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Federal Oversight of Authorized State Environmental Programs: Reforming the System

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FEDERAL OVERSIGHT OF AUTHORIZED STATE ENVIRONMENTAL PROGRAMS: REFORMING THE SYSTEM

Environmental Law Institute

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The views expressed herein have not been reviewed or approved by EPA, and do not reflect the views of EPA nor should any official endorsement be inferred.

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Chapter I
Introduction

Congress has found that a number of environmental problems -- particularly pollution of air, water, and land are national problems requiring national solutions. To remedy these problems, Congress passed federal statutes which provided for national standards. Recognizing the value of implementation by governments closest to local needs and issues, Congress developed a system for state implementation of the national environmental statutes.

However, in the case of most environmental statutes, the U.S. Environmental Protection Agency (EPA) remains accountable for implementation of the national standards. Congress requires periodic feedback on the implementation of the statutes it creates. In the case of federally authorized programs, EPA relies on the states to provide the required information on implementation, while EPA retains responsibility to ensure that the states are meeting the national standards set forth by the federal statutes.

Virtually all of the national environmental programs feature a dual federal-state system in which the federal government establishes baseline standards and states with approved programs carry out implementation and enforcement, subject to federal oversight. The oversight process is at the heart of federal-state conflict by its nature. In dealing with questions of how to reform oversight to better accommodate the desire for greater cooperation between the federal government and the states, it is necessary to examine the goals of oversight and the methods for evaluation.

Accountability to Congress, policy-makers, and the public requires a system for evaluating the effectiveness of implementation and enforcement of environmental laws which considers all relevant information, is well-balanced in its requirements, and is transparent for Congress and the public.

This report describes, analyzes, and makes recommendations concerning the reform of federal oversight of state environmental programs authorized under the federal environmental statutes. In particular, four of the major environmental statutes administered by EPA allow federal authorization of implementation and enforcement to state environmental agencies. These statutes -- the Clean Air Act (CAA), the Federal Water Pollution Control Act or Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act (SDWA) -- provide the basis for the analysis found in this report. The report describes how oversight works in practice, the rationale behind the many attempts to reform the oversight system, and the reform strategies EPA and the states have initiated to date. Finally, the report identifies central principles for the oversight reform process to consider.

Chapter II
What is Oversight?

Oversight generally refers to the review of state implementation of federal statutes by EPA program officials. Federal environmental statutes give general implementation responsibility to EPA, which must report on successes and failures to Congress. Most federal environmental statutes allow states with adequate authority and capability to implement and enforce the federal statute. Congress provided for state program authorization because it recognized that implementation of national standards is best managed at a level of government closer to the affected community and region. Still, although most of the statutes allow EPA to give primary implementation responsibility to the states, EPA remains ultimately accountable to Congress.

Congress established at least the broad outlines of oversight in the statutes. Congress apparently envisioned a certain level of federal oversight of a state's continuing ability to implement a program after the initial authorization process but, in general, it left the details of an oversight system up to EPA.[1]

EPA began developing an oversight system to ensure state environmental program compliance with federal statutes as soon as the first program was authorized over twenty years ago. One of the main concerns of EPA at the beginning of this process was to ensure that state environmental programs had the administrative capacity and legal authority to carry out their responsibilities under the statutes. Thus, the oversight system developed a series of detailed reporting requirements for authorized state programs through which EPA monitors the ability of the state program to continue to meet the federal statutory goals.

A. Federal Authorization of State Environmental Programs

Under most of the major federal environmental statutes, EPA may authorize implementation and enforcement of the various federal programs by the state environmental authority. EPA does this by granting "authorization" or "approval" based on state submission of a plan for the specific program. The state role is described by EPA and in the statutes as state "primacy,"[2] state "authorization,"[3] program "approval,"[4] or "delegation."[5] These terms are often used interchangably. For purposes of legal analysis, however, the use of the term "delegation" may be misleading in the context of federal authorization of state environmental programs.[6] Despite the common use of the term delegation by EPA and practitioners, none of the federal statutes effectively delegates any federal power to the states. Rather the federal government relies on the states' own inherent and constitutional powers to carry out environmental implementation responsibilities and, upon recognition of a state's programs, refrains from exercising federal powers to their fullest in that state.[7]

The effect of state authorization is to trigger suspension of the direct federal role in implementing the environmental program in that state.[8] However, state laws and programs are binding on state residents and companies regardless of federal authorization. State law is only preempted if it is inconsistent with federal law. A state is not empowered through authorization. If EPA elects to withdraw authorization, a state's program itself is not legally or materially undercut, except to the extent that the availability of federal funds may be conditioned by law or agency policy on the existence of an authorized program.

The statutes create a clear authorization process and define the respective responsibilities of EPA and the states. Most states choose to request federal authorization. They do so primarily in order to preempt federal environmental programs in their state which could duplicate state environmental program efforts. In addition, authorization is a prerequisite for many sources of federal funds.

In order for an existing or planned state program to be "approved" by EPA, the state must meet certain requirements, which are similar in the CAA, CWA, RCRA, and SDWA, and in most of the federal environmental statutes. States are

generally required to submit an implementation plan including state authorities, staff and resources necessary to implement the program, for EPA approval. If approved, the state is authorized to implement and enforce the requirements of specific programs under the federal statute.

While authorized state programs have the lead in most direct compliance and enforcement activities, EPA usually retains certain responsibilities, such as setting and ensuring achievement of national goals, objectives, and standards. EPA's role in states with authorized programs shifts from primary implementation and enforcement to ensuring that the goals of the statute are met. EPA has a potentially large influence over state program design in the approval phase. EPA approval is primarily based on its assessment of a state's capability to carry out a specific environmental program. The federal statutes give specific lists of elements that must be included in a state program, such as "adequate" procedures for enforcement, "adequate" personnel, funding, and legal authority, inspection and reporting capacity, and "effective" implementation capacity.[9]

In addition, EPA retains "residual" enforcement authority following approval or authorization of state programs. Residual enforcement authority is a consistent feature of the federal-state partnership, though its scope varies somewhat among statutes.[10] EPA can play a strong back-up role to the states by taking direct enforcement action in those cases where a state is unwilling to establish a strong enforcement presence or is unable to do so due to a lack of necessary resources or requisite legal authority. Residual enforcement authority can also be a point of tension between states and EPA; particularly when it is used in the case of perceived state noncompliance or inaction.

Federal environmental statutes consist of many sub-programs. In general, a state may develop plans for any one, several, or all of the programs under a statute. In addition, under some programs, EPA may grant partial or conditional state plan approval and require the state to correct deficiencies before approval for an entire program is granted.[11]

If a state does not request authorization, EPA must promulgate and administer a federal program for that state. If a state fails to comply with its

approved plan, EPA may apply various sanctions, culminating with removing the authorization for the state program. EPA has an implicit responsibility, under the statutes, to assure that the state has the capacity to administer the program. Only a few statutory provisions give EPA explicit responsibility to oversee the authorized state program. The statutes, in general, do not make an explicit link between oversight criteria and the requirements that states had to meet to gain authorization for a program.

B. Statutory Context

The Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act contain detailed provisions for authorization of specific programs to the states.[12] They list detailed criteria that a state must meet in order to gain approval. They list circumstances where the federal government can withdraw authorization for a program from a state, in addition to other sanctions for state "noncompliance" in implementing a federally-authorized program. Yet, apart from a few specific state reporting provisions and even fewer EPA review requirements, these statutes do not provide detailed guidance for establishing an oversight system.

The federal environmental statutes largely leave the details of oversight procedure for EPA to regulate. The existing oversight system has been developed by EPA regulation or agency policy, with minimal guidance from the statutes. For most of the programs, the statutes do not explicitly require EPA to monitor approved state programs to ensure that they maintain those elements of their programs that allowed them to receive authorization. Yet, a general duty for EPA to oversee state implementation of federally authorized programs is implicit based on EPA accountability to Congress for the implementation of the statute and the achievement of its stated goals.

In the CAA, CWA, RCRA, and SDWA, Congress approached oversight through a few disjointed requirements, around which an elaborate regulatory oversight system has evolved. The oversight provisions included in the statutes tend to require a state with an authorized program to make certain information available

to EPA. Whether or not EPA reviews or uses this information is largely left to EPA's discretion. Under most programs, EPA also has the discretion to determine the extent of a state's reporting requirements or to waive the requirements altogether.

The following descriptions of the statutory authorization and oversight provisions under the CAA, CWA, RCRA, and SDWA will illustrate the requirements in more detail.

