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THE FEDERAL AND STATE ROLES IN ENVIRONMENTAL ENFORCEMENT: A PROPOSAL FOR A MORE EFFECTIVE AND MORE EFFICIENT RELATIONSHIP

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I. INTRODUCTION

Before 1970, the responsibility for environmental enforcement had been the nearly exclusive domain of state and local governments.¹ However, beginning with the passage of the Clean Air Act Amendments of 1970² and continuing through the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act³ in 1980, the federal enforcement role and federal influence over state enforcement programs dramatically expanded. By the mid-1980's the federal government had assumed the dominant role in the enforcement of environmental law.⁴ Not only did this change in the traditional roles of the state and federal governments occur very rapidly, but it also occurred without a consistent set of principles controlling the appropriate role of state governments versus the federal government. Instead, the increasing federal domination of environmental enforcement programs of this era

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1. Federal involvement in environmental programs began with the Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121 (1899). Additional federal legislation was enacted in the 1950's and 1960's, but the scope of this legislation was relatively limited. See 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.01, at 1-6 (1989).

2. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

3. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)).

4. See 1 F. GRAD, *supra* note 1, § 1.03, at 1-19.

appeared to be a reaction to the slow response of state governments in dealing with emerging environmental problems.⁵

An equally dramatic shift in enforcement responsibilities is evident in newer environmental programs such as the Emergency Planning and Community Right-to-Know Act⁶ and the Medical Waste Tracking Act of 1988⁷ where the major enforcement responsibilities have been directly assigned to the states with little federal involvement. Here, too, the allocation of enforcement responsibilities lacks any principled determination of the appropriate roles of the federal and the state governments. Rather, the allocation of responsibilities under these laws appears to be based largely on factors such as the lack of federal resources and the expanding number of regulated entities.

Nearly twenty years have elapsed since the passage of the Clean Air Act Amendments of 1970. This period has permitted experimentation with a variety of approaches to environmental enforcement. It has also produced significant tensions between the states and the federal government, and enforcement programs which, in many cases, do not produce optimal results. At least part of the reason for these problems has been the absence of a clear understanding of the appropriate roles of the states and the federal government in environmental enforcement.

To allow the federal and state governments to work together better, to best utilize the limited resources available for enforcement, to minimize duplication of effort, and to help meet the rapidly expanding enforcement responsibilities of both states and the federal government, a clear set of principles for allocating enforcement responsibilities must be developed and utilized by Congress, the United States Environmental Protection Agency ("EPA") and the states. These principles should include the following:

1. States should adopt their own regulatory and enforcement authority to support federal regulatory programs that a state chooses to manage.

5. 1 F. GRAD, *supra* note 1, § 1.03, at 1-21.

6. Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 11,001-11,050 (Supp. V 1987)).

7. Pub. L. No. 100-582, 102 Stat. 2950 (codified at 42 U.S.C.A. §§ 6992-6992k (West Supp. 1989)).

2. EPA should ensure a state has developed and has authority to implement a reasonable enforcement strategy before authorizing a state to carry out the enforcement responsibility for a federal program.
3. Once a state has been authorized to carry out a federal program, most enforcement cases should be handled by the state without EPA intervention.
4. EPA should retain authority to bring enforcement actions in cases involving significant interstate pollution.
5. States should be able to refer certain enforcement cases to EPA.
6. Systems used to account for progress in enforcement should be based on state enforcement strategies and should be designed to encourage innovation by states.
7. EPA should maintain a credible threat to withdraw authority from states whose implementation of federal programs is consistently inadequate.

To provide the background necessary for understanding the need for a set of principles upon which enforcement responsibilities are allocated, this Article will first examine the historical allocation of environmental enforcement responsibilities between the federal and state governments. It will then review the major federal environmental legislation to identify how enforcement roles are divided between the various governmental bodies and to examine how federal enforcement policies under those laws effect state enforcement. Finally, a discussion of a series of new problems facing environmental enforcement officials will precede a detailed review of the suggested principles for allocating enforcement responsibilities.

II. ENVIRONMENTAL ENFORCEMENT BEFORE 1970

"Environmental law" is not an innovation of the last two decades, of course. As Professor Rodgers notes in his treatise on environmental law, "[p]rivate nuisance law long has forbidden substantial and unreasonable intrusions upon the use and enjoyment of another's property."⁸ Private nuisance cases are reported as early as the sixteenth century.⁹

Governmental involvement with environmental problems traces its history to the associated principle of public nuisance. A public nuisance is one that affects an interest common to the general public, rather than an interest peculiar to one or several individuals.¹⁰ This public wrong is normally redressed by the government.¹¹ Public nuisance actions have been brought by state and local governments to deal with a wide variety of environmental problems. Examples of problems addressed using nuisance law include the escape of petroleum from a storage tank into the groundwater,¹² the discharge of chemicals into a watercourse,¹³ smoke and gas emissions from a charcoal kiln,¹⁴ the storage of hazardous explosive materials,¹⁵ odors from the operation of a rendering plant,¹⁶ the maintenance of an open irrigation ditch,¹⁷ the improper operation of a chemical waste disposal site,¹⁸ and the discharge of mercury-contaminated waste into a waterway.¹⁹

States use other common law theories to address environmental problems, such as trespass, negligence, strict liability for abnormally dangerous activities, water law, and public trust doc-

8. W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 101 (1977).

9. *Id.* (citing Z. CHAFFEE & E. RE, CASES & MATERIALS ON EQUITY 795-96 (4th ed. 1958)).

10. W. PROSSER, LAW OF TORTS 585 (1971).

11. See RESTATEMENT (SECOND) OF TORTS § 821C (1969); 1 W. RODGERS, ENVIRONMENTAL LAW § 2.2, at 34 (1986).

12. *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N.W. 336 (1895).

13. *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N.E. 879 (1904).

14. *Richards v. City of Seattle*, 62 Wash. 684, 114 P. 896 (1911).

15. *State v. Excelsior Powder Mfg. Co.*, 259 Mo. 254, 169 S.W. 267 (1914).

16. *State ex rel. Harris v. Drayer*, 218 Iowa 446, 255 N.W. 532 (1934).

17. *City of Scottsbluff v. Winters Creek Canal Co.*, 155 Neb. 723, 53 N.W.2d 543 (1952).

18. *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d. 1, 426 N.E.2d 824 (1981).

19. *State v. Ventron Corp.*, 182 N.J. Super. 210, 440 A.2d 455 (App. Div. 1981), *aff'd in pertinent part, rev'd in part*, 94 N.J. 473, 468 A.2d 150 (1983).

trine.²⁰ Environmental enforcement based on nuisance and other common law theories was, and still is, primarily the domain of states and localities.²¹ Finally, beginning in the late 1940's, states adopted a variety of statutes to help address environmental problems.²²

Although federal and state governments took some steps to deal with worsening environmental problems, by the late 1960's the nation's environment was visibly hemorrhaging. Dirty air, polluted streams and lakes, and tainted drinking water supplies were being identified in all parts of the country.²³ State and local common law regulation and enforcement, and the then limited statutory law available to states was not adequate to resolve such severe problems.²⁴

Several factors contributed to the inadequacy of state programs. The case-by-case approach, necessitated by nuisance and other common law actions, was simply too slow, too cumbersome,

20. W. RODGERS, *supra* note 8, at 100. See also ENVIRONMENTAL LAW INSTITUTE, STATE HAZARDOUS WASTE ENFORCEMENT STUDY 97 (1987) [hereinafter STATE HAZARDOUS WASTE STUDY].

21. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), the Supreme Court held that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law" *Id.* at 103. Only nine years later, the Supreme Court all but closed the door on the federal environmental common law. In *Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Supreme Court concluded that:

Congress has not left the formulation of appropriate federal [water pollution] standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law "touching interstate waters" of the sort surveyed in *Illinois v. Milwaukee*, and found inadequate to supplant federal common law. Rather, the Amendments were viewed by Congress as a "total restructuring" and "complete rewriting" of the existing water pollution legislation considered in that case The establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois v. Milwaukee* was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law.

Id. at 317-19. Most of the federal laws enacted after 1970 have been similarly comprehensive in nature and thus are likely to have displaced federal common law. See 1 W. RODGERS, *supra* note 11, § 2.14, at 122.

22. See, e.g., 1945 Minn. Laws 395, § 11 (relating to water pollution); 1947 Cal. Stat. 632, § 1 (establishing air pollution control districts); 1954 N.J. Laws 212, § 1 (Air Pollution Control Act).

23. See S. REP. NO. 296, 91st Cong., 1st Sess. 4 (1969).

24. See 1 F. GRAD, *supra* note 1, § 1.03, at 1-20.

and too unpredictable to handle the rapidly expanding number of environmental problems.²⁵ State statutory law controlling environmental pollution had not adequately developed in most states.²⁶ Further, state laws could not adequately handle interstate air or water pollution problems.²⁷ Economic competition among the states also put pressure on states not to make their environmental laws significantly more stringent than those of other states.²⁸ Finally, while public interest in environmental protection was growing, the public consensus needed to expand state enforcement resources had not yet emerged.²⁹

It was apparent by 1970 that the emergency measures necessary to control environmental pollution had to come from the federal government. The resulting flurry of environmental legislation³⁰ greatly increased the federal regulatory role. Along with this expanded regulatory role came a growing federal role in environmental enforcement and enforcement policy.

To understand the federal and state enforcement roles, it is helpful to review the general structure of the state and federal roles in federal environmental programs and to examine the allocation of enforcement responsibilities in each of the major federal environmental laws.

25. See F. SKILLERN, ENVIRONMENTAL PROTECTION: THE LEGAL FRAMEWORK § 1.25, at 18-19 (1981); see also F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 56-58 (1984).

