has been closed to shellfish harvesting due to fecal coliform contamination, to which the Smithfield companies' discharges have contributed. Phosphorous and nitrogen discharges from the plants have contributed to nutrient loadings that have decreased the health and productivity of the Chesapeake Bay. The violations continued for at least 5 years.

The United States brought its civil enforcement action because the Commonwealth for years took no action to require compliance and assess penalties against the Smithfield companies despite the seriousness of their violations. Rather, in the face of threats by the Smithfield companies to leave Virginia, the Commonwealth entered into a series of agreements allowing the companies to discharge uncontrolled amounts of phosphorus into the Pagan River for at least 5 years, in violation of the State-issued permit and Federal Clean Water Act requirements. In May 1996, the State Water Control Board specifically directed the State Department of Environmental Quality to enforce the consent agreements but to take no penalty action. As the district court held, the Commonwealth's consent orders did not expressly alter the companies' obligations to comply with the phosphorus discharge limitation in their discharge permit, and "Smithfield indicated in a letter to the [State agency] that it did not believe the [State's order] specifically relieved it from compliance with the limitations in the Permit." *See* slip op. at 43.

Because the Commonwealth had not halted the Smithfield companies' serious and repeated violations, nor assessed a penalty for those violations, EPA referred the matter to the Justice Department. EPA provided the Commonwealth with information on Smithfield's violations and invited the Commonwealth to join the Federal enforcement action. As the court's opinion states, "[t]he Commonwealth declined the EPA's invitation to join the Federal action. Although the Commonwealth never mentioned its plan to file its own enforcement action to EPA, on August 30, 1996, the Commonwealth filed an action against Smithfield." *See* slip op. at 21. The Commonwealth for the first time finally sought penalties, but in amounts far lower than sought by EPA. Federal enforcement was necessary and appropriate due to the Commonwealth's inability or unwillingness to halt the Smithfield companies' violations and to assess a penalty that would send the message to Smithfield that breaking the law is not cost-effective.

I wish to correct one error in my written statement. The EPA referred this matter to the Department of Justice on July 27, 1996, not August 27, 1996. However, as the district court found, the EPA notified Virginia of the referral by August 27, several months before the United States filed its complaint.

RESPONSES OF LOIS SCHIFFER TO ADDITIONAL QUESTIONS FROM SENATOR REID

Question 1. As an Assistant Attorney General, what are your goals for environmental enforcement?

Answer. As I said in my prepared testimony, our mission is to ensure—through firm, fair enforcement—that all Americans can breathe clean air, drink pure water, and enjoy clean lakes and streams; to provide law-abiding businesses a level economic playing field on which to compete; and to deter and punish bad actors who break the law. Vigorous enforcement of our environmental laws protects the health of our families, our communities, our environment, and our economy.

Environmental statutes achieve results only if enforced. As William K. Reilly, the EPA Administrator between 1989 and 1993, stated, enforcement of environmental laws "is at the very heart of the integrity and the commitment of our regulatory programs." *See* Reilly, "The Future of Environmental Law," 6 Yale J. on Reg. 351, 354 (1989). Our response to unlawful conduct must be firm.

Working closely with our colleagues at the U.S. Attorneys' Offices, the EPA, other Federal agencies, the States, and local law enforcement agencies, our environmental enforcement efforts have achieved superb results. My written statement addresses

several of our notable successes, and some of our efforts to improve our effectiveness.

Question 2. You have often said that one goal of your enforcement program is to ensure that any fines assessed adequately secure (or recover) the economic benefit gained by a company that has violated this nation's environmental laws. What do you mean by this? Why is this important?

Answer. Companies that break our environmental laws should not benefit from their unlawful conduct. The fine or penalty secured in an enforcement action must, at an absolute minimum, persuade the violator and similarly situated polluters that timely compliance would have been the better business choice. Law abiding companies also should not be placed at a competitive disadvantage because they complied while some bad actor did not. Recouping economic benefit, plus more, removes an incentive to break the law and insures a level economic playing field. Thus, an enforcement action should recover all economic benefits enjoyed by the polluter by failing to comply with the law on time, plus an additional sum so that the violating company is worse off because it broke the law than it would have been if it chose to comply.

Question 3. What have you done to improve relationships between the Department and State and local Governments? What effect, if any, has having a career local prosecutor, Janet Reno, had on your efforts to improve coordination with State and local governments?

Answer. Attorney General Reno has been a staunch supporter of improved intergovernmental coordination and cooperation, and I subscribe to that view. In fact, Mark Coleman, the Executive Director of the Oklahoma Department of Environmental Quality and Chairman of the Compliance Committee of the Environmental Council of the States, testified at the Committee's recent hearing that relations between top-level State and Federal environmental enforcement officials merited an "A" grade. This Division has taken a number of steps to strengthen ties between the Department of Justice and State and local governments. For example:

• *We are notifying States before filing suit.* As stated in my written testimony, we have established a policy that our Environmental Enforcement Section will notify a State in advance of filing a suit in that State, absent exceptional circumstances, and will invite the State's participation or cooperation in the action. This policy encourages coordination and information exchange with the State, and ensures that the States do not learn about our actions from reading the newspaper.

• *We are bringing more cases jointly with States.* In many of our cases, States are co-plaintiffs and work closely with our attorneys, through discovery, settlement discussions, briefing, or even sitting together at the trial counsel table.

• *We are sharing penalties with States in appropriate cases.* Since the beginning of Fiscal Year 1996, we have entered into 25 settlements in which States were co-plaintiffs and in which we split penalties with the States. All told, States have collected almost $12 million from our joint enforcement actions during that period.

• *We have developed productive relationships with State and local law enforcement in criminal environmental enforcement.* Our Environmental Crimes Section has worked closely with U.S. Attorneys' Offices to support environmental crimes task forces and Law Enforcement Coordinating Committees (LECCs) across the country. As Senator Sessions stated at the Committee's recent hearing, an environmental crimes working group in Alabama that included the State attorney general, State environmental agency, the U.S. attorneys, EPA, the Coast Guard, and others, was a "good model" for law-enforcement cooperation. Similarly, the United States Attorney's Office for the Eastern District of Missouri established an Environmental Crime Task Force, which includes members from all Federal, State and local law enforcement agencies that have responsibility for the detection, investigation, and prosecution of environmental crimes in that jurisdiction. The Environmental Crimes Section has worked closely with the Task Force. The Missouri Attorney General also has designated two assistant attorneys general to handle cases in Federal court through the U.S. Attorney's Office. Because the State of Missouri has only misdemeanor penalties for violations of State environmental law, most cases are brought under Federal statutes and in Federal court. The task force has been very successful in coordinating and prosecuting environmental crimes. Similar task forces are thriving in many other States.

Even where LECCs and task forces do not yet exist, State and/or local government personnel are directly involved in most Federal environmental prosecutions. Often their contributions extend from the initial investigation through trial of the case.

In addition, for a number of years, Department attorneys—including those in this Division and in United States Attorneys' Offices—have worked with State officials

to train State and local prosecutors, investigators, and technical personnel in the development of environmental crimes cases. Much of that work has been done in conjunction with EPA's training program at the Federal Law Enforcement Training Center in Georgia. Department attorneys have helped develop the basic curricula and regularly teach there. Our attorneys also assist as faculty and otherwise for State and local training sponsored by the National Association of Attorneys General, by the four regional State and local environmental enforcement organizations, and for a wide variety of other training efforts at the State and local level. Such instruction frequently is a weekly routine for our Environmental Crimes Section attorneys.

• *We meet regularly with State and local governments to discuss environmental enforcement and compliance.* In 1994, then-Attorneys General Tom Udall of New Mexico and Deborah Moritz of New Jersey joined with a number of State environmental commissioners, tribal representatives, EPA Assistant Administrator Steve Herman, and me to establish a senior forum for the discussion of environmental enforcement and compliance issues. The group has met as many as several times a year since then. We have been very pleased to join in this process, which facilitates coordination and idea-sharing among policymakers in State and Federal Governments. We participate in many other such cooperative efforts, and have met often with the National Association of Attorneys General and the Conference of Western Attorneys General. We have also met with other State and local entities such as the Environmental Council of the States and the International City/County Management Association.

• *I have created a position in my office that reflects the special importance of our relationships with State and local governments.* Near the beginning of my tenure as Assistant Attorney General, I created a new position, the Counselor for State and Local Environmental Affairs. My Counselor works with State and local officials and attorneys in our Division to maximize environmental enforcement through cooperative efforts, and to act as liaison with our colleagues in the States and with State organizations.

• *We have worked with States to develop the environmental crimes bill.* The "Environmental Crimes and Enforcement Act of 1997," which has been introduced in the House as H.R. 277, and which we hope soon will be introduced with bipartisan support in the Senate, will enhance environmental criminal enforcement under a wide range of statutes. It was developed to reflect the needs of, and is designed to support, law enforcement officials throughout the country. The legislation strengthens Federal, State, local, and tribal partnerships by authorizing courts to order convicted criminals to reimburse States, localities, and tribes for their costs in assisting Federal environmental prosecutions. Among other things, the bill also provides for increased punishments when police officers, firefighters, other State and local officials, or anyone else suffers death or serious injury as a result of an environmental crime. The bill also will respond to the urgent need expressed by State, local, and tribal officials for additional Federal training on environmental criminal enforcement. It establishes a program dedicated to the training of law enforcement personnel investigating environmental crimes.

Question 4. Can you tell us more about your approach to cases involving small businesses? How do they differ from your approach to more well-heeled polluters?

Answer. We have taken some special steps regarding penalties for small businesses and to encourage such businesses to participate in Federal and State outreach and compliance assistance programs. Under the Department's "Interim Policy on Penalty Mitigation for Small Businesses" (July 19, 1995), a small business may qualify for extra mitigation of any proposed penalty if it learns of a violation for the first time through its voluntary participation in a government-sponsored compliance assistance program and cures any violation as soon as possible. In such cases, I have directed that we consider compromising as much as 100 percent of the "gravity" component of any proposed penalty. The policy does not apply to violations for which extra mitigation would be inappropriate, such as criminal acts and actions that posed an imminent and substantial endangerment to public health or the environment, or to repeat violators. This policy supplements the Department's regular exercise of enforcement discretion, under which we may decide not to bring an enforcement action, or to seek less than the maximum penalties due to case specific circumstances that warrant leniency. The Department's policy, a copy of which is attached, encourages small businesses to participate in outreach assistance programs, discover and disclose violations, and cure them as soon as possible. We are also guided by EPA's settlement policies in our settlement negotiations, which recognize, among other things, ability-to-pay limitations.

In all our civil cases, we regularly offer parties an opportunity to settle with us before we initiate litigation, and in all our cases, we seek to ensure that our settle-

ment offers are appropriate under the circumstances. Where we believe a regulatory enforcement action for penalties would involve a "small entity," as defined in the Small Business Regulatory Enforcement and Fairness Act, we generally refrain from demanding a specific settlement sum until we ask the small entity for financial or other information that may bear on an appropriate penalty or injunctive relief. After analyzing information provided, we make a best and final (absent new information) settlement offer. By presenting a "best and final" offer early, we try to relieve any need the small entity may perceive to litigate or negotiate unnecessarily.

Question 5. What role do citizen suits play in environmental enforcement? Why is it important that we preserve a role for citizens in enforcing environmental laws?

Answer. Citizen enforcement is an important supplement to Federal environmental enforcement, because the government has only limited resources with which to bring its own enforcement actions. The responsible exercise of citizen enforcement authorities provides a strong incentive for regulated entities to comply with the law. Citizen suits enable those most affected by pollution—those who live, work, or recreate in an area affected by pollution—to ensure compliance with environmental protection laws when Federal, State, and local governments have not acted effectively.

July 19, 1995

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
INTERIM POLICY ON PENALTY MITIGATION FOR SMALL BUSINESSES

Purpose: This policy is intended to promote environmental compliance among small businesses by providing compliance incentives for participation in federal and state compliance assistance programs and prompt correction of violations discovered therein. It is intended to be consistent with EPA's Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. 32,675 (June 23, 1995), and, accordingly, may be revised when EPA's policy is issued in final form.

Applicability: This policy applies to settlement of claims for penalties in any civil enforcement action brought by the Environment and Natural Resources Division (Division) against small businesses pursuant to the following statutes: the Clean Water Act; the Clean Air Act; the Resource Conservation and Recovery Act; the Safe Drinking Water Act; the Toxic Substances Control Act; the Emergency Planning and Community Right to Know Act; the Federal Insecticide, Fungicide, and Rodenticide Act; and the Marine Research Protection and Sanctuaries Act. This policy is effective immediately. It applies to all civil judicial enforcement actions filed after the effective date of this policy and to pending cases in which the government has not reached an agreement in principle with the alleged violator on the amount of the civil penalty.

This policy is not applicable to penalty collection actions; to penalty claims in civil judicial enforcement actions filed by the Division pursuant to the Comprehensive Environmental Response, Compensation and Liability Act or the Public Water System Supervision Program of the Safe Drinking Water Act; or to claims for restitution, damages, natural resource damages, cost recovery, civil forfeiture, or any other type of relief other than civil penalties.

For purposes of this policy, "small business" means facilities owned by a person, corporation, partnership, or other entity operating a business that employs 100 or fewer individuals (on a company-wide basis including parent companies, subsidiaries, and affiliates).[1]

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[1] Although small landowners of non-commercial real property subject to regulation under federal environmental protection statutes are not covered by this "small business" policy, similar

Criteria for civil penalty mitigation under this policy:

To receive penalty mitigation under this policy for violations discovered in a compliance assistance program, a person or entity must be an eligible "small business" as defined herein and the violations must qualify for penalty mitigation pursuant to the criteria enumerated below:

A small business is eligible for penalty mitigation pursuant to this policy if:

(1) it voluntarily requests and receives compliance assistance from a non-confidential government program or a non-confidential government-supported program;

(2) it has not previously been subject to a warning letter, notice of violation, field citation, enforcement action, or other notification by a government agency within the last five years for violation of the requirement as to which the small business seeks penalty mitigation pursuant to this policy;

(3) it has not been subject to two or more enforcement actions for violations of any environmental requirements in the past five years, even if this is the first violation of the particular requirement as to which the small business seeks penalty mitigation pursuant to this policy; and

(4) it has at all times demonstrated a good faith attempt to comply with the law.

A violation by an eligible small business must meet the following criteria to receive penalty mitigation pursuant to this policy:

(1) the violation must have been detected for the first time in the compliance assistance program;

(2) the violation did not cause actual, serious harm to public health, safety, or the environment;

(3) the violation does not present an imminent and substantial endangerment to public health or the environment;

(4) the violation does not present a significant threat to health, safety, or the environment;

(5) the violation does not involve criminal conduct; and

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considerations for penalty mitigation will apply to such landowners.

(6) the violation is corrected during the correction period of up to 180 days specified in writing by the federal or state agency providing or supporting the compliance assistance program. For violations that cannot be corrected within 90 days, the correction period may be extended for an additional period not to exceed 90 days so long as the business enters into a written agreement that sets forth the additional steps to be undertaken by the business to achieve compliance. Correcting the violation includes remediating any environmental harm associated with the violation.

Penalty mitigation guidelines:

(1) Each small business eligible for participation in this program will receive a grace period in which to correct any violations meeting the criteria for compliance incentives pursuant to this policy. No penalties will be sought for any such violations if corrected during the specified correction period.

(2) If a small business meets all of the criteria except that the agency providing compliance assistance has determined that it needs a corrections period longer than 180 days, up to 100% of the gravity component of the penalty will be waived, after consideration of the statutory factors pertaining to determination of an appropriate penalty, but the full amount of the economic benefit of the violations may be recouped. Any corrections period of longer than 180 days must be incorporated into an enforceable order.

Note: Irrespective of whether a small business is eligible for penalty mitigation pursuant to this policy, the Division retains its existing enforcement discretion not to bring an enforcement action or not to seek all or a portion of the available penalties, if circumstances warrant such leniency. Regulated entities, including small businesses, are also eligible for penalty mitigation for violations detected in an environmental self-audit or self-evaluation, voluntarily disclosed, and promptly corrected under the conditions specified in EPA's Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16875 (April 3, 1995).

Private Rights: This policy is intended to provide guidance to Department attorneys in the exercise of their prosecutorial discretion. It is not intended to, does not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States. It does not in any way limit the lawful litigation prerogatives of the Department of Justice or the Environmental Protection Agency. The Department reserves the right to change this policy at any time, without prior notice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. ACTION NO. 2:96cv1204

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., and
GWALTNEY OF SMITHFIELD, LTD.,

Defendants.

OPINION

This matter is before the court on (1) the Motion to Join the Virginia State Water Control Board and the Virginia Department of Environmental Quality as Parties to this Action filed by Smithfield Foods, Inc., and its subsidiary companies Smithfield Packing Co., Inc., and Gwaltney of Smithfield, Ltd. (hereinafter "defendants" or "Smithfield"), on March 14, 1997, and (2) the Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues filed by the United States on March 10, 1997. For the reasons stated from the bench, the court DENIES defendants' Motion to Join the Virginia State Water Control Board and the Virginia Department of Environmental Quality as Parties to this Action. For the reasons stated below, the court GRANTS the United States' Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues.

I. Factual and Procedural History

Smithfield Foods, Inc. is a publicly-held Delaware corporation that owns and operates two pork processing and packing plants in Smithfield, Virginia, namely Smithfield Packing (a Virginia corporation) and Gwaltney (a Delaware corporation), that discharge wastewater. The wastewater generated by the Smithfield Packing and Gwaltney facilities is treated by two wastewater treatment plants operated by Smithfield Foods, Outfalls 001 and 002. The discharge through Outfall 001 generally originates from the Smithfield Packing plant, while the discharge through Outfall 002 generally originates from the Gwaltney plant. Between at least August, 1991, and the present, defendants discharged treated wastewater from Outfall 001 into the Pagan River, a tributary of the James River. Treated wastewater was also discharged by defendants into the Pagan River through Outfall 002 from at least August, 1991, until June, 1996, when Outfall 002 was connected to the Hampton Roads Sanitation District ("HRSD") system.

A. The Clean Water Act

The Clean Water Act ("Act") was enacted by Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101, 33 U.S.C. § 1251.

In order to achieve these goals, Section 301(a) of the Act prohibits the discharge of pollutants into the waters of the United States by any person except as authorized by specific provisions of the Act. 33 U.S.C. § 1311(a). Section 402, one of the specified sections, establishes the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342. Under the NPDES program, the Administrator of the Environmental Protection Agency ("EPA") may issue permits to point sources[1] authorizing the discharge of pollutants in accordance with specified limitations and conditions. Section 402(a), 33 U.S.C. § 1342(a). Section 301(b) of the Act authorizes the EPA to establish nationally applicable effluent limitations for point sources, 33 U.S.C. § 1311(b), which are incorporated into the discharger's permit along with any other requirements established pursuant to the Act. Section 402(a), 33 U.S.C. § 1342(a).

Although the primary responsibility for the administration of the Act lies with the Administrator of the EPA, Section 101(d), 33 U.S.C. § 1251(d), Congress has stated that the participation of the public must be provided for, encouraged, and assisted, see Section

[1] A "point source" is defined as "any discernable, confined and discrete conveyance, . . . from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. § 1362(14).

101(e), 33 U.S.C. § 1251(e), and that the "primary responsibilities and rights of States" to control pollution and manage natural resources must be recognized, preserved, and protected. Section 101(b), 33 U.S.C. § 1251(b). Consequently, Section 402(b) of the Act allows a state to become involved in the administration of the NPDES program for discharges within that state's boundaries. 33 U.S.C. § 1342(b). Congress retained in the EPA, however, "close and continuing oversight and supervision of the state program," including the authority to withdraw EPA approval of the state NPDES program in extreme situations. United States v. Cargill, Inc., 508 F. Supp. 734, 740 (D. Del. 1981) (citing Section 402(c)(3), 33 U.S.C. § 1342(c)(3)). Accordingly, while the enforcement provision of the Act, Section 309, 33 U.S.C. § 1319, gives "primary responsibility to the state with an approved NPDES system," it also places "significant authority in the EPA to oversee the state's administration and to step in itself in appropriate situations." Id.

Once the EPA determines that it should assume enforcement responsibility with regard to a violator, the EPA may issue an order requiring compliance, "commence a civil action for appropriate relief" pursuant to Section 309(b), 33 U.S.C. § 1319(b), or institute administrative proceedings pursuant to

Section 309(g), 33 U.S.C. § 1319(g). Not only may the EPA pursue injunctive relief, but the Act also provides for civil penalties not exceeding "$25,000 per day for each violation." Section 309(d), 33 U.S.C. § 1319(d).

B. The Permits and Special Orders relating to defendants

In March, 1975, the EPA authorized the Commonwealth of Virginia to issue permits governing the discharge of pollutants into navigable waters within the Commonwealth. Pursuant to this authorization, the Virginia State Water Control Board ("Board") issued Permit No. VA0059005 ("Permit") to Smithfield on May 13, 1986. The Permit placed various restrictions on the operation of Smithfield's wastewater treatment plants, including limitations on the amount and concentration of certain pollutants in the wastewater. In addition, the Permit required Smithfield to monitor the wastewater discharged from the outfalls, submit Discharge Monitoring Reports ("DMRs") reporting the results of wastewater sampling and analysis, submit the results of annual toxicity testing, and retain all sampling and analysis data for three years. The 1986 Permit imposed stricter total Kjeldahl nitrogen ("TKN") limits on Smithfield than prior permits governing Outfalls 001 and

002.[2]

Pursuant to its authority to promulgate state environmental standards more stringent than those required by federal law, the Commonwealth promulgated its "Policy for Nutrient Enriched Waters" ("Policy"), effective May 25, 1988, which provided for the control of discharges of nutrients from point sources affecting state waters designated "nutrient enriched waters." Va. Admin. Code tit. 9, § 25-40-10 et seq. The Policy required the Board to reopen and modify the permits of point sources discharging into nutrient enriched waters to include a monthly average phosphorus effluent limitation of 2.0 mg/l. The Pagan River is designated a "nutrient enriched water." Va. Admin. Code tit. 9, § 25-260-350(17). Because the Policy applied to defendants' facilities, on June 3, 1988, Smithfield filed a petition of appeal in Isle of Wight Circuit Court challenging the 2.0 mg/l standard as not reasonable

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[2] The Board imposed "interim limits" for TKN in a Special Order dated May 13, 1986, that were less strict than the limits set forth in the 1986 Permit because "the Board and Smithfield recognize[d] that additional water quality data on the Pagan River would be of benefit in confirming the model prediction" used to set the stricter TKN limits in the 1986 Permit. In return, Smithfield was required to submit water quality data and modeling information to the Board by March 31, 1987. See May 13, 1986 Special Order. In an amendment to the May, 1986 Special Order, dated January 25, 1988, the Board extended the deadline for Smithfield's submission of data to October 1, 1988, and set forth a schedule of compliance for the TKN standards.

and practical of attainment.

Notwithstanding Smithfield's appeal, the Board reopened and modified Smithfield's Permit to include the 2.0 mg/l phosphorus limitation on January 4, 1990. The modified January 4, 1990 Permit, which was approved by the EPA, retained the requirements of the 1986 Permit, but added the phosphorus limitation of 2.0 mg/l and required monitoring for total nitrogen. Part I.C. of the Permit included the following "Schedule of Compliance" for the total phosphorus limitations: (1) initiate design of facilities within 30 days after the modification date of the permit; (2) submit plans to the Board within 90 days from #1; (3) commence construction within 30 days of the Board's approval of the plans; (4) complete construction within 29 months of #3; and (5) achieve compliance with final effluent limitations 30 days after completion of construction. Jan. 4, 1990 Permit, Part I.C., at 3. Smithfield appealed the modified 1990 Permit. Since the new phosphorous limitations were not required in other states, the company considered moving its operations outside of Virginia if forced to comply.

After conducting negotiations with Smithfield, the Board elected to settle the dispute concerning the phosphorus limitations by issuing a Special Order on March 21, 1990. In the March, 1990

Special Order, the Board first explained the deadlines imposed by the modified 1990 Permit: Smithfield was "required to commence design of treatment works to achieve compliance with th[e] phosphorus limitation on February 4, 1990, and complete design within 90 days thereafter. Smithfield is further required to attain full compliance with the phosphorus limitation by January 4, 1993." March 21, 1990 Special Order at 1.[3] Because Smithfield challenged the schedule of compliance for the phosphorus limitations in Part I.C. as unreasonable and not practicable of attainment, the Board agreed "to defer commencement of the schedule in Part I.C of the 1990 Permit until December 1, 1990." Id. at 2.[4]

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[3] In the record, this is the first time "January 4, 1993," is mentioned as the date that Smithfield must attain full compliance with the phosphorus limitation. March 21, 1990 Special Order at 1.

[4] Initially, it was not clear from the March 21, 1990 Special Order whether the Board intended to defer just the commencement of the schedule of compliance from February 4, 1990 to December 1, 1990, or if the Board intended to defer the entire schedule of compliance, so that full compliance with the phosphorus limitation was not required until several months after January 4, 1993. The court concludes that the Board only deferred the commencement of the schedule, and not the entire schedule of compliance, for several reasons. First, the Special Order clearly states that "[t]he Board agrees to defer commencement of the schedule . . . ." March 21, 1990 Special Order at 1 (emphasis added). Second, in the record, this March 21, 1990 Special Order is the first time the date January 4, 1993, is cited as the date of full compliance required by the modified 1990 Permit. See supra note 3. While the Board deferred commencement of the schedule from February 4, 1990 to December 1, 1990, it did not similarly defer the date of full

The Special Order also continued the interim effluent limits for TKN. Id. The Board noted that "[t]he remainder of the Permit shall remain in effect pending further action by the Board." Id. In return, Smithfield agreed, inter alia, to (1) study the available costs and technologies involved in achieving compliance with the phosphorus limitations, (2) study the feasibility of connecting its wastewater system to the HRSD system, and (3) notify the Board by November 13, 1990, whether it intended to connect to the HRSD system. Id. at 1-2.

The Board issued an amendment to the March, 1990 Special Order on November 6, 1990. In the November, 1990 Special Order, the Board gave Smithfield until February 15, 1991, a three-month extension, to advise the Board whether it intended to connect to the HRSD system. The Board also agreed "to defer commencement of the schedule" of compliance for phosphorous limitations set forth

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compliance, January 4, 1993, to a later date. Third, in the subsequent 1992 Permit, the Board included the January 4, 1993 date, and not a later date, for full compliance with the phosphorus limitation. This issue of whether the Board's March, 1990 Special Order deferred the commencement of the schedule, or the entire schedule of compliance, is not in any way dispositive, however, as the court has found that the EPA was not bound by the Board's Special Orders. See infra Part II.B.2.

in Part I.C. of the Permit until March 1, 1991.[5]

On May 9, 1991, the Board issued another Special Order granting an extension to Smithfield. In the May, 1991 Special Order, the Board required Smithfield to notify the Board no later than June 15, 1991, of defendants' commitment "to connect to the HRSD line or to upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." May 9, 1991 Special Order at 2. If Smithfield agreed to connect to the HRSD system, it was required to do so within three months after notification by HRSD that a sewer line was available for the collection of defendants' wastewater. If Smithfield decided not to connect to the HRSD system, it was required to "submit by August 15, 1991, an approvable schedule for upgrading its treatment facilities to comply with all Permit effluent limitations." Id.

The May, 1991 Special Order also indicated that Smithfield was required to comply with the interim effluent limitations in Appendix A of the Special Order, until it connected to the HRSD system or completed the approved upgrade of its treatment facilities. Id. The first part of Appendix A set forth discharge

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[5] Again, while initially it was not clear if the Board agreed to defer the commencement of the schedule, or the entire schedule of compliance, the court concludes that it intended the former here. See supra note 4.

limitations and monitoring requirements for TKN, and the second part stated that "[e]ffluent limitations and monitoring requirements for all other parameters and characteristics shall be those set out in the Permit." Id. at App. A. The May, 1991 Special Order also provided that Smithfield must dismiss its challenge to the phosphorus standard in Isle of Wight Circuit Court.[6] At the end of the May, 1991 Special Order, the Board stated that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in VPDES Permit No. VA0059005." Id. at 2.

On June 7, 1991, Smithfield notified the Board of its decision to connect its wastewater treatment facility to the HRSD system. Consequently, Smithfield "ceased all attempts to comply with the phosphorus limits by upgrading its treatment facilities" and "instead conduct[ed] studies and cooperat[ed] with HRSD to ensure compatibility of Smithfield's effluent with HRSD's system." Defs.' Br. at x, ¶ 9jj.

In 1991, the Board issued a draft of a new Permit for Smithfield. Part I.B. of the draft Permit retained the schedule of

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[6] The Isle of Wight Circuit Court dismissed Smithfield's action on April 1, 1991, actually pre-dating the May, 1991 Special Order. Defs.' Br. at ix, ¶ 9bb.

compliance for the phosphorus limitation first included in the modified 1990 Permit; Smithfield was required to achieve compliance with the phosphorus limitation by January 4, 1993. Part I.C. stated that the phosphorus limitation in effect after that date was a monthly average of 21 lbs/day and 2 mg/l. After reviewing the draft Permit, the EPA advised the Board that it had no objection to the issuance of the revised draft Permit. July 25, 1991 Letter from EPA to Board (Defs.' Ex. 27). The EPA reminded the Board that "[a]ny additional changes to the draft permit will require EPA review prior to issuance." Id.

On October 1, 1991, Smithfield submitted the following comments to the Board regarding Part I, Sections B and C, of the draft Permit:

> Compliance dates of the effluent characteristics and engineering milestones listed in the Part I, Section C tables (pages 6 and 7) cannot be met by Smithfield Foods, Inc. now that we have agreed to abandon the plans to upgrade our existing facilities and[7] tap onto HRSD when it becomes available. Relief from such compliance is not specifically present or is not apparent in the [1991] Consent Order. In view of these factors, Smithfield Foods, Inc. requests that if these compliance dates and milestones are required in the proposed permit, some documentation or letter be provided by the State Water

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[7] In their brief, defendants insert the word "[instead]" between "and" and "tap" when quoting this portion of Smithfield's letter. Defs.' Br. at xi, ¶ 9kk. The word "instead," or a similar word, is not included in the original text of Smithfield's letter.

> Control Board stating that alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs.

Oct. 1, 1991 Letter from Smithfield to Board at 3 (Defs.' Ex. 25).

The Board responded as follows in a letter dated October 10, 1991:

> The draft permit is a separate document from the current Consent Special Order issued to Smithfield Foods in May 1991. The effluent limitations imposed on two point source discharges from the facility are based on State Water Quality Standards, the Permit Regulation and the revised Pagan River Model presented to the Board. The compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations. Any special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the VPDES Permit.

Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3 (Defs.' Ex. 26). The EPA was provided a copy of the Board's letter. See id.

On December 23, 1991, the Board staff sent a memorandum to the Executive Director of the Board recommending approval of the proposed 1992 Permit. Dec. 23, 1991 Memorandum Accompanying 1992 Permit (Defs.' Ex. 23). The Board staff indicated that Smithfield "notified the Board that it will eliminate its wastewater discharges to the Pagan River and connect its facilities to the HRSD system when the sewer has been extended to their plant." Id. at 2. The staff noted that Smithfield's "discharge is not

controversial and is expected to meet the required final effluent limitations" and that it believed "that the future effluent limitations will maintain the Water Quality Standards adopted by the Board." Id. at 4.

On January 3, 1992, the Board issued Smithfield's 1992 Permit. Despite Smithfield's October 1, 1991 letter to the Board stating that it could not meet the compliance dates listed in Part I.C. of the draft 1992 Permit now that it had agreed to connect to the HRSD, the Board did not change the terms of the 1992 Permit. Part I.C. of the 1992 Permit retained the monthly average phosphorus limitation of 21 lbs/day and 2 mg/l, which was required after "completion of the schedule of compliance contained in Part I.B. (Total Phosphorus)." January 3, 1992 Permit, Part I.C, at 7. Part I.B. of the 1992 Permit required Smithfield to: (1) "[s]ubmit quarterly progress reports for achievement of final effluent limitations" for phosphorus "[w]ithin 30 days of the effective date of the permit and each calendar quarter thereafter until completion of item #2 below" and (2) "[a]chieve compliance with final effluent limitations" for phosphorous "[b]y January 4, 1993." Id. Part I.B., at 5.[9] A three-year schedule of compliance was also included

[9] Because Smithfield agreed to connect to the HRSD system, defendants contend that this schedule of compliance for the

for carbonaceous biological oxygen demand ("CBOD"), total cyanide, and ammonia-nitrogen,[9] which required Smithfield to "[a]chieve compliance with the final effluent limitations" for those effluents no later than May 13, 1994. Id. Part I.D., at 8.

In response to a February 12, 1992 letter from Smithfield to the Board, which indicated that Smithfield intended to achieve compliance with the final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen by connecting to the HRSD system, the Board responded as follows:

> These "plans" are acceptable as submitted. The remainder of the schedule requires submittal of quarterly progress reports. These reports should indicate construction progress and other issues which may affect completion of the project. Also note that the deadline for achieving

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phosphorus limitations "merely provided the official point of reference that would be needed in case Smithfield reneged on its commitment to make the HRSD connection." Defs.' Br. at xii, ¶ 9nn. There is nothing in the record to support this conclusion.

[9] The terms "ammonia" and "ammonia-nitrogen" have both been used in the parties' briefs, filings, and exhibits, often interchangeably. Thus, it is unclear to the court whether the United States is alleging violations of the same or different effluent limitations when it alleges a violation of "ammonia-nitrogen" in Counts I and II, and a violation of "ammonia" in Counts III and IV. The Summary of Violations attached to Nash's Declaration, and the United States' brief in support of their motion for summary judgment only mention violations of "ammonia-nitrogen." Pl.'s Br. at iii, ¶ 9. Accordingly, the court will assume that "ammonia" and "ammonia-nitrogen" are the same effluent when quoting the record, and the court will refer to the effluent at issue as "ammonia-nitrogen."

> final effluent limitations is May 13, 1994. Should construction be delayed such that this deadline may be missed, a modification to the existing Consent Order should be requested.

May 15, 1992 Letter from Board to Smithfield (Defs.' Ex. 30).[10]

Defendants failed to meet either the January 4, 1993 deadline in the 1992 Permit for phosphorus compliance, or the May 13, 1994 deadline in the 1992 Permit for CBOD, total cyanide, and ammonia-nitrogen compliance. There is no evidence in the record that Smithfield sought or procured a permit modification with regard to these deadlines.

On November 8, 1994, the Board issued an amendment to the May, 1991 Special Order. In the November, 1994 Special Order, the Board agreed that Smithfield "may achieve compliance with the [final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by connecting to the HRSD system" and agreed "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with these effluent limitations by May 13, 1994." November 8, 1994 Special Order at 1. In addition, the Board and Smithfield

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[10] In their brief, defendants state that "Smithfield was specifically exempted from the May 13, 1994 deadline for ammonia and cyanide in the letter from the Board dated May 15, 1992. (Exh. 30 at 1)." Defs.' Br. at xvi, ¶ 23. Clearly, the text of this letter from the Board shows that Smithfield was reminded of the deadline rather than "specifically exempted" from it.

agreed "that an appropriate toxicity reduction evaluation plan, as required by Part I.F.4.c. of the Permit, is connection to the HRSD system in accordance with this Order. No additional toxicity testing is required." Id. at 1-2. At the end of the Special Order, the Board and Smithfield agreed that they both "understand and agree that this amendment does not alter, modify, or amend any other term or condition of the Order or of the Permit except as specified above." Id. at 2.

No other Special Orders are relevant to the issues before this court at this time.

C. The HRSD system connection

Before defendants could connect to the HRSD system, Smithfield explains that three tasks had to be completed: (1) an upgrade of Smithfield's wastewater treatment system to pretreat properly the effluent before discharging it into the HRSD system; (2) construction of a seventeen-mile interceptor force main pipeline extending from the HRSD treatment facility to Smithfield, Virginia; and (3) an upgrade of HRSD's Nansemond treatment facility so that it could properly treat the additional effluent from defendants. Defs.' Br. at ix, ¶ 9dd.

Smithfield hired Wells Engineering to design and construct

onsite wastewater treatment works sufficient to pretreat adequately its process effluent. Id. at ix, ¶ 9ee.[11] On August 23, 1991, HRSD submitted a Virginia Revolving Loan Fund Construction Assistance Program ("CAP")[12] application to the Board requesting funding of approximately $14.6 million for the construction of the seventeen-mile interceptor force main pipeline. The initial completion date for the pipeline was February, 1995. Id. at xii, ¶ 9pp. On July 29, 1992, HRSD submitted another CAP application to the Board requesting funding of approximately $54.4 million for upgrading the HRSD Nansemond facility to a treatment capacity of twenty-million-gallons per day. Although the original completion deadline for the Nansemond facility upgrade was December, 1996, id. at x, ¶ 9hh, this completion deadline was extended several times by the HRSD, to

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[11] It is unclear when Wells Engineering completed this construction, but it appears it may have been completed in 1996, as defendants state that "Wells Engineering designed and constructed these required facilities at a capital cost of approximately $3 million in 1995 and 1996." Defs.' Br. at ix, ¶ 9ee.

[12] In the Clean Water Act, Congress directed the EPA to establish capitalization grants, known as "state revolving funds," to each state to assist in the construction of publicly-owned treatment works. Section 601, 33 U.S.C. § 1381. Before funds will be given to a state, the EPA must enter into an agreement with that state establishing a procedure for the distribution of funds. Section 602, 33 U.S.C. § 1382. Once that agreement has been established, as it has in Virginia, the state oversees the individual projects. Section 603, 33 U.S.C. § 1383.

March 25, 1997. Id. at x, ¶ 9ii.[13]

The interceptor force main pipeline was completed on March 22, 1996, thirteen months after the original deadline for completion. Id. at xiii, ¶ 9qq. Outfall 002 at the Gwaltney plant was connected to the HRSD system on June 24, 1996, and there is currently zero discharge from this facility into the Pagan River. Id. at x, ¶ 9gg. Defendants expect to connect Outfall 001 at the Smithfield Packing plant to the HRSD system in May, 1997, as soon as the Nansemond facility is available, and completely cease their discharge from Outfall 001. Id. at x, ¶ 9ii.

D. Enforcement by the EPA

Under the NPDES enforcement program administered by the EPA, point source facilities that are not complying with their NPDES permit are listed in the EPA's Quarterly Noncompliance Report ("QNCR"). Decl. of Lorraine H. Reynolds ¶ 8. According to Ms. Reynolds, an Environmental Scientist with the EPA, defendants' violations of Permit No. VA0059005 did not appear on the QNCR until the third quarter of the 1994 fiscal year, because Smithfield falsely and inaccurately reported its discharges, and because the

[13] It is not clear from the record whether this project completion date for the Nansemond upgrade was met.

Commonwealth of Virginia issued consent orders allowing defendants to exceed the limits established in the Permit. Id. ¶ 12. Ms. Reynolds notes that the "EPA was not a participant nor a signatory to the Commonwealth issued consent orders and therefore, EPA never agreed nor intended to be bound by the consent orders." Id. ¶ 13.

Once a company appears on the QNCR, the EPA begins to track the state's actions in getting the company into compliance. If the state does not achieve compliance, the EPA steps in and initiates its own enforcement action to ensure compliance. Id. ¶ 9. Once defendants' violations of Permit No. VA0059005 appeared on the QNCR in 1994, the EPA tracked the Commonwealth's attempts to get Smithfield into compliance. Id. ¶ 14.

On April 8, 1996, the Commonwealth's Department of Environmental Quality ("DEQ") notified Smithfield that it had evidence of numerous violations of the Permit and Special Orders, including violations of effluent limits, sampling and analysis methods, recording of results, records retention, reporting requirements, operator requirements, treatment works operation, quality control requirements, and unauthorized discharge of pollutants. April 8, 1996 Letter from DEQ to Smithfield at 1 (Pl.'s Ex. 18). Due to these violations, the DEQ stated it would recommend to the Board that it consider asking the Attorney General

of Virginia to seek injunctive relief and civil penalties against Smithfield. Id. at 2. At their May 22, 1996 meeting, however, the Board instead voted to "reaffirm their March 21, 1996, approval of the Consent Special Order for the HRSD Nansemond Treatment Plant" and "direct [its] staff not to take enforcement action against Smithfield, Inc. for violations of their 1991 Consent Special Order until such time as staff has met with the company and brought the matter back to the Board at their next meeting." Excerpt of Minute No. 28 from the Board Meeting on May 22, 1996 (Pl.'s Ex. 19).

"When it became apparent that the Commonwealth's actions were not resulting in compliance, and the Commonwealth did not intend to seek a civil penalty for the violations, the EPA initiated its own enforcement action." Decl. of Reynolds ¶ 14. On August 27, 1996, the EPA informed the Commonwealth that it had referred a case against defendants to the United States Department of Justice for an enforcement action, and invited the Commonwealth to join the federal action. The EPA provided the Commonwealth with a copy of the table of defendants' violations. Id. ¶ 15.

The Commonwealth declined the EPA's invitation to join the federal action. Although the Commonwealth never mentioned its plan to file its own enforcement action to the EPA, id., on August 30, 1996, the Commonwealth filed an action against Smithfield in the

Circuit Court of the County of Isle of Wight. The Commonwealth sought injunctive relief and civil penalties for Smithfield's violations of the Permit and Special Orders, and alleged violations of "the Permit limitations for fecal coliform, pH, total suspended solids, biochemical oxygen demand, and oil and grease" dating back to 1994. Commonwealth's Complaint at 3 (filed Aug. 30, 1996) (Pl.'s Ex. 23). The Commonwealth did not seek penalties for phosphorus violations, inaccurate reporting, or late reporting. See id. at 1-4. The Commonwealth amended its complaint on September 20, 1996, to correct certain factual allegations and to add an allegation that Smithfield violated "other permit terms and conditions" of Permit No. VA0059005. Commonwealth's Amended Complaint at 3 (filed Sept. 20, 1996) (Pl.'s Ex. 24).

The United States filed this action on December 16, 1996, seeking permanent injunctive relief and civil penalties from all three defendants for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Count I alleges that since October, 1991, defendant Smithfield discharged pollutants from Outfall 001 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia-nitrogen, TKN, fecal coliform, pH, cyanide, and oil and grease. Count II alleges that from October, 1991, until June, 1996, defendant Smithfield

discharged pollutants from Outfall 002 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia-nitrogen, TKN, fecal coliform, and oil and grease. In Counts III and IV, plaintiff alleges that since October, 1991 for Count III, and between October, 1991 and June, 1996 for Count IV, defendants Smithfield Packing and Gwaltney discharged pollutants from Outfalls 001 and 002 into the Pagan River in violation of the effluent limits in the Permit for phosphorus, ammonia, TKN, fecal coliform, pH, cyanide, oil and grease, CBOD, and biological oxygen demand ("BOD"). In the alternative, Counts III and IV allege that on numerous occasions during these time periods, Smithfield Packing and Gwaltney discharged pollutants from Outfalls 001 and 002 into the Pagan River without a permit. Count V alleges failure of all defendants to comply in a timely manner with the Permit's reporting requirements since October, 1991. Count VI alleges that all defendants submitted DMRs containing inaccurate information. Count VII alleges failure of defendants to maintain records, or destruction of records required to be maintained by the Permit.

Defendants' Answer, filed January 9, 1997, put forth several affirmative defenses. Defendants maintain Permit No. VA0059005 was

> actually or constructively conditioned or amended, or an actual or constructive variance granted, or the underlying standards were revised by the issuance of several Special Orders and amendments thereto by the Virginia State Water Control Board. None of the Defendants violated the permit as revised with respect to the following pollution parameters: phosphorus, nitrogen, CBOD, cyanide and ammonia.

Answer at 13. Defendants also argue that they agreed to connect to the HRSD system to achieve compliance with the Permit, but were unable to connect earlier due to circumstances and delays beyond their control. Therefore, even if they did fail to meet the terms of the Permit, defendants claim they "cannot be held liable therefor when it was impossible to meet the terms of the permit until the [HRSD] sewer line had been completed." Id. at 14-15.[14] In addition, defendants assert that plaintiff's claim for civil penalties is barred by the doctrines of estoppel, waiver, and/or laches, and by Section 309(g)(6)(A) of the Clean Water Act. Id. at

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[14] Although defendants maintain that it is not their fault that the HRSD connection was delayed, fault is not the focus of this inquiry, as the Clean Water Act is a strict liability statute, intended to protect the public from environmental damage. Stoddard v. Western Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986). It is the defendants, and not the public, who are discharging wastewater into the Pagan River, who waited until June 7, 1991, to commit to connect to the HRSD system, and who have still not fully connected to the HRSD system. Accordingly, it is defendants, and not the public, who should pay the price for the damage to the environment caused by their Permit violations and the delay in the HRSD connection. See also infra note 19.

12-13.[15]

In the United States' Motion for Partial Summary Judgment on Liability and Section 309(g)(6) Issues, filed March 10, 1997, the United States argues that there is no genuine issue of material fact that defendants committed thousands of days of violations of the Clean Water Act by discharging pollutants into the Pagan River at levels above the limits contained in the Permit[16] and that Smithfield committed over one hundred days of violations by submitting required reports late. In addition, the United States contends it is entitled to summary judgment because the Permit did not incorporate the Special Orders issued by the Commonwealth, the United States is not estopped from enforcing the Permit, and the United States' claims are not barred by Clean Water Act

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[15] In their response, defendants indicate that they believe that plaintiff's claim for injunctive relief is also barred by Section 309(g).

[16] The United States alleges violations of phosphorus, ammonia-nitrogen (or ammonia), TKN, fecal coliform, pH, cyanide, oil and grease, CBOD, and BOD in the Complaint. In their brief and the Summary of Violations, however, the United States alleges violations of phosphorus, ammonia-nitrogen, TKN, fecal coliform, pH, cyanide, oil and grease, and total suspended solids--not CBOD and BOD. See Pl.'s Br. at iii, ¶ 9; Decl. of Nash at App. C. Because the limits for CBOD and BOD are listed separately from the limits for total suspended solids in the Permit, the court will address separately the violations of the effluent limitations for CBOD, BOD, and total suspended solids.

§ 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A).

