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Report of the Colloquium on Federal-State Relations in Environmental Enforcement

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REPORT

OF THE

COLLOQUIUM ON FEDERAL-STATE RELATIONS

IN

ENVIRONMENTAL ENFORCEMENT

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TABLE OF CONTENTS

I. INTRODUCTION

The Colloquium on Federal-State Relationships in Environmental Enforcement was held on November 29 and 30, 1990, at Westfields, Virginia, The Colloquium, convened by the Environmental Law Institute (ELI), was sponsored by the U.S. Environmental Protection Agency (EPA) to serve as a first step in reevaluating the roles and enhancing the effectiveness of federal, state, and local governments in environmental enforcement.

Objectives

The Colloquium undertook the task of identifying the issues that need attention if environmental enforcers are to:

- pursue ways of enhancing enforcement effectiveness;
- optimize the use of limited public and private sector resources in enforcement; and
- provide accountability to Congress and the public.

In addition, the Colloquium was intended to improve communication and understanding among the enforcement interest groups and to stimulate new thinking about perennial issues of federalism in environmental enforcement. Most importantly, it sets the stage for future efforts that will focus detailed attention on the specific environmental enforcement issues highlighted by the participants.

Participants

The Colloquium grew out of a dialogue between EPA and state enforcement officials. It began as a cooperative effort to identify ways of using limited resources more effectively in dealing with an ever-expanding set of enforcement responsibilities, regulated entities, and regulatory programs.

Approximately 50 persons participated in the Colloquium (See Appendix). EPA and state enforcement officials each comprised one fourth of the participants. Because Congressional perceptions are integral to a thorough understanding of the enforcement issues, one fourth of the participants were staff from the Congressional committees dealing with environmental enforcement matters. Finally, because federal environmental laws give citizen organizations significant enforcement capabilities, experienced citizen enforcers comprised the other one fourth of the group.

The participants were selected to be representative of their constituencies in the environmental enforcement community, as well as for their personal experience with environmental enforcement issues. The Colloquium was limited to 50 persons in order to facilitate frank discussion of the issues, and to allow the participants to develop close working relationships over a relatively short but intensive period. In addition to the participants, many other environmental enforcement individuals contributed useful ideas and approaches that were used in strung the Colloquium.

Approach

The Colloquium participants worked almost entirely in small groups of 8 to 12, focusing on hypothetical enforcement problems and policy decisions. The participants focused in successive sessions upon the enforcement activities that they perform, the

measures of enforcement performance that might be used, the allocation of enforcement responsibilities among possible enforcement entities, and the responses available if enforcement performance deteriorates. The groups were reshuffled after each of the working sessions in order to give each participant the opportunity to work with every other participant and to assure the fullest exposure of participants' ideas.

The groups reported their conclusions in brief plenary sessions and participants recorded further observations on individual forms. This approach was used in order to promote the widest range of thinking on enforcement and federalism issues, so that the Colloquium would not simply replicate two decades of discussions of state-federal relations.

The process was not designed to direct the participants toward consensus. Nor was it intended to construct a whole new enforcement framework. Rather, the Colloquium was designed to identify the issues that deserve attention now -- those areas that offer possible improvements over current approaches to enforcement relationships.

Results

The participants succeeded in identifying key areas for further detailed work. In addition, the Colloquium increased participants' understanding and appreciation for the complexity of the issues facing each of the four constituencies represented. Significantly, in their analysis the participants moved beyond traditional first-order concerns -- e.g. who should enforce? to what extent is oversight legitimate? -- to the more difficult, second-order, questions: How can accountability be improved? Where should time and resources be focused? What oversight measures are most useful? What responses should be taken if a program is failing?

This report sets out the ideas offered by the Colloquium participants. It notes areas of commonality, areas of disagreement and concern, and potential solutions offered for further development. Specifically, Section II reports on the participants' discussion of allocations of enforcement responsibilities among governmental and citizen enforcement entities; Section III, their discussion of methods of evaluating performance; and Section IV, their discussion of federal responses to enforcement breakdowns. Section V summarizes those ideas identified by participants that they believe may show promise for enhancing enforcement, optimizing resource use, and providing accountability. It is a partial agenda for future work.

EPA did not intend the Colloquium to supersede -- or even to synthesize -- all the work that has gone before in the area of federalism in environmental enforcement. Indeed, participants drew directly upon their own experiences in the enforcement field rather than upon the "letter" of EPA or state policies. A substantial amount of useful thinking has taken place in other forums – the 1983 and 1984 studies of environmental federalism initiated by EPA, the Policy Framework for Implementing State/Federal Enforcement Agreements, EPA's recent Enforcement Four-Year Strategic Plan and the Enforcement in the 1990s project, and the work of the Steering Committee on the State/Federal Enforcement Relationship. This report should be seen as supplementing, rather than supplanting, these efforts.

II. ALLOCATION OF ENFORCEMENT FUNCTIONS

There are many possible enforcers of U.S. environmental laws. Multiple federal, state, and local enforcement agencies and citizens' organizations may all have the capacity to take enforcement action in a given situation. One of the primary areas of concern is how to determine which enforcement entities should be responsible for which enforcement actions, or for which enforcement functions. This is a problem of enforcement "allocation."[1]

The goals of such an allocation may vary. Colloquium participants noted that these may range from seeking greater efficiency in the use of enforcement resources, to maximizing deterrence, to maintaining backup capabilities for each primary enforcer. Different goals may require different allocations. Participants noted that, in practice, the actual allocation of enforcement responsibilities is not driven so much by overall enforcement goals as by the independent needs or objectives of the respective enforcement organizations.

The allocation of enforcement functions among enforcers is not entirely dictated by statute. In most of the environmental laws administered by EPA, the state program

[1] The participants identified a broad range of enforcement activities carried on by environmental enforcers. These included not only the traditional menu of notices of violation, administrative orders, permit actions, civil penalties, injunctions, contractor debarment, and criminal enforcement, but many others. Some of the interesting activities they identified included establishing different inspection frequencies for compliant vs. noncompliant facilities; creating national databases on facilities; using "dirty dozen" or "filthy five" lists to publicize bad actors; forming criminal strike forces; citizen inspections; training citizens on firms' technical compliance obligations; using field citations for small violations; requiring chemical suppliers to inform users of disposal requirements in order to establish knowledge; bonding of some facilities; varying permit fees based on compliance history; publicizing all violations -- not just major ones; and requiring onsite environmental monitors paid for by entities found in violation.

authorization process contemplates the primary role being taken by authorized states, with EPA retaining responsibility for oversight and backup enforcement. However, as a practical matter, there are many different divisions of responsibility between EPA and state governments even in states with authorized programs. Significant variation also has been observed among EPA regions. Participants noted that some tend to do a great deal of direct enforcement, while in others the states do most enforcement. In addition, the roles of the U.S. Department of Justice, the Federal Bureau of Investigation, U.S. attorneys and other federal instrumentalities in environmental enforcement are not spelled out in detail in law or regulation. These entities often have their own priorities and objectives. Local governments and citizens also participate in environmental enforcement, yet their roles are frequently even less well-defined.

All of this uncertainty makes enforcement allocation a dynamic process, subject to frequent reexamination and renegotiation. Indeed, it may be that there is no permanently optimal allocation. Participants noted that the need to reexamine the allocation of enforcement roles is further driven by changes in the resources and missions of state, federal, and local governmental entities -- as relevant political administrations, economic conditions, and public concerns change.

Despite the dynamic nature of the allocation process, the Colloquium participants identified a number of shared assumptions concerning environmental enforcement allocations. None of these is new, but all of them raise significant issues requiring further examination. As one participant aptly put it, "the devil is in the details." The Colloquium explored some of these details and identified some possible approaches.

The participants also identified areas in which there is less agreement, but which reflect assumptions held by one or more of the groups involved in enforcement. Finally,

two general observations -- one about the link between enforcement allocation and oversight, and one about joint enforcement planning -- emerged from the Colloquium.

Shared Assumptions

Preference for the Nearest Capable Enforcer

The participants found themselves in substantial agreement that the level of government closest to the problem, provided that it has the capability and will, should be the primary enforcer.

This was the most widely shared assumption the Colloquium identified concerning the allocation of enforcement functions. At a superficial level, it merely reiterates the "cooperative federalism" scheme of existing federal environmental law. Beyond this, however, it plainly reflects a shared theory of allocation. Participants believed that enforcement agencies should look to the use of local governments in as many instances as possible, to state governments where local enforcement agencies are not capable, and to EPA as the backup choice.

As a corollary to this "nearest capable enforcer" principle, participants noted that EPA must pay particular attention to determining enforcement capability in making state program authorization decisions. Some participants emphasized that the capability determinations currently being made by EPA in the process of state authorization may not be measuring all of the right things. Staffing levels, the implications of weak administrative structures, the enforcement impacts of review boards and other institutions, and the effects of state procedures are not always thoroughly understood. Participants suggested that the overall EPA authorization procedure should be reexamined to assure

that it is capable of assessing state enforcement capabilities. This issue is also discussed in Section IV, infra.