26. See 1 F. GRAD, *supra* note 1, § 1.03, at 1-20.

27. See *id.* § 1.03, at 1-20 to -21.

28. See ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW 3 (1974).

29. See, e.g., AMERICANS FOR THE ENVIRONMENT, THE RISING TIDE: PUBLIC OPINION, POLICY & POLITICS 5-4 to -5 (1989).

30. Among the major federal environmental laws enacted beginning in 1970 were the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)); the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982 & Supp. V 1987)); the Federal Environmental Pesticide Control Act, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. §§ 136-136y (1982 & Supp. V 1987)); the Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f-300j (1982 & Supp. V 1987)); the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6991i (1982 & Supp. V 1987)); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987)); the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6991i (1982 & Supp. V 1987)); the Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, Title III, 100 Stat. 1613, 1728 (codified at 42 U.S.C. §§ 11,001-11,050 (Supp. V 1987)); and the Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, 102 Stat. 2950 (codified at 42 U.S.C.A. §§ 6992-6992k (West Supp. 1989)).

III. STRUCTURE OF FEDERAL-STATE ENVIRONMENTAL PROGRAMS

Most of the major federal environmental laws divide responsibilities for environmental programs between the states and the federal government. Typically, a federal law will allow states to assume responsibility for carrying out a regulatory program if a state demonstrates that it has adequate authority and resources to implement and enforce the law. Federal laws refer to approved state programs in several ways, ranging from states with programs having "primary enforcement responsibility," or "primacy," to states with programs having "approval," or "authorization," of state plans by EPA with joint federal-state enforcement. Federal authorization of a state program is usually a prerequisite for receiving federal funding to help support the program.

EPA typically retains some enforcement authority, although limitations may be placed on this authority. EPA's retained enforcement authority will be reviewed in detail in this Article. EPA also retains the ability to withdraw any authority delegated to a state if the state consistently fails to carry out its responsibilities.

The delegation of responsibility to the states combined with some retained authority raises legal questions of when the state or federal government will be precluded from pursuing an action that has been resolved by the other governmental body.³¹ The overlapping authority has an even more important practical effect. EPA's independent authority to file enforcement actions has no doubt resulted in stronger enforcement actions in some cases enforced at the state level. It has also caused frequent conflicts with the states, especially when it is used in a case where a state has already initiated an enforcement action against a facility.

This practice, known as "overfiling," is designed to protect against inadequate state enforcement actions.³² Overfiling, how-

31. See *infra* notes 152-153 and accompanying text.

32. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, POLICY FRAMEWORK FOR STATE/EPA ENFORCEMENT AGREEMENTS 22-23 (1986). The overfiling policy states that EPA may take enforcement action if the content of a state enforcement action is "inappropriate." *Id.* at 22. An inappropriate action is described as one where the "remedies are clearly inappropriate to correct the violation, if compliance schedules are unacceptably extended, or if there is no appropriate penalty or sanction." *Id.* at 22-23. Finally, the policy provides that EPA generally will not consider taking direct enforcement action solely for the recovery of additional penalties unless a state penalty is determined to be "grossly deficient." *Id.* at

ever, can disrupt state enforcement programs in several ways. The most important consequence of overfiling is an increased reluctance of regulated entities to deal solely with state enforcement officials. After an overfiling, the regulated entities quite understandably become concerned that, without involving EPA, they cannot be sure a compliance schedule or a penalty amount agreed to by a state is final. As a result, states may find it more difficult to reach settlements in cases initiated subsequent to an overfiling.

Overfiling cases also use a great deal of the limited governmental enforcement resources simply dealing with other government regulators. Finally, overfiling cases frequently cause significant problems in the working relationship between state and federal regulators.

IV. THE EXPANSION OF THE FEDERAL ENFORCEMENT ROLE

A. Clean Air Act

The passage of the Clean Air Act Amendments of 1970³³ initiated the rapid expansion of the federal enforcement role. The expanded federal role under the Clean Air Act was, however, relatively modest. Federal enforcement authority was limited to taking enforcement action in a state with an approved state implementation plan ("SIP") if the state failed to initiate an action within thirty days after being notified of a violation.³⁴

Under the Clean Air Act, the central regulatory mechanism is the SIP.³⁵ The SIP must provide for the "implementation, maintenance and enforcement" of air quality standards in the state.³⁶

23. While this policy appears on its face to circumscribe EPA's ability to second guess state enforcement actions, its effect is limited for at least three reasons. First, the policy still leaves EPA with substantial discretion to determine whether a state enforcement action is "inappropriate." Second, EPA has final authority to make the decision on inappropriateness. Third, the policy is only guidance to EPA regions and to states.

33. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

34. See *id.* § 7413(a)(1). For mobile sources of air pollutants (*e.g.*, automobiles) the federal role is more expansive than for stationary sources. Violations of mobile source requirements are enforceable only by the federal government. See *id.* §§ 7523, 7524.

35. See *id.* § 7410(a)(1). See also W. RODGERS, *supra* note 8, at 230-38.

36. 42 U.S.C. § 7410(a)(1) (1982).

EPA must approve any SIP or revision to a SIP if it is adequate to meet federal standards.³⁷ The SIP is specifically required to provide for enforcement of emission limits and other regulations relating to stationary sources of air pollution.³⁸

Direct federal enforcement of an approved SIP requirement is authorized only if a violation of the SIP continues more than thirty days after EPA has notified the violator and the state of the violation.³⁹ This notice period allows a state to initiate an enforcement action against the violator before EPA becomes involved. While EPA must review any resulting compliance plan,⁴⁰ raising the possibility of overfiling, the practical effect of the notice period is to provide more state control over enforcement actions.

EPA can also take over all SIP enforcement in a state. Federal assumption of SIP enforcement is authorized only if EPA finds that violations of the SIP are "so widespread that such violations appear to result from a failure of the State . . . to enforce the plan effectively."⁴¹

Even though the new federal enforcement authority provided in the Clean Air Act was relatively narrow in comparison to later federal laws, it was a substantial expansion of previous federal authority.⁴² The 1967 Air Quality Act⁴³ had authorized federal enforcement only to abate an imminent and substantial endangerment to public health and only when state or local authorities had failed to act.⁴⁴ The 1970 amendments shifted the focus of federal involvement from extraordinary circumstances to a more general role in regulatory enforcement.

37. *Id.* § 7410(a)(2).

38. *Id.* § 7410(a)(2)(D). If a state fails to submit an implementation plan that meets the requirements of the Clean Air Act, if a state implementation plan or a portion of a plan is determined by EPA not to accord with the requirements of the Clean Air Act, or if a state fails to revise an implementation plan after being notified by EPA, EPA may propose an implementation plan or a portion of one for the state. *Id.* § 7410(c)(1). The federal implementation plan must be promulgated by the Administrator within six months after the date the state plan or revision was to have been submitted unless the state has adopted and submitted a plan or revision prior to the promulgation of the federal implementation plan. *Id.*

39. *Id.* § 7413(a)(1).

40. *Id.* § 7410(a)(3).

41. *Id.* § 7413(a)(2). Thirty days advance notice of the proposed assumption of enforcement responsibility is required. *Id.*

42. See Environmental Law Institute, *Federal-State Partnerships Under Three EPA Programs: A Legislative History* 11-14 (Mar. 1987) [hereinafter *Federal-State Partnerships*].

43. Pub. L. No. 90-148, 81 Stat. 485 (1967).

44. *Id.* § 108(K).

B. Federal Insecticide, Fungicide, and Rodenticide Act

The federal law regulating pesticides follows the advance notice pattern used in the Clean Air Act to allocate enforcement authority. The Federal Insecticide, Fungicide, and Rodenticide Act⁴⁵ ("FIFRA") regulates the manufacture, distribution, sale, and use of pesticides. The law requires pesticides to be registered with EPA.⁴⁶ Data on the safety of a pesticide must be submitted to EPA, if requested by the Administrator, to support the registration.⁴⁷ EPA may decide not to register a pesticide, register it for general use, or register the pesticide only for restricted uses.⁴⁸ The use of registered pesticides is controlled by requiring the certification of most applicators⁴⁹ and the submission and review of pesticide labels.⁵⁰

State authority to regulate pesticides is limited under FIFRA.⁵¹ However, FIFRA allows a state to assume "primary enforcement responsibility for pesticide use violations" once EPA has determined that a state has adopted adequate pesticide use laws, has adopted and is implementing adequate procedures for enforcing the laws, and will keep adequate compliance records.⁵² States may also enter into cooperative agreements with EPA to enforce pesticide use restrictions.⁵³ In this case, the state essentially is acting as an agent for EPA in enforcing federal law.

EPA may initiate an enforcement action in a state with primary enforcement responsibility only after providing the state with thirty days advance notice and after determining that the state has not commenced an appropriate enforcement action.⁵⁴ The FIFRA standard appears to allow a somewhat greater federal role than the Clean Air Act since EPA is authorized to bring an enforcement action, after providing thirty days notice, if it determines that a

45. 7 U.S.C. §§ 136-136y (1982 & Supp. V 1987).

46. *Id.* § 136a(a).

47. *Id.* § 136a(c).

48. *Id.* § 136a(d).

49. *Id.* § 136i.

50. *Id.* § 163a(c)(1)(C).

51. For example, states may not impose labeling or packaging requirements in addition to or different from those required by the Federal Insecticide, Fungicide, and Rodenticide Act. *See id.* § 136v(b).

52. *Id.* § 136w-1(a).

53. *Id.* § 136w-1(b).

54. *Id.* § 136w-2(a).

state enforcement action was not “appropriate.” Under the Clean Air Act, EPA is only authorized to commence an enforcement action if the violation in question continues after the thirty-day notice period has expired.

Under FIFRA, state primacy can be rescinded if EPA determines that the state is not carrying out its responsibilities, provides the state ninety days to correct the deficiencies, and determines that the state program remains inadequate.⁵⁵ The FIFRA enforcement scheme, like the scheme under the Clean Air Act, evidences a strong preference for state enforcement even though the federal government may take an enforcement action under limited circumstances.