In defendants' response, filed March 26, 1997, they address the issues in the United States' Motion, and also argue that the United States is not entitled to summary judgment with regard to the phosphorus claims because Section 510 of the Act, 33 U.S.C. § 1370, bars federal enforcement of limitations that are set by the state and that are more stringent than federal limits. The United States filed a rebuttal on April 1, 1997. The court heard argument from the parties on April 14, 1997, and the matter is ripe for decision.

II. Analysis

Summary judgment is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50 (1986); Terry's Floor Fashions, Inc. v. Burlington Indus., 763 F.2d 604, 610 (4th Cir. 1985). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the

pleadings, but must instead set forth specific facts illustrating genuine issues for trial. Celotex Corp., 477 U.S. at 322-24. Such facts must be presented in the form of exhibits and sworn affidavits. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322.

The court concludes that the United States is entitled to partial summary judgment as a matter of law for several reasons. First, there is no genuine issue of material fact that defendants are liable for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Specifically, Smithfield Foods is liable for at least 164 days of violations of the reporting requirements of Permit No. VA0059005 (Count V); and defendants Smithfield Foods, Smithfield Packing, and Gwaltney are liable for any violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids (Counts I-IV). Second, Permit No. VA0059005 did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action. Third,

the United States' claims are not barred by estoppel. Fourth, the United States' claims are not barred by Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A). Fifth, the United States' phosphorus claims are not precluded by Clean Water Act § 510, 33 U.S.C. § 1370. Each of these conclusions is addressed in turn below.

A. Clean Water Act violations

The United States alleges that defendants violated Permit No. VA0059005 when Smithfield Foods submitted late reports, and when all the defendants discharged wastewater into the Pagan River that violated the effluent limitations contained in the Permit. Section 309(a)(3) of the Act provides that the EPA can bring a civil action in accordance with Section 309(b), 33 U.S.C. § 1319(b), for appropriate relief against "any person . . . in violation of any permit condition or limitation . . . in a permit" issued pursuant to the Clean Water Act. 33 U.S.C. § 1319(a)(3).

Under Section 502(5), 33 U.S.C. § 1362(5), a corporation is considered a "person" within the meaning of the Act. It is undisputed that Smithfield Foods and Gwaltney are Delaware corporations, and Smithfield Packing is a Virginia corporation, thereby constituting "persons" under the Act. In their Answer,

however, defendants contend that Smithfield Packing and Gwaltney did not have any obligations or duties under Smithfield Foods' Permit, and thus cannot be held liable for violations of the Permit, because they are not named in the Permit. The court disagrees. First, Section 309(a)(3), 33 U.S.C. § 1319(a)(3), clearly states that "persons"--not permit holders--are liable for permit violations. Second, defendants admit that "Smithfield Foods operates two wastewater treatment plants which accept and treat the wastewaters generated by the Smithfield Packing and Gwaltney facilities." Answer ¶ 18. By generating wastewater discharged into Smithfield Foods' wastewater treatment plants, which was then discharged into the Pagan River, Smithfield Packing and Gwaltney actively caused violations of Smithfield Foods' Permit and are, therefore, considered "persons" who may be held liable for violations of the Act.[17] Cf. United States v. Avatar Holdings, Inc, No. 93-281, 1995 WL 871260, at *14 (M.D. Fla. Nov. 22, 1995) (unpublished) (parent liable for subsidiaries' violations if parent "acted in such a way that it may be considered a 'person who violates' under § 309(d) of the Clean Water Act, through such actions as directing or causing the violations").

[17] Defendants did not dispute this argument in their response to the United States' Motion.

1. Smithfield Foods' late submittal of reports

The United States claims that Smithfield Foods did not timely submit the Discharge Monitoring Reports detailing the results of sampling and analysis of the wastewater discharged from Outfalls 001 and 002. Smithfield Foods' Permit No. VA0059005 requires submission of DMRs reporting the results of sampling on individual parameters within ten days of the end of each month. According to Leonard Nash, an Environmental Protection Engineer with the EPA, Smithfield Foods submitted the September, 1994 DMR, which was due on October 10, 1994, without reporting a value for average loading of TKN. The Notice of Violation issued by the Commonwealth of Virginia indicates that this missing information was not submitted until 58 days after it was due, on December 9, 1994. Decl. of Nash ¶ 17-18.

Smithfield Foods does not contest that the DMR did not contain the value for the average loading of TKN. Instead, it contends that the EPA could have easily calculated this value using information in the DMR on both flows and concentrations. The court agrees with the United States that the Clean Water Act requires the permittee to submit the values in the DMR, not just the raw data, because "[i]f Smithfield Foods' argument prevailed, every person required to submit discharge monitoring reports could simply

provide EPA with copies of their data and demand that the regulators determine the values." Pl.'s Rebuttal at 3. In addition, Smithfield Foods explains that the employee responsible for submitting the DMRs was on sick leave from late August, 1994, until October, 1994, and that the data was submitted within a reasonable time after the error was discovered. Defs.' Br. at xiii, ¶ 12. These excuses, however, are irrelevant with regard to Smithfield Foods' liability for violations of the Permit, because the Clean Water Act is a strict liability statute. Stoddard v. Western Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986).

The Permit also required the submission of annual reports regarding Smithfield Foods' toxics management plan by May 10, 1993. Decl. of Nash ¶ 19. According to the Notices of Violation, Smithfield Foods' annual toxics management plan was not received until August 26, 1993, which was 106 days late. Smithfield Foods does not contest this fact. Defs.' Br. at xiii, ¶ 12.

Because these two incidents of late reporting by Smithfield Foods are uncontested violations of Permit No. VA0059005, the court GRANTS summary judgment against Smithfield Foods on the issue of liability for at least 164 days of violations of the reporting requirements of the Permit. If the United States uncovers

additional instances of late reporting during discovery, or any other violations of the Permit, the court will allow it to prove these additional violations by defendants.

2. Defendants' violations of effluent limits

Permit No. VA0059005 requires the submission of monthly reports detailing the results of sampling conducted on wastewater discharged from defendants' plants. Decl. of Nash ¶ 12. A copy of the DMRs submitted by defendants is attached as Appendix B to Mr. Nash's Declaration. Id. at App. B. "Required reports such as DMRs may be used as admissions in court to establish a defendant's liability." Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1115 n.8 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989). Consequently, several courts have accepted the data reported by a defendant in its DMRs as true, and entered summary judgment on the issue of liability based on the DMRs completed by that defendant. See, e.g., Connecticut Fund for the Env't v. Job Plating Co., Inc., 623 F. Supp. 207, 218 (D. Conn. 1985) (granting summary judgment based on DMRs, and noting that several courts who granted summary judgment in citizen suits brought under 33 U.S.C. § 1365 based their decision "on findings of strict liability derived from discharge data reported in defendants' DMRs that exceeded levels

allowed by NPDES permits"); Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1429-33 (D.N.J. 1985) (accepting as true the data reported in a defendant's DMR, and rejecting defendant's argument that when it exceeded its permit, this was not a violation of the Act). Since the Act's approach of regulating effluent levels "was intended to achieve 'swift and direct' enforcement based on 'simple numerical standards,'" Georgia-Pacific, 615 F. Supp. at 1430 (citing Corn Refiners Ass'n, Inc. v. Costle, 594 F.2d 1223, 1226 (8th Cir. 1979)), this court is reluctant to limit the legal effect of any permit violations revealed in the DMRs completed by defendants.

Defendants' DMRs have been reviewed by Mr. Nash in accordance with his position at the EPA. Based on the DMRs, Mr. Nash has determined that defendants have committed numerous violations of the Permit, which are summarized in Appendix C to Mr. Nash's Declaration. Decl. of Nash ¶ 14 & App. C.[18] Although defendants

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[18] In determining the number of days of violations, Mr. Nash counted each daily maximum violation as a separate violation. For each monthly average violation, Mr. Nash calculated the number of violations by using the number of days in that month. Decl. of Nash ¶ 16 & App. B. According to these calculations, defendants committed 5,330 total days of violations of the effluent limits contained in Permit No. VA0059005: 4,501 for phosphorous, 458 for ammonia-nitrogen, 199 for TKN, 70 for fecal coliform, 4 for minimum pH standard, 4 for cyanide, 1 for oil and grease, and 93 for total suspended solids. Pl.'s Br. at iii, ¶ 9. Although offering no

contend that they did not violate "the permit as revised with respect to the following pollution parameters: phosphorus, nitrogen, CBOD, cyanide, and ammonia," Answer at 13, defendants submitted DMRs which indicate that they did violate the effluent limitations contained in the Permit, and they admit that "Smithfield Foods has on occasion discharged effluent from Outfalls 001 and 002 in excess of the limits in VPDES Permit No. VA0059005, as issued, amended, revised and reissued from time to time, which permit speaks for itself." Id. at 5, ¶ 25. Because defendants grudgingly admit that they violated the terms of the Permit, if the Permit is considered in isolation from the Board's Special Orders and letters, and because defendants' DMRs are admissions for the purpose of establishing liability and they indicate that defendants have repeatedly violated the effluent limits contained in the Permit, the court GRANTS the United States summary judgment on the issue of liability for defendants' violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and

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concrete evidence to the contrary, defendants disagreed with the United States' determination of the number of days of violations, and reserved the right to address this issue at a later time. Defs.' Br. at 10 n.3.

grease, CBOD, BOD, and total suspended solids.[19] The amount of the days of violation for each effluent will be determined by the court at a later juncture.[20]

B. The 1992 Permit did not incorporate, nor was it "conditioned, revised, or superseded by," the Board's Special Orders with regard to phosphorus, TKN, CBOD, cyanide, and ammonia-nitrogen

Defendants claim they did not violate the effluent limitations stated in the 1992 Permit because the Permit incorporated, or was

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[19] In their brief and at the April 14, 1997 hearing, defendants argued that they should not have to pay penalties to the federal government for alleged violations of the 1992 Permit because they have paid, and continue to pay, a substantial amount of money for the HRSD connection, and because there will be zero discharge by defendants into the Pagan River once they connect Outfall 001 to the HRSD system, as Outfall 002 has already been connected. While defendants' efforts to eliminate their discharge into the Pagan River are certainly laudable, they are still required to meet their obligations under the Permit. This is true even if the court believes that defendants did not cause the delay in finishing the HRSD-Smithfield connection--they should have sought a Permit modification, and approval of the EPA, once it was clear they could not meet the deadlines in the Permit. As determined herein, the EPA-approved Permits control over any Special Orders issued by the Board. See infra Part II.B.2. The selection of the means of compliance with the Permit was at the discretion of defendants, and clearly they knew they would be required to pay a considerable amount of money to achieve compliance, regardless of the means selected. That defendants will eventually achieve compliance with the Act, and spend a considerable amount of money to do so, does not excuse the fact that for years they have discharged pollutants into the Pagan River in violation of Permit No. VA0059005.

[20] See supra note 18.

grease, CBOD, BOD, and total suspended solids.[19] The amount of the days of violation for each effluent will be determined by the court at a later juncture.[20]

B. The 1992 Permit did not incorporate, nor was it "conditioned, revised, or superseded by," the Board's Special Orders with regard to phosphorus, TKN, CBOD, cyanide, and ammonia-nitrogen

Defendants claim they did not violate the effluent limitations stated in the 1992 Permit because the Permit incorporated, or was

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[19] In their brief and at the April 14, 1997 hearing, defendants argued that they should not have to pay penalties to the federal government for alleged violations of the 1992 Permit because they have paid, and continue to pay, a substantial amount of money for the HRSD connection, and because there will be zero discharge by defendants into the Pagan River once they connect Outfall 001 to the HRSD system, as Outfall 002 has already been connected. While defendants' efforts to eliminate their discharge into the Pagan River are certainly laudable, they are still required to meet their obligations under the Permit. This is true even if the court believes that defendants did not cause the delay in finishing the HRSD-Smithfield connection--they should have sought a Permit modification, and approval of the EPA, once it was clear they could not meet the deadlines in the Permit. As determined herein, the EPA-approved Permits control over any Special Orders issued by the Board. See infra Part II.B.2. The selection of the means of compliance with the Permit was at the discretion of defendants, and clearly they knew they would be required to pay a considerable amount of money to achieve compliance, regardless of the means selected. That defendants will eventually achieve compliance with the Act, and spend a considerable amount of money to do so, does not excuse the fact that for years they have discharged pollutants into the Pagan River in violation of Permit No. VA0059005.

[20] See supra note 18.

> Smithfield's only obligation with respect to phosphorus was to connect to the HRSD system within three months of system availability. Until the connection was available, Smithfield could not be expected to comply with the 1990 Modified Permit phosphorus limits. Compliance would only have been possible in the interim through the significant expansion of its wastewater treatment system--an expansion made moot by an agreement by Smithfield to connect to HRSD.

Id. Defendants claim they could not afford to connect to the HRSD and construct or upgrade their treatment facilities to meet the Permit's schedule of compliance. Thus, under the terms of the May, 1991 Special Order, defendants maintain that they were only required to commit to connect to the HRSD system or comply within the modified 1990 Permit deadlines by expanding or upgrading their treatment facilities.

According to defendants, the EPA reviewed and approved of the agreement between the Board and Smithfield that the latter would be exempt from compliance with the phosphorus effluent limits in the Permit, if Smithfield agreed to connect to the HRSD system.[21] First, the EPA approved the 1992 Permit after receiving a copy of the Board's May, 1991 Special Order, and a copy of the Board's October 10, 1991 letter stating that "[a]ny special order agreements relative to compliance with water quality standards

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[21] These arguments are also relevant to defendants' defense of estoppel, which will be addressed at infra Part II.C.

. . . take precedence over the VPDES Permit." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. Because the EPA did not notify the Board or Smithfield that it disagreed with the May, 1991 Special Order or the October, 1991 letter, defendants contend the EPA approved of it. Defs.' Br. at 13-14. Second, after the EPA received information from Smithfield indicating that defendants were following the requirements in the Special Orders, rather than those in the Permit, it also failed to indicate that defendants were doing anything wrong. Defs.' Br. at 14 & n.9 (noting that the EPA has possession of Smithfield's DMRs in its files). Third, defendants point out that once Smithfield elected to connect to the HRSD system, the EPA indicated that it reviewed and approved of the plan when it noted that "[t]he sewer line offers a cost effective solution for this major regional industry," Mar. 14, 1994 EPA Program Evaluation Report at 16 (Defs.' Ex. 4), and provided federal funding, via the Virginia Revolving Loan Fund Program, which was used for the HRSD upgrade and sewer connection. Defs.' Br. at ii, ¶ 3b.

In light of these facts, defendants claim they relied upon their agreement with the Board and their belief that the terms of the May, 1991 Special Order, and the agreements in the other Special Orders and letters, took precedence over the terms of the

1992 Permit. Citing United States v. AM General Corp., 34 F.3d 472 (7th Cir. 1994), and United States v. Solar Turbines, Inc., 732 F. Supp. 535 (M.D. Pa. 1989), defendants contend that a permit holder should be entitled to rely on the statements of a state agency without fear of being subjected to a federal penalty action that is actually a challenge to the permit's terms, especially when "a permit holder can see on the face of the documents memorializing the state agency's official decision that the federal government has no objection." Defs.' Br. at 12.

In AM General, when the EPA objected to the terms of a state-issued permit issued to a manufacturer, it forwent pursuing a direct challenge to the permit, and instead filed a civil penalty action against the manufacturer alleging violations of emissions standards promulgated under the Act. The Seventh Circuit held that the Act did not "authorize the EPA to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted and the modification implemented, 28 U.S.C. § 2462, by which time a defendant would have accrued a potential liability in excess of $40 million even though it had been operating under a permit valid on its face and never before challenged." AM General, 34 F.3d at 475.

In Solar, a district court rejected the EPA's attempt to

pursue an enforcement action against a permittee who was acting in accordance with its state permit. Although the EPA believed the state permit had been improperly granted, the court found the permittee had not committed a violation of the permit. Allowing the government to proceed with the action "would not only be contrary to the general enforcement scheme in the Clean Air Act, but would also lay waste to a source's ability to rely on a permit it has been issued by an authorized state permitting agency." Solar, 732 F. Supp. at 540.

AM General and Solar do not support defendants' argument, and they are distinguishable from this case. In those cases, the defendants complied with their permits, and the federal government objected to the terms of the permit, decided to forgo a direct challenge, and instead filed an enforcement action which in effect challenged the terms of the permit. In the case at hand, defendants have not complied with the terms of the Permit, so they cannot argue that they relied on its terms to their detriment. Moreover, unlike AM General and Solar, here the United States is enforcing--not challenging--the terms of defendants' state-issued Permit. It is the defendants who chose to forgo a direct challenge to the terms of the Permit, and who are currently challenging it by arguing that the Board's Special Orders are incorporated into, or

change, the terms of the Permit.

There are two other problems with defendants' argument that they are not liable for effluent violations under the Permit because it incorporated the Board's Special Orders, which exempted them from compliance, if they elected to connect to the HRSD system. First, it is not clear that the May, 1991 Special Order exempted defendants from compliance with the phosphorus limitations in the Permit, if they elected to connect to the HRSD system. Second, even if the Special Orders provided for this exemption, in addition to the exemptions for CBOD, cyanide, and ammonia-nitrogen, and the interim limits for TKN, the Special Orders were not incorporated into, nor did they "condition, revise, or supersede," the 1992 Permit.

1. Exemption from compliance

For the effluent TKN, the Board's May, 1991 Special Order, and other Special Orders, clearly provided interim effluent limitations and monitoring requirements for Smithfield that were different from the Permit requirements. It is not clear, however, that the May, 1991 Special Order exempted Smithfield from the January 4, 1993 deadline for full compliance with the phosphorus limitations, if Smithfield elected to connect to the HRSD system, as defendants

claim.[22] Appendix A to the May, 1991 Special Order set forth interim discharge limitations and monitoring requirements for TKN, and provided that "[e]ffluent limitations and monitoring requirements for all other parameters and characteristics shall be those set out in the Permit." (emphasis added). The May, 1991 Special Order states that Smithfield was required to comply with the interim effluent limitations in Appendix A of the Special Order, until it connected to the HRSD system or completed the approved upgrade of its treatment facilities. May 9, 1991 Special Order at 2, ¶ 4. Thus, it appears that Smithfield was required to comply with the limitations in the Permit for all effluents, except TKN. The court is unable to find in the May, 1991 Special Order any specific or express statement by the Board that Smithfield was not required to achieve full compliance with the phosphorus

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[22] In the May, 1991 Special Order, the Board required Smithfield to notify the Board no later than June 15, 1991, of defendants' commitment "to connect to the HRSD line or to upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." May 9, 1991 Special Order at 2. According to defendants, they were therefore required to choose between the following two options: (1) "connect to HRSD line" or (2) "upgrade their facilities to comply with the 2 milligram per liter phosphorus standard." Defs.' Br. at viii-ix, ¶¶ 9x-9cc. Another way to read this sentence, however, is that defendants were required to "comply with the 2 milligram per liter phosphorus standard," either by (1) connecting to the HRSD line or (2) upgrading their facilities.

limitations by January 4, 1993, if it elected to connect to the HRSD system.

Moreover, on October 1, 1991, Smithfield indicated in a letter to the Board that it did not believe the May, 1991 Special Order specifically relieved it from compliance with the limitations in the Permit: "[r]elief from such compliance [with the effluent limitations in Part I.C. of the draft 1991 Permit, which included a phosphorus limitation required to be achieved by January 4, 1993,] is not specifically present or is not apparent in the [1991] Consent Order." Oct. 1, 1991 Letter from Smithfield to Board at 3 (emphasis added). Although defendants sought reassurance from the Board, in the form of "some documentation or letter," that they were relieved from compliance with the effluent limitations in the Permit if they agreed "to connect to HRSD as soon as it becomes available regardless of the time frame in which it occurs," id., the Board did not do so in its response. Instead, the Board indicated that the Permit deadlines were still applicable to defendants when it stated, inter alia, that "[t]he compliance schedules and related goal dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. Thus, neither the Board's May, 1991

Special Order, nor its October 10, 1991 letter, clearly exempted defendants from the January 4, 1993 deadline for full compliance with the phosphorus limitations, if defendants elected to connect to the HRSD system.

In addition, defendants' current interpretation of the Board's May, 1991 Special Order and October 10, 1991 letter does not make sense when one considers the fact that after Smithfield agreed to the HRSD connection on June 7, 1991, the 1992 Permit issued by the Board included the January 4, 1993 deadline for phosphorus compliance, and a May 13, 1994 deadline for CBOD, cyanide, and ammonia-nitrogen compliance. It would be illogical for the Board to include deadlines in a 1992 Permit which are no longer applicable to Smithfield after June 7, 1991, as defendants contend. Defendants boldly assert that the deadlines "merely provided the official point of reference that would be needed in case Smithfield reneged on its commitment to make the HRSD connection." Id. at xii, ¶ 9nn. Nothing in the 1992 Permit, or the entire record, supports this contention. On the contrary, the Board's inclusion of these deadlines in the 1992 Permit, and the absence of any clear statement in the May, 1991 Special Order that defendants were exempt from the schedule of compliance for phosphorus, if they decided to connect to the HRSD system, points to the fact that

neither the May, 1991 Special Order, nor any other Special Order or letter, relieved defendants from compliance with the January 4, 1993 deadline in the Permit for the phosphorus limitations.[21]

The Board did provide an exemption, however, for the CBOD, cyanide, and ammonia-nitrogen limitations in the November 8, 1994 amendment to the May, 1991 Special Order. After the 1992 Permit was issued, and after the May 13, 1994 deadline for compliance with the CBOD, cyanide, and ammonia-nitrogen limits had passed without full compliance by defendants, the Board issued an amendment to the May, 1991 Special Order on November 8, 1994, in which it agreed that defendants "may achieve compliance with [the permit effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by connecting to the HRSD system." Nov. 8, 1994 Special Order at 1. The Board further decided "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with these effluent limitations by May 13, 1994," and agreed that "this amendment does not alter, modify, or amend any other term or condition of the Order or of the Permit except as specified above."

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[21] While the Board did defer the commencement of the schedule of compliance for the phosphorus limitations in its March, 1990 and November, 1990 Special Orders, the entire schedule for phosphorus compliance, or the January 4, 1993 deadline, was not deferred in the March, 1990 and November, 1990 Special Orders. See supra note 4.

Id. at 1-2. Although these Special Orders may have included different requirements for TKN, CBOD, total cyanide, and ammonia-nitrogen, defendants are still liable for Permit violations for these effluents, unless the Special Orders actually changed the terms of the 1992 Permit.

2. The Special Orders did not change the terms of the Permit

Defendants admit that the May 9, 1991 Special Order provides that "[n]othing herein shall be construed as altering, modifying, or amending any term or condition contained in VPDES Permit No. VA 0059005." May 9, 1991 Special Order at 2; see Defs.' Br. at xv, ¶ 20 (admitting sentence four of ¶ 20 of Pl.'s Facts). Defendants claim, however, that they are not arguing that the Special Orders altered, modified, or amended the Permit--they claim the Special Orders were incorporated into, or "conditioned, revised, or superseded," the 1992 Permit. Defs.' Br. at ii, ¶ 7. Regardless of the semantics, for the purposes of this motion, the court must determine whether the terms of the 1992 Permit, or defendants' obligations under the 1992 Permit with regard to the EPA, were changed in any way by the Board's Special Orders or letters. There is no evidence to suggest that the Special Orders or letters were incorporated into, or that they conditioned, revised, superseded,

altered, modified, amended, or changed the terms of the 1992 Permit, or defendants' obligations under the Permit.

With regard to the Board's Special Orders and letters dated after the issuance of the 1992 Permit, there is no evidence in the record that they changed the terms of the 1992 Permit or defendants' obligations under the Permit. First, there is no evidence that defendants ever followed the specific, mandatory procedures for modification of a Permit. See 40 C.F.R. § 122.62; see also Citizens for a Better Environment-California v. Union Oil Co. of California, 83 F.3d 1111, 1119 n.7 (9th Cir. 1996) (finding that a cease and desist order did not modify the terms of the permit because it was undisputed that the permit modification procedures were not followed), cert. denied, 117 S. Ct. 789 (1997). Second, the Virginia statute cited by the Board for its authority in the Special Orders does not authorize permit modification; rather, it authorizes the Board to, inter alia, "issue special orders to owners (i) who are permitting or causing the pollution . . . of state waters to cease and desist from such pollution . . . ." Va. Code § 62.1-44.15(8a). Accordingly, because defendants did not follow the procedures required for the modification of a permit, and none of the Board's Special Orders and letters were issued in accordance with the permit modification

procedures, defendants cannot support their argument that the Special Orders or letters issued by the Board after the 1992 Permit modify the terms of the Permit or bind the EPA.[34]

The Board's Special Orders or letters dated before the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA. The 1992 Permit was issued after the May, 1991 Special Order and the October 10, 1991 letter. Consequently, these documents, and any other Special Orders or letters of the Board dated prior to January 3, 1992, cannot change the terms of the 1992 Permit.

Moreover, the court does not agree with defendants that the EPA "incorporated" the Boards' May, 1991 Special Order and October 10, 1991 letter into the 1992 Permit, and approved of the agreement between the Board and Smithfield, when it failed to object to the content of these documents before approving the 1992 Permit, and when it failed to object after receiving information from

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[34] If the court allowed the terms of a Permit to be modified by special orders or interpretive letters issued by the state, which are not subject to EPA approval, this would undermine the EPA's ability to enforce the Act. In the Act, Congress gave the EPA authority to approve of and enforce permits, and to set specific regulatory guidelines for the modification of permits. States and permittees should not be allowed to circumvent the Act by issuing consent orders or interpretive letters which are binding on the EPA without its consent or approval.

defendants indicating they were violating the terms of the Permit, but not the terms of the Special Orders. The EPA's silence with regard to the agreement between Smithfield and the Board does not indicate its approval, especially when the EPA was not asked to review and approve of Smithfield's agreement with the Board.[25]

Furthermore, even if the EPA indicated approval of the HRSD-Smithfield connection when it stated it was a "cost effective solution," and provided funding through the Virginia Revolving Loan Fund Program for the HRSD upgrade and sewer extension,[26] this does not mean that the EPA approved of the timetable for compliance allegedly established by the Board, i.e., that upon deciding to connect to the HRSD, Smithfield no longer had to comply with the limitations in the Permit, but was only required to connect to the HRSD within three months of its availability, regardless of when the connection became available.

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[25] This conclusion of the court is also addressed in the estoppel section. See infra Part II.C.

[26] It is not clear to what extent the EPA reviewed or approved of the HRSD-Smithfield connection. The United States contends that while the EPA may require a state to refund monies loaned in violation of the financial restrictions set forth in a state revolving fund agreement, the EPA cannot approve or disapprove of a particular project--it is the state that oversees the individual projects. Pl.'s Br. at 9 (citing 55 Fed. Reg. 10176 (Mar. 19, 1990) and 40 C.F.R. part 35).

Even if defendants thought in good faith that the United States was bound by the agreements in the Special Orders and letters of the Board, the United States is not bound unless it is a party to those agreements or it consents to be bound. See United States v. Atlas Powder Co., 26 Env't Rep. Cas. (BNA) 1391, 1392 (E.D. Pa. 1987) (Pl.'s Ex. 31) (where explosives manufacturer had good faith belief that United States was bound by terms of a consent decree between environmental group and manufacturer, court held that United States was not subject to liability for manufacturer's attorneys' fees and costs in negotiating settlement with the group). The court in Atlas Powder noted that

> [t]here is no authority for the proposition that the United States has an affirmative duty to notify a potential defendant that it does not intend to be bound by any consent decree entered into by the defendant and a private party, or by the defendant and the Commonwealth. The United States is not bound by the settlement agreements or judgments in cases to which it is not a party.

Id. (emphasis added).

In the case at hand, the United States was not a party to the agreements between the Board and Smithfield, and it never affirmatively agreed to be bound by the Board's Special Orders and letters. Decl. of Reynolds ¶ 13. Thus, the Special Orders and letters of the Board have no binding effect on the United States.

This fact is true even though the EPA received copies of the Special Orders and letters, and failed to indicate its disapproval. See United States v. Ohio Edison Co., 725 F. Supp. 928 (N.D. Ohio 1989) (holding that the United States did not "waive any objection" to the state's suspension of a construction schedule when the EPA failed to object or oppose the action, because "[s]ending a copy of the letter to the [EPA] . . . is not equivalent to the procedural requirements set forth in 40 CFR 123.44 or Section 402(d) of the Act, which allow the Administrator of the [EPA] to veto a state's issuance of a permit").

Defendants next argue that the Board's contemporaneous interpretations of defendants' obligations under the Permit and Special Orders are entitled to greater deference than explanations made after-the-fact. Defs.' Br. at 10 n.4; see SSM Rehabilitation Institute v. Shalala, 68 F.3d 266, 270 (8th Cir. 1995) (an "agency's contemporaneous interpretation of its own regulation is entitled to greater deference" than an explanation made by that same agency "after-the-fact") (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). According to defendants, the Board's contemporaneous interpretation is that the May 9, 1991 Special Order exempted them from phosphorus compliance, if they chose the HRSD connection, and this Special Order took precedence over the terms of the 1992

Permit. In 1991, Smithfield asked the Board whether the draft 1992 Permit was imposing the January 4, 1993, compliance date for phosphorous standards and therefore ignoring the 1991 Special Order. See Oct. 1, 1991 Letter from Smithfield to Board at 3. The Board responded that "[t]he draft permit is a separate document from the current Consent Special Order issued to Smithfield Foods in May 1991" and noted that "[a]ny special order agreements relative to compliance with water quality standards" approved by the Board would "take precedence over the VPDES Permit." Oct. 10, 1991 Letter from Board to Smithfield at 2, ¶ 3. While the Board does state here that the agreements in the Special Orders take precedence over the Permit, the text of this letter contradicts defendants' assertion that the Permit incorporated the Special Orders, as the Board considered the Permit and Special Orders to be "separate document[s]." Id. Even if this court opined that the EPA was bound by the Board's statement that the Special Orders "take precedence" over the Permit, which it does not, the court has already determined that the May, 1991 Special Order did not exempt defendants from the phosphorus compliance deadlines, if they elected to connect to HRSD.[27] Thus, the court disagrees with

[27] See supra Part II.B.1. In addition, as noted previously, defendants' own contemporaneous interpretation of the May, 1991

defendants that "[t]he clear import of the Board's response [in the October 10, 1991 letter] is that so long as Smithfield remained committed to connecting to HRSD, the Permit terms were superseded by the terms of the 1991 Order and that Smithfield would comply with the 1992 Permit so long as it satisfied the terms of the 1991 Order." Defs.' Br. at 11.

Other statements by the Board contemporaneous with the issuance of the 1992 Permit indicate that defendants were still required to comply with its terms. On December 23, 1991, after the May 9, 1991 Special Order was issued, the Board reported to the EPA that defendants' discharge was "expected to meet the required effluent limitations." Dec. 23, 1991 Memorandum Accompanying 1992 Permit at 4. Later, on May 15, 1992, the Board sent a letter to Smithfield reminding it that "the deadline for achieving final effluent limitations [for CBOD, total cyanide, and ammonia-nitrogen] is May 13, 1994." May 15, 1992 Letter from Board to Smithfield. The Board further stated that "[s]hould construction be delayed such that this deadline may be missed, a modification to the existing Consent Order should be requested." Id.

Special Order is that relief from compliance with the schedule in the 1992 Permit "is not specifically present or is not apparent in the [1991] Consent Order." Oct. 1, 1991 Letter from Smithfield to Board at 3.

Consequently, the court concludes the Board's contemporaneous interpretation of the 1992 Permit was that defendants were "expected to meet the required final effluent limitations" in the 1992 Permit for phosphorus, TKN, CBOD, total cyanide, ammonia-nitrogen, and the other effluents.[28]

In conclusion, the Board's Special Orders did not change the terms of the 1992 Permit, nor did the 1992 Permit implicitly incorporate any agreements set forth in the Special Orders. This is true notwithstanding the fact that the EPA failed to object to the alleged agreement between the Board and Smithfield even though it had copies of the Board's May, 1991 Special Order and October 10, 1991 letter, and information about defendants' noncompliance with the Permit. Defendants never explicitly asked the EPA to approve of their agreement with the Board, and the EPA's failure to comment on this agreement did not endorse the agreement. If defendants wanted to extend the deadline for full compliance for

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[28] It was not until two years after the issuance of the 1992 Permit that the Board clearly agreed "to hold in abeyance the requirement in Part I.D.6. of the Permit for Smithfield to comply with [final effluent limitations for CBOD, total cyanide, and ammonia-nitrogen] by May 13, 1994." November 8, 1994 Special Order at 1. However, as already discussed herein, the United States is not bound by the Board's Special Orders issued after the 1992 Permit because the Special Orders did not modify the Permit, and because the United States never agreed to be bound by them. See supra at 46-51.

phosphorus, CBOD, total cyanide, and ammonia-nitrogen, or obtain different effluent limitations for TKN, they should have done so by seeking a permit modification. Since the 1992 Permit was not modified, defendants were still required to follow the TKN limitations in the 1992 Permit, and the schedule of full compliance for phosphorus, CBOD, cyanide, and ammonia-nitrogen limitations in the 1992 Permit, or subject themselves to liability for permit violations.[29]

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[29] Defendants claim that the United States should not seek penalties against defendants because "the federal government itself pursues a policy similar to that pursued by Virginia in this case when it sees fit" and they note that the Supreme Court has recognized that the Administrator of the EPA may issue compliance orders under Section 309(a) of the Act, 33 U.S.C. § 1319(a), agreeing "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 61 (1987) (Congress did not intend to allow citizens to file suit against a violator, months or years later, "in order to seek the civil penalties that the Administrator chose to forgo," because this would considerably curtail the Administrator's discretion to enforce the Act in the public interest); see Defs.' Br. at 2. Notwithstanding the fact that the EPA may forgo seeking civil penalties with regard to other violators, this does not prevent the EPA from seeking them when the EPA deems that other methods of enforcement are not achieving compliance with the Act in a timely manner, as in this case.

C. Estoppel

Defendants contend that the United States is not entitled to summary judgment because it is estopped from enforcing the limitations in the Permit. Estoppel against the United States is permitted, however, only in the most extraordinary circumstances. Heckler v. Community of Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). The United States is only estopped from enforcing the Permit if defendants prove: (1) the traditional elements of estoppel are present, id. at 61; (2) the United States has engaged in affirmative misconduct, I.N.S. v. Miranda, 459 U.S. 14, 17 (1982); and (3) the circumstances are such that "the public interest in ensuring that the [United States] can enforce the law free from estoppel might be outweighed by the countervailing interest of [the private party]." Heckler, 467 U.S. at 60-61. As defendants have not satisfied the second element required for estoppel against the United States--affirmative misconduct--the court declines to address the other elements.

According to defendants, the United States is estopped from enforcing the limitations in the Permit because the "EPA has been aware for many years of the Board's Special Orders revising Smithfield's obligations," and "[d]iscovery to date demonstrates that the United States acted affirmatively." Defs.' Br. at 15. As

discussed in the last section, there is no evidence whatsoever indicating that the EPA ever affirmatively stated to defendants that they were not obliged to comply with the Permit requirements; that the Special Orders changed, or were incorporated into, the Permits; that the EPA agreed to be bound by the Board's Special Orders or letters; or that the EPA approved of the Board's alleged agreement with Smithfield, namely that the latter did not have to comply with the schedule of compliance in the Permit, if it elected to connect to the HRSD, regardless of when this connection occurred.[30] Inaction or passivity of the EPA is not affirmative misconduct with respect to defendants' violations. Thus, because defendants have failed to present any evidence of affirmative misconduct by the EPA, they are not entitled to the defense of estoppel against the United States.

D. Claims for civil penalties and injunctive relief are not barred by Section 309(g)(6)(A)(ii) of the Clean Water Act

Defendants assert that the United States' claims for civil penalties and injunctive relief[31] are barred by Clean Water Act

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[30] See supra Part II.B.2.

[31] In their Answer, defendants initially only allege that the claims for civil penalties are barred by this section. In their response to the United States' motion, however, they state that the

§ 309(g)(6)(A)(ii), 33 U.S.C. § 1319(g)(6)(A),[32] because for the last ten years the Commonwealth, by issuing Special Orders, has commenced and is diligently prosecuting an administrative action against Smithfield under Virginia law that is comparable to Section 309(g). Since Section 309(g)(6)(A) only applies to civil penalty actions, the court finds that the United States' claim for injunctive relief is not barred by this section. Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection, 830 F. Supp. 194, 196 (S.D.N.Y. 1993). Section 309(g)(6)(A)(ii) of the Act does bar the United States from bringing a civil penalty action for "any violation" whenever a state enforcement agency has "commenced and is diligently prosecuting an action under a State law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii).

Rather than include a penalty provision in each subsection of the Virginia statute, as Congress did in the Clean Water Act,

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claims for injunctive relief are also barred. Defs.' Br. at 27 n.19.

[32] Although defendants also cite Section 309(g)(6)(A)(iii), 33 U.S.C. § 1319(g)(6)(A)(iii), in their Answer, the United States' suit is clearly not barred by this section, which applies only if "the violator has paid a penalty assessed under [Section 309(g)], or such comparable State law, as the case may be." Defendants do not even allege that they have paid any such penalties, and there is no evidence to this effect.

Virginia simply created a single penalty provision to govern all violations of Virginia's State Water Control Law. See Va. Code § 62.1-44.32. Therefore, the United States urges the court to compare Section 309(g) to the specific code section cited by the Commonwealth as its authority for issuing the Special Orders, Virginia Code § 62.1-44.15(8a), which contains no specific penalty provision. However, this court agrees with defendants that it should compare Section 309(g) to the entire state enforcement scheme. See, e.g., North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 555-56 (1st Cir. 1991) (court should focus on whether the entire statutory scheme is comparable to the entire Clean Water Act, rather than the individual section of state law, when determining whether a citizen suit is barred); Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., Inc., 777 F. Supp. 173, 182 (D. Conn. 1991) (same), rev'd in part on other grounds, 989 F.2d 1305 (2nd Cir. 1993). But see Union Oil, 83 F.3d at 1118 ("the penalty at issue must have been assessed under that provision of the state law that is comparable to [Section 309(g)]"); Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1404 (D. Haw. 1995) (same).

The proper focus in determining comparability is on the substance of the law, not its form; the comparability determination

should not turn on "the logistical happenstance of statutory drafting." Scituate, 949 F.2d at 556. Accordingly, because the court will not elevate form over substance when determining if the state and federal laws are comparable, it will consider whether Virginia's entire enforcement scheme is comparable to Section 309(g).

1. Authority to impose administrative penalties

The United States contends that Virginia law is not comparable to Section 309(g) because it does not provide the Commonwealth with the authority to impose administrative penalties.[33] Section 309(g)(6)(A)(ii) only bars a civil penalties action when a state has commenced and is diligently prosecuting an action under a state law comparable to Section 309(g). Section 309(g) is entitled "Administrative penalties," and it authorizes the EPA to assess administrative penalties for violations of the Act or a permit condition or limitation. Accordingly, a state law is only comparable to Section 309(g), if it authorizes the state to assess

[33] The United States also notes that the Board's Special Orders have not required defendants to pay any penalties. See supra note 32.

administrative penalties for violations of the Act or of a permit.[34] See, e.g. Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 380-81 (8th Cir. 1994) ("comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce," along with other provisions) (emphasis added), cert. denied, 115 S. Ct. 1094 (1995); Scituate, 949 F.2d at 556 (finding Massachusetts statutory scheme comparable where it "authorized" the Massachusetts Department of Environmental Protection to assess penalties in a manner similar to Section 309(g) of the Federal Act, even though penalties were not actually sought); Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1014 (S.D.N.Y. 1994) (finding New York law comparable to the Act's administrative penalty provisions because "penalties may also be assessed by the Commissioner in the first instance which are subject to review" by a court); Remington Arms, 777 F. Supp. at 181 (Section 309(g)(6)(A)(ii) "bars citizen suits where a state agency

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[34] Although the court agrees with defendants that the Commonwealth does not have to seek or impose administrative penalties, see Defs.' Br. at 16, Virginia law must still authorize the Commonwealth to pursue administrative penalties--not just judicial penalties--for the state law to be comparable to Section 309(g), and consequently bar the United States' action for civil penalties under Section 309(g)(6)(A)(ii). See infra note 35.

conducting enforcement proceedings has authority to assess civil penalties, regardless of whether the agency has actually assessed such penalties."); New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) (noting that New York law allows the state to "seek penalties for violations" of New York's Environmental Conservation Law, but the state is not required to impose penalties for a citizen suit to be precluded).

Virginia law provides for the imposition of "civil charges" only when the violator consents. Va. Code § 62.1-44.15(8d) ("With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board" or any permit condition, "the Board may provide, in an order . . ., for the payment of civil charges for past violations" in specific sums.).[35] A penalty provision requiring the consent of the violator does not have the same "teeth" to encourage enforcement as Section 309(g). As noted by the Supreme Court in Tull v. United States, 481 U.S. 412, 422-23 (1987), civil penalties are very important in the Act's enforcement scheme, as they punish violators, deter violations, and

[35] Virginia Code § 62.1-44.15(8c) does authorize the Board to pursue civil penalties in a court of law under Virginia Code § 62.1-44.32, but this is a judicial rather than an administrative penalty.

disgorge economic profits derived from the violations.

Although the court recognizes that it is important to grant state enforcement agencies latitude to pursue the remedies they deem most effective in furthering the goals of the Clean Water Act, a state law must be comparable to the administrative penalty provision of the Clean Water Act, Section 309(g), for it to preclude a civil penalty action under Section 309(g)(6)(A)(ii). Virginia law, requiring the consent of the violator to the penalties, does not authorize the imposition of administrative penalties in a manner comparable to Section 309(g). Accordingly, the United States is not barred herein from bringing an independent penalty action against defendants.

2. Public notice and participation

Numerous courts have also found that a state law is only comparable to Section 309(g), if it contains public notice and participation rights that are similar to Section 309(g). See, e.g., California Sportfishing Protection Alliance v. City of West Sacramento, 905 F. Supp. 792, 804 (E.D. Cal. 1995) (finding California law comparable to Section 309(g) because it has public participation procedures closely analogous to each of the provisions in Section 309(g)(4)); Save our Bays and Beaches v. City

and County of Honolulu, 904 F. Supp. 1098, 1133 (D. Haw. 1994) (state statutes and regulations which do not contain mandatory safeguards of public notice and participation cannot be deemed comparable to Section 309(g)); Public Interest Research Group of New Jersey, Inc. v. New Jersey Expressway Authority, 822 F. Supp. 174, 184 (D.N.J. 1992) (finding state law not comparable because the statutes and regulations did not afford the public notice and opportunity to comment or participate in a hearing, like Section 309(g)(4)); National Resources Defense Council, Inc. v. Vygen Corp., 803 F. Supp. 97, 101 (N.D. Ohio 1992) (Ohio law, which contained discretionary notification and participation provisions, was not comparable to Section 309(g) because it did not contain mandatory public participation safeguards); Public Interest Research Group of New Jersey, Inc. v. GAF Corp., 770 F. Supp. 943, 950-51 (D.N.J. 1991) (state law that did not provide public notice, or provide the public an opportunity to comment or request a hearing on a proposed administrative consent order, was not comparable); Atlantic States Legal Foundation, Inc. v. Universal Tool and Stamping Co., Inc., 735 F. Supp. 1404, 1415-16 (N.D. Ind. 1990) (state law not comparable where it failed to require notice of matters concluded by consent decree, and did not provide a reasonable opportunity to comment on a proposed penalty assessment

or to obtain judicial review of administrative orders similar to Section 309(g)(8)). But see ICI Americas, 29 F.3d at 381 (agreeing with Scituate, and holding state law comparable where it provided an ex post facto right to intervene, no public notice at any time, and no opportunity to comment on a proposed consent order); Scituate, 949 F.2d at 556 n.7 ("So long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act.").

Congress provided for the "rights of interested persons" in Section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4). Although a state's statutory or regulatory scheme need not be identical to the federal government's to be "comparable," the state law must provide public notice and participation safeguards similar to those in Section 309(g) to ensure that interested citizens have an opportunity to contest administrative actions. These safeguards include: (1) "public notice and reasonable opportunity to comment on the proposed issuance of an order," Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A); (2) the right of persons who commented on the proposed penalty assessment to "notice of any hearing held under this subsection and of the order assessing such penalty,"

Section 309(g)(4)(B), 33 U.S.C. § 1319(g)(4)(B); (3) if a hearing is held, the commentators have a right to receive "a reasonable opportunity to be heard and to present evidence," id.; (4) if a hearing is not held, the commentators may petition the EPA to set aside the order and provide a hearing, Section 309(g)(4)(C), 33 U.S.C. § 1319(g)(4)(C); (5) if a hearing is denied, the EPA must provide notice of and the reasons for the denial, id.; and (6) the commentators have a right to appeal an administrative penalty assessment in United States District Court. Section 309(g)(8), 33 U.S.C. § 1319(g)(8).

With regard to public notice and opportunity to comment, Virginia's regulations provide that the Board will investigate and respond to citizen complaints concerning matters within the Board's purview. Va. Admin. Code tit. 9 § 25-31-910(B)(1). The regulations further provide that

> [a]t least 30 days prior to the final settlement of any civil enforcement action or the issuance of any consent special order, the board will publish notice of such settlement or order in a newspaper of general circulation in the county, city or town in which the discharge is located, and The Virginia Register of Regulations. . . .

Id. § 25-31-910(B)(3). The regulations also require the Board to consider all comments received during this thirty-day period before taking final action. Id. The United States concedes that the

November, 1994 Special Order was published for public comment, as required by Title 9 of Virginia Administrative Code § 25-31-910(B)(3). See Pl.'s Br. at 26 n.19.

With regard to public participation in hearings, there are two types of administrative hearings in the Virginia Administrative Code, informal hearings, referred to as "public hearings," and "formal hearings." Va. Admin. Code tit. 9 § 25-230-10. "Public hearings" are informal fact-finding proceedings "held to afford interested persons an opportunity to submit factual data, argument and proof to the board." Id. § 25-230-30. A permit applicant, permittee, or any person may request a public hearing when the Board considers whether to issue, deny, modify, or revoke a permit. Id. § 25-230-40. Any person aggrieved by any action or inaction of the Board with respect to a permit or arising out of the public hearing procedures may petition the Commonwealth for a "formal hearing." Id. § 25-230-130.

