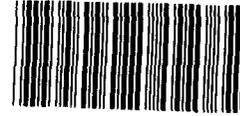


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WATER POLLUTION

**Observations on Compliance and
Enforcement Activities Under the Clean
Water Act**

Statement of
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Before the
Subcommittee on Environmental Protection
Committee on Environment and Public Works
United States Senate



Mr. Chairman and Members of the Subcommittee:

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

In summary, Mr. Chairman, our experience with EPA's water quality programs shows that strong enforcement by EPA and the states is fundamental to ensure compliance with the Clean Water Act. Effective enforcement is critical to the success of the water quality programs because it 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 shows the following:

-- Dischargers' compliance with the act's requirements to monitor their effluent and meet pollutant discharge limits has historically been problematic. There have been numerous violations, many of which have been serious and long-standing.

-- Despite the serious and long-standing violations, EPA and state enforcement of our nation's water quality laws

continues to be weak and sporadic. Most enforcement actions are mild, informal "slaps on the wrist," such as verbal warnings, rather than formal actions such as fines and penalties. Further, even in the relatively few cases in which penalties have been assessed, they are often significantly reduced or dropped without adequate documentation.

- An effective enforcement program requires (1) the development of criteria that allow regulators to set enforcement priorities and to identify what types of enforcement actions are appropriate, and (2) vigilant oversight by EPA headquarters of its regional offices' and states' enforcement activities. Although EPA has made some progress in recent years in these areas and plans to enhance its enforcement efforts in the future, additional improvements are still needed.

Thus, Mr. Chairman, EPA still has a long way to go before enforcement serves as an effective tool to reach higher levels of compliance with the Clean Water Act. Until then, violators will continue to enjoy competitive advantages over those complying with the act, and the act's full potential to protect the nation's waters will not be realized. Before I discuss the points outlined above, I would like to provide a little background on how violations are detected and how

enforcement is integrated into EPA's key water quality programs.

BACKGROUND

EPA implements many of its primary water quality programs through issuing permits that limit pollutant levels. Under the National Pollutant Discharge Elimination System (NPDES) program, limits are placed on the pollutants that 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 servicing 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 the sewage sludge that is a by-product of the wastewater treatment process.

To determine if the limits are being complied with, pollutant levels are to be monitored by the dischargers 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.

VIOLATIONS HAVE BEEN
SERIOUS AND LONG-STANDING

Past GAO evaluations have revealed a long-standing pattern of noncompliance with the requirements of EPA's water quality programs. Violations have been numerous and in many cases, serious and long-standing:

-- Our 1983 report on the NPDES program estimated¹ that over 80 percent of the 531 municipal and industrial facilities we reviewed exceeded the monthly average limits of their permits at least once during an 18-month period, and many exceeded the permit limits for more than 6 months. More importantly, over 30 percent of the violators exceeded permit limits by 50 percent or more in at least 4 consecutive months.

-- Our 1988 report on federal facilities' compliance with NPDES permits also documented widespread significant noncompliance. On average, 15 percent of the 150 major federal facilities were in significant noncompliance and an

¹These estimates were based on a review of randomly selected major dischargers in six states.

additional 5 percent were under enforcement orders during any given quarter in fiscal years 1986 and 1987.

Furthermore, over 40 percent of all violating federal facilities were in noncompliance for a year or longer.

- Our 1989 report on the pretreatment program estimated that over 40 percent of 18,000 industrial users of treatment plants exceeded one or more of their discharge limits over a 12-month period. These violations led to a variety of problems, including (1) untreated pollutants passing through treatment plants to receiving waters, (2) interference with the treatment process, and (3) health and safety problems for workers.

Some recent reviews conducted by EPA's Office of Inspector General and EPA itself have also found widespread compliance problems:

- EPA's Office of Water Enforcement and Permits 1989 midyear evaluation of the NPDES program found that 14 percent of the nation's major municipal facilities, 6 percent of industrial facilities, and 18 percent of federal facilities were in significant noncompliance. The evaluation noted that "the federal facility rate is still out of line and needs to be addressed."

-- A 1990 Inspector General report on the NPDES program found that 18 percent of major treatment plants in the three regions reviewed did not meet the Clean Water Act's requirement to achieve treatment levels necessary to protect water quality. According to the report, "these facilities continue to discharge in violation of their NPDES permits to the detriment of the environment."