C. Federal Water Pollution Prevention and Control Act

Although the Clean Air Act and FIFRA expanded the federal enforcement role, states still controlled most enforcement cases because of the mandatory advance notice requirements. The mandatory advance notice requirement was not included in the Federal Water Pollution Prevention and Control Act of 1972 (“Clean Water Act”).⁵⁶ The result was a significant expansion of the federal enforcement role.

The principal regulatory mechanism in the Clean Water Act is the National Pollutant Discharge Elimination System (“NPDES”) permit.⁵⁷ Almost all facilities that discharge pollutants into a watercourse must hold an NPDES permit.⁵⁸ Each NPDES permit contains a series of discharge limits designed to reflect the best currently available control technology,⁵⁹ to protect the quality of receiving waters,⁶⁰ and to limit the release of toxic pollutants.⁶¹ The authority to issue NPDES permits may be delegated to a state⁶² if the state demonstrates, among other things, that it has adequate authority “[t]o abate violations of the permit or the permit

55. *Id.* § 136w-2(b).

56. 33 U.S.C. §§ 1251–1376 (1982 & Supp. V 1987).

57. *Id.* § 1342.

58. Exceptions to the requirements of holding an NPDES permit are set out in 40 C.F.R. § 122.3 (1988).

59. 33 U.S.C. § 1311(b)(1)(A) (1982 & Supp. V 1987).

60. *Id.* § 1313(a)(1).

61. *Id.* § 1317(a)(2).

62. *Id.* § 1342(b).

program, including civil and criminal penalties and other ways and means of enforcement."⁶³

EPA retains enforcement authority under the Clean Water Act even if the NPDES permitting process has been delegated to a state.⁶⁴ Unlike the Clean Air Act and FIFRA, the Clean Water Act allows EPA to initiate an enforcement action against a facility in a delegated state without advance notification.⁶⁵ EPA *may* provide thirty-day advance notice of an enforcement action to the state, but it is not required to do so.⁶⁶

While the Clean Water Act made only a simple change in the federal-state enforcement relationship in not including the advance notice requirement, the result was a substantially heightened federal impact on state enforcement. Instead of being required to give states an opportunity to take action to ensure that a violation is corrected, EPA can initiate its own enforcement case immediately.

D. Safe Drinking Water Act

The federal law regulating public drinking water supplies further expanded federal enforcement authority by authorizing direct federal involvement in enforcement actions where an imminent hazard has been identified. The Safe Drinking Water Act⁶⁷ regulates the quality of public drinking water systems and the underground injection of contaminants. The drinking water system portion of the law requires the establishment of drinking water regulations identifying the maximum acceptable contaminant level

63. *Id.* § 1342(b)(7).

64. *Id.* § 1319(a).

65. The Federal Water Pollution Control Act authorizes federal reassumption of all enforcement responsibilities where the Administrator finds widespread violations of permit conditions or limitations. *Id.* § 1319(a)(2). At least 30 days advance notice to the state is required in this case. *Id.*

66. The statute provides:

Whenever . . . the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a state under an approved permit program . . . he shall proceed under his [order or civil penalty] authority . . . or he shall notify the person in alleged violation and such state of such finding.

33 U.S.C. § 1319(a)(1) (1982 & Supp. V 1987) (emphasis added).

67. 42 U.S.C. §§ 300f-300j (1982 and Supp. V 1987).

of various chemicals for a public drinking water supply.⁶⁸ The underground injection provisions of the law only permit authorization, by permit or rule, of injections which will not endanger drinking water sources.⁶⁹

States are authorized to assume primary enforcement responsibility for the drinking water supply program if the state has, among other things, adopted drinking water regulations which are no less stringent than the federal regulations, and has adopted and is implementing adequate procedures for the enforcement of the state regulations.⁷⁰ For the underground injection program, EPA is required to publish a list of states in which EPA believes an underground injection program is necessary.⁷¹ To obtain primary enforcement authority a listed state must demonstrate that it has adopted an underground injection control program that meets the requirements of regulations issued by EPA.⁷²

Unlike the Clean Water Act, federal enforcement in a state with primacy for the drinking water system program ordinarily is authorized only if EPA has notified the state and the public water system, and provided "such advice and technical assistance to such State and public water system as may be appropriate to bring the system into compliance with such regulation or requirement by the earliest feasible time."⁷³ If the violation continues beyond sixty days, EPA may initiate an enforcement action.⁷⁴ Similarly, the underground injection portion of the law ordinarily requires EPA to provide thirty days notice to the state and an opportunity for the state to take appropriate enforcement action before EPA may commence an action.⁷⁵

However, in contrast to earlier statutes, the EPA Administrator is authorized to initiate an enforcement action under both the drinking water and underground injection programs in a state with primacy whenever EPA determines that the presence of a contaminant presents an "imminent and substantial endangerment" to the public health, and that state and local authorities have not acted

68. *Id.* § 300g-1(B).

69. *Id.* § 300h(b)(1).

70. *Id.* § 300g-2(a).

71. *Id.* § 300h-1(a).

72. *Id.* § 300h-1(b)(1)(A).

73. *Id.* § 300g-3(a)(1)(A).

74. *Id.* § 300g-3(a)(1)(B).

75. *Id.* § 300h-2(a)(1).

to protect the public health.⁷⁶ The Administrator is required to consult with the state and local authorities only "[t]o the extent he determines it to be practicable in light of such imminent endangerment."⁷⁷

The Safe Drinking Water Act endangerment enforcement authority, more so than federal enforcement authority in early statutes, permits a quite independent federal enforcement role. Even though the Clean Water Act permits the federal government to proceed without notifying the state, the statutory language at least provides an optional procedure for allowing the state to act before EPA proceeds with an enforcement case.⁷⁸ The endangerment provision of the Safe Drinking Water Act conceivably permits a federal enforcement action to be initiated in a state without prior notice to the state.

E. Resource Conservation and Recovery Act

The degree of federal involvement in environmental enforcement increased significantly with the development of the hazardous waste regulatory program under the Resource Conservation and Recovery Act of 1976 ("RCRA").⁷⁹ Under the RCRA program, the federal government has the authority not only to bring a direct federal enforcement action in a state, but also to control, through federal enforcement policy, the design of state enforcement programs.

The RCRA hazardous waste program is based on an extremely detailed set of federal rules that regulate the generation, storage, transportation, treatment, and disposal of hazardous waste.⁸⁰ These "cradle to grave" regulations require that all "suspect" wastes be tested to determine if they are hazardous,⁸¹ mandate hazardous waste be transported in appropriate containers that are clearly labeled as containing hazardous waste,⁸² provide for proper storage conditions,⁸³ require that a manifest accompany each ship-

76. *Id.* § 300i.

77. *Id.*

78. See 33 U.S.C. § 1319(a)(1) (1982 & Supp. V 1987).

79. 42 U.S.C. §§ 6901-6991i (1982 & Supp. V 1987).

80. See 40 C.F.R. §§ 260-265 (1988).

81. *Id.* § 261.10.

82. *Id.* §§ 262.30-.31.

83. *Id.* § 262.34.

ment of hazardous waste by a generator,⁸⁴ and establish design and operating standards for treatment, storage, and disposal facilities.⁸⁵

In order to assume responsibility for the RCRA program, states are required to adopt rules that are "equivalent" to the federal regulations.⁸⁶ However, even in authorized states, EPA retains extensive enforcement authority under RCRA.⁸⁷ EPA may (1) assess civil penalties through an administrative order, (2) issue compliance orders, (3) revoke or suspend permits, (4) commence civil judicial enforcement actions, or (5) initiate criminal investigations.⁸⁸ RCRA also allows EPA to exercise authority similar to its authority under the Safe Drinking Water Act when the Administrator determines that an imminent hazard exists.⁸⁹

Except in the case of an imminent hazard, notice must be provided to a state with an authorized program at the time EPA initiates an enforcement action.⁹⁰ However, the advance notice provisions in prior federal laws that allow a state time to resolve the matter are not required under RCRA.⁹¹ This structure raises the same types of overfiling concerns present under the Safe Drinking Water Act. However, the more important issue under RCRA is the effect that EPA's RCRA "Enforcement Response Policy"⁹² has had on the structure of state enforcement programs.

The Enforcement Response Policy is guidance provided by EPA to its regional offices and to states on what EPA considers to be "timely and appropriate" enforcement responses to violations of the RCRA regulations.⁹³ As guidance, the Enforcement Response Policy is not binding on states. However, the policy is important because compliance with it is one of the most significant criteria for evaluating the performance of state programs. Federal funding for state programs is, in turn, dependent upon the performance evaluation.

84. *Id.* § 262.20.

85. *Id.* § 264.

86. 42 U.S.C. § 6926(b) (1982 & Supp. V 1987).

87. *See id.* § 6928. *See also* Federal-State Partnerships, *supra* note 42, at 32.

88. *See* 42 U.S.C. § 6928 (1982 & Supp. V 1987).

89. *Id.* § 6973(a).

90. *Id.* §§ 6928(a)(2), 6973(a).

91. *Id.* § 6973(c).

92. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENFORCEMENT RESPONSE POLICY (1987) [hereinafter ENFORCEMENT RESPONSE POLICY].

93. *Id.* at 3, 4, 12-15.

Target numbers of inspections and estimates of the number of enforcement actions that a state is expected to meet during a fiscal year are based on an assumption that compliance will be achieved by the initiation of numerous administrative and judicial enforcement actions.⁹⁴ By focussing on a limited range of enforcement alternatives and by mandating rapid response to violations, the policy inhibits states from using enforcement techniques that may be more effective than those that EPA would utilize.⁹⁵

In addition, EPA's enforcement policies focus on investigations of treatment, storage, and disposal facilities and large generators rather than on small-quantity hazardous waste generators.⁹⁶ In states such as Minnesota, there are few treatment, storage, or disposal facilities and relatively few large generators. There are, however, a very large number of small-quantity generators. Thus, one of the most significant enforcement concerns is small-quantity generator compliance.⁹⁷ The Enforcement Response Policy, however, constrains states from directing their limited enforcement resources to these generators.