"A formal hearing is a public proceeding for the taking of evidence . . . ." Id. § 25-230-100. "A formal hearing may be held to consider appeals of certain actions of the board . . . taken without a formal hearing," and "must be held prior to the issuance of a special order . . . unless the owner consents to the issuance

of a special order without a hearing." Id.[36] If the owner does not consent to the issuance of a special order without a formal hearing, and a formal hearing is held, "the only party to a special order hearing shall be the proposed recipient of the special order." Id. § 25-230-120.

Thus, it appears that, under Virginia law, a citizen can petition for either a public or formal hearing, only if the grievance is with respect to an action or inaction of the Board in issuing, denying, modifying, or revoking a permit. However, a grievance with the issuance of a special order is not a permit grievance. There appears to be no provision allowing a citizen to petition for either a public (informal) hearing, or formal hearing, if a citizen has a grievance with respect to the proposed issuance of a special order. Moreover, a formal hearing regarding the proposed issuance of a special order may never be held because the recipient of that special order can waive the formal hearing. Then, even if a formal hearing is held regarding the proposed issuance of a special order, the only party at that special order hearing is the recipient of that special order.

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[36] "A consent special order is a special order issued without a public hearing and with the written consent of the affected owner." Va. Admin. Code tit. 9 § 25-31-910(B)(3).

In this case, Smithfield consented to the issuance of the Special Orders without a hearing, and there was no opportunity for the public to request a hearing prior to their issuance. Defendants maintain that a state law need not provide hearings in all cases to be comparable to Section 309(g), because even Section 309(g)(4) does not require a hearing--it only allows interested persons to comment, if a hearing is held, or petition the EPA for a hearing, if one is not held. Section 309(g)(4)(C), however, does require "notice of and the reasons for" the denial of a hearing. Virginia law, which allows the violator to waive a formal hearing, does not contain similar provisions protecting the public's right to request a hearing prior to issuance of a special order, to be heard and present evidence if a hearing is held on the proposed issuance of a special order, and to obtain an explanation if a hearing is not held.

In addition, at the time the Special Orders were issued, there was also no Virginia law counterpart to the public's opportunity to obtain judicial review under Section 309(g)(8). Although any violator "aggrieved by a final decision of the Board" under 62.1-44.15(8a) was "entitled to judicial review," Va. Code § 62.1-44.29 (1992 Replacement Volume), Virginia law provided no similar right

to any other persons. Town of Fries v. State Water Control Board, 13 Va. App. 213, 216 (1991).[17]

Virginia law does provide the public with notice and some opportunity for comment, but the court finds that Virginia law at the time of the issuance of the Special Orders did not include public participation provisions sufficiently comparable to Section 309(g). Unlike Section 309(g), Virginia law did not grant the public a right to request a hearing prior to issuance of a special order, to be heard at a hearing regarding the proposed issuance of a special order, to obtain reasons for denial of a hearing, or to seek judicial review of a special order. Consequently, this court does not find Virginia's public participation procedures at the time of the issuance of the Special Orders to be sufficiently

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[17] After the Fourth Circuit in Commonwealth of Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996), cert. denied, 117 S. Ct. 764 (1997), upheld the EPA's disapproval of the citizen standing provisions of the Virginia Code, the Commonwealth amended Section 62.1-44.29 of the Virginia Code in 1996. This amendment, effective January 1997, now allows the violator and "any person who has participated, in person or by submittal of written comments" to appeal a special order. Supplement to January 6, 1995 Virginia Attorney General's Opinion at 2, 5 (dated Feb. 6, 1997) (Pl.'s Ex. 26). Because this amendment was not in effect when the Special Orders were issued, or when this Complaint was filed, it is not relevant to the court's determination of whether the state law was comparable to federal law at the time of the state's enforcement action.

similar to Section 309(g).[36]

In conclusion, Virginia's entire enforcement scheme is not comparable to Section 309(g) because it does not provide authority to issue administrative penalties and because it failed, at the time of the Special Orders, to provide adequate procedures for public participation. Because the court concludes that Virginia law is not comparable to Section 309(g), and thus does not bar the United States from pursuing an independent penalty action against defendants, the court need not address whether the Commonwealth is diligently prosecuting an administrative action against defendants.

E. Phosphorus claims not precluded by Section 510 of the Act

In their response to the United States' motion, defendants contend that Section 510 of the Act, 33 U.S.C. § 1370, precludes federal enforcement of the United States' phosphorus-based claims. The court agrees with the United States that this argument "is completely unsupported by the language of Section 510 and flatly inconsistent with the language, intent, and structure of Sections 309(a) and 301 of the Clean Water Act, 33 U.S.C. §§ 1319(a), 1311."

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[36] This conclusion is consistent with Congress' intent to provide for, encourage, and assist the participation of the public in the enforcement of the Act. Section 101(e), 33 U.S.C. § 1251(e).

Pl.'s Rebuttal at 16.

Section 510 of the Act states that the Act does not preclude or deny the right of any state to adopt or enforce standards, limitations, or requirements that are more stringent than federal law. 33 U.S.C. § 1370(1)(A) and (B). The Commonwealth of Virginia has adopted stricter standards, limitations, and requirements for the discharge of phosphorus than required by the Act, and it included these phosphorus limitations in defendants' Permit. In filing this action alleging violations of the phosphorus limits, defendants contend that the United States is contravening "the clear mandate of Section 510 by denying Virginia its right to enforce without federal interference more stringent state standards and requirements than it created itself." Defs.' Br. at 29. The court disagrees.

The Commonwealth's phosphorus limitation, which is a standard within the meaning of Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), was incorporated into defendants' NPDES Permit issued pursuant to Section 402, 33 U.S.C. § 1342. Defendants admit that the EPA has the authority to enforce a more stringent state effluent standard incorporated into a permit approved by the EPA. Defs.' Br. at 29 (citing 33 U.S.C. § 1319(a)(1) and (3)). Thus, because the plain language of Section 309(a)(1) and (3), 33 U.S.C.

§ 1319(a)(1) and (3), clearly provides that the United States may enforce the phosphorus standard in defendants' Permit, the court concludes that Section 510, 33 U.S.C. § 1370, does not preclude the United States from pursuing their phosphorus-based claims against defendants in this action.

III. Conclusion

As a matter of law, the court GRANTS partial summary judgment to the United States against defendants for several reasons. First, defendants are liable for violations of Clean Water Act § 309(b) and (d), 33 U.S.C. § 1319(b) and (d). Specifically, Smithfield Foods is liable for at least 164 days of violations of the reporting requirements of Permit No. VA0059005 (Count V); and defendants Smithfield Foods, Smithfield Packing, and Gwaltney are liable for any violations of the effluent limitations contained in Permit No. VA0059005 for: phosphorus, ammonia-nitrogen, TKN, fecal coliform, minimum pH, cyanide, oil and grease, CBOD, BOD, and total suspended solids (Counts I-IV). Second, Permit No. VA0059005 did not incorporate, nor was it conditioned, revised, or superseded by, the Board's Special Orders issued prior to the filing of this action. Third, the United States' claims are not barred by estoppel. Fourth, the United States' claims are not barred by

Clean Water Act § 309(g)(6)(A), 33 U.S.C. § 1319(g)(6)(A). Fifth, the United States' phosphorus claims are not precluded by Clean Water Act § 510, 33 U.S.C. § 1370.

The Clerk is DIRECTED to send a copy of this Opinion to counsel for the parties.

It is so ORDERED.

Rebecca Beach Smith

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 30, 1997

PREPARED STATEMENT OF STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENVIRONMENTAL PROTECTION AGENCY

I. INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to testify on the Environmental Protection Agency's (EPA) enforcement and compliance assurance program and EPA's enforcement relationship with the States. Today's hearing is very timely as these two issues have received a great deal of attention this past year. I believe that this attention is entirely appropriate, since effective environmental protection requires not only a strong Federal enforcement presence, but also a solid, dynamic EPA-state partnership that can adapt to new and changing environmental challenges facing this country at both the local and national levels.

I would like to talk about the two fundamental principles that guide EPA's own enforcement approach and the agency's work with the States. These two principles are accountability and flexibility.

II. ACCOUNTABILITY TO ENSURE ENVIRONMENTAL COMPLIANCE

Accountability is the central part of EPA's enforcement and compliance assurance program. By accountability, I mean that the public expects the regulated community to obey the law and fully comply with applicable regulations and also expects EPA to take tough, but fair action against those who fail to do so. We also know that regulated entities that comply with environmental requirements expect, and rightly so, EPA to hold noncomplying entities accountable for violations that may place the violators at a competitive advantage.

EPA ensures accountability by maintaining a strong enforcement program that includes bringing criminal, civil, and administrative actions against violators. A strong enforcement program punishes wrongdoers, deters potential violators, brings actual violators into compliance, and can ensure that damage to the environment is rectified. In a March 1996 report, the General Accounting Office emphasized the important deterrent role of penalties:

[P]enalties play a key role in environmental enforcement by deterring violators and by ensuring that regulated entities are treated fairly and consistently so that no one gains a competitive advantage by violating environmental regulations.

Water Pollution: Many Violators Have not Received Appropriate Enforcement Action (GAO/RCED–96–23, March 1996). See also, *Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators* (GAO/RCED–91–166, June 1991).

The deterrent value of established enforcement methods has also been confirmed by a recent study undertaken by EPA's Pollution Prevention Policy Staff and cosponsored by the U.S. Departments of Energy, Defense, and Commerce entitled *Study of Industry Motivation for Pollution Prevention.* The purpose of the study was to improve the understanding of Federal agencies about how environmental issues influence core business decisions. Based on information from more than 1000 business people representing randomly-selected lithographic printing companies and larger manufacturing companies reporting on the Federal Toxics Release Inventory (TRI), the study showed that environmental enforcement actions were among the most important factors in getting both TRI respondents and printers to consider environmental issues in the performance of their duties.

EPA has a firm commitment to a strong enforcement program. As shown in our 1996 Enforcement Accomplishments Report, we referred a record 262 criminal enforcement actions to the Department of Justice (DOJ), as well as 295 civil cases—up 38 percent from 1995. We also assessed a record $76.6 million in criminal penalties and another $66.2 million in civil penalties—up 90 percent from 1995. Our combined criminal, civil judicial, and administrative penalties for 1996 were the highest in the history of the agency at more than $172 million. Significantly, EPA was able to measure for the first time the environmental results of these enforcement actions. This data includes types and amounts of pollutants reduced as a direct result of EPA's 2,500 enforcement actions taken in 1996, the environmental benefits and impacts of those completed actions, and the types and amounts of actions taken by regulated entities.

Indeed, the report shows that we are focusing our efforts on the most serious pollutants and health risks, making the polluter pay for noncompliance, and securing settlements that have a direct, positive impact on public health and the environment. For example, during 1996 polluters spent almost $1.5 billion on correcting violations, cleaning up hazardous waste sites and/or taking additional steps to improve the environment or prevent future problems. Our settlements also resulted in sig-

nificant aggregate reductions in the amount of pollutants discharged into the environment, including nearly 200 million pounds of carbon monoxide, 16.6 million pounds of lead, and 7.7 million pounds of asbestos. The report also punctures the myth that EPA pursues only so-called "paper" violations that have no real public health or environmental impacts.

Our commitment to strong enforcement is also reflected in the efforts of our criminal enforcement program. Our Office of Criminal Enforcement, Forensics, and Training (OCEFT) will soon have 200 specially trained criminal investigators assigned to area offices in 36 cities across the country to work directly with local enforcement agencies in communities at greater risk of environmental crimes. Recognizing the critical importance of cooperation with State and local law enforcement agencies, OCEFT special agents now participate in more than 90 environmental crimes task forces nationwide with Federal, State and local law enforcement agencies to share information, establish local priorities, and pursue criminal environmental violations. Since 1992, EPA has participated in 644 joint criminal investigations with State and local law enforcement personnel. OCEFT also devotes significant resources to the training of law enforcement and regulatory personnel from States and cities across the country.

We are building upon these successes through our National Performance Measurement Strategy. This strategy is developing an enhanced set of performance measures for our enforcement and compliance assurance program. The measures will be used to supplement our established output measures (i.e., number of civil and criminal cases referred and amount of penalties assessed) with additional outcome measures to better assess the status and trends of regulatory compliance and environmental improvements resulting from our enforcement and compliance assurance activities.

So far, we have held two successful public meetings in Alexandria, Virginia and San Francisco, California, where we heard from State environmental agencies and State attorneys general, other Federal agencies, environmental groups and environmental justice advocates, regulated companies and industry associations, academic experts, and Congressional staff about their ideas for measuring the effectiveness of environmental enforcement and compliance assurance programs. We are following up on these two meetings with a series of more focussed discussions with different stakeholders. EPA will conclude these meetings in mid-September at a "Capstone" conference with a cross-section of stakeholders to identify common understandings, areas of agreement, and unresolved issues. Finally, EPA will develop a report of findings and an implementation plan with a schedule by October 1997.

III. FLEXIBILITY TO PROMOTE ENVIRONMENTAL COMPLIANCE

Along with accountability, flexibility is the other principle at the foundation of our enforcement program. Flexibility is not only necessary to find new and innovative ways to achieve compliance—for there is often more than one way to comply—but is also necessary to make the most of limited government resources and target efforts more efficiently on the country's most urgent health risks and environmental problems.

Flexibility is a key part of EPA's enforcement and compliance assistance program. In fact, the primary purpose of the reorganization of EPA's Office of Enforcement into the Office of Enforcement and Compliance Assurance (OECA) in 1994 was to institutionalize Administrator Browner's conviction that effective environmental protection must include a range of compliance assistance tools in addition to established enforcement methods. The reorganization was more than just moving boxes within an organizational chart; it was a vehicle for ensuring that we consider the best and most effective ways to achieve and maintain compliance. Consistent with this approach, and the Clinton Administration's high priority on reinventing environmental regulation, EPA has launched a number of compliance assistance programs and activities over the last few years, including our Compliance Assistance Centers, Environmental Leadership Pilot Program, Project XL, Common Sense Initiative, and Sector Notebooks. OECA is playing a key role in all of these efforts.

EPA's Compliance Assistance Centers

In partnership with industry, academic institutions, environmental groups, other Federal agencies, and the States, EPA has established its national Compliance Assistance Centers. The purpose of the centers is to improve compliance by increasing awareness of the pertinent Federal regulatory requirements and providing information that will help to achieve compliance. The centers accomplish this by serving as the first place that businesses, trade associations, and other interested parties can go to get comprehensive, easy to understand compliance information.

So far, Compliance Assistance Centers have been established for four industry sectors: printing, metal finishing, automotive services and repair, and agriculture. Although the centers have not been in existence for very long, they are already getting a lot of use. For example, the National Metal Finishing Resource Center, which began operating as a pilot in April 1996, has had more than 1,354 registered users to date. The Auto Service and Repair Center, opened in June 1996, has received a total of 130,000 hits to its home page. OECA is now working on four new centers that will assist municipalities, the transportation industry, small chemical manufacturers, and manufacturers of printed wiring boards.

The Environmental Leadership Program

EPA has promoted a systematic approach to managing environmental issues and encourages environmental enhancement activities through the Environmental Leadership Program (ELP). For a facility to qualify for the initial phase of ELP, EPA looked at several criteria, including the facility's systems for monitoring and maintaining compliance with environmental laws, relationship with its employees, and involvement with the surrounding community. EPA also examined the company's investment in environmental enhancement activities, such as environmental restoration, product stewardship, or additional pollution prevention efforts.

During the 1 year pilot phase, which ended in August 1996, ten private companies and public utilities and two Federal facilities tested the design of specific elements of the program. ELP pilot participants represented such industries as manufacturing, chemical, printing, pulp and paper, and solid/hazardous waste disposal.

The anticipated benefits of a full scale ELP for facilities would include recognition as an environmental leader, reduced and/or modified discretionary inspections, and a limited correction period for instances of noncompliance as long as certain conditions are met. Potential benefits to the environment include increasing the number of activities that go beyond compliance with existing environmental requirements and encouraging the implementation of best practices related to self-monitoring and pollution prevention activities.

Project XL

An acronym standing for "excellence and leadership," Project XL allows facilities and communities to pilot environmental activities that produce greater environmental protection than what would be achieved from conventional compliance measures, and often at less cost. In return, EPA provides relief from certain regulatory requirements, as agreed between EPA, the State, and the project sponsor in consultation with other stakeholders. Thus, the XL program gives participants the flexibility to develop common sense, cost-effective strategies that will replace or modify specific regulatory requirements, on the condition that they produce greater benefits.

There are three projects underway to date, and EPA-proposal teams are developing final project agreements for 11 more projects.

Common Sense Initiative

The Common Sense Initiative (CSI) represents a new approach for creating policies and environmental management solutions that relate to whole industries. It is an experimental effort to increase the role of collaboration and consensus into the environmental protection process and to address environmental problems in a more holistic way. The goal is to encourage the development and creation of innovative solutions to today's environmental problems. Six industries are laboratories for testing CSI concepts: Automobile Manufacturing, Iron and Steel, Metal Finishing, Computers and Electronics, Printing, and Petroleum Refining.

Sector Notebooks

Sector notebooks are designed to serve as a resource guide for learning about specific industries and their environmental issues. In October 1995, OECA released profiles of 18 selected industries. Included in each notebook profile is a description of the industrial processes used, pollution outputs, pollution prevention opportunities, applicable Federal statutes and regulations, past compliance history, and compliance assistance information. More than 50,000 printed and electronic copies have been requested and distributed so far to States, locals, individual facilities, Federal agencies, foreign governments, trade groups, and environmental organizations. Several other industries have asked EPA to produce notebooks for their industries so that regulators and compliance assistance providers can become more knowledgeable about their industry. EPA is now in the process of developing Notebooks for an additional eight sectors.

In addition to these activities and programs, EPA has issued policies to promote environmental compliance in small businesses and communities and, as described

in more detail below, issued its self-disclosure policy in 1996 to give businesses a real incentive to self-audit, disclose, and correct violations.

Taken as a whole, these activities and policies demonstrate the agency's strong commitment to a flexible, creative compliance assistance program. They are tremendous opportunities for the agency to improve its own operations, for the regulated community to improve its relationships with the public, the government, and the environment, and for the public to be assured that we are upholding our responsibilities for protecting public health and environment. Ultimately, this flexible regulatory approach enables the agency to be more proactive and strategic in response to compliance problems.

However, it is important to emphasize that the key to the success of these compliance programs is having a strong enforcement program as a base. This base provides a real incentive for companies to participate in these compliance assistance programs, because it helps assure them that they will not be put at a disadvantage to those who ignore their environmental obligations. Further, it assures the public that special deals are not being cut and that the regulated community remains beholden to the law.

IV. THE EPA-STATE PARTNERSHIP

As stated earlier, effective environmental regulation requires a strong EPA-state partnership. Most Federal environmental statutes recognize the importance of this partnership by giving to authorized or approved States the primary responsibility for implementing and enforcing Federal programs. This framework provides States the opportunity to craft new and innovative solutions to address local health risks and environmental problems. But these statutes also recognize the necessity and importance of the Federal Government's role and give EPA the authority and responsibility to establish baseline national standards for public health and the environment and ensure that these standards are implemented and enforced fairly and consistently in all the States.

Therefore, EPA works to ensure that citizens in all our States are afforded a base level of protection, leaving individual States free to establish and implement more stringent, but not less stringent, environmental standards. In addition, EPA takes enforcement action in cooperation with the States or on its own, when necessary, to prevent the creation of pollution "safe havens" in lax States, and to maintain a level playing field by protecting companies in States that comply with environmental requirements from being placed at an economic disadvantage to those companies in other States that do not. EPA's approach to its State partners follows from these statutory principles as well as the principles of flexibility and accountability that guide its own regulatory programs.

Flexibility with the States

EPA is pursuing its policy of flexibility with the States through the National Environmental Performance Partnership System (NEPPS). Established by the Administrator and State environmental program leaders in May 1995, the NEPPS provides a new process by which EPA and the States can work together to establish joint national and local environmental priorities and then integrate and focus resources to best address these priorities. These priorities will then be incorporated into our Performance Partnership Agreements (PPA) and Performance Partnership Grants (PPGs) with the States. OECA is working with the regions and the States to incorporate enforcement and compliance assurance priorities into these agreements. In addition, EPA and the Environmental Council of States (ECOS) have recently formed a work group to help facilitate these efforts and address major enforcement issues between EPA and States. The first meeting of this work group, chaired by Mark Coleman, Executive Director of the Oklahoma Department of Environmental Quality, and myself, was held on May 23 in Arlington, Virginia.

As part of the NEPPS process, EPA and ECOS have been working to develop proposed core performance measures for State enforcement and compliance assurance programs. These measures would be used to monitor the performance of enforcement actions to deter noncompliance and the performance compliance assistance and incentive policies. The proposed measures utilize both output measures and outcome measures to track the performance of State enforcement and compliance assurance programs. EPA believes the proposed measures will ensure accountability to the pubic and allow EPA and the States to begin measuring the effectiveness of alternative approaches to compliance. EPA is continuing to work with ECOS to put these measures in place for the fiscal year 1998 cycle of PPAs.

The next step in this NEPPS process is to reduce the reporting burden placed on States. To meet this goal, EPA and ECOS are developing a set of principles for data reporting. These principles will be used to evaluate the need for current and future

reporting requirements and eliminate obsolete and unnecessary reporting requirements, while maintaining or strengthening the data reporting requirements necessary to evaluate compliance trends nationwide. EPA and ECOS are examining efforts underway in several Regions to reduce reporting and will ask them to examine some of the reporting requirements they suspect are not necessary.

The Necessity of Strong State Enforcement Programs

Just as EPA is committed to maintaining a strong Federal enforcement program, we expect States to have strong enforcement programs. Strong State enforcement programs are essential to ensure environmental protection nationwide; further, pollution does not recognize State boundaries and many major companies are no longer regional, but national in scope and operation.

As I said earlier, there has been a lot of attention focused recently on the EPA-state relationship. In particular, there has been some controversy surrounding the impact of State audit laws on authorized programs and EPA's national response to the Inspector General report in Pennsylvania. EPA's response to these issues is consistent with the general views I have just expressed. This means that while the agency is working with the States to promote compliance and increase the flexibility in the implementation of their authorized programs, EPA still expects States to hold violators in their jurisdictions accountable by maintaining and utilizing an adequate enforcement program.

Impact of State Audit Privilege and Immunity Laws on State Enforcement Authority

Regarding State audit laws, we recognize that States may find different ways to encourage companies to voluntarily discover, disclose, and correct environmental violations. But, at the same time, we are concerned that some of the approaches being taken actually can allow polluters to keep secret from the public critical information about potential threats to health and the environment, and can obstruct the ability of the States and the public to hold the regulated community accountable for violating environmental requirements.

Let me be clear that we have two distinct issues regarding State audit laws—one of policy and one of law. On the policy level, we oppose all State audit privilege and immunity laws in any form. Both EPA and DOJ have repeatedly testified before Congress and State legislatures that audit privileges make it more difficult to enforce the nation's environmental laws by making it easier to shield evidence of wrongdoing. A privilege law invites defendants to claim many types of evidence relevant to a violation as privileged, including sampling data and information concerning the cause of and possible environmental contamination resulting from a violation. A privilege could, consequently, breed litigation and waste government resources as both parties struggle to determine what materials fell within the protected scope of the audit. Furthermore, a 1995 study by Price Waterhouse of 369 businesses entitled *The Voluntary Environmental Audit Survey of U.S. Business* indicated that a privilege is not needed to encourage voluntary compliance.

Ultimately, an audit privilege invites secrecy and breeds distrust with the community thereby undermining the kind of openness that builds trust between regulators, the regulated community, and the public necessary for the regulated community to be able to effectively police itself. We also oppose blanket immunities as a matter of policy, because, among other things, they can eliminate the important deterrent effect of penalties and result in disparate treatment of companies in States with different immunity laws.

The second issue we have with these audit laws is legal. Under Federal law, EPA has to ensure that the States retain certain minimum enforcement authorities required by Federal law for program approval, delegation, and authorization. More specifically, EPA must assure that a State audit immunity law does not deprive a State of its authority to obtain injunctive relief and civil and criminal penalties for any violation of program requirements. In determining whether these requirements are met, EPA is particularly concerned with whether a State has the authority to: (1) obtain immediate and complete injunctive relief; (2) recover civil penalties for significant economic benefit, repeat violations and violations of judicial or administrative orders, serious harm, and activities that may present an imminent and substantial endangerment; and (3) obtain criminal fines and sanctions for willful and knowing violations of Federal law.

Under Federal law, a State must also have the ability to get information needed to identify noncompliance or criminal conduct and ensure correction of violations. Further, it appears that a State privilege law that restricts the public's legal right to information regarding a facility's compliance with environmental requirements or sanctions "whistleblowers" for divulging information about a company's noncompli-

ance runs afoul of minimum Federal requirements. Thus EPA must evaluate State audit laws in light of these Federal requirements.

Federal law also authorizes citizens to petition the agency to review or withdraw State programs on the grounds that States lack the enforcement authority necessary to carry out Federal programs. Recently, citizen groups in the States of Idaho, Michigan, Texas, Colorado, and Ohio have filed these types of petitions. EPA and its regional offices are working with the States and these citizen groups to resolve the agency's legal concerns with particular provisions of State audit laws. EPA has also established a task force of senior representatives from EPA headquarters and regional offices and the DOJ to ensure national consistency in EPA's response to these matters. So far, EPA has worked cooperatively with several States, including Utah, New Jersey, and Texas to make sure that their audit laws do not present an obstacle to program approval.

EPA's Self-Disclosure Policy—Encouraging Audits Without Secrecy and Blanket Immunities

Although EPA has clearly and consistently opposed State audit privilege and broad immunity laws, the agency wants to encourage companies to self-monitor, self-disclose, and correct violations. Therefore, in 1995, EPA issued its own Incentives for Self-Policing: Discovery, Disclosure, and Correction and Prevention of Violations (60 Federal Register 66706). This policy was a result of an intensive, 18 month public process designed to find the best way to encourage companies to police themselves while preserving fair and effective enforcement and the public's right-to-know. The policy reflects thorough review and thoughtful suggestions from DOJ, State attorneys general and local prosecutors, State environmental agencies, the regulated community, and public interest organizations.

The policy encourages companies to police themselves by eliminating punitive, gravity-based penalties for violations that are discovered through an environmental audit. EPA will also not recommend criminal prosecution for those companies that disclose violations discovered through an audit, so long as the violations do not suggest high-level corporate involvement or a prevalent management practice to conceal or condone violations. The policy carefully balances these incentives with conditions and exceptions to protect public health and the environment and the community's right to know. In addition to prompt disclosure and correction, the policy requires that companies prevent recurrence of the violation and remedy any environmental damage. Repeat violations or those that present an imminent or substantial threat to public health or the environment or result in serious harm are excluded from the policy. As a condition of penalty mitigation, EPA may require that a description of a company's due diligence efforts be made publicly available.

Many companies have begun to avail themselves of the benefits provided by EPA's policy. Thus far, more than 120 companies have disclosed and corrected violations at more than 400 facilities under the policy. EPA has settled matters with nearly half of these companies, waiving penalties in most cases. In addition, several States, including Florida, California, and Pennsylvania, have fashioned State audit policies patterned on EPA's policy, thus reducing confusion in the regulated community in those States about the effect of voluntary audits.

Concerns With Federal Overfiling

There has been some concern expressed by some States that EPA is preparing to "overfile" against companies in States that have objectionable audit laws. Federal overfiling is the initiation of a Federal enforcement action, either administrative or civil, following a State enforcement action. Federal overfiling is in addition to, not in replacement of, a State enforcement action for the same violation at the same facility. Let me be clear that EPA has not and will not arbitrarily target companies in States with audit privilege and immunity laws. However, EPA will continue to exercise its normal Federal oversight responsibility and retain the right to bring independent enforcement actions in specific circumstances against regulated entities that violate environmental requirements in States where the agency believes that the State has failed to take timely and appropriate enforcement action.

Rather than overfile, the agency prefers to work with the States to determine who should take the necessary enforcement action. In the rare instance that the agency does overfile in a State, it does so to protect the public health or the environment or to maintain a level economic playing field for the regulated community within and among the States, and we make sure to provide a State notice prior to filing our own enforcement action.

Statistics show that overfiling is in fact a rare event. As reported by a state-by-state survey conducted by ECOS, the agency overfiled on about 30 cases or 0.3 percent of all Federal enforcement action during fiscal years 1992 through 1994. During

fiscal years 1994 and 1995, the agency overfiled on a total of 18 cases or about 0.1 percent of State enforcement cases. From October 1995 through September 1996, there was a total of four overfiling cases. It is important to note that none of these cases were filed as a result of the impact of State audit laws on the adequacy of the particular State enforcement actions.

EPA's National Response to the Inspector General Report in Pennsylvania

Enforcement accountability involves not only retaining the legal authority and capacity to take enforcement action but also having the commitment to take enforcement action when appropriate. I was therefore very concerned by the findings of a report issued by EPA's Inspector General (IG) in February 1997. At the request of EPA's Region III office, the IG reviewed the Pennsylvania Department of Environmental Protection's (PDEP) program under the Clean Air Act (CAA). The region called for the audit, because it was concerned that the State was not reporting significant violators to the region, despite ongoing discussions between the region and the State. This was not only hampering the region's oversight responsibility, but was also a violation of the terms of EPA's CAA grant to the State. Therefore, the purpose of the audit was to get an independent determination from the IG about whether the PDEP was in fact identifying significant violators of the CAA in accordance with Federal policy, and reporting these violators to EPA. The report found, among other things, that the PDEP had failed to report significant violators to EPA or take appropriate enforcement action in every case to bring violating facilities into compliance.

In response to this report, Region III is assessing the current compliance data of the unreported significant violators identified by the IG and working closely with Pennsylvania to initiate appropriate enforcement responses as necessary. The Region is also conducting a multimedia evaluation of the State's environmental enforcement program and is posing the matters raised in the IG report as threshold issues that must be addressed before PPA discussions can proceed. In addition, I asked my staff to perform an initial review of our data bases to determine if the problems in Pennsylvania regarding the reporting of significant violators exist elsewhere. This initial screening strongly suggested the potential for problems in other States.

Therefore, the Regions and, independently, the IG are working to determine the level of reporting and enforcement activity in other States under the CAA as well as other programs. The review will explore the full range of potential verification approaches, including oversight inspections, State file/data audits, statistical sampling of the regulated community, and concentrated multi-statute reviews of State environmental compliance and enforcement programs. Each region has also contacted their respective States to discuss the problem revealed by the IG report and will work closely with them to ensure that the problem is not widespread.

I want to emphasize that EPA's review will be thorough and fair; we are not jumping to any conclusions in our review process. Where our review shows that States are meeting their obligations, we will let them know. Where we believe that problems exist, we will work with those States to identify the reasons and correct them. Timely and accurate information reporting by the States is critical for EPA and State enforcement and cooperation. The agency depends substantially on information from the States to maintain our data bases, take independent enforcement action as necessary, and develop national enforcement policies and strategies. In return, EPA provides technical and legal support to States in their enforcement actions and often takes joint enforcement actions with States for large, complex, and multi-state cases.

V. CONCLUSION

Since joining EPA, I have emphasized that we will not run an "either/or" enforcement program. Only a combination of approaches involving tough enforcement actions to ensure compliance, and innovative programs to promote compliance, will be effective to protect public health and the environment. Therefore, we will continue to build upon our balanced enforcement and compliance assurance program adhering to the principle that strong enforcement is the central and indispensable element of our efforts to ensure and promote compliance.

We will take this same approach in our relationship with our State partners and continue to work with them and others to find new ways to promote compliance and innovation, improve coordination, and lower costs. But, at the same time, we will work to ensure that States are maintaining and utilizing rigorous, effective enforcement programs.

Thank you again for the opportunity to testify before your committee. I would be happy to answer any questions you may have.

Senate Environment and Public Works Committee
Oversight Hearing on Federal/State Enforcement
Responses to Senator Reid

Q1. How does the EPA spend its enforcement dollars and encourage state criminal enforcement training?

A. EPA's Office of Criminal Enforcement, Forensics and Training (OCEFT) devotes significant resources to the training of State and local law enforcement and regulatory personnel from States and cities across the country.

During Fiscal Year 1996, OCEFT personnel provided training to a variety of audiences, including local, county, State and federal law enforcement and regulatory agencies. OCEFT assisted in the development of a new Federal Law Enforcement Training Center (FLETC) training program for local, county, State and federal law enforcement officers entitled "Advanced Environmental Investigative Operations Training Program." OCEFT assisted in the delivery of three (3) "Advanced Environmental Crimes Training Program" courses in Fiscal Year 1996 which graduated a total of 90 local, county and State law enforcement and regulatory personnel. OCEFT also assisted in the delivery of two (2) "Environmental Crimes Police Academy Instructor Training Program" courses which were attended by 60 police academy instructors from throughout the United States, and which received tremendous praise from the law enforcement community.

Recognizing the critical importance of cooperation with State and local law enforcement agencies, OCEFT special agents now participate in more than 90 environmental crimes taskforces nationwide with federal, State and local law enforcement agencies to share information, establish local priorities, and pursue criminal environmental violations. These taskforces foster sate and local capacity building and have proven very effective in identifying and dealing with criminal cases at both the federal and State levels. Since 1992, EPA has participated in 644 joint criminal investigations with State and local law enforcement personnel.

Q2.a. Your testimony suggests that the vast majority of enforcement actions are initiated by states. Yet, we have several state witnesses today whose testimony suggests EPA is overfiling constantly. Can you explain this?

A. The States have close to 10,000 enforcement actions. The EPA in FY 1996 had only 4 overfiles.

Q2.b. Further, what have you done during your tenure as AA to improve relationships between EPA and your state and local government partners?

A. As Assistant Administrator, I initiated a work group with State environmental

commissioners, State Attorney Generals, the Department of Justice, tribal representatives, and senior OECA managers to discuss important environmental enforcement issues. This group, called the Senior Environmental Enforcement and Compliance Forum (or the "Forum"), meets about four times a year and has proven highly effective in fostering good relations with our partners who are implementing enforcement and compliance programs in States. More recently, I am working with a new work group of State environmental commissioners and EPA Regional Administrators to discuss specific enforcement and compliance issues. This new group holds promise for creating a constructive dialogue between EPA and States on these issues.

Q3. Small businesses are an important part of the economy in my home state of Nevada. Could you spend several minutes discussing the Agency's compliance programs for small businesses.

A. EPA has established several compliance programs, policies, and tools which provide valuable assistance to small businesses subject to environmental regulations.

COMPLIANCE ASSISTANCE CENTERS

EPA has joined with industry and State environmental experts to create national Compliance Assistance Centers that provide multi-media and sector-specific compliance information to the regulated community, including small entities, on how to comply with environmental requirements. So far, compliance assistance centers have been established in several industry sectors which contain a large percentage of small businesses: printing, metal finishing, automotive services and repair, and agriculture. The Agency is currently developing new centers for four additional sectors: printed wiring board, small chemical manufacturers, local governments, and transportation.

INFORMAL GUIDANCE PROGRAM

EPA has developed a program for responding to small business inquiries about compliance with statutes and regulations within the agency's jurisdiction. This program is required to be established by Section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). EPA uses as the core of its implementation efforts the Agency's existing Small Business Ombudsman (SBO) Office. The SBO serves as the small entity community's gateway to the Agency, and while that office itself does not always respond to fact-specific inquiries, it helps route such inquiries to the appropriate Agency technical experts for response. It provides information about regulations and rulemakings to small businesses across the country through various means, including meetings, conference calls and a toll-free hotline. For small business questions which concern the applicability and terms of EPA regulations and statutes, the SBO works with technical experts in each of EPA's program offices (i.e., the Offices of Solid Waste, Water, Air and Radiation,

Pesticides and Toxic Substances and the Office of Enforcement and Compliance Assurance) to provide the needed information. The SBO has also established Small Business Liaisons in each of EPA's regional offices to provide small businesses with a local option for obtaining compliance assistance information. In addition, we continue to explore additional avenues for providing Agency assistance to regulated small entities and will be making a determination whether additional activities should be incorporated into this program.

CAA 507 Program

Under Section 507 of the Clean Air Act, EPA has worked with States to establish State-run programs for assisting small businesses to comply with clean air requirements under State and federal law. All 50 States now operate such programs, over half of which provide assistance for other media in addition to air.

COMPLIANCE INCENTIVE POLICIES

EPA has also developed several policies which provide for incentives for small businesses and communities to come into compliance with environmental requirements. EPA's Policy on Compliance Incentives for Small Businesses (Small Business Policy) and a similar policy aimed at small communities provide for civil penalties to be reduced or waived for small entities which discover first-time violations through on-site, government-supported compliance assistance programs or self-audits, where the entity promptly discloses and corrects the violation and meets certain other criteria. In a statement made on the Senate floor during congressional consideration of SBREFA, Senator Christopher Bond used EPA's Small Business Policy as an example of the kind of policy Congress had in mind in developing the SBREFA Section 223 requirement. Vol. 142 No. 46, 142 Cong Rec S 3242 (Friday, March 29, 1996). In addition to that policy, EPA has issued an audit policy entitled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" which creates incentives for all entities, including small businesses, to voluntarily discover, disclose, correct and prevent violations of environmental regulations.

COMPLIANCE ASSISTANCE TOOLS

In addition to these programs and policies, EPA offers a range of compliance assistance tools for use by small businesses. As required by SBREFA Section 212, EPA now prepares a compliance guide for every final rule that requires the preparation of a regulatory flexibility analysis. The compliance guide provides small businesses with a Plain English explanation of how to comply with the regulation. Even before SBREFA required the issuance of such guides, the Agency already was in the process of developing multi-media sector-specific guidance for several industrial sectors dominated by small

businesses. For example, for the dry cleaning industry, EPA has prepared the following documents: (1) a Plain English and Plain Korean Guide for Perc Dry Cleaners, (2) a Multi-media Inspection Guidance Manual, (3) Compendium of Education Materials, (4) Generic Dry Cleaning Equipment Owner's Manual, (5) Clean Air Act NESHAP Regulation Translations into Korean, French, Chinese, Vietnamese and Spanish; and (6) Sector Notebook Profile for the Dry Cleaning Industry. Another example is the printing sector, for which EPA recently issued Multimedia Compliance/Pollution Prevention Assessment Guidance for Lithographic Printing Facilities. Other tools currently available or under development include compliance guides and self-assessment manuals for the chemical manufacturing, food processing, automobile service and repair, wood preserving, and shipbuilding industries.

Q4. What are your goals for environmental enforcement? How do they differ from the goals of your predecessor?

A. EPA's fundamental enforcement goal is to ensure that all of our citizens are afforded protection from risks posed by noncompliance with environmental laws. The vital protections our laws afford the American people depend on regulated persons adhering to environmental requirements. The Agency is committed to working with our State partners to protect the health of the people of this nation, and the air, water, and land we share, by enforcing environmental laws and regulations.

The core of our efforts to assure compliance with environmental requirements is a vigorous enforcement program targeted towards significant environmental problems and non-compliance. A strong enforcement program achieves environmental protection and accountability by punishing wrongdoers, deterring potential violators, bringing actual violators into compliance, rectifying damage to the environment, preventing the creation of pollution "safe havens" in lax States, and maintaining a "level playing field" by protecting companies that comply with environmental requirements from being placed at an economic disadvantage relative to those that do not. At the same time, EPA is continuing to develop increasingly sophisticated and effective compliance incentives and assistance programs to promote industry compliance which minimize the need for lawsuits and penalties. Since the credible threat of enforcement provides incentives to seek compliance assistance and deters noncompliant behavior, strong enforcement is an essential underpinning to the success of these new programs.

Protecting the public and the environment from risks posed by violations of environmental requirements is, and has always been, basic to this Agency's mission. The public's expectation that the federal government will play a key role by promoting compliance and deterring violations has been a consistent one from Administration to Administration.

Consistent with the President's directive to reinvent environmental regulation, this Administration has emphasized promoting compliance assistance and incentives as a

complement to our traditional enforcement activities and integrating both into a coherent and effective program. We are working, consistent with the requirements of the Government Performance and Results Act, to form new and more effective partnerships with the States, and improve how we measure the success of our activities and adjust our strategic planning and targeting in response to new information. These efforts are exemplified by ongoing programs and policies such as the Environmental Leadership Program (ELP); Project XL; Compliance Assistance Centers; EPA's audit, small business, and small communities enforcement policies; the Common Sense Initiative (CSI); the EPA/CMA Root Cause Analysis Pilot Project (fact sheet attached); Case Conclusion Data Sheets (CCDSs) (sample attached); Sector Notebooks (fact sheet attached); the National Environmental Performance Partnership System (NEPPS) (fact sheet attached); and the National Performance Measures Strategy (NPMS). The investments we are making in these projects and policies today will lead to a new generation of environmental protection as they produce better and more cost-effective environmental results well into the 21st century.

Q5. I received a letter from a constituent the other day that suggested that EPA and DOJ do not hold federal facilities to the same environmental standards as private enterprises. Is this true?

A. The United States must meet the same environmental standards as those in the private sector. As President Clinton stated in his 1993 Earth Day speech, "[n]ow we are taking steps to defend our people and our environment and the environment of the world.... it is time that the United States government begins to live under the laws it makes for other people.... [we need to] make our government what it should be -- a positive example for the rest of the country." The Administration continues to emphasize the importance of the United State's commitment to environmental compliance. For example, in FY 1996, EPA used its authority under the 1992 Federal Facility Compliance Act to ensure compliance at federal facilities. The Act boosted enforcement capability by clearly establishing RCRA administrative penalty authority against federal facilities, and putting it on par with EPA's authority against private companies and individuals. The Act authorizes EPA to levy fines against another agency. During this time frame, EPA issued 12 RCRA 3008(a) orders seeking more than $1.3 million in penalties. Historically, between October 1992 (passage of the Federal Facility Compliance Act) and December 1995, EPA issued 29 orders to Federal agencies assessing over $9 million in penalties.

For your information, attached is correspondence from Administrator Browner to Congressman Dan Schaefer on a related issue.

Senate Environment and Public Works Committee
Oversight Hearing on Federal/State Enforcement
Responses to Senator Allard

Q1. Define what overfiling is, both administratively and legally.

A. All of the major environmental statutes that Congress has charged EPA with implementing give the federal government concurrent authority to enforce federal environmental law in States that have received authorization to implement and enforce such laws. Although the term "overfiling" is not defined in these statutes, in administering its enforcement program EPA uses the term to refer to the initiation of a federal enforcement action (civil judicial or administrative), following a State enforcement action involving the same violations and facility, to ensure that all violations of environmental law are appropriately addressed. In the rare instance that the Agency does overfile in a State, it occurs most often to ensure the adequacy of injunctive relief in correcting violations, protecting public health, mitigating environmental harm, and ensuring consistent environmental protection across the nation. Overfiling also may occur in order to ensure that penalties are adequate to deter future violations and remove a violator's economic advantage over its law-abiding competitors, thereby maintaining a level playing field for the regulated community. Many overfilings are done in agreement, or jointly, with the State.

Q2. What are the guidelines for overfiling? Please forward to me those guidelines and indicate where they can be found.

A. In making a determination as to whether to use federal enforcement authority to overfile, EPA will take into account a number of factors, including the need for adequate injunctive relief to correct violations, protecting public health, mitigating environmental harm, and ensuring consistent environmental protection. EPA also considers whether a State penalty recovers the economic benefit of noncompliance gained by the violator, whether the State's penalty reflects the seriousness of the violation, and the impact of the violations on the effectiveness of the national, State, or local enforcement program. EPA also gives due consideration in making overfiling decisions to the State's or local agency's own penalty policies and the effectiveness of its overall enforcement program in achieving deterrence. The policy documents that EPA uses in making a determination as to whether to file an enforcement action in a particular instance, include the 1986 *Policy Framework for State/EPA Enforcement Agreement* and the 1993 *Revision to the 1986 Revised Policy Framework for State/EPA Enforcement Agreement.* In addition to these two cross-media policies, our media-specific enforcement programs each have enforcement response policies that provide guidance as to what type of enforcement response is timely and appropriate in their respective regulatory programs. Attached are copies of the policy documents cited above.

Q3. I'm aware that in Texas there was a Clean Air Act overfiling involving Hoechst-Celanese. In this instance the Texas Air Control Board advised Hoechst-Celanese (HCC) that they were exempt from the benzene National Emissions Standards for Hazardous Air Pollutants (NESHAP) rule and in December 1984 wrote a letter to the Hoechst-Celanese to that effect and copied the Region VI Administrator of EPA of their ruling.

On or about 1995 EPA filed a benzene CAA enforcement action against Hoechst-Celanese.

My questions are as follows;

A) Are the facts above accurate?
B) If the facts are accurate how could HCC know it was in violation of the CAA?
C) Why did it take so long for an overfiling to occur given that EPA had notice of the written opinion of the TACB in December, 1984?
D) Is it the opinion of EPA that tardiness in reacting to state action is beneficial to the state/federal relationship?
E) Why was it appropriate to overfile against Hoechst-Celanese, and please include the guidelines EPA used when the decision was made to overfile? Who made this decision?

A. DOJ will be responding to this question and coordinating this response with EPA.

Q4. How many over filings had the EPA taken against companies, municipalities, or other entities based upon activities that were approved by states under delegated authority previous to 1993.

A. The EPA has no records of the number of overfilings prior to 1993. However, as reported by a State-by-State survey conducted by the Environmental Council of States (ECOS), the States reported their assessment that the Agency overfiled on about 30 cases or .3% of all federal enforcement actions during fiscal years 1992-1994. A copy of that survey is attached for your information.

Q5. In reply to Mr. Herman's comment that , "out of 20,000 cases EPA has only overfiled in four" in fy '96, Patricia Bangert of the Colorado AG's office replied that in Colorado alone there have been 3 over filings this year. Is that accurate, and if not why? If so please forward those cases to my office.

A. In FY 1996, EPA overfiled in four cases. Provided below are explanations of the three referenced cases (attached) from Colorado, all of which were filed in FY 1997. The universe of potential opportunities to overfile is probably closer to 10,000 than 20,000 cases per year.