Likewise, participants noted, reliance on local entities to carry out enforcement (e.g., for industrial pretreatment enforcement) presupposes that they have competence at this function. Several participants suggested that it was unfortunate that EPA and a number of states have not adopted a mechanism to assess this competence a priori, but only have reviewed poor performance after the fact. Participants noted that future consideration of reliance on local enforcement in other areas should include guidance on what constitutes an adequate showing of local capability, and who should make the assessment.

EPA Sometimes Should be the Primary Enforcer

Despite the general preference for enforcement at state or local levels, participants did identify certain situations in which EPA should be the enforcer of first resort. Participants felt that EPA was legitimately the primary enforcer in instances where the violator is a state agency, a municipality, or a politically well-connected entity. This recognition of a significant direct role for EPA by state, as well as federal, participants was somewhat surprising, but arose from the concern that, as one participant put it, any government has difficulties "enforcing against its own."

The participants also observed that the same principle applies equally to federal agencies; states, they generally agreed, should expect to be the primary enforcers when violations are committed by federal agencies. This discussion raised some issues of Congressional intent and dual sovereignty.

Participants noted several difficult issues surrounding the application of their general assumption concerning those cases when direct federal enforcement is appropriate. For example, a federal enforcer's perception of who is "politically well-connected" might well be different from that of the state agency. Indeed, individuals' perceptions within a state might also differ substantially, so that a given federal action may be perceived by different state interests as either an unwelcome intrusion on state primacy or a welcome relief for a beleaguered state enforcement agency -- or both simultaneously.

Federal-state conflicts over such enforcement activities against private entities may well be intractable, despite the general agreement noted by the participants. Even if there is conflict however, the issue should be addressed in terms of what the federal-state conflict is about -- is it about the appropriateness of the action or whose "turf" is being trampled? Improved mechanisms should be developed, the participants believed, so that federal and state energies can be focused on the former concern rather than the latter.

The participants regarded the circumstances of federal enforcement against state and local instrumentalities as more clearcut. Here the conflicts may tend to arise chiefly when federal authorities believe that a state action against a municipality or state entity is insufficient. It may be possible, some suggested, to minimize conflicts of this type if states expressly agree to recognize federal primacy for state and local government violations, or to pre-clear state actions involving these types of violators with federal enforcers. This approach would involve a re-ordering of traditional notions of state primacy, but may offer the promise of rationalizing enforcement in difficult cases.

Coordination of Enforcement Activities

Participants expressed substantial interest in coordinating enforcement efforts so that there are no surprises among enforcers. A "no surprises" policy requires a rational environmental enforcement strategy. One participant aptly summarized this concept as "joint planning/independent execution." Under one approach discussed by the participants, the appropriate EPA region, the state, and relevant localities would identify their enforcement priorities and targets. Based on these priorities, they would then devise a strategic plan, which they would continually revisit. Participants emphasized that, unlike current efforts, such a plan would not be directed at deciding who takes on which "significant non-complier," but would address the entire enforcement menu across all media programs (including those where states have authorities that federal entities lack). The goal would be to indicate where respective objectives and priorities lie and to provide some means of assuring that all key areas are covered and that independent efforts can be complementary rather than redundant.

Several participants also pointed out that a frequent re-examination of the enforcement allocation in general by the parties is both necessary and desirable. One suggested mechanism for assuring that an allocation does not stagnate is to convene a meeting -- like this Colloquium, some suggested -- every few years to ascertain where changes might be appropriate. A number of participants suggested that this might work best on a-regional level. Others noted the benefit of convening also at a national level. Issues the participants identified for future consideration include how often such reexaminations should occur and who should participate.

During the discussions, several participants noted that a "no surprises" policy is more than just an issue of planning. It also applies to case-by-case activities. Some

participants suggested that enforcement actions be taken by federal agencies in authorized states if the state has failed to act or has acted incompletely, but only if the EPA first notifies the state that it intends to act, or if the state requests EPA to act. Devising such a system is relatively straightforward when EPA proposes to act administratively or civilly. However, it is significantly more difficult, participants noted, if EPA or another federal entity has launched a criminal investigation, because of needs for confidentiality. This is why more comprehensive planning can be beneficial. A strategic plan could address contingencies of this nature, establishing mechanisms for exchanging information and for preserving confidentiality.

Citizen Enforcement as Part of the Overall Environmental Enforcement Mix

Because citizens have enforcement authority under the nation's environmental laws, Colloquium participants found that it makes sense to try to include them in any rational allocation of enforcement responsibilities undertaken by governmental enforcement entities. At a minimum, this means that governmental plans should not thwart or undermine the possibility -- or viability -- of citizen suits. In general, governmental enforcers should anticipate and welcome citizen suits. Indeed, participants suggested that state and federal enforcement programs be structured to make such actions easier to bring and more complementary to government enforcement goals.

The participants appeared to agree that, at a minimum, governmental enforcers should attempt to foster citizen identification of violations -- the "eyes and ears" function -- and thus enhance the effectiveness of government enforcement agencies. Creation of hotlines and other programs, including advertising campaigns, designed to encourage citizens to identify violations may significantly enhance a governmental enforcement effort.

Some participants suggested involving citizen-enforcers in the "joint planning/independent execution" effort. One of the working groups suggested that each state develop a strategic plan in conjunction with its citizen groups and local governments. Then the state could present its strategic plan to the EPA region and the two could coordinate to achieve maximum coverage and improve efficiency. Some participants suggested that citizen groups also participate in the negotiation of a memorandum of agreement between their state and the EPA region.

Participants also identified several difficult issues surrounding the incorporation of citizen enforcement into a general enforcement allocation:

First, while citizens have the power to sue, they have no accountability to other enforcers. They may choose not to sue, or to bring an entirely different type of suit without consulting governmental enforcement agencies. Any enforcement program explicitly building in reliance upon a citizen-enforcement component (beyond simply the identification of violations) will need to deal with this issue. Perhaps governmental support for citizen litigation could be made contingent upon certain commitments or undertakings by citizen groups. This potential solution raises additional difficulties, however, as it might make certain groups preferential "deputies," while excluding other segments of the citizenry -- including industry and non-environmental interest groups. Another approach might be simply to recognize that citizen enforcers are not accountable to the government and to view their role as a "bonus." Accountability is the most difficult of the issues surrounding an allocation to citizen groups that goes beyond mere noninterference with citizen suits and encouraging reporting of violations.

Second, citizen-enforcers may not be capable of handling the types of matters a government agency wishes to allocate to them. One participant expressed it particularly

well: "Citizens . . . should not be viewed as [a] fallback for assuming whole categories of cases during times of limited government budgets." Participants noted that a realistic approach must retain government enforcement as primary for all categories, but allow for complementary enforcement by citizen groups.

Third, citizen organizations need data in order to be effective enforcers. If a governmental enforcement program contemplates placing some reliance on independent citizen group litigation, it must provide for ample and simple access to government data. This, of course, means that the data must be available to the public generally, as the government cannot legitimately provide differing access to different parties. Participants identified the development of a system that will fully serve the data needs of citizen groups as a significant need. Many noted that such systems would benefit government enforcement and sharing of facility-specific information among governments as well. Participants suggested the use of additional industry self-reporting and the presentation of reported information in reasonably accessible formats. Such an initiative might increase costs to be borne either by governmental agencies or reporting entities, but might be worth the investment of resources if additional enforcement is generated, some participants suggested.

Finally, participants noted that the realistic allocation of some enforcement to citizen organizations may be precluded in some states by the absence of citizen suit provisions in state laws that correspond to the citizen suit provisions of the federal environmental laws. Even some states that do have citizen suit provisions may lack provisions authorizing recovery of attorneys fees. Without reaching resolution, participants urged further consideration of whether state programs should be required to contain citizen suit provisions corresponding to federal law as a condition of EPA

authorization. Citizen participants suggested that the issue be addressed in EPA's state program authorization rules, federal legislation, or state-by-state legislation.

Local Government Enforcement

Local governments have widely varying capabilities for environmental enforcement. Participants suggested that both federal and state programs should allow local governmental agencies to take a leading role in enforcement where they are capable of doing so. One of the difficult issues raised by this suggestion is how to determine the capability of local enforcement entities. There is no equivalent to the EPA program authorization process, or even a clear model for oversight of local agencies. For example, what does it take to know that a local government is capable of inspecting generators under RCRA? One state participant noted the difficulty of obtaining an EPA agreement to allow local officials to conduct such inspections in connection with the state's authorized program.