94. STATE HAZARDOUS WASTE STUDY, *supra* note 20, at 88.

95. According to one study:

By encouraging compliance orders and civil penalty actions rather than shut-down orders, permit "bars," suspensions or revocations, bond forfeitures, and personal civil and criminal liability, EPA actually *encourages* affirmative actions in which the agency carries the burden of proof and the burden of going forward and tolerates delay and litigation on the public's time, with the consequent devotion of limited technical and legal resources to virtually *all* cases rather than a concentration of resources on a few, targeted individuals or entities. By limiting the time for initiating action on a "RCRA violation," the state may be precluded (or at least discouraged) from addressing the major problem at a site with the most powerful and relevant legal tools, strategies and resources, and is encouraged to initiate a minor, relatively ineffective and limited, enforcement action for no reason other than to satisfy EPA timeframes and policies.

Id. at 99-100.

96. A person who generates between 100 and 1000 kilograms of hazardous waste in any month. Interview with Gordon Wegwart, assistant director, Hazardous Waste Division, Minnesota Pollution Control Agency (Sept. 11, 1989). *See also* 40 C.F.R. § 262.44 (1988).

97. Improper disposal of hazardous waste by small-quantity generators can produce serious environmental problems. For example, disposal of under 100 gallons of the dry-cleaning solvent perchloroethylene by a small-town dry-cleaning operation in Minnesota resulted in groundwater contamination that required the closing of a city well and dozens of private wells. The remedial costs have exceeded \$1 million. Interview with Gary Pulford, chief, Site Response Section, Ground Water and Solid Waste Division, Minnesota Pollution Control Agency (Sept. 5, 1989).

F. Comprehensive Environmental Response, Compensation, and Liability Act

With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"),⁹⁸ the federal role in enforcement reached its zenith. CERCLA, in contrast to the other laws discussed in this Article, is not a regulatory program. Instead, it is designed to accomplish the cleanup of hazardous waste disposal sites by establishing liability standards for persons responsible for disposal activities⁹⁹ and creating a federal fund to be used when responsible parties do not conduct the cleanups.¹⁰⁰ The principal regulation under CERCLA, the National Contingency Plan,¹⁰¹ simply provides directions on carrying out cleanup actions.¹⁰²

There are thousands of old hazardous waste disposal facilities in the country, representing varying degrees of risk to public health and the environment.¹⁰³ Congress directed EPA to prioritize sites in accordance with their risk. As a result, the Superfund program established by CERCLA focusses on sites listed on the National Priorities List.¹⁰⁴ The National Priorities List consists of those sites scoring above a threshold value on EPA's hazard ranking system.¹⁰⁵ Over 1100 sites, assumed to be the worst in the country, are currently listed on the National Priorities List.¹⁰⁶

A major goal of CERCLA is to encourage persons responsible for the release of a hazardous substance to undertake the necessary cleanup activities.¹⁰⁷ Therefore, the Superfund program essentially

98. 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987).

99. *Id.* § 9607.

100. *See id.*; 26 U.S.C. § 9507 (Supp. V 1987) (originally enacted as CERCLA, Pub. L. No. 96-510, § 221, 94 Stat. 2767, 2801 (formerly codified at 42 U.S.C. § 9631 (1982))); CERCLA, Pub. L. No. 96-510, § 232, 94 Stat. 2767, 2804 (formerly codified at 42 U.S.C. § 9641 (1982)) *repealed by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 514, 100 Stat. 1613, 1767.

101. 42 U.S.C. § 9605 (1982 & Supp. V 1987).

102. *See* 40 C.F.R. § 300 (1988).

103. *See* ENVIRONMENTAL LAW INSTITUTE, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY at III-3 to -5 (Aug. 18, 1989).

104. *See* 42 U.S.C. § 9605(a)(8) (1982 & Supp. V 1987).

105. *See* 40 C.F.R. § 300, apps. A, B (1988).

106. CLEAN SITES, MAKING THE SUPERFUND WORK: RECOMMENDATIONS TO IMPROVE PROGRAM IMPLEMENTATION 1 (Jan. 1989).

107. *See* 42 U.S.C. §§ 9606(b)(1), 9622 (1982 & Supp. V 1987); Committee on Appropriations, 100th Cong., 2nd Sess., United States House of Representatives, Status of

was designed to be an enforcement program,¹⁰⁸ but little of this enforcement responsibility was provided to the states. CERCLA did not authorize any form of delegation to the states. The ability to issue cleanup orders was lodged solely with EPA.¹⁰⁹ The only "enforcement" authority given a state was an ability to recover in federal court the costs a state had incurred in connection with a cleanup.¹¹⁰ States only gradually assumed any role in the Superfund process, primarily acting as agents of EPA in overseeing projects paid for with federal funds.¹¹¹ While a few states have initiated enforcement actions against responsible parties at National Priorities List sites, EPA has maintained its prerogative to seek additional relief against the responsible parties.

EPA practice under the Superfund program has emphasized the use of Superfund dollars to clean up hazardous waste sites, rather than an aggressive effort to seek cleanup commitments from responsible parties.¹¹² The result has been that EPA's Superfund enforcement program has been underfunded.¹¹³ Not surprisingly,

the Environmental Protection Agency's Superfund Program 2 (Mar. 1988) (unreleased) [hereinafter *Superfund Program Status*] (on file with HARV. ENVTL. L. REV.).

108. A 1985 report issued by the United States House of Representatives noted that:

The current reauthorization, coming when it does, forces Congress to face a very fundamental policy question: how to ensure in the future that there are adequate resources, and to see that past, thoroughly repudiated, mismanagement problems are behind us.

H.R. 2817 has been written with the underlying belief that Congress should focus on ways to ensure rapid and thorough cleanup of abandoned hazardous wastes rather than on past mistakes. It is clear from the accumulating data on waste sites that EPA will never have adequate monies or manpower to address the problem itself. As a result, an underlying principle of H.R. 2817 is that Congress must facilitate cleanups of hazardous substances by the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards.

H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 55 (1985).

109. See 42 U.S.C. § 9606 (1982 & Supp. V 1987).

110. See *id.* § 9607(a)(4)(A).

111. The 1986 amendments to CERCLA require that states be provided with a "substantial and meaningful" role in designating National Priority List sites, developing cleanup plans, and settling with responsible parties. Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, § 121(f), 100 Stat. 1613, 1676 (1986) (codified as amended at 42 U.S.C. § 9621(f) (Supp. V 1987)). The draft revisions of the National Contingency Plan required by SARA permit states to assume the lead role in overseeing work at National Priority List sites. 53 Fed. Reg. 51,393, 51,454-56 (1988). Still, states are not delegated the authority to run the CERCLA/SARA enforcement program in the manner states are authorized to manage other federal environmental programs.

112. See CLEAN SITES, *supra* note 106, at 7-8.

113. *Id.* at 7.

financial and other resources available from EPA to the states to pursue enforcement actions have been correspondingly limited.¹¹⁴

The combined effect of the failure of CERCLA to delegate enforcement responsibilities to the states, the inability of states to settle conclusively National Priorities List cases with responsible parties, EPA's emphasis on cleanups financed with dollars from the Superfund, and the limited enforcement resources available to EPA and the states has resulted in a low level of enforcement activity under CERCLA.¹¹⁵ In addition, because of EPA's lack of emphasis on enforcement, states that have had successful hazardous waste cleanup enforcement programs have administered the programs essentially independent of the federal program.¹¹⁶

V. REVERSING THE TREND

Beginning in the mid-1980's, the trend toward federalizing environmental enforcement and enforcement policymaking began to change. The three newest federal environmental programs all provide for a much stronger state enforcement role. Unfortunately, no clear pattern for allocating enforcement responsibilities can be gleaned from these new statutes. Rather, this change appears to have been produced by federal budgetary limitations and by the administrative difficulty created by the large number of facilities regulated by these laws.

114. Only \$5 million was available to support state enforcement actions nationwide in each of federal fiscal years 1988 and 1989. Interview with Gary Pulford, chief, Site Response Section, Ground Water and Solid Waste Division, Minnesota Pollution Control Agency (Oct. 30, 1989).

115. See SENATE SUBCOMM. ON SUPERFUND, OCEAN AND WATER PROTECTION, 101ST CONG., 1ST SESS., LAUTENBERG-DURENBERGER REPORT ON SUPERFUND: CLEANING UP THE NATION'S CLEANUP PROGRAM 118-27 (1989).

116. In Minnesota, for example, the state adopted its own superfund legislation in 1983. Minnesota Environmental Response and Liability Act, MINN. STAT. § 115B (1988). In November of 1988, 139 sites were listed on the state's "Permanent List of Priorities," 40 of which were on the National Priority List. MINNESOTA POLLUTION CONTROL AGENCY, REPORT ON THE USE OF THE ENVIRONMENTAL RESPONSE, COMPENSATION AND COMPLIANCE FUND DURING FISCAL YEAR 1988 4-5 (1988) (report on use of the state fund) (on file with HARV. ENVTL. L. REV.). Response actions had been taken at 104 of the sites with 73 of the response actions conducted by responsible parties. *Id.* at 5. Response actions had been completed at 38 sites by November of 1988. *Id.* at 6. Both the percentage of responsible party funded response actions and the percentage of completed actions substantially exceeded the record of the federal Superfund program. See Superfund Program Status, *supra* note 107, at ii; CLEAN SITES, *supra* note 106, at 1-2.