Denver Radiator (Serck Services), Denver, CO

Violations:

On January 31, 1997, EPA initiated an administrative enforcement action alleging 257 counts of illegal storage, disposal, and handling of hazardous waste over a 5-year period, including storing hazardous waste in open containers and a dumpster, failing to label containers, failing to have a contingency plan, and contaminating soil with lead.

Status/Timing of State Action:

In 1994, the State ordered Denver Radiator to take steps to correct the problems. After pressure from EPA to finish the case, State regulators reached a final settlement with the company on January 30, 1997. The agreement resulted in penalties against Denver Radiator and supplemental environmental projects (SEPs) totaling $165,000 ($60,000 cash penalty, $55,000 in SEPs, and $50,000 suspended if in compliance with the order).

Reasons for Overfile:

On January 31, 1997, EPA filed an administrative enforcement action seeking $466,000 in penalties against Denver Radiator. EPA subsequently reviewed the State settlement and, while the penalty does recoup the economic benefit of noncompliance, the Agency does not believe that the gravity component of the penalty is sufficient to provide adequate deterrence against future violations.

Conoco in Commerce City, CO

Violations:

In 1992 and 1995, the State discovered violations of the RCRA regulations governing recordkeeping, storage and personnel training. The 1995 inspection also revealed violations of a 1992 compliance order.

Status/Timing of State Action:

The State settled an action with Conoco on March 7, 1997, which included a $33,000 administrative payment ($10,000 cash penalty, $23,000 for SEPs). The State settlement resolves most of the 1992 violations that were subject to the 1992 compliance order and the 1995 violations found in the inspection.

Reasons for Overfile:

EPA's administrative enforcement action, filed on March 18, 1997, proposed a penalty of $666,771 for 78 counts. The Agency believes that the State penalty is insufficient to even recoup the economic benefit Conoco gained through its noncompliance. EPA's action also included counts alleging transportation-related, illegal storage, and illegal disposal violations that were not included in the State's settlement. The State did receive notice of EPA's concerns with the case before the State signed the settlement with Conoco.

Platte Chemical

Violations:

Platte Chemical Company is a pesticide manufacturer that is a wholly owned subsidiary of ConAgra. The violations at issue are numerous, including: failure to make a hazardous waste determination; failure to conduct waste analysis; storage of hazardous waste in improper, leaking, and open containers; and storage of hazardous waste without a permit.

Status/Timing of State Action

The State of Colorado has instituted but never resolved a RCRA action for these violations. The State cooperated with EPA in developing the federal action.

Justification for Federal Action:

The case is a multimedia administrative enforcement action with 752 RCRA counts and 4 EPCRA counts. The proposed penalty for the RCRA violations is $1,200,895. The proposed penalty for the EPCRA violations is $20,000. EPA decided to take an action in this matter because the State of Colorado had no effective order in place and EPA had determined that the penalty proposed by the State was insufficient to deter this company from future violations. The State had informed Platte Chemical that the State's proposed administrative penalty would be $398,850, and the State was considering settling the matter for $100,000 in cash and $95,000 in supplemental environmental projects (SEPs).

Q6. Is it true that EPA wrote state legislatures urging them not to pass environmental self-audit bills? If so please include a copy of one of those letters in your reply for the record.

A. EPA has written letters to a number of State legislatures expressing EPA's concerns with pending State audit privilege and/or penalty immunity legislation. In addition, Agency officials have in several instances testified in opposition to such State legislation. We are enclosing a letter from Nancy J. Marvel, Regional Counsel for

EPA Region IX, to Rep. Herschella Horton of the Arizona House of Representatives, dated March 20, 1996, and are also enclosing the written text of testimony given on June 14, 1995, by Bertram C. Frey, Deputy Regional Counsel for EPA Region V, before the Ohio Senate Energy, Natural Resources, and Environment Committee concerning that part of Ohio Senate Bill 138 dealing with environmental audit privileges and immunities. Arizona considered an audit law in 1995 and 1996, but ultimately shelved the proposal, while Ohio enacted an audit privilege and penalty immunity statute in December of 1996.

Q7. Can you explain what measures EPA uses to measure success of delegated environmental programs?

A. EPA and the States have initiated the National Environmental Performance Partnership System (NEPPS) that is being implemented in 27 States to date in FY 1997. The system requires that States prepare a self-assessment of their environmental programs, then work with the EPA regional offices to negotiate performance partnership agreements. The agreements will emphasize joint priority-setting, differential oversight for delegated or authorized programs, public involvement, and increased use of environmental indicators along with program performance activity measures for State and EPA management evaluation purposes. As part of the NEPPS, OECA developed specific core program performance measures to evaluate State Performance Partnership Agreements negotiated between EPA Regional Offices and States. OECA believes that these measures match up very well with the objectives of the OECA strategic plan being developed for the Government Performance and Results Act.

The core measures are a set of ten outcome and output measures. The outcome measures attempt to evaluate rates of compliance with environmental laws and regulations and the environmental benefits achieved from the use of enforcement tools (i.e., case settlements, injunctive relief, and Supplemental Environmental Projects). OECA believes that these are sound measures, but we are committed to working with our stakeholders to improve them in the upcoming year.

OECA will continue to use a series of output measures, such as the number of inspections and enforcement cases initiated and concluded, in the mix of core program performance measures. These measures are important in two ways. First, they allow us to evaluate the effectiveness of enforcement and compliance activities on enforcement presence, and the deterrence effect to non-compliance this creates. Second, they measure our performance in returning the most environmentally significant violations to compliance in a timely manner, and ensures that these instances of non-compliance receive an appropriate enforcement response and remedy. We believe that these are strong measures of program performance and that they make a strong contribution to the accountability and effectiveness of enforcement and compliance resources required under the Government Performance and Results Act.

Q8. Would the Administration support a commission to study measures of success of environmental laws?

A. Numerous organizations have studied the success of environmental laws. The studies range from reports produced by the General Accounting Office (GAO), which generally focus on the EPA's implementation of environmental law, to reports produced by the National Academy of Public Administration (NAPA) which generally focus on organizational reforms within the EPA. Studies from business interests that are directly affected by environmental regulations and reports from academia which examine environmental law, in general, are produced frequently. The reports, and recommendations contained within, are taken seriously by the EPA and we have devoted considerable effort in responding to reports when appropriate. The EPA values the independent advice that we receive from scholars, businesses, public interest groups, governments, and other constituencies throughout the world. It is unclear whether a new commission would provide a benefit not otherwise available through the observations and constructive criticism that we receive on a regular basis.

In addition to seeking external advice, the EPA is committed to examining its own programs. The EPA has projects under development that will continue to improve the measures used to examine program effectiveness. The National Performance Measures Strategy (NPMS), is a stakeholder process designed to improve the EPA's ability to statistically assess program effectiveness. Under the NPMS, the EPA has conducted two national meetings, and is holding a series of structured focus groups with members of the regulated community, State, local and tribal governments, and members of the public to find out what measures are most valued. The findings from this process will be used to structure future improvements in measuring program success.

Secondly, the EPA is in the process of developing a five-year strategic plan National Enforcement and Compliance Assurance Plan (NECAP) that will set national priorities, and associated goals and measurement techniques. The plan has been coordinated with ongoing performance measurement efforts under the Government Performance and Results Act. When finalized, the strategic plan will establish procedures for collecting measurement data for the EPA's programs. The plan will contain a strong focus on setting baseline measures in a series of areas that will be used to measure program effectiveness.

(Note: Attachments submitted by EPA are retained in committee files.)

Senate Environment and Public Works Committee
Oversight Hearing on Federal/State Enforcement
Responses to Senator Baucus

Q1. Please provide the Committee with additional information about the negotiations and status of state laws that may present obstacles to their maintaining delegated programs.

A. Despite our profound opposition to State environmental and audit privilege/immunity legislation in general, EPA is committed to working with the States to identify and resolve concerns with audit privilege and immunity legislation and laws as they impact the federal authorization of State programs. In furtherance of that goal, on February 14, 1997, EPA outlined the minimum enforcement authorities necessary for delegation of federal programs to States in a memorandum entitled, "Statement of Principles: Effect of State Audit Immunity/Privilege Laws on Enforcement Authority for Federal Programs," a copy of which is attached for your information. Pursuant to that memorandum, Regions have been contacting States with audit laws to request Attorney General opinions regarding the effect of any audit privilege or immunity law on enforcement authority as discussed in these principles, and to discuss possible amendments to State audit laws to remove barriers to federal program delegation.

Last year, EPA officials -- including Administrator Carol Browner and Assistant Administrator Steven Herman -- met with several State commissioners and representatives of the Environmental Council of States (ECOS) to hear their concerns about EPA's approach to States with audit privilege and/or immunity laws. EPA continues to be willing to meet with States to discuss these issues and has provided copies of its Statement of Principles to the environmental commissioners and attorneys general of each State.

Steve Herman, EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, stated to the Senate Committee that the EPA has worked cooperatively with a number of States, including Utah, New Jersey, and Texas, to "make sure that their audit laws do not present an obstacle to program approval." Utah was the first State that worked with EPA to develop and enact legislation to amend its audit law. Utah approached EPA late in 1996 to discuss possible amendments to its audit law to remove barriers to the Agency's approval of a RCRA cluster in that State. The State discussed the issues with EPA Region VIII and Headquarters over a period of weeks, and language was crafted that would ensure that the State maintained the minimum enforcement authorities necessary for the State to run the additional RCRA program elements. In particular, Utah decided to eliminate sanctions for whistle blowers, eliminate application of the privilege to criminal investigations and prosecutions, and to preserve the State's authority to investigate possible violations of federally authorized environmental programs. In commenting on these changes, EPA made clear that it and the Department of Justice are still "deeply opposed" to environmental audit privileges

"in any form" and noted that EPA and DOJ had repeatedly testified before Congress and State legislatures that audit privileges "make it more difficult to enforce the nation's environmental laws by making it easier to shield evidence of wrongdoing." It also noted that the federal government is not bound by State audit privileges in any enforcement proceeding brought by a federal agency under federal law.

EPA has received petitions to withdraw (or disapprove) federal programs in five States with audit privilege and/or penalty immunity statutes: Texas, Michigan, Idaho, Colorado and Ohio. With regard to Texas, in June of 1996, the Agency received a petition from the Environmental Defense Fund to withdraw the Underground Injection Control program. EPA and Texas officials engaged in several months of discussion concerning the issues raised in the petition. In March of 1997, Texas officials decided to seek amendment to the State's audit privilege and immunity law to allow the State to retain minimum enforcement authorities required for federal program delegation. The proposed amendments to Texas' audit privilege and immunity law were adopted by the Texas legislature and signed into law by Governor Bush in May, 1997.

EPA was petitioned in June of 1996, by a coalition of public interest groups in Michigan to revoke that State's National Pollutant Discharge Elimination System (NPDES) and Prevention of Significant Deterioration (PSD) programs and to disapprove additional federal programs because of Michigan's audit law. EPA has provided the State a detailed letter outlining its concerns and those of the petitioners. State officials have agreed to amendments to Michigan's audit law, which, if enacted, will enable Michigan to obtain minimum enforcement authorities for purposes of federal program delegation. South Carolina, which has an audit privilege and penalty immunity statute is also considering possible changes to its law to remove obstacles to federal program delegation.

In 1995, New Jersey enacted a penalty immunity law providing a "grace period" during which a violator can correct certain "minor violations" before the State can issue a penalty. The State may designate a violation as "minor" only if: it is not the result of purposeful, knowing, reckless, or criminally negligent conduct; it "poses minimal risk to the public health, safety, and natural resources;" it does not "materially and substantially undermine or impair the goals of the regulatory program;" the violation is less than 12 months old; the violator is not a repeat violator or does not show a pattern of illegal conduct; and the violation "is capable of being corrected and compliance achieved" within the period of time prescribed by the State. EPA expressed serious concerns about early drafts of the legislation, which was modified by the legislature prior to final enactment in a manner that accommodates EPA's concerns. EPA has continuing reservations about State legislation that provides immunity from civil and criminal penalties without corresponding safeguards.

Q2. Has the EPA been able to reach agreement with any States regarding changes to State audit/privilege laws that would remove obstacles to program approval?

A. As noted in the response to the previous question, after discussions with EPA, Utah and Texas have made changes to their State audit laws, and Michigan officials have agreed to amendments to that State's audit law, that represent the minimum necessary to maintain delegated programs in those States.

Q3. Please provide the Committee with details on the ARCO cleanups at Sand Springs and Vinita, Oklahoma.

A. In response to this query, EPA is providing the following response to a question posed by Senator Inhofe (R-OK) in a oversight Hearing on S.8., held on March 5, 1997, before the Senate Environment and Public Works Subcommittee on Superfund, Waste Control and Risk Assessment, the Superfund Cleanup Acceleration Act of 1997:

Comparison of ARCO Cleanups at Sand Springs and Vinita, OK
3/11/97

Background
At the March 5, 1997 Senate Environment and Public Works Subcommittee on Superfund, Waste Control and Risk Assessment Oversight Hearing on S.8, the Superfund Cleanup Acceleration Act of 1997, Sen. Inhofe used a comparison of ARCO's cleanup costs and time frames for two Oklahoma sites in his opening remarks. Sen. Inhofe's statements included the following:

> Two former refineries were purchased by the same company, ARCO. Both had similar wastes and similar remedies. And both needed to be cleaned up. The difference was that the state of Oklahoma took the lead for one, while the federal EPA managed the other. The difference was dramatic and underscores the inherent problem of directing a local cleanup process from Washington, D.C. The EPA site took eight years longer and $37 million more. Specifically, the state site was a refinery located in Vinita, Oklahoma. Remediation began in 1989, took less than three years and only cost six million dollars. The federal site was a refinery located in Sand Springs, Oklahoma. Remediation began, Mr. Chairman, remediation began in 1985, and it was finished in 11 years, in 1996 -- just finished -- at a cost of $43 million. Both remedies involved the solidification and on-site landfilling of petroleum and refinery acid sludges.

Site Comparison
While both of these sites are former Sinclair refineries, several differences exist which prevent a credible direct comparison of cleanup costs and time frames between the two

sites. The Sand Springs site was judged much more of a threat to public health and the environment and was listed on the NPL. The Vinita site was evaluated by EPA and referred to the State for action because it presented little health risk. Key differences include the following:

- **Volume of Waste Cleaned Up** - The Sand Springs cleanup addressed nearly three-and-one-half times the volume of waste at Vinita.

- **Complexity of Wastes** - After closing as a refinery, the Sand Springs site was used by several other industries, including a chemical recycler, resulting in a significant degree of contamination from chlorinated solvents and other chlorinated hydrocarbons at the site. As a result, 5000 cubic yards of Sand Springs waste had to be shipped off-site to a commercial hazardous waste incinerator. In contrast, the Vinita site contained refinery wastes only, which are much less expensive to remediate than chlorinated wastes.

- **Proximity to Population** - The Sand Springs site is located in a populated area, adjacent to businesses, near to residences, and adjacent to the Arkansas River, which is heavily used for recreational purposes. Approximately 300 people work on, or adjacent to, the site. There are four schools, a hospital, an orphanage, and numerous restaurants within a mile of the Sand Springs site. The Vinita site is in a relatively remote area, nearly two miles from the town of Vinita.

- **Ground Water Use** - Ground water is used within one-half mile of the Sand Springs site. There are no water wells within four miles of the Vinita site.

- **Air Emissions Safeguards** - Due to the proximity of population and the chemical composition of the wastes, there was a major concern with controlling air emissions at Sand Springs. For example, there was a documented incident which indicated the presence of hydrofluoric acid gases within the sludge pits. Prior to EPA involvement,. earthwork activities by the City of Sand Springs to construct a storm water retention basin adjacent to the sludge pits caused a significant release of gases which required the hospitalization of workers and the evacuation of nearby businesses. Due to this potential for an off site release of air contaminants, EPA took extra precautions to protect the health and welfare of surrounding businesses and residents, including the Sand Springs Home for Orphans. EPA required extreme care to be taken during excavation activities, including emission controls and extensive air monitoring. Although expensive and time consuming, these protective measures were necessary to ensure the safety of the community. The more remote Vinita site, without the complications posed by chemical plant wastes, did not require this degree of protection .

- **Priority of Site** - Due to the types of waste present, the proximity to population, and the sensitivity of ground water, the Sand Springs site ranked for NPL listing under the HRS, while the Vinita site fell far short.

- **Protectiveness of Disposal Cell** - The Sand Springs site used a RCRA-caliber vault for disposal of the stabilized waste, whereas a simple clay-lined cell was used at Vinita.

- **Design Costs** - Due to uncertainties as to whether the stabilization process would work effectively on the Sand Springs wastes within allowable air emission levels, ARCO proceeded with design of an incineration system so that they would have a fall-back treatment technology ready in case the stabilization did not work. This added significantly to ARCO's design costs at sand Springs but was not a factor at Vinita. Furthermore, ARCO was able to utilize its extensive (and costly) initial stabilization process studies from Sand Springs to shortcut the design process at Vinita.

The following matrix compares some characteristics of the two sites:

Factor	Vinita	Sand Springs
Size of site	177 acres	200 acres
Volume of waste	62,000 cu yds	213,000 cu yds
Volume of Chlorinated Hydrocarbons	0	5,000 cu yds
Population within 4 miles	6,582	15,000
Distance to nearest water well	>4 miles	<1/2 mile
HRS Score	0.94 (prescore)	28.86
Drums of hazardous materials removed	0	400

Sand Springs Touted as Ahead of Schedule and Under Budget

The Sand Springs remediation (construction) actually began in 1992 (not 1985) and took four years to complete. At an August 29, 1995, ribbon-cutting to celebrate completion of construction, ARCO stated that the remedy had been completed one year ahead of the Consent Decree schedule and $10 million under budget.

Impact of Administrative Reforms
In addition to the differences above, it must also be pointed out that the Sand Springs cleanup was conducted prior to the Superfund Administrative reforms. A much better example of how EPA is currently addressing the cleanup of abandoned refineries is the Fourth Street site in Oklahoma City. The Fourth Street site utilized on-site stabilization/soiidification, neutralization, and off-site disposal as the remedy. The waste at the site was an acidic sludge containing high levels of lead. The remediation of approximately 43,000 cubic yards of sludge was completed on schedule, under budget, and with no lost time due to accidents, at a total cost of just under $5 million. The volume and type of waste addressed make Fourth Street a much more credible point of comparison to the Vinita site, even though Fourth Street is in a much more populated area.

Q4. Without violating the Department of Justice's Pending Matter Policy that EPA follows in order to preserve the rights of any parties that may be subject to an enforcement action brought by the United States Government, please provide the Committee with public information on the facts of the case against Harmon Industries, Inc. that would respond to the assertions contained in Mr. Harmon's testimony.

A. Harmon's illegal actions not only resulted in violations, but they also caused both ground water and soil contamination. The State of Missouri had prior notice of the Agency's administrative complaint before the State had resolved the matter with Harmon. This case was litigated before a federal Administrative Law Judge (ALJ), who determined that Harmon had violated several important RCRA statutory and regulatory provisions and assessed a $586,000 penalty, the largest such administrative penalty assessed by an ALJ. On appeal, the Environmental Appeals Board upheld the ALJ's decision. A more detailed discussion is provided below.

- **State's Enforcement Response** -- In this case, which Harmon has failed to make clear, the State, as of September 1991, did not initiate an enforcement action in accordance with EPA's RCRA Enforcement Response Policy. Additionally, EPA filed its administrative complaint in September 1991, which was approximately 18 months prior to the filing of the State-court consent decree in March 1993.

- **EPA Voiced Concern about State's Approach** -- Contrary to Harmon's assertion that "EPA has never contended that MDNR's actions were inconsistent with RCRA requirements or otherwise inappropriate" (Harmon Testimony, p. 4), as noted by the Administrative Law Judge (ALJ) and the Environmental Appeals Board (EAB) in their administrative decisions, EPA notified MDNR in May and October 1990, that it: (1)

considered Harmon a high priority violator, (2) expected MDNR to expedite its enforcement of Harmon's violations, including the assessment of penalties, and (3) stated that if MDNR did not initiate an enforcement action within 30 days, EPA would consider taking an action. (Letter from Michael Sanderson (EPA) to Nicholas DiPasquale (MDNR) (May 29, 1990), and Letter from David Wagoner to David Schorr (Director, Division of Environmental Quality, MDNR) (October, 1990).

- **Prior Notice to State** -- Counter to Harmon's belief that "EPA at no time sought to intervene" (Harmon Testimony, p. 3), EPA notified MDNR on September 24, 1991, that the EPA was going to file an enforcement action against Harmon Electronics. Additionally, the week following that September 24, 1991 telephone call, MDNR and EPA managers and staff had several conversations during which time MDNR had an opportunity to convey any comments to EPA concerning EPA's plan to file against Harmon. In fact, on September 30, 1991, David Schorr (MDNR), concurred with the proposed EPA enforcement action. (See Affidavit of David Schorr.)

- **Liability Insurance** -- Harmon asserts that "EPA presented no evidence that disputed Harmon's testimony that it was unable to obtain liability insurance required by RCRA." (Harmon Testimony, p. 7). Harmon fails to acknowledge, as determined by the ALJ during the administrative hearing, that Harmon did not first inquire into obtaining the required insurance coverage for the facility until sometime in 1991 (Initial Decision, p. 17), which is at least 13 months (November 1989) after the initial discovery of the noncompliance.

Q5. Please provide the Committee with additional information regarding what EPA is doing to measure the effectiveness of its enforcement and compliance program.

A. EPA is in the process of developing new measures of success to augment the measures that have been traditionally used. Traditional measures examine trends regarding inspection patterns, compliance and significant non-compliance, enforcement actions taken, and penalties assessed. Many of these measures are contained within EPA's annual Enforcement Accomplishments Report. The new strategies under development focus on examining the environmental benefits derived from enforcement and compliance activities, and measures that examine the impact of compliance assistance programs. Additionally, EPA is designing a series of baseline reports and statistics that will set benchmarks in areas such as compliance trends within industrial sector categories. These benchmarks will allow trend analysis that will be used as part of EPA's overall effectiveness measures.

EPA has already re-designed its Enforcement Docket data system to accommodate

information regarding the environmental benefits attributable to individual enforcement cases. Specifically, for federal enforcement actions, EPA now completes a Case Conclusion Sheet that records information relating to the environmental benefits of any injunctive relief obtained as well as information on Supplemental Environmental Projects undertaken by defendants. A copy of a sample of an EPA Case Conclusion Sheet is attached. When aggregated, this information provides program effectiveness measures regarding the environmental benefits of the enforcement program. EPA has also developed procedures for tracking disclosures by companies seeking to avail themselves of reduced penalties under EPA's audit policy, and the compliance status and pollutant release records of industrial sectors. Setting baselines for industrial sectors will allow EPA to examine the enforcement and compliance impact of programs and initiatives that are tailored to individual sectors. In addition, EPA tracks the extent to which companies discover, disclose, correct and prevent violations under EPA's audit policy entitled, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations".

EPA has two projects under development that will continue to improve the measures used to examine program effectiveness. The first effort, the National Performance Measures Strategy (NPMS), is a stakeholder process designed to improve EPA's ability to statistically assess program effectiveness. Under the NPMS, EPA has conducted two national meetings, and is holding a series of structured focus groups with members of the regulated community, State, local and tribal governments, and members of the public to find out what measures are most valued. An outcome of these meetings will be a report in FY 97 on the findings of the NPMS dialogue on enhanced performance measures. The findings from this process will be used to structure future improvements in measuring program success.

In addition, EPA is in the process of developing a five-year strategic plan, the National Enforcement and Compliance Assurance Plan (NECAP), that will set national priorities, and associated goals and measurement techniques. The plan has been coordinated with ongoing performance measurement efforts under the Government Performance and Results Act (GPRA). When finalized, the strategic plan will establish procedures for collecting measurement data for EPA programs. The plan will contain a strong focus on setting baseline measures in a series of areas that will be used to measure program effectiveness.

Q6. In her testimony, Patricia Bangert, Director of Legal Policy for the Colorado Attorney General's Office, made several statement regarding EPA's action under the Resource Conservation Recovery Act against the Colorado School of Mines. Please describe the status of that action.

A. In December 1995, following unsuccessful negotiations to enter an Administrative Order on Consent (AOC), EPA issued a Unilateral Administrative Order (UAO) to 13 potentially

responsible parties (PRPs) to conduct a removal action at the Colorado School of Mines Research Institute (CSMRI) site. Virtually all of the work was performed by one of the PRPs, the Colorado School of Mines (CSM), which is the entity that owns the site. The work involved removing contaminated soils that EPA had stockpiled on the site.

In June 1996, CSM staff knowingly perforated the clay liner that had underlain the stockpiled soils in order to install a below ground sprinkler system for a planned softball field. EPA asked CSM to stop the installation, and CSM staff refused to stop. EPA then contacted CSM's attorney, after which CSM agreed to stop the installation.

The clay liner had been the subject of previous discussions between EPA and CSM. EPA had not fully sampled and characterized the soil underlying the liner before the liner was installed. The history of the CSMRI site indicated that radioactive material was likely disposed of in the soil underneath the liner. The site possessed a radioactive materials license, and radioactive materials had been worked with on the site.

The liner served two purposes: as a liner and a cap. As a liner, it prevented contaminants from the previously existing waste pile from leaching into the ground. As a cap, it prevented migration of potentially radioactive materials from the ground up to the surface, which could thereby be spread into the environment through surface water runoff or wind erosion. More specifically, it prevented the release of potentially radioactive materials into Clear Creek and the surrounding city of Golden, Colorado.

The UAO intended and contained language requiring the PRPs to conduct an investigation of the soils below the liner if the liner was to be removed. The PRPs' workplan did not provide for an investigation and instead indicated that if the liner was not contaminated, it would not be removed. EPA informed the State in February 1996, that if the integrity of the liner could be maintained, EPA would not require a sub-liner investigation. A sub-liner investigation was to be required only if the liner did not remain in place. The rationale was the liner acted as a cap for the uncharacterized soil. If the liner was removed, the cap was removed, and uncharacterized soils containing radioactive contamination would be exposed to the environment. In spite of this, CSM broke through and removed portions of the liner, thereby destroying its integrity, while grading the area and installing a sprinkler system for a planned softball field.

CSM initially admitted to EPA that it had violated the UAO. EPA issued a notice of violation to CSM related to the liner, then held a series of meetings with the State to resolve the matter. To date, no penalties have been issued against CSM.

Q7. In your testimony, you stated that the day-to-day working relationship with the states is generally very good. Please provide the Committee with recent examples of cooperative enforcement efforts between EPA and the states.

A. The EPA places a high priority on working cooperatively with States to jointly achieve enforcement settlements which provides significant benefits to the public health and the environment. Here are a few examples of what EPA, working with the Department of Justice, has achieved through cooperative enforcement efforts:

-- On July 22, 1996, the federal government and the State of Montana announced a settlement under which Pegasus Gold Corporation and its subsidiary, Zortman Mining, Inc., will spend up to $32 million (including $2 million in penalties) to upgrade and expand their mine wastewater management and treatment facilities at two gold mines in the Little Rocky Mountains. The lawsuit had alleged that the mining companies discharged acidic, metal-laden wastewater into waters draining into the Missouri and Milk Rivers. As part of the settlement, the companies agreed to construct a water treatment plan at the Zortman mine, construct water capture systems to ensure proper and safe wastewater discharge, and pay for a community health evaluation to investigate the pathways and possible impacts of environmental contaminants on residents of the adjacent to Ft. Belknap Indian reservation, especially children. The result of substantial cooperation between the Tribes, the State and the Federal government, Mark Simonich, Director of the Montana Department of Environmental Quality, called it "...the biggest settlement on record in the State of Montana regarding water quality violations."

-- On April 16, 1997, the federal government secured an important public health agreement with developers of an El Paso, Texas, colonia, i.e., a housing development for low-income Hispanic residents. Colonias often lack basic water service and a sewage treatment system. The settlement, which resolved a lawsuit brought under the emergency powers of the Safe Drinking Water Act, provides the residents of the Cuna del Valle colonia with a permanent supply of safe drinking water. The case was developed with the assistance and cooperation of the State of Texas and the office of the Texas Attorney General.

-- On February 19, 1997, in a cooperative effort with State and local authorities, the federal government sued Spartan Technology Inc., alleging the company polluted groundwater in and around Albuquerque, New Mexico. The lawsuit alleges that hazardous waste generated by the company had contaminated part of the Sante Fe Group aquifer system, Albuquerque's only source of drinking water, and sought a court order for the company to stop the spread of the contamination and clean it up. Similar lawsuits were filed the same day by the State of New Mexico, Bernalillo County and the City of Albuquerque.

-- On May 27, 1997, the federal government and the State of California jointly lodged a consent decree settling a Clean Water Act (CWA) case against Pacific, Gas & Electric Company (PG&E). Under the settlement, PG&E will pay more than $14 million, including $7.1 million in civil penalties to the State and EPA and over $6 million for environmental enhancement and restoration. The violations arose out of PG&E's incomplete and inaccurate reporting of data required in the late 1980s to ensure that the company's Diablo Canyon Nuclear Power Plant's cooling water intake system used the

"best technology available" to minimize damage to aquatic life. As part of the settlement, PG&E will provide more than $3.6 million to implement a management plan for Morro Bay, approximately 12 miles north of the Diablo Canyon power plant, that includes projects to protect, restore and enhance the Morro Bay estuary, watershed and marine environment. PG&E also will provide more than $2.4 million for a State-wide mussel watch program. By sampling water, sediment and marine life, this program will detect the presence and evaluate the impact of toxic substances and pollutants in California's bays, harbors and estuaries and enable the State to take the preventive steps needed to reduce the risk of more serious environmental harm.

Q8. In your testimony, you briefly discussed the Colorado Public Service over filing case. Please provide more information regarding this case.

A. EPA made a determination to intervene in this case because the violations were substantial, the State's original administrative action did not address these violations, with the exception of one, and the penalty assessed by the State for that violation was small. The violations were SIP and NSPS violations involving particulate matter of opacity greater than 20%. EPA alleged thousands of opacity violation, which were in addition to the 19,000 violations alleged for an earlier period by the original plaintiff, the Sierra Club. During one period, a piece of equipment was broken and there were almost continuous violations for almost a full month, well in excess of the 20% opacity standard.

The violations were not corrected by the State as a result of the original administrative action. The State assessed only a $4,000 penalty. That administrative order also did not impose any injunctive relief to ensure that these violations did not recur.

The United States and the State ultimately intervened in that lawsuit and jointly asserted many more violations than the original State administrative action. The final consent decree, done jointly, asserted many more violations than the original State administrative action. The final consent decree done jointly with the citizen plaintiffs and the State, obtained a $2 million civil penalty and over $2 million for environmentally beneficial projects, including the purchase of land or conservation easements in the Yampa Valley, natural gas buses, and natural gas conversions of wood burning fireplaces. The consent decree also mandated corrective measures valued at over $130 million in new control equipment on the power plant, that reduces not only particulate emissions, but also acid rain causing NOx and SO2. The anticipated positive impact of this settlement on the environment is significant. The new controls will reduce opacity violations by 95% in a sensitive visibility area, close to the Mt. Zirkle Wilderness Area. SO2 emissions will be reduced by 14,000 tons per year, which is a 85% reduction in emissions. NOx emissions will be reduced by 6,000 tons per year, which is a 55% reduction in emissions. All three pollutants impair visibility in the wilderness area. The SO2 and NOx emissions contribute to high levels of acidic deposition measured in the surrounding snow pack. Particulate matter emissions (which are reflected in the opacity violations) exacerbate the health

problems of people, especially those with breathing difficulties.

The State's original administrative action did not recover the economic benefit that the defendants obtained by not complying with the Clean Air Act. The final penalty obtained in the settlement was $2 million. As mentioned above, the State joined in that settlement.

Q9. Becky Norton-Dunlop, Virginia Secretary of Natural Resources, stated in her testimony that Virginia heard of the EPA action against Smithfield only after the case had been announced to the public. Please provide the Committee with information that would address Ms. Norton-Dunlop's assertion.

A. Beginning in September, 1995, about one year before EPA referred its case to the Department of Justice (during a quarterly enforcement meeting between EPA, Region III and the Commonwealth), EPA informed Virginia that the United States contemplated taking action against Smithfield Foods. In August, 1996, EPA further notified Virginia that the Agency had referred this action to the Department of Justice for civil judicial action. Although the Commonwealth never mentioned its plan to file its own enforcement action to EPA, on August 30, 1996, the Commonwealth filed an action against Smithfield. A letter notifying Smithfield Foods that it was subject to a civil judicial action, and fulfilling the requirements in Executive Order 12778, regarding prefiling negotiations, was sent on October 18, 1996. Additionally, a letter notifying Virginia of the impending suit against Smithfield Foods was sent to Roger Chafee of the Virginia Attorney General's office on October 18, 1996. In October, 1996, EPA met with the Commonwealth. During the course of the meeting, we invited the Commonwealth to join our action as co-plaintiffs. The Commonwealth declined. Since that time, we have repeatedly asked the Commonwealth to join in our suit, and it has repeatedly refused. Although the Commonwealth was not specifically notified that we would file the complaint on December 16, 1996, it had notice that a filing would occur in the near future.

(Note: Attachments submitted by EPA are retained in committee files.)

PREPARED STATEMENT OF NIKKI L. TINSLEY, ACTING INSPECTOR GENERAL, ENVIRONMENTAL PROTECTION AGENCY

Good morning, Mr. Chairman and members of the committee. I am pleased to have the opportunity to discuss recent audits conducted by the Office of Inspector General dealing with issues related to environmental enforcement activities.

Our work has shown that EPA is pursuing an enforcement program through compliance assistance to the regulated community, backed up by the more traditional enforcement mechanisms including administrative, civil and criminal remedies. EPA is working in partnership with State and sometimes local agencies to achieve environmental goals. This morning I would like to discuss three aspects of a partnership that are essential if it is to work well and achieve its objectives: (1) mutually agreed upon enforcement approaches; (2) clear agreement on each partner's responsibilities; and (3) complete and accurate reporting of enforcement data. I will discuss these three areas in light of audits we have recently conducted in the Air and Hazardous Waste Programs.

Enforcement Approaches

Compliance assistance is a key component of an effective enforcement and compliance assurance program. Compliance assistance includes outreach, response to requests for assistance and on-site assistance. By providing clear and consistent descriptions of regulatory requirements, compliance assistance helps the regulated community understand its obligations. For instance, Texas and Louisiana held workshops and distributed brochures that described which air emissions rules applied to dry cleaning businesses. Compliance assistance can also help regulated industries find cost-effective ways to comply through the use of pollution prevention and other innovative technologies. When voluntary compliance is not achieved, EPA and the States have the authority to use more traditional enforcement actions to encourage compliance.

One generally agreed upon enforcement concept is that of escalating enforcement actions for repeat violations. For instance, a violator may initially be required to comply with an administrative order or be assessed a relatively small monetary penalty. If these actions do not bring about compliance, the enforcement actions may be escalated to civil or criminal judicial actions and progressively higher monetary penalties. We found numerous instances where this progressive enforcement approach was not employed. For example, in California, a glass manufacturing company paid a penalty of $1,000 for emitting excessive particulate matter from its furnace. This company was cited 18 times for the same violation within a 2-year period, and each time the penalty was $1,000. During this time, the company also received nine notices of violation for failure to report its excess emissions, and was fined an average of $645 for each violation. The fact that the company remained out of compliance for 2 years indicates the enforcement actions (which were not progressively more stringent) were unsuccessful in bringing the company quickly into compliance.

Another enforcement concept is that penalties should be large enough to negate any economic benefits of noncompliance. For the most part, EPA regions included an economic benefit component in their penalty assessments, but the States we reviewed generally did not. For example, five of the nine hazardous waste cases we reviewed in Louisiana should have included in the penalty calculations the economic benefits received by the firms for noncompliance, but none were collected. In one case the calculated economic benefit was $45,000. When economic benefits are not consistently calculated and collected, complying industries are treated unfairly due to the lack of a "level playing field," and varied levels of environmental protection could put public health and the environment at varying levels of risk.

A third enforcement concept is that compliance with rules and regulations should be enforced consistently across the country, including the assessment of penalties. Our audits, however, found a great variance when we compared EPA and State penalties, and when we compared penalties between States. In both the Air and Hazardous Waste Programs we found that penalties assessed by States were much less than those assessed by EPA. For example, we reviewed 54 randomly selected local air enforcement cases in California and found, with the exception of a $1 million penalty, the average assessed penalty was about $1,000. By contrast the penalties assessed by EPA averaged $31,000. Penalties assessed against hazardous waste violators in a sample of 13 States varied from an average of about $7,000 in Maryland to almost $60,000 in Texas.

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

different enforcement approaches. Representatives of State and local agencies we interviewed were concerned that larger penalties would result in negative impacts on their economies, such as the possibility of industry relocations.

Partnership Responsibilities

In order for a partnership between EPA and a State enforcement agency to work, there must be common agreement about the activities each will perform. However, Office of Inspector General audits showed that EPA and the States frequently did not come to agreement on program requirements, and commitments made were not fulfilled. To illustrate the problems that can occur in this area, I would like to refer to an audit we did of EPA and the Pennsylvania Air Enforcement program. EPA expected the State of Pennsylvania to report all significant violators so that EPA could carry out its oversight role and take necessary enforcement actions. In comparison to EPA, the State placed less emphasis on reporting violators. While Pennsylvania performed 2,000 inspections at major facilities in fiscal year 1995, it only reported six significant violators to EPA. We reviewed 270 of the inspections and identified 64 additional facilities that should have been reported. Pennsylvania did not believe these violators warranted being reported, and this allowed the State to work with violators to achieve compliance without EPA involvement. Unfortunately it took Pennsylvania a long time to resolve some of these violations—sometimes years—during which time facilities were emitting excessive pollution into the atmosphere in violation of their permits. Because EPA was unaware of these violations, it was unable to exercise appropriate oversight. This example shows the importance of EPA and the States having a meeting of the minds on expectations.

This is especially critical in our view because EPA is now awarding new Performance Partnership Grants in lieu of the old categorical grants. These grants necessitate a new cooperative relationship where EPA and States share the same environmental and program goals. No partnership can be successful without such sharing.

Collecting and Reporting Enforcement Data

Accurate and complete data on environmental enforcement is vital to provide a baseline so that we as a Nation can judge the extent that industry complies with environmental laws, and to provide the information that States and EPA need to target areas for increased enforcement. We found major omissions and inaccuracies in enforcement data systems of both the Air and Hazardous Waste Programs. In the Air Program, enforcement actions were often underreported and inaccurately characterized. In the San Francisco area, for instance, half of the notices of violation were not entered into the data system; while in Texas and Louisiana not all enforcement cases were reported, and almost half of those that were reported were not properly identified as significant violators.

By way of contrast, a data information system must guard against requiring unnecessary reporting. In the Hazardous Waste Program, we found that EPA's instructions and forms were long and complex, using a programming language that was difficult to learn and use. As a result many users of the system had problems obtaining usable data and used their own versions instead. EPA is now working with its State partners through the Waste Information Needs initiative to reduce reporting requirements for States and industry, while ensuring accurate data is available for tracking national results in areas such as waste minimization.

Conclusion

I have discussed three elements we believe are necessary for effective partnerships between EPA and the States.

- First, partners must agree upon an overall enforcement approach. That approach should include assisting the regulated community to comply with environmental laws and regulations; and must include consistent employment of fines and penalties when voluntary compliance cannot be achieved.
- Second, all partners must have a clear understanding and acceptance of their responsibilities. This requires a meeting of the minds on what the partners are going to be held accountable for, agreement on measures of success, and good faith efforts to achieve environmental goals.
- Third, data collection and systems must be improved to provide complete, accurate and timely data on enforcement activities. However, systems should not burden the regulated community with unnecessary reporting requirements.

This concludes my prepared remarks. I will be happy to answer questions.

PREPARED STATEMENT OF MARK COLEMAN, EXECUTIVE DIRECTOR, OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

My name is Mark Coleman. I am the Executive Director of the Oklahoma Department of Environmental Quality and the Chairman of the Compliance Committee of the Environmental Council of the States. The Environmental Council of the States (ECOS) is the national, non-partisan, non-profit association of State and territorial environmental commissioners. I appreciate this opportunity to testify before you today regarding the enforcement relationship between the States and the Environmental Protection Agency (EPA).

In keeping with congressional intent, the vast majority of environmental enforcement in America is done by State government. State governments bring 9 out of 10 of the nation's enforcement actions each year. States have been delegated the Federal programs, involving tens of thousands of permits, and have direct and continuous interface with both the regulated community and public. EPA has a clear role to assure that we do our jobs.

I am pleased to report that although there are many factors that place strain on the existing enforcement relationship, the States and EPA are still committed to strengthening this partnership. One of the most recent endeavors to improve this bond was the formation of the State/EPA Enforcement Forum, which held its first meeting May 23, about 2 weeks ago. All ten EPA regional administrators, a State representative from each region, and primary EPA enforcement personnel will be working to resolve enforcement issues that compromise the current State/EPA enforcement relationship.

The State/EPA relationship regarding enforcement has been in development for over two decades. After extensive negotiations, that relationship was institutionalized in 1986 in the Policy Framework for State/EPA Enforcement Agreements. That document, as amended, remains the foundation for current State/EPA roles in enforcement matters.

The Policy Framework provides a blueprint where States assume primary day-to-day enforcement responsibility. The document was intended to ensure that clear oversight criteria were set, procedures for advance consultations and notification established, and there was adequate State reporting to ensure effective oversight.

EPA has largely delegated responsibility for national programs to the States, including the primary role in enforcement. There is general consensus on the basic allocation of enforcement responsibilities. However, when EPA brings a direct enforcement action in a State, there is often concern that the principle setting forth the primary role of the State has been violated. The Policy Framework, and subsequent addendum (the latest being 1993), lists four types of cases when EPA may consider taking direct enforcement action as follows:

1. State or local agency request EPA action
2. State or local enforcement response is not timely and appropriate
3. National precedents (legal or program)
4. Violation of EPA order or consent decree

To complement the four situations when EPA may consider enforcement action, there are procedures and protocol that have been set up to assist matters. The Policy Framework states, "A policy of 'no surprises' must be the centerpiece of any effort to ensure the productive use of limited Federal and State resources and an effective partnership in achieving compliance." It is clear that the Policy Framework mandates that if EPA is to initiate enforcement in a State, certain protocols must be met to promote the spirit of cooperation, trust, and stability in the working relationship between States and EPA.

This last issue is perhaps the starting point at which the relationship breaks down. It is my belief that if EPA does not first give the States an opportunity to act in enforcement matters, and if they follow a loose standard when applying the four above mentioned criteria, the already fragile relationship will continue to weaken.

The States believe that enforcement is a tool, not a goal. Compliance itself is a goal, but is not our main goal. Our main goal is, and should be, reaching the environmental quality goals that Congress and our legislatures have set. No amount of enforcement and compliance activity measures will tell us anything about whether we have met, or will meet, that goal.

Let me give an analogy. If I were to tell you that the number of detentions and expulsions in our nation's high schools had doubled last year, would you then conclude that our nations students were better educated than before? No State would deny that enforcement is an important and necessary tool. But I can also make the case that such an increase in enforcement actions would mean a terrible breakdown in communications between government and the regulated communities had oc-

curred. Such a breakdown would mean little chance of improvements in environmental quality.

It is not only the occurrence of EPA enforcement action in States that creates friction but also how EPA chooses to involve the States once action is planned in a particular State. Since States have primary responsibility for enforcement in most EPA programs the national enforcement strategy cannot be implemented without active State participation. If EPA begins to aggressively pursue national or Regional initiatives without adequately involving the States, there is serious potential for damaging the EPA/State relationship.

Whether EPA consistently follows or even remembers these criteria when deciding the types of cases it will pursue and the mechanisms of involving States once it has begun are additional opportunities for instances of friction, each of which are very significant to State programs. There is also the issue of delegation of programs and direct accountability. The first, program delegation, in theory is not an issue. It is clear that EPA has delegated programs to States. In delegating this responsibility they have also delegated the primary enforcement responsibility. If EPA strays from this practice, then possibly true delegation has not yet occurred. State officials feel that once a program is delegated, EPA should be most concerned with overall program effectiveness and not about the details of how a State handled each individual enforcement matter.

This is not to say that EPA does not have a strong oversight role. These oversight practices should be there to assure that States have effective compliance and enforcement programs. In 1983, a special State-Federal Roles Task Force defined the roles and responsibilities of EPA and the States for environmental protection in light of increasing delegations of authority to the States as follows:

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

This brings us to the second part of the equation, accountability. Although EPA has delegated responsibility for administering national environmental programs to the States in keeping with Federal law, EPA has the view that Congress expects an ever-increasing number of direct Federal enforcement actions and assessment of Federal mandates. These direct enforcement actions are reportedly viewed, by Congress and the public, as the success measuring stick of how well EPA is performing. EPA may be receiving conflicting messages of the roles and duties they are to perform to help the States succeed in program management. On one hand, the message is to give the States the first opportunity to act, but on the other hand, the message is to keep Enforcement numbers up. This perceived pressure for direct EPA enforcement may be the source of much of the conflict with the statutory principle of deferring to the States.

Overfiling, the term used to describe when EPA pursues lead enforcement action in a State, is also an important piece of the enforcement relationship. Although the instances of EPA overfiling are relatively few, the possibility of overfiling and the use of overfiling comes at a great cost. The potential for overfiling leads to mutual wariness and if not done with extreme care it can rapidly damage the enforcement relationship. EPA overfiling sometimes means that communications between EPA and the States have failed. If EPA has clear communication of what is expected, including notice of EPA's expectations and the intent of overfiling if these expectations are not met, then EPA overfiling should rarely occur. The success of EPA is not measured by the number of enforcement actions it takes, but the effectiveness of its oversight role.

The basic problem between the States and EPA as it relates to enforcement, is that in recent times role assignments have become less clear. Changes in administration at both State and Federal levels, expectations from outside focus, and the natural maturation of programs has resulted in uncertainty (thus inconsistent action) or lack of awareness of the established basic principals. If all the involved parties do not realize and support the roles each has in enforcement, regional offices

and States are left in the position of determining for themselves the nature and extent of their relationship, this is done with little success.