1. Clean Air Act

The primary goal of the Clean Air Act[13] (CAA) is to "protect and enhance the quality of the nation's air resources to promote public health and welfare."[14] The Act mandates attainment of certain national ambient air quality standards (NAAQS).[15] The NAAQS apply to eight air pollutants and are set by EPA. States must devise state implementation plans (SIPs) for reducing the levels of the eight pollutants to meet the NAAQS. In devising their SIPs, states must demonstrate their capacity to meet the requirements of the various programs under the act in order to control a variety of mobile and stationary air emission sources. States submit their SIPs to EPA for approval. If the SIP is approved -- for all or some of the programs under the statute -- the state is authorized to implement and enforce those CAA requirements. If a state has failed to submit a SIP, EPA must promulgate and administer its own program, a federal implementation program or FIP, for that state. If a state fails to comply with its approved SIP, EPA may impose sanctions, including withholding funding for highways and other grants.[16]

In general, state reporting requirements under the CAA are left for EPA to determine. According to the statute, states must submit regular reports as EPA may require for assessing the effectiveness of the SIP.[17] However, states have certain requirements which are not discretionary. Under the NAAQS program, for example, states must notify EPA of each penalty assessment, although EPA has discretion in its review.[18] Also under NAAQS, each state must review its SIP provisions relating to major fuel burning sources to determine whether SIP compliance is dependant on the use of petroleum products and coal, as well as to

determine long-term viability of these energy sources.[19] States must submit the results of the review to EPA. Under the prevention of significant deterioration (PSD) program, a state must give EPA a copy of each construction permit application in PSD areas, as well as notice of any state action concerning the permit.[20] Under the operating permit program, state permitting authorities are required to transmit a copy of each permit application to EPA and a copy of each permit to be issued, but there is no direct requirement for review by EPA.[21]

The nonattainment areas program is one of the few instances in the Clean Air Act where EPA is required to review a state action. EPA must review state reports within 90 days to determine state compliance with state-set milestones for ozone, carbon monoxide, and particulate matter.[22] In addition, under the acid deposition program, EPA is required to review the state determinations to allocate allowances for energy conservation and renewable energy projects.[23]

In general, the Clean Air Act specifies very few elements of an oversight system. Apart from limited non-discretionary reporting by the states under the programs for NAAQS, PSD, and operating permits, EPA has discretion to require state reporting on implementation and enforcement. Moreover, EPA has almost no requirements to review the state reports, including some of those that states are required to file by statute. Only the milestone program for nonattainment areas and certain allocations under the acid deposition program require EPA review of state reports.

2. *Clean Water Act*

The primary goal of the Federal Water Pollution Control Act or Clean Water Act (CWA)[24] is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[25] The act regulates the discharge of pollutants into surface waters. It consists of two key permitting programs, the National Pollutant Discharge Elimination System (NPDES) and a permit program for dredged or fill material, as well as several specialty programs that target pollution prevention in the nation's lakes and estuaries.

EPA, under the CWA, is responsible for establishing nationwide minimum standards for pollutant dischargers. These effluent limits are set by EPA based on increasing levels of control technology. The act also requires each state to set water quality standards within its jurisdiction. The two standards -- the federal technology-based effluent standards and the state environmental quality standards -- are used to formulate effluent limitations for each permittee. A state may seek approval from EPA to assume primary responsibility for issuing permits under each of the two permitting programs and for the administration and enforcement of the permit program within its jurisdiction. However, the statutory language suggests an intent that EPA maintain a strong enforcement presence in states with approved programs and a responsibility to enforce in the absence of an "appropriate" state enforcement effort. The NPDES program has approximately 39 states with approved programs, but only a few states have approval for full implementation and enforcement of most of the programs under the CWA. Only a few have been approved to administer the §404 dredge and fill permit program.

Oversight under the CWA is based on EPA review of state-issued permits. In general the state is required to give EPA a copy of each permit application and notify EPA of every action taken in consideration of a permit application.[26] However, EPA is not required to actually review the permit, and may waive the permit submission requirements for both NPDES permits and dredge-and-fill permits after a program is approved.[27]

The CWA requires a state to submit to EPA a biennial state report on water quality. EPA then is required to transmit the reports directly to Congress.[28] Each state (whether or not there is an approved program) is required to submit a description and analysis of water quality in all of its navigable waters, including an analysis of the extent that the water quality and discharge reduction requirements of the statute will have been achieved, along with recommendations for further action. The report must also include an estimate of the environmental impact and economic and social costs and benefits that will result from achieving the goals of the statute. EPA is required to attach an analysis of these reports before submitting them to Congress.

Environmental quality is also taken more directly into account in oversight under the clean lakes program.[29] Under the statute, a state must submit a biennial report to EPA showing that it continues to satisfy the criteria which were necessary for clean lakes program approval. These include a list of lakes whose uses are impaired or have high acidity, and an assessment of the trend in lake water quality in the state.[30] EPA is required to use these reports as the basis for continued program approval and, in turn, must submit a report to Congress.[31] In addition, under the nonpoint source management program, each state must report to EPA on an annual basis on its progress in meeting a schedule of milestones submitted, including information on reducing pollutant loading.[32]

The CWA, of all the statutes reviewed, makes the most direct connection between improvements in environmental quality and oversight. Since the permit review process is discretionary for EPA, the main oversight requirements are found in the state report on general water quality and the specific reporting requirements under the clean lakes and nonpoint source management programs. EPA review of these reports is not mandated, nor is it connected to continued program approval status. However, EPA is expected to directly report to Congress on the content of the state reports in meeting the goals of the statute.

3. Resource Conservation and Recovery Act

The primary objective of the Resource Conservation and Recovery Act (RCRA)[33] is to protect "health and the environment and to conserve valuable material and energy resources."[34] The statute includes a hazardous waste management program (with permitting requirements), a non-hazardous waste management and landfill program, and an underground storage tank program. EPA sets minimum requirements for each of these programs. States may develop their own programs based on federal requirements and submit them to EPA for authorization. Once approved the state is authorized to implement and enforce the program in lieu of the federal agency.[35] If EPA determines that the state is not administering and enforcing the program, EPA can withdraw authorization and establish a federal program.[36]

RCRA has fewer oversight-related requirements than the Clean Air Act, the Clean Water Act, or the Safe Drinking Water Act. The hazardous waste management program, for instance, has no statutory reporting requirements for states operating federally-authorized programs. EPA may authorize state hazardous waste management programs after state submission of a plan which is equivalent to the federal program and provides for adequate enforcement.[37] EPA is required to withdraw program authorization if a state is not "administering and enforcing" the program.[38] However, there are no further requirements for state reporting or EPA monitoring to assess a state's achievements in administering and enforcing the program.

Only under the program for non-hazardous waste management and landfills, does the statute require EPA to review state solid waste management plans "from time to time" to make sure that they meet the minimum requirements for plans set out in the statute.[39] If the plans do not meet the minimum requirements, EPA is required to withdraw approval of the plan. Although this is virtually the only oversight-related requirement in the whole statute, it does explicitly link a review process to the criteria for approval and to the sanction of authorization withdrawal. Few of the oversight provisions in other statutes have similar requirements.

4. Safe Drinking Water Act

The Safe Drinking Water Act (SDWA)[40] consists of a program for administering public water systems and several programs for underground drinking water systems. EPA sets health-based water standards for the public water system program and certain minimum requirements for the underground drinking water programs. States must then develop plans to meet federal standards and submit them for EPA approval.[41] If the state plan is approved by EPA, the state receives primary enforcement responsibility over water systems.[42] If the state fails to submit a program or fails to comply with a federal requirement, EPA must promulgate and implement a program for the state. If a state program does not comply with federal requirements, EPA may apply different sanctions against the state, including compliance orders and civil action.[43]

Under two of the SDWA programs -- public water systems and injection control systems -- most state reporting requirements are left to EPA to determine by regulation.[44] Still, there are several exceptions where the statute provides for reporting requirements. For example, under the public water systems program, states are required to notify EPA of the availability of results from monitoring of drinking water for unregulated contaminants.[45] In addition, several of the other programs dealing with underground drinking water sources, such as the sole source aquifer program and the wellhead protection program, require state reporting. Under the sole source aquifer program, each state is required to submit a report to EPA assessing the impact of the program on ground water quality and identifying measures found to be effective in protecting ground water resources.[46] Under the wellhead protection program, each state is required to submit a biennial status report describing the state's progress in implementing the program.[47] The wellhead protection program also contains one of the few specific requirements for EPA oversight action: EPA is required to conduct a review of state programs with active wells using annular injection.[48]

C. Oversight in Practice

During the past 25 years, the oversight system has evolved requirements for a flow of information from the states to EPA, which EPA evaluates against certain criteria. The oversight system uses criteria which primarily measure the capacity of a state to administer and implement a program, as well as the implementation and enforcement actions (for example, permits or compliance orders) taken by a state. The assumption behind this system is that if a program has legal authority, administrative capacity, and carries out an adequate number of implementation and enforcement actions, the state program will be fulfilling the goals of the statute. This oversight system assumes that a well-administered program will meet the environmental goals of the statute.

EPA's role in the oversight process is to decide which information it wishes to receive from the states, evaluate that information, and take actions to ensure that the state is in compliance with its obligation to implement and enforce the federal statutory program. The state's role is to collect the information required by EPA and to convey it to the regional office for assessment.