Participants also identified the need for state and federal officials to understand the real abilities of local agencies in order to use them appropriately in an enforcement allocation. For example, police forces may have widely divergent priorities from state environmental agencies. Building inspectors, fire marshals, or local health agencies may provide better assistance. How can appropriate local enforcement resources be identified? Participants suggested that one answer may lie in involving local agencies (at least the larger metropolitan areas) in the federal-state enforcement planning process described above.

Joint Responsibilities for Priority Setting and Other Functions

Participants believed that EPA and states should share responsibility for setting enforcement priorities, maintaining enforcement databases, communicating enforcement successes to enhance deterrence, and educating the regulated community on enforcement-related issues. Priority setting was central to the discussion. In particular, participants felt that priority setting should be a joint effort because enforcement interests may differ significantly, and areas of gap or overlap should be identified explicitly rather than discovered after the fact.

Common databases can improve enforcement by increasing the accessibility of information about regulated entities and about governmental enforcement, permitting, or other actions. Such databases can also assist citizen enforcement.

Publicizing enforcement actions enhances deterrence. Participants saw publicity as the responsibility of all levels of government, in order to increase the visibility of such actions. A great number of participants identified the most frequently overlooked "enforcement activity" as "publicizing the results of successful enforcement actions." Jointly publicizing actions and giving one another credit for enforcement successes should increase the climate of deterrence.

Finally, participants viewed compliance education as a joint responsibility, in order to promote consistency in implementation.

Differing Assumptions

In addition to those areas where common assumptions emerged, the participants identified several aspects of enforcement allocation where there was less agreement. These are areas in which intergovernmental allocation conflicts may arise not just in

working out the details, but because of more fundamental differences in the parties' working premises.

Cases of National Significance

A significant number of participants asserted that EPA should maintain a direct, primary enforcement role in cases of "national significance." Others pointed out that it may not always be clear which cases those are, and there was concern by state officials in particular that EPA should not scrape off the "cream" of the cases. This area is one in which conflicts among enforcers may arise because of differing visions. There was greater apparent agreement with the proposition that in relatively new programs, EPA should maintain a tighter control over enforcement in order to develop precedents and initial national consistency.

Who Conducts Criminal Enforcement

Individuals and Colloquium work group allocated criminal enforcement to federal, state, and local levels in different ways and with various priorities. All appeared to view their allocation as obvious and natural. This suggests a significant potential for conflict over particular criminal investigations and cases. A number of such stories emerged from the participants in both working sessions and the plenary discussion.

This difference in perceptions of the optimal parties to conduct criminal enforcement may suggest that such enforcement should be carried out at a number of levels simultaneously. The problem then is to coordinate efforts. This problem may be more complex than that commonly faced by police forces and federal investigatory agencies (DEA, BATF, or FBI) in other criminal enforcement contexts. Environmental

crimes generally fall squarely under both state and federal jurisdiction, thus obscuring the relatively bright line between state and federal crimes in other contexts. Furthermore, coordination is complicated by the fact that in the environmental arena one level of government is likely to take a civil or administrative approach to a violation that is being treated as criminal by another. Thus, coordination must operate across the civil/administrative vs. criminal divide as well as government to government.

Who Has Final Responsibility

There was disagreement over where the "buck" stops. EPA and Congressional participants seemed to believe that EPA has final responsibility as the agency charged with implementing environmental protection; state participants seemed to see it as the state's responsibility as the protector of the environment. Citizen participants could not be clearly aligned with one or the other position. This philosophical issue may require further exploration. It affects both on-the-ground allocations and oversight. It is particularly important in program accountability, as discussed infra at Section IV.

The Value of Overlapping Enforcement

One issue raised, but not fully discussed by the participants, is the possible desirability of overlapping enforcement to promote deterrence. One participant articulated this as an entrepreneurial theory of enforcement allocation: "The more enforcers there are, the greater the likelihood that a violation will be prosecuted." Such an approach does not place a premium upon inter-governmental coordination or cost efficiency, but suggests that a multiplicity of enforcers who may strike at any time will produce a climate conducive to compliance. This approach may produce conflicting

demands on regulated entities. So long as the substantive requirements being enforced are identical, and the remedies being required are not inconsistent, however, the possibility of multiple enforcement actions should produce greater deterrence.

A multiple enforcer approach would require moving away from the hierarchical preference articulated by the participants in their "nearest capable enforcer" assumption. In comments similar to the entrepreneurial enforcement approach, other Colloquium participants suggested "there should always be some visible federal presence as an additional deterrent, even if the state is doing O.K.," and "states need to shake off the belief that federal action is interpreted as a failure on their part to take action." A multiple enforcer approach may produce conflicts among enforcement agencies and levels of government unless it is integrated through some type of planning mechanism such as those discussed above.

Overall Observations

Two overarching observations emerged from the participants' consideration of allocation. These were: (1) the direct relationship between the allocation of enforcement functions and the method of oversight, and (2) the immediate need for a planning mechanism to allocate enforcement responsibilities, given EPA's recent intention to "target" its enforcement efforts.

<u>Allocation is Linked to Oversight</u>

Colloquium participants observed that the current allocation of enforcement functions is driven, in part, by EPA's need to report enforcement successes to Congress.

Unless reporting and oversight systems are changed, changes in allocations of enforcement responsibilities will be difficult.

After devising a model allocation for one of the hypothetical problems considered in the Colloquium, one of the working groups noted that such an agreed allocation "only works if Congress will accept state numbers, and not compel EPA to do all of its own enforcement." The Colloquium identified an apparent cause-and-effect relationship between EPA's need to have enforcement numbers to show Congress for legislative oversight purposes, and its insistence on doing a significant amount of direct enforcement. If environmental enforcers hope to adjust allocations -- and they undoubtedly will, given the dynamic nature of allocation choices identified by the participants -- then reporting and oversight methods will also need to be flexible.

EPA currently keeps records of its own enforcement activities and reports these to Congress as a measure of its performance. Congress has come to expect annual increases in these enforcement numbers and uses these as a method of evaluating EPA's effectiveness and commitment to its mission. Some participants perceived that the desire to generate higher EPA enforcement numbers in part encourages EPA regions to bring cases and take enforcement actions, rather than to direct their activities toward support of state enforcement. In the same discussion, some participants also cited an apparent contrast in attitudes within some EPA regional offices between media program managers responsible for delegated programs, who are more content to have states do the enforcement, and regional enforcement personnel, who want (and need) to have a significant number of EPA enforcement cases. The result may be conflict and suboptimal use of available enforcement resources by both EPA and states.

In general, participants perceived weaknesses in the reporting and utilization of state enforcement data in Congressional oversight. Participants observed that if Congress had an effective way of reviewing and relying upon state enforcement data together with that of EPA, it might be possible to implement a system with different enforcement locations. EPA might not have to achieve a certain level of federal enforcement for each media program. Instead it could target its efforts to states with weaker programs, to interstate problems, and to newer programs and receive due credit for well-functioning state programs. EPA might also be enabled to target more of its efforts to multimedia or geographic enforcement initiatives. If Congress received and reviewed reliable state data, it could enable EPA to allow states with good programs to do most of the work.

Assuming that reporting and oversight drive current allocations and that changes in allocation require concomitant changes in oversight, several issues remain:

First, how can EPA more effectively obtain and report reliable state data? Even assuming there were agreement on what to "count" (see Section III, Measuring Enforcement Effectiveness), it may be difficult to obtain reliable, useful and compatible data. Currently, states report their enforcement data to EPA in idiosyncratic ways. Different categories and classifications are used. Reporting periods correspond to state budget years, or calendar yers, rather than to federal fiscal years (or any uniform national reporting period). Actions not fitting under a specific EPA media program may go unreported.

Achieving standardized reporting may be highly difficult for other reasons. For example, an administrative order in one state might have entirely different consequences than an administrative order in another. In one it may be immediately effective, while

in another it may be the equivalent of a "complaint for relief." Both are currently reported in the same way when they are reported at all. How to obtain and report state data in a manner that is reliable and uniform for all states is a key task for future attention.

Second, can EPA maintain its enforcement skills if, in some states or regions where the states are performed well, EPA does little direct enforcement? It may be difficult for EPA to attract and retain qualified enforcement personnel if they don't "get to do cases," participants observed. This may not be a problem if, as some participants suggested, EPA conducts some federal enforcement in every program simply to provide "an additional deterrent, even if the state is doing OK." Nevertheless, staff retention and quality is an issue related to reallocation.

Third, what would be acceptable to Congress as a measure of performance? This issue is addressed further in Section III of this report. Some of the Congressional staff participants suggested that Congress may be more open to alternative methods of evaluating enforcement performance than other participants and EPA had believed. How could a different system be developed? Specifically, how can Congress make a transition from the expectation of continual increases in EPA enforcement numbers to take into account the effective performance of enforcement functions by other entities?

Coordinated Enforcement Planning is Needed

Targeted enforcement initiatives by EPA can put significant strain on enforcement relationships and allocation decisions. A mechanism is needed to plan for such efforts.