In my view the solution to these conflicts is to reaffirm the established roles. In doing so we can focus limited resources towards these roles and accomplish the goal we all share in protecting the environment. Federal enforcement personnel should be leading the drive in research, standard setting, oversight, technical support and national information collection. The States should perform their lead duties in direct program administration and enforcement. Neither party should seek to pick off choice plums from the other's role. When these roles are used in guiding the State/EPA relationship in enforcement, it can be expected that the presence of existing tension and frustration will decrease and future conflicts can be avoided.

We are not so far from the goal of both levels of government effectively working together. States already do take well over 90 percent of enforcement action within the country. Perhaps with your help the efforts to reduce frustration and unnecessary loss of resources and credibility due to public disagreements can be significantly reduced. Thank you for your efforts in this regard and for inviting me to represent the views of the States.

PREPARED STATEMENT OF BECKY NORTON DUNLOP, SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA

INTRODUCTION

I appreciate the opportunity to present Virginia's views on State-Federal relations in the context of environmental enforcement. There is more to policy than enforcement, however, and I caution that enforcement is only one tool in the kit bag of environmental policy. The truth is that enforcement action means "failure" not success. It is certainly not the best tool to improve the quality and condition of the resources which make up our environment. In fact, it is the tool of last resort.

Virginia's legislature and Virginia's Governor have, in many important ways, established that policies which focus on compliance with environmental laws are better for the natural resources than policies which focus on enforcement. Virginia has demonstrated leadership in putting the proper emphasis on the purpose, goals and objectives of environmental policy, which, of course, is to improve the quality and condition of the air, water, soil, flora and fauna resources which make up the environment.

Having said that, it is important for the committee to have an understanding of the entire issue of enforcement, and not simply a current "cross section" of what is happening. Allow me to provide a brief historical background of where the environmental *compliance* and enforcement debate has been, and where it is going, in addition to articulating Virginia's pro-active views on getting results.

HISTORY OF ENFORCEMENT AND VIRGINIA/STATES ACTION IN THE 1990'S

- The 1970's saw the first, serious enactment of comprehensive, media-specific environmental laws, whose basis was a facility-based permit system.
  - The inception of environmental enforcement took place in the mid–1970's, when then-EPA Administrator William D. Ruckelshaus took the first enforcement steps in dealing with the permitting issues under the then newly-enacted Clean Water Act. Historical records show that EPA's first enforcement steps were difficult to engage, because the Federal Government had never before taken Federal action to meet discharge and emission limits.
  - The 1970's were punctuated with the passage of other permit-driven statutes, such as the Clean Air Act (in 1970 and amended in 1977) and the 1976 Resource Conservation and Recovery Act and the 1972 Clean Water Act.
  - Because of this company-by-company permit system, enforcement by the EPA was also company-by-company, and in the many cases where government entities were the polluters, on a government jurisdiction by government jurisdiction, basis.
- The 1980–1990 decade witnessed enactment and implementation of far more punitive measures, in response to serious pollution incidents.
  - In 1980, Congress passed the Federal Superfund statute (Comprehensive Environmental Response, Compensation and Liability Act), which provides for strict, joint and several, and retroactive liability. This turned much of the environmental profession into a lawyers' business instead of an environmental science and resource management business.

- In 1990, Congress passed the Oil Pollution Act, which also provides strong regulation in the oil and gas sector.

• *Once it was understood that these punitive enforcement measures were not particularly effective, environmental policymakers turned up the heat.*

- In 1986, EPA issued its first environmental audit policy, which sought to encourage companies to perform environmental audits, but which left the companies at significant enforcement jeopardy. In 1991, the Justice Department's Environment Division issued its Audit Policy. These strict enforcement-driven rules continue to exist today, even as amended by EPA.
- In 1991, EPA issued its first policy on "Supplemental Environmental Projects" by which violators could mitigate part of the civil penalties levied on violations in exchange for a same or greater investment in environmental improvements at or near the same facility. Again, the regulated community has been left at significant enforcement jeopardy.
- In 1990, Congress passed the Pollution Prevention Act, by which it directed EPA to begin establishing measures to *prevent* pollution, in addition to focusing on "end of pipe" permits and enforcement actions.
- In the 1986 Superfund Reauthorization (the Superfund Amendments and Reauthorization Act, "SARA" of 1986), Title III was added (known as the Emergency Planning and Community Right-to-Know Act (EPCRA), which instituted the annual Toxics Release Inventory (TRI) publication. The publication and dissemination of the annual TRI, published since 1987, has brought the "sunshine" of public disclosure of emissions, and has resulted in considerable reduction in emissions. This is quite a success story for voluntary compliance strategies, and has happened in spite of EPA's preference for non-voluntary enforcement-litigation strategies.

• *In the 1990's, Virginia and other States took a more comprehensive, pro-active role in obtaining environmental solutions.*

• Virginia and other States "staffed up" with their own environmental expertise, and subsequently took their own actions to pro-actively lead the environmental *results* agenda:

—recognizing the inherent deficiencies in the cumbersome, permit-by-permit and litigation approach to regulatory enforcement, Virginia and other States formulated their own, outcome-driven compliance measures to improve the quality and condition of the environment, including:

- implementation of a "Compliance First, Enforcement Second" approach to expeditiously gain compliance and avoid the hemorrhage of non-compliance while conducting cumbersome litigation;
- as done in Florida by Carol Browner and other States, Virginia "regionalized" its compliance and enforcement system, by which it created a broader, more comprehensive team (permitting, technical, and compliance/enforcement staff) to respond to environmental complaints faster;
- Virginia was the first State to institute a new paradigm for implementation of environmental policy. Previously in Virginia, and in almost all other States, environmental protection and natural resource agencies had been organized on what is called a "media-specific" basis. That is, each environmental department had an Air Division, a Water Division, and a Waste Division, etc. Each of these divisions employed all the tools of permitting, compliance, and enforcement. The Virginia paradigm has reorganized and streamlined environmental policy management by substituting the previous media-based divisions for Divisions of Permitting, Compliance, and Enforcement, each with the capability to deal with the media of air, water, and waste. This new paradigm has empowered regional and local DEQ officials to expedite improvements in environmental quality.
- Virginia took a new, varied approach, not relying simply on the slow, often litigious permit-by-permit and administrative enforcement penalty system:
  - instead, we focused on environmental remedies and behavior modification to gain expeditious compliance;
  - developed a bifurcated approach:
    - —cooperatively working with entities who want to get into compliance;
    - —take formal, punitive action against recalcitrant actors. (E.g., the U.S. Government/Avtex, the U.S. Army (Vint Hill Farms, Warrenton Army Training Center), U.S. Navy/Little Creek, NASA/Wallops Island, Rhinehart/tire pile, multiple private sector

landfill operators, Smithfield Foods, State government (VDOT, Dept. of Mental Health, Dept. of Corrections, State universities—UVa, Va. Tech, James Madison U.)

—work with Commonwealth's Attorneys and the U.S. Attorneys to bring the full force of law against criminal polluters.

- targeted "worst polluters" and long-overlooked government facilities, which are the most egregious and persistent polluters in Virginia.
- used compliance incentives by which to encourage, and not discourage, broad groups of entities to pro-actively "think ahead" about their environmental responsibilities. Among these are:

—development of specific plans of work with specific timelines to improve emissions performance rather than imposing fines on cash-strapped municipalities—i.e., non-profit, taxpayer-funded entities, to take that necessary action to retrofit their municipal water/wastewater treatment and waste systems (since 1994, Va. has issued orders to over 110 municipalities, by which they will fix their water systems, at a cost to them of approx. $1–2 billion);

—encourage environmental audits by which companies and municipalities take the initiative to pro-actively deal with their environmental problems and avoid being the subject of expensive governmental enforcement action, fines and litigation;

—work with and encourage—i.e., not discourage—*environmental entrepreneurs*, who wish to run a business for profit while simultaneously and expeditiously repairing an environmental malady (e.g., Virginia's Voluntary Remediation Program, by which some 40 companies are voluntarily moving to cleanup contaminated properties; also quickly encouraging Va. Power to join the Army Corps of Engineers to clean up the Tidewater Community College site, thus avoiding the legal nightmare of EPA naming the College as a NPL Superfund site, thus forcing gargantuan cleanup costs on the State government)

—use of specialized grant and tax funds as economic incentives for unique environmental problems—e.g., the Virginia Waste Tire Fund and reimbursement allocation for tire pile cleanups, which has prevented a major environmental crisis for Virginia. Virginia's Revolving Loan fund to help small communities deal with long-standing air, water, and waste problems (e.g., the 1996 Tangier Island settlement, ending a 10-year nightmare of environmental litigation and delay in cleanup)

- We are now involved with the States in EPA Region III and ECOS to develop and refine new measures of compliance and enforcement success, rather than simply relying on numerical action outputs, originated in the 1970's, that do not measure real environmental results. Frankly, it is an absurdity and demonstrated failure to measure improvements in environmental quality by the number and amount of fines imposed or litigations entered into. We believe that a true environmental compliance and enforcement system will:
  - measure concrete, physical, and measurable improvements in the quality of the resources themselves.
  - utilize the comprehensive range of environmental tools, from Small Business Assistance, Compliance Assistance and use of specialized funds, in preference to punitive litigation;
  - by these measures, Virginia has done quite well, including but certainly not limited to:

—real, measurable improvements in Virginia's air, water and land (EPA announced this year (including Thursday, June 5) that two of the 3 Clean Air Act Non-Attainment Areas (Hampton Roads, Richmond area) will be removed from their non-attainment status, due the technical results from many measures that have been taken.

—By taking this approach, Virginia has moved to resolve its most serious, known environmental problems, and, in so doing, has resolved a list of long-standing environmental violations that date to the mid–1980's.

These are *environmental results that count*, consistent with the Federal Government Performance and Results Act—not simply the typical "bean counting" exercises (how much in fines, number of lawsuits or orders issued) that continue to char-

acterize traditional enforcement. We believe the compliance-first approach is one that focuses on real solutions, not simply, rhetorical assertions about complex, technical problems.

Virginia's leadership in streamlining permitting, appropriate use of consent orders, and our compliance assistance initiatives have encouraged new investment in Virginia that has created the wealth and technological innovations for a continuing and ever-increasing improvement in environmental quality for the people of the Commonwealth.

In light of this history, what is an objective view of EPA and how does it work with States like Virginia?

• A range of disinterested but knowledgeable parties, ranging from former EPA Administrator Bill Ruckelshaus to EPA's current Inspector General and Congress' General Accounting Office are making the same statement that many States are making: EPA has some serious problems that need to be fixed. To quote from GAO's June, 1996 report on the Government Performance and Results Act:

> • The Environmental Protection Agency (EPA) was established in 1970 under a Presidential reorganization plan in response to public concerns over unhealthy air, polluted rivers, unsafe drinking water, and haphazard waste disposal. Congress gave EPA responsibility for implementing Federal environmental laws. From the start, however, EPA lacked an overarching legislative mission, and its environmental responsibilities have yet to be integrated with one another. As a result, EPA could not ensure that it was directing its efforts toward the environmental problems that were of greatest concern to citizens or posed the greatest risk to the health of the population or the environment itself.

• It was with almost universal approval that *Carol Browner testified before this committee in March, 1993, on her objectives, including her affinity for State environmental programs and providing flexibility to such States and their programs.* I agree with the following insightful remarks she made then, because they were based on her experience in both Florida as well as in Washington:

> This [EPA's relationship with State, tribal and local governments] is an issue of particular interest to me, obviously, because of my past experience in a State environmental agency. I have a real affinity for State environmental agencies and what they bring to the table. In Florida, we launched a fairly intensive program to delegate a number of our powers to regional, county and city organizations because we felt they brought to the table a real understanding of the issues at hand and a set of resources to do the job that the public demanded.
>
> I think that one of the most important pieces of this Administration will be to forge stronger relationships with State and local government and to build on what has already been done. I feel very strongly that we cannot reach environmental objectives until we acknowledge the value of and support of the building of strong State and local capacity to manage environmental programs.

In response to Senator Baucus' question regarding EPA allowing States to manage environmental programs, Ms. Browner stated:

> Well, it's a change in how we think about our relationship with the State agencies. We at EPA are going to have to think a little bit differently about the State agencies. We're going to have to recognize the strengths that they bring to the table, and we're going to have to allow them to do the job the way they see fit.
>
> I would just say that the other piece of this is that there are places where—and we look forward to working with this committee during reauthorization—where we would like to see greater flexibility in some of the statutes under which we delegate, to make sure we're not put in an awkward position of always being responsible for making sure on a permit-by-permit basis that in fact what Congress intended is being done.

Again in response to Senator Baucus' question, "But where can EPA be more flexible?", Ms. Browner stated:

> I do think that we can also change how we relate to the States. It's not all going to take statutory changes. Part of it is just recognizing within EPA that we need to behave in a different way.

Again in response to Senator Baucus, Ms. Browner stated:

> Well, we have several processes going on right now in terms of dialogs taking place between EPA and local governments, between State and tribal governments. We need to increase these dialogs. And, quite frankly, we probably need to swallow hard. I know when I looked at delegating my powers in Florida to regional governments, it was just a question of sort of saying, "OK, we're going

to do it, and we're going to trust them." That's a hard thing. It's not within our nature, but we have to do it.

I think there is a growing recognition within the agency at all levels that if we are going to accomplish our mission, it will only be through the cooperation of State, tribal and local governments, that they bring such a large number of resources to the table to help us do our job, and that we have to maximize the use of those resources so that we can be moving on to the next challenge. . . .

[I] recognize that we at EPA have a tremendous responsibility to improve that relationship and that we have to reach out to the States in a way that we never have before.

With Ms. Browner's mission statement for EPA as context, we ask anew: What is the relationship between EPA and Virginia?

Answer: Though much of the staff-level relationship is good, however, a number of unilateral, surprise EPA actions leave Virginia perplexed:

Which EPA are we supposed to deal with? Is it Ms. Browner's cooperative, collegial approach, or is it that approach punctuated by repeated, rhetoric-laden surprises by which Virginia has been treated? Examples:

Example: *EPA's Belief in Civil Penalties as a Measure of Enforcement Success.*

EPA maintains a steadfast belief, by and through their annual enforcement accomplishments, that one of the key barometers to the success of environmental enforcement is civil penalties extracted from violators. If this is so, consider the following:

Blue Plains. The District of Columbia's Blue Plains wastewater treatment plant is one of the largest plants on the Potomac River, and has had a longstanding, chronic compliance problem which has polluted Virginia waters. So when the Attorney General of Virginia sought to join in a Federal lawsuit over the plant, the United States Department of Justice and EPA successfully kept the Commonwealth out of the suit. Then, when the U.S. got a consent decree requiring—yet again—that Blue Plains get into compliance (a judgment that it had received in previous litigation), the U.S. sought and received no civil penalties for the dramatic Clean Water Act violations that had impacted the Potomac River and Virginia Waters.

Lorton. On the heels of this, Virginia sued the U.S. and the District of Columbia for the chronic compliance problems at the Lorton, Virginia wastewater treatment plant that was polluting Virginia waters. When the Commonwealth obtained a consent decree calling for $175,000 in civil penalties (some of which would be waived pending significant environmental plant construction), EPA Region III wrote to Virginia stating that Virginia's civil penalty was not high enough.

Virginia is perplexed: Which EPA are we supposed to deal with? The one that claims collegiality and joint efforts, or the one that cuts Virginia out of litigation, seeks no civil penalties for repeated violations, and then separately criticizes Virginia for its civil penalties being too small.

Example: EPA's Posture on Government Facility Pollution and Responsibility.

Virginia enforcement against government facilities. Virginia has taken the lead to enforce environmental laws among its own State government, as well as local and Federal Government. It has enforced against entities varying from the Virginia Dept. of Transportation to the University of Virginia, as well as the municipalities mentioned before, at extraordinary cost for environmental retrofitting and construction. It also must enforce against the largest polluter in the Commonwealth, the Federal Government, and has done so against Army, Navy, and NASA facilities, in order to require them to do the same thing as private entities.

EPA Non-Enforcement at Avtex Fibers. EPA claims to take this same posture, but there is a serious question about this. Why is it that the Commonwealth has to sue the Department of Defense, Air Force and NASA to recover Virginia's cleanup costs at a toxic waste disaster that they knowingly bailed out and exacerbated, while EPA refuses to enforce against them? In November, 1988, the U.S., by and through the National Security Council, bailed out Avtex Fibers—then recognized as the largest polluter in the State—with $43 million, in order to continue providing specialized rayon for Air Force missiles and the NASA space shuttle. The NSC meeting included an EPA warning that the plant had major environmental problems, and that taking such bailout action would bring on Superfund liability. Notwithstanding this warning, the U.S. bailed the company out and—according to Air Force memos—pushed production "all the while knowing an environmental disaster was brewing". When Avtex closed and aban-

doned the facility 1 year later, the U.S. abandoned the facility as well. Since then, EPA has not taken *any* enforcement action against the Federal Government, and has been slowly cleaning it up using money from the Commonwealth, the Superfund, and one private responsible party. The environmental property damage to this 440 acre site is gargantuan, including a 65-mile health advisory warning people not to fish in that part of the Shenandoah River. Though Virginia was not responsible for this toxic waste disaster, it is having to pay 10 percent of all of EPA's cleanup costs and 100 percent of EPA's future operation and maintenance costs, at an expected exponential figure. EPA's posture? They won't enforce against a sister agency, due to the Federal Government's "Unitary Executive Theory", thus leaving the Commonwealth of Virginia having to pay for the Federal Government's knowing environmental damage.

Virginia is perplexed: Which EPA is it supposed to believe? The one who claims enforcement against the worst polluters is a priority, or the one that sits idly by as the Commonwealth has to sue the Federal Government to make it pay back Virginia for the environmental catastrophe it created?

Example: *EPA Violation of EPA-Virginia Enforcement Agreement, and Inflammatory EPA Rhetoric*

Smithfield Foods. The formal, 1975 enforcement agreement between EPA and the Commonwealth of Virginia states that, pursuant to delegation, Virginia has primacy in all NPDES environmental enforcement. That agreement has characterized the relationship since 1975.

So why did EPA surprise Virginia by secretly taking enforcement action against a private party, Smithfield Foods, when it has known and acquiesced in the results-driven actions Virginia has taken against that party since 1991? And, why did EPA take this action after Virginia complied with a request from EPA, Justice and the FBI not to take civil action, so as not to jeopardize a criminal investigation? And, when EPA did so, why did EPA make false, rhetorical statements about Virginia?

Virginia is perplexed. Which EPA are we to believe? The collegial one Ms. Browner suggested, or the hostile one Virginia deals with at Region III that breaks a 22 year agreement?

Example: *EPA's Posture on Environmental Audits*

Like many other States, Virginia enacted an environmental audit and related limited civil immunity statute. Any immunity was predicated on it being consistent with Federal law. In a survey of all States' environmental audit statutes, EPA's Director of Congressional Relations for Virginia was quoted as saying that EPA was familiar with Virginia's environmental audit statute and that, even though it had criticized it before, the EPA team reviewing these State audit statutes did not intend to contact Virginia again. Surprisingly, the EPA Regional Administrator wrote a letter shortly thereafter regarding the Smithfield case, and cited as a criticism of Virginia the same Virginia statute that EPA had just tacitly approved.

Virginia is perplexed. Which EPA are we to believe? The EPA Headquarters Team that has reviewed and acquiesced in Virginia's statute, or the EPA Regional Administrator who takes a contrary view?

Example: *EPA's Posture on Tributyltin (TBT)*

In 1988, Congress mandated EPA to conduct a study of tributyltin, a chemical defoliant agent by which shipyards clean the hull of ships, for purposes of arriving at a national regulatory standard in water. EPA has never done that study. If that is the case, then why is EPA publicly criticizing Virginia and holding up EPA's approval of a major permit over TBT?

Virginia is perplexed. Which EPA are we to believe? The one that is required to promulgate a national standard with which all States are to comply, or the one that fails to comply with such Congressional mandate and then criticizes a State for acting on the EPA created vacuum.

Example: *EPA's Plan for State Delegated Program Flexibility*

EPA announced in 1995 that it intended to promulgate a plan by which it would provide considerably more flexibility to States by which to run delegated environmental programs. However, shortly after the 1996 election, the Deputy Administrator of EPA withdrew this plan.

Virginia is perplexed. Considering Ms. Browner's testimony before this very Senate committee, which EPA are we supposed to believe? Her firmly stated belief in State environmental programs and EPA flexibility, or EPA's recent move to shut off such flexibility.

Example: *EPA's Non-Responsiveness Regarding Challenge to Virginia's Water Program Delegation*

In November, 1993, a public interest group, the Chesapeake Bay Foundation, filed a formal petition with EPA Region III by which it sought for EPA to withdraw its 1975 delegation of the NPDES program to the Commonwealth of Virginia. Notwithstanding multiple requests since 1994, EPA Region III has never made a decision, even though it has historically ranked Virginia as one of its better States dealing with the water program.

Virginia is perplexed. Considering Ms. Browner's testimony, which EPA are we to believe? The collegiality and State flexibility that Ms. Browner articulated, or the non-responsiveness of Region III?

Example: *EPA Overfiling After State Achieves Environmental Resolution*

Conclusion: As was stated at a recent meeting of the Environmental Council of the States, "states are not branch offices of EPA".

These facts remain clear:

• Virginia is achieving *real* environmental results, and is not relying on 1970's barometers to measure 1990's accomplishments;

• Virginia is in the forefront of developing useful, environmentally-sound methods by which to *expeditiously* achieve environmental compliance, notwithstanding 1970's era-EPA criticism;

• Virginia remains perplexed. Why has Ms. Browner's cooperative, collegial approach somehow gotten lost in EPA between her office and Region III?

Finally, one more note regarding State-Federal relations. On May 30, the U.S. District Court for the Eastern District of Virginia ruled, in *U.S.* v. *Smithfield Foods,* that Virginia's statutory water enforcement program is not afforded any deference from EPA, since it is not comparable to the Clean Water Act's program. This was because, the Court reasoned, Virginia's water law does not have the same administrative civil penalty tools as the Clean Water Act. If this is upheld, then *any State whose State water laws do not contain the same tools as the Clean Water Act should know that EPA can overfile them, regardless of what environmental progress the State is making.* This effectively means that there can and will be serious questions by every State's permittees regarding whether they even need to deal with the State, since EPA can simply ignore such State action. If this is the result that EPA sought, then we must truly ask which EPA any State deals with: the one which believes that "We're going to have to recognize the strengths that they (the States) bring to the table, and we're going to have to allow them to do the job the way they see fit", or the one which wants to turn back the clock, to return to the 1970's, monolithic "Big Brother" approach to environmental enforcement? Ms. Browner said that the change would be hard, but that EPA would "have to do it". Despite these sentiments, they have not done it yet, and it isn't clear from their actions that they ever intended to.

HELPFUL SERVANT OR FEARFUL MASTER

The issue about EPA and State relations in regard to enforcement of environmental laws is simply this: Is government to be a helpful servant or a fearful master? This question is at the very core of the reforms and improvements now taking place in environmental quality policy in the States all across this land.

States, not only Virginia, but in virtually all States, including those whose top environmental officials have long been associated with the "Enforcement First" approach are moving in the same direction as Virginia. Indeed, Florida under Administrator Browner's leadership, began to initiate Compliance First policies when she was my counterpart there. States' environmental agencies, States' legislatures and States' Governors want the quality of the environment in which they and their people live and work to be improved.

States want real and meaningful reform to help them put aside the one-size-fits-all, top down, Washington knows best, litigious approach of the past because the experience of the past 30 years demonstrates that compliance with national environmental quality goals and standards is the most effective focus of environmental policy. This is the helpful servant approach.

The "fearful master" approach is simply wrongheaded and is proven to be counter productive in improving environmental quality. The "fearful master" approach demonstrated by EPA for the past 30 years to be its preferred approach, has turned concern for the environment away from its beginnings as a profession of scientists, environmental engineers and resource managers into a profession of lawyers, litigators and one-size-fits-all regulators and political opportunists.

In his Farewell Address, George Washington warned Americans to always be vigilant to assure that the new American Nation would never allow the government to

become a fearful master. Virginia submits that now is the time for Congress to assess this State and Federal relationship as regards environmental policy. Will you determine George Washington was correct in thinking that the "helpful servant" approach we are now trying to implement in Virginia is far more effective and far more suitable for a free and prosperous people? I trust you will find this to be true.

INTRODUCTION

1. *Virginia has demonstrated leadership in putting the proper emphasis on the purpose, goals and objectives of environmental policy—which should be to improve the quality and condition of the air, water, soil, flora and fauna resources which make up the environment.* Believe it or not, EPA seems to believe, or act as if they believe, that the principal purpose of environmental policy has little to do with improving natural resources and much to do with "enforcement outcomes"—which is bureaucratese for the amount of fines, litigations and permit restrictions which can be imposed.

• *Virginia Way, Compliance First.* We call the Virginia Way our "Compliance First" approach. The Virginia Way is a science-based approach which uses every resource of State agencies, other government agencies and entities, and the private sector to HELP companies and municipalities reduce site-and-situation specific emissions which can have a harmful effect on the people, wildlife and the air and water resources.

• *Enforcement when necessary.* When Compliance First will not accomplish the purposes of environmental policy, as is in the case of willful polluters who have demonstrated themselves to be "bad actors," Virginia is vigorous and aggressive in employing all the tools of enforcement at our disposal—including fines, litigation, cease-and-desist orders, and referral to the Commonwealth's Attorneys for criminal prosecution.

2. *Virginia has taken the lead in changing the way improvements in environmental quality are managed, pollution is prevented and clean-up of past pollution is accomplished.*

• *New Paradigm for implementation of environmental policy objectives.* Virginia has re-organized and streamlined environmental policy management by substituting for the previous media-based organization of DEQ a new set of Divisions for Permitting, Compliance and Enforcement, each with the capability to deal with the media of air, water and waste.

• *Decentralization.* Virginia has moved its permit, compliance and enforcement process to six regions and Central office within the State, here decision can be made on site-and-situation specific priorities by people who live and work in the communities they serve.

• *Cooperation and involvement with local elected officials.* Virginia has established a system to work with local elected officials and governments to develop a cooperative approach to improving environmental quality. We have had great success with our new Tributary Strategy to improve water quality in the Chesapeake Bay drainage and elsewhere.

3. *These changes have caused EPA to put itself in conflict with the States.*

• *EPA's approach is Enforcement First.* EPA, in practice (but pointedly not always in the rhetoric of Administrator Browner and President Clinton) has always been and continues to exercise an "Enforcement First" approach to environmental policy.

> The principal tools in the environmental policy kit bag of EPA are fines, litigation, cease-and-desist orders, ever-more-stringent permit provisions, and referral for criminal prosecution. The States are constantly pressured by EPA to use these "enforcement outputs" as the tools of preference in carrying out environmental policy objectives. In fact, it seems as if the whole mindset at EPA, and indeed perhaps with many in Congress, is that these kinds of enforcement actions are, in fact, the beginning and end of environmental policy. Because this approach only works best as a matter of last resort, Virginia and many other States, are shifting emphasis to a compliance-based policy. *With this enforcement first approach, EPA puts itself into conflict with the States.*

• *EPA's approach is top-down, command and control.* EPA is inherently disdainful of de-centralization and regionalism as employed by Virginia and other States. EPA constantly pressures the States to retain the EPA model of central planning, central control, central decision making, and centralized one-size-fits-all standards environmental quality. The States' increasing emphasis on regional and site-and-situation specific approaches has put EPA into conflict with the States. Indeed, EPA seems entirely disdainful of the concepts of Federalism, demonstrated by their frequent complaints and agitations about laws and statutes enacted with bi-partisan

support by the Virginia General Assembly. With this, EPA puts itself into conflict with the States.

• *Federal Government Polluters get the kid glove treatment.* EPA refuses to focus its attention on resolving the principal pollution problems we have in Virginia (and in other States)—which are at Federal facilities. For example, the worst pollution sites in Virginia are sites in which Federal agencies are the responsible parties. *When dodging the Federal responsibilities, EPA puts itself into conflict with the States.*

• *Superfund Failure.* EPA refuses to modify its failed and counter-productive Superfund Approach. With this, EPA puts itself into conflict with the States.

• *Political Posturing.* EPA's Region III in Philadelphia (in obvious connivance with the EPA Administrator) engages partisan political posturing that has nothing to do with improving the quality and condition of the environment. [Cite examples]. *With this EPA puts itself into conflict with the States.*

Virginia's relations with EPA can be quite good on the technical level, and my Agency people appreciate it very much when we can work together in helpful cooperation. Helpful cooperation to improve the quality and condition of the environment is the Virginia Way.

4. Helpful Servant or Fearful Master? The issue about EPA and State relations in regard to enforcement of environmental laws is simply this: Is government to be a helpful servant or a fearful master? This question is at the very core of the reforms and improvements now taking place in environmental quality policy in the: States all across this land.

• *States—not only Virginia—but in virtually all States, including those whose top environmental officials have long been associated with the "Enforcement First" approach—are moving in the same direction as Virginia.* Indeed, Florida under Administrator Browner's leadership, began to initiate Compliance First policies when she was my counterpart there. States' environmental agencies, States legislatures and States governors want the quality of the environment in which they and their people live and work to be improved.

• *States want real and meaningful reform* to help them put aside the one-size-fits-all, top-down, Washington-knows best, litigious approach of the past because the experience of the past 30 years demonstrates that compliance with national environmental quality goals and standards is the most effective focus of environmental policy. This is the helpful servant approach.

• *The "fearful master" approach is simply wrongheaded and is proven to be counterproductive in improving environmental quality.* The "fearful master" approach demonstrated by EPA for the past 30 years to be its preferred approach, has turned concern about the environmental away from its beginnings as a profession of scientists, environmental engineers and resource managers into a profession of lawyers, litigators and one-size-fits-all regulators and political opportunists.

• *In his Farewell Address, George Washington warned Americans to always be vigilant to assure that the new American Nation would never allow the government to become a fearful master.* Virginia submits that now is the time for Congress to assess this State-and-Federal relationship situation as regards to environmental policy. Will you determine George Washington was correct in thinking that the "helpful servant" approach we are now trying to implement in Virginia is far more effective and far more suitable for a free and prosperous people? I trust you will find this to be true.

PREPARED STATEMENT OF PATRICIA S. BANGERT, DIRECTOR OF LEGAL POLICY, ATTORNEY GENERAL'S OFFICE, STATE OF COLORADO

INTRODUCTION

My name is Trish Bangert. I am presently the Director of Legal Policy for the Attorney General's Office in the State of Colorado. Prior to that, I was in charge of the section of the office that handled the environmental and natural resources legal issues for the State. Before coming to Colorado, I worked in the Solicitor's Office at the Department of the Interior. I was at Interior for 11 years, so I know well the Federal agency perspective on environmental and natural resources issues. I also teach administrative law at the University of Denver. I want to thank the Committee for the opportunity to present our views on EPA-State relations, especially EPA's much-publicized partnership program.

In summary, I think that there is no EPA-State partnership in some areas of environmental enforcement. EPA's perspective appears to be that they own the ranch and that we, the States, are the hired ranch hands. For example, there is no com-

promise that I can see in the area of self-audit. EPA's policy is simply to dictate changes to State laws.

In addition, I would like to respond specifically to the charges made by the EPA that some States, especially those with self-audit programs, are failing to protect the environment. In summary, my response is that those charges are hogwash.

States like Colorado are working hard to protect and improve our environment. Although I do not have specific statistics, I understand that the number of enforcement actions brought by the State has remained relatively steady over the past several years. More importantly, Colorado is working more effectively and efficiently to improve the environment. For example, there is general agreement that a "command and control" approach to environmental protection, by itself, does not work. The States, as the laboratories of democracy, are trying out new approaches that may bring greater protection at lesser cost. One new approach in Colorado and many other States is self-audit legislation. These statutes encourage companies to audit their own compliance with environmental laws and correct the violations found in those audits.

For its part, EPA is resisting innovative State approaches. Rather, the agency is affirmatively doing everything it can to create mirror images of itself in the several States. For States that do not like that image, EPA has launched a holy war, composed of negative comments in the press, threats to revoke delegated programs and overfilings. The end result of this battle inevitably will be that the environment comes out the loser. Something has to change before this happens. We come here today to suggest several such changes.

As detailed below, we are suggesting changes primarily in the areas of Congressional oversight of EPA activities, such as overfiling, the methods that are being utilized to measure success in the areas of environmental protection and improvement, and the legislative provisions applicable to the exercise of State authorities in the environmental area. We believe these changes are necessary to effectively and efficiently implement environmental protection and improvement. Further, they are necessary to prevent EPA from presenting roadblocks to new approaches that might represent positive environmental gains.

ENVIRONMENTAL SELF-AUDIT PROGRAMS

Let me turn to a prime example of EPA recalcitrance in allowing States to experiment with programs that might well result in significant environmental gains—environmental self-audit legislation. Twenty-two States have passed some sort of legislation to encourage companies to audit their environmental compliance and to correct any problems found. In Colorado, we have a statute that gives a qualified privilege for self-audits and provides immunity from certain penalties if violations found in the audits are promptly corrected. Remember, we are talking about violations that probably would not have been discovered by the company, and certainly not by State enforcement officials absent the audit. We are talking about a positive environmental gain. Not only are companies becoming more aware and sensitive to environmental compliance through audits, but, problems are being corrected. In addition, companies and State regulators are working together in a cooperative, as opposed to an adversarial fashion to improve and protect the environment.

What is EPA's response to these innovative State programs? The agency is trying as hard as it can to eliminate these laws. In fact, over the past 5 years, the agency has engaged in a systematic program to kill the self-audit movement. First, it wrote to State legislatures considering self-audit laws to urge them not to pass the bills. Second, once bills were passed, the agency enacted policies that clearly expressed its opposition to the new laws and threatened to overfile in cases in which the laws were used. Third, the agency began a program of intimidation against companies and States utilizing the self-audit laws. For example, in Colorado, several companies utilizing the immunity provisions of the act, including the Denver Water Board, received letters requesting information about violations voluntarily disclosed. Further, EPA has threatened to overfile in those cases. My understanding is that EPA, in fact, has overfiled against companies utilizing self-audit laws in other States. Finally, EPA has threatened to revoke the delegation of environmental programs, such as those under the Clean Air Act, the Clean Water Act and RCRA, in States with audit laws. I have been told that the EPA regional office in one State invited petitions from the public to revoke the State's delegated programs.

It is a legitimate question to ask whether EPA's criticisms of audit laws have merit. At least in Colorado, we think not. EPA is concerned that States with audit privilege laws cannot enjoin violations that are harming the public or the environment. Our law retains fill injunctive authority. EPA is concerned that the laws might allow companies to hide violations. Our law allows a privilege only for infor-

mation that would not otherwise have to be disclosed. And, the privilege does not apply to audits done to evade investigations or for fraudulent purposes. Further, under our law, a court can order any information released if there is a compelling need for that information. The EPA is concerned that the States will not be able to get penalties in certain situations. Under Colorado's law, immunity is offered only when violations are discovered in a voluntary self-audit, those violations are corrected, and the violations would not have been reported under a permit condition. Further, there is no immunity for willful criminal conduct or for repeat violators. In short, we believe that EPA's concerns are met by the provisions of our law. Regardless of that fact, EPA is looking at revoking our delegation under the Clean Water Act in response to a citizen petition. We are told that EPA will be sending us a letter shortly which details the "flaws" in our statute and asks that we justify our law.

What does EPA's negative response mean to State self-audit programs? We might as well toss them out the window. If a company comes forward with information about a violation of the environmental laws, it is providing a blueprint to EPA to bring an action against it. In addition, it is impossible to measure the success of audit programs if companies are discouraged from participating in them by EPA's threats of overfiling. EPA's response, in practice, nullifies State laws. Think about that for a moment. Not only has EPA spent a great deal of public money to advance its policy perspective, but, without even having to do a public rulemaking, or a formal hearing, EPA can change the laws passed by State governments. Texas substantially amended its self-audit law recently to meet EPA concerns. My understanding is that the State gave up, in part, provisions granting immunity in the civil and criminal areas and gave up audit privilege in the context of criminal cases. This is not the system envisioned by our founders—an unelected, largely unaccountable body dictating the content of laws to a sovereign State.

METHODS OF MEASURING SUCCESS AND OVERFILING

The EPA's obsession with self-audit laws appears to stem in large measure from its obsession with numbers. EPA has always measured success in protecting the environment in large measure by the number of enforcement actions brought and the size of penalties assessed. We applaud the fact that the agency has recently come out with new core performance measures for State enforcement and compliance assurance programs. Five of the eight measures, however, are still traditional enforcement "beans," that is, the number and size of enforcement actions. The eighth measure is the frequency and impact of the use of audit laws. It is unclear whether this is a positive or negative value in the measurement of performance.

Measuring success by the number of enforcement actions, as opposed to actual improvement in the environment, causes EPA to overfile when there is no danger to the public or the environment, but, when penalty amounts are not "high" enough. This misuse of overfiling authority has the inevitable result of discouraging the States from attempting innovative approaches to environmental problems.

I am not suggesting that the number of enforcement actions brought is meaningless, but, let's look at one of the "beans" that EPA counted as a success in Colorado last year. We have a very good school in our State called the Colorado School of Mines. A research institute on the School of Mines property did experiments on mining ore. A substantial amount of waste ore was generated, and, a waste pile was created. A break in a water main necessitated the emergency removal of the waste pile by EPA to another site. In the removal, a liner was laid down and the pile was put on top. The EPA ordered the State to permanently remove and dispose of the pile. The State removed the pile to a waste disposal facility.

The pile being gone, the State proceeded to build a softball field on the site upon which the pile was formerly located. In the process, workers breached the liner. Now, remember, the liner was constructed to prevent water running through the waste pile from getting into the ground. But, there was no pile when the softball field was under construction. In other words, there was nothing to line. Nevertheless, EPA issued a notice of violation against the State for breaching a liner that lined nothing. Even though it admitted that there the breach caused no danger to the public or the environment, EPA ordered the State to repair the liner and to pay a civil penalty. The State ended up paying thousands of dollars for nothing, thousands of dollars that could have been spent removing real threats to the environment. Yet, this is used as an example of EPA's enforcement success. Something is wrong with this picture.

FEDERAL FACILITIES

I cannot help but mention that EPA's fine sentiments about protecting the environment extend only to private parties, and, seemingly, not to the Federal Government. The Administration has recently released its Superfund Legislative Reform Principles. My understanding is that those principles were authored largely by EPA and released by that agency. Those principles contain several statements which evidence EPA's retreat on the issue of strong Superfund enforcement. Specifically, one of the statements is that the Administration opposes any changes to the present law on Federal facilities. This means that the Administration opposes reforms necessary to ensure that the Federal Government obeys the law to the same extent as private parties, reforms such as stronger sovereign immunity waivers.

In addition, the principles abandon the Administration's support for strong provisions delegating the Superfund program to the States. There is general agreement that the States can often carry out cleanups in a more efficient and effective manner than EPA. We in Colorado fought for many years to apply our own laws at the Rocky Mountain Arsenal. Prior to our victory in our case against the Army, the United States contended that it could run the cleanup of this former nerve gas facility without any regard for State law, regardless of the environmental consequences or danger to our citizens. The EPA was largely silent in this battle. The EPA's principles ensure that they, and not the States, will be in control of Federal facility cleanups. Yet again, the agency stands in the way of true environmental gains.

SUGGESTIONS

We would offer several suggestions that might improve the EPA-State relationship. First, we recognize that EPA is often caught between its legislative mandates and a desire to work with the States. The environmental laws must be reviewed with an eye toward changing those provisions that prevent EPA from allowing States to experiment by putting their own environmental programs into place. For example, the courts have interpreted the present Superfund law as not providing the States substantial authority to implement clean-up programs. We believe that it was the intention of Congress to create a floor for environmental protection in the statutes, and, then, to allow the States to accomplish the goals set out in the statutes in their own fashion. Perhaps a short-term task force or a commission could be created to review the present laws and recommend changes, if necessary, to implement this intention.

Second, there must be a review of the methods for measuring success in the environmental area. Until we have a legitimate and effective means of measuring success, and as long as we are wedded to the "number of enforcement actions" model, we will be unable to try new approaches that may well mean greater gains for fewer costs. We would recommend a study of this issue, perhaps starting with EPA's new performance measures, that will result in recommendations for changes to the present measurement methods.

Third, and specific to EPA, there needs to be greater Congressional oversight with regard to agency activities. For example, Congress, the States and the public should know the criteria for overfiling. At present, the authority to overfile is used as a weapon by EPA to extort changes in State laws and to manipulate the failure of audit laws. The agency should be required to set out clearly the criteria it will use for determining whether to overfile in particular cases. Perhaps it should be required to do so after a series of hearings or a formal rulemaking process.

Fourth, as to specific substantive areas, there should be Federal legislation allowing States to experiment with self-audit legislation without EPA interference. We do not take a position at this time as to whether that legislation should include Federal privilege and immunity provisions. At a minimum, however, it should say that EPA cannot revoke the delegation of States that have audit laws just because of those laws, and, that EPA cannot overfile in situations in which the States have given immunity under their own audit laws.

We would be happy to work with your staffs to implement these suggestions legislatively. Again, we appreciate the opportunity to submit these remarks to the Committee on this important issue.

PREPARED STATEMENT OF CHRISTOPHE A.G. TULOU, SECRETARY, DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

Mr. Chairman and Members of the Committee, my name is Christophe Tulou, and I have been the Secretary of the Delaware Department of Natural Resources and Environmental Control (DNREC) since March 1993.

I appreciate the invitation to join you today to discuss Delaware's enforcement relationship with the Federal Environmental Protection Agency (EPA).

The amount and quality of discourse between EPA and the States is greater today than it has ever been. We are sharing perspectives on environmental goals for the country, providing suggestions on EPA's goals and objectives under the Government Performance and Results Act, and helping develop performance measures to evaluate our successes under the National Environmental Performance Partnership System (NEPPS). EPA and the States are not that far apart in terms of a shared vision for our nation's environment.

Enforcement, and the related issue of regulatory flexibility, are the areas of greatest disagreement between us. Our environmental management challenges are diverse and complex, and our Federal laws and regulations are often stiff and constraining. Finding room for common sense is tough.

EPA has delegated essentially all the major Federal regulatory programs (except § 404 of the Clean Water Act dealing with wetlands) to Delaware based upon our demonstrated performance in environmental management. As part of our acceptance of full authority for these programs, the State Attorney General provided assurances regarding our capacity to enforce. According to EPA's estimates, States account for 87 percent of environmental civil enforcement each year. This estimate excludes criminal enforcement activities. Though I do not have the figures, I strongly suspect that DNREC undertakes—along with our Attorney General's office—an even greater majority of enforcement actions in Delaware.

Delaware's enforcement relationship with EPA Region III is very good. Though the relationship continues to be positive, our development of a Performance Partnership Agreement (PPA) with Region III has created some friction regarding the role of enforcement in environmental management.

We are proud that Delaware was the second State to adopt a PPA. We wanted to take advantage of EPA's promise to work in partnership with Delaware to build the capacity necessary to meet OUR environmental priorities. We sought a relationship that recognized that States are at the forefront of environmental management, and that the fastest way to our mutual goals is through partnership, not paternalism.

Working very closely with Region III (and with the strong support of Regional Administrator, Mike McCabe), we jointly developed a model Partnership Agreement. We agreed to move away from case-specific review of our activities towards a more holistic consideration of the State enforcement programs, encouraging innovation and creativity in achieving our environmental goals. To that end, the Agreement focuses on outcomes more than activities or processes. The outcomes we agreed to achieve are:

- correcting promptly violations that threaten Delaware's environment or the health of Delaware's citizens;
- achieving and maintaining widespread compliance with the environmental laws, both to protect human health and the environment, and to assure that those who violate the laws do not obtain an economic benefit from their unlawful activity; and
- preventing violations through use of applicable enforcement and compliance tools and targeted assistance.

Despite these assurances in our Agreement, I fear that EPA will insist on greater reliance on enforcement-specific activities, focusing on enforcement for enforcement's sake.

We have argued since the beginning of the PPA process that enforcement should be a part of all our environmental goals, not a stand-alone end unto itself. In short, we view enforcement as an important tool to achieve our environmental goals, not a goal in its own right. That disagreement continues.

We also contend that compliance is a more relevant and important programmatic goal than enforcement. We should be striving—through whatever means—to get all our polluters in compliance. This distinction between compliance and enforcement is crucial in determining what States and EPA should be measuring and reporting. If enforcement is a goal, then we should continue to count beans such as penalty dollars collected or enforcement actions taken. If compliance is the goal, then we should be measuring and reporting who is in, and who is out, of compliance. The traditional measures of dollars and enforcement actions are less important if compliance is the true goal. Measuring compliance is feasible and relevant. Last year, just over 70 percent of facilities in Delaware complied with hazardous waste regulations at the time of inspection. Within 30 days of the inspection, the percentage rose to 85 percent. Within 180 days, 100 percent of facilities were in compliance.

In Delaware, we work with violators to get them back into compliance as quickly as possible. Using compliance assistance as an option of first choice, we can usually achieve that goal much faster, cheaper, and with far greater goodwill than through

aggressive enforcement. We also create allies for our environmental efforts. In fact, several of our companies are moving beyond mere compliance by adopting forward-looking environmental management strategies such as continuous improvement, pollution prevention, and enhanced product stewardship.

Overly aggressive and ill-timed enforcement is a dare: it inspires polluters to assume an adversarial relationship with their environment and regulatory agencies, and to challenge enforcers to discover their misdeeds. Neither the States nor EPA can afford that cat-and-mouse approach to environmental management; neither can our environment.

Nonetheless, enforcement is critical. In fact, in Delaware and other States attempting to inject common sense into their regulatory process. the stick must be bigger than ever. Those polluters who choose not to participate in our compliance assistance efforts, and those who continuously violate environmental obligations, should face the full force of public indignation and legal recourse. In this context, States and EPA can forge a powerful partnership that combines the benefits of compliance and deterrence.

Making the philosophical point about compliance and enforcement, and arguing the failings of traditional enforcement measures is not enough. States have an obligation to work with EPA to identify clearly the appropriate role for enforcement and how best to measure our success in getting polluters into compliance and keeping them there. The States and EPA in Region III have initiated a process to identify which measures of compliance and enforcement would be more useful and appropriate than those that are currently in use. Our goal is to make recommendations for inclusion in the Region III—EPA Headquarters enforcement Memorandum of Understanding, which will be finalized in July. I understand similar efforts are underway in other EPA Regions. As Steve Herman and Mark Coleman have pointed out in their testimony, the Office of Enforcement and Compliance Assurance (OECA) at EPA is also working closely with ECOS to define a better State-EPA relationship.