Taken together, these evaluations show that there has been widespread and continuing noncompliance with the Clean Water Act. Further, the evaluations identified a lack of strong, consistent enforcement against violators as a major reason for this continuing noncompliance. Mr. Chairman, I would now like to briefly discuss the level of enforcement actions these violators face when they do not comply with the law.

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:

-- Our 1983 report on the NPDES program revealed that industrial and municipal facilities' noncompliance with permit limits continued for extended periods before formal

enforcement actions were taken by EPA or the states. In some cases, formal enforcement actions were not taken for years after noncompliance began.

-- Our 1988 report on federal facilities' compliance with NPDES permits also documented that despite widespread significant noncompliance, EPA and the states rarely took enforcement actions within prescribed time frames. 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 violations of discharge limits. For example, while about 60 percent of the nation's major 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.

The reviews conducted by EPA's Office of Inspector General and by EPA's Office of Water also found serious problems with enforcement of water programs:

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

-- The evaluation by EPA's Office of Water Enforcement and Permits found that states' enforcement actions had decreased significantly, and it expressed concern with the "low level" of states' enforcement activities.

In recognition of these problems, in June 1990, EPA issued a 4-year strategic plan aimed at enhancing the agency's and states' enforcement efforts. The plan contains both agencywide and program-specific components. For the NPDES enforcement program, it calls for an "early warning system" to identify municipalities with the potential for losing their capability to maintain compliance. The plan states that "by taking quick action to correct problems, water enforcement hopes to ensure continued compliance with NPDES permit limits."

While EPA's increased attention to enforcement represents a step in the right direction, our evaluations have shown that poor enforcement can often be traced to fundamental weaknesses in programs. Mr. Chairman, I would now like to briefly discuss EPA's progress in addressing the weaknesses in its water quality enforcement programs.

ELEMENTS 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. Furthermore, in cases in which such criteria exist, EPA's regional offices and states frequently do not adhere to them. Because EPA headquarters officials often have not tracked or followed up on these cases, some violators remained in noncompliance for years. Although EPA has taken some steps to correct these weaknesses, the important role that these criteria and headquarters' oversight play in an effective enforcement program warrants our continued monitoring of EPA's progress.

Establishing Enforcement Criteria

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. An effective enforcement program also needs criteria that identify what types of enforcement actions are appropriate for given violations and when they should be taken.

Our reports on EPA's pretreatment and interim sludge management programs illustrate the need for criteria defining significant noncompliance. In our review of the pretreatment program, we found that the lack of such criteria fostered inconsistencies among enforcement actions against violators. After dischargers complained to EPA and the states about such inconsistencies, EPA established a definition of significant noncompliance to be used in enforcing the pretreatment program's requirements. In our report on EPA's interim sludge management program, we also noted the absence of such criteria and recommended that EPA develop them 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 in issuing criteria defining significant noncompliance.

Our 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 review of 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 of up to \$10,000 per day.

Acknowledging the possible need for criteria defining timely and appropriate enforcement for its sludge management program, EPA plans to develop these criteria sometime after the program's final regulations are issued. Here again, to avert enforcement problems, we continue to believe that EPA should not delay in issuing criteria defining timely and appropriate enforcement.

Our report on the pretreatment program also demonstrated the value of criteria defining timely and appropriate enforcement. 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 for it 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 that was reportedly discharging particularly toxic metals at an average of 3,130 percent over its permit limits. Criteria defining timely and appropriate enforcement 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 guidance for defining timely and appropriate enforcement of the pretreatment program, the guidance allows for a great deal of discretion on the part of enforcement officials. Accordingly, the guidance acknowledges that EPA's oversight is imperative to ensure that enforcement officials are, in fact, taking appropriate actions.

Headquarters' Oversight

Although criteria for significant noncompliance and timely and appropriate actions are vital elements of an effective enforcement program, systematic oversight by EPA headquarters of its regional offices' and states' 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 oversight by EPA 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 oversight by EPA of regions' and states' enforcement activities. Similarly, our June 1991 report on EPA's policies and practices regarding penalties revealed that in this area, EPA's oversight of regions' and states' practices was insufficient.

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

Given the critical role oversight plays in an effective enforcement program, we are continuing to review this component in our ongoing evaluations of EPA's water quality 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.

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 comply with the law and 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 against those that 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.

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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

Environmental Enforcement: Penalties May Not Recover Economic Benefits Gained by Violators (GAO/RCED-91-166, June 17, 1991).

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