A. Underground Storage Tanks

The Hazardous and Solid Waste Amendments of 1984 to the Solid Waste Disposal Act established a new program to regulate underground storage tanks ("UST").¹¹⁷ EPA's enforcement strategy for the program strongly supports the need for innovative state enforcement, beginning the reversal of the trend toward increased federalization of environmental enforcement.¹¹⁸

The UST program is designed to address two problems. First, similar to the Superfund law, the UST program requires owners of underground tanks to take corrective action with respect to the release of petroleum from storage tanks.¹¹⁹ Second, the Act mandates the development of regulations establishing new tank performance standards¹²⁰ and requirements for leak detection, record keeping, and closure of tanks.¹²¹ The responsibility for managing the federal UST program may be delegated to a state if the state standards are at least as stringent as the federal standards and the state has adequate enforcement authority.¹²²

The UST program combines some of the regulatory aspects of RCRA with cleanup requirements similar to CERCLA. However, in marked contrast to CERCLA, the UST program relies heavily on state enforcement. The enforcement strategy for the program notes that "[s]tates will be expected to conduct the majority of enforcement actions" for the program.¹²³ Further, unlike the RCRA enforcement strategy, the UST strategy provides that EPA will approve a variety of state programs and will "encourage States to use innovative approaches in all program areas."¹²⁴

States may also administer the UST program without adopting state rules. In an expansion of the cooperative agreement enforcement approach originated under FIFRA,¹²⁵ the UST law permits a

117. Pub. L. No. 98-616, Title VI, 98 Stat. 3221, 3277-88 (codified as amended at 42 U.S.C. § 6991-6991i (Supp. V 1987)).

118. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, FY 1989-FY 1990 COMPLIANCE AND ENFORCEMENT STRATEGY FOR THE UNDERGROUND STORAGE TANK PROGRAM 3-5 (Jan. 5, 1989) [hereinafter UST COMPLIANCE AND ENFORCEMENT STRATEGY].

119. 42 U.S.C. § 6991b(h) (Supp. V 1987).

120. *Id.* § 6991b(e).

121. *Id.* § 6991b(c).

122. *Id.* § 6991c(a).

123. UST COMPLIANCE AND ENFORCEMENT STRATEGY, *supra* note 118, at 3.

124. *Id.* at 5.

125. *See supra* notes 45-55 and accompanying text.

state to exercise most of the enforcement authorities provided to the EPA Administrator where (1) the Administrator determines a state has the capabilities to carry out effective corrective actions and enforcement activities, and (2) the Administrator has entered into a cooperative agreement with the state.¹²⁶

EPA does retain the authority to issue compliance orders for violations that occur in a state with a delegated UST program.¹²⁷ Notice to the states is required.¹²⁸ This provision does not cover violations in a state where the state is exercising enforcement authority pursuant to a cooperative agreement. Since the state essentially is acting as an agent of the federal government in this case, EPA is probably precluded from taking enforcement action where the state has already acted.¹²⁹

B. Emergency Planning and Community Right-to-Know Act

The state role in enforcement of a federal program was significantly expanded by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").¹³⁰ Title III of SARA, the Emergency Planning and Community Right-to-Know Act ("Emergency Planning Act"),¹³¹ for the first time gave states extensive direct authority to enforce a federal environmental law in federal court.¹³²

Title III was introduced in response to the disaster in Bhopal, India.¹³³ The Act was designed to upgrade planning for chemical emergencies,¹³⁴ as well as to provide persons in communities where hazardous substances are stored with information about which

126. 42 U.S.C. § 6991b(h)(7)(A) (Supp. V 1987).

127. *Id.* § 6991e(a)(2).

128. *Id.*

129. *See* STATE HAZARDOUS WASTE STUDY, *supra* note 20, at 5.

130. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. §§ 9601-9675, 11,001-11,050 (Supp. V 1987)).

131. 42 U.S.C. §§ 11,001-11,050 (Supp. V 1987).

132. States have been authorized to initiate citizen suits under several of the principal environmental statutes. Citizen suit provisions, however, frequently contain restrictions on their use, such as advance notice requirements. *See* Clean Water Act, 33 U.S.C. § 1365(b) (1982 & Supp. V 1987); Safe Drinking Water Act, 42 U.S.C. § 300j-8(b) (1982 & Supp. V 1987); RCRA, 42 U.S.C. § 6972(b) (1982 & Supp. V 1987); and Clean Air Act, 42 U.S.C. § 7604(b) (1982). Direct access to federal court is provided to states under section 107 of CERCLA, 42 U.S.C. § 9607 (1982 & Supp. V 1987). However, this section only enables states to recover costs they have incurred in cleaning up hazardous waste sites.

133. *See* H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 258 (1985).

134. *See* 42 U.S.C. § 11,003 (Supp. V 1987).

facilities utilize the hazardous materials.¹³⁵ The vehicle for accomplishing these purposes is a series of reporting requirements. The Emergency Planning Act mandates submission of a variety of reports and documents concerning the presence, release, and inventory of hazardous materials¹³⁶ to State Emergency Response Commissions,¹³⁷ Local Emergency Planning Committees,¹³⁸ and local fire departments. The Act also requires manufacturing facilities to quantify routine releases of toxic chemicals and to report the releases to the state and to EPA.¹³⁹

Unlike early environmental programs, the Emergency Planning Act extends direct federal enforcement authority to state and local governments.¹⁴⁰ Since the Act mandates reporting requirements to state and local entities created by federal law and provides for direct enforcement by state and local governments, delegation authority was not included in the law. While the EPA and state enforcement jurisdiction are not coextensive, the state authority extends to most of the key reporting requirements of the Act.¹⁴¹ From the perspective of practical enforcement, it is significant that Congress has provided little funding to EPA to enforce the Emergency Planning Act. As a result, EPA's enforcement strategy for the Act relies heavily on state enforcement.¹⁴²

135. *See id.* § 11,022(e).

136. *See id.* §§ 11,002, 11,004, 11,021, 11,022.

137. *See id.* § 11,001(a).

138. *See id.* § 11,001(c).

139. *Id.* § 11,023.

140. *Id.* § 11,046(a)(2).

141. States are not granted enforcement authority for violations related to reporting releases of extremely hazardous substances under section 11,004 of the Emergency Planning Act and related to reporting the routine release of toxic chemicals under section 11,023 of the Act. Compare 42 U.S.C. § 11,045 (Supp. V 1987) with 42 U.S.C. § 11,046 (Supp. V 1987).

142. EPA's Title III enforcement strategy provides that:

With the notable exception of section 313 Toxic Release Inventory requirements and section 322 Trade Secret submissions, Title III [the Emergency Planning and Community Right-to-Know Act] was intended to be implemented mainly as a state and local program. Consistent with Congressional intent, EPA plans a two tiered approach for enforcement. First, EPA will place major emphasis on enforcing those sections of Title III where it has primary governmental enforcement authority, namely sections 304 [spill reporting], 313 [toxic release inventory], and 322 [trade secrets]

Second, EPA will take enforcement action on a limited number of specific cases referred by the State Emergency Response Commissions ("SERCs") for violation of sections 302, 303, 311 and 312 However, EPA believes that states have the primary responsibility for enforcement of sections 302, 303, 311

C. Medical Waste Tracking Act

The direct statutory authorization of state enforcement programs was further expanded by recent legislation dealing with medical waste. The Medical Waste Tracking Act of 1988¹⁴³ provides participating states with the same enforcement authority as the federal government. The Act establishes a demonstration medical waste tracking program for the states of New York, New Jersey, and Connecticut.¹⁴⁴ In addition, all of the Great Lakes states are included in the demonstration program unless the governor of a state decides to withdraw from the program.¹⁴⁵ The demonstration program in participating states will require specific types of medical waste¹⁴⁶ to be separated from other waste, to be placed in specially labeled containers, and to be accompanied by a manifest¹⁴⁷ if the waste is shipped off-site.¹⁴⁸

The Medical Waste Tracking Act moves a step beyond the Emergency Planning Act by providing coextensive enforcement authority to the states and the federal government. The Act provides that a state may conduct inspections and take enforcement actions against any person to the same extent as the EPA Admin-

and 312. State and local governments are the recipients of the data submissions for most of the requirements and are in the best position to identify violators. SERCs and Local Emergency Planning Committees ("LEPCs") have the statutory authority to enforce sections 302, 303, 311 and 312 through civil actions. Regional enforcement personnel should contact SERCs in their regions to set up counterparts for enforcement referrals and information exchange. This approach acknowledges that successful implementation of Title III requires states to have an active role in enforcement.

United States Environmental Protection Agency, Draft Enforcement Strategy for CERCLA § 103 and Title III Provisions 1-2 (Apr. 8, 1988) (emphasis added) [hereinafter CERCLA Enforcement Strategy] (on file with HARV. ENVTL. L. REV.).

143. Pub. L. No. 100-582, 102 Stat. 2950 (codified as amended at 42 U.S.C.A. §§ 6992-6992K (West Supp. 1989)).

144. *Id.* § 6992(a).

145. *Id.* All the Great Lakes states decided to withdraw from the program, except New York, which was required to participate. Louisiana, Rhode Island, and the District of Columbia initially petitioned for acceptance into the demonstration program. However, Louisiana and the District of Columbia ultimately decided not to participate. *See* 54 Fed. Reg. 35,189 (1989).

146. Regulated medical wastes include cultures and stocks of infectious agents, human pathological wastes, human blood and blood products, animal wastes, isolation ward wastes, and sharps. 54 Fed. Reg. 12,373 (1989).

147. A manifest is a shipping document that contains information on the shipper of the waste, the nature of the waste to be shipped, the transporter, and the facility to which the waste is to be shipped.

148. 42 U.S.C.A. § 6992b(a) (West Supp. 1989).

istrator.¹⁴⁹ In an interesting reversal of the practice under earlier federal laws, the Act requires states to notify EPA when initiating an enforcement action under the Act.¹⁵⁰

Under the Medical Waste Tracking Act, just as under the Emergency Planning Act, Congress provided very limited funding to EPA for enforcement. As a result, EPA's enforcement strategy again relies heavily on state enforcement.¹⁵¹

The structure of the Medical Waste Tracking Act has raised a number of potential difficulties in the federal-state enforcement relationship. The EPA enforcement strategy for the Act points out that, in signing the law, then-President Reagan noted that

I have also been advised that Section 11007 of the bill, which authorizes states "to take enforcement action against any person to the same extent as the Administrator" may raise serious constitutional problems. To the extent that Congress provided for States to prosecute crimes or exercise other executive branch authority, it could be inconsistent with the Appointments Clause of the Constitution.¹⁵²

Further, the EPA enforcement strategy asserts that a state enforcement action brought in federal court under the Medical Waste Tracking Act is not binding on EPA.¹⁵³ This asserted non-binding effect of state enforcement actions creates a significant problem for state enforcement officials. Knowing the federal government believes it could pursue an independent action even if the state action is brought directly under federal law, the regulated party may be reluctant to settle an enforcement action with a state. Finally, the policy provides that all penalties collected by a state in such an action must be paid to the Federal Treasury.¹⁵⁴ The fact

149. *Id.* § 6992f(a).