EPA should, and I hope will, continue to be a crucial enforcement partner. We will continue to rely on EPA to: assist with our "bad actors"; help with transboundary pollution problems; set protective national standards; and to ensure that all States live up to their end of the environmental protection bargain. We will also continue to work with EPA through Performance Partnership Agreements and other means to build the capacity we need to meet Federal and State environmental goals. We need EPA, just as EPA needs the States. That is what partnership is all about.

Thank you again, Mr. Chairman, for the opportunity to share my views with you today.

PREPARED STATEMENT OF JOSEPH RUBIN, CONNECTICUT ASSISTANT ATTORNEY GENERAL

As the head of the Environment Department of Connecticut Attorney General Richard Blumenthal's office for the past 7 years, I have participated closely in many aspects of the State-EPA environmental enforcement relationship. Overall, I have found the relationship among the Connecticut Department of Environmental Protection (DEP), our office, EPA Region 1, and the United States Department of Justice to be cooperative and productive. I will focus my remarks on two aspects of this relationship which provide good examples of this relationship at work—a model State-Federal working group on water enforcement efforts, and a current EPA review of some of Connecticut's State enforcement programs.

Almost 3 years ago, under the leadership of EPA Region 1 General Counsel Harley Laing and myself, with the full support of the Connecticut DEP, we began monthly meetings including DEP water enforcement staff, Region 1 water enforcement and legal staff and the Connecticut Attorney General's office. At some of our meetings, the EPA Criminal Division and the U.S. Attorney's Office are also represented. This group, composed entirely of working level staff, operates under an informal, non-bureaucratic structure, with no memoranda of agreement, no guidance documents, and no protocols. Instead of making pronouncements and fighting about turf, we actually work cooperatively. In fact, this lack of bureaucratic structure is a key to the group's success, because everyone is more willing to cooperate when we all understand that cooperation is voluntary, and continued success depends on everyone's continued voluntary cooperation.

At each meeting, current and potential water enforcement cases which have come to the attention of any of the participants, whether from citizen complaints or routine inspections, are discussed and reviewed. Together, the group comes to an informal consensus as to whether a case merits serious enforcement action, and whether

State, Federal, or joint action will be most efficient and effective. In reaching this determination, the group considers who has the best legal tools, discovery tools, available enforcement staff, technical resources, and legal staff to prosecute a particular case. This is not an all or nothing decision. Often, we agree, for example, that Federal discovery may be followed by a State judicial enforcement action, or that State and Federal technical staff will work together, or, on rare occasions, that a case should be prosecuted jointly by the State and Federal Governments.

The group accomplishes several important goals—it maximizes the effectiveness of overall enforcement efforts by eliminating unknowing duplication of effort and by using everyone's limited resources most effectively. It greatly reduces inter-agency competitiveness and goes a long way towards replacing it with cooperation. By, in effect, providing ongoing "peer review" to all of us, the process also helps stimulate everyone to timely high quality work. In sum, it gives all taxpayers more bang for their environmental buck.

Of course this group is not a panacea. Sometimes discussions illuminate the resource limitations of both State and Federal Governments which may limit us. Still, this group is a model of the best in State-Federal environmental enforcement cooperation.

A second, and somewhat more controversial example of the State-Federal relationship is the series of reviews or audits of State environmental enforcement efforts produced by EPA Region 1. Several years ago, EPA actively and assertively reviewed many State enforcement actions in federally funded programs on an ongoing basis. Understandably, the States sometimes resented what they saw as duplication of effort and "second guessing" by EPA of their enforcement strategies and decisions. Recently, Region 1 has moved away from such constant and intrusive monitoring to periodic overall reviews of States' enforcement efforts in federally funded programs. Region 1 completed a draft review of Connecticut DEP's enforcement programs about 6 months ago, and expects to complete its final report this month.

This periodic review process represents an excellent compromise between overly intrusive and resource-wasting oversight, and a complete lack of oversight of the use of Federal funds. The review process almost necessarily produces positive results. In the first place, any peer review process always helps to insure high and consistent quality. Programs which are peer-reviewed by outsiders will almost always be better than those that are not. In addition, at least in the case of Connecticut, our DEP has already taken many positive steps to improve in areas of concern identified by EPA in its draft report. These steps should result in improved documentation, and therefore, consistency, of enforcement actions and decisions. The report is also leading, within ever-present budget constraints, to improved enforcement staffing in the water pollution area. Further, the review has, very appropriately, identified many special strengths and accomplishments of our DEP and its staff. No peer review is painless, and EPA, in its original draft, may have failed to fully recognize the positive aspects of certain compliance assurance initiatives of DEP. Overall, however, the review process has been effective and beneficial.

While these two examples—the joint water enforcement working group and the EPA review of State enforcement programs—are certainly not comprehensive, they do provide a fair snapshot of successes in the State-Federal enforcement relationship. In my experience, they are exemplary of the success of that relationship between Region 1 and Connecticut, and I urge this Committee to continue to encourage the unfettered and unencumbered growth of these cooperative efforts.

PREPARED STATEMENT OF ROBERT E. HARMON, CHAIRMAN OF THE BOARD OF DIRECTORS, HARMON INDUSTRIES, INC.

Chairman Chafee, members of the committee, good morning. My name is Robert E. Harmon. I am the Chairman of the Board of Directors of Harmon Industries, Inc. I appreciate the opportunity to appear before the Committee this morning to discuss important issues of Federal-State relations in enforcement of the environmental laws. I am accompanied today by Harmon's attorney, Ms. Terry J. Satterlee of Lathrop & Gage L.C. of Kansas City.

With your permission, I would like to read to you a brief prepared statement explaining the reasons for Harmon's interest in these issues.

Harmon Industries is the leading supplier of railroad signal, train control, and related equipment for use in the railroad industry. The company is headquartered in Blue Springs, Missouri, and has assembly and manufacturing facilities across the country. My father founded the company which is now Harmon Industries in 1946. Today, Harmon employs more than 1,500 workers in the United States, and had

sales of more than $175 million in 1996; the company's stock is publicly traded on the NASDAQ national market system.

I believe Harmon's case well illustrates the way in which conscientious regulated industries who are seeking in good faith to comply with their obligations under the environmental laws can be whipsawed by EPA's claimed "overfiling" authority. If EPA has this authority, regulated industries cannot negotiate binding agreements with authorized State agencies, since EPA may later disagree with and completely override the State resolution.

One of Harmon's assembly facilities is located in Grain Valley, Missouri, which is a rural agricultural area outside Kansas City. The Grain Valley plant assembles circuit boards for use in railroad control and safety equipment.

As was common in the industry at the time, prior to 1987 Harmon employees used small quantities of organic solvents to remove soldering flux from circuit boards they were assembling. The solvents were kept at the employees' work benches in small jars. Residues were collected in a 3 to 5 gallon pail, and dumped by Harmon maintenance employees approximately once every 1 to 3 weeks on the ground outside the back door of the Grain Valley plant. This practice probably began in the late 1970's.

Harmon's management was unaware that employees were disposing of used solvents until it discovered the practice during a routine internal safety inspection in November 1987.

Upon learning of this practice, we promptly took every action we could to stop, and remedy the effects of, this disposal practice. Harmon's management immediately ordered the disposal practice stopped, fired an employee who refused to comply and demoted or reassigned several others, and retained environmental consultants to investigate the extent of any resulting contamination. Harmon also voluntarily reported the discontinued disposal practice to the Missouri Department of Natural Resources ("MDNR"), the agency delegated the authority by EPA to implement and enforce the Federal RCRA hazardous waste program within the State of Missouri. It is undisputed that, prior to Harmon's voluntary notification to MDNR in June 1988, neither MDNR nor EPA was aware of the way in which Harmon's employees had been disposing of solvent residues, or of the contamination of the soil at the immediate disposal area at Harmon's Grain Valley plant.

Harmon conducted an extensive scientific investigation of the Grain Valley plant property between late 1987 and February 1996, with MDNR's intensive oversight and approval. As of January 1994, this investigation had cost Harmon over $1.4 million, excluding attorney's fees and other indirect costs. MDNR issued Harmon a "post-closure" permit in July 1996. Harmon anticipates additional costs of approximately $500,000 during the 30-year post-closure period.

Since June 1988, MDNR reported the status of the ongoing investigation to EPA during quarterly program meetings, and promptly provided EPA with copies of all significant correspondence, plans and other documents concerning MDNR's dealings with Harmon. To Harmon's knowledge, EPA has at no time sought to intervene in, or assume responsibility for, MDNR's enforcement of RCRA with respect to Harmon.

Besides the costs of investigating and remedying the existing contamination problem, Harmon has instituted costly changes to its manufacturing process to insure that the past disposal problem does not recur. During December 1987, while its investigation was ongoing, Harmon changed its assembly process to a state-of-the-art technology using a nonhazardous cleaning material, rather than organic solvents, to remove soldering flux from equipment being assembled. As a result of these changes, Harmon ceased generating hazardous waste at the Grain Valley facility. These changes had an initial cost exceeding $800,000, and Harmon incurs ongoing costs of approximately $125,000 every year as a result.

In the end, Harmon's environmental consultants concluded that the contamination at the Grain Valley plant was limited, and posed no significant threat to human health and the environment. Both MDNR and the EPA have accepted this conclusion. In a State-court consent decree negotiated between Harmon and MDNR, MDNR imposed regulatory sanctions on Harmon, but agreed not to seek monetary penalties against Harmon based on its voluntary self reporting and its prompt action to investigate and remedy any contamination. The decree specifically provides that "Harmon's compliance with this Consent Decree constitutes full satisfaction and release from all claims arising from allegations contained in plaintiff's petition." The consent decree provides in ¶23(a) that it will terminate when, among other things, "MDNR issues a post-closure Part B permit." This condition was satisfied on July 31, 1996.

Even though MDNR has been authorized by EPA to run the RCRA program in Missouri, and despite Harmon's extensive dealings and settlement with MDNR, after entry of the State-court decree EPA continued to pursue a separate Federal

action seeking over $2.7 million in RCRA penalties. EPA sought these penalties for exactly the same conduct which was the subject of Harmon's State-court consent decree with MDNR.

During the administrative penalty proceedings, both the ALJ and the EPA's Environmental Appeals Board held, without extended discussion, that EPA had the authority to "overfile" in this way when it was dissatisfied with an authorized State agency's resolution of a RCRA case.

We believe EPA's actions are contrary to the letter and spirit of the RCRA statute, and we accordingly filed suit in Federal court last Friday, June 6, to set aside the penalty. Because of the importance of the issues presented in Harmon's case to regulated industries across the country, Harmon's position was supported before the agency by two private parties as *amicus curiae,* and we anticipate support from industry groups in the court action.

MDNR's enforcement of RCRA with respect to Harmon's solvent disposal has been rigorous, and EPA has never contended that MDNR's action were inconsistent with RCRA requirements or otherwise inappropriate. In connection with its extensive investigation of the site, Harmon submitted, revised as requested, and obtained MDNR approval for, two detailed site investigation plans, as well as a closure and post-closure plan. Harmon also submitted to MDNR two detailed reports describing the results of its consultant's investigations, in addition to the Phase I report Harmon submitted in June 1988. In connection with its investigation of the site, Harmon installed 29 groundwater monitoring wells, drilled 27 soil borings and 69 soil probes, and took and analyzed a large number of soil and water samples over a 5-year period before MDNR was satisfied that the extent of contamination at the site had been adequately defined. Moreover, throughout its investigation Harmon's representatives were in frequent contact with MDNR.

The practical consequences of EPA's decision in Harmon's case are significant. Congress made clear in RCRA that it intended State agencies to take the lead in enforcing RCRA's hazardous waste provisions, subject to the States' compliance with the program's broad, national goals. However, under the EPA's decision no regulated entity can enter a settlement agreement with an authorized State agency, without also formally making the Federal EPA a party to the agreement. The possibility always exists, even after conclusion of a final settlement agreement with the State, that EPA will choose to second-guess the State's exercise of its enforcement discretion, and file a duplicative Federal enforcement action. Indeed, during the administrative hearing the ALJ suggested that Harmon should have dealt with *both* the State and EPA when it originally negotiated the consent decree. This duplicative, redundant regulation is hardly what Congress intended when it spoke of a "Federal-State partnership." Any suggestion that the States may be too lenient on regulated entities, or may settle RCRA disputes based on ulterior motives, are simply unfounded. The States have every incentive to vigorously enforce environmental laws, and MDNR's actions in this case (which EPA has not challenged) show that the States take these responsibilities seriously. While it may be true that the States are more conscious of the consequences of their regulatory actions on the local economy and the competitiveness of local firms, I assume this is what Congress intended, consistent with Congress' overall initiative to introduce more cost-benefit analysis into this country's enforcement of its environmental laws. Of course, if any State is consistently disregarding its obligations to vigorously enforce the RCRA program, EPA retains the right to withdraw its authorization of the State program, and directly enforce RCRA's hazardous waste program in any such State.

EPA's standard response to criticisms of its claimed overfiling authority has been to argue that it needs this authority to insure, at a minimum, that companies which violate RCRA's requirements disgorge any economic benefits they derived from their noncompliance. This argument does not apply here, however. The ALJ rejected EPA's argument that Harmon received between $600,000 and $975,000 in economic benefit through its solvent disposal practice; instead, EPA's own ALJ ruled that Harmon received an economic benefit of only $6,072 by failing to dispose of its small volume of solvent residues through an appropriate offsite disposal facility. MDNR's agreement not to seek to recoup economic benefit from Harmon hardly justifies a separate Federal enforcement action.

The consequences of EPA's claimed "overfiling" authority are perhaps best illustrated in connection with the RCRA requirement that any hazardous waste disposal facility must have in place liability insurance to protect against accidental releases of pollutants. Harmon's insurance agent attempted to acquire this coverage, but could not find a policy which would cover defense costs, on-site occurrences, or preexisting pollution, as the RCRA regulations require. After lengthy discussions, MDNR agreed in the State-court consent decree that Harmon need not comply with

the insurance requirements, so long as it demonstrated to MDNR twice a year that it had made reasonable, good-faith efforts to procure the necessary insurance.

During the administrative proceedings, EPA presented no evidence to dispute Harmon's testimony that it was unable to obtain the liability insurance required by RCRA. Nevertheless, the ALJ rejected Harmon's reliance on the waiver of the liability insurance requirement in the State-court consent decree, since "[Harmon's] consent decree is immaterial to EPA's enforcement action." According to the ALJ, EPA is free to determine that the State "has not exercised its enforcement discretion properly," and therefore Harmon was not entitled to rely on the decree. On appeal, the EAB specifically refused to reduce or eliminate the penalty based on the liability insurance requirements, based on Harmon's reliance on the consent decree with the State of Missouri, which excused Harmon from the liability insurance requirement. The EAB reasoned that "this exercise of enforcement discretion on the part of the State does not prevent the Region from taking its own enforcement action against Harmon." Thus, Harmon was penalized by EPA for violating a regulation which an authorized State agency had agreed would not apply to Harmon in a judicially approved consent decree.

It is our view that RCRA was clearly written to allow the States to control the implementation of RCRA for so long as they are authorized by EPA. Harmon's experience illustrates that EPA thinks it can override an authorized State's implementation of RCRA at any time, for any reason or for no reason. Neither an authorized State nor a company being regulated can make any agreement free of fear that the Federal Government will step in and set the agreement aside, even after millions of dollars have been spent.

Once again, thank you for the opportunity to appear before you to discuss these important issues. Both Ms. Satterlee and I would be happy to answer any questions you may have.

PREPARED STATEMENT OF ROBERT R. KUEHN, TULANE LAW SCHOOL, NEW ORLEANS, LA

I. INTRODUCTION

Mr. Chairman, Members of the Committee, my name is Robert Kuehn and I am a professor at Tulane Law School in New Orleans, Louisiana, where I teach classes in environmental enforcement, environmental advocacy, and solid and hazardous waste regulation. I appreciate the opportunity to testify before this Committee on the important, and always controversial, topic of the relationship of Federal and State governments in the implementation of Federal environmental laws.

I would like to discuss today the results of some research that I published last year on the devolution of enforcement of Federal environmental laws from Federal agencies to the States ("The Limits of Devolving Enforcement of Federal Environmental Laws", 70 Tulane Law Review 2373 (1996)).

Before discussing the specifics of what I found, it is important to keep in mind that issues of federalism are not new to environmental policy debates. Until the 1970's, Congress had determined that the Federal Government should play a supporting role in the regulation of pollution by providing grants and technical assistance to the States. The 1970's then witnessed a rising national concern over the environment and a surge of legislation giving the Federal Government the primary, and in some areas exclusive, authority over the protection of public health and the environment. While President Reagan's "New Federalism" policies of the early 1980's reversed the trend of centralization and returned some powers to the States, the Federal Government continued to establish the standards of environmental protection and had the authority and resources to dictate, in large measure, the activities of the States, including their enforcement operations. Recent Federal legislation on pollution control, the 1990 amendments to the Clean Air Act and the Pollution Prosecution Act of 1990, signaled another expansion of Federal enforcement power.

While the pendulum swing of federalism is not new, what is new about the most recent controversy is how widespread the sentiment is for devolving environmental enforcement powers from the Federal Government to the States and how dramatically some of the current proposals would reduce the Federal role. Not only are there calls for less oversight of State enforcement activities, but some now advocate that Federal environmental agencies be prohibited from taking any enforcement action in States with federally-approved environmental programs.

Unfortunately, as with past efforts to decentralize environmental protection, there has been little serious discussion, much less agreement, regarding the criteria by which to judge the suitability of devolving enforcement.[1]

My research reviewed the original arguments for and against Federal enforcement of environmental laws to determine if these justifications for Federal enforcement are still supportable. As I set forth more fully below, I found that while some of the original arguments for Federal enforcement (such as lack of adequate State enforcement commitment and resources) may find less support today, there are still a number of compelling justifications for a meaningful Federal role in enforcement, even where States have been authorized to implement Federal programs.

Believing that the issue of the proper mix of Federal and State enforcement of Federal environmental laws out to be based on pragmatic policy grounds, I also sought to develop and apply some non-ideological criteria for determining the appropriate level of Federal involvement in enforcement. Using the criteria of effectiveness, efficiency and equity, I compared federally-run enforcement programs with State-run programs. I was surprised to find how little empirical data was available on the suitability, under these three criteria, of Federal versus State enforcement. Based on the limited data that I could find, I concluded that public policy criteria did not support a dramatic reduction in Federal enforcement.

I have set forth more fully below my analysis and conclusions.

II. RATIONALE FOR FEDERAL ENFORCEMENT

Some Federal enforcement of national pollution control laws is still justified on a number of grounds, even 20 years after the enactment of most Federal statutes. An obvious justification is that States are, and always will be, particularly ill equipped to address the interstate effects of pollution. As pollution knows no political boundaries, a pollution source's noncompliance could impose significant adverse impacts, or what has been termed "spillover effects," on another jurisdiction.[2] Where the local jurisdiction enjoys significant benefits from the source's activities yet bears little or none of the harm, that governmental entity may have little incentive to enforce pollution laws against the source. A Federal role in ensuring appropriate compliance by sources that may have impacts in other States is therefore essential, particularly since previous attempts to address interstate effects of pollution through regional compacts proved unsuccessful.[3]

The growing importance of international environmental agreements further creates an indisputable and growing need for Federal enforcement. If a treaty provides for a right of the United States to enforce certain pollution standards against a source in another country or if the United States has entered into an international agreement to ensure enforcement of its own laws, individual States are in no position to uphold such obligations.[4] Indeed, without a significant, continuing Federal presence in environmental enforcement, the ability of the United States to represent that its pollution standards will be enforced is debatable.

It is realistic to expect that some State environmental agencies may not vigorously enforce environmental standards against other State agencies or the State's political subdivisions. State and local governments operate numerous sources of pollution, such as landfills and sewage treatment plants, and, through their ownership and operation of buildings and equipment, also generate wastes that are subject to regulation. In the 1980's, EPA launched a municipal treatment enforcement initiative to address widespread noncompliance by publicly-owned sewage treatment facilities and the failure of State environmental agencies to enforce compliance.[5] Because of concerns that EPA was lacking in its enforcement efforts against facilities owned or operated by the Federal Government, States argued for and received ex-

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[1] *See* William F. Pedersen, Jr. Federal/State Relations in the Clean Air Act, the Clean Water, Act, and RCRA: Does the Pattern Make Sense?, 12 *Environmental Law Rept.*. (Environmental Law Inst.) 15,069, 15,071 (Dec. 1982) (Congress has failed to confront with any degree of rigor the issue of which pollution control responsibilities properly belong to the States and which to the Federal Government).

[2] Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 *Yale Law Journal* 1196, 1215–16 (1977).

[3] *See* Lewis G. Green, State Control of Interstate Air Pollution, 33 *Law & Contemporary Problems* 315, 323–24 (1968).

[4] *See e.g.*, North American Agreement on Environmental Cooperation (Final Draft), Sept. 13, 1994, art. 5 (U.S. agrees, along with Canada and Mexico, to initiate proceedings to seek appropriate sanctions or remedies for violations of domestic environmental laws and regulations).

[5] *See* Thomas Puts in Place Enforcement Strategy to Maximize POTW Compliance with '88 Deadline, 18 *Environmental Rept.* 1436, 1437 (1987).

panded rights to enforce State environmental statutes against Federal facilities.[6] The same arguments that support the need for State enforcement against Federal facilities favor a Federal role in enforcing environmental laws against States and their political subdivisions.

One of the most compelling justifications for Federal enforcement is the need to ensure equal enforcement among the States. Without Federal environmental laws, including Federal enforcement to ensure that national standards are implemented nationwide, States are likely to vary widely in the extent of their regulation of pollution. Some States would weaken their standards or lessen enforcement as a way to induce polluting industries to invest in their States. States that refused to weaken their standards would risk losing economic development activities to the less restrictive States.

Although the theoretical basis of this "race to the bottom" rationale for Federal regulation has been questioned,[7] State regulators report that the regulated community repeatedly argues, and even threatens, that relaxed standards are needed to attract new industry or keep companies from moving to other States.[8] In addition, the growing popularity of State laws that prohibit agencies from promulgating regulations more stringent than the counterpart Federal rule "provides some evidence that the concern about a 'race to the bottom' in the absence of Federal minimum standards remains valid."[9] Today, States are engaged in what one Governor called "cannibalism" in their competition to attract new businesses, wooing them with tax breaks and other taxpayer-financed economic incentives.[10] In the present climate of economic rivalry between States, one would be naive not to believe that, without the specter of Federal intervention, some States would purposefully reduce their enforcement efforts as an economic incentive.

Federal enforcement also helps avoid certain market imbalances. Companies that invest in environmental compliance are at a competitive disadvantage if their competitors can avoid those costs because the lax enforcement practices of another jurisdiction overlook some violations of environmental laws. Industries that had invested heavily in environmental compliance were placed at a competitive disadvantage when the regulated community perceived in the early 1980's that the EPA would not enforce environmental laws.[11] Federal enforcement, when aggressively implemented, has the ability to "level the playing field" by initiating enforcement actions, or forcing reluctant State agencies to initiate enforcement actions, in States with weak enforcement practices.

In some enforcement matters, the issue is uniquely Federal. For example, *United States* v. *Marine Shale Processors*[12] involved the interpretation of EPA's cryptic regulations differentiating between recycling and waste treatment. Because EPA developed the regulation and had the greatest stake in ensuring that its rule was upheld by the court and properly applied nationwide, Federal enforcement was fitting.

The centralization of environmental protection was often justified in the 1960's and 1970's by the States' lack of legal capacity, resources, and commitment to effectively enforce pollution control laws. The development of strong Federal programs, along with financial assistance to State environmental programs and nationwide standards for authorization of State programs, have helped stimulate the growth of

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[6] *See e.g.,* Federal Facility Compliance Act, Public Law 102–386, § 102(a),(b), 106 Stat. 1505–06 (1992).

[7] *See* Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 *New York University Law Review* 1210, 1233–44 (1992); *but see* Kirsten H. Engel, State Environmental Standard Setting: Is There a "Race" and is it "to the Bottom"?, 48 *Hastings Law Journal* 271 (1977) (documenting the race to the bottom).

[8] *See e.g.,* Adam Babich, Our Federalism, Our Hazardous Waste, and Our Good Fortune, 54 Maryland Law Review 1516, 1533 n.64 (1995) (State officials were responsive to arguments by members of the regulated community that environmental standards must be reduced); Vicki Arroyo Cochran, EPA Regional Offices: Unequal Protection Under the Law? 48–49 & n.96 (April 1994) (unpublished manuscript, on file with author) (Indiana's top environmental official says that companies have threatened to either move to another State or shift resources to other facilities to escape rigorous enforcement).

[9] Jerome M. Organ, Limitations on State Agency Authority to Adopt Environmental Standards More Stringent than Federal Standards: Policy Considerations and Interpretive Problems, 54 *Maryland Law Review* 1373, 1393 (1995).

[10] Taking Stock of Environmental Problems: Hearings Before the Senate Comm. On Environment and Public Works, 103d Cong., 1st Sess. 148 (1993) (testimony of Thomas C. Jorling, Commissioner, New York Dept. of Environmental Conservation) ("Governor Cuomo considers the relationship between and among the States now as cannibalism in the competition for economic activity.").

[11] Rochelle L. Stanfield, Ruckelshaus Casts EPA as 'Gorilla' in States' Enforcement Closet, *National Journal*, May 24, 1984, at 1034, 1035.

[12] 81 F.3d 1361 (5th Cir. 1996).

competent State environmental programs.[13] Ironically, the desire to avoid federally-run permitting programs in their States encouraged State legislators to provide the necessary laws and resources to obtain primacy. Once a State obtains authorization, the threatened return of the program to EPA has been used by State agencies to leverage additional funds from State legislators.[14]

Today, most State programs have the necessary resources and commitment to assume most Federal enforcement. Yet this enhanced capability is due, in large part, to Federal enforcement program technical and financial assistance to States, EPA's prodding of States to take enforcement actions, and the desire of States to avoid a Federal takeover of enforcement and other regulatory functions. One State environmental commissioner observed that the publicity and implications regarding the State's inability to handle its responsibilities that would result if EPA were to take over pollution compliance responsibilities is "the greatest incentive for the State to do the job."[15]

The availability of EPA as a backup to State enforcement efforts also enhances the State's effectiveness. State officials overwhelmingly agree that the threat of the EPA enforcement gorilla bringing its own enforcement action strengthens the State's position with polluters.[16] Without a strong Federal enforcement program, State programs would undoubtedly suffer.

Even with the notable improvements in the commitment and ability of States to enforce environmental laws, in some cases the resources and political influence of the regulated entity may still overwhelm the State agency. When faced with potential penalties or remediation costs in the millions of dollars or with the potential closure of their businesses, many regulated entitles are able to dedicate legal and technical resources that may overpower the limited enforcement resources of State agencies. For example, a defendant spent $3 million in legal fees fighting a Clean Air Act enforcement action brought by EPA.[17] In fiscal year 1994 alone, the United States Department of Justice dedicated more than 29,000 work hours (the equivalent of 15 persons working full time for the entire year), and EPA used three employees full time and spent $2 million in litigation support, on a single enforcement action in Louisiana against Marine Shale Processors; the entire Louisiana Department of Environmental Quality legal staff only consists of 15 lawyers.[18] Budget cuts threaten to reduce further the ability of States to handle enforcement matters, particularly cases with great resource demands.[19]

Political connections may also affect the enforcement activities of State agencies. In Marine Shale Processors, the owner of the company spent $1 million of his own money to defeat the election campaigns of the Governor who had sought to shut the company down for violations of hazardous waste laws.[20] In Virginia, the Governor

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[13] Congressional Research Service, for the Senate Comm. on Environment and Public Works, Federal-State Relations in Transition: Implications for Environmental Policy, 31 (1982).

[14] Rebecca Clay, A New Breed of Regulator, *Environmental Forum,* March/April 1995, at 32, 33–34 (Indiana Department of Environmental Management able to reverse budget cuts by arguing that reductions would mean that State would lose authorization and EPA would assume permitting and enforcement activities).

[15] Dan W. Lufkin, State Responsibility in Managing the Environment, in Office of Research and Development, U.S. EPA, *Managing the Environment,* 351 (1973).

[16] Richard J. Tobin, Environmental Protection and the New Federalism: A Longitudinal Analysis of State Perceptions, *Publius* 93, 105 (Winter 1992) (90 percent of State air and water quality directors agreed that the threat of EPA intervention strengthens the State's position). West Virginia's attorney general stated: 'Threatening EPA lawsuits is how we get voluntary compliance." Lawrence Mosher, Reagan's Environmental Federalism—Are the States Up to the Challenge?, *National Journal* Jan. 30, 1982, at 184, 185.

[17] Barry M. Hartman, The Litigation Explosion, in *Environmental Law: ALI–ABA Course of Study Materials* 567,569 (American Law Institute-American Bar Association, Feb. 13–15, 1992). The defendant eventually settled the case for $350,000. *Id.*

[18] U.S. Dept. of Justice, *Statistical Report–Fiscal Year 1994* 86 (1994); Telephone Interview with Terry Sykes, Office of Regional Counsel, Region 6, EPA (Nov. 29, 1995); Telephone Interview with Ann Coco, Office of Legal Affairs and Enforcement, Louisiana Department of Environmental Quality (Nov. 13, 1995).

[19] See Rex Springstein, Twenty Lose Jobs at DEQ—Total of 91 People Left the State Agency Yesterday, *Richmond Times-Dispatch,* April 29, 1995, at B1 (Governor cuts 91 jobs at Virginia Department of Environmental Quality; Reorganization plan calls for reducing staff involved in enforcement); Office of the Administrator, U.S. EPA, *Report of the Task Force to Enhance State Capacity* 5 (July 1993) (increased demands for expenditures and decreased State revenues draw into question ability of States to continue expansion of environmental management activities).

[20] Gwendolyn Thompkins, *et al., Campaign Watch; A Look at the Day's Highlights and Happenings, Times-Picayune*, Oct. 25, 1995, at A2; Tyler Bridges, Roemer Lashes Back Over Kent TV Ads, *Times-Picayune*, Oct. 11, 1995, at A11. The company's owner spent $500,000 in 1991 and another $500,000 in 1995 attacking former Governor Buddy Roemer; Roemer was defeated in both elections. *Id.*

accepted a $100,000 campaign contribution from a company under investigation by the State environmental agency and facing millions of dollars in fines for illegally discharging wastes to a tributary of Chesapeake Bay.[21] Even the most capable State environmental agency may find itself unduly influenced or overwhelmed by a well-heeled, politically influential polluter and, therefore, in need of Federal enforcement.

A final rationale for Federal enforcement is that EPA must be involved in enforcement to ensure that the national pollution control standards it promulgates are enforceable and achievable. "By splitting standard setting and enforcement between two governmental levels, the Nation would risk the promulgation and maintenance of unenforceable standards."[22]

III. RATIONALE FOR STATE ENFORCEMENT

The primary philosophical justification for State enforcement of Federal environmental laws is the principle of federalism, which, as primarily expressed in the Tenth Amendment, recognizes the limited, enumerated powers of the Federal Government and the residual powers of the States. In particular, States have pervasive police powers which they were exercising to control pollution long before the Federal Government entered the field. In enacting Federal environmental statutes, Congress respected this historical involvement by acknowledging the primary responsibilities and rights of States in the protection of public health and the environment, including their primary responsibility for enforcement.[23]

Although efforts by EPA to punish States that failed to enforce Federal environmental statutes were struck down by the courts, there is little support for the contention that the Constitution compels Congress to grant States the exclusive authority to enforce Federal environmental laws.[24] Nevertheless, to those who believe that the Federal Government has become too pervasive or too powerful, devolution is justified as redressing an imbalance that has developed in the decisionmaking power between the Federal Government and the States.[25] Hence, the history of pollution control, respect for principles of federalism, and the structure of most Federal environmental statutes dictate that the States play a dominant role in enforcement.

A more practical justification for State enforcement is the claim that decentralized enforcement is more flexible and responsive than enforcement by a centralized agency such as EPA. The provisions in Federal statutes allowing a State to attain authorization to enforce the Federal program reflect the belief that the level of government closest to the environmental problem should be the primary enforcer, provided it has the capability and will to enforce.[26] But, as outlined above, the capability and will of States to enforce present a problem in most States at one time or another. Thus, to say that States should enforce where they have the capability and will does not eliminate the need for Federal enforcement but rather highlights the concerns that justify Federal enforcement.

By being closer to the problem, State enforcement agencies, in theory, can obtain better information on the nature of the compliance problem. States have more interaction with the regulated community and are better able to monitor their compliance.[27] It is not surprising, therefore, that 90 percent of environmental inspections are performed by State environmental agencies.[28] EPA simply does not have the resources or physical proximity to monitor and inspect sources in 50 States, and it may be at a particular disadvantage in trying to respond to a situation that requires rapid governmental action.

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[21] Peter Baker, Allen's Pac Took $100,000 From Company Under Probe, *Washington Post*, Oct. 25, 1995, at A1.

[22] *Law of Environmental Protection* § 6.02[3] (Sheldon M. Novick et al. eds., 1990).

[23] *See* Frank P. Grad, *Treatise on Environmental Law* § 2.03 (1992).

[24] *See Brown* v. *EPA,* 530 F.2d 215 (4th Cir. 1975), vacated and remanded per curium, 431 U.S. 99 (1977) (case remanded because EPA agrees, after losing in court of appeals, to modify regulations requiring States to enforce Federal transportation control plans); Edward L. Strohbehn, Jr., The Bases for Federal/State Relationships in Environmental Law, 12 *Eenvironmental Law Rept.* (Environmental Law Inst.) 15,074, 15,075 (1982).

[25] Evan J. Ringquist, *Environmental Protection at the State Level* 45 (1993).

[26] *National Academy of Public Administration*, Setting Priorities, Getting Results 72 (1995); *Environmental Law Institute*, Report of the Colloquium on Federal-State Relations in Environmental Enforcement 7 (1991).

[27] David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and their Citizens?, 54 *Maryland Law Review* 1552, 1571 (1995).

[28] Office of Enforcement, U.S. EPA, *Enforcement in the 1990's* Project: Recommendations of the Analytical Workgroups 2–15 (1991).

State enforcement officials also may be more responsive to local needs and conditions than Federal officials who do not reside in the area.[29] This could result in more enforcement, if enforcement policies and procedures provide for citizen input and if officials are sensitive to citizen concerns. Conversely, it could give the regulated community greater access to the agency's personnel and more influence over enforcement decisions. At least with the enforcement of hazardous waste site cleanups by State agencies, citizens want expanded Federal involvement because they view States as "more readily subject to political pressure from industry."[30]

A greater awareness of local conditions may facilitate more flexible, tailored enforcement programs that take into account local geographic, economic and social conditions and focus on the area's most severe enforcement problems. Thus, rather than all States spending the same proportion of resources on a problem regardless of the local conditions, State officials can focus enforcement programs toward areas that will result in the greatest amount of compliance and environmental protection for the same level of enforcement resources. On the other hand, awareness of local conditions, particularly local economic conditions and the economic and political power of the violator, may make State regulators less inclined to take necessary enforcement actions. For example, Maryland's failure to take enforcement action against a steel manufacturer for extensive, longstanding violations was attributed to "the cozy relationship large companies develop with State regulators."[31] In addition, while the ability to weigh the local costs and benefits may be beneficial to the immediate area, it may result in an uneven playing field if a local pollution source is allowed to avoid compliance costs that are imposed by other States.

Rare is the proponent of devolution who does not refer to Justice Brandeis' observation that one of the benefits of federalism is that it allows States to serve as laboratories of democracy for novel social and economic experiments. Indeed, many Federal environmental statutes are based on programs that were first developed at the State level. However, it is also true that EPA has played a major role in numerous advances in enforcement, such as multimedia, industry sector, and environmental justice enforcement initiatives.[32] Even where State experimentation does result in an innovative solution, the Federal Government is uniquely situated to take that successful experiment out of the State lab and see that it is implemented across the country. In fact, because "innovative policies" tend to be adopted primarily by a few States with more liberal or progressive State governments,[33] the inability of EPA to diffuse inventions to all States may exacerbate differences in environmental protection between States if laggard States fail to adopt the new policies.

One of the most compelling original justifications for Federal enforcement has been diminished by the dramatic growth in the size and capability of State environmental agencies. Because of this growth, some believe that Federal enforcement and oversight of State programs may at times undermine the efforts of competent State enforcement agencies by making the State appear less able to handle the State's problems, by discouraging violators from resolving their disputes with the State for fear that EPA may still take enforcement action, or by diverting State resources to the demands of Federal oversight or to EPA-targeted priorities that may not reflect the true needs of the State.[34]

Not all States, however, are equally able or willing to enforce Federal laws. Not surprisingly, the most eloquent proponents of a reduced Federal role in enforcement generally are from States with strong State programs. But a Federal enforcement presence that may seem burdensome in strong States appears absolutely essential in a State where relaxed environmental enforcement is seen as a way to induce economic development.[35] Therefore, although the concern that States lack the resources

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[29] *See* Ringquist, *supra* note 25, at 44.

[30] David J. Markell, The Federal Superfund Program: Proposals for Strengthening the Federal/State Relationship, 18 *William and Mary Journal of Environmental Law* 1, 33 n.86 (1993) (results of informal survey).

[31] Robert V. Percival, *Environmental Regulation—Law, Science, and Policy* 1014 (1992).

[32] *See* Office of Enforcement and Compliance Assurance, U.S. EPA, Enforcement and Compliance Assurance Accomplishments Report, fiscal year 1994 2–4 to 2–12 (1994).

[33] Richard P. Nathan, The Role of the States in American Federalism, in *State of the States* 15, 27 (Carl E. Van Horn ed., 1989).

[34] See Novick, *supra* note 22, at § 6.02[3]; Hubert H. Humphrey III & Leroy C. Paddock, The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship, 14 *Harvard Environmental Law Review* 7, 13 (1990). On the other hand, "EPA's independent authority to file enforcement actions has no doubt resulted in stronger enforcement actions in some cases enforced at the State level," *id.* at 40–41, and may make "bad" States better enforcers, Novick, *supra* note 26, at § 6.02[3].

[35] *See, e.g.,* Bob Anderson, DEQ Penalties Down for Fiscal 1996, *Baton Rouge Advocate*, Jan. 4, 1997, at 1B; Kelly King Alexander, A Toxic Job: The State's Top Environmental Watchdog Turns Over the Controversial Portfolio to His Deputy, *Greater Baton Rouge Business Report*,

and commitment to aggressively enforce environmental laws may be less justified than in the past, without a significant EPA role in enforcement, compliance and environmental quality would suffer in many States.[36]

Finally, the Federal Government cannot handle all, or even most, enforcement. In 1994, States brought approximately 80 percent of all enforcement actions.[37] Regulatory programs are covering an expanded number of increasingly small sources, making it even less likely that EPA could handle most enforcement, thereby increasing the benefits of having most enforcement done by the government entity closest to the problem. This need for State enforcement of Federal programs, however, does not argue for no Federal role, or even for a reduced Federal role. It does, however, dictate that the Federal Government not unduly interfere with the primary job of enforcement performed by the States.

Thus, while some of the original arguments for Federal enforcement may find less support today, there are still compelling justifications for a significant Federal role in enforcement.

IV. CRITERIA FOR DEFINING THE LIMITS OF DEVOLVING ENFORCEMENT

While there are many justifications for Federal enforcement of environmental laws and perhaps an equal number of arguments in favor of State enforcement, a consensus on the criteria for determining the appropriate level of government to enforce environmental laws is lacking. Most arguments for further or complete devolution of enforcement to the States are ideologically based. Federalism, it is contended, mandates that without a compelling justification for Federal involvement, the policing of pollution is best left to the States.

Yet federalism claims may mask a hidden agenda of deregulation—an often unspoken benefit of more decentralized enforcement is not just that it allegedly will work better or be more responsive to local concerns, but it is also likely to be less effective and result in less regulation if States are unwilling or unable to aggressively enforce the law. President Reagan's New federalism was not just an attempt to transfer power back to the States; it also aimed to eliminate the perceived regulatory excesses of pollution control regulations.[38] Devolution wasn't just an end; it was also a means to deregulate.

Likewise, some current proponents of devolution mix their calls for a transfer of power to the States with tales of regulatory excess and a sermon on the virtues of less government regulation. Even without such obvious deregulatory goals, the hidden agenda behind earlier attempts to devolve enforcement taints the present proponents of devolution and requires proponents to justify a shift in enforcement authority on public policy, not just ideological, grounds.

It is also the case that the public cares less about ideology when it comes to questions about the division of authority between the Federal and State governments and more about what works and what it costs. When asked whether Federal or State government should have more responsibility for achieving environmental protection, Americans preferred the Federal Government over State government by a 50 percent to 38 percent margin.[39] According to one survey, 60 percent of the public opposes reducing the compliance powers of EPA, while 70 percent feel the Federal Government has not gone far enough to protect the environment.[40] These polls support the observation that "[t]here is no guarantee that Washington can do any better, but in the face of State and local failure the American public tends to turn to the national government. In fact, the public looks to the national government to solve any major problem, regardless of how successful the other levels of government have been."[41]

Therefore, if we should respect the desires of the public and base the limits of devolution on who gets the job done rather than on ideology, then what we need are pragmatic grounds for any further devolution of enforcement authority. Sound public policy criteria and demonstrated results, not abstract political doctrines of

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Nov. 2, 1993, at 22 (enforcement actions and penalty assessments decrease under new governor; agency accused of protecting economic interests of industry at expense of environment).

[36] See Ringquist, *supra* note 25, at 151; Mosher, *supra* note 16, at 186.

[37] Office of Enforcement and Compliance Assurance, U.S. EPA, *supra* note 32, at 2–2 (EPA brought a record 2,246 enforcement actions; States took 11,334 actions).

[38] *See* J. Clarence Davies, Environmental Institutions and the Reagan Administration, in *Environmental Policy in the 1980's: Reagan's New Agenda* 143, 151 (Norman J. Vig & Michael E. Kraft eds., 1984).

[39] Albert R. Hunt, Federalism Debate Is as Much About Power as About Principle, *Wall Street Journal,* Jan. 19, 1995, at A19.

[40] Margaret Kriz, The Green Card, *National Journal* 2262, 2265 (Sept. 16, 1995); *Clean Air Trust, Americans Want Tougher Stance on Pollution* (October 1995) (on file with author).

[41] J. Clarence Davies III & Barbara S. Davies, *The Politics of Pollution* 220 (1975).

federalism versus nationalism or unspoken agendas of deregulation, should determine the level of government that is most appropriate to enforce environmental laws.

Surely the first criteria for any pragmatic devolution ought to be the relative effectiveness of Federal and State enforcement. There is great concern that the present amount of governmental enforcement is inadequate. Polls show that an overwhelming percentage of the public wants stricter enforcement of existing environmental laws,[42] and rightly so, given that violations of Federal environmental laws are widespread.[43] Two-thirds of corporate counsel admitted in 1993 that their businesses operated in violation of environmental laws during the past year.[44] Half of all corporate environmental managers believe that the Federal Government's enforcement is inadequate, citing the need for more enforcement to ensure that all companies are treated equally.[45]

The difficulty lies, not in gaining agreement on the need for more effective enforcement, but in defining and measuring enforcement effectiveness. While EPA often focuses its resources on high visibility cases that advance the goal of general deterrence, States have traditionally taken a less confrontational approach, often preferring to work informally with the violator to bring it back into compliance.[46] Thus, attempts to evaluate the effectiveness of an enforcement program through the number of enforcement actions or the size of the penalties assessed may overlook other important measures of compliance. Even if there were agreement on some "objective" measure of enforcement success, because EPA often takes the lead in larger, more difficult cases, numbers alone are not likely to reflect the relative success of the two levels of enforcement. Thus, there is no agreement on how to define a successful program.

Ideally, measures of effectiveness could be compared for State-run programs, federally-run programs, and programs with State implementation and Federal oversight. However, there is no published empirical study comparing the effectiveness of Federal and State environmental enforcement, leading one commentator to observe that although it is often claimed that States have advantages over Federal enforcement, "[i]t is unclear whether these State advantages are real or primarily received as articles of faith."[47]

Although a systematic study is lacking, a number of observations have been made about the success of various State and Federal enforcement programs. When Iowa returned responsibility for its municipal water monitoring to EPA in the early 1980's, EPA managed to conduct only about 15 percent of the number of inspections formerly performed by the State.[48] An EPA official observed that if only a small number of delegated States were to return their programs to EPA, because of resource constraints "there would be less enforcement, not more."[49]

Critics of the Superfund program point to the lengthy time for EPA cleanups and the small number of completed cleanups, as compared to sites addressed by State programs, as evidence of the lack of effectiveness of Federal enforcement programs.[50] However, this observation overlooks the fact that EPA, by law, focuses on emergency cleanups and the most hazardous sites. It also fails to acknowledge that the mere threat of becoming a Federal Superfund site has encouraged responsible parties to cooperate with State cleanup efforts. Undoubtedly, the influence of EPA's independent enforcement authority on the success of State enforcement programs makes it difficult to predict the results if EPA were to cease enforcement activity.

Problematic as EPA enforcement has been, State enforcement has not necessarily been any more successful. The General Accounting Office found that the track record of States in carrying out enforcement of Federal laws, particularly in assess-

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[42] *See* Dana A. Rasmussen, Enforcement in the U.S. Environmental Protection Agency: Balancing the Carrots and the Sticks, 22 *Environmental Law* 333, 338 (1991) (71 percent of public support more aggressive enforcement of antipollution laws).

[43] Robert R. Kuehn, Remedying the Unequal Enforcement of Environmental Laws, 9 *St. John's Legal Comment.* 625 625 & n.2 (1994).

[44] Marianne Lavelle, Environment Vise: Law, Compliance, *National Law Journal*, Aug. 30, 1993, at S1, S1.

