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Observations on EPA and State Enforcement Under the Clean Water Act

Statement of
Richard L. Hembra, Director
Environmental Protection Issues
Resources, Community, and Economic Development Division

Before the
Subcommittee on Water Resources
Committee on Public Works and Transportation
House of Representatives

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Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the Environmental Protection Agency's (EPA) enforcement activities under the Clean Water Act. Our views are based on a number of GAO evaluations of EPA and state enforcement, as well as other assessments conducted by EPA's Office of Inspector General and by EPA itself (see attachment).

In summary, Mr. Chairman, our experience with EPA's water quality programs suggests that strong enforcement by EPA and the states is fundamental to their success. Effective enforcement serves as a deterrent to violations and, when violations do occur, helps to ensure that appropriate corrective action is taken in a timely manner.

Specifically, our work clearly indicates that:

-- Enforcement of our nation's water quality laws continues to be weak and sporadic. Despite serious and longstanding violations, most enforcement actions are mild, informal "slaps on the wrist" rather than formal actions such as administrative orders or fines and penalties. Further, even in the relatively few cases where penalties have been assessed, they are often significantly reduced or dropped without adequate documentation.

-- An effective enforcement program requires the development of criteria that (1) allow regulators to set enforcement priorities and (2) identify what types of enforcement actions are appropriate and when they should be taken. Although EPA has made some progress in recent years in both of these areas, additional improvements are still needed.

-- EPA headquarters' oversight of its regional offices and state enforcement activities is essential so that policy-making officials (1) know whether timely and appropriate enforcement is being taken and (2) can hold program officials accountable when it is not. EPA headquarters officials often have not tracked or followed up on enforcement activities. As a result, many enforcement problems remain unresolved.

Thus, Mr. Chairman, EPA still has a long way to go before enforcement serves as an effective deterrent against violations of the Clean Water Act. Until then, violators will continue to enjoy competitive advantages over those complying with the Act, and the Act will not realize its full potential in protecting the nation's waters. Before I discuss the points outlined above, I would like to provide a little background on how enforcement is integrated into EPA's key water quality programs.

BACKGROUND

EPA implements many of its primary water quality programs through permits that limit pollutant levels. Under the National Pollutant Discharge Elimination System Program (NPDES), limits are placed on the pollutants sewage treatment plants and industries discharge directly into the nation's waters. Under the National Industrial Pretreatment Program, limits are placed on pollutants that industrial facilities discharge indirectly into these waters through sewers that service municipal wastewater treatment facilities. These pollutant discharges often include toxic chemicals from industrial wastewater. In the Municipal Sludge Management Program, limits are placed on the toxicity allowed in sewage sludge generated as a by-product of the wastewater treatment process.

To determine if the limits are being complied with, pollutant levels are to be monitored and any violations reported to the regulatory authority. In turn, these violations are to elicit an enforcement response that can range from informal actions, such as verbal warnings or written notices of violation, to formal actions such as fines or penalties. The type of action to be taken depends on various factors, including how significant and long-standing the violations are, whether the violations are intentional, and how successful informal actions are in correcting them.

ENFORCEMENT PROBLEMS HAVE BEEN PERSISTENT

Past GAO evaluations of EPA's water quality programs have consistently identified a reluctance on the part of EPA and the states to take strong enforcement actions. For example:

-- Our 1983 report on the NPDES program revealed widespread and long-standing noncompliance with permits before formal enforcement actions were taken by EPA or the states. In some cases, noncompliance continued for years.

-- Our 1988 report on federal facilities' compliance with NPDES permits also documented that despite widespread significant noncompliance, EPA and the states rarely took timely enforcement actions. EPA and state regulators took timely enforcement actions in only about one of six cases.

-- Our 1989 report on the pretreatment program suggested that the absence of aggressive enforcement by treatment plants was an important underlying cause of discharge limit violations. For example, while about 60 percent of the plants served informal written notices of violation to dischargers, only 5 percent levied administrative fines. Furthermore, the plants often failed to escalate

enforcement when informal measures to correct violations were unsuccessful.