1. *State-EPA Agreements*

The actual oversight system is much more detailed and elaborate than the sparse statutory requirements would suggest. Oversight has evolved into a web of EPA regulations, guidelines, and policy statements.[49] In addition, EPA regional offices often provide guidance statements on oversight requirements under specific programs.[50] State-EPA agreements (SEAs), which include cooperative agreements, enforcement agreements, and grant agreements or assistance agreements, also set out oversight obligations state by state for specific authorized programs. The programs under these agreements are usually supported by a combination of state and federal funds. SEAs can cover programs under several statutes simultaneously.[51] They are usually grant vehicles for federal funds to support state implementation of federal statutes, but also provide the vehicle for setting out the oversight requirements.

EPA oversight of state programs is conducted primarily by the regional offices. EPA headquarters provides the regional offices with guidance in the form of regulations and policy documents which further specify the working relationship between state offices and EPA. Specific agreements and work plans also are made between individual states and the regions regarding which oversight tools will be used and which performance criteria which EPA will apply in evaluating the state program.[52]

Federal grants under the national environmental statutes are usually reserved for states with primary enforcement responsibility or for states with authorized or approved programs. Grants tend to be designated for state initiatives to strengthen the program capacity, such as personnel training and administering the program, as well as for initiatives which strengthen implementation and enforcement.[53]

2. *Reporting and Review*

EPA needs a constant flow of information from the states in order to evaluate state environmental programs. Information about program activities and results can ensure that states responsible for implementing and enforcing the programs are, in fact, doing so consistently using established procedures and strategies.

In order to evaluate how a state is meeting its programmatic goals, EPA sets reporting and communication requirements. In addition, EPA retains the right to directly review different aspects of the state program. Reporting requirements include self-assessments and periodic reports on program activities. Specific examples of review activities include file audits, inspections, annual program reviews, information database reviews, and permit reviews. Communication requirements are geared towards state environmental program staff and EPA regional staff discussing implementation and enforcement problems and needs on a regular basis.

These requirements are usually handled separately for each authorized program under each statute. This means that reporting and review are done separately for the different media and that there is little focus on cross-program issues or on management of non-authorized state programs, which may complement or support authorized programs. The traditional reporting and review system can leave important innovations in the development of cross-media implementation and enforcement techniques unreported and allow an incomplete picture of a state's environmental program to be portrayed.

In addition, oversight is structured in such a way that EPA has the option to be involved at the level of day-to-day state decisionmaking. For example, EPA's main tool for overseeing state-run NPDES permitting programs under the Clean Water Act has traditionally been real-time permit reviews. This means that EPA has the opportunity to review state-drafted permits prior to issuance and to object to them. EPA has tended to focus on major permits in an attempt to limit its oversight to the most complex permits or those with potentially toxic discharges. The number of the permits which EPA actually reviews in this category tends also to be relatively low. Still, many states view such review efforts, which intervene in daily decisions, as duplicating their efforts and as coming too late in the process to add useful input. In addition, states feel that reviews which focus on such a small part of the overall program may identify problems, while missing the underlying causes.[54]

3. *Evaluation*

EPA has developed an evalution process using criteria such as timeliness, administrative capacity, effectiveness, and accuracy. Each EPA region and program uses different criteria in evaluating state programs. The administrative criteria can be roughly divided into those measuring administrative capacity, those measuring compliance and enforcement responses, those measuring communication and cooperation efforts, and those measuring general implementation ability. In addition, certain regions and states have begun to examine environmental quality criteria to evaluate certain elements of state programs.

In general, EPA regional offices concentrate most of their efforts on evaluating administrative capacity, implementation techniques, and enforcement responses.[55] Communication and general implementation are reported on or evaluated to a much smaller degree. Important elements of the implementation of any environmental program, such as public participation, preventative techniques, education, and achievement of environmental quality goals are to a large extent missing from the list of common performance criteria.

EPA tends to evaluate the reported data based on both quantitative and qualitative measurements. Quantitative measurements evaluate the number of times a certain activity is carried out or the timeliness with which certain obligations are met. For instance, states usually report, and EPA reviews, the number of inspections completed, the number of unaddressed violators, or the number of workplan commitments met. EPA considers factors such as the percentage of permitting work dedicated to high priority facilities or the percentage of permit applications that are stale. EPA also considers timeliness important in the case of report submissions, initial enforcement actions, post compliance follow-ups, adoption of new federal regulations, and availability of enforcement or inspection data on databases.[56]

EPA finds qualitative measurements more difficult to use and assess. EPA has stressed their importance as it has tried to shift the oversight process from a sole focus on state activities to a more accurate evaluation of the effectiveness of a state program. Examples of qualitative criteria which are being implemented include accuracy in reporting, *good* communication with EPA, *technically complete*

inspections, *well organized and accessible* files, *appropriate* enforcement actions, *accurate* classification of violators, *sound* management practices, *adequate* staff, *adequate* training of staff, *sufficient* data reporting on the various databases, *well written* permits that are enforceable and legally defensible, *effective* monitoring and reporting requirements, and *good* standard operating procedures. Most of the qualifiers which indicate how different aspects of the state program will be evaluated are vague and undefined. This leads to difficulty in making comparisons among states. It also introduces a system for which it is difficult to establish clear guidelines for evaluation.

The information concerning state program activities is often difficult to evaluate in the context of the overall quality of the program -- especially where EPA would like to compare the data of similar programs between states. In general, EPA has not developed uniform reporting methods. Each state program has developed its own categories and classifications for relaying information concerning their program to EPA. This makes it difficult to compare the information received from different states and makes it more difficult to judge the reliability of the data. In addition, comparison is made difficult by the differing reporting periods used by states, which sometimes correspond to individual state budget years and sometimes correspond to calendar years.

The current oversight system looks at aspects of state program management that are easily measurable and those that are more difficult to quantify. However, all of these criteria lead towards an evaluation of the administration, implementation, and enforcement of the state program. These criteria do not lead EPA to evaluate directly if the environmental goals of the statute are being met or how the state program has affected environmental quality in the state over time.

4. Ensuring State Program Effectiveness

EPA's obligation in the oversight process does not end with an evaluation of the state program. EPA also has a duty to identify weaknesses in a state program and to encourage the state to improve those aspects either through technical assistance or through the range of sanctions at its disposal. Sanctions include grant

funding reduction, permit denial and withdrawal of authorization, although in practice the latter never occurs. In addition to sanctions, EPA also retains enforcement authority which it can implement in the face of state noncompliance or reluctance to enforce the laws against violators. Residual enforcement authority can include the ability to hold informational hearings, issue compliance orders, inspect facilities, suspend or revoke permits, assess civil penalties, and take civil action. Notice to the state is not required in most of these situations.

Endnotes

1. For a more detailed analysis of the statutory provisions, see, *Comparison of Federal-State Allocation of Responsibility in Five Environmental Statutes*, Environmental Law Institute, September 1995 (hereinafter *ELI Statutory Comparison*).

2. *See, e.g.*, Safe Drinking Water Act (SDWA) §1412(b)(7)(C), 42 U.S.C. §300g-1(b)(7)(C), (States may follow federal procedures and gain "primary enforcement responsibility for public water systems.").

3. Under the Resource Conservation and Recovery Act (RCRA), a state that wishes to administer and enforce a hazardous waste program may develop and submit a program for EPA "authorization." RCRA §3006(b), 42 U.S.C. §6926(b).

4. *See, e.g.*, Federal Water Pollution Control Act (FWPCA) §402(b), 42 U.S.C. 1342(b), (each state desiring to administer its own NPDES permit program may submit a full and complete description of the program to EPA for "approval").

5. Under the Clean Air Act (CAA) New Source Performance Standards (NSPS) program, EPA "shall delegate" to a state any authority it has under this chapter to implement and enforce NSPS. CAA §111(c)(1), 42 U.S.C. §7411(c)(1).

6. See *Report of the Colloquium on Federal-State Relations in Environmental Enforcement*, Environmental Law Institute, January 1991.

7. For further discussion of this issue, see, S. Novick, et al (eds.), *Law of Environmental Protection*, §6.02, (Environmental Law Institute, Clark Boardman Callaghan, 1987, updated annually).

8. See *Federal-State Partnerships Under Three EPA Programs: A Legislative History (Draft)*, Environmental Law Institute, 1989.

9. See *ELI Statutory Comparison* for a more detailed analysis.

10. See *ELI Statutory Comparison*.

11. *See, e.g.* Clean Air Act programs for air quality (NAAQS), new sources (NSPS), hazardous air pollutants (HAP), operating permits, and acid deposition. *ELI Statutory Comparison*.

12. For analysis of the statutory language concerning the delegation process, oversight requirements, residual federal enforcement authority, grants and assistance to states, and issues concerning state noncompliance and program authorization withdrawal, see *ELI Statutory Comparison*.