[45] Government Has Too Many Rules, Too Little Enforcement, Not Enough Prevention, Environmental Managers Report in BNA Survey, [Special Report] 22 *Environmental Report* (BNA) 2386, 2386 (1992).

[46] *See* Office of Enforcement, U.S. EPA, *supra* note 28, at 2–13.

[47] Novick, *supra* note 22, at § 6.02[2].

[48] Martha Derthick, American Federalism: Madison's Middle Ground in the 1980s, *Pub. Admin. Rev.* 66, 70 (Jan./Feb. 1987).

[49] Hodas, *supra* note 27, at 1586 (quoting letter by Richard D. Morgehstern, Acting Administrator, Office of Policy, Planning and Evaluation, U.S. EPA).

[50] *See* State Cleanup Systems More Effective than Federal Superfund Program; Report Says, [Current Development] 26 *Environmental Report* (BNA) 982 (1995).

ing penalties and in ensuring that any penalty assessed at least recovers the economic benefit of noncompliance, "is even more disappointing" than the record of EPA.[51] Government studies repeatedly document the failure of States to take necessary enforcement actions for violations of water pollution, drinking water and hazardous waste regulations.[52]

Historically, withdrawal of Federal enforcement has not resulted in more State environmental enforcement. When the Reagan Administration greatly reduced Federal enforcement and increased State responsibilities, States also reduced their environmental regulatory activities, especially their enforcement of laws and regulations.[53] Indeed, if the withdrawal of Federal authority as a backstop to State enforcement efforts is coupled with reductions in Federal grants for State enforcement efforts, as is expected over the next few years because of the budgetary problems of the Federal Government, then State enforcement may become dramatically less effective than at present.

Therefore, although a lack of data hinders the ability to judge the relative effectiveness of the two enforcement programs, there is no compelling case on effectiveness grounds for eliminating or drastically reducing the Federal role.

Efficiency is the second criterion by which to judge the limits of pragmatic devolution. An efficient enforcement program would maximize enforcement effectiveness for a given expenditure, generate the lowest enforcement costs for a given level of compliance, or provide marginal benefits of increased enforcement at least equal to the marginal costs of additional enforcement.[54] Once again, lack of data prevents a conclusion on the relative efficiency of Federal and State enforcement programs.

It is clear, though, that EPA's enforcement expenditures are a small part of the overall Federal budget. Indeed, EPA's expenditures are only 0.4 percent of the Federal budget, and enforcement makes up only a modest part of EPA's total operating budget.[55] Moreover, while EPA's responsibilities have increased significantly, the buying power of EPA's budget in 1992 was only 55 percent of what it was in 1978.[56]

Federal enforcement is efficient, at least when measured in terms of enforcement dollars spent and relief received, and is even a source of revenue for the government. In 1991, for every dollar spent, civil judicial environmental enforcement actions returned $25 to the U.S. Treasury; criminal enforcement actions returned $3.[57] In fiscal year 1994, the U.S. Department of Justice's Environmental Enforcement and Environmental Crimes Sections collected more than $80 million in penalties and fines alone, all on a total budget, including all Superfund cases, of $50 million.[58] EPA's enforcement programs also return more in benefits than they spend on enforcement. In 1994, EPA recovered $151 million in civil penalties and criminal fines and more than $740 million in non-Superfund injunctive relief and supplemental environmental projects at a cost of less than $230 million.[59] These efficiencies, coupled with the high nationwide rates of noncompliance, make it hard to justify drastic cuts in Federal enforcement budgets that would have the resulting indirect effect of devolving an even greater proportion of enforcement responsibilities to the States.

In spite of these impressive statistics, it is generally assumed that States run their enforcement programs more efficiently than EPA, presumably because State

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[51] Management Deficiencies in Environmental Enforcement: "Forceless Enforcement": Hearing Before the Senate Comm. on Governmental Affairs, 102d Cong., 1st Sess. 5 (1991) (testimony of Richard Hembra, General Accounting Office).

[52] *See,* e.g., Resources, Community, and Economic Development Division, *U.S. General Accounting Office*, EPA and the States: Environmental Challenges Require a Better Working Relationship 16–19 (1995); Water Pollution Prevention and Control Act of 1991: Hearing on S. 1081 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 1st Sess. 687 (1991) (statement of John Martin, Inspector General, EPA).

[53] Martin H. Belsky, Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof, 12 *Ecology Law Quarterly* 1, 63 (1984).

[54] See *Congressional Budget Office*, Environmental Federalism: Allocating Responsibilities for Environmental Protection 21–22 (1988).

[55] Ringquist, *supra* note 25, at 20. EPA's $230 million in enforcement-related costs were less than 10 percent of the agency's $2.689 billion fiscal year 1994 operating budget. Telephone Interview with Terry Ouverson, Office of the Comptroller, EPA (Nov. 27, 1995).

[56] Ringquist, *supra* note 25, at 19–20.

[57] Council on Environmental Quality, *Environmental Quality: 22nd Annual Report* 83 (1992)

[58] U.S. Dept. of Justice, *supra* note 18, at 30, 33, 44. When injunctive relief, supplemental environmental projects and Superfund cleanup activities are included, the Enforcement Section returned $34 for every dollar budgeted; Environmental Crimes returned $7. *Id.* at 44.

[59] Office of Enforcement and Compliance Assurance, U.S. EPA, *supra* note 32, at 2–2; Office of the Comptroller, U.S. EPA, *Budget Analysis Resource System: FY94 Actual by Media, Approp.* (Nov. 1995) (on file with author).

salaries are less than Federal salaries and, by being closer to the source of the problem, travel and other costs are lower.[60] One of the few available comparisons resulted when EPA was forced to resume implementation of Idaho's air quality program for 15 months beginning in July 1991. One EPA official estimated that it cost the Federal Government at least double what it cost the State to run the program; another commentator claims that EPA reportedly spent almost five times as much to maintain the Idaho program that year as the State would have spent to do the same job.[61]

Even this natural experiment suffers from problems that make comparisons difficult. Because EPA could not hire employees for what the agency viewed as a temporary program, EPA was forced to hire more expensive private contractors to implement the program.[62] Moreover, while this example suggests that it might cost EPA more to run an enforcement program (or at least a new program) than it would cost the State to continue with its existing program, the Idaho example tells us nothing about the effectiveness of either the State or EPA-run enforcement program. Therefore, while it might cost more, a federally-run enforcement program might result in greater compliance.

Other issues further cloud any accurate assessment of efficiencies. A certain amount of overlap and duplication of effort exists between Federal and State environmental enforcement programs, as is true in other areas of dual enforcement, such as drug-related crimes, civil rights, and workplace safety. The most controversial form of duplication, independent enforcement action by EPA in an authorized State, is EPA's most effective means to oversee State enforcement programs and provides significant deterrence value.[63] While overlap increases compliance, if one level of government could implement all enforcement and attain results comparable to what are now being achieved by dual enforcement, then costs could be saved. But this is a very big "if," the general agreement that, were the Federal Government to decrease its environmental enforcement activities, many State programs would be weaker, deterrence would suffer, and noncompliance would increase.

It is also repeatedly suggested that there are certain inefficiencies with nationwide enforcement programs because they focus resources on issues that may not be problems in particular localities.[64] While this is likely true in some circumstances, national enforcement serves other important goals such as providing equitable treatment of the regulated community and helping ensure equal environmental protection for all citizens. Federal officials could address any such inefficiencies by tailoring enforcement efforts to address local problems and providing greater decision-making discretion to State enforcement officials rather than by abolishing Federal enforcement programs.

Moreover, just as EPA cannot accomplish all enforcement, it is unreasonable to assume that States can assume all enforcement responsibilities, particularly if there are reductions in Federal grants to State enforcement programs. In fact, cuts in Federal grants could have the unintended effect of increasing the need for Federal enforcement as States may become increasingly reluctant to assume Federal responsibilities that appear to be yet another unfunded mandate and may decide to return pollution control programs to EPA.[65]

Finally, pragmatic devolution requires that officials vest enforcement responsibilities in a level of government that can ensure equitable treatment of citizens and businesses. The desire to ensure that the benefits and costs of environmental protection are evenly distributed was a compelling reason for the establishment of Federal environmental programs. However, national pollution standards do little to ensure equal protection if these requirements are not uniformly enforced throughout the country.

Federal enforcement plays a major role in seeking to ensure fair and equitable treatment of the regulated community. As markets for goods and services have become increasingly national and international, centralized enforcement programs are in a unique position to provide consistent enforcement policies and practices.[66] If a company violates a Federal pollution control standard in Louisiana, then it should expect roughly the same enforcement response as a similarly situated company in

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[60] See Novick, *supra* note 22, at § 6.02[2]; Congressional Research Service, *supra* note 13, at 76.

[61] See Derthick, *supra* note 48, at 70; Stanfield, *Ruckelshaus Casts EPA as Gorilla, supra* note 11, at 1038.

[62] Stanfield, *Ruckelshaus Casts EPA as Gorilla, supra* note 11, at 1038.

[63] *See* William H. Rogers, Jr., 4 *Environmental Law* § 7.23(B)(3)(1992); Novick, *supra* note 22, at § 8.02[6].

[64] *See, e.g.,* Stewart, *supra* note 2, at 1219–20.

[65] *See* Strohbehn, *supra* note 24, at 15,079–80.

[66] *See* Margaret E. Kriz, Ahead of the Feds, *National Journal* 2989, 2990 (Dec. 9, 1989).

California or New York. Only a significant Federal enforcement program, as argued above in Part II, can maintain this level playing field and minimize the market imbalances that might result from unequal enforcement among the States.

Citizens likewise are entitled to an equitable level of environmental protection. "The justification for uniform [national] standards is that each citizen has an inherent right to the same level of environmental quality (or the same level of environmental risk)."[67] This expectation of environmental protection has become so pervasive that it is now viewed by persons of every political party "to be an inalienable right that they rank alongside liberty and the pursuit of happiness."[68] If we believe that businesses should expect similar treatment for violations of the same Federal standard, then should not a citizen of Louisiana expect that he or she will receive the same Federal protection from environmental hazards, and a comparable enforcement response for violations of Federal standards, as a person residing in California or New York?

Balanced against this right of citizens to equal protection is the desire of States to implement their own enforcement programs. However, important as it may be to respect federalism and State autonomy, national environmental standards mean nothing if citizens cannot expect equal enforcement of those standards regardless of where they live. Thus, if States alone were allowed to enforce Federal standards or if they were free to ignore noncompliance with environmental regulations or tradeoff enforcement of environmental laws for promises of economic development, then many citizens could lose the uniform levels of environmental protection legislated by Congress. If, as reflected in the legislation of national standards, there is agreement that citizens are entitled to a fundamental level of environmental protection, then some government entity must be in a position to ensure on a State-by-State basis that the equal protection of citizens is being safeguarded. Even State environmental officials recognize the role of the Federal Government in ensuring that all States provide fundamental public health and environmental protection.[69]

Only Federal enforcement can ensure that citizens, like businesses, are equally treated and equally protected. Although the need to ensure equal protection of citizens may not justify that the Federal Government perform all or even most enforcement, it does justify a substantial Federal presence to act where and when needed. As long as we recognize the right of citizens to equal protection from environmental hazards through the promulgation of uniform national standards, then some Federal enforcement is necessary to ensure that States respect and protect those rights.

V. CONCLUSION

Based on my analysis, I do not believe that devolution of all enforcement of Federal environmental laws to the States is supportable. The initial justifications for Federal enforcement, though they have changed over the past two decades, are still largely valid. In addition, although the available data is limited, the public policy criteria of effectiveness, efficiency and equity do not support a dramatic reduction in Federal enforcement. Unfortunately, this lack of data also hinders informed choices about the proper mix of Federal and State enforcement and makes it difficult to define the appropriate limits of devolving Federal enforcement.

It is apparent from the information that is available that because of resource limitations and respect for principles of federalism, the Federal Government alone cannot and should not administer all, or even most, enforcement. On the other hand, because pollution has economic and public health impacts that transcend State boundaries, States cannot execute all enforcement. States also lack the will and resources to address all violations. Environmental enforcement problems are just too large and too complex for any one level of government to handle.

To argue that there should not be a dramatic reduction in Federal enforcement is not to suggest that the Federal-State enforcement relationship could not be improved. Reforms are needed that will make enforcement programs work better by minimizing unnecessary duplication and conflicts between Federal and State programs. EPA and the States are considering a number of new oversight reform proposals, such as the development of new enforcement performance measures, "differential oversight," and increased use of block grants. Provided that issues of enforcement devolution are resolved on sound public policy, not ideological, grounds, these proposal have the potential to improve both enforcement and Federal-State relations.

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[67] Ringquist, *supra* note 25, at 68.

[68] Margaret Kriz, *The Green Card, supra* note 40, at 2264.

[69] *See* U.S. EPA, *National Environmental Performance Partnership System* 1 (May 17, 1995) (on file with author).

Therefore, I urge you to encourage EPA and the States to both: (1) gather additional data on the effectiveness and efficiency of Federal and State enforcement so that this important issue can be resolved on pragmatic grounds; and (2) continue efforts to coordinate and cooperate on enforcement so that Federal and State governments can provide the public with what they want and need—effective, efficient and equitable enforcement of Federal environmental laws.

Thank you for allowing me to testify before the Committee, and I hope that my remarks are useful to you in addressing this important issue. I will be happy to answer any questions you may have.

PREPARED STATEMENT OF TODD ROBINS, ENVIRONMENTAL ENFORCEMENT, U.S. PUBLIC INTEREST RESEARCH GROUP

I. INTRODUCTION

Good morning, Chairman Chafee, Senator Baucus and distinguished members of the Environment and Public Works Committee. My name is Todd Robins; I am an environmental attorney with the U.S. Public Interest Research Group. U.S. PIRG is the national lobbying office for the State PIRG organizations active in more than 30 States around the country. The State PIRGs are non-profit, non-partisan environmental and consumer watchdog groups with nearly one million citizen members nationwide. I also chair the Clean Water Network's Enforcement Work Group, and in that capacity, work with citizen litigators, citizens suit plaintiffs, and grassroots groups fighting illegal pollution in their communities around the country. The Clean Water Network is a national coalition of over 900 groups, including environmental organizations, labor unions, and commercial and recreational fishers, all dedicated to strengthening the Clean Water Act and its implementation in the States. All of these groups have endorsed a Clean Water enforcement platform which calls for mandatory minimum penalties for serious violations, simplified and strengthened citizen suit authority, and increased citizen right to know about polluted waterways. Finally, I am a member of the Steering Committee of the Network Against Corporate Secrecy, a network of environmentalists and community groups around the country working together to fight corporate secrecy laws and protect the public's right to know.

Fair and effective enforcement of our environmental laws is an issue of substantial importance to the PIRGs and its members. We have brought more than 80 successful citizen enforcement suits, recovering over $46 million in payments for violations. Most importantly, New Jersey PIRG helped to write and pass the country's strongest Clean Water enforcement law in 1990—a law that has been remarkably successful, and a law about which I plan to speak in some detail today.

I am here today to provide the Committee, from the perspective of the public interest, an analysis of the environmental enforcement crisis that exists in many States around the country, and to offer a vision of a more effective Federal-State partnership and how it could function to address this crisis. I would like to say at the outset what may otherwise get obscured by this discussion—namely that the public, the agencies represented here today, and law abiding companies disadvantaged by scofflaw competitors, I believe, share the same goal: which is compliance in the first place, achieved efficiently. The purpose of my testimony today is to demonstrate that the way we get there is not by voluntary, hand-holding approaches, but by creating a constructive partnership between the States, EPA, and citizens that maintains a genuine, firm and predictable threat of serious consequences for those who choose to violate pollution laws.

Specifically, I would like to make three points. The first is that the failure or unwillingness of States to enforce the law, in conjunction with corporate secrecy, immunity, and deregulatory policies in some States, has encouraged widespread violations of our environmental laws and promoted an atmosphere for scofflaws in which it simply pays to pollute. The second point is that, despite several important examples of Federal enforcement intervention in the face of inadequate State action, the U.S. Environmental Protection Agency (EPA) is not doing enough to assure compliance with the laws it oversees, but instead has also measurably reduced its commitment to effective Federal environmental enforcement in recent years. Third, and finally, the firm, but fair, no-nonsense approach to Clean Water Act enforcement that we have seen in New Jersey since 1990—characterized by mandatory minimum penalties for serious violations, stronger citizen suit provisions, better monitoring and reporting, and adequate resources—should serve as a national model for enforcement of the Clean Water Act and other Federal environmental statutes. Key aspects

of the New Jersey law are embodied in Federal legislation introduced this year by Senators Lautenberg and Torricelli (S. 645).

II. SERIOUS VIOLATIONS OF ENVIRONMENTAL LAWS ARE WIDESPREAD

Recently, representatives of polluting industries have asserted that "the vast majority of the regulated community has demonstrated its strong commitment to operating within the regulatory structure" and that environmental "compliance is the rule, not the exception."[1] However, the data EPA has compiled on Clean Water Act violations tell a different story. U.S. PIRG has endeavored to tell this story to the public throughout the 1990's by researching, analyzing, and releasing this data showing that an alarming number of major point source polluters seriously and chronically violate the law.

In March of this year, U.S. PIRG released our *Dirty Water Scoundrels* report, documenting serious violations of the Clean Water Act by the Nation's largest facilities from January 1995 through March 1996. We were disturbed to find that nearly 20 percent of the major industrial, municipal and Federal clean water permit holders nationwide were listed by EPA in Significant Noncompliance with the Clean Water Act in at least one quarter during this period.

What's more, these EPA numbers are probably just the tip of the iceberg. When we looked at industry's self-reported discharge monitoring information for just the first quarter of 1996, we found that 576—or 21 percent—of the nations's major industrial polluters exceeded their pollutant limits by 50 percent or more. That is nearly three times the number of companies EPA listed in Significant Noncompliance during this single quarter.

Unfortunately, national rates of compliance with the Clean Air Act are not readily available. The lack of information is, in part, attributable to the fact that some States seriously and purposely under-report the number of significant violations of the Act.[2] An EPA Inspector General report earlier this year found that although the State of Pennsylvania reported only six major air pollution violations in 1995, a review of the data revealed that in fact 64 of 270 Pennsylvania plants (24 percent) had committed major violations in that year.[3] According to that report, the data "strongly suggests the potential for problems in other States."[4]

III. WIDESPREAD NON-COMPLIANCE HAS BEEN ENCOURAGED BY STATES' INADEQUATE ENFORCEMENT

Clearly, when one in every five major Clean Water Act permit holders is a serious or chronic violator, compliance cannot be said to be the rule. We think the findings of the U.S. PIRG and the EPA Inspector General reports demonstrate gross and unacceptable levels of non-compliance with our environmental laws. The question, then, is: why are serious and chronic violations so widespread? The answer is obvious: our Federal environmental laws are not being enforced effectively. Weak and inconsistent enforcement at the State level encourages non-compliance, creates a "race to the bottom" in which companies shop for States with weak standards, and disadvantages law abiding companies who take their environmental responsibilities seriously. Without environmental cops aggressively on the beat, without a credible, predictable deterrent to illegal pollution, polluters have little incentive to clean up their acts and plenty of incentive to disregard the law.

Historically Weak State Enforcement

The problem of inadequate State environmental enforcement is not a new one. Indeed, in 1991 Richard Hembra, the Director of Environmental Protection Issues at the U.S. General Accounting Office, described enforcement of water quality laws as "weak and sporadic."[5] According to Hembra:

> Despite serious and longstanding violations, most enforcement actions are informal slaps on the wrist rather than formal actions, such as administrative fines and penalties. Further, even in the relatively few cases where penalties have been assessed, they are often significantly reduced or dropped . . . With-

[1] Joan Heinz, Esq. and Paul Wallach, Esq., on behalf of the Corporate Environmental Enforcement Council, before the U.S. EPA Office of Enforcement and Compliance Assurance, Public Meeting re: National Performance Measures Strategy, 2/3/97, Alexandria, Va.

[2] U.S. EPA Office of the Inspector General, Report of Audit: Validation of Air Enforcement Data to EPA by Pennsylvania, 2/14/97.

[3] Ibid.

[4] Ibid.

[5] Richard Hembra, Director of Environmental Protection Issues at U.S. General Accounting Office, Testimony before House Public Works Committee's Subcommittee on Water Resources, May 14, 1991.

> out enforcement, dischargers have little incentive to incur the cost of pollution control. At the same time, industrial dischargers that do abide by program requirements are unfairly placed at a disadvantage with those who choose not to invest in pollution control equipment and practices.[6]

In a 1989 EPA Inspector General audit of enforcement under all EPA programs, the IG concluded that penalties rarely were sufficient to recover the economic benefit the violator had gained from avoiding compliance.[7]

> When penalties are reduced to below what it would cost to comply with the environmental laws, they encourage rather than deter noncompliance. Small fines and lengthy time limits to achieve compliance promote a pay-to-pollute mentality.[8]

The Enforcement Crisis Has Worsened

Today, the problem in many States appears to be growing worse. A significant number of States around the country have explicitly reduced, or even dismantled, their already weak, under-funded environmental enforcement programs under the philosophy that voluntary, hand-holding compliance assistance efforts will achieve compliance more efficiently.[9] State and EPA data, as well as anecdotal evidence from around the country indicates that the opposite is true: as the numbers of inspections conducted, enforcement actions taken, and penalties collected by State environmental departments have declined rapidly and dramatically, rates of non-compliance, as described earlier, have remained persistently high and in some States have worsened. It is critical to note that when a decrease in enforcement actions and penalties is accompanied by a parallel decline in violations, as has happened in New Jersey under a mandatory minimum penalty scheme that I will discuss later, the goal of compliance efficiently achieved has been met. The data and information U.S. PIRG has gathered from around the United States demonstrate that most States are nowhere near this goal, and many are headed in the wrong direction.

U.S. PIRG is currently in the process of compiling information on State environmental enforcement into a comprehensive national report. What follows is a sampling of what we have learned, containing data and examples that are either particularly egregious or may be of special interest to members of the Committee:

• The Commonwealth of Virginia and its Department of Environmental Quality (DEQ) have received significant publicity as a leading example of States' "resistance to vigorous enforcement of Federal environmental laws."[10] In 1993, citizen groups filed a petition asking EPA to revoke Virginia's delegated authority to implement the Clean Water Act for the Commonwealth's failure to correct long-standing violations and its failure to pursue adequate enforcement penalties, among other things.[11]

Since then, the situation has only deteriorated. According to a recent report by the Virginia General Assembly's Joint Legislative Audit and Review Commission, top DEQ officials "have chosen to disregard the State's laws and Constitution and were skirting Federal environmental requirements to favor industry."[12] Water inspections are down 38 percent since fiscal year 1990; DEQ has not maintained computerized water compliance information for over 2 years; enforcement referrals to the Office of the Attorney General have fell from 30 in fiscal year 1989 to 1 in fiscal year 1996; civil penalties for water violations in fiscal year 1996 totaled $4,000, a 98 percent decline from fiscal year 1994, and civil penalties for hazardous waste violations dropped by 94 percent in the same period.[13] According to the report, this decline in enforcement "does not correlate to any increase in compliance with the law."[14]

• Although approximately 26 percent of major Oklahoma water polluters were listed by EPA in "Significant Non-Compliance" with their Clean Water Act permits

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[6] Ibid.

[7] EPA Office of the Inspector General, *Capping Report on the Computation, Negotiation, Mitigation, and Assessment of Penalties Under EPA Programs,* September 1989.

[8] Ibid.

[9] Tom Arrandale, "Can Polluters Police Themselves," *Governing,* June 1997.

[10] Cushman, 12/15/96.

[11] Chesapeake Bay Foundation, Environmental Defense Fund, Petition for Corrective Action, An Order Commencing Withdrawal Proceedings, and Other Interim Relief With Respect to Virginia's Water Pollution Control Program, before U.S. EPA Region III, 11/5/93.

[12] Joint Legislative Audit and Review Commission of the Virginia General Assembly, Review of the Department of Environmental Quality, 1997.

[13] Ibid.

[14] Ibid.

at least once from July 1993 through March 1996,[15] Oklahoma's Department of Environmental Quality (DEQ) collected a total of $1,000 in fines for water violations from fiscal year 1994 through fiscal year 1996.[16] The story of DEQ's Air Quality Division is similar: notices of violation and consent orders have decreased in recent years, and fines for air pollution violations dropped 86 percent from fiscal year 1994 to fiscal year 1996. Weak air pollution enforcement in Oklahoma is not a new problem, however. One longstanding beneficiary of DEQ's unwillingness to enforce air pollution laws has been the Sun Oil Company refinery in Tulsa. According to a January 1989 internal Sun Oil memo, their Tulsa facility reported fewer environmental violations than other Sun refineries because, among other things, DEQ did not conduct routine inspections of the refinery to monitor compliance.[17] More recently, residents nearby the refinery have been pressing DEQ to take action against Sun for repeated nighttime releases of sulfur, hydrocarbons, and hydrofluorides—some of which have sent neighbors to the hospital with headaches and lung ailments—but the department has still never conducted an inspection or issued a Notice of Violation.[18]

• In *Alabama*, after several years of steady cuts in the State Department of Environmental Management's (DEM's) budget, waterway assessments and discharger inspections are at an all-time low. Inspections dropped 62 percent from 1994 to 1995 alone, and the percentage of waters assessed by the State in 1994 was only 17 percent, the lowest in the southeast.[19] Meanwhile, Alabama ranked tenth worst in the Nation with 44 major water polluters listed in Significant Non-Compliance with the Clean Water Act from January 1995 through March 1996.[20]

• According to U.S. PIRG's March 1997 study, the State of *Missouri* ranked third worst in the Nation with 44 percent of its major water polluters in Significant Non-Compliance with the Clean Water Act at least once during a recent period. A review of Clean Water Act permit files at the Missouri Department of Natural Resources by the Ozark Chapter of the Sierra Club revealed that many of the listed non-compliers have long histories of almost constant violations of water standards. The files of the State's two major lead mining companies, Doe Run and Asarco, showed steady patterns of violations going back as far as 1984 and 1968, respectively. In fact, the records on Asarco indicate that the company has never been in compliance with the Clean Water Act, demonstrating that Missouri DNR's enforcement program has not provided a credible deterrent that succeeds in returning violators to compliance.

• In *Florida*, where civil penalties imposed against violators by the Department of Environmental Protection (DEP) are down in some regions of the State by 90 percent since 1993,[21] the State's recently delegated Clean Water Act permit program is particularly troubled. In 1995 and early 1996, 87 major facilities in Florida were listed by EPA in Significant Non-Compliance with the Clean Water Act, the second highest number of violators in the country for that period.[22] What is worse is that a substantial number of those polluters were violating out-of-date permits: recent U.S. EPA Region IV statistics indicate that 41 percent of Florida's major industrial facilities are operating with expired permits, the worst in the southeastern region.[23]

• A recent U.S. EPA Region I audit of the Connecticut Department of Environmental Protection's (DEP's) enforcement program revealed serious shortcomings in the department's water bureau.[24] According to the audit, the water bureau shifted most of its enforcement personnel to other areas in 1993, and since then has conducted significantly fewer inspections and issued many fewer notices of violation for water violations. In addition, notices and orders issued or negotiated since late 1992 have gone unmonitored.[25] During the same period industrial non-compliance with the Clean Water Act has worsened—with one in five of the State's major industries in serious violation from mid–1993 through 1994[26] and one in four in serious viola-

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[15] U.S. PIRG, *Dirty Water Scoundrels,* March 1997, *Permit to Pollute,* June 1995.
[16] Oklahoma DEQ, Annual Report, Fiscal Years 1994, 1995, 1996.
[17] Internal Sun Oil Memo, from W.R. Clarke to W.T. McCollough, 1/3/89.
[18] Telephone conversation with B.J. Medley, Citizen Activist, Tulsa, OK, 6/6/97.
[19] Greg Jaffe, "Officials Fear EPA Takeover in Alabama," "*The Wall Street Journal Southeast Journal*, 2/14/96.
[20] U.S. PIRG, March 1997.
[21] *St. Petersburg Times,* "Has State Environmental Watchdog Lost It's Bite?" 4/13/97.
[22] U.S. PIRG, March 1997.
[23] U.S. EPA, Region 4 NPDES Permits Update, May 1997.
[24] U.S. EPA Region I, Draft Multimedia Review of the Enforcement Programs of the Connecticut Department of Environmental Protection, November 1996.
[25] Ibid.
[26] U.S. PIRG, June 1995.

tion from 1995 through early 1996.[27] The audit also found that DEP ignores chronic violations, delays initiation of enforcement actions, substantially reduces penalties without justification, and systematically fails to recover the economic benefit gained by violators from avoiding compliance.[28] Most recently, the department has come under scrutiny for accepting a relatively low fine from MacDermid chemical company, whose 1994 spill of 1,500 gallons of corrosive, copper-containing liquid into the Naugatuck River killed 12,000 fish. MacDermid's C.E.O. has been identified as a political contributor to Governor Jim Rowland.

• Recent data show that more than 40 percent of *South Carolina's* major industrial water polluters were considered in Significant Non-Compliance with their permits during 1995 and early 1996, the third highest percentage in the U.S. for that period.[29] One company not on that list was Laidlaw, a company that operates a hazardous waste incinerator in the State. When citizens sued Laidlaw for dumping significant quantities of mercury over its permit limits into a nearby stream, the State Department of Health and Environmental Control (DHEC) imposed a modest penalty in order to block the citizen suit from proceeding. When the court found that civil penalties that amount to less than the economic benefit to the polluter are not sufficient to block a citizen suit, DHEC simply relaxed Laidlaw's mercury limit so significantly as to make the violations "go away."[30]

• Although 53 major water polluting facilities in *New York* committed serious Clean Water Act violations in 1995 and early 1996,[31] the New York State Department of Environmental Conservation (DEC) experienced a 45 percent decline in the number of formal water enforcement actions it initiated from 1992 to 1996.[32] In addition, according to U.S. EPA's Office of Enforcement and Compliance Assurance, DEC has issued general stormwater permits to only 14 percent of the 10,000 industrial facilities and municipalities subject to stormwater controls. Among the worst casualties of DEC's neglect is Lake Onondaga, widely regarded as the most polluted lake in the United States. Despite the fact that the lake's primary polluter, the Metropolitan Syracuse Sewage Treatment Plant (Metro), settled a citizen suit and agreed in 1988 to develop a plan to come into compliance, today no clean-up plan yet exists, much less any action to reduce pollution in the lake. In the almost 10 years since the settlement, DEC has taken no affirmative action against the county to enforce the agreement.[33]

• From July 1995 to June 1996, 70 percent of the 334 facilities permitted to discharge pollutants into Puget Sound in *Washington* committed violations, the overwhelming majority of which were repeat violations. Of the violators, 35 percent were listed as serious or chronic. Nonetheless, the State imposed penalties against only 10 percent of the repeat violators during this period.[34]

• Although a recent Mellman Group poll showed that an overwhelming majority of *Louisiana* voters support stronger clean water, clean air, toxic emissions, and right to know regulations and believe businesses lobby to weaken environmental laws out of greed rather than concerns about job losses,[35] the Louisiana Department of Environmental Quality has, nonetheless, steadily reduced its commitment to enforcement of current laws in recent years. From 1991 to 1996, enforcement actions have declined by 32 percent, the percentage of enforcement actions with penalties assessed dropped from 14.7 to 5, and the total number of penalty dollars assessed has dropped by 82 percent.[36] In addition, the State House of Representatives has passed an audit privilege and immunity law that, if enacted, will be among the broadest and most pro-business self-audit laws in the county.[37] Meanwhile, Louisiana ranked eighth worst in the country, with 57 major facilities listed by EPA in Significant Non-Compliance with the Clean Water Act from 1995 through early 1996.[38]

• According to a report last year of the Environmental League of Massachusetts Education Fund, the *Massachusetts* Department of Environmental Protection has been substantially less aggressive about penalizing behavior that violates environ-

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[27] U.S. PIRG, March 1997.
[28] Ibid.
[29] U.S. PIRG, March 1997.
[30] Telephone conversation with Carolyn Pravlik, Esq., attorney against Laidlaw, 6/6/97.
[31] U.S. PIRG, March 1997.
[32] Based on U.S. EPA Permit Compliance System data.
[33] From materials provided by Timothy P. Mulvey, Onandaga Lake Cleanup Corp., 6/5/97.
[34] Puget Soundkeeper Alliance, 1997.
[35] Mellman Group poll, January 1997.
[36] Robert Keuhn, Tulane Law School, June 1997.
[37] Christi Daugherty, "Polluter, Heal Thyself, Environmental Self-Audits Would Let Louisiana Polluters Off the Hook," *Gambit,* April, 1997.
[38] U.S. PIRG, March 1997.

mental protection laws in recent years.[39] While the department has been issuing more "Notices of Non-compliance," (NON) analogous to a warning rather than a ticket, administrative penalties have dropped by more than half since 1989.[40] A recent EPA Region I audit found that NONs were issued when penalties should have been, including a case where a paper company had multiple serious Clean Water Act and Resource Conservation and Recovery Act violations.[41] Also, inspectors returned to the scene of violations to follow up on subsequent compliance steps in fewer than 2 percent of the cases during 1995 and 1996, despite State guidelines requiring subsequent inspections.[42]

• In *California*, the San Diego Regional Water Quality Control Board (RWQCB) announced its formal decision to commit resources to permitting of new facilities, in order to encourage development, rather than enforcement, according to environmental advocates.[43] One example of weak enforcement involved the San Diego County sanitation district, which caused 3,700 sewage spills, dumping 86 million gallons of sewage into surface waters that flow into San Diego Bay in the past 7 years. The RWQCB assessed $5 million in penalties, and then settled for $300,000, despite the fact that the sanitation district had avoided $18 million in costs as a result of its long history of exceedences.[44]

While these data and cases represent only a sampling of the many examples of States beating a retreat from their responsibilities to enforce environmental laws, they illustrate that an alarming number of States are increasingly allowing for strong influence by those being regulated, while others are simply dismantling environmental protections altogether. Moreover, when viewed in the context of persistently high rates of environmental non-compliance, these findings demonstrate that the current approach at the State level of compliance assistance without the underlying deterrent of strong enforcement tools at the ready has sent the message to industry that environmental compliance is voluntary, not mandatory. As State agencies seek to pat the backs of the entities they regulate, with an occasional slap on the wrist, the result is that, for scofflaws, it pays to break the law, and for law-abiding companies, the playing field is tilted against them.

State Self-Audit and "Regulatory Innovation" Legislation Further Threaten Enforcement

We believe the evidence we have presented raises serious questions as to the ability, or inclination, of the States to protect the environment and the health and safety of their citizens. As for the ability of States to carry out the mandates of Federal environmental law, an increasing number of State officials make the legitimate complaint that inadequate Federal funding significantly impedes the implementation of Federal environmental programs.[45] Nevertheless, most State officials have chosen not to join citizen groups and environmentalists in their call to improve environmental funding by shifting the burden from the tax-payers to the polluters. Creating polluter-pay mechanisms to fund enforcement and other environmental programs would be practical and equitable in a time of fiscal constraint.

Nevertheless, many State officials have echoed the deregulatory rhetoric of corporate interests that labels EPA, other Federal agencies, and the Federal programs they oversee as harmful to economic development, and have proceeded to create further, more serious resource shortages by actively cutting their own environmental agency staffs and budgets.

What is more, many States have pursued environmental policies that reflect this anti-Federal sentiment and reveal that the problem of inadequate State enforcement may have more to do with inclination than ability. Although couched in the attractive language of "flexibility," "innovation," "local control," and the like, these policies seem aimed instead toward effectively minimizing protection of the environment and public health in what has been characterized as a "race to the bottom."

For example, 21 States, have passed "audit privilege" and/or "immunity" laws that dangerously undermine both enforcement and the public's right to know. Citizens groups in *Idaho, Ohio, Colorado, Michigan,* and *Texas* have petitions pending before U.S. EPA asking the agency to withdraw these States' authority to enforce Federal

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[39] Donna Tesiero, James Gomes, Enforcement Trends at the Massachusetts Department of Environmental Protection 1989–96, May 1996.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Telephone Conversation with Laura Hunter, Environmental Health Coalition, San Diego, CA, 6/5/97.

[44] Ibid.

[45] U.S. General Accounting Office, EPA and the States: Environmental Challenges Require a Better Working Relationship, GAO/RCED–95–64, 4/3/95.

environmental laws in light of the obstacles the audit laws potentially pose to enforcement and victim compensation. Audit privilege laws, which allow a company that discovers its own violations and corrects them to conceal all internal evidence of its violations from the government and citizens, keep vital information out of the public's hands. Under audit immunity laws, a company's voluntary disclosure of information regarding its violations immunizes the company from any civil penalties.

The rationale behind these laws is to give incentives for more thorough, voluntary internal reviews of corporate behavior.[46] However, that rationale, like the rationale behind voluntary compliance, is based on an assumption of good faith by polluting companies and largely ignores the potential for abuse. By cloaking routinely generated corporate information in secrecy, audit privilege laws can make it more difficult for those outside, in communities affected by the company's practices, from knowing what the company is doing and holding it accountable. The sunshine provided by strong right to know laws, combined with a genuine threat of firm, but fair enforcement far better serves the goal of encouraging voluntary compliance, as we have seen in New Jersey, where a strong water enforcement program has companies taking their permits seriously.

In a most recent development, some members of the Environmental Council of the States, a body of State environmental commissioners, have drafted a legislative proposal to authorize States to develop and implement "regulatory innovation projects" where any Federal standard or requirement under the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, or the Resource Conservation and Recovery Act could be waived with no prior U.S. EPA approval.[47] This draft bill, being formally circulated among commissioners and informally circulated in Congress, would also allow minimum Federal standards to be waived with no requirement of superior environmental performance, and would actually allow projects that increase the risk to human health or further degrade the environment, as long as the increase is not "significant." The bill also makes no guarantee of equal public participation and accountability in the development of projects, and would prohibit Federal and citizen enforcement of waived Federal standards.

Proposals such as this are irresponsible and manifestly inconsistent with the States' mandate to protect the environment and the public whose health would be put at risk. Indeed, it is critical to note that, in asserting our grave concern about the problem of poor or nonexistent environmental enforcement and other deregulatory policies by the States, our interest is not merely in achieving compliance for compliance's sake. The widespread violations that occur in the vacuum created by lax enforcement often have serious consequences for the environment and public health.

Although the attorney for Smithfield Foods, Inc., the pork producer recently held liable for illegal dumping into the Pagan River in Virginia, claims "[t]here's a difference between discharging of a pollutant [over legal limits] and pollution," the facts in many cases around the country demonstrate otherwise. To cite from just a few of the examples discussed earlier, the illegal releases by the Sun refinery in Tulsa repeatedly sent its neighbors to the hospital, the MacDermid spill in Connecticut killed thousands of fish in the Naugatuck River, and Lake Onandaga has been pronounced "dead" to aquatic life after decades of violations by the Syracuse sewage treatment plant. In fact, a scientific consensus is emerging that the threats to human health and the environment posed by toxic pollution are more insidious than once thought—toxic chemicals cause not only cancer, but also reproductive, respiratory, endocrinological, neurological, and developmental health problems in humans and other animals.[48] In addition, these problems can be passed from one generation to the next.

Therefore, when we talk about poor enforcement and serious violations, more than the legal status of the violator is at stake, especially for those in communities downwind or downstream, and that is why this is no time to be talking about relaxing environmental standards and transforming our environmental law system into one of voluntary compliance.

IV. DESPITE NEED FOR STRONG OVERSIGHT, FEDERAL ENVIRONMENTAL ENFORCEMENT HAS ALSO DECLINED

When enforcement works the way it is supposed to, providing a credible deterrent to illegal conduct, States should be able to achieve environmental compliance more

[46] Sanford Lewis, "Feel-Good Notions, Corporate Power & The Reinvention of Environmental Law," Good Neighbor Project for Sustainable Industries, 1997.

[47] ECOS, "The Environmental Regulatory Innovation Act of 1997," draft, April, 1997.

[48] *See*, for example, U.S. EPA, Draft Reassessment of Dioxin's Toxicity, 1994.

efficiently, taking fewer actions and imposing fewer penalties because permits are taken seriously. Under these conditions, as we have seen in New Jersey, the State is able to assume primary responsibility for the implementation of Federal environmental laws, while U.S. EPA maintains a constructive, but non-intrusive oversight role.

However, the Federal enforcement role we envision under the alarming conditions I have described today is somewhat different. From the perspective of the public interest, the eagerness States have exhibited to dismantle many hard-won environmental protections highlights our position that the Federal Government must not only continue, but improve, its oversight role of maintaining strong national standards. In recent years and months, several—but not enough—examples of EPA fulfilling its oversight role emerge:

• In *Rhode Island*, where the budget of State's Department of Environmental Management (DEM) has been repeatedly reduced in recent years and staffing has dropped by more than 100 employees in the past 2 years, the number of State employees managing wastewater permits has dwindled to just two people.[49] As a result, permits for most treatment plants have expired and violations at others persist, causing closed shellfish beds, destroyed habitat, and lost recreational opportunities. Serious problems with DEM's RCRA, air, and pesticide programs have also developed.[50] In response, U.S. EPA's Region I intervened earlier this year in Rhode Island's budget process, and has been working with the State to rebuild DEM in order to avoid an EPA takeover of the State's environmental programs. Recent reports indicate an agreement is imminent and adequate staffing levels will be restored.

• In 1995, in what was described as a "rush to remove barriers to industrial development,"[51] the State of *Mississippi* significantly slashed the budget and staffing of the State Department of Environmental Quality (DEQ), resulting in an almost complete collapse of the department's water enforcement program. Inspections fell by a dramatic 96 percent, and expired permits in the State rose 64 percent from 1993. As a result, U.S. EPA Region IV was forced to take over enforcement of industrial and municipal permits, inspection of major permitees, and the drafting of some permits.[52] Tough action by EPA prompted the State to hire 30 additional personnel to enforce pollution laws.[53]

• In *Alabama*, the Jefferson County sewer system has been experiencing overflows and bypasses for at least 20 years. Despite improvements taken by the county, the lack of attention from the State DEM allowed the problem to grow worse. DEM never imposed any fines against the county, despite the fact that over one billion gallons of raw and partially treated sewage mixed with stormwater were discharged into the Cahaba and Black Warrior creeks in recent years, causing five incidents where residents were evacuated due to raw sewage flooding in their homes. After two and a half years of negotiating, citizen plaintiffs, supported by the intervention of the U.S. Department of Justice, have secured a win-win agreement whereby the County will develop a remedial plan and pay for a supplemental environmental project to reduce stormwater polluted runoff into Cahaba and Black Warrior streams.[54]

• In *Montana*, where the State's water quality enforcement program has been described as "a toothless dog, snarling and lunging at the end of a short chain,"[55] EPA intervention in some cases has also made a difference. From 1990–1994, of the 30 water violation cases the State deemed severe enough to warrant action, fines were assessed in only two, and problems persisted in more than half. In the case of Meadow Gold Dairy, where Spring Creek was virtually destroyed by the company's wastewater discharges, the State took nearly 1 year to take formal action, and then the action was to give temporary approval of the pollution due to threats that the company would shut down.[56] The same day in 1991, EPA filed a $5.2 million lawsuit, eventually collecting $265,000 in penalties for the same violation. Two years

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[49] John Cushman, "EPA Warns Rhode Island About Water Quality Effort," *New York Times, 2/4/97.*

[50] "Rhode Island and USEPA Near Deal on State Environment Budget," *State Environmental Monitor, 6/2/97.*

[51] "EPA Asks What's In the Water," *The Sun Herald, 9/95.*

[52] Robert McGhee, Acting Director of Water Management Division, U.S. EPA Region IV, Letter to Barry Royals, Surface Water Division, Mississippi DEQ, 8/9/95.

[53] Charles Seabrook, "U.S. Asked to Control Georgia Waters," *The Atlanta Journal-Constitution, 1/11/97.*

[54] Beth Steward, Cahaba River Society Newsletter, 1997.

[55] "Toothless, Montana's Water Police Choosing Not to Penalize Most Polluters," *Independent Record,* 7/17/94.

[56] Ibid.

later, Meadow Gold again began applying its wastewater illegally. No action was taken by the State.

• With respect to *Idaho, Michigan, Ohio*, and *Colorado,* EPA has maintained a strong position against these States' audit privilege and immunity laws. In Idaho, when EPA notified the State earlier this year that its audit privilege law would need to be changed before the State could receive final approval to carry out the Clean Air Act, the State legislature decided to allow the audit law expire at the end of the year. In addition, EPA has taken a similarly strong stand in *Louisiana* in the midst of a heated legislative battle surrounding a particularly pro-business self-audit proposal, threatening to withdraw the State's right to administer Federal environmental programs if the law is enacted.[57]

As these cases indicate, Federal Government intervention can play a critical role in protecting minimum standards of public health and environmental protection when States fail to fulfill their delegated responsibilities. However, given the widespread nature of inadequate or nonexistent State enforcement, EPA could be and should be doing more. Despite cries of EPA "overregulation" by State officials, the EPA enforcement presence, if anything, has dwindled. Again, the numbers are illustrative:

- While EPA Clean Air Act inspections of stationary sources have increased, Clean Water Act inspections are down 31 percent, Safe Drinking Water inspections are down 42 percent, Toxic Substances Control Act inspections are down 38 percent, and pesticidspections are down 80 percent since fiscal year 1994.[58]
- Similarly, Administrative Penalty Order Complaints and Administrative Compliance Orders fll statutes are down byercent since fiscal year 1994[59]
- Civil referrals from EPA to the Department of Justice are down 31 percent for all statutes since fiscal year 1994, with a 44 percent drop in Clean Water Act cases and a 50 percent drop in Clean Air Act cases.[60]
- In the 10 States where EPA has retained responsibility for issuing Phase I stormwater general permits, EPA has issued permits to only 16 percent of the near 10,000 facilities potentially subject to storm water controls.[61]

Thus, when viewed in the context of EPA's apparent embrace of "devolution" policies, illustrated by the 20 "performance partnership agreements" EPA has signed with States giving them increased responsibility for environmental enforcement, these declining enforcement numbers show a waning Federal commitment to step into the void when States turn their backs.