Some recent reviews conducted by EPA's Office of Inspector General and by other EPA offices have also found serious problems with enforcement of water programs. For example:

-- A 1990 Inspector General report on the NPDES program found that EPA regions and states had not assessed penalties in accordance with the agency's civil penalty policy, and had not adequately documented penalty reductions. In one case, a state initially assessed a penalty of $1,000,000 against a violator, but then reduced it to $57,000, and then only collected $15,000. The study also found that EPA was not ensuring that penalties recover the economic benefit enjoyed by violators for continued noncompliance.

-- EPA's Office of Water Enforcement and Permits 1989 mid-year evaluation found that state enforcement actions had decreased significantly and expressed concern with the "low level" of state enforcement activities.

Taken together, these evaluations show that poor enforcement can often be traced to fundamental program weaknesses. Mr. Chairman, I would now like to briefly discuss EPA's progress in

addressing the weaknesses in its water quality enforcement programs.

CRITERIA NEEDED FOR EFFECTIVE ENFORCEMENT PROGRAMS

Our prior work revealed that some of EPA's water quality enforcement programs have not included criteria to identify significant noncompliance or timely and appropriate enforcement actions. Although EPA has taken some steps to correct these weaknesses, the important role that these criteria play in an effective enforcement program warrants continued oversight of EPA's progress.

Setting Enforcement Priorities

With limited resources, environmental regulators are unable to take enforcement actions against all violators. Many environmental programs therefore include a system for setting enforcement priorities to target the most serious violators for enforcement action. A key part of such a system is the criteria for determining when noncompliance is "significant" enough to warrant an enforcement action.

Our report on EPA's pretreatment program illustrates how the lack of criteria to determine significant noncompliance can foster

inconsistencies among enforcement actions against discharge violators. For example, EPA headquarters considered a discharger in significant noncompliance with discharge limits if 66 percent or more of the measurements (analyses of its wastewater) exceed the same daily maximum limit or the same average limit in a 6-month period. EPA's Region IV, on the other hand, considered a discharger in significant noncompliance if 20 percent or more of the wastewater samples collected during the past 12 months contain one or more violations, provided more than four samples were taken. After dischargers complained to EPA and the states about such inconsistencies, EPA established a definition of significant noncompliance to be used in enforcing pretreatment program requirements.

We also identified the lack of significant noncompliance criteria as a problem in our 1990 report on EPA's interim sludge management program. To improve the prospects for an effective permanent program, we recommended that EPA develop criteria for significant noncompliance before the permanent program begins. Although EPA acknowledged the need for such criteria, it does not plan to formally establish significant noncompliance criteria until after the final sludge management regulations are issued, currently scheduled for January 1992. We continue to believe that EPA should not delay promulgating significant noncompliance criteria.

Establishing Timely and Appropriate Criteria

Our prior reports also illustrate the importance of identifying specific criteria for when enforcement action is required, and for the type of action appropriate for a given violation. Our report on the sludge management program found that the absence of such criteria led to significantly inconsistent enforcement responses among the states. For example, one state without formal criteria relied heavily on informal actions (such as sending written notices to violators) and allowed for a maximum fine of only $100. In contrast, another state used specific criteria for timely and appropriate enforcement. A key aspect of these criteria was the use of escalating steps that strengthened the enforcement actions until compliance was reached. If these actions did not lead to compliance, the case could be referred to the state's Department of Justice. Continued failure to comply could result in fines up to $10,000 per day.

Acknowledging the possible need for timely and appropriate enforcement criteria for its sludge management program, EPA plans to develop these criteria sometime after its final sludge program regulations are issued, which is currently scheduled for January 1992. Here again, to avert enforcement problems, we continue to believe that EPA should not delay promulgating timely and appropriate enforcement criteria.

Our report on the pretreatment program also demonstrated the value of timely and appropriate enforcement criteria. We found that the traditional role of the wastewater treatment plant as a service-oriented facility in the local community can make it politically difficult to take strong enforcement actions against industrial dischargers that pay local taxes and employ local residents. One treatment facility with a weak enforcement record had an industrial user who was reportedly discharging particularly toxic metals at an average of 3,130 percent over its permit limits. Timely and appropriate criteria could help avoid this type of problem by allowing the treatment plant to claim it is simply "following the rules" when taking an enforcement action.

