

## Reinventing Environmental Regulation Through the Government Performance and Results Act: Are the States Ready for the Devolution?

**Rena I. Steinzor**

*Editors' Summary: In 1993, Congress passed the Government Performance and Results Act (GPRA), which requires federal agencies to prepare strategic plans and performance reports for achieving program goals. In a Dialogue published in the October 1998 issue of ELR — The Environmental Law Reporter, Professor Rena Steinzor and law student William Piermattei of the University of Maryland examined the impact of GPRA on EPA and especially on the Agency's strategic planning and budget process.*

*In the Dialogue being published this month, Professor Steinzor examines GPRA's impact on EPA's relationship with the states. The Dialogue begins by describing the demands that GPRA imposes on EPA. It then examines EPA's relationship with its state counterparts, focusing on the trend toward greater devolution of authority to implement federal programs and exploring the states' ability to meet the demands of this increased responsibility. The Dialogue concludes with an assessment of the tension between devolution and GPRA and warns that the result of this tension could prove destructive in the long run.*

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### [29 ELR 10074]

Environmentalism started as a movement of ... white hats and black hats.... Any change in environmental regulation will be depicted by some as a rollback in requirements. But it will be seen by others as an outbreak of reason and common sense in the regulatory jungle.

— Robert E. Roberts, Executive Director

Environmental Council of the States<sup>1</sup>

This movement is clothed in the very appealing language of innovation and new federalism, but it's really an attempt by industry to get [the U.S. Environmental Protection Agency] off its back.

— Todd E. Robins, Attorney

U.S. Public Interest Research Group<sup>2</sup>

I feel this Administration has led the way in encouraging flexibility for the states. But I draw the line at flexibility designed to undermine or weaken environmental health or protections.

— Carol Browner, Administrator

U.S. Environmental Protection Agency<sup>3</sup>

The U.S. Constitution's delicate balance of power between the federal government and the states ranks with popular elections and the three branches of government in making America the most successful democracy in the world. Those gifted political scientists, the

Framers, foresaw — and this 200-year-old insight is remarkable in its own right — that a modern nation state would endure only if a strong central government negotiated constantly to divide authority with levels of government closer to the people.

Like most grand theories, federalism has suffered both heydays and setbacks, and we are now in a period of sustained backlash against Big (translate as national) Government. Health and safety regulation is a major subject of demands that power devolve to lower levels of government, and the U.S. Environmental Protection Agency (EPA) is among the most visible targets for the revolt organized by [29 ELR 10075] militant states.<sup>4</sup> Ironically, as it is denounced for arrogant misuse of its authority, the Agency is also the victim of what one of its former Administrators describes as "battered agency syndrome."<sup>5</sup> Under assault by Congress and industry for poor performance and negligible results, EPA is fighting a losing battle to placate its junior regulatory partners without losing its grip on its mission as a whole.

EPA's battle with the states is joined most destructively in its halting efforts to implement the Government Performance and Results Act (GPRA, pronounced "gipra").<sup>6</sup> GPRA demands that EPA (and every other federal agency) stop counting bureaucratic "beans" and deliver verifiable results. Because it is an overwhelming job to define and measure, much less assess, the true state of the environment, EPA must depend on its state counterparts to help justify its existence at the same time that it has diminishing leverage over the devolutionists among them.

Of course, bureaucratic strife is nothing new, and these ongoing struggles may strike some as relatively uninteresting from a national policy perspective. But EPA's weakness as an institution presents us with the far more serious threat that the balance of federalism could be fatally undermined. This result will damage all of EPA's constituencies by making environmental protection erratic and irrational.

This Dialogue is the second in a two-part series on the implications of GPRA. The first part, appearing in the October 1998 issue of the *Environmental Law Reporter*, explored GPRA's effect on EPA's budget and strategic planning process, documenting that the Agency's actual spending power has risen no more than 15 percent since 1980 and arguing that it cannot be expected to implement the exponential increase in statutory mandates that were enacted during this period and also undertake the costly monitoring required by GPRA.<sup>7</sup> This Dialogue will consider the synergy between this drastic underfunding, EPA's struggle to implement GPRA, and its deteriorating relationship with the states.