150. *Id.*

151. The enforcement strategy for the Medical Waste Tracking Act provides that "[t]he task of implementing the Medical Waste Tracking Program will lie primarily with the States. States will have the lead for conducting inspections related to, and enforcement of, the medical waste tracking program." United States Environmental Protection Agency, Office of Solid Waste and Emergency Response, Medical Waste Enforcement Strategy 8 (1989) (on file with HARV. ENVTL. L. REV.).

152. *Id.*

153. *Id.* Similar concerns about whether a state enforcement action will preclude a subsequent federal enforcement action exist under most of the major environmental laws. However, no other federal law has provided as much direct enforcement authority to the states as the Medical Waste Tracking Act. Thus, the preclusion issue is heightened in cases brought under the Act.

154. *Id.*

that any fines collected as a result of a state enforcement action are to be paid to the Federal Treasury may be a substantial disincentive for a state to pursue an enforcement action directly under the authority of the Medical Waste Tracking Act.

Given these limitations, the enforcement program for the Medical Waste Tracking Act as implemented through EPA's enforcement strategy will likely be very difficult to carry out in the absence of parallel state enforcement legislation.

VI. THE NEED FOR A REASSESSMENT OF THE STATE AND FEDERAL ENVIRONMENTAL ENFORCEMENT ROLES

The preceding discussion depicts the varying approaches to the state and federal roles in environmental enforcement taken by Congress and EPA over the past two decades under the major federal environmental programs. In particular, it demonstrates a dramatic federalization of enforcement in the 1970's and early 1980's and an apparent reversal of this trend in the last half of the 1980's.

No set of principles readily emerges from the analysis of these laws and the underlying federal enforcement policy to explain why enforcement responsibilities were allocated to the federal or state governments under each of the federal laws. Instead, the allocation of responsibility appears to be haphazard, responding to short-term problems rather than to any consistent theory of the appropriate long-term roles of various levels of government.

This erratic pattern is perhaps the inevitable result of the massive new environmental programs constructed during the period. However, it is now clear that environmental enforcement will be a bilateral responsibility of the federal and state governments over the long-term. Given this long-term enforcement relationship, it is important that a carefully considered set of principles be utilized to allocate responsibilities between the federal and state governments. Only by clearly understanding their respective roles in enforcement can the states and the federal government establish the effective enforcement programs necessary to respond to the increased workload that has come with the expansion of environmental programs, given the limited resources available.

Several factors make this a particularly important time to develop a set of principles upon which enforcement responsibilities can be consistently allocated. The first factor is the profound change in environmental enforcement in the past five years resulting from the geometric expansion in the number of regulated entities. From 1970 to the early 1980's the principal focus of environmental enforcement was on relatively few larger facilities, perhaps numbering in the tens of thousands nationally. Beginning with the expansion of the application of the RCRA regulations to small-quantity hazardous waste generators,¹⁵⁵ the number of regulated entities grew rapidly. The scale of the enforcement problem is demonstrated by the number of regulated entities in Minnesota.¹⁵⁶ There are more than 15,000 small-quantity hazardous waste generators in the state.¹⁵⁷ The underground storage tank program added another large universe of facilities to the enforcement agenda. In Minnesota, there are more than 33,000 regulated underground storage tanks.¹⁵⁸ Reporting requirements under the Emergency Planning Act further ballooned enforcement responsibilities. In Minnesota, the reporting requirements cover more than 10,000 facilities.¹⁵⁹ The Medical Waste Tracking Act will introduce thousands of previously unregulated facilities into the environmental enforcement system in participating states. In Minnesota, there are more than 6000 facilities that generate infectious medical waste,¹⁶⁰ a subset of the medical wastes regulated under

155. Prior to September 22, 1986, most of the federal RCRA regulations only applied to persons who generated more than 1000 kilograms of hazardous waste a month. *See* 51 Fed. Reg. 10,150-51 (1986). In the 1986 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act, Congress required EPA to promulgate standards for persons who generate between 100 and 1000 kilograms of hazardous waste in a month. *See* Pub. L. No. 98-616, § 221, 98 Stat. 3221, 3248 (codified at 42 U.S.C. § 6921(d) (Supp. V 1987)). One hundred kilograms equals 220 pounds or the equivalent of about one-half of a 55-gallon drum.

156. Minnesota is a medium-sized state with a population of slightly over 4,100,000. *See* STATE INFORMATION BOOK 1987-1988 at 379 (G. Jones ed. 1987).

157. Interview with Gordon Wegwart, assistant director, Hazardous Waste Division, Minnesota Pollution Control Agency (Sept. 11, 1989).

158. Interview with Michael Kanner, chief, Tanks and Spills Section, Minnesota Pollution Control Agency (Sept. 17, 1989).

159. Interview with Lee Tischler, director, Minnesota State Emergency Response Commission (Apr. 17, 1989).

160. Infectious waste typically includes certain wastes from medical laboratories, blood and some other body fluids, hypodermic needles and syringes, and waste from research animals intentionally exposed to agents that are infectious to humans. *See* OFFICE OF THE ATTORNEY GENERAL, STATE OF MINNESOTA, REPORT AND RECOMMENDATIONS ON THE REGULATION OF INFECTIOUS WASTE III-9 to -22 (Aug. 1988). Although Minnesota

the federal law.¹⁶¹ In the next few years it is likely that groundwater protection programs will be adopted in many states.¹⁶² When enacted, these groundwater programs will add thousands more regulated entities to the enforcement responsibilities of officials in the states involved.

It will be difficult for government to respond effectively to this vastly expanded workload. One consequence is that enforcement programs likely will be required to focus more on general deterrence¹⁶³ of violations rather than on cases designed only to resolve specific violations. Federal enforcement policies also will have to provide states with incentives to utilize innovative approaches rather than constrain states by imposing federal enforcement preferences on them.¹⁶⁴

withdrew from participation in the Medical Waste Tracking Act demonstration program, the state legislature adopted legislation regulating the management of infectious waste. *See* 1989 Minn. Laws 337.

161. Interview with Pauline Bouchard, division director, Division of Environmental Health, Minnesota Department of Health (Mar. 2, 1989).

162. Arizona, Iowa, Minnesota, and Wisconsin, among others, have already adopted comprehensive groundwater protection legislation. *See* ARIZ. REV. STAT. ANN. §§ 45-401 to -636 (1987); IOWA CODE §§ 455E.1-.11 (1989); 1989 Minn. Laws 326; WIS. STAT. ANN. §§ 160.001-.50 (West 1989).

163. In its analysis of hazardous waste enforcement under RCRA, the Environmental Law Institute noted that:

Because it is impossible ordinarily to achieve *specific* deterrence [in the RCRA program] (site-by-site detection and citation of every violation ever committed), credible enforcement programs must also rely on *general* deterrence (voluntary compliance induced by awareness of the risk of detection and the net effect of the likely sanction as compared with the benefit of noncompliance). Credible general deterrence efforts generally require (1) public awareness of active enforcement personnel, (2) public awareness that there is a hidden enforcement presence (*i.e.*, investigators), (3) credible sanctions timely imposed upon a cross-section of the regulated community, and (4) some number of severe sanctions that have been imposed.

STATE HAZARDOUS WASTE STUDY, *supra* note 20, at 5-6.

164. The enforcement strategy for the UST program recognizes the need for encouraging the states to develop innovative approaches to enforcement.

The State program approval objectives provide the States with the minimum Standards for EPA's approval, but at the same time do not dictate the methods States may use in meeting these standards. EPA believes this approach to State program approval will provide the States with significant flexibility, permit alternative methods of implementation, and still ensure that State UST programs adequately protect the environment. EPA seeks to approve a variety of State programs and to encourage States to use innovative approaches in all program areas.

UST COMPLIANCE AND ENFORCEMENT STRATEGY, *supra* note 118, at 4-5. *See supra* note 95 and accompanying text.

The second factor pointing to the need to re-evaluate the federal-state enforcement roles is the failure of the heavily federalized RCRA and CERCLA programs to achieve high compliance rates. Under RCRA, compliance rates have been consistently low. A 1988 Government Accounting Office study found that even for landfills, EPA's highest enforcement priority, compliance rates were only about fifty percent.¹⁶⁵ The study also found accurate compliance rates were not even available for hazardous waste treatment and storage facilities.¹⁶⁶

The Superfund program has been heavily criticized for not achieving more rapid cleanups.¹⁶⁷ Much of this criticism has focussed on the failure of EPA to utilize the enforcement tools provided in both CERCLA and SARA.¹⁶⁸ A 1988 report by the United States House of Representatives, Committee on Appropriations, found that "EPA's management philosophy and policies are generally predisposed to relying on Superfund assets to execute the program rather than requiring responsible party cleanups."¹⁶⁹ The result was that in 1989 five public dollars were being expended for Superfund work for every responsible party dollar.¹⁷⁰ The five-public-to-one-private dollar ratio was in marked contrast to the

165. GOVERNMENT ACCOUNTING OFFICE, HAZARDOUS WASTE: NEW APPROACH NEEDED TO MANAGE THE RESOURCE CONSERVATION AND RECOVERY ACT 43 (July 1988).

166. *Id.* at 41.