13. Clean Air Act (CAA) §101-618, 42 U.S.C. §§7401-7671g.

14. CAA §101, 42 U.S.C. §7401.

15. *See* CAA §109 et seq., 42 U.S.C. §7409 et seq.

16. *See* CAA §105, 42 U.S.C. §7405 on grants for air pollution planning and control programs and CAA §179(b), 42 U.S.C. §7509(b) for provisions concerning highway grant and sewage treatment construction grant withholding.

17. This is true for every program included in the SIP. *See, e.g.*, CAA §110(p), 42 U.S.C. §7410(p) under the NAAQS program.

18. CAA §120(b), 42 U.S.C. §7420(b).

19. CAA §124, 42 U.S.C. §7424.

20. CAA §165(d), 42 U.S.C. §7475(d).

21. CAA §505(a), 42 U.S.C. §7661d(a).

22. *See, e.g.*, CAA §182(g), 42 U.S.C. §7511a(g).

23. CAA §404(f), 42 U.S.C. § 7651c(f).

24. CWA §§101-60742, U.S.C. §§1251-1387.

25. CWA §101, 42 U.S.C. §1251.

26. *See*, CWA §402(d)(1), 42 U.S.C. §1342(d)(1) for NPDES program or CWA §404(j), 42 U.S.C. §1344(j) for dredged or fill material permits.

27. *See*, CWA §402(d)(3) and §402(e), 42 U.S.C. §1342(d)(3) and §1342(e) for NPDES permits and CAW §404(k), 42 U.S.C. §1344(k) for dredge-and-fill permits.

28. CWA §305, 42 U.S.C. §1315.

29. CWA §314, 42 U.S.C. §1324.

30. CWA §314(a)(1), 42 U.S.C. §1324(a)(1).

31. CWA §314(a)(1) and §314(a)(3), 42 U.S.C. §1324(a)(1) and §1324(a)(3).

32. CWA §319(b) and §319(h), 42 U.S.C. §1329(b) and §1329(h).

33. RCRA §§1001-11012, 42 U.S.C. §§6901-6992k.

34. RCRA §1003, 42 U.S.C. §6902.

35. *See, e.g.*, RCRA §3006(b), 42 U.S.C. §6926(b) under the hazardous waste management program.

36. *See, e.g.*, RCRA §3006(e), 42 U.S.C. §6926(e).

37. RCRA §3006(b), 42 U.S.C. §6926(b).

38. RCRA §3006(e), 42 U.S.C. §6926(e).

39. RCRA §4007(a), 42 U.S.C. §6947(a).

40. SDWA §§1401-1465, 42 U.S.C. §§300f-300j.

41. *See, e.g.*, SDWA §1413, 42 U.S.C. §300g-2 concerning the public water system program.

42. *See, e.g.*, SDWA §1412(b)(7)(C), 42 U.S.C. §300g-1(b)(7)(C) concerning the public water system program.

43. SDWA §1414, 42 U.S.C. §300g-3.

44. SDWA §1413(a)(3), 42 U.S.C. §300g-2(a)(3) (public water systems) and SDWA §1422(b)(1)(A)(ii), 42 U.S.C. §300h-1(b)(1)(A)(ii) (injection control systems).

45. SDWA §1445(a)(5), 42 U.S.C. §300j-4(a)(5).

46. SDWA §1427(l), 42 U.S.C. §300h-6(l).

47. SDWA §1428(g), 42 U.S.C. §300h-7(g).

48. SDWA §1428(i)(3), 42 U.S.C. §300h-7(i)(3).

49. For example, EPA provided guidelines on state-federal cooperation under RCRA for FY95 with guidance on the schedule for FY95 Cooperative Agreement awards, elements for workplans, recommendations concerning quality performance criteria, pricing factors, and implementation guidance. *FY95 RCRA Guidance*, U.S. EPA.

50. See, for example, *Policy, Guidance, and Standard Operating Procedures for Oversight of Hazardous Waste Compliance Monitoring and Enforcement Programs*, U.S. EPA Region VIII and the States of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming, November 1993.

51. See, for example, the 1995-1997 SEA for South Dakota which includes activities under the SDWA, RCRA, CWA, Toxic Substances Control Act (TSCA), Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and CAA. *The State of South Dakota and U.S. Environmental Protection Agency Multi-Year Agreement for Fiscal Years 1995, 1996, 1997*, South Dakota Department of Environment and Natural Resources and U.S. EPA Region VIII.

52. See, for example, guidance concerning oversight, implementation, and enforcement priorities for the state offices and for the EPA regional offices under the Safe Drinking Water Act. *PWSS Program Priority Guidance to Water Management Division Directors Regions I-X*, U.S. EPA Office of Ground Water and Drinking Water, June 1992.

53. See, for example, the North Carolina-U.S. EPA Cooperative Agreement on Underground Storage Tanks, which lists the activities for which federal funds are to be used as enforcement activities, site actions, provision of water supplies, relocation of residents, and cost recovery. *Cooperative Agreement Leaking Underground Storage Tank Trust Fund*, North Carolina Department of Natural Resources and Community Development and U.S. Environmental Protection Agency, FY 1994 report.

54. For further analysis of these issues, see, *Recommendations of the Permits Quality Action Team to the State and EPA Water Directors on the Subject of Federal Oversight of State Programs*, U.S. EPA Region V Water Division, August 1994. See also, materials discussing Minnesota Pollution Control Agency FY94 Assessments and FY95 Oversight Strategy, in part lessening permit review by U.S. EPA, Minnesota Pollution Control Agency and U.S. EPA, January 1995.

55. This information is based on an ELI survey of cooperative agreements, workplans, assessments, and other oversight documents from several regions under RCRA and CWA.

56. See, for example, the list of data EPA is to consider as part of its evaluation of delegated programs in Utah. The list includes timeliness of reports, timeliness of state enforcement activities, whether the state follows its penalty policy, number of permits issues, quality of permits issued, and percent backlog for major and minor permits. *Differential Oversight Project*, Utah Department of Health and U.S. EPA Region VIII, July 1990.

Chapter III
Why is Oversight Reform Needed?

The states and EPA have been discussing oversight reform for over ten years. These discussions have resulted in a series of *ad hoc* experiments with oversight reform initiatives. The basic reason for states and EPA to search for new oversight methods lies in the changing relationship between the federal and state governments. Another important reason for oversight reform is to improve the capability of the system to do what it was created to do: ensure that the federal environmental statutes are implemented and enforced and provide a system of relaying that information to the U.S. Congress and the public.

A. The Federal-State Relationship Has Changed

The existing oversight system evolved at a time when states were first developing their environmental programs. EPA had two main concerns at that time. First, to ensure that state environmental programs had the administrative capacity and legal authority to carry out their responsibilities under the statutes.[1] Second, to ensure that the state actually undertook enforcement activities against violators in the regulated community. The level of oversight chosen at that time was one of detailed and frequent oversight activities, including EPA involvement in day-to-day operation decisions of the state programs, such as permit issuance, penalty assessment, and site inspections.

Since the oversight system first evolved, many states have developed comprehensive environmental programs in air, water, and waste which include federally authorized programs as one component. In addition, enforcement actions and programs to ensure compliance have become an integral part of many state environmental programs. State environmental programs have had at least two decades of experience implementing and enforcing programs in air, water, and waste.

This growth in capacity in many state environmental programs suggests the need for a different level and focus of oversight.[2] The challenge is to ensure that the strengths and weaknesses of a state program are accurately reflected, while at the same time allowing states room to develop their own priorities.

B. The Goals of Oversight Are Not Being Met

The oversight system should help EPA ensure that federal statutory goals are being met by the state environmental programs. In theory, this comes from evaluating the quality of the programs and the improvements in the state's environment. The primary goals of oversight are to collect relevant information concerning federally authorized state environmental programs and to evaluate that information to develop an accurate assessment of the quality of the state environmental program and its achievements in fulfilling the mandates of the federal environmental statutes.

The existing oversight system falls short of meeting these goals in several ways. First, the scope of oversight has been too narrow to reflect the progress a state has made in meeting the goals of an environmental statute or in improving the overall state environmental quality. Second, the criteria used in oversight have put more emphasis on administrative actions and capacity than on environmental quality. Third, oversight reporting has not been conducive to transparency or public accountability.