EPA has announced its intention to target future federal enforcement efforts. Such targeting may include specific industries or industry sectors, geographical areas, or specific types of enforcement. Multimedia enforcement is a current priority for EPA.

Participants commented that EPA's efforts are likely to produce conflict with state and local enforcers, absent some common understanding of what the targeting means and how it is to be carried out. Participants noted, for example, that the new multimedia approach may involve the federal government -- for at least some enforcement actions – in some media programs that are now almost wholly operated by the states. Likewise, multimedia enforcement against a facility may involve some media where the state has program authorization and others where it does not. Absent coordination and agreement among the enforcers, new problems in federal-state-local enforcement relationships will almost surely arise.

In some respects, targeting direct federal enforcement efforts may conflict with the general assumption that enforcement should be by the "nearest capable enforcer." On the other hand, targeting serves an important deterrent or programmatic (e.g. "national") mission. EPA's targeting represents an allocation of enforcement functions to the federal level for the media, industry sector, or geographical area selected. Thus, its consequences for state and local performance must be examined and, where possible, agreed to in advance. This suggests the need for national or regional enforcement planning meetings on targeting like those suggested by the participants in their discussion of the "no surprises" assumption described above. Announcement by EPA of its "targets" irrespective of state or local action and without consultation is problematic.

Conclusion

Allocating enforcement responsibilities is a dynamic process. This is why, as one of the participants reasonably noted, "we revisit this every few years." It is not because we do not have the correct answer or that we cannot determine the proper mix of enforcement entities, but rather that the answer changes over time. This is also why oversight systems develop significant tensions.

The difficulty, then, is to establish an enforcement system that allows for reallocations, including changes in reporting and oversight practices, without starting over to reinvent "environmental federalism" every three to five years. Some version of joint enforcement planning involving all of the relevant enforcers, is one critical approach suggested by the Colloquium participants.

III. MEASURING ENFORCEMENT EFFECTIVENESS

Improving the enforcement of environmental laws requires a system for measuring and evaluating the effectiveness of enforcement activities. An accurate and reliable set of measures will enable EPA and the states to identify the most successful and cost-effective enforcement responses, to allocate scarce resources wisely, and to develop criteria for program management and accountability. Well-chosen measures will also give citizens, state legislators, and Congress better means to judge the performance of environmental regulators.

Experience with performance measures in a variety of settings, including private firms and regulatory agencies, has shown that the criteria selected for evaluation influence the decisions and actions of those evaluated. Satisfying the measures can become an end in itself, and if the measures are not carefully designed, they can sometimes do more harm than good. Thus a poorly chosen system of measures not only can lead to faulty judgments about the effectiveness of enforcement efforts, but it can also drive an agency in wrong directions.

Efforts to measure the effectiveness of environmental enforcement raise at least three interrelated questions: what is being measured or evaluated; how is the process of measurement accomplished; and what done with the information once it is obtained? This section of the report deals primarily with the first and second of these questions. The third is addressed primarily in Section IV, Enforcement Program Accountability.

The Colloquium participants identified a wide range of measures or criteria by which enforcement programs could be evaluated. These criteria fall into four major categories: (1) measures of the specific enforcement activities performed by the agency; (2) measures of rates of compliance and non-compliance in the regulated community; (3) measures of changes in environmental quality; and (4) measures of "cultural" changes produced by enforcement, including changes in corporate decision-making, the practices of financial and other institutions, and the public's attitudes.

Potential Measures of Effectiveness

Enforcement Activities: From Bean Counting to Weighted Beans

Attention focused on what participants referred to as the "bean counting" approach to evaluation, which measures a program's effectiveness by the number and type of enforcement activities undertaken. Despite substantial criticism of this approach, most of the participants agreed on the necessity of having a complete and accurate picture of an agency's enforcement activities. Even the working group of state regulators, who might have been expected to have the least sympathy with the "bean counting" approach, ranked measures of enforcement activities near the top of their list of preferred measures.

The participants suggested that the problem with "bean counting" is not in the measurement of enforcement activities per se, but in the perceived failure of such systems to account for qualitative differences in the effectiveness of various enforcement activities. Another problem with "bean counting," the participants suggested, lies in the use of raw measures of enforcement activities without linking those data with other information, such as trends in compliance or changes in environmental quality.

As a partial solution to the first problem, several participants recommended using a system that would account for qualitative differences between enforcement activities by assigning differential scores or "weights" to particular activities. In discussing this system of "weighted beans" participants suggested that credit be given for such factors as the quality, complexity, cost, and direct outcomes of enforcement actions. For example, some participants would look to the number of criminal convictions obtained (as opposed to the number of criminal cases simply filed), the jail time sentenced, and the amount of fines awarded. One participant noted that "CERCLA §106 injunctive actions should count more than a simpler or less resource intensive case." Other participants said that activities should be differentiated based on their "significance," which could include considerations such as the severity of the violation, the gravity of the environmental risk, and the nature of the harm abated. A few participants would measure "significance" by looking at the identity of the violator, giving an agency extra credit for the "number of senior people punished."

The participants' discussion of "weighted beans" raised a number of difficult questions. The questions asked most often related to the design and focus of a weighted evaluation system. If, as some participants suggested, resource-intensive cases should be given special credit, it is unclear how such credit would be assigned. A system that measured the sheer dollars spent on a case would have serious drawbacks, because money spent in an action does not always correlate with its effectiveness. Such a system might tend to encourage time-consuming, expensive cases for their own sake, or give disproportionate credit to comparatively wealthy states that are able to bring large, costly cases. Conceivably, some of these problems can be avoided through case-by- case evaluations of individual enforcement activities. But is any "bean counting" system, even

one that uses "weighted beans ," amenable to case-by-case judgments, or is the system's main virtue its ability to avoid the need for individual judgments by creating an objective yardstick of performance?

Other comments suggested that enforcement activities be weighted based on their direct outcomes, such as whether prison sentences were obtained, or a site cleaned up as a result of the enforcement activity. But here, too, there are difficult questions about how to measure outcomes fairly. Factors like jail time and fines may be quantified, but other "outcomes" may be less amenable to quantification. In addition, many outcomes depend on factors that are beyond enforcers' ability to control, such as the type of remedies available under state law, or the sensitivity and experience of the state's judiciary. One agency might suffer a string of bad luck in court despite the high quality of its cases, while another might enjoy a high percentage of success in its comparatively inferior efforts. Should an agency be rewarded or punished for outcomes that are beyond its ability to control? Or are these, in fact, appropriate measures given that what matters is impact upon the regulated community, not whether the state is "trying?"

The weights given to various outcomes have the potential to skew enforcement decisions in favor of attaining those outcomes. For instance, a system that gives special weight to criminal convictions may persuade an agency to pursue major criminal actions to a greater degree than called for by the circumstances.

Another issue raised at the Colloquium related to whether a system of "weighted beans" should consider levels of compliance and environmental quality and by enforcement activities, or whether the system should look only to such factors as the cost, complexity, and direct outcomes (e.g. fines, penalties, jail time) of enforcement activities. It may be that compliance rates and changes in environmental quality cannot be

accounted for in any system that relies on an activity-counting approach to program evaluation.

Ultimately, the participants' discussion of "weighted beans" questioned how far such a system can account for qualitative differences between enforcement activities without losing its utility as a uniformly applicable test of performance. "Bean counting" is attractive because it is a simple and efficient means for comparing enforcement programs. But the very simplicity and uniformity offered by "bean counting" are its principal drawbacks. Because enforcement needs in each state differ, it can be misleading and unfair to evaluate enforcement programs based on counts of the number of complaints brought, convictions obtained, or other raw data. Similarly, state administrative actions cannot always be regarded as comparable. An administrative order has different practical consequences (and resource demands) in different states. If a "weighted" evaluation system can take into account qualitative differences between enforcement programs, can such a system continue to provide an objective means for making comparisons among programs? Or can qualitative differences among states be addressed more simply through case-by-case evaluations of state programs rather than by increasingly subtle and complex measures of general applicability?

A major advantage of a "weighted beans" approach is its ability to fit within current practices. The system would evaluate essentially the same data that is presently evaluated, but in a more sophisticated and sensitive manner. However, it may be that such a system would offer only slight improvements over current approaches. Further consideration is necessary to determine how a system of "weighted beans" would be used, and what it can reasonably be expected to accomplish.

Compliance: The Bottom Line of Enforcement

Many participants argued that measuring compliance by the regulated community, when linked with information about the frequency and variety of enforcement activities, should be the principal means of evaluating enforcement programs. As one participant wrote, "the primary goal of enforcement is to ensure compliance with the law, so you should look at the rate of compliance as a first indicator of success." Others noted that the rate of compliance by industry sector is the "bottom line" that "shows the true measure of environmental enforcement." In fact, several participants said that the working session should more appropriately have been titled "how to measure compliance," rather than "how to measure enforcement."