Although EPA has developed timely and appropriate criteria guidance for pretreatment enforcement, the guidance allows for a great deal of discretion on the part of enforcement officials. Accordingly, the guidance acknowledges that EPA oversight is imperative to ensure that enforcement officials are, in fact, taking appropriate actions.

Mr. Chairman, I would now like to discuss the critical role oversight plays in an effective enforcement program.

IMPORTANCE OF EPA HEADQUARTERS OVERSIGHT OF REGIONAL OFFICE AND STATE ENFORCEMENT ACTIVITIES

Although criteria for significant noncompliance and timely and appropriate actions are vital elements of an effective enforcement program, systematic EPA headquarters oversight over its regional offices and over state enforcement is critical to a program's success. Headquarters oversight is necessary to identify cases in which timely and appropriate enforcement actions are not being taken and to follow up with program officials to discuss why such actions are not taken and how they can be resolved.

Our prior reports and ongoing reviews of EPA's water quality programs indicate that EPA's regional offices and states frequently do not adhere to EPA's enforcement criteria and that greater headquarters' oversight is needed. For example, our report on federal facilities' compliance with the Clean Water Act noted that despite the absence of timely and appropriate enforcement actions by EPA regional offices and the states, headquarters did not consistently make follow-up phone calls to the regions to discuss the cases. As a result, some federal facilities remained in significant noncompliance for up to 2 years without receiving an enforcement order.

Our report on the pretreatment program also concluded that greater EPA oversight was needed to deal with limited enforcement against noncomplying wastewater treatment facilities. In fact, we noted that EPA's Office of Water cited ineffective oversight as a material program weakness under the Federal Managers' Financial Integrity Act. Our report on the sludge management program also stressed the need for greater EPA oversight of regional and state enforcement activities.

Recent EPA evaluations have also called for improved headquarters' oversight. For example, the EPA Inspector General's 1990 report on NPDES enforcement concluded that greater compliance could be achieved if EPA increased its oversight of the enforcement program. Similarly, the 1989 mid-year evaluation by the agency's Office of Water Enforcement and Permits concluded that greater attention needed to be paid to encourage state enforcement efforts.

Given the critical role oversight plays in an effective enforcement program, we are continuing to include this component in our ongoing reviews of EPA's water and other environmental programs. For example, in a review of the NPDES program in the Great Lakes area, we plan to examine EPA's enforcement and oversight activities. In another review, we are examining EPA's penalty policies and practices carried out under a number of environmental laws. This review will also examine the adequacy of headquarters' oversight of regional and state penalty practices.

CONCLUSIONS

In summary, Mr. Chairman, the ability of our nation's environmental laws to protect health and the environment depends greatly on effective enforcement programs. Without 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 competitive disadvantage with those who choose not to invest in pollution control equipment and practices.

Effective enforcement programs, in turn, need criteria that identify significant noncompliance and timely and appropriate enforcement actions. Once these criteria are in place, vigilant oversight by EPA headquarters is needed to ensure that the criteria are followed consistently and that appropriate actions are taken when they are not.

EPA acknowledges the importance of these key enforcement components and has taken some steps to incorporate them more effectively into its programs. However, significant problems still remain, and are likely to become more difficult to resolve as environmental requirements become increasingly more stringent. We have in the past made recommendations to EPA to deal with a number

of these problems and will continue to pay close attention to EPA's enforcement efforts.

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions at this time.

Selected GAO and EPA Reports on Water Program Enforcement

Water Pollution: Serious Problems Confront Emerging Municipal Sludge Management Program (GAO/RCED-90-57, Mar. 5, 1990).

Consolidated Report on the National Pollutant Discharge Elimination System Permit Enforcement Program (EPA/IG E1H28-01-0200-0100154, Jan. 4, 1990).

Capping Report on The Computation, Negotiation, Mitigation, and Assessment of Penalties Under EPA Programs (EPA/IG E1G8E9-05-0087-9100485, Sept. 27, 1989).

Office of Water Enforcement and Permits National Mid-Year Evaluation (EPA/OWEP, July 1989).

Water Pollution: Improved Monitoring and Enforcement Needed for Toxic Pollutants Entering Sewers (GAO/RCED-89-101, Apr. 25, 1989).

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

Wastewater Discharges Are Not Complying With EPA Pollution Control Permits (GAO/RCED-84-53, Dec. 2, 1983).