EPA may wish to consider and states may wish to provide a broader base of information in the oversight process to ensure that EPA is aware of a state environmental program's overall priorities and goals. Understanding the other components of a state program, such as cross-media issues and the relationship to other programs, can help EPA see a specific authorized program as one component in a state portfolio of priorities. For instance, authorized programs do not exist in a vacuum, but are supported and strengthened by the entire state environmental program. In addition, cross media issues, such as pollution prevention, environmental justice, public participation, enforcement and compliance, and information management, can play an important role in supporting authorized

programs. To report on and evaluate only those parts of a program which relate to a specific media or to analyze the cross-media issues only in the context of one specific medium, may not accurately reflect the effectiveness of a state environmental program. Programs outside of EPA jurisdiction, such as natural resources use, resource extraction, energy consumption, can also affect authorized programs, especially where the state has created special links with other agencies.[3]

In addition, how to shape the evaluation criteria, or the "measures of success," has long been a debating point for EPA and the states in the process of reforming oversight. The primary emphasis of the existing oversight system is on evaluating administrative actions and capacity, rather than on environmental quality. EPA has developed a detailed system for reporting administrative actions with little or no connection to the resulting achievement of environmental goals. In the past, oversight functioned on the assumption that a program which carried out certain implementation and enforcement tasks was therefore meeting its environmental goals. However, EPA and the states are exploring the use of environmental indicators as a more effective method for evaluating state environmental performance. Environmental indicators can show more directly if environmental goals are being met. In addition, environmental indicators give a sense of trends and progress in meeting environmental quality goals.

Finally, the format and presentation of reports under the traditional oversight system has not been conducive to comprehensive, comparative evaluations of state environmental programs. Reporting under the traditional oversight system is done through a series of small reports which vary from state to state and program to program. Reports cover different reporting periods for each state and issue. This virtually precludes comparison either between states or between programs. It also makes it very difficult to ever get an overview of program strengths and weaknesses -- both at the level of a single authorized program and at the multi-media level within a state. In addition, the current reports are not presented in a way which encourages their use by the public or by legislators.

Endnotes

1. See *Report of the Task Force to Enhance State Capacity: Strengthening Environmental Management in the United States*, U.S. Environmental Protection Agency, EPA-270-R-93-001, July 1993.

2. See *Principles for a More Workable and Effective Relationship Between the State and Federal Governments*, Western Governor's Association, January 1995.

3. See *Setting Priorities, Getting Results: A New Direction for the Environmental Protection Agency*, National Academy of Public Administration, April 1995.

Chapter IV
What Has Been Done So Far?

For at least the last five years, EPA and the states have been working jointly to improve the existing oversight system. This was done through the encouragement of *ad hoc* initiatives on the part of various states and EPA regional offices to reform oversight. Most recently, EPA and the states have been working to channel oversight reform along a common path, through a new partnership initiative. In May 1995, EPA and the Environmental Council of the States (ECOS)[1] initiated a more comprehensive approach to state-federal relations, including oversight reform. At that time, leaders of EPA and ECOS initiated the development of a system -- the National Environmental Performance Partnership System (NEPPS) -- which will attempt to restructure federal-state relationships in the environmental arena.[2] The new approach focuses in part on what have been the three main targets of oversight reform: reducing any unnecessary or duplicative administrative burdens, limiting oversight for states with good environmental programs, and more use of environmental quality indicators. The NEPPS is still very much in the formative stage.

Prior to the most recent developments, oversight reform initiatives tried to modify the traditional system to improve efficiency and reliability of the reporting and evaluation.[3] The results of these initiatives are already apparent in the several states and EPA regions where they were implemented.

The oversight reforms implemented by EPA and the states have had the principal goal of lessening the administrative burden by making oversight a more efficient process and by allowing a lower level of oversight for states with "sound" environmental programs. In addition, EPA has tried to find oversight methods which reflect the overall quality of the state environmental program and its effectiveness in meeting the environmental goals of a statute. The criteria used under these reforms have taken a first step away from counting the number of times certain actions were taken, to trying to evaluate the impact of the program on

B. Lessening the Level of Oversight

EPA and certain states have been experimenting with a new system which would virtually eliminate all but the most basic oversight reporting requirements for states that met certain criteria for having a "sound" program. This process is known as "differential" oversight. Differential oversight means that activities such as oversight inspections, file reviews, and audits will be conducted at a level commensurate with a state's performance. The purpose is to relieve states which meet certain criteria set by EPA of most of their oversight reporting burdens. With a few exceptions, EPA has statutory discretion to limit oversight reporting and review requirements to substantially below the current required level.[7]

For example, new policies in Region V for both the NPDES and RCRA Subtitle C programs outline guidance on differential oversight. In each case the policy sets out a baseline of minimum reporting requirements for the state and oversight duties for the regional office.[8] The minimum requirements are substantially lower than those under the previously existing oversight system. The minimum requirements are applied to every state: only if a state fails to meet certain EPA-determined criteria in implementing and enforcing their authorized environmental programs will a higher level of oversight requirements be applied.

For the Region V RCRA program, the minimum requirements include decreases over previous years in existing oversight mechanisms, such as in the number and frequency of joint inspections, file audits, and conference calls. The minimum requirements also include a state program review which is conducted twice a year. The state's performance, as determined in the reviews, is used by EPA as a starting point for a negotiation with the state concerning the appropriate level of oversight for future years. Scenarios outlined in the Region V policy which would warrant additional oversight include: requests from states for more assistance (which may indicate difficulties in implementation); difficulties in state-federal communication; significant new program element implementation (such as corrective action); low rate of meeting commitments in the past year or two; special initiatives (such as the Great Lakes initiative); or poor internal communication between district, regional, or field offices at the state level. The Region V RCRA differential oversight policy went into effect in FY95, although some FY94 end-of year evaluations were conducted using the new policy.

environmental quality. This section will provide an overview of *ad hoc* oversight reforms implemented by EPA regional offices and the states.

A. Tightening the Existing Oversight System

EPA and the states are working to make the existing oversight system more effective through streamlining reporting and review requirements and through increasing joint planning and cooperative efforts.

1. Streamlining

Streamlining refers to EPA reducing duplicative or unnecessary reporting requirements and reviews. Some regions and states are streamlining the oversight process by, for example, decreasing the frequency of reviews, eliminating duplicative reports, decreasing EPA's turn-around time on permit reviews, decreasing the number of permit reviews, and instituting multi-year workplans. The decision to streamline is not usually based on the quality of the state program. EPA believes that oversight of all programs could benefit from streamlining.

In Region II, for example, EPA initiated streamlining efforts because New York state officials and EPA officials were concerned about excessive reporting requirements and the resulting heavy workloads. The reform process consisted of each agency letting the other know what it needed in terms of information or technical assistance. This revealed that the state air program, for example, was submitting many reports that were not used by the EPA office.

After a similar evaluation, which found duplication among reports, Region IV recommended eliminating the 1995 end-of-year reports for the RCRA programs in Georgia and North Carolina because other reports submitted during the year were enough to assess the states' progress. The Region V RCRA program reduced the number of state-submitted management reports, the number of evaluation meetings and file audits, the number of evaluation reports, and the amount of information audited annually.[4]

Region VIII has a program to minimize oversight reporting to the level that is strictly necessary. Currently each state in the region has one pilot project. For example, Montana's pesticide program, under the Montana Department of Agriculture had its reporting reduced to a mid-year and end-of-year report. Montana and EPA also reached an agreement to eliminate most EPA inspections and to avoid excessive reporting in other programs.

2. *Cooperative Planning and Better Communication*

EPA and the states have also realized that if EPA helps a state to plan its program and workplan, there should be less need for oversight and EPA involvement later in the process. An improvement in up-front and day-to-day communication is essential to achieving the goals of this approach. Under this method, EPA regional offices are shifting the emphasis of the EPA role from end-product and programmatic review to technical assistance with program development and implementation. Up-front planning is meant to more effectively distribute expertise and resources between agencies and across programs, make administrative activities more efficient, and minimize oversight.

For example, Region V revised its RCRA oversight policy for all states by putting a new emphasis on communication and joint planning.[5] Region V hopes that this approach will allow EPA and the states to reach consensus on state environmental program goals before implementation. It will also create a process for discussing problems as they arise, rather than after the fact.

The Region V NPDES program provides another example of a shift to more cooperation among EPA and state environmental programs. EPA identified lack of trust, ineffective communication, and lack of clear definition of roles for EPA and state staff as the root causes of many of the tensions between the state and regional EPA offices.[6] As a result, oversight reform for the NPDES programs included a shift towards partnerships between the state and federal offices to identify problems and their solutions. In order to put this into practice, EPA and the states established a joint EPA-state program planning process, instituted state self-evaluations, and conducted annual program reviews.

The Region V water program managers began addressing how to implement a differential oversight system in 1992. In 1994, Region V developed a new differential oversight policy for the NPDES program based on the lessons learned from the past two years. The focus of the new policy is on NPDES permits. The baseline is defined as 50% reduction in real-time reviews of major permits by EPA. Under the new process the amount of real-time reviews decreases as the quality of the program increases, allowing real-time reviews to vary from 100% of actions for major permits to practically zero. Real-time reviews are those which take place prior to permit issuance. In Region V, major permits constitute approximately 10% of the NPDES permits issued, not including those under the storm water program. In order to determine how far to reduce real time reviews, EPA used performance criteria such as state-demonstrated capability to produce quality permits over the last two to three years; state support systems in place to develop quality permits; legal authority to implement the goals and mandates of the Clean Water Act; internal mechanisms to ensure consistency within the state; and a track record of meeting annual program plan commitments. Depending on how a program rates against the above criteria, the amount and focus of real-time reviews and after-the-fact audits will vary.