Participants emphasized that enforcement activities can be judged as successful to the extent that they increase the rate of compliance with the law being enforced. Although some participants argued that environmental enforcement could be judged by additional factors as well, such as improvements in environmental quality, practically everyone agreed that determining the rate of compliance in the regulated community was essential to assessing the success of an enforcement program.

At the outset, a number of participants emphasized that the focus must be on real compliance rates by all regulated entities -- both in and out of the agents recordkeeping systems -- rather than only previously identified regulated entities or the even smaller group of "significant noncompliers" (SNCs). Although a focus on SNCs had some support, several participants criticized the SNC methodology for its dependence on the state's success at identifying noncompliers. This dependence, they noted, can have the paradoxical effect of making weak agencies appear strong and strong agencies appear weak. A weak agency might appear strong, for example, by failing to identify the full

extent of noncompliance in its jurisdiction, but returning to compliance those few noncompilers it does identify. By contrast, a strong agency might appear weak by making a greater effort to identify noncompliers in the first place -- something that the participants agreed was critical -- thereby revealing more accurately the true rate of noncompliance in its jurisdiction. Of course, the same problem could affect use of compliance rates as a whole. Participants noted that this could be overcome by determining the real compliance rate, as discussed infra.

Criticism was directed at the use of SNCs as a measurement tool rather than its use as a management tool. Significant noncompliance can be used by program managers to direct limited resources to the areas having the greatest environmental and programmatic significance. Few argued with this use of the SNC principle. However, as currently utilized, the SNC method is used not merely as a management tool, but also as a means of judging a program's overall effectiveness.

Participants emphasized that measures of compliance are informative only when they demonstrate changes in the rates of compliance over time in particular regulated sectors or geographic areas. They noted that overall measures of compliance, unless they are extremely high or extremely low, are generally not informative by themselves, because they are influenced by a variety of factors. Changes in rates of compliance, however, indicate whether an enforcement program appears to be having the desired effect.

As noted above, in order for the rate of compliance to be a useful measure of enforcement, an agency must be able accurately to identify and assess the universe of regulated entities. As several participants pointed out, measuring compliance requires that firms operating completely outside the regulatory system -- the "outlaws" -- be

located and identified by state agencies. This is no easy task, to be sure, but it is one that "cuts to the heart of the issue," as one participant noted.

Discussion centered on a sector-by-sector "compliance audit" as a promising method for identifying the full scope of the regulated community, and for determining rates of compliance and noncompliance. One suggested approach would use statistical modeling to develop a sample group of firms within a particular industrial sector in a particular area, such as electroplaters in a particular river basin. By using sources of data in addition to the state's environmental records -- such as tax information, industrial directories, corporate records, and law enforcement data - auditors would develop a representative sample of firms that would reflect more fully the range of regulated entities, including the environmental "outlaws." After inspecting the firms in the sample group, auditors would extrapolate compliance rates across the entire sector. By using information as a baseline, and by repeating audits of new samples at regular intervals, the auditors could ascertain the impact over time of various enforcement activities in achieving higher rates of compliance and in identifying noncompliers. This approach, some hoped, would provide the missing link between enforcement activities and their effects on compliance.

Reliance on "compliance audits" of this nature as a means of evaluating enforcement effort raises a host of difficult questions, however. First, there are methodological issues concerning how such an audit would be conducted. If auditors hoped to capture information about companies outside of the agency's recordkeeping systems, how would they do so? Sources such as tax databases, the state's roster of corporations, or independent listings of companies might be used to identify regulated entities that had escaped detection by the state environmental agent. Attention to other

ways of identifying a complete sample will be needed. Some sources, such as midnight dumpers, might be impossible to track down through traditional methods. Could these sources be accounted for by some other method, or could their presence be estimated with any degree of precision? If not, this might suggest that compliance audits would be most useful for determining rates of compliance among stationary sources of pollution that are easily identifiable.

Participants discussed other questions related to who would conduct the compliance audit. Some indicated that EPA could conduct the audit, since EPA has the ultimate oversight responsibility in delegated program areas. Other participants emphatically asserted that EPA should not be the one to conduct the audit, either because they mistrusted the agency's ability to conduct reliable audits, or because they believed that the audits should be conducted by an independent body without links either to direct enforcement or to the oversight function. As alternatives, some suggested that the audit be conducted by independent accounting firms. Others recommended a team of experts drawn from state agencies and citizen groups. While these alternatives would give a greater degree of independence to the auditors' conclusions, EPA or Congress may be hesitant to accept their conclusions or may reach conflicting conclusions of their own.

In addition to audits that measure compliance by industrial sector, several participants suggested measuring post-violation compliance and recidivism by individual fir ms. These facility-specific audits would measure a particular firm's rate of compliance not only in the media program that was the subject of the initial violation, but in all other areas. By evaluating this information, an agency could gauge the specific deterrent effect of various enforcement responses. As one participant put it, "if enforcement is successful, future non-compliance [by the violator] should be effectively deterred. If

future non-compliance occurs, deterrence was not achieved and enforcement was not successful."

Environmental Quality: How Does it Measure Enforcement?

Whether enforcement effectiveness can be judged by evaluating environmental results -- changes in mass loadings, biological indicators, ecosystem recovery, and the like -- proved to be one of the most controversial issues raised by the Colloquium. At one extreme, some participants believed that environmental quality should be the chief, if not the only, measure of effective enforcement. "Effective environmental enforcement should mean one thing and one thing only, reduction of environmental degradation," one participant stated. At the opposite extreme, others thought that enforcement efforts cannot be judged accurately by their environmental impact. For most of these participants, compliance represented the only reliable measure of effective enforcement.

The major difficulty with using environmental results to measure enforcement is the wide range of factors besides enforcement that can affect environmental quality. For example, one participant said that if mass loadings were used as a measure, the temporary closure of a major manufacturing facility due to an economic recession in his state would have far greater impact on environmental quality than his state's entire enforcement program. Similarly, external influences such as economic downturns or upturns, changes in population, and even variations in the weather can have a large effect on pollutant loadings. In addition, failure to achieve environmental improvement may indicate that laws, regulations, or permits are deficient, not that an agency's enforcement efforts are inadequate.

Despite these problems, a number of participants remained convinced that indicators of environmental quality offer a promising means of measuring effective enforcement. It might be possible to account for non-enforcement factors -- such as plant closings, economic trends, or changes in weather or population -- in assessing the environmental impact of enforcement actions. If non-enforcement variables can be controlled, one participant noted, "we might then be able to assess whether the regulatory program is 'working'." In other words, an agency could better ascertain the degree to which environmental quality improved or deteriorated as a result of programmatic factors.

One use of environmental quality measures that participants identified as especially promising is in the assessment of targeted enforcement activities, such as actions taken against certain industries in a particular geographic regions. It may be particularly informative, for example, to learn that the loading of a particular pollutant into a defined geographical region or ecosystem decreased (or failed to decrease) after a series of specifically targeted enforcement activities. Several participants thought that environmental quality indicators could be useful in assessing enforcement activities targeted at specific regions, ecosystems, or pollutants. This more refined use of environmental quality as a measure of enforcement warrants further analysis.

It remains to be seen whether indicators of environmental quality can become useful measures of general enforcement success. The problem of accounting for extraneous factors, such as the influence of economic activity and meteorological trends, is surely a difficult one. Even assuming that this could be accomplished, many participants expressed doubts that environmental quality trends would reveal useful information about an agency's enforcement programs. Determining the true promise of such a system requires further study.

Other Impacts: Cultural and Institutional Changes

Some participants suggested that environmental enforcement could be evaluated based on its impact on such matters as corporate culture, social attitudes, and the behavior of non-regulatory institutions like banks and insurance companies. According to one participant, effective environmental enforcement means that "you are a 'presence' in the community and that the regulated community has gotten the message that you are serious." Another wrote that "ultimately I think you measure [effective enforcement] as changes in culture." This participant would assess the extent to which "corporations are elevating compliance to a highly visible place, whether local police are sensitive to violations, and whether violations are viewed as a crime by the public." Obviously, quantifying these matters would be extremely difficult.

Corporate "culture" is a nebulous concept. Participants seemed to be using it to refer to a set of shared understandings and decision-making norms which determine "how things work" in a firm. Although it is difficult to pinpoint, much less quantify, corporate culture seems to play an important role in determining whether, and how well a firm complies with its environmental obligations. If it is possible to measure corporate culture, several participants thought that it might reveal important information about the impact of state and federal enforcement actions.

Participants identified a number of ways that corporate culture might be assessed. Several suggested tracking investments in preventive technology, and one would compare the percentage of corporate money dedicated to complying proactively with environmental laws with the percentage dedicated to defending environmental lawsuits. Another participant would look at the speed and willingness of industry to settle environmental actions, saying that a greater willingness to settle indicates a more effective state

enforcement program. Others would evaluate the attitude of workers in a plant, "the folks who really know what's going on," through confidential surveys and other measures, such as the number of whistleblower calls received by the agency.