The Dialogue concludes that there is a profound tension between GPRA's requirements and the devolution demanded by GPRA's most ardent supporters: conservative critics of so-called command-and-control regulation. Some states may be ready to shoulder the burden of devolution but most will stagger under the weight. As state implementation falters, EPA will often be powerless to intervene. Unless something gives somewhere soon, EPA could implement GPRA in ways that mask its own profound failures as a regulatory institution.

The Dialogue begins with a description of the demands GPRA makes on EPA and the states. It then examines the relationship between EPA and its state counterparts, putting the tension between them in a historical context and describing the National Environmental Performance Partnership System (NEPPS), a relatively recent invention of the Clinton Administration that is designed to grant the states flexibility and reduce federal oversight.<sup>8</sup> The Dialogue next explores some disturbing indications that state capacity to assume increased responsibility is far weaker than state regulators assert. It concludes by assessing the implications of the tension between GPRA's demand for uniform national measures of performance and the devolution of authority to the states.

While this Dialogue suggests that state capacity to shoulder the burdens of devolution is far less robust than state regulators suggest, proving (or disproving) that controversial assertion is beyond the scope of this discussion. Hopefully, policy analysts will tackle that crucial task soon, with the preliminary information offered here spurring an interest in that inquiry. The Dialogue also does not explore the ongoing dispute between federal and state regulators over the "reinvention" of federal regulation, another major source of tension that deserves additional analysis.<sup>9</sup>

## What GPRA Demands

GPRA's purpose is couched in unassailable, if politically expedient rhetoric: "[W]aste and inefficiency in Federal programs undermine the confidence of the American people in the Government and reduces [sic] the Federal Government's ability to address adequately vital public needs .... [The purpose of this Act] is to improve [that] confidence ... by systematically holding Federal agencies accountable for achieving program results."<sup>10</sup>

The statute orders all agencies to submit strategic plans covering a period of "not less" than five years to Congress and the director of

the Office of Management and Budget (OMB) no later than September 1997.<sup>11</sup> Those plans must contain a "comprehensive mission statement," as well as general "goals and objectives."<sup>12</sup> Agencies must explain how they intend to achieve their goals and then describe the "human, capital, information, and other resources" they will need to do so.<sup>13</sup> They must also identify the "key factors external [29 ELR 10076] to the agency and beyond its control" that could affect achievement of their "general" goals and objectives.<sup>14</sup>

Strategic plans must be supplemented by "performance plans," covering each "program activity" set forth in the agency's budget.<sup>15</sup> Performance plans must establish goals in an "objective, *quantifiable*, and measurable form."<sup>16</sup> They must identify the "indicators" agencies will use to assess "outputs, service levels, and outcomes," and the "means" they will use to "verify and validate measured values."<sup>17</sup> Agencies may ask OMB for waivers of the requirement that they quantify goals, but they must justify why they feel an exception is necessary.<sup>18</sup>

Finally, GPRA requires that beginning in March 2000, agencies produce annual "program performance reports," comparing their performance indicators with their "actual program performance."<sup>19</sup> If they fail to achieve their goals, they must explain why and state what they intend to do about it.

The Clinton Administration has enthusiastically embraced GPRA, which it views as consistent with its own brand of government reform, the National Performance Review.<sup>20</sup> This endorsement puts EPA Administrator Carol M. Browner in a difficult position. As an honorary member of the Clinton cabinet and a team player, she cannot ignore GPRA, nor can she blame budget constraints for her Agency's shortcomings when implementing its requirements. However, EPA's resources are clearly insufficient to tackle the web of detailed statutory mandates that are the legacy of the Reagan Administration's epic battles with a Democratically controlled Congress, and Browner dare not return to a conservative, Republican-controlled Congress to achieve statutory reform. These constraints leave EPA's senior leadership to make the best of a bad situation, walking a fine line between vague promises and commitments to achieve tangible results.

Thus, it is not surprising that EPA's *Strategic Plan* is a cheerful, energetic document, promising "every American" clean water, clean air, clean food, and a healthy life.<sup>21</sup> The most revealing feature of the plan is its definition of the "specific measurable outcomes" EPA will achieve over the "next few years," pledging that those outcomes will (1) reduce risk to human health and the environment, (2) achieve statutory mandates, and (3) improve the quality and quantity of services delivered.<sup>22</sup>

The explicit assumption that the achievement of statutory mandates is a goal separate and distinct from reducing risk — or, put another way, that the achievement of mandates does not necessarily reduce risk — is troubling because it suggests that EPA may be willing to assign statutory mandates a lower priority than reductions of "risk" it defines administratively, a dangerous precedent no matter what the character of Congress at the moment. As discussed below, this concept is reiterated in the context of EPA's relationship with the states.

Applying these three criteria, the *Strategic Plan* articulates a series of goals and objectives that run the gamut from virtually meaningless general statements to carefully worded promises that specific numbers will be met. Thus, the Agency promises that by 2010, it will "improve air quality" and make "the air safer to breathe" for Americans who live in areas that do not comply with the national ambient air quality standard (NAAQS) for ozone, but pledges that all areas will come into attainment with the standard no later than 2012.<sup>23</sup> By 2005, EPA hopes to "reduce" exposure to contamination in waters used for recreation,<sup>24</sup> but promises that in the same year, 95 percent of people served by community systems will receive drinking water that meets "existing health-based standards."<sup>25</sup> Under a picture of an adorable child eating a cluster of luscious grapes, EPA promises to "reduce by 50 percent" the "risk" posed by agricultural use of pesticides,<sup>26</sup> but explains that risk in this context will be determined by tracking a small number of pesticides as "surrogates" for the large number of products that are not monitored because "the challenge of direct measurement of pesticide risk has not yet been met."<sup>27</sup> The first *Annual Plan* issued under GPRA does not depart significantly from these initial goals and objectives, but rather concentrates on translating such commitments into budgetary terms, specifying the work years and dollars EPA will need to achieve them.<sup>28</sup>

The first Dialogue in this two-part series argued that EPA's goals under GPRA are unlikely to become more specific unless the Agency *and the states* commit significant resources to the rulemaking *and monitoring* that are necessary to define, much less *measure*, progress. That Dialogue speculated that EPA may try to meet GPRA's requirements by cooking the numbers to demonstrate progress, confusing its outside constituencies, its congressional overseers, and, ultimately, the public about the true state of the environment.

Given the federalist framework of the American system of environmental regulation, an exclusive focus on EPA's choices tells only half the story. To evaluate the conclusion that implementation of GPRA could prove destructive over the long run, one must also consider the status of the working relationship between EPA and the states. In the bestcase scenario, the states would help EPA develop

national indicators and would agree that achievement of those goals was of overriding importance. In the worst-case scenario, the states would resist federal efforts to develop uniform goals and would refuse to devote their own resources to achievement, much less verification, of such results. At the moment, the worst-case scenario seems far more likely to occur.

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## A New "Partnership" and an Old Paradox

### *EPA's History With the States*

EPA's relationship with the states is confounded by the organizing principle of federal environmental laws: policy is developed at the national level, while programs are implemented by the states.<sup>29</sup> In other words, the bureaucrats that conceive of a program, nursing it through the legislative and rulemaking processes, must send their regulatory children to foster care, keeping track of their progress at a distance with little real control over crucial decisions made in the field. Conversely, state regulators are handed regulations at an advanced stage of development and can only influence their nature and scope by refusing to enforce them. With EPA evaluating their mistakes from a distance, state regulators cannot help but resent a role that is as demanding as it is inferior. A productive and efficient relationship requires a high level of diplomacy on both sides.

Throughout the 1980s, an epic conflict between the Reagan Administration and environmental activists in Congress dominated EPA and the states, with most state regulators content to play a subordinate role as their federal counterparts struggled to survive in the no-man's-land between the two clashing titans. Perhaps the single most telling indication of this subordinate role was the fragmented presence of state environmental regulators in Washington. As Congress rewrote every major environmental statute, specialized trade associations like the Association of State and Territorial Solid Waste Management Officials and the State and Territorial Air Pollution Program Administrators provided technical advice on the fine points of legislation, but left attempts to influence debates over larger policy questions to the National Governors' Association.<sup>30</sup> Of course, the fine points of legislation are often extremely important, and state regulators had significant influence on the details of how programs were structured. But participation as a technocrat is a far cry from a full seat at the table when the overriding principles of legislation are negotiated.

By the early 1990s, this dynamic began to change. For one thing, the implications of congressional reaction to Reagan environmental policies — the dramatic expansion of statutory mandates imposed on EPA and the states — became clear at every level of government. EPA either churned out regulations at a rate never seen before or landed in court if it failed to act. The inevitable industry backlash against the rigors of the new laws took hold, prompting a spate of attacks on the regulatory system.<sup>31</sup>

The 1992 and 1994 elections solidified those new dynamics, installing conservative Republicans as leaders in control of both houses of Congress and many key statehouses, and reemphasizing the importance of devolving authority to the states.<sup>32</sup> The potential rewards of devolution were not lost on Republican administrators appointed to head environmental agencies in such states as California, Colorado, Illinois, Massachusetts, Michigan, and Wisconsin.

In 1993, state administrators took the important step of founding their own trade association — the Environmental Council of the States (ECOS) — and the organization soon became a major player in environmental policymaking at the national level.<sup>33</sup> No longer content to provide technical support behind-the-scenes, ECOS convened a series of committees, task forces, and other groups to negotiate a fundamental realignment of power with EPA. The May 1995 agreement establishing NEPPS is the central product of this collaboration.<sup>34</sup>

### *Devolution Under the National Environmental Performance Partnership System*

The 1995 NEPPS *Joint Statement* embraces two farreaching devolutionary themes: (1) the states should have far more discretionary authority — or "flexibility" — to implement federal environmental laws, and (2) EPA should lighten the burden of oversight for states willing to assume this additional responsibility.<sup>35</sup> The more detailed, unsigned nine-page explanation attached to the 1995 *Joint Statement* continues this emphasis on devolutionary principles, acknowledging EPA's role in forging national policy only in passing.<sup>36</sup> It reiterates the importance of giving the states the flexibility to allocate resources to the "highest priority problems across all media," acting as the "primary front-line delivery agent, managing their own programs, adapting to local conditions, and testing new approaches for delivering more environmental protection for less."<sup>37</sup> NEPPS foresees the creation of an elite group of state agencies that would receive significantly diminished federal oversight, "freeing up federal resources to address problems where state programs need assistance."<sup>38</sup> The federal bailiwick would include "ensuring good science and strong national health and environmental standards,"

analysis of "environmental and compliance trends," technical assistance, and jurisdiction [29 ELR 10078] over problems caused by so-called transboundary pollution.<sup>39</sup> EPA would serve as a "backstop," ensuring that the states provide "fundamental" environmental protection.<sup>40</sup>

The 1995 agreement commits EPA to an ongoing process of "joint workgroups" to "fully develop components" of the new system.<sup>41</sup> EPA has given more than paper allegiance to this process: it now provides most of the funding that supports ECOS,<sup>42</sup> which plays the dual role of collaborator and antagonist in the heated efforts to make these ideas operational.<sup>43</sup>

By April 7, 1997, a scant two years following the issuance of the *Joint Statement*, 27 states had signed Performance Partnership Agreements (PPAs) with EPA regional offices.<sup>44</sup> EPA also developed new "interim guidance" offering states the opportunity to apply for Performance Partnership Grants (PPGs) whether or not they had negotiated PPAs with the Agency.<sup>45</sup> Some 37 states signed PPGs for fiscal year 1997.<sup>46</sup>

PPGs allow states to receive federal assistance for up to 16 federal grant programs as a lump sum, with discretion to spend the money far more freely to accomplish their program commitments.<sup>47</sup> Consistent with the rationale of NEPPS as a whole, EPA defines the purpose of PPGs as affording states the "flexibility to address their highest environmental priorities across all media and establish resource allocations based on those priorities, while continuing to address core program commitments."<sup>48</sup> If this rhetoric is to be believed, NEPPS represents a fundamental change in the Agency's posture toward the states, leaving the states significantly expanded discretion to decide which federal regulatory programs they will fully implement.<sup>49</sup>

Unfortunately, the 1995 *Joint Statement* does not acknowledge, much less analyze, the far-reaching implications of EPA's attempts to reform its relationship with the states. The importance of this omission is underscored by the *Joint Statement's* contradictory endorsements of state autonomy and GPRA's directive that EPA develop "performance measures" to enhance its "accountability to the public."<sup>50</sup> The *Joint Statement* commits the Agency and its state partners to the development of "goals" and "indicators" that would evaluate the state of the environment, eventually replacing the more traditional "bean-counting" system that quantifies bureaucratic output.<sup>51</sup> If implemented faithfully, this nationally uniform system for determining success or failure has the potential to restrict state discretion as effectively as detailed, prescriptive federal environmental statutes.

Despite their tacit acceptance of this dichotomy when they signed the *Joint Statement*, the states have become increasingly resistant to EPA's efforts to develop nationally uniform measures of performance. In characteristically blunt language, the states have alleged that GPRA is a vehicle for mid-level EPA career staff to reassert the control over state programs that EPA lost under NEPPS.<sup>52</sup> In late October 1998, ECOS pulled out of the negotiations to develop "core measures," contending that state programs are too diverse to be reduced to a single set of measures.<sup>53</sup> By the end of November 1998, shortly before this Dialogue went to press, the states were reportedly "gearing up" to pressure EPA to modify its own unilateral policy on such "core performance measures."<sup>54</sup> The controversy does not bode well for EPA's successful implementation of GPRA, and developments in the field suggest that the situation is unlikely to improve any time soon.

Early analysis indicates that aggressive states have won significant concessions from their federal supervisors and that devolution has eclipsed the search for national uniformity. In 1996, the Environmental Law Institute (ELI) issued an independent review of five PPAs, covering Colorado, Delaware, Illinois, New Jersey, and Utah.<sup>55</sup> The report's disconcerting conclusion is that the five documents vary widely in structure, format, content, and coverage, raising the question "whether there will be any national or regional consistency among agreements."<sup>56</sup> Further, "none of the five agreements covers all of the priorities identified by the national program managers for those programs included within [their] scope."<sup>57</sup>

Instead, ELI reports, NEPPS agreements are written "from the state's perspective,"<sup>58</sup> incorporating goals such as "employee and customer satisfaction" that are irrelevant to [29 ELR 10079] the missions of the national programs the states are deputized to accomplish.<sup>59</sup> If states are allowed to substitute such tangential criteria in place of more rigorous performance goals, PPAs could prove counterproductive to GPRA's mandate that EPA and the states be held accountable for actual results. ELI further found that the development of PPAs in four of the five states occurred with "little actual public involvement, despite the fact that public outreach and involvement was one of the principal components of NEPPS."<sup>60</sup> The unappealing image suggested by this finding — that EPA regional office staff succumbed to militant state demands for autonomy behind closed doors — bodes ill for EPA's long-term success as an institution, much less its ability to justify its existence under GPRA.

But what is the real-world significance of these bureaucratic struggles? Why should we care whether GPRA performance indicators are thorough, meaningful, and accurate? After all, the states have long been recognized as so-called laboratories for democracy. If they are getting the job done, what difference does it make if the quality of a set of national statistics is undermined? To borrow the language of

reinvention, the answers to these questions depend on developing reliable measures of actual state capacity.

## The Myth and Reality of State Capacity

### *The States' View*

State regulators' confidence in their own capacity and resentment of EPA interference have a grand but defiant flavor. "Maybe 20 or even 10 years ago, agencies like ours could not have run all these programs capably. Today they can. Today we have the resources, the sophistication, the expertise, the commitment to run every environmental program in the nation," contends Barry McBee, chairman of the Texas Natural Resource Conservation Commission.<sup>61</sup> David Struhs, his counterpart in Massachusetts, indicts the system as a whole for wasting precious resources:

This command-and-control approach of "engineering the permit" was developed by EPA over 25 years ago and is today staunchly defended although it is highly outdated. While the conventional approach certainly has moved us toward clean air and water, it frustrates businesses that might otherwise want to do more than simply meet the standards [and] it sometimes stands in the way of [my state's] fair and even enforcement of the rules, and costs everyone — industry and the taxpayer — too much time and money.<sup>62</sup>

Michigan's Russell Harding is even more blunt: "I am concerned that EPA may not be capable of making the needed fundamental shift in how this country approaches environmental regulation."<sup>63</sup> And, at the peak of their frustration with EPA for rejecting a proposed agreement allowing them to waive federal regulatory requirements, a group of state officials organized by ECOS bitterly chided EPA's top leadership: "You appear to be focused on creating greater barriers to true innovation.... States are not branch offices of the Federal Government."<sup>64</sup>

The intensity of such statements indicates the startling deterioration that has occurred in EPA's relationship with the states since the 1980s. This shift does not stop at heated rhetoric; ECOS committees and task forces systematically pursue the most contentious issues of the day, putting EPA staff on the defensive as they wrestle for control over the implementation of regulatory programs.<sup>65</sup> Because EPA's own funding shortfalls make it difficult for the Agency to threaten to withdraw state delegations with any credibility, federal regulators remain on the defensive, caught between a Congress demanding proof of its accomplishments and states demanding to be left alone. If the results GPRRA seeks to measure occur in any event, this dilemma has little realworld significance. But if devolution proves substantially worse in practice than a system of federal dominance, and performance indicators are unreliable, we could lose substantial ground before the public or Congress realizes what is happening.

### *Indicators of State Performance*

Admittedly, EPA's track record is checkered at best, and any evaluation of state capacity must begin with a realistically low benchmark for determining whether devolution would accomplish more or less environmental protection than the status quo. The diversity of the 50 states makes this evaluation extremely difficult and, without an investment of considerable resources, definitive conclusions are difficult to draw. However, there is telling evidence that even the most robust and aggressive states have severe problems in their own backyards. Two of the most useful performance indicators for the states are the level of their financial resources and their track record on enforcement. Again, this information is preliminary and is presented both to spark further inquiry and to suggest that until we have a firmer grasp of the states' true capacity, devolution should proceed both slowly and cautiously.

### *Financial Resources*

The first Dialogue in this two-part series concluded that there is a debilitating gap between EPA's budget and the resources that are necessary to meet its statutory mandates. This gap undermines state regulators at least equally. Although the states do not share the same burden of writing regulations under orders from Congress, they must implement and enforce the thousands of requirements that EPA writes, a more expensive and in many ways more difficult job.

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Quantitative comparisons of the resources the states have available are difficult to compile. The best source of data is the *Resource Guide to State Environmental Management* published periodically by the Council of State Governments.<sup>66</sup> Unfortunately, the fourth edition of this *Guide*, the most recent available, is based on state spending for fiscal year 1994.<sup>67</sup> Even though the information is

somewhat outdated, when combined with data regarding EPA's fiscal year 1998 grants to the states, the data reveal inexplicable disparities in state spending and federal aid, as well as the wide fluctuations in such funding from one fiscal year to another.

To simplify the analysis, the figures presented below cover only 10 states, chosen to reflect diversity in region, size, population, economics, and reputation for good — or bad — performance.<sup>68</sup> Because total spending on environmental programs is misleading unless it is read in the context of a state's area, population, and degree of industrialization, Table 1 uses three figures to characterize the relative levels of resources expended by the 10 states: (1) total state spending; (2) spending per capita; and (3) spending per pound of toxic releases, an admittedly rough surrogate for severity of environmental problems.

**Table 1: State Spending**

	Total Spending	\$\$/capita	\$\$/lb. Toxic Releases
California	\$ 2,103	\$ 66.93	\$ 6.37
Colorado	\$ 271	\$ 74.15	\$ 11.25
Massachusetts	\$ 194	\$ 32.23	\$ 3.66
Michigan	\$ 197	\$ 20.82	\$ 0.52
Minnesota	\$ 234	\$ 51.43	\$ 4.16
Mississippi	\$ 112	\$ 42.08	\$ 0.29
New Jersey	\$ 346	\$ 43.82	\$ 1.73
New York	\$ 516	\$ 28.45	\$ 3.31
Oregon	\$ 192	\$ 62.29	\$ 4.44
Texas	\$ 700	\$ 38.11	\$ 0.91

All figures are presented in millions.

**Source:** RESOURCE GUIDE, *supra* note 66, at 108, 111-120. All figures are based on fiscal year 1994 spending. Expenditures include the total spent in the following categories: air quality, drinking water, forestry, fish and wildlife, geological survey, hazardous waste, land management, marine and coastal programs, nuclear waste, pesticide control, soil conservation, mining reclamation, solid waste, water quality, and water resources.

What is most striking about these figures is the wide range of spending within the second and third categories, including a low of \$ 20.82 per capita in Michigan and a high of \$ 74.15 per capita in Colorado, as well as a low of \$ 0.29 per pound of toxic releases in Mississippi and a high of \$ 11.25 per pound, again in Colorado. Unless one is willing to assume that the lowest expenditures produce adequate environmental performance, with all the others representing state efforts to gild the proverbial lily, these data demonstrate that some states are committing severely inadequate resources to environmental protection.

Of course, federal aid is a critical element of state efforts to control pollution. EPA gives the states grants to operate delegated regulatory programs and grants to make investments in such infrastructure as sewage treatment and drinking water purification. To give some sense of the trends in this area, the following figures reflect federal aid to the 10 states for fiscal years 1994 and 1998, as well as the percentage increases in state spending between 1986 and 1994. Again, these figures are presented to indicate trends and disparities between states, rather than for the absolute accuracy of their specific dollar amounts.

Fiscal year 1994 figures are derived from the Council of State Governments *Resource Guide*, which describes them as fiscal year 1994 federal aid for "abatement and control" that does not include grants for "research and development."<sup>69</sup> These data do *not* include aid that states receive from the State Revolving Fund, which was established in 1996 to support better efforts to purify drinking water.<sup>70</sup> Fiscal year 1998 figures were compiled from EPA's Envirofacts Internet site, and include expenditures described as "non-construction grants."<sup>71</sup> These figures include State Revolving Fund money for drinking water. To allow more direct comparison, the table includes a second set of figures that are the amount the states received *minus* drinking water grants; those amounts are enclosed by parentheses in the "Federal Aid 1998" column.

**Table 2: Trends in Federal Aid and State Spending**

Federal Aid	Federal Aid	% increase state
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	1994 *	1998 **	\$\$ 1986-94 ***
California	\$ 52	\$ 206.7(\$ 91.1)	75%
Colorado	\$ 12	\$ 52.4(\$ 39.5)	322%
Massachusetts	\$ 22	\$ 72.4(\$ 17.5)	59%
Michigan	\$ 25	\$ 158.5(\$ 89.0)	14%
Minnesota	\$