C. Broadening the Evaluation Criteria

EPA and the states are searching for ways to reflect the quality of a state environmental program. Several states are using a more holistic review method, for instance, through multi-media review. In addition, several states are experimenting with increased and more systematic use of environmental indicators to determine the state program's effect on environmental quality.

1. Development of Multi-Media Oversight Methods

Multi-media oversight methods allow EPA to compare program operations in air, water, and waste programs. The overall purpose of multi-media review is to develop an overall, qualitative understanding of air, water, and waste implementation or enforcement by the state. A multi-media overview is not the

same as a detailed, quantitative review of media-specific programs. Thus, while EPA has traditionally reviewed the water, air, and waste programs separately, in a multi-media overview EPA would focus on issues common to all programs.

A multi-media program overview was used in Region I to evaluate the Massachusetts multi-media enforcement program. EPA assessed air, water, and waste enforcement in order to identify any cross-cutting issues. EPA staff reviewed facility files, considered certain enforcement statistics, and observed multi-media inspections. As a new aspect to the oversight process, EPA instituted discussions with state officials to consider enforcement strategies, organizational approaches, and management practices.

2. *Use of Environmental Indicators*

Whether program implementation and enforcement effectiveness can be judged by evaluating environmental results -- changes in ambient air and water quality, affects on biological indicators, level of ecosystem recovery, etc. -- has proved a controversial issue. The major difficulty with using environmental results to measure implementation and enforcement is the wide range of factors, other than the state environmental program, which can affect environmental quality. For example, temporary closure of a major manufacturing facility or substantial production decreases due to an economic recession would have a large effect if mass loadings were used to measure changes in environmental quality. 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. Substantial amounts of pollutants may also be dumped on the state from outside its borders, or it may release pollutants across its borders, thus, escaping the effects of some of its own pollutants. These potential problems indicate a need to control and monitor external variables when using environmental indicators to evaluate a state environmental program.

EPA is exploring the use of environmental indicators to assess the quality of state programs and a few pilot projects are moving closer to integrating environmental indicators into the evaluation process. Environmental indicators can

be used at the ecosystem level or at the regional or national level. EPA faces challenges in linking environmental data to program activities. However, a few states have begun to incorporate information on environmental quality into their reporting process. Oregon and Minnesota are tracking goals and indicators and have established benchmarks of performance.[9] In its 1995 self-assessment, New Jersey reported certain indicators, such as attainment levels for particular pollutants. It also analyzed the responses taken to specific problems, such as impacts of landfills on groundwater.[10] Kentucky, in its 1994 *State of Kentucky's Environment* report, reviewed the status of certain state priorities in the light of water quality and threats to that quality.[11] But aside from *ad hoc* use of environmental indicators, a process to develop a national approach for their use is still in its initial stages.

For example, the Region II water program instituted a strategic planning process with New York and New Jersey which focuses on the environmental quality needs and achievements in specific ecosystems. Using joint state-federal strategic plans allows EPA to track the achievement of environmental quality commitments made by a state. The joint strategic plan lays out goals for maintaining a credible state water program and for targeting specific water bodies. Some of these waterbodies, which are considered of national importance, will be targeted for joint EPA-state efforts. A detailed implementation plan exists for each waterbody. For those in which EPA is directly involved, a management conference with EPA, the state, the public, and other stakeholders, set commitments for each party, including a monitoring plan and biennial environmental reports. For example, for the Long Island Sound, which is an estuary of national significance, the parties agreed on what needs to be done and how to measure progress. Environmental indicators, such as the amount of nitrogen and oxygen in the Sound, were measured against desired standards. Such plans will also be written for the waterbodies managed by the state alone. The state sets the priorities in the main strategic plan and is supported by EPA, although EPA does not take an active role in implementation of the state plan. This system is moving in the direction of a more direct link between oversight criteria and environmental quality measurements.

Environmental criteria can also be incorporated into the evaluation process by tracking environmental quality information under state program implementation. For instance, EPA's 1995 RCRA implementation plan includes tracking certain

environmental indicators. The corrective action program implementation plan requires states to report on the effect of remediation activities on the environmental status of facilities. In order to evaluate the changes in environmental quality achieved by the corrective action program, two new environmental indicators were developed. EPA and the states will use the Human Exposures Controlled Determination (CA725) and Groundwater Releases Controlled Determination (CA750) to track and report human health risk reductions and environmental successes at facilities without waiting for the entire facility to undergo remediation. It is expected that, to a large extent, these determinations can be made based on information already collected at the facilities. Environmental indicators are also being developed to monitor the changes in environmental quality caused by the RCRA safe management and waste minimization programs.

Endnotes

1. The Environmental Council of the States (ECOS) is an organization of the heads of state environmental agencies.

2. Leaders from states and the federal Environmental Protection Agency (EPA) signed a "Joint Commitment to Reform Oversight and create a National Environmental Performance Partnership System". For more information, see *Using the NEPPS to Forge a New State/Federal Relationship: A Guide for States and EPA* (First Draft), ECOS Core Oversight Workgroup, U.S. EPA and ECOS, September 1995.

3. See, e.g., *Principles for State/EPA Relationships*, State and EPA Region V Water Quality Directors, 1994, which identifies the need to streamline, implement differential oversight, and carry out up-front planning and priority setting on a routine basis.

4. See, e.g., the revised *FY95 Work Plan Reporting Requirements* which a joint state-EPA Quality Action Team developed to take streamlining into account, U.S. EPA Region V, July 1994.

5. See *Recommendations of the RCRA State Oversight Quality Action Team*, U.S. EPA Region V, August 1994.

6. *Status Report on Reducing Oversight*, Region V State and U.S. EPA Water Program Directors, U.S. EPA Region V, September 1994.

7. *See, e.g., Assessment of the Differential Oversight Pilot for the NPDES Program*, U.S. EPA Region VIII and Utah Department of Environmental Quality, Division of Water Quality, May 1992 and *ELI Statutory Comparison*.

8. *See, e.g., Joint Region 5 - State Policy for the Assessment and Management of State Hazardous Waste Programs*, U.S. EPA Region V, August 1994.

9. Walter Corson, An Inventory of Local and Regional Programs Using Goals and Indicators to Define and Measure Quality of Life, Progress, and Sustainability at the City, County, and State Level, (Global Tomorrow Coalition, 1994). If coupled with responsibility for tracking them, a set of indicators can build community commitment and environmental literacy. Communities that track their own air quality or that measure acres of greenways conserved may take greater interest in the processes that bring these results about. Collecting and making data available regionally and locally is becoming ever more possible as information-transfer capabilities improve. James McElfish, "Back to the Future," The Environmental Forum 14 (September-October 1995).

10. *National Environmental Performance Partnership System (NEPPS): Self-Assessment of New Jersey's Environment and NJDEP Programs: Air Quality, Water Quality, Drinking Water*, NJ Department of Environmental Protection, August 1995.

11. *The State of Kentucky's Environment: 1994 Status Report*, Kentucky Environmental Quality Commission, February 1995.

Chapter V
Principles for an Evolving Oversight System

The National Environmental Performance Partnership System provides an initial framework for how states and EPA can work together to ensure that national and local environmental goals are met. The framework provides an opportunity for moving beyond *ad hoc* oversight reforms of the past. Under NEPPS, oversight is but one tool in a larger system of federal-state cooperation to improve the quality of the environment across the country.

Oversight is a system of reporting, evaluation, and response. Oversight exists to achieve two concrete purposes: to ensure that federal statutory goals are being met and to ensure the state programs are improving environmental quality in each state, regionally, and nationally. EPA has a variety of sources available to it in conducting an evaluation of a state environmental program. EPA can gain the necessary information from environmental indicators, from data on state implementation and enforcement actions, public input and from the state agency's own priorities and the relationship of the authorized program to other state programs.

Eight principles can help EPA and the states focus reform efforts to meet the goals of oversight.

- ***Include evaluation of environmental indicators.***

Oversight should include environmental indicators. The use of environmental indicators includes analysis of the quality and condition of the water, air, soil, and biota, as well as the types, amounts, and sources of pollutants being released into the environment. Environmental indicators are generally classified into three categories: the condition of the environment (state indicators), the stresses on the environment

(pressure indicators), and the human actions to protect the environment (response indicators).[1]

Indicators can help EPA and states understand the significance of existing environmental conditions. Indicators also improve communication with the public and with policy-makers by simplifying information concerning complex natural phenomena. If a sufficiently broad range of indicators can be identified, they can provide highly useful long term measures for assessing state program performance. However, environmental indicators alone do not directly show the overall effectiveness of a state environmental program. For example, indicators may show a decline even though all intervention efforts have been successful on their own terms. Indicators may also improve although efforts were not focused on the proper issues. Yet, by monitoring changes in environmental indicators, the causes for those changes may become discernable, allowing government responses and private actions to be refocused if necessary.