Some participants thought that an enforcement program could be measured by the degree of commitment to enforcement within the agency itself, although this would be exceedingly difficult to determine. One suggestion was to measure the rate of "promotions, pay raises, and bonuses for enforcement personnel" in an agency. Other suggestions were to measure the "resources . . . dedicated to enforcement as a percentage of the [agency's] whole budget," and changes in the number of enforcement personnel in each jurisdiction. Although considerations like pay raises for enforcement personnel may indicate something about the agency's dedication to enforcement, they may also be affected by other causes. Given the uncertain relationship between budgetary decisions and "dedication" or commitment" to enforcement, it was unclear whether these measures of effective enforcement would garner widespread support.

Several participants wanted to consider the impact of enforcement activities on non-regulatory institutions. An example of this was the extent to which banks and insurers took environmental concerns into account in their day-to-day business decisions about loans and policy coverage. One participant suggested measuring the "frequency of use of non-regulatory compliance mechanisms by insuring and financing institutions -- driven by their perception (perhaps valid) of financial exposure resulting from noncompliance (CERCLA liability, natural resource damage liability, etc.)." Provided that information of this nature could be obtained, it would seem to provide an interesting angle on how effectively the business community was receiving the state's enforcement "message." Here again, however, it might be difficult to establish a connection between

particular enforcement activities and particular decisions by banks and insurance companies, although general trends might nevertheless be informative.

Finally, several participants would measure the public's perception of environmental enforcement. This could be accomplished, in part, through citizen surveys, some participants suggested. One person wanted to assess whether there was "full disclosure" to the public of all environmental violations, while another suggested measuring "column inches of publicity" devoted to environmental enforcement, such as reports of criminal sentences imposed, in-depth news coverage, and public mea culpa advertise me nts by industry.

Evaluating "cultural" changes to judge enforcement, while appealing at first, may not directly measure enforcement effectiveness. It may be impossible, for example, to correlate a change in management ideology in company A with an enforcement action taken against company B. Evaluating changes in the behavior of banks and other institutions is just as uncertain. Such changes may be the result of social and political factors wholly unrelated to environmental enforcement. Thus the real utility of these measures may be limited. Perhaps they will prove impossible to quantify or to associate with enforcement efforts. Nonetheless, it is significant that so many Colloquium participants identified cultural changes as important criteria for judging environmental enforcement. The effect of enforcement on corporate culture and social attitudes appears to be an important subject for future discussion and planning.

Cross-cutting Issues

Importance of Good Data

Whatever combination of measures is used to evaluate enforcement, virtually every participant stressed the importance of having complete and accurate data. Many participants pointed out that an accurate and up-to-date inventory of pollution sources was an essential prerequisite to measuring enforcement. One complained that "too few facilities are even regularly inspected to give any good indication of the success of the enforcement program. How can you judge a state's RCRA program if it inspects only ten percent of its large quantity generators?" Several participants also mentioned that each state agency's data should be verified by an independent body, "so that agencies can't play games with numbers."

Participants also expressed concerns about the accessibility of data once it is gathered. One participant explained the difficulty of verifying an agency's enforcement numbers when information was kept in paper files only. Many emphasized the importance of developing a computerized database, integrated among all state and federal environmental enforcement agencies, to store data on regulated firms. Others suggested coordinating this database with other databases (e.g. IRS, SEC, OSHA) and making some information accessible to the public at little or no cost. Several participants mentioned the successes of the Toxic Release Inventory database, and suggested that the TRI system could be used as a model for data management in other areas.

Need for Flexibility and Qualitative Judgment in Evaluating Performance

Although some of the measures suggested showed more promise than others, there was widespread agreement that no measure, by itself, would be sufficient to evaluate accurately the effectiveness of an enforcement program. Instead, several participants recommended using a flexible combination of measures to assess enforcement effectiveness. Information missed by one measure could, in some cases, be captured by another, or the inaccuracies of one measure could be counterbalanced by another. A combination of measures might therefore provide a more accurate picture of the overall effectiveness.

A number of participants advocated an evaluation system that allows for flexibility and qualitative judgments. Given the wide range of environmental concerns that states must address in addition to their responsibilities under federal laws, the legitimate priorities of states do not always match those of EPA. Some participants argued that EPA should take the differing priorities of states into account in evaluating state enforcement programs, while still seeking a basic level of effectiveness across all states.

One participant wrote that "the discussion shows that no single measure -- or collection of measures -- is adequate to describe the complex interactions between enforcement activity, compliance, and environmental improvement. Instead of using statistics as an end in themselves, I think we should use them as a basis for intelligent discussion." A forum for this discussion could be periodic meetings involving EPA, the state agency, and citizens. Another participant wrote that "someone from EPA should travel to each state to get a comprehensive and qualitative sense of what enforcement efforts look like in each state. I can name 10 programs in our state -- all of which are working -- but none of which could be quantified."

These call for greater flexibility and qualitative judgment in evaluating enforcement programs suggest that there is support on all sides for revamping EPA's approach to evaluating state programs, and for implementing more innovative measures of enforcement. Congressional staffers at the Colloquium indicated that Congress would be receptive to innovation. They also suggested that, although Congress is not likely to mandate new measures, it would encourage EPA's efforts to move beyond the "bean-counting" approach, and would welcome reports directly from the states, or through EPA, about the effectiveness of state enforcement. Participants from EPA were likewise receptive to new approaches to evaluating state programs; several suggested that alternative measures be tested in pilot programs. State participants urged the trial of new measures, while citizen group participants also supported changes -- especially those that might lead to greater availability of information and more citizen involvement. In all, the participants seemed to agree that improved messures should be developed and implemented.

If the climate is right for new measures of enforcement, a process to agree on them is needed. Memoranda of agreement and other types of agreements between EPA and individual states offer one set of opportunities to implement new measures. This approach has the advantage of testing new measures in individual states before adopting them as nationwide policy. But memoranda of agreement do not typically include opportunities for citizen involvement, and most participants at the Colloquium agreed that citizens were important players in the planning process. This limitation suggests that additional mechanisms should be used for debating and agreeing upon new measures for enforcement effectiveness. Possible mechanisms for implementing new measures should be explored.

IV. ENFORCEMENT PROGRAM ACCOUNTABILITY

Congress holds EPA accountable for achieving results under the statutes that EPA administers. When EPA delegates authority to a state to administer a statute, by approving a state's program, EPA in turn is required to hold the state accountable for achieving that statute's goals. This aspect of the relationship between EPA and the states is fraught with tension. Since each government has its own sphere of sovereignty, their legitimate goals and priorities may not coincide, or may even conflict. Furthermore, even where the states and EPA share goals, they serve different constimencies and must report to different masters. EPA is directly responsible to the President, but must also report regularly to Congress on its progress in implementing the environmental statutes. State environmental agencies have responsibilities to the governor and the legislature, as well as to EPA. State attorneys general may be independent of the governor and the state environmental agencies. These differing masters can make it difficult to achieve the ideal of state implementation that achieves the results desired by Congress.

The tension inherent in one sovereign requiring another to meet goals and standards can be minimized when the two are in relative agreement on their goals. The more intractable problems arise when EPA determines that a state with a delegated program is not meeting the goals of the federal statute. Of course, the state may not agree with EPA's determination, may not agree that the goals are appropriate to the state, or may have some other disagreement with EPA that is fundamental to the program at issue. Nevertheless, EPA must ensure that the federal statute is implemented, and, when it determines that a state is not implementing the statute in accordance with the federal goals and standards, must motivate the state to change its

performance. A major issue, then, is how, given the existing statutory frameworks and limited federal resources, EPA can motivate such states to change.

The Colloquium participants accepted as a basic premise that the current federalist system for implementing environmental laws can work only if the states are accountable in some way. The participants addressed two types of accountability issues: how to structure the system so that states are accountable, and how to motivate a state to change its performance under a delegated program so that it satisfies EPA and, ultimately, Congress. The discussion of motivation presupposes that EPA has accurately identified the existence of a problem. This is the issue addressed in Section II of this report, Measuring Enforcement Effectiveness.

Structural Issue

Some of the participants noted that the lack of complete criteria for an approvable state program with respect to enforcement has enabled states with historically weak enforcement programs to obtain EPA approval. Establishing specific criteria for program approval would be one mechanism for clarifying what EPA expects from states and for then holding them accountable for continuing to meet those criteria.

In addition to recommending generally that the approval criteria be improved, the participants suggested some specific criteria. Participants often raised the issue of how to increase public involvement, including a suggestion that a program not be approved unless the state provides citizens the same rights to sue the state government for failure to perform non-discretionary duties as are allowed citizens under federal law. Another idea for structural change to improve citizen involvement was to require the government to investigate all citizen complaints about specific facilities and to allow the complainant

to accompany the inspector on the inspection. Some participants cited the Surface Mining Control and Reclamation Act as an example of such a system that has been working well for years. Participants also recommended that EPA look beyond superficial similarities of state program authorities to federal authorities in order to determine whether additional burdens of proof, technical resources, or procedural steps might impede the enforceability of such state programs.