In addition, even regarding the audit privilege issue, EPA is signalling a retreat. In a recent agreement reached with *Texas,* without consultation with the citizen group petitioners, EPA gave its approval in March to several proposed amendments to the State law. If the amendments are enacted by Texas, the audit law would, nonetheless, continue to hurt the public's right to know, silence whistleblowers, and curb citizen enforcement under State law. Finally, despite the angry response in some quarters to EPA's "overfiling" in the recent Smithfield Foods case in Virginia,[62] even the Environmental Council of the States (ECOS) found in its own 1995 survey that EPA overfiling was not a common occurrence, and that when it did occur, it was often "prompted by a mutual belief that the Federal Government has an enhanced opportunity for success in the action."[63]

In our analysis, then, the problem is not too great a Federal presence, but not enough.

V. STRONG CLEAN WATER ENFORCEMENT IS WORKING IN NEW JERSEY

Clearly, current State and Federal approaches to enforcement are not working. Significant cuts in State enforcement budgets and personnel, accompanied by compliance assistance approaches that rely on little more than industry's good intentions, have failed to efficiently achieve compliance as promised. To figure out what does work when it comes to improving environmental enforcement, we need only look as far as the State of New Jersey.

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[57] Daugherty, *Gambit,* April 1997.
[58] U.S. EPA Office of Enforcement and Compliance Assurance, January 1997.
[59] Ibid.
[60] Ibid.
[61] U.S. EPA Office of Enforcement and Compliance Assurance, 1997.
[62] "Virginirm Fined $3.5 Million in Pollution Case," *Waston Post, 10/23/96.*
[63] ECOS Enforcement Survey, 6/1/95.

In 1990, New Jersey PIRG helped write and pass the New Jersey Clean Water Enforcement Act.[64] Some of the law's key provisions include mandatory minimum penalties for serious violations and significant non-compliance, requirements that penalties recover the economic benefit gained from violations, strengthened citizen suit provisions, and uniform monthly monitoring and reporting requirements for all dischargers.

The Clean Water Enforcement Act has been a remarkable success. The New Jersey Department of Environmental Protection's (NJ DEP's) assessment, and we agree, is that under the Clean Water Enforcement Act, the deterrent value and the certainty of mandatory minimum penalties has caused permittees to take their permits seriously.[65] NJ DEP's 1996 annual report states that compliance with permit limits and reporting requirements has significantly improved since passage of the Act.[66] NJ DEP's numbers are worth a thousand words: since 1992, the total number of Clean Water Act violations in New Jersey has dropped by 78 percent. According to one citizen suit attorney with extensive experience in New Jersey, although there are still some problems with underreporting violations, "at least companies have NPDES permits on tfront burner[67]

At the same time, with dischargers more widely abiding by the law, the number of enforcement actions naturally has declined as well. By prompting the agency to take timely enforcement action, especially against serious and chronic violators, the law ensures that problems are addressed quickly and more effectively, thus reducing the average amount and the total amount of penalties. Since 1992, enforcement actions are down 67 percent. While penalties rose substantially from 1991 to 1994 as longstanding non-compliance problems were finally addressed, total penalties are down 92 percent since 1994, and the average penalty amount dropped 46 percent from 1993 to 1995[68]

Under this approach everybody wins: industry wins by paying lower penalties, and by enjoying a level playing field while playing under consistent game rules; the State wins by producing better compliance more efficiently; and, most importantly, the public wins by having a more accountable system, as well as a cleaner environment. Plus, the program has been self-funding: enforcement is paid for primarily through a fund made up of penalty dollars collected from violators.

Finally, when enforcement works as it does in New Jersey, the State is able to assume primary responsibility for the implementation of Federal environmental laws, while EPA maintains a constructive, but non-intrusive oversight role. It is worth noting that in the 1995 ECOS enforcement survey, New Jersey reported no cases of Federal overfilling in Clean Water cases. "All DEP enforcement programs enjoy an excellent working relationshith EPA and do not see overfiling on cases by EPA as a signant issue,"[69] the State said.

VI. THE LAUTENBERG–TORRICELLI BILL (S. 645): A SOLUTION

The success story in New Jersey should serve as a model for the rest of the country. The Senators from New Jersey have introduced S. 645, legislation to replicate key aspects of the New Jersey Clean Water Enforcement Act at the Federal level. U.S. PIRG, the State PIRGs, and the members of the Clean Water Network strongly support this bill, because it would bring certainty, predictability, and credibility to Clean Water Act enforcement throughout the country. Specifically, S. 645 would do the following:

- By establishing mandatory minimum penalties for serious violations and requiring that all penalties recover the violator's economic benefit, serious and chronic violations will be deterred and permitees will take their permits more seriously. Also, government accountability will be improved and the playing field for businesses will be leveled.
- By strengthening the right of citizens to enforce the law themselves, communities will be better able to protect themselves and make polluters pay for the pollution they create.
- By extending reporting and monitoring requirements for dischargers, and by requiring the government to post signs warning the public of polluted waterways and contaminated fish, the public's right to know about water pollution in the places they fish and swim will be fulfilled.

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[64] N.J.S.A., 58:10A–14.1.

New Jersey DEP, 1995 Annual Report of the Clean Wateforcement Acarch 196

[66] NJ DEP, 1996 Annual Report of the Clean Water Enforcement Act, March 1997.

[67] Telephone Conversation with Carolyn Pravlik, Esq., 6/6/97.

[68] NJ DEP, March 1997.

[69] ECOS Enforcement Survey, 1995.

The time to address the environmental enforcement crisis is now. As the Clean Water Act approaches its 25th birthday this year, we urge you to support this important piece of legislation that will give States and EPA needed direction and clarity so that they may work together, in a constructive partnership, to realize the promise of this visionary law.

Thank you very much for the opportunity to share my comments with you today.

BURR & FORMAN LLP
POST OFFICE BOX 830719
BIRMINGHAM, ALABAMA 35283-0719
(205) 251-3000

ROBERT G. TATE
DIRECT DIAL (205) 458-5251

WRITER'S OFFICE:
SUITE 3100, SOUTHTRUST TOWER
420 NORTH TWENTIETH STREET
BIRMINGHAM, ALABAMA 35203
FACSIMILE (205) 458-5100

June 6, 1997

Senate Environment and Public Health Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

I want to thank the Committee for the opportunity to submit this statement and the accompanying documents. I am of the firm opinion that the Environmental Protection Agency must have the authority to file suit against those who violate the environmental laws, even in cases where it has delegated permitting and enforcement to state environmental agencies. I can best support my opinion by describing a recent experience in this regard.

I am an attorney with the law firm of Burr & Forman LLP in Birmingham, Alabama. I represented the Cahaba River Society, Inc., in *Kipp, et al. and Cahaba River Society, Inc. v. Jefferson County, Alabama*, Civil Action No.: CV-93-G-2492-S, in the United States District Court for the Northern District of Alabama, a citizen suit under the Clean Water Act against Jefferson County, Alabama which owns and operates eleven (11) wastewater treatment plants. The suit was initially filed by three individuals. My client, the Cahaba River Society, an environmental organization, intervened in the suit. The purpose of the suit was to eliminate very serious threats to the public health and the environment which were being caused by the County violating its NPDES permits and discharging untreated sewage from a number of point sources (for which they had no NPDES permit) into the Cahaba River, the Black Warrior River and their tributaries. Some of these discharges of raw sewage into the Cahaba River were upstream of the major drinking water supply for more than a million people in the area.

For a number of years, the Society had written letters, published articles in its newsletter, attended meeting and hearings in an effort to get Jefferson County to make some significant efforts to remedy these problems and eliminate the danger to the public and the environment. We had also tried to get the Alabama Department of Environmental Management (ADEM) to require the County comply with its NPDES permits and stop the illegal discharges. All these efforts went unheeded.

To give you some idea of the magnitude of the violations in our case, in one month at one of the unpermitted discharge points, we called them automatic by-passes or flap-gates, there hadbeen

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a discharge of over 50,000,000 gallons of totally untreated sewage. Additionally, in a three (3) months period at one of the wastewater treatment plants, there had been discharges of over 448,000,000 gallons of totally untreated sewage. Further, it was estimated that the County had over eleven thousand (11,000) violations of the Clean Water Act during the time period relevant to the lawsuit. We were convinced from the County's own records that the County was not making an effort to fix the problems and had no realistic plans to do so and that ADEM was not going to act.

The Clean Water Act requires a sixty (60) day notice before filing a citizen suit. The purpose of the notice is to give EPA and/or the state regulatory agency, the opportunity to take enforcement action to require the violator to remedy the situation. In our case, the Alabama Department of Environmental Management (A D E M) did nothing. This was not a complete surprise in that ADEM had issued a few administrative orders addressing some of the various problems that the County was having with its wastewater treatment plants. However, these administrative orders were basically meaningless in that they had no deadline and no penalties for the past violations or for not complying with the orders. In fact, in a letter from ADEM to the County, it was explain that one of the purpose of an administrative order was to protect the County from citizen suits.

We had filed a Motion for Summary Judgment on liability, and in late October, 1994, the Court announced that it was going to grant our motion and instructed the parties to work out a settlement. Despite repeated efforts, we could not get the County to discuss settlement. After the Judge made his announcement, but before he had entered the formal order, we were notified that the Department of Justice had been requested to file suit on behalf of the Environmental Protection Agency against the County based on the same fact situations on which our suit was founded. This was a great relief to me because I was confident that the experts at EPA would know what the County would have to do in order to fix its severely broken system. The Department of Justice filed suit in December 1994, and a meeting was set up in early December with the County attorneys and engineers, and EPA Region IV engineers and experts, along with attorneys from the Department of Justice. At the outset it was explained to the County that we wanted to give them an opportunity to sit down with us and have input into the remedial action plan. After about an hour of going back and forth, I will never forget one of the county engineers making the statement; "Well, why can't we just keep on doing what we've been doing". It was apparent that the County's engineers did not appreciate the gravity of their situation.

Subsequently, on January 20, 1995 the Court entered its formal order granting our Motion for Summary Judgment on liability and added that it expected the parties to **"work together diligently on the complex issues involved in this case and to present to this Court a reasonable plan for measures and remedies adequate in fact and in law to address the myriad problems manifested in the Jefferson County sewage treatment system"**.

Now that EPA and the Department of Justice were involved, the County began to take the Judge's mandate seriously. We began innumerable meetings and innumerable revisions of a draft consent decree. These were not just little short meetings or meetings over lunch, they were all day meetings, sometimes twice a week, with many conference calls in between, and at times they got rather intense. With the help of the EPA experts, we were able to work out a significant remedial action plan wherein the County will solve its problems. I am convinced that without the intervention of EPA and the Department of Justice we would not have been able to work out this very successful remedial action plan which is incorporated in a Consent Decree.

Whenever the Department of Justice and EPA are involved in an enforcement action in a clean water suit, they are required to get a penalty for violations of the Act. I support this principle because it is my belief that pollution has to be expensive in order to make people stop polluting. As mentioned above , someone had estimated that there were over 11,000 violations in our case. In the case of *Atlantic States Legal Foundation v. Tyson Foods, Inc.* 897 F.2d. 1128 (11th Cir. 1990) that Court described the proper way a court should go about calculating penalties. The first thing is to determine the number of violations and multiply that by $25,000. In our case, using the 11,000 figure, that came to around $375,000,000. Then, the Court is to apply various factors to determine what is a reasonable and proper fine in each particular case. One of the factors to be considered is the amount of money that the violator has saved by not complying with the Act , i.e., the economic benefit it has derived by non-compliance. During the deposition of the Director of the Environmental Services Department of the County, I asked the director, how much money, during his seven (7) year tenure as director, had the county saved by not fixing the system. His answer was three hundred million dollars ($300,000,000) just for not remedying the illegal by-passes.

From time to time during our negotiations, we had suggested to the county that they come up with some supplemental environmental project as a method to reduce the magnitude of the penalties. As time went on, nothing was forthcoming, until we finally got the county to come up with a supplemental environmental project of major proportions. The County is putting up a substantial sum of money to be used for "Greenways", that is to purchase the fee interest or a

conservation easement along the banks of the Black Warrior and Cahaba Rivers and their tributaries that will protect them from erosion, runoff and non-point source pollution.

Where was the Alabama Department of Environmental Management and what role did they play in this? For the most part, they were nowhere to be seen. The State of Alabama was made a defendant in the United States case against the County, and although ADEM occasionally sent one of its employees to attend some of the settlement negotiations, they appeared to be much more on the side of the County rather than trying to help enforce the environmental laws and regulations. We are convinced that the entire settlement will not only remove the threat to public health and the environment but will also benefit the citizens of Jefferson County in other ways. Had we waited on ADEM to act, I am sure nothing would have happened and we would still be waiting. Much of the credit goes to EPA and the Justice Department for their help and participation

Again, I thank you for allowing me to submit these comments.

Respectfully submitted,

Robert G. Tate

STATEMENT
OF
SMITHFIELD FOODS, INC.

CONCERNING

FEDERAL / STATE ENFORCEMENT ROLES
UNDER THE CLEAN WATER ACT

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

June 10, 1997

OVERVIEW

The federal-State enforcement partnership that this Committee created under the Clean Water Act 25 years ago has become a trap for businesses who negotiate with State regulatory agencies to define their effluent discharge responsibilities. That trap is not necessarily a product of flaws in statutory design; it has come about primarily because of appallingly poor coordination and blatant political gamesmanship among EPA and State agencies. The Committee needs to understand and address this growing problem because, as often happens when government fails to work as it should, regulated entities are being made to pay a very heavy price for that failure.

Smithfield Foods has become ensnarled in perhaps the worst example of this bureaucratic trap -- a situation so deplorable as to make a mockery of the goals this Committee has set for environmental protection. Over the past ten years, Smithfield worked with Virginia, under authority delegated to the Commonwealth by EPA, to develop and carry out a plan for meeting the CWA's highest goal -- elimination of pollutant discharges. EPA knew all about the plan and never objected; it even applauded Virginia's use of some $50 million in federal funds to finance the plan. Then in the fall of last year, as EPA's policy bickering with certain States reached a crescendo just before the elections, EPA decided to take a slap at Virginia by suing Smithfield for over $130 million. It's basis? EPA says that Smithfield should have spent millions of dollars for new treatment equipment that would have become obsolete immediately once Virginia's zero-discharge plan

was fully implemented. It's justification? None -- except a hypertechnical application of the Act, with a blind eye to fairness and the practical realities of the situation.

Smithfield will continue to stand up for itself even if that requires, as it surely will, the payment of substantial legal costs to defend its position. But Smithfield should not have to pay those costs and devote its management's time and attention to legal battles with EPA. Our government should work better than that. Smithfield appreciates this Committee's interest in exploring the fundamental flaws in the EPA-State relationships that have brought about this situation, and hopes the Committee will persist in developing statutory improvements designed to prevent this sort of governmental abuse in the future.

Under the Clean Water Act, Congress wisely chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). In Virginia and most other States, therefore, the Act's permitting and enforcement responsibilities were transferred long ago from EPA to the State pollution control agencies. Under a 1975 Memorandum of Understanding (MOU), EPA and Virginia made clear that the Commonwealth would deal directly with regulated entities and keep EPA informed, while EPA would function, behind the scenes, by reviewing Virginia's actions and objecting to specific State decisions when necessary. EPA may object to virtually any State permitting decision; indeed it may unilaterally veto Virginia's proposed permits. Similarly, EPA is constantly apprised of Virginia's enforcement

decisions; the Agency's responsibility is to tell Virginia when it believes tougher enforcement is required, and then if Virginia disagrees, EPA is empowered to pursue enforcement actions on its own.

Regulated entities in Virginia understand this system quite well. We know that both sovereigns will have an important role in deciding the stringency of our effluent discharge obligations, and that the more stringent position among the two will govern our operations. We know, too, that Virginia and EPA will not always agree, and that the MOU includes mechanisms for resolving any differences among the regulatory agencies.

Regulated entities such as Smithfield therefore expect, and have a right to expect, that they can deal directly with Virginia, trusting that the Commonwealth and EPA will communicate, coordinate and resolve any differences as required by the MOU. We do not also deal with EPA directly. We expect this critical mechanism of government to work as it was designed. We depend on it, and the Clean Water Act should protect dischargers when we rely on the two sovereigns to do their jobs, as provided in the MOU.

Smithfield and others in Virginia do not expect EPA to silently harbor disagreements with the Commonwealth's regulatory decisions for over a decade. We do not expect the two sovereigns to fail to communicate about fundamental and extremely costly regulatory actions. We do not expect, in the end, that Virginia believes we are in compliance while EPA asserts that we are not. And we do not

expect EPA to pursue its political agenda against Virginia by seeking to punish businesses who have relied on the Commonwealth's regulatory decisions.

These are the characteristics of bad government, and they are very much in evidence in the Smithfield case. Ironically, by implementing Virginia's regulatory directives, Smithfield is on the verge of achieving the Act's ultimate goal -- total elimination of its discharge to receiving waters. After ten years of analysis, negotiation and major improvements to public and private wastewater treatment facilities -- all known to EPA and largely capitalized by federal funds under the Act -- the Agency now comes forward to seek massive penalties against Smithfield just as the goal is being achieved. EPA's action is not about protecting water quality; Virginia took care of that. It is about scoring political points against Virginia and inflating the Agency's enforcement statistics at Smithfield's expense.

If EPA succeeds in its enforcement action against Smithfield, it will be because the federal courts are convinced that Congress has authorized EPA to delegate responsibility to the States and then ignore their decisions and agreements with regulated entities. Smithfield does not believe the Congress, or any rational policymaker, would ever intend such a result. But if that is the law, then businesses all over this Country must quickly adjust to a new reality. Businesses must always look over their shoulders for EPA's looming presence. Businesses can no longer deal directly with State regulators or place any trust in the agreements they reach because those agreements will provide no protection against federal second-guessing many years later.

If that is this Committee's policy, then EPA is headed in the right direction -- toward resumption of centralized federal control and repudiation of genuine delegation of authority to the States. The Smithfield case does not represent some complicated, middle ground. It is a clear and vivid assertion of federal authority to ignore State action. Even though EPA agrees with the outcome achieved by Smithfield and Virginia for water quality protection, it seeks to penalize Smithfield because the solution chosen by Virginia took longer to achieve than other, much more limited options that EPA believes may have been available.

Smithfield does not believe the Congress should endorse EPA's assertion of unilateral power to second guess the States in this fashion. State agencies routinely rely on their enforcement powers to extract agreements under which regulated entities will take specific actions for water quality protection rather than pursue legal challenges to standards and permits. And States frequently prefer such results to extracting civil penalties. The States will lose this leverage to accomplish their goals for environmental protection if EPA can ignore those agreements, and can unilaterally insist on penalties rather than results, as it has in this case. No regulated entity will place itself in Smithfield's current position; they will protect themselves up front by exercising their rights in State and federal courts.

This Committee need not accept Smithfield's or any regulated entity's assessment of the consequences that will follow from EPA's position that penalties must be extracted in every case. We hope the Committee will ask the States directly whether their enforcement and permitting programs will suffer. While

EPA no doubt will offer its glowing assessment of recent initiatives to salvage federal-State relations through "partnerships," we doubt that any State will be comfortable with a partner that repudiates the State's agreements with regulated entities, accuses the State of bad faith, and tosses the State's entire enforcement program into a cocked hat, as EPA has done to Virginia.

- Becky Norton Dunlop, Virginia's Secretary of Natural Resources, said in the January 30, 1997 edition of The Washington Post that EPA's behavior in the Smithfield case was "an abuse of longstanding State-federal relations," and that "many other States are watching to see if consent orders reviewed but never criticized in writing by the EPA are going to be subject to over-filing long after their implementation."
- Thomas L. Hopkins, Director of the Virginia Department of Environmental Quality; said in a September 4, 1996 letter to EPA protesting the enforcement action against Smithfield that "If DEQ cannot issue enforcement Orders with the understanding that compliance with the Order will protect the owner from further enforcement action, then DEQ cannot, in good faith, issue the Orders at all, even though they are our most effective enforcement tools."
- Environmental commissioners and directors of many States are concerned that EPA is embarked on a vendetta against Republican governors, using environmental enforcement issues as a means to score political points. Indeed, EPA did not object to Virginia's zero-discharge solution vis a vis Smithfield during the Wilder

administration, but has chosen to so object during the Allen administration, even though the Allen administration is simply following through with a decision made by the Wilder administration. In a December 23, 1996 letter to EPA Administrator Browner, the environmental leaders of Georgia, New Jersey, New Hampshire and Illinois, speaking for all of their colleagues in the Environmental Council of the States, said:

> We write on behalf of the member States and territories of the Environmental Council of the States (ECOS) seeking clarification of remarks you are alleged to have given to *The New York Times* ("States Neglecting Pollution Rules, White House Says," Sunday, December 15, 1996). In an article given unusual prominence in the *Times*, and one which strikes directly at the heart of federal State cooperation in environmental management, you are quoted as saying that a "number of States that are emboldened by the anti-environmental sentiment that began here in Congress . . . are retreating from their commitment to enforce the law." You are further quoted as comparing this issue to the "Contract with America" which you say has now "moved down to the States."
>
> States are very concerned about what appears to be a retreat on your part from the partnership relation which had been carefully and, in some instances, painfully built over the past four years. State commissioners, some of whom have worked very hard to advance EPA's interests and agenda over the past few years, and to create and administer strong State programs, are disappointed to be the objects of your apparent lack of trust.
>
> As you know, States do more than 85% of the enforcement actions currently being done. States issue most of the rules. While some States have reduced their spending on environmental issues, total State budgets for environmental purposes have been increasing over the last few years and, in the most recent information available to ECOS, they increased again during the last legislative sessions. While dollars do not always equal environmental protection, continual increased total State spending does demonstrate that the States have not walked away from their responsibilities.

> We are particularly concerned that the comments you are alleged to have made have a strong partisan flavor. We note that the States mentioned throughout the report all have Republican governors. We know that your agency has been conducting investigations in States with Democratic governors; we hope that the partisan slant in your reported comments is accidental. Clean air, clean water and proper handling of waste material should not be -- and must not become -- political partisan issues.

As described more fully in the discussion below, Section 309(g)(6)(A) of the Act is at the heart of this issue. That provision of the law precludes EPA from extracting civil penalties when a State is diligently prosecuting an enforcement action under administrative authorities comparable to EPA's under the Act. In case after case across the country, EPA is taking the position that "comparable" means exactly the same. In other words, if States exercise their discretion to secure progress toward pollution abatement rather than to collect penalties, or if they proceed without following precisely he same procedural steps EPA must follow, the Agency contends that it is free to punish the discharger with additional fines. It does not matter to EPA whether the State and the discharger had reached an agreement calling for substantial pollution-control expenditures rather than fines. Indeed, it is not the water quality result that matters at all to EPA; it is whether the State squeezed money out of the discharger and followed procedural steps precisely the same as EPA's.

The central question we hope this Committee will address is whether such negotiations and agreements matter to the Congress. If the Congress expects EPA to continue its heavy-handed practice of second guessing the States, then nothing need be done. But if the Congress envisions a more meaningful role for

State agencies under the Act, then EPA needs to be apprised of that fact before the process of negotiation and productive compromise at the State level becomes an artifact of history.

BACKGROUND OF THE SMITHFIELD CASE

Smithfield has followed a straight-forward course of action over the past ten years, in cooperation with the Commonwealth and with the full knowledge of EPA, toward protecting water quality in a realistic timeframe and a cost-effective manner. Early on, Smithfield asserted compelling objections to the scientific basis for the Commonwealth's water pollution standards, but instead of litigating those objections to conclusion, Smithfield agreed to conduct further analyses and undertake other measures desired by Virginia, and ultimately agreed to extreme corrective actions that will produce greater benefits (zero discharge) than other options (stringent standards) first proposed by the Commonwealth.

At many points in this ongoing process, EPA could have asserted itself and changed the course of action. Had it done so at times when critical decisions and commitments were being considered, then the outcome might have been different -- not necessarily better for water quality in the long run, but different in kind and in cost. EPA did not assert itself or otherwise contribute its independent perspective to the difficult decisions that had to be made. Now, EPA seeks to penalize those who did have to decide and move forward with a solution.

Stripped of extraneous considerations and examined objectively, the facts in the Smithfield case show: (1) that the Company and the Commonwealth have acted diligently and responsibly, with EPA's full knowledge, throughout the

history of this matter; (2) that contentious litigation over the increasing stringency of generally applicable State standards was avoided through good-faith negotiation and compromise; (3) that a common-sense solution is at hand which, despite delays beyond Smithfield's control, will soon achieve remarkable water quality benefits; and (4) that Smithfield has incurred, and will incur, substantial costs to implement the solution, without any economic benefit to the Company.

The Company discharges effluent into the Pagan River from two packing plants in Smithfield, Virginia. The plants are operated by Smithfield Packing Company and Gwaltney of Smithfield, LTD. In the late 1970s and early 1980s, Smithfield substantially upgraded the wastewater treatment facilities at both plants at a cost of several millions of dollars.

In 1986, the Virginia State Water Control Board (VSWCB) amended Smithfield's permit to reduce by more than half the existing limit on unoxidized nitrogen compounds (measured as Total Keldjahl Nitrogen, or "TKN"). These proposed TKN limits were based on a 1977-vintage water quality modeling effort which was scientifically flawed and justly criticized by Smithfield. The Company considered a legal challenge, but instead offered to hire, at its expense, the Virginia Institute of Marine Sciences (VIMS) to undertake a more rigorous and scientifically valid modeling effort to establish appropriate TKN limits.

The VSWCB could have attempted to defend its proposal, but instead it agreed with Smithfield that better science was a more appropriate response. The VSWCB issued an Administrative Consent Order (ACO or "Order") requiring

Smithfield to undertake this analytical program, and Smithfield agreed to comply with interim limits until the study produced "an adequate basis for confirming or modifying the Pagan River water quality model prediction." The Company also deferred its challenge to the new limits. Since 1986, with some exceptions, Smithfield has met the interim TKN requirements contained in the Order.

In 1988, VIMS completed its TKN modeling effort, in compliance with the 1986 Order. VIMS concluded that, if the discharges from Gwaltney and Smithfield Packing were combined, then water quality standards could be met through Smithfield's compliance with VSWCB's interim (less stringent) TKN limits, as set forth in the 1986 Order. The VSWCB agreed with this conclusion. The TKN question appeared to be resolved.

Just as the TKN issue was reaching a resolution, the goal posts were moved again. In 1988, the VSWCB adopted a new rule on nutrient-enriched waters and notified Smithfield that its permit would be amended to add a strict new limit (2 mg/l) on phosphorus. The limit was based on the Board's analysis of phosphorus reductions that are achievable by publicly owned treatment works discharging sanitary wastes, not by industrial dischargers. Further analysis by VIMS showed that when the proposed new limit on phosphorus was taken into account, the TKN discharge from both plants had to be cut dramatically.

This abrupt and dramatic change by Virginia meant that Smithfield could not achieve compliance. Removing phosphorus and nitrogen would require major capital improvements to add more units or completely different treatment

processes. To achieve the required limitations on phosphorus and nitrogen, Smithfield would have to add several entirely new units. Due to space constraints, Smithfield would have to completely tear up and reconfigure its existing systems before adding these new units. Finally, and worst of all, Smithfield's consultants said that there could be no assurance that such facilities could achieve continuous compliance with these new limitations.

Because its effluent is very rich in both phosphorus and nitrogen, and is unique in Virginia, Smithfield sought a variance for phosphorus. The VSWCB refused, and Smithfield had no choice but to initiate its legal challenge to the phosphorus rule. The early stages of the Company's legal challenge produced no relief from the phosphorus limitation. Left with no realistic alternative, Smithfield considered moving much of its production, entailing several thousand jobs, out of Virginia.

In 1990, the VSWCB decided that further analysis would be appropriate, and issued an Order allowing Smithfield to study the technological feasibility and cost of meeting a 2 mg/l phosphorus limit or an alternative limit. In addition, Virginia asked Smithfield to analyze the feasibility of connecting its plants to the Hampton Roads Sanitation District's (HRSD's) treatment system, thereby eliminating the Company's discharge to the Pagan. Smithfield stayed its judicial challenge to the rule and reserved its right to challenge the permit.

In 1991, the VSWCB issued a new Order setting June 15, 1991 as the deadline for Smithfield to indicate whether it would connect to the HRSD treatment

facility. The Order provided that, if Smithfield elected this option, it would complete the connection and cease discharging to the Pagan within three months of HRSD's notification that a new sewer line was available to accept Smithfield's wastewater. Smithfield would be required to construct expensive treatment facilities to meet the phosphorus limit at its packing plants only if it elected not to connect to HRSD. Smithfield agreed to dismiss, without prejudice, its pending appeal of the phosphorus standard.

Smithfield completed its analysis and decided to connect to the HRSD treatment facility. All parties, including EPA, understood at the time that this major public works project, which included construction of a 17-mile-long sewer to the Town of Smithfield and a major expansion and improvement of the HRSD treatment facility, would require four to five years to complete. EPA voiced no objection whatsoever, and Smithfield, HRSD and the Commonwealth committed themselves.

In 1991, Smithfield's VPDES permit was due for routine reissuance. Pursuant to the agreement the Board had extracted from Smithfield, Smithfield had set aside all plans to upgrade its treatment facilities and was instead conducting studies and cooperating with HRSD to ensure compatibility of Smithfield's effluent with HRSD's system. Much to Smithfield's dismay, the Draft Permit prepared by the Board and sent to EPA inexplicably contained the phosphorus standard included in the 1990 Permit modification.

Smithfield was concerned that, if issued, the Draft Permit could be later construed in a fashion inconsistent with the fundamental choice it had been

forced to make under the 1991 Order. Accordingly, Smithfield submitted comments on the Draft Permit on October 1, 1991, that squarely put the issue before the Board. In those comments, Smithfield flatly Stated:

> Compliance dates of the effluent characteristics and engineering milestones . . . cannot be met by Smithfield Foods, Inc. now that we have agreed to abandon plans to upgrade our existing facilities and [instead] tap onto HRSD when it becomes available . . . Smithfield Foods, Inc. requests that if these compliance dates and milestones are required in the proposed permit, some documentation or letter be provided by the State Water Control Board stating that alternate compliance will be maintained with Smithfield's agreement to connect to HRSD as soon as it becomes available regardless of the time frame in which this occurs.

The Board responded on October 10, 1991, with a letter reassuring Smithfield that it would not be issuing a permit which changed the Board's prior commitment to authorize Smithfield to comply by connecting to the HRSD sewer. The Board specifically Stated:

> The compliance schedules and related goals dates contained in the permit are there to afford the permittee necessary time to comply with the established effluent limitations. Any special order agreements relative to compliance with water quality standards, the Permit regulation and associated studies that have been approved by the Board take precedence over the VPDES Permit. (emphasis added).

As required, the Board provided EPA with a copy of its response, and so indicated on the original it sent to Smithfield. Meanwhile, EPA already had indicated, on July 25, 1991, that it had no objection to the Draft Permit. EPA did not alter its position after receiving the Board's response to Smithfield's comments.

Over two months later, on December 23, 1991, the Board's staff provided a memorandum to the Executive Director recommending approval of the Draft Permit. This memorandum described the 1991 Order and Smithfield's June 7, 1991, commitment to hook up to HRSD, and noted that EPA had no objection to issuance of the Permit

On January 3, 1992, the Board issued the new VPDES Permit to Smithfield, and attached to it the staff memorandum indicating that EPA had no objection to its issuance. Like the Draft Permit, the 1992 Permit simply rolled over the original phosphorus limit and the January 3, 1993, compliance deadline contained in the 1990 Permit. Given Smithfield's commitment to connect to HRSD, these provisions merely provided the official point of reference that would be needed in case Smithfield reneged on its commitment to make the HRSD connection.

The Board did not expect Smithfield to proceed simultaneously under the second alternative described in the 1991 Order by also constructing expensive treatment facilities for meeting the phosphorus limitation within one year. The 1991 Order still provided that Smithfield was obligated to comply with the phosphorous limits through the construction of additional treatment facilities at its plants only if it did not connect to HRSD, and the Board's October 10 letter, reviewed by EPA, maintained the authority of the 1991 Order after issuance of the 1992 Permit.

On June 24, 1996, after the HRSD sewer extension was completed, Smithfield connected its Gwaltney facility to the HRSD system. Smithfield also upgraded its on-site treatment facilities in order to convert the effluent into a form

that HRSD could process. All in all, Virginia's prosecution of its administrative action has required Smithfield to spend nearly $7 million to improve its water treatment facilities and to commit to paying an additional $1.5 million to HRSD in annual user fees to finance capital improvements to HRSD's public water treatment facilities. The Smithfield-financed expansion of the HRSD system will also have the collateral benefit of permitting the nearby Town of Smithfield and others to connect to HRSD, eliminating even more discharges to the Pagan River.

EPA'S ENFORCEMENT ACTION AGAINST SMITHFIELD

In bringing its federal enforcement action against Smithfield for over 5,000 alleged permit violations, EPA has tried to create the impression that it only recently discovered the Company's allegedly unlawful discharges -- that somehow the Virginia DEQ kept this information from the Agency year-after-year in their joint, quarterly enforcement status meetings. The truth is quite different.

Virginia sent to EPA each of the Orders, described above, that resulted in Smithfield's June 1991 election to connect to HRSD rather than upgrade its own treatment facilities. As noted earlier, Virginia sent to EPA a copy of its October 1991 letter to Smithfield indicating that the 1991 Order takes precedence over the 1992 permit. As Virginia's zero-discharge solution was being implemented, EPA reviewed the Commonwealth's expenditure of over $50 million in federal funds to finance the upgrading of HRSD's treatment system and construction of the 17-mile sewer specifically to accommodate Smithfield's effluent. And month-after-month over the course of many years, EPA received Discharge Monitoring Reports

("DMRs") showing that phosphorus levels in Smithfield's effluent were nearly always in excess of the numeric limits referenced in the 1992 permit. Importantly, these DMRs, which contained effluent limits pre-printed by the Virginia DEQ, indicated that Smithfield had no limit for phosphorus, consistent with the 1991 Order and its controlling effect on Smithfield's obligations. The bottom line is that EPA: (1) knew all about Virginia's strategy to end Smithfield's phosphorus discharge rather than ratchet it down; (2) approved the use of federal funding to implement the strategy; (3) had ample information and numerous opportunities to object and unilaterally set a different course; and (4) silently acquiesced in the Virginia strategy for five years.

Then something changed, abruptly and dramatically. EPA surprised both Virginia and Smithfield by bringing its federal enforcement action seeking penalties which could total over $130 million for over 4,000 phosphorus violations. EPA claimed ignorance of the past five years' events and pursued a hyper-technical interpretation of the Act: no matter what sort of agreement Virginia had reached with Smithfield, and no matter how much notice EPA had, the United States was not bound by the agreement.

How did that happen? Why has it happened now rather than in 1991, 1992, 1993, 1994 or 1995? The curious history leading up to EPA's action may shed light on the motivations and purposes behind EPA's initiative against Smithfield and Virginia:

- Over the past several years, EPA and the Allen Administration in Virginia have engaged in high-profile policy battles over a long list of

issues, including: automobile testing programs, low-emission vehicles, listing Superfund Sites, environmental audit legislation, and EPA's lack of meaningful enforcement against the District of Columbia's Blue Plains sewage treatment plant and the Lorton Penitentiary.

- In 1995, Smithfield Chairman Joseph Luter made a large contribution to Governor Allen's fundraising efforts on behalf of Republican State legislative candidates. The Governor's Democratic opponents launched a vicious political attack in the media against the Governor and the Company.
- In July 1996, just as Smithfield was connecting to the HRSD treatment facility, EPA Region III referred the case against Smithfield to the Department of Justice (DOJ) without telling Virginia officials with whom EPA meets regularly to discuss enforcement matters. In a September 4, 1996 letter to the EPA Regional Administrator, Virginia's DEQ Director protested EPA's secret action and made clear that Smithfield was in compliance with Virginia's directives.
- In July 1996, the EPA Regional Administrator met with environmental activists in Richmond to discuss "environmental issues in Virginia." According to the Regional Administrator's "talking points" for the meeting, one item for discussion was "the current challenges here in Virginia (The Allen Administration)." Following up on that meeting, one of the groups wrote to the Regional Administrator

on December 5, 1996 (11 days before the Smithfield case was filed) to discuss how to spend the money they expected EPA to extract from Smithfield in civil penalties. The Regional Administrator promptly wrote back suggesting a meeting to discuss the proposal.

- On October 18, 1996, DOJ wrote to Smithfield threatening to sue the Company. Smithfield received numerous calls from the media asking about the DOJ letter several days before we received it.
- On December 16, 1966, DOJ filed the suit against Smithfield. Again, Smithfield learned that it was being sued from reporters who had been informed earlier.
- On December 10, 1996, about a week before the DOJ suit was filed, a State legislative committee consisting of 5 Democratic members, issued a report criticizing the Allen Administration's environmental enforcement record and praising EPA's case against Smithfield in contrast to Virginia's less confrontational approach. Commenting on the draft committee report, the Virginia DEQ Director said in a December 5, 1996 letter that "EPA water enforcement staff at Region III has Stated informally that the actions mentioned in the report [the Smithfield case] were ordered by the Regional Administrator for political reasons and were objected to by the EPA enforcement staff."
- On December 20, 1996, The Washington Post and The New York Times both (by coincidence?) published editorials praising EPA's action

against Smithfield and criticizing Governor Allen. Like countless news articles in these and other newspapers, the Post editorial highlighted Mr. Luter's political support for Governor Allen. The Times stressed, as it had in earlier articles, that the Smithfield case was part of a concerted effort to strike at States that had displeased the EPA, including Virginia, Pennsylvania, Michigan, Texas and Idaho.

Did EPA abruptly reverse the position it had held since 1991 and initiate this action to support Democrats in Virginia? To retaliate against Governor Allen and his political supporter? To please environmental groups? To politicize the environment prior to the 1996 elections? None of these possibilities has yet been proven, and perhaps never will be demonstrated to a court's satisfaction. But several things have become crystal clear during the early stages of this litigation:

- EPA does not object to the zero-discharge solution being implemented by Virginia and Smithfield.
- EPA does not deny that it had ample information over the past 6 years from which it could clearly understand, and on which it could have based its objection to, the course of action on which Virginia and Smithfield had agreed: eventual elimination of Smithfield's discharge, but no interim requirement to meet any particular phosphorus standard.
- EPA's legal position is that Smithfield is liable for thousands of phosphorus violations because --

- -- EPA is not bound by the Commonwealth's agreement since the Agency never said so explicitly; EPA's failure to object during its review of a draft permit apparently does not mean what the States think it means under MOU's with the Agency.
- -- EPA's silent assent over the course of many years counts for nothing.
- -- Virginia's clear, written intent to have its 1991 Order supersede the permit is irrelevant; the old permit limits that were mechanically rolled over from 1990 into the 1992 permit should control even though they contradict the agreement.
- -- Section 309(g)(6)(A) of the Act cannot preclude EPA's quest for penalties against Smithfield because Virginia did not seek or secure a penalty as part of the 1991 agreement, and because Virginia acted under a State law that did not technically provide all of the procedural rights that third parties enjoy under the Act.

These and other legal issues in the Smithfield case will occupy the litigants and the courts for years to come. The more important issue is whether the Act should authorize EPA to proceed in this fashion at all.

The Smithfield case is only the latest of numerous attempts by EPA to assert its view of Section 309(g)(6)(A) of the Act. That Section provides, in pertinent part, that the United States is barred from seeking civil penalties whenever a State enforcement agency has "commenced and is diligently prosecuting" an administrative action "under State law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii). Under precedents established by the majority of federal courts addressing this issue, that is precisely what Virginia has done in its 1991 Order.

EPA and DOJ have attempted, in federal courts all over the Country, to propagate a much more restrictive, distinctly minority view growing out of one case in California: Citizens for a Better Environment - California v. Union Oil Co. of California (UNOCAL), 83 F.3d 1111 (9th Cir. 1996), cert. denied, 117 S. Ct. 789 (1997). The UNOCAL case put forward the view that, in order to preclude a civil penalty, a prior State administrative action must have been initiated under statutory authority that is virtually identical, in all procedural respects, to EPA's authority under Section 309(g). The Ninth Circuit appeared to believe that Congress wanted Section 309(g)(6)(A)(ii) to apply only in those very narrow circumstances where the precise authority cited by the State was identical to EPA's. It does not matter, under this interpretation, that the State had all of the relevant authority but chose, in the end, to utilize a different statutory provision in order to achieve a better result.

Addressing the same issue from a more common-sense perspective, two other U.S. Circuit Courts of Appeal have concluded that the question of

"comparability" should be examined with an eye toward the entire State statutory scheme, not merely with respect to the particular provision which the State chose to cite in its final action. In North and South Rivers Watershed Assn. Inc. v. Scituate, 949 F.2d 552 (1st Cir. 1991) and Arkansas Wildlife Fed'n v. ICI Americas, Inc. 29 F.3d 376 (8th Cir. 1994), the courts found that Section 309(g)(6)(A) precluded additional penalties in situations similar to those presented in the Smithfield case, effectively rejecting EPA's position, which was offered as amicus curiae in both cases. Most federal district courts have followed suit.

The Smithfield case will add a fourth voice to the growing chorus of U.S. Courts of Appeals interpreting Section 309(g)(6)(A). It will differ from the others, however, in this respect: Scituate, ICI Americas and UNOCAL each arose in the context of citizen suits; the Smithfield case will be the first in which the United States attempts to avoid preclusion of its quest for civil penalties by a prior State administrative action.

The United States has argued that Virginia's prior actions should not be given preclusive effect for two reasons. First, the government argues that, in issuing the 1991 Order, Virginia cited a provision of State law that confers authority to secure actions by dischargers, not exact penalties from them. The United States concedes that Virginia has the authority to assess penalties and then go to court to collect them, just as EPA does, but it contends that the Commonwealth's Order was not issued under "comparable" authority because the State penalty provisions were not cited.

What is the policy position behind such an argument? It appears to be that EPA opposes State administrative enforcement actions designed to achieve results -- even zero discharge of pollutants -- unless the State also imposes major penalties. This may make sense when it comes to satisfying EPA's insatiable appetite for enforcement bean counting to justify its budget, but in Smithfield's opinion it makes no sense whatsoever for the environment. As demonstrated by the comments of Secretary Dunlop and Director Hopkins, noted above, Virginia agrees.

Second, the United States argues that Virginia's actions were not taken under "comparable" authority because, at the time Virginia issued its 1991 Order, there was no guarantee that a third party, such as a citizens organization, could demand a hearing to contest Virginia's action. Because Smithfield consented to the Order, Virginia's procedure provided that no hearing was necessary or required. In this respect, the United States says that Virginia's administrative enforcement authority was not "comparable" to Section 309(g).

Thus, EPA's position is that Congress intended for Section 309(g)(6)(A)'s preclusive effect to apply <u>against the government</u> only when a prior State action was undertaken pursuant to State statutory provisions that, at the time, protected <u>third-party</u> participation rights. The government seizes on Senator Chafee's 1987 floor Statement, obviously aimed at avoiding preclusion of <u>citizen suits</u> where <u>citizens</u> had not been able to participate in prior State administrative actions, as the principal authority for its position. 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987).

The logic, if any, in the government's argument appears to be that Congress thought EPA should only be prevented from heaping massive penalties on top of prior State enforcement agreements if non-profit groups had been given the opportunity to argue for such a result at the State level -- in essence, to carry EPA's water in the first instance. If they had the opportunity to participate (but failed to do so), then the State's law would be comparable and EPA would be precluded from acting.

Smithfield finds it difficult to believe that the Committee could have intended such a result under the circumstances of this case. As outlined above, EPA not only had all of the necessary information concerning Virginia's actions at each juncture, but it also had the unilateral authority under the MOU to prevent the agreement, change its conditions or take any other measures EPA deemed appropriate. The Agency also could have said, at the time, that civil penalties should have been assessed in connection with the agreement; the Commonwealth and Smithfield then could have evaluated EPA's position before embarking on their chosen course of action.

In other words, EPA had the opportunity and the ability to do its own job; it did not need any third party to request a hearing and contest Virginia's administrative action. Its argument that Virginia's action cannot preclude additional EPA penalties because some hypothetical third party may have been foreclosed from the process appears, in Smithfield's opinion, to stretch well beyond the good common sense this Committee has demonstrated in the 25-year history of the Act.

CONCLUSION

In its review of federal-State relations under the Clean Water Act, the Committee has an opportunity to examine some of the most important, emerging issues concerning environmental protection and enforcement. The Act attempts to establish an intricate and sometimes delicate balance between State implementation and federal oversight. Whether that balance is achieved in practice is of major significance, not only to EPA and State agencies, but to thousands of regulated entities across the Country.

The Smithfield case contributes to the Committee's review by presenting a number of questions for examination. We believe the most important are these:

1. Should EPA be allowed to initiate major litigation, many years after States and dischargers have committed to a responsible and costly course of action, with EPA's silent assent, solely for the purpose of recovering civil penalties that no one knew would be the consequence of that commitment? It is no answer to simply defer to the courts' application of equitable principles such as laches and estoppel; these defenses almost never succeed against the United States, and the cost of litigation, by itself, imposes enormous burdens on defendants.

2. What will be the effect on the States' ability to negotiate administrative agreements with dischargers if EPA succeeds in overriding those agreements many years later by imposing significant penalties for conduct which the State clearly authorized?

3. Is EPA exercising its enforcement authority "for political reasons" -- i.e., to strike back at States that differ with the Agency's policy positions, principally those with Republican administrations and visible supporters whose activities are regulated under the Act.

4. Does the Congress intend for Section 309(g)(6)(A) to preclude EPA penalty actions only when a State has doggedly insisted on a penalty rather than coercing a discharger into performing costly corrective actions?

5. Does the Congress intend for Section 309(g)(6)(A) to preclude EPA penalty actions only when some private third party could have become involved in a State's prior administrative action against the discharger?

* * *

These are important questions. In view of EPA's increasingly aggressive posture, the Committee's review could not be better timed to evaluate the issues they raise, and to inject some common sense and fairness into enforcement policy under the Act. Smithfield hopes the Committee will solicit the views of all State environmental agencies, interested regulated entities, and members of the public in assessing these issues and formulating an appropriate policy response. In Smithfield's opinion, <u>much</u> more is needed than soothing words from EPA about federal-State "partnerships;" EPA's actions speak far louder than its words, and defy the concept of genuine partnering with the States.

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