167. See generally Environmental Defense Fund, Hazardous Waste Treatment Council, Nat'l Audubon Soc., Nat. Resources Defense Council, Nat'l Wildlife Fed., Sierra Club, U.S. PIRG, Right Train, Wrong Track: Failed Leadership in the Superfund Cleanup Program 42-54 (June 20, 1988).

168. SARA added several provisions designed specifically to encourage settlements, including providing responsible parties with non-binding allocations of the parties' shares of responsibility, the availability of partial government funding, and authority to enter into separate settlements with de minimis contributors. See 42 U.S.C. § 9622 (Supp. V 1987). See also CLEAN SITES, *supra* note 106, at 11-13.

169. Superfund Program Status, *supra* note 107, at ii. The report also observed that:

It is EPA's responsibility, given the legal authorities provided in the Superfund legislation, to implement an enforcement program which will achieve timely, privately-funded cleanup actions or cost recovery settlements. This *fundamental responsibility* was set forth in the original legislation and reinforced in SARA. Further, the SARA legislative history makes evident that the Congress recognized that *without a highly successful enforcement program, EPA would never achieve the objectives of the Superfund legislation because EPA, by itself, could not secure the financial and human resources required to solve the problem.*

Id. at 8. See also Mays, *Superfund Enforcement in the Dumps: What's Wrong with the Superfund Program?*, NAT'L ENVTL. ENFORCEMENT J., Feb. 1989, at 4.

170. See Superfund Program Status, *supra* note 107, at 13.

experience reported under the enforcement-based Minnesota Superfund program, under which private funds have financed the vast majority of cleanup work.¹⁷¹ A more recent study by Clean Sites, an organization developed to help bring about settlements with responsible parties in Superfund cases, also concluded that the slow progress of the Superfund cleanup program was related to EPA's failure to use aggressively its enforcement authority.¹⁷²

A third factor pointing toward the need to reassess the governmental enforcement roles is the increasing demand on EPA related to interstate and international problems. A number of interstate issues have become more important in the past few years. These issues include acid precipitation, interstate transport of ozone precursors, the interstate movement of air toxics, and the interstate transportation and disposal of solid and hazardous

171. A United States House of Representatives report which examined the Minnesota program noted that:

By December 1987, the State had categorized 20 of 130 (15 percent) sites as having the final remedy in place. In comparison, EPA, on a national basis, has completed work on only 13, or 1 percent, of the 951 NPL sites.

Minnesota's Superfund philosophy on enforcement has clearly favored obtaining PRP's [potentially responsible parties] takeovers on hazardous sites. For example, PRP's are conducting about 80 percent of the RI/FS's [remedial investigation/feasibility studies] and about 90 percent of the RD/RA's [remedial design/remedial actions]. Further, through June 30, 1987, PRP's have financed about 90 percent of program costs, which total about \$113 million.

Id. at 23.

172. The Clean Sites study noted that:

When the Superfund law was first enacted, the government intended to use its broad enforcement authorities to require responsible parties to clean up a sizeable percentage of the sites on the [National Priority List] . . .

After the reauthorization of Superfund in 1986, when ample Superfund money subsequently became available to finance site work, EPA came to rely more extensively on Fund-financed actions. In those years, 1982-84, and 1987-88, when EPA reportedly had abundant money and few sites ready for expenditures, the Agency chose to spend most of the money on its own program of site investigation and cleanup, rather than undertake the more lengthy and expensive process of PRP identification, enforcement negotiations, and litigation leading to privately financed cleanups or cost recovery actions. Given Clean Sites' understanding that there will be more sites ready to have work begin by the end of 1989 than there will be Fund money available, it is clear that the financing of additional cleanups will have to come from PRP settlements and EPA enforcement actions.

EPA's 1986-88 pattern of using the Superfund monies as a first choice to finance response actions retarded the ultimate resolution of the site cleanup problem.

CLEAN SITES, *supra* note 106, at 7.

waste. Internationally, global warming, exportation of hazardous waste, overseas disposal of solid waste, and acid precipitation problems are also drawing more of EPA's attention.¹⁷³ These interstate and international issues are likely to require an increasing percentage of EPA's limited resources. Due to federal deficit problems, these resources are unlikely to increase in proportion to the new demands on EPA.¹⁷⁴

Finally, in the twenty years since the federal government began assuming a heightened role in environmental enforcement, many state programs have been significantly strengthened. State budgets for environmental programs have increased substantially since 1982, even in the face of declining levels of federal grant assistance.¹⁷⁵

VII. THE PRINCIPLES FOR ALLOCATING ENFORCEMENT RESPONSIBILITY

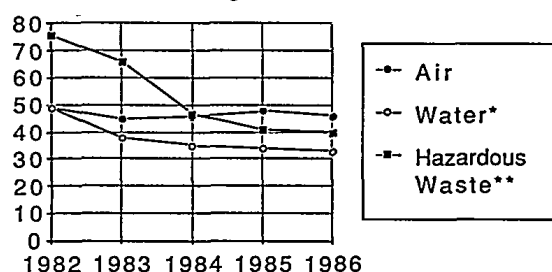
Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing

173. Indicative of the increased emphasis on international issues is the fact that the Administrator of the Environmental Protection Agency recently has proposed upgrading its Office of International Activities from Associate to Assistant Administrator status. See 19 Env't Rep. (BNA) 2542 (Mar. 31, 1989).

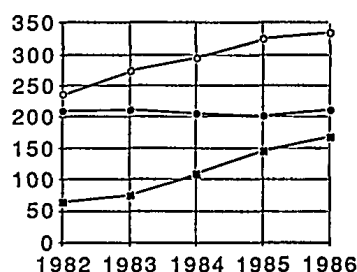
174. See Congressional Budget Office, *Environmental Federalism: Allocating Responsibilities for Environmental Protection* 1, 4 (Sept. 1988) (staff working paper) (on file with HARV. ENVTL. L. REV.).

175. The following table shows the increased state funding role in three environmental programs.

EPA Grants as a Percentage of State Budgets



Total State Budgets (in millions of 1987 dollars)



*Includes water quality programs; some drinking water programs may not be included.

**Includes both hazardous and solid waste programs.

Id. at 18-19.

states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focussed enforcement efforts designed to address the varying types of regulated entities in each state are necessary to obtain the high levels of voluntary compliance without which the vast regulatory programs will not succeed.

The principles articulated below are designed to assign specific responsibilities to each level of government to avoid duplicative efforts, conserve limited resources, minimize disruptive intergovernmental conflicts, provide greater certainty and finality in enforcement actions, and allow for flexibility and innovation to meet the heavy enforcement responsibilities of government regulators—in sum, to achieve more effective and efficient enforcement. Congress should apply these principles to allocate enforcement responsibilities between the states and the federal government in enacting new environmental programs and reauthorizing existing programs. EPA should also utilize the principles to the extent permitted by Congress in developing enforcement policies.

A. States Should Adopt Their Own Regulatory and Enforcement Authority to Support Federal Regulatory Programs

Most of the environmental laws reviewed in this Article require states to adopt parallel regulatory programs and to use existing enforcement authority or to obtain new enforcement authority in order to be delegated enforcement primacy. The Emergency Planning Act and the Medical Waste Tracking Act, however, provide direct federal enforcement authority to the states. Even if states are authorized to use federal enforcement authority directly, states should enact parallel state enforcement authority. There are several reasons for this approach.

First, the state enforcement authority allows access to the more numerous state courts. Second, state enforcement authority can be more closely tailored to the enforcement needs of each state. Third, the adoption of federal enforcement programs as state law helps develop legislative support for the program which, in turn, helps to make available the necessary resources to enforce

the law adequately. Fourth, and perhaps most importantly, independent state enforcement authority may avoid federal "strings" such as those EPA apparently is attempting to attach to the states' exercise of federal enforcement authority under the Medical Waste Tracking Act.¹⁷⁶ For example, independent state authority would avoid the problem of having to pay any assessed civil penalties to the Federal Treasury.¹⁷⁷

B. EPA Should Ensure that a State Has Developed and Has Authority to Implement a Reasonable Enforcement Strategy Before Authorizing a State to Carry Out the Enforcement Responsibility for a Federal Program

Nearly all the major environmental programs require EPA to review the adequacy of state programs before granting enforcement responsibility to the states. The Emergency Planning Act and the Medical Waste Tracking Act do not require EPA approval of state programs, however. While the absence of federal approval requirement removes the burden of this approval process from states, EPA has little stake in a state enforcement program that it has not reviewed and found to be adequate. The result may be that EPA would feel unconstrained in filing an independent enforcement action. To coordinate governmental enforcement resources effectively, it is important that EPA and the states work together to put in place enforcement programs that allocate enforcement responsibilities clearly rather than ones that leave open the possibility of potentially duplicative and disruptive independent enforcement actions.

States wishing to assume enforcement responsibility for a federal program should be required to develop an enforcement strategy for each program for which they seek authorization. The EPA approval process should not involve a microscopic examination of state authority. In particular, it should not require states to adopt enforcement authority and approaches that would mirror how EPA would proceed if it were managing the enforcement effort. Rather, the approval process should focus on whether the

176. See *supra* notes 152-153 and accompanying text.

177. The adoption of state enforcement authority would also avoid the possible constitutional issues raised under the Medical Waste Tracking Act scheme. *Id.*

state has developed a reasonable enforcement strategy for the program based on the types of regulated facilities in the state and the unique mix of statutory and common law enforcement authority available to the state.¹⁷⁸ The strategy should lay out the state and federal enforcement authority that the state will utilize, the personnel and other resources that will be committed to enforcing the program requirements, the general strategy for achieving and maintaining compliance, and the criteria for measuring progress of the enforcement effort in obtaining compliance.