Most states already use some environmental indicators in their self-assessments and reporting. Very few states, however, have developed a strategic system for deciding which indicators to use and how to interpret them.[2] In addition, very few states use indicators consistently from year to year to allow comparison.

Information which contributes to oversight could also prove useful for meeting other federally-mandated goals. Indicators are being recognized as a hallmark of "sustainable development" efforts in communities throughout the United States.[3] Sustainable development efforts have gathered stakeholders together over time to define their aspirations for the future of a region and, having done so, to devise indicators of progress. Data concerning indicators can be used in measuring national progress toward environmental goals. The National Environmental Policy Act (NEPA) requires the identification and monitoring of a whole range of indicators of national progress.[4] This is relevant to EPA oversight of authorized state programs. NEPA requires all federal agencies to assist the Council on Environmental Quality (CEQ),[5] and federal agencies to cooperate with states and local governments by providing ecological data.[6]

- *Ensure that numerical data informs oversight, but is not-mistaken for oversight.*

Much of the friction in "traditional" oversight has involved the use of so-called "bean counting" to determine state program performance. Both state and EPA participants in the process have often noted that the wrong things are being counted, or that the number of actions taken, such as inspections, penalties, permit renewals or other measures, gives a misleading picture of state performance and even can distract state activities away from effective environmental protection.

While these criticisms have merit, it is also the case that such data, especially where collected by the state programs for their own use, can be quite informative. Oversight reform need not necessarily abandon the use of such data; rather its use should be reviewed and revised so that it informs oversight. Data on state implementation and enforcement actions can prompt intelligent questions that go to the heart of program performance; but the information should not be a substitute for critical analysis. Inspection frequency may decrease, for example, because the state decides to focus on frequent violators or industry sectors and allow others to do self audits (rewarding exemplary compliance with fewer inspections, for example). Inspection frequency may also decrease because the legislature has refused to provide funding for vehicles, sampling equipment, or inspection staff. The numerical data can be useful, but what is critical is understanding causation -- the reasons behind the data. The numbers provide a basis for asking the key questions -- in the first case revealing a potentially useful strategy, in the second revealing a problem requiring corrective action.

The shift to new modes of oversight does not necessarily mean elimination of statistics. It means intelligent use of the statistics, in conjunction with non-numerical information (and even some new statistics related to environmental indicators).

- *Assess the federally authorized program within the broader context of the entire state environmental program.*

EPA should seek information about a state's entire environmental program. Under the statutes, oversight is limited to EPA assessment of federally authorized

programs. However, a federally authorized program is usually but one element of a broader state environmental program. Oversight should include consideration of this broader context. It may be important to the assessment of the authorized program to understand its place in the state context. The goals of the federal statute may be met through state programs outside of the authorized program, or in cooperation with the authorized program. In addition to EPA's role in ensuring that the federal environmental statutes are implemented, it also has a role in ensuring that national environmental goals are met.

There are three main types of information which can be useful to EPA as it oversees a federally-authorized environmental program. First, EPA needs to understand cross-media issues. Currently, most oversight takes place within a media-specific program. Many state initiatives, however, cut across the traditional media-specific focus of environmental programs, either because states are starting focused initiatives which include all the media (multi-media) or because states are initiating programs which span different media (cross-media). This information can help EPA assess the priorities which the state has set. States have begun to include multi-media issues in their permitting and enforcement actions, as well as in their strategic planning efforts. Multi-media issues can be included in oversight through evaluation of pollution prevention programs, integrated pollution control programs, or through comparison of environmental indicators between media programs to ascertain what the effect of, for example, the water program is on the air program. In addition, states have begun to include issues common to all media programs in their self-assessments. For instance, in its 1995 self-assessment, New Jersey included an analysis of information management, resource management, enforcement and compliance strategies, and capacity building. Environmental justice, environmental education, and public participation are other examples of initiatives which are implemented across the various media-specific programs.

Second, EPA's assessment of a state program would benefit from understanding the relationship between authorized programs and non-authorized programs within the same environmental medium. When EPA assesses an authorized program without understanding a state's plans for all programs concerning a specific media, it is functioning with only partial information. State programs, such as the water program or the air program, typically consist of a

mixture of federally authorized programs, programs under state law that are not federally authorized but for which there is a federal program counterpart, and programs under state law for which there is no federal counterpart. For instance, many state water quality programs include wetland permitting programs under state law; however, only two states have federally authorized wetland permitting programs. Many states also have groundwater permitting programs, which exist only at the state level and which form an important part of many state water programs. An EPA review of water-related programs should not overlook the contribution of the state-based programs to the success of the state's environmental protection effort.

Third, EPA will gain a better understanding of state priority-setting for federally-authorized programs, if EPA understands the relationship among the various programs, both in the traditional EPA-regulated media and in sectors affected by other state and federal agencies. Federally authorized state environmental programs are also affected by state (and federal) activities that are administered by other departments. State departments of agriculture, health, conservation, mining, and energy, state public service commissions, state engineers, and other state agencies can profoundly affect environmental protection decisions and effectiveness. Some of these programs are federally approved or otherwise related to federal programs. For example, complete understanding of a state's progress on water quality may require information about the state groundwater program, non-point source program (including cooperation with agricultural programs), mining program, and the water allocation program. Evaluation of this cooperation can add a critical level of depth to EPA's understanding of the state water program as a whole. Overlooking the impact of these programs can result in a misleading assessment of state capacity and progress.

While such comprehensive reviews of state programs can be expected to improve the mutual understanding of the ways in which both state and federal levels of government contribute to meeting shared goals, EPA must respect the limits to its authority and not instrude in matters purely of state law or policy. States themselves are in the best position to identify for EPA on a state-by-state basis where such cross-media, intra-program, and inter-program cooperation is important for understanding the priorities set by the state in authorized programs.

- *Limit oversight for states which meet the goals of the federal statutes.*

States which meet the goals of the federal statutes and have a high quality environmental program should have less of an oversight burden. Limiting oversight for federally authorized state programs that consistently meet national goals allows EPA resources to be used where they are needed most, and can allow successful and effective states to function with fewer administrative demands. Limiting oversight means reducing the administrative burden and intrusiveness of an oversight system; it does not mean any limits on EPA's ability to learn if the statutory goals are being met or not.

Oversight currently requires states to prepare a large number of reports and to revise and update them frequently. Oversight also often includes EPA interventions in daily operations or implementation of state priorities. Reform efforts for the last few years have focused in part on reducing the level of oversight. It is generally accepted that some state programs effectively meet most of the goals of the federal statutes. EPA and the states have tried to develop a system that would reduce the burden of oversight for these states.

EPA and the states have interpreted limiting oversight as reducing the number of reports, audits, and inspections and as reducing the frequency of EPA actions or requests for evaluations. Reducing oversight can also mean moving away from a system of reports on specific activities and program elements to a system which emphasizes more informal EPA-state communication and joint planning and review efforts. Different levels of oversight can also mean that activities such as oversight inspections, file reviews, and audits will be conducted at a level commensurate with a state's performance. The purpose would be to relieve states of most of their oversight reporting burdens if they meet certain criteria set by EPA . With a few exceptions, EPA has statutory discretion to limit oversight reporting and review requirements to substantially below the current required level. When a state implements a federally authorized program effectively, typical oversight practices can become unnecessary or even intrusive on state operations and priority-setting. Just as importantly, EPA needs to be able to focus its limited oversight resources on states and state programs that need the most assistance and direction.

EPA and the states can follow two main paths in developing a system with different levels of oversight. Both of these involve setting a baseline for oversight review requirements. EPA can either award states a special status which allows them to have less oversight than the baseline, or it can require more oversight than the baseline for programs with special needs. The issue of what will trigger different levels of oversight should be carefully considered by EPA and the states. On the one hand, consistently identifying good state practices in achieving national environmental goals could be the trigger for reduced oversight. On the other hand, special needs, such as newly authorized programs, consistent problems in meeting national goals, or a low rate of meeting commitments, could lead towards maintaining a greater level of oversight.

Identifying appropriate states for differential oversight also implies a capacity to distinguish meaningfully among state programs. States with more resources and ability to collect and analyze data concerning their program effectiveness may be identifying more problems for EPA's consideration. Other states with fewer resources allocated to environmental protection efforts may have similar problems which are less apparent through lack of staff and other resources for self-evaluation. Reduced oversight programs should not favor the latter nor penalize the former.

- ***Reduce the need for intense oversight by using partnership mechanisms.***

Partnership mechanisms, such as joint planning, joint implementation and enforcement, and mutual communication of needs, perceived problems, and ideas for improvements, all serve to reduce the need for oversight. The need for detailed and frequent oversight can be reduced by mechanisms which increase cooperation, informal transfer of information, and trust between the EPA regional office and a state. State-EPA cooperation in planning and in implementation already exists for most interstate projects and projects of national significance. For these projects, EPA has traditionally played the role of actor and co-implementor; whereas in the traditional oversight process, EPA's role is that of supervisor.