Other recommendations for structural change involved establishing procedures to evaluate how states are implementing a program after approval. Participants suggested that EPA's memorandum of agreement with a state should include specific milestones for actions to be accomplished by the state. Several suggested that EPA develop with each state a joint strategic plan for enforcement of each delegated program. The plans would provide clear objectives against which the state's performance could then be judged. Others referred to the planning process recommended in the Colloquium's discussion of allocation issues. See Section II, supra. This process would involve strategic planning that includes all environmental programs.

A related suggestion for holding states accountable for implementing federally mandated programs was to require state-by-state reporting to Congress. This would take advantage of the principle that whatever a party is required to report tends to be what it accomplishes. The crucial question then becomes what the states would be required to report.

Motivating Change in Approved Programs

Despite the interest in addressing accountability prior to approval of a state program, the participants focused more of their efforts on developing methods for

motivating states that clearly have approved programs. Some participants noted that it is critical for EPA to be flexible in choosing from the range of available techniques. In order to decide which techniques to use, EPA must determine why the state is not implementing and enforcing the program in accordance with the federal standards. Thus, many of the participants agreed that high level fact-finding meetings should be held as soon as EPA senses there may be a problem with the state's performance. Participants considered such fact-finding necessary in order to identify the precise obstacles to implementing a strong enforcement program. Fact-finding might also be useful in directly motivating change by exposing the depth of EPA's concerns. Audits of a state's program could serve both these purposes.

Capacity Building

For state agencies that recognize their problems and desire to improve their programs, the participants identified capacity-building measures that EPA could use to assist states. These include training state staff; providing experienced federal staff to the state through greater use of intergovernmental personnel assignments (IPAs); providing direct technical services, such as laboratory work; and conducting joint inspections with the state. Joint inspections could help in training state inspectors and expanding the scope of the inspections -- for example, to cover multimedia compliance.

The participants also identified the issue that is at the root of many states' inadequate capabilities -- inadequate levels of staff and funding authorized by state legislatures. Some of the ideas discussed below might effectively influence state legislatures to provide more resources to state agencies that are motivated to improve their enforcement efforts.

Tools to Motivate Reform

The participants devoted considerable time to discussing how EPA could deal with states whose inadequate performance was due to more complex reasons than simple lack of resources. One suggested approach was for EPA itself to fill the holes in the state's program. EPA would take direct enforcement action under its own residual enforcement authority, without withdrawing program approval. The advantage of this course of action, one participant explained, is that EPA could ensure that necessary enforcement occurs in the short term, while allowing the state time to put its house in order. Many participants agreed that at some point EPA would need to ignore the state and enforce the program itself on a temporary basis. There was, however, also a general recognition that EPA does not have the resources to initiate and maintain a full enforcement program for very long in many states.

There was widespread, though not universal, agreement that EPA's ultimate tool for dealing with a state where the enforcement program has failed should be withdrawal of the state's program. But many also expressed disbelief in EPA's willingness actually to withdraw any state's program, and in its ability to administer a federal program in a state after such a withdrawal. Moreover, at least one participant argued that program withdrawal would not be an effective motivator.

Making program withdrawal credible was a matter of much discussion at the Colloquium. Nearly all participants agreed that EPA needs additional authority or resources in order for this to be a realistic option. Among the proposals discussed for improving the credibility of this tool were creating a trust fund -- possibly funded by a portion of permit fees -- to be used by EPA for the costs associated with program withdrawal; amending the statutes to allow citizen suits to force withdrawal; and creating

a shadow agency or national strike force within EPA that would be ready to take over administration of a program if withdrawal became necessary.

Several participants advocated partial program withdrawal as another strategy or making withdrawal more credible. One noted that this might require statutory amendments by Congress. The advantages of partial withdrawal identified by the participants were that it could more precisely address a state's particular problems and should create less difficulties for EPA in administering the federal program in the state. The federal Office of Surface Mining has this authority under the Surface Mining Control and Reclamation Act, and has used it to take over a portion of one state's program in order to assure performance until the state was able to bring its effort up to approvable standards.

Participants generally shared the assumption that, absent some of the reforms discussed by the Colloquium, program withdrawal is not now a realistic option and, therefore, other remedial techniques need to be explored. Many participants also noted that there is not a great range of effective options available to EPA short of program withdrawal. The frustrations of many of the participants seemed to be summed up by one who asked, "Where are the scalpels instead of the sledge hammers?"

A number of participants thought that EPA's withholding of grant funds until a state improved its enforcement program would be an effective motivator. A number expressed support for the idea of putting a state's grant funds in an escrow account until it satisfied EPA's standards. One participant noted that grant withholding is particularly effective in motivating state legislatures to act. With less money available for grants, however, this was considered to be a less effective incentive than it might have been in the past. Also, the short-term effect of a withholding of grant funds might be to weaken

an already weak state program; therefore, any use of such an option should ordinarily be accompanied by another type of action by EPA. Linkage between federal dollars and state performance has some potential to change state behavior. One working group suggested linking the release of federal grant funs to a state's performance of milestones established under a remedial memorandum of agreement.

Since withholding grant funds and withdrawing approval of all or part of a program were generally considered to be responses of last resort, the participants spent most of their time seeking to identify or devise tools in the middle of the spectrum of responses. The concept of escalating responses or varying the technique used to fit the cause of the state's inadequate performance drew broad support. A number of working groups suggested that EPA escalate its responses by having a series of meetings, for example, first with the state agency director, and then with the governor, to make sure that the highest levels of the state's administration were aware of the exact problems. These meetings should always occur where EPA believes there is a programmatic problem. Participants suggested that these meetings would allow EPA to determine if the state had the political will to solve the problem and, if so, would help EPA determine how it could work cooperatively with the state to solve the problem. If it appeared that the highest levels of state management would not commit to resolving the problems, then EPA's response would need to be unilateral rather than cooperative.

Among the responses suggested for EPA to pursue if the state foreclosed the cooperative mode were to embarrass the state into improving by filing federal enforcement actions -- either by overfiling or filing new actions. Embarrassing a state into improving was widely viewed a potentially effective motivator. Different mechanisms for inducing shame were suggested for varying contexts. Informal or non-adjudicatory

public hearings to review a state's performance were suggested as one powerful method of shaming a state into acting due to the hearings expected effects on public opinion. However, a number of participants argued that such hearings would be counterproductive by worsening EPA-state relations. Public report cards were also suggested as a way of mobilizing public opinion; this did not seem to draw the same level of objection as the suggestion of public hearings, but may be objected to depending upon what measures are selected.

Participants suggested that EPA could step up its own enforcement efforts in states with failing programs, not simply to embarrass states into action, but to draw fire from the regulated community that would lead to support for strengthened state programs as a way of diminishing the federal presence. Some participants suggested a highly targeted campaign focusing on highly visible firms and resources. Perhaps a strike force or special team of EPA enforcers could be deployed in states with weak programs as an intermediate step between meeting with the governor and possible program withdrawal.

Involving the Public

There was widespread discussion of the need to involve the public throughout the process of initial program approval, evaluation, and corrective action.

One idea that surfaced a number of times was that EPA should make clear, unambiguous public statements about what it considers to be the problems with a state's enforcement program and what changes are needed. Some saw this as an integral part of the oversight process while others thought it should be a last resort. This strategy clearly has the potential to increase friction and animosity between state and federal governments. On the other hand, it also has the advantage of exposing to the public

where the agencies' respective priorities and objectives lie, and identifying areas that may need strengthening.

The participants suggested that another way to involve the public in the process of identifying causes of inadequate enforcement and devising solutions would be to create an advisory board to help EPA review the program. By including representatives of all the affected parties on such a board, EPA could also begin to hear and deal with the concerns of the public and the regulated entities. Meetings with broader groups such as trade associations or citizen groups were also suggested, both as a way of dealing with their concerns and as a way of mobilizing their support or pressure for change within the state's program. Participants also noted that the latter purpose would be served by informing the public and regulated entities of the consequences of program withdrawal.

Encouraging citizen suits is another method of involving the public in the process of holding states accountable for enforcement of delegated programs. This concept was discussed in several contexts. Potential targets of such suits could be EPA, the state agency, or the regulated entity, but most of the focus was on suits against the state agencies. Such suits were considered to be more a method of shaming the agency into improving than a method of directly forcing changes in the program. Nevertheless, some participants believed that they could exert significant pressure, in conjunction with EPA actions, to obtain reforms in state programs.

A number of participants among the citizen group representatives advocated the use of an "ombudsman." Such an official, either at the state or federal level, could address citizen concerns or complaints about programs and case-by-case failures. In some respects this might be similar to the Public Intervenor authorized in some states. In any

case, the existence of such an office might provide an additional voice or force for necessary reforms and changes in the event of a state breakdown.

Management Audits

Audits of state enforcement activities received much attention during the Colloquium as a mechanism for improving the system of holding states accountable. A variety of types of audits were suggested, including EPA audits of state inspections, citizen audits of state enforcement programs generally, and EPA audits of the state's management of its enforcement program. The main attraction of audits was the specificity of the information they could provide about the effectiveness of a state's program. Audits were also seen as a tool for obtaining more objective information that EPA or the public could then use to influence the state to improve in the specific areas needed. One state participant noted that his state enforcement programs had just undergone an audit by citizen groups, and that while the results were expected to raise some potentially embarrassing concerns, they would also build the legislative case for better authorities and additional resources.

Future Agenda

The participants reached general agreement about several major accountability issues and broadly defined goals, but they recognize that more work is needed to determine specific mechanisms for attaining these goals.

One of the areas of agreement was the need to involve the public to a greater extent in the accountability process, particularly in finding remedies for inadequate state enforcement efforts. A second was to find a way to make program withdrawal a realistic

option for EPA if a state‘s performance cannot be improved by any other means. Third, participants emphasized the need to find "scalpels" that could be used effectively to deal with serious state problems that do not require program withdrawal.

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

V. AGENDA FOR FUTURE ACTION

The Colloquium identified several areas that may provide opportunities for enhancing environmental enforcement, optimizing use of enforcement resources, and improving accountability. These constitute an important agenda for future work that has a significant degree of common recognition and support.

This section summarizes the areas identified by the Colloquium participants for future work. Because it is a summary of the more detailed discussions reflected in sections II, III, and IV, it necessarily omits some of the nuances and issues raised by the participants in conjunction with each subject. Moreover, it reflects areas of general agreement, rather than equally interesting ideas that generated some opposition or desires for more information. Accordingly, users of this report should consult the more detailed discussions in the body of the report in addition to the agenda set forth here. As Colloquium participants emphasized, the issues are quite complex at the implementation level.

How Can Methods of Measuring Enforcement Effectiveness be Improved?

If new measures of enforcement effectiveness are desirable, what are they? What process should be used to develop them and to assure their use?

First, participants concluded that the state program approval process must be strengthened to achieve greater assurance of enforcement competence and capability at the outset. They noted that oversight problems, measurement issues, and enforcement problems could be anticipated and forestalled if EPA were clearer about its criteria for approval of the enforcement component of a state program during the authorization

process. In some cases, programs are approved without adequate enforcement personnel, or with cumbersome enforcement authorities that resemble but are less effective than EPA's authorities. An effort should be undertaken by EPA, in cooperation with the other enforcement constituencies, to identify what elements, resources, and staffing are essential for effective enforcement and to build consideration of these into the approval process.

Second, participants noted that while it is very important to collect data on numbers and types of enforcement activities for management purposes, these data are not very informative for purpose of judging the effectiveness of an enforcement effort. They urged the exploration of a system of "weighted beans" to give a more accurate picture of enforcement effectiveness. They urged that the system perhaps grant greater recognition to a permit revocation or criminal conviction -- or even a permit denial -- than to a routine administrative consent order. And differences in state authorities should also be recognized -- administrative orders are immediately effective in some states, but act merely as complaints for relief in others. Also, they urged that environmental priorities or risk reduction should perhaps be recognized in determining whether a given enforcement program is operating effectively. They suggested that work be undertaken to establish ways in which these "weights" might best be assigned and used for oversight purposes.

Third, Colloquium participants strongly suggested that actual compliance rates be considered as a useful measure of enforcement effectiveness. They noted that the important measurement is not the initial gross compliance rate, but changes in compliance over time. This destination is necessary because states have problems of varying severity, and because states may be more or less effective in identifying

noncompliers. Changes in compliance rates will provide an indicator of whether the state enforcement program is improving or failing, and may identify those areas toward which additional efforts might be most profitably directed. Participants suggested the use of compliance audits to ascertain actual compliance rates by industry sector or other regulated sector. Several Colloquium work groups suggested that the audits be conducted by auditors not responsible for compliance and enforcement in the given state program in order both to increase the possibility of identifying and including facilities that might be outside the system or that have escaped inspection, and to apply a uniform identification of violations. Use of compliance rates as a measure should not, the Colloquium concluded, simply consist of an evaluation of whether significant noncompliers or other facilities identified by the program have been brought into compliance, but rather should invoke broader measures, such as audits, that are able to assess the overall effectiveness of deterrence, publicity, and other important components of the enforcement effort.

Fourth, some eftore could be made to authorize qualitative evaluations. These would be based on changes in the enforcement climate as shown by such things as a state's corporate culture, private investment decisions, compliance assessments by non-regulatory institutions, and other factors.

Finally, the Colloquium participants noted that federal enforcement is influenced by Congressional oversight, and that a different and more effective allocation might be possible if reliable state enforcement data were available and reported to Congress together with EPA data. They suggested that Congress take state data into account when judging the success or failure of a federal regulatory enforcement program. This might involve developing reporting mechanisms to allow state activities to be submitted directly

to Congress, or coordinating dam among states and EPA. They recommended that work be undertaken to improve the reliability and compatibility of reporting systems, to give "credit" to EPA regions for state efforts, and to establish a more accurate and complete picture of overall enforcement activities.

How Can Options for EPA Oversight Response be Improved?

Colloquium participants urged that effective intermediate steps short of program withdrawal be developed and used to deal with state programs that fail to function effectively. When EPA determines that a state enforcement program is beginning to fail, EPA has a number of options -- greater federal enforcement, limiting or withholding grant funding, overfiling, or program withdrawal. Many participants believed that EPA needs to have the ability to use a "scalpel" when necessary. This might include targeted enforcement initiatives, a capacity for "partial" program withdrawal, and other options that should be developed in cooperation with enforcement entities in advance.

Second, participants concluded that even when program withdrawal may be necessary and appropriate, it is an empty threat. The lack of federal funds, personnel, or both, forestalls EPA's ability to operate in lieu of a state program. The Colloquium explored a number of options to improve the vitality of this option, including creating a fee-funded trust fund, to be used by EPA for the costs associated with program withdrawal, and a "shadow agency" or national strike force, prepared to take over failed programs (similar to bank examiners taking over failing institutions). Work should be undertaken to assure EPA's capability to exercise this option.

How Can Citizen Efforts be Used to Strengthen Enforcement?

Colloquium participants identified two opportunities for strengthening enforcement through use of citizen efforts. First, citizens and citizen groups can facilitate government enforcement by identifying violations and coordinating objectives with governmental enforcers; and second, governmental entities can encourage and strengthen programs of active and independent citizen enforcement.

The Colloquium participants from all four constituencies strongly emphasized the usefulness of citizen partidpation in improving the identification of violations and in providing additional direct enforcement. They emphasized that citizens need better access to good data, and that government enforcers -- who sometimes regard citizen enforcement as irrelevant or as a nuisance -- should encourage coordination of citizen enforcement efforts with government efforts. This might include:

- development of policies about when agencies should decline to overfile citizen actions;
- use of an ombudsman to respond to citizen concerns with enforcement;
- improved access to compliance data;
- consideration of authorizing citizen-accompanied inspections;
- possible expansion of right-to-know and other self-reporting mechanisms; and
- a study of "good neighbor" and citizen inspection agreements with corporations that might achieve environmental improvements beyond current standards.

Participants emphasized that work should be undertaken to ascertain what governmental efforts could best assist citizen enforcers to become an effective supplement to governmental enforcement.

How Can Enforcement Efforts be Leveraged Effectively?

Colloquium participants strongly urged coordination among enforcers in order to maximize the effectiveness of environmental enforcement. The existence of a wide range of possible enforcers is not an obstacle or impediment to good enforcement, but an opportunity to leverage the use of different authorities and resorts. Allocations should be made on the basis of their ability to improve enforcement.

Participants recognized coordination as essential given the independent objectives of EPA, states, local governments, and citizen groups and as desirable for increasing efficiency and effectively using scarce enforcement resources. They concluded that coordination should occur on three levels: first, in the recognition and setting of respective priorities; second, in devising strategic approaches; and finally, by preventing cue-by-case overlap and surprise.

Participants urged that work be undertaken to share priority-setting within the governmental re mine ntal enforcement community. Different enforcement entities will always have different priorities. Colloquium participants noted that these independent priorities should be disclosed to one another, so that they can be taken into account, meshed, or even changed, where this would improve the prospects of increasing compliance. Participants advocated improved strategic planning at the state and EPA regional level with the involvement of citizen enforcers and capable local governments. In addition, they urged, processes should be developed to implement a policy of "no surprises" among enforcers

on the case-by-case level. Colloquium participants identified the creation of forums for coordination as an urgent task for the environmental enforcement community.

APPENDIX

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