C. Once a State Program Has Been Authorized to Carry Out a Federal Program, Most Enforcement Cases Should Be Handled by the State Without EPA Intervention

Except for cases involving significant interstate impact and cases that have been referred to EPA by the state, a state should handle all enforcement cases without EPA intervention once the state program has been authorized. While the filing of a federal enforcement action in an authorized state may occasionally correct an inadequate enforcement action, the consequences of initiating a federal enforcement action, particularly an overfiling case, do not justify the continued exercise of this authority. Federal intervention introduces uncertainty into state enforcement programs, results in duplicative enforcement efforts, drains the limited enforcement resources available to both the state and federal governments, often disrupts the working relationship between states and EPA, and conflicts with the historical role of states in dealing with local environmental enforcement problems.¹⁷⁹

Further, there are at least two types of safeguards that minimize the impact of limiting EPA enforcement authority in an authorized state. First, most of the environmental statutes authorize citizen suits.¹⁸⁰ These citizen suit provisions increasingly have been used to address cases where governmental enforcement has not proceeded on a timely basis. Second, EPA should retain the ability to withdraw program authorization where there has been a consis-

178. See *supra* note 95.

179. See *supra* note 32 and accompanying text. See also S. NOVIK, THE LAW OF ENVIRONMENTAL PROTECTION § 6.02[3], at 6-19 to -20 (1989).

180. See *supra* note 132.

tent pattern of inadequate enforcement. If EPA periodically exercises the option of withdrawing state authorization when a state has consistently failed to pursue enforcement actions, the number of inadequate state enforcement actions should be minimized.

Finally, given the huge enforcement workload, Congress and EPA must begin to view environmental enforcement as a true partnership effort. While the partnership terminology has long been used by EPA, the actual federal-state relationship has been closer to that of a parent watching over an unreliable child than a relationship of equals. If the federal government is to maintain a credible enforcement program to deal with the hundreds of thousands of regulated entities, it must trust the states to do an adequate job once the states are authorized to carry out a program. There simply are not adequate resources to approach the problem any other way.

D. EPA Should Retain Authority to Bring Enforcement Actions in Cases Involving Significant Interstate Pollution

States are often not in a good position to address enforcement problems involving more than one state for several reasons. The point of emission may be in a jurisdiction entirely separate and possibly remote from the several jurisdictions that are likely to experience the fallout.¹⁸¹ The jurisdiction that suffers the problem has little regulatory control over the emission. Further, the government of the place where an emission originates may have little interest in dealing with the problem.¹⁸² As a result, the federal government is in a better position to deal with enforcement matters that involve multiple states. EPA should therefore retain enforcement authority in cases involving significant interstate pollution impact.

Because many enforcement problems may involve some interstate impact, a set of criteria for determining whether a case has significant interstate importance should be developed by EPA and the states. The criteria should also include a system for a state to provide early notice to EPA about violations that have the potential to cause significant interstate impact. Similarly, EPA

181. See 1 F. GRAD, *supra* note 1, § 1.03, at 1-20.

182. *Id.* § 1.04, at 1-22 to -23.

should be required to notify a state of violations EPA believes have the potential to cause significant interstate impact. Finally, EPA should decide as early as possible in the process whether it wishes to assume full responsibility for an enforcement action to avoid duplicative efforts and to minimize disruptions to the state enforcement program.

E. States Should Be Able to Refer Certain Enforcement Cases to EPA

EPA's enforcement strategy under both RCRA and the Emergency Planning Act specifically provides for referral of cases to EPA.¹⁸³ If their programs have been authorized, states should be able to handle most enforcement cases. However, the availability of a referral process is important for a limited set of cases.

First, there may be some cases that involve complex technical issues that EPA is better equipped to handle. Second, if a case is extraordinarily large, a smaller state may not have the resources necessary to carry out the enforcement action. Finally, in some cases states may be placed in a difficult political position. For example, if a large employer in an economically distressed area of a state has committed serious violations, it may be difficult in some states to proceed vigorously against the company. The ability to refer the matter to EPA could remove the state enforcement officials from this problematic situation.

The conditions under which a referral can be made and will be accepted should be clearly articulated. EPA and the states should jointly develop referral criteria.

F. Systems Used to Account for Progress in Enforcement Should Be Based on State Enforcement Strategies and Should Be Designed to Encourage Innovation By States

A system of accounting for the progress of state enforcement efforts is necessary for several reasons. There is a national interest in the enforcement of all federal environmental programs. Thus,

183. ENFORCEMENT RESPONSE POLICY, *supra* note 92, at 16; CERCLA Enforcement Strategy, *supra* note 142, at 9.

Congress has a right and an obligation to know how enforcement efforts are proceeding under the environmental programs it has enacted. Further, continued federal financial support of state enforcement programs is needed. EPA should be able to assess whether the funds it is providing the states are being well managed. Finally, states themselves should have a system of measuring progress in their enforcement efforts.

Given the vast enforcement responsibilities of the states, the accountability system must encourage states to use all of their available enforcement tools to achieve high compliance rates. Thus, the system should be built from the bottom up, based on the enforcement strategies developed in each state. This approach contrasts with the EPA's current enforcement response policies, particularly in the RCRA program, which tend to dictate enforcement responses from the top down, focussing on the enforcement tools that EPA utilizes.¹⁸⁴

The accountability system could continue to establish a target number of enforcement actions to be initiated each year. However, these targets should be established by each state based on the anticipated mix of enforcement tools that may be used. The state by state numbers could then be aggregated to help measure nationwide progress for Congress. Although target numbers of en-

184. A study conducted by the Environmental Law Institute on RCRA enforcement concluded that:

By focusing on how states address individual cases and by failing instead to examine the panoply of enforcement authorities available to a state agency to compel or leverage compliance settlement in all types of cases, as well as *how* those authorities are used and have been used by the state and how they are *publicized* to regulated industry, EPA has ignored that which may be the most significant aspect of the enforcement program—*i.e.*, the existence of a credible, deterrent enforcement presence. Oversight should not be driven solely by the examination of the program on a case-by-case basis, but by an examination of the strengths and weaknesses of the program as an entity. The question should not be whether the state agency has filed a particular prescribed enforcement action within the scheduled timeframe, but whether the agency is *capable* of swiftly and effectively leveraging compliance and stringent settlement orders or decrees (which include substantial sanctions) as a natural response to the *overall* enforcement presence established by the state.

... [The RCRA oversight policy] instead encourages the initiation of cases that may actually *divert* the agency's resources from pursuing and maintaining an aggressive credible deterrent enforcement presence throughout the state by addressing the most pressing cases with its limited resources.

STATE HAZARDOUS WASTE STUDY, *supra* note 20, at 102-05 (citations omitted).

forcement actions may help measure short-term accomplishments, the primary focus of the accountability system should be on industry compliance.¹⁸⁵ EPA should work with states to help develop meaningful measures of industry compliance that could be incorporated into state accountability systems.

Finally, the accountability system should also be used to help identify and correct weaknesses in state programs. Annual state meetings with EPA should address training, technical assistance, funding and other needs that, if help were provided, could improve the performance of the state enforcement program.

G. EPA Should Maintain a Credible Threat to Withdraw Authority from States Whose Implementation of Federal Programs is Consistently Inadequate

The federal laws discussed in this Article represent a consensus on the need for establishing minimum federal environmental standards. Because of the massive workload, the flexibility of state enforcement programs, and the traditional role of states in enforcing environmental laws, states should ordinarily be authorized to enforce these laws if the state has an adequate enforcement program. However, if a state consistently fails to undertake adequate enforcement actions, the federal government should reassume primary responsibility for enforcement. This authority is understand-

185. A Government Accounting Office report observed that EPA's RCRA enforcement strategy is based on the premise that it is more appropriate to hold enforcement officials accountable for accomplishing activities, such as conducting inspections and taking enforcement actions, than for achieving actual compliance rates. See GOVERNMENT ACCOUNTING OFFICE, *supra* note 165, at 41. The report went on to conclude that:

EPA's goal should be to achieve actual compliance and that compliance should be used to measure the effectiveness of EPA's RCRA enforcement program. Oversight of the inspectors and other accountability measures may be necessary to make sure that enforcement officials discover and address violations, and a goal based on actual compliance may need to be reduced to reflect changing requirements or the technical complexity and difficulty involved. However, actual compliance is an important measure of performance. Otherwise, enforcement officials may have little incentive to take the types of enforcement action necessary to get facilities back into actual compliance and deter future violations.

Id. at 43.

ably difficult to utilize.¹⁸⁶ Establishing a clear set of standards for program withdrawal, in consultation with states, would assist in dealing with the inevitable political battles that would result from withdrawal of federal authorization.

Under the approach suggested in this Article, EPA should be more aggressive in withdrawing approval if there has been a consistent pattern of inadequate enforcement. By retaining and using this authority, EPA would maintain an incentive for states to carry out reasonable enforcement activities and preserve the integrity of the underlying regulatory programs. While program withdrawal would be disruptive to federal-state relationships, it nevertheless provides an incentive for maintaining an adequate state program and avoids the introduction of uncertainties in the enforcement process that are inherent in concurrent jurisdiction situations.

VIII. CONCLUSION

The allocation of enforcement responsibility between the state and federal government has varied dramatically in different statutory programs enacted over the past twenty years. These variations appear to have occurred as a result of short-term environmental and resource problems rather than in response to any set of principles concerning the appropriate role of each level of government. In the past, when the environmental enforcement workload was smaller, a clear allocation of enforcement responsibilities was perhaps less important. Today, faced with the task of assuring that a huge universe of regulated facilities is complying with environmental laws, neither federal nor state officials can afford the confusion, delay, disputes, and duplicative enforcement efforts that result when the roles of various governmental entities are not clearly and consistently laid out. Further, after twenty years, environmental enforcement programs should now be mature enough to be governed by a stable set of principles. Therefore, as Congress enacts or reauthorizes environmental laws in the future, and as EPA develops new environmental enforcement policies, they should do so utilizing allocation principles such as those suggested by this Article. The result will be more effective and more efficient enforcement of our nation's environmental laws.

186. The sanction of program withdrawal has never been exercised by EPA. *See* S. NOVIK, *supra* note 179, § 6.02[3], at 6-19.