Most recent calls for reform of the oversight system postulate some form of state-federal "partnership." Partnership can have apparent advantages in working toward improvement of state programs; it can have apparent disadvantages in

providing for accountability. There are, however, ways to serve both of these interests.

Some of the difficulties with oversight in the past have resulted from the conflicting perceptions of EPA and a state of what priorities are appropriate. Oversight was then intensified in the face of potential conflicts between EPA and a state. One way to constructively reduce the need for oversight is to encourage a joint planning and priority-setting system between EPA and each state environmental program. If EPA is involved in the state strategic planning process from the beginning, it will have had a chance to add its perspective to the priority-setting process. From a state's perspective, EPA will have an increased understanding of why a state choses certain priorities and resource allocations in the context of the overall state environmental program. A higher level of cooperation in planning of state environmental programs is already being promoted in most EPA regions and the new National Environmental Performance Partnership System is a further step in this process.

Within a system of oversight of an authorized program, EPA will retain its role and responsibility to ensure that states are meeting the goals of the federal environmental statutes. Enhancing EPA's cooperative role as advisor, planner, and implementor can allow EPA to reduce these supervisory obligations. Partnership can give EPA a base of knowledge and understanding, and a history of involvement that make an intense level of oversight unnecessary.

- ***Select and refine oversight tools to focus on the purposes of oversight.***

To ensure that every reporting and evaluation process used meets certain needs within the oversight system, EPA and the states should select and refine their oversight tools to meet certain purposes within the oversight system. Once an oversight tool's purpose and role is established, determinations as to how it can be used and what standards should apply can be determined.

For example, the NEPPS has adopted state self-assessments as a method to evaluate which states can gain "leadership" status and enter the new system. Self evaluations or assessments have been used in an *ad hoc* fashion in oversight for many

years. If self-assessments are to become more central to the oversight process, EPA and the states should reach consensus on the purpose of self-assessment. For instance, a self-assessment can be as broad as a state of the state's environment report, or it can be as narrow as a report of the actions taken under a specific federally-authorized program. Self-assessment can answer questions concerning the quality of the environment and provide a basis for tracking trends in environmental quality over the years. It also can answer questions concerning the capacity of the specific program, its resources and actions. Self-assessment can place the authorized program in the context of the entire state program's strategic planning and resource allocation process. Finally, it can serve to gather together the most important data to meet the goals of public transparency and accountability for the authorized program. A self-assessment can serve any or all of these goals, but the NEPPS will operate more smoothly if EPA and the states agree on which of these goals is to be served by the self-assessment.

In addition to determining a common set of goals, EPA and the states will also need to be aware of the limits of particular oversight tools. For example, if EPA wishes to replace the current panoply of oversight tools with a single one, such as self-assessments, EPA should ascertain that self-assessments alone can meet the goals of oversight. Self-assessments by their very nature carry with them problems of credibility and accountability. A self-assessment may need to be supported by some type of outside audit or review to assure that state program weaknesses and strengths have been assessed from all necessary angles. A self-assessment also could be conducted by -- or under the supervision of -- a state entity other than the regulatory agency itself. For example, a state environmental quality council might provide an "outside" assessment. Other methods might include alternating self-assessments with EPA reviews or combining self-assessments with EPA spot-checks.

Alternatively, if EPA wishes to continue to use many different types of oversight tools, EPA should ascertain that this does not lead to duplication of reporting or evaluation efforts.

Once the purposes and role of an oversight tool are determined, EPA and the states can decide what standards should apply. A model or set of rules, arrived at by EPA and the states will help assure that self-assessments meet the goal of public

transparency and governmental accountability. In addition, a common understanding of standards can make the oversight reports comparable, as far as this is possible among media-specific programs and among various states.

- *Ensure transparency of oversight.*

The oversight process should be transparent and open to members of the public. Transparency ensures the public a meaningful role in evaluating state environmental programs. The public, including individuals, groups, and members of the regulated community, brings multiple perspectives to the evaluation process. In addition, transparency directly serves oversight's goal of accountability to the public.

As part of transparency, public access to information and data collected during the oversight process will assist the public in its understanding of how the state environmental program functions. In addition, the public is an important resource for EPA in identifying potential weaknesses and strengths in the state programs. Public involvement in oversight enhances this process by expanding the knowledge base for evaluation and by dealing with problems identified by the public at an early stage. Finally, through a transparent oversight process, EPA and state environmental programs can gain the support of the public for their actions.

- *Preserve accountability as the central purpose of oversight.*

The core purpose of oversight is to ensure accountability of the authorized state environmental programs to Congress, to other states, and to the public in general. Oversight should preserve this accountability through any reforms.

Congress holds EPA accountable for achieving results under the statutes that EPA administers. Oversight requirements are usually set out between EPA and a state in the context of grant agreements. This means that fiscal and program accountability are often mixed in the oversight process. States are accountable for both the program implementation and enforcement and for the use of the federally granted funds. Oversight is the primary tool by which EPA checks both fiscal and program accountability of the federally authorized program. Oversight is also the mechanism by which EPA gathers information on an important part of the

implementation and enforcement of federal environmental statutes to pass on to Congress.

Accountability includes access to data collected in the state program. These data include environmental indicators, administrative capacity indicators, and implementation and enforcement actions. Raw data from these categories do not provide direct answers concerning the overall quality of the state program, but data feed into more sophisticated measures of state performance. Taken in the proper context, these data can be useful for understanding the weaknesses and strengths of the state environmental program.

In addition, accountability includes some type of process for review. This review process can take many forms, including self-assessments or program audits. Self-assessments may need to include some sort of cross-check by an outside reviewer. Program audits could also be structured in many forms. One possible model would be a system of mutual oversight with planned reviews carried out by high level state officials from other states and EPA officials. Such a system might be based on auditing principles agreed upon in advance among EPA and the states.

Endnotes

1. For more information concerning environmental indicators in general, see *Environmental Indicators: A Systematic Approach to Measuring and Reporting on Environmental Policy Performance in the Context of Sustainable Development*, Hammond et al, World Resources Institute, May 1995.

2. For more information concerning use of environmental indicators by the states, see *Information About Using Environmental Indicators in U.S.EPA/State Performance Partnerships*, Florida Center for Public Management, Florida State University, May 1995 and *Prospective Indicators for State Use in Performance Agreements*, Florida Center for Public Management, Florida State University, August 1995.

3. "Sustainable development" means development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. World Commission on Environment and Development, Our Common Future (1987).

4. Under 42 U.S.C. § 4344 the Council on Environmental Quality has "the duty and function --

> (1) to assist and advise the President in the preparation of the [annual] Environmental Quality Report [on the status and condition of the nation's environment, current and foreseeable trends, the adequacy of natural resources for fulfilling human and economic requirements of the nation, and an evaluation of programs and activities of all levels of government, nongovernmental

entities, and individuals, and a program to remedy deficiencies];

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere with the achievement of the policy set forth in subchapter I [of NEPA]...

(3) to review and appraise the various programs and activities of the Federal Government in the light of the policy...

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirement and goals of the Nation;

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying cause; and

(7) to report at least once each year to the President on the state and condition of the environment."

5. 42 U.S.C. § 4332(2)(I).

6. 42 U.S.C. § 4332(2)(G) ("make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment.")

Chapter VI
Conclusion

A system where national standards are implemented at the state level needs some method of ensuring that the national goals are met throughout the country. Ever since the oversight system evolved with the advent of the first national environmental statutes, EPA and the states have been struggling to develop a system which serves the goals of accountability to Congress and implementation of the national statutory goals.

Reform efforts have focused on tightening the oversight system, limiting oversight obligations for states with good environmental programs, and increasing the use of environmental indicators for reflecting the quality of a state program. The newest initiative of EPA and the states -- the National Environmental Performance Partnership System -- views oversight as one element of an evolving partnership among EPA and the states.

This report identifies several factors that EPA and the states should consider as they continue to reform the system. First, oversight requirements traditionally have emphasized evaluation, primarily through numerical data, of administrative activities in a media-specific context. Numerical data should be used only to inform oversight; and environmental indicators should be added to the range of information evaluated. In addition, EPA should assess a federally-authorized program within the broader context of the entire state environmental program. Second, the structure of the oversight system has emphasized similar oversight treatment for all state programs and *ad hoc* use of oversight tools. Instead of imposing the same oversight system on every state, EPA should explore differential oversight and limit the oversight burden for states which meet the goals of the federal statutes. In addition, EPA and the states can reduce the need for intense oversight by cooperating in other aspects of program planning and implementation. EPA and the states should also carefully chose the oversight tools they use, assuring that they have a clear purpose and a clear role within the oversight system. Third, oversight gathers the information necessary for Congress and the public to evaluate how national environmental goals are being met and how federal funds are being used. Oversight

should be transparent and open to members of the public and should preserve accountability to Congress, to other states, and to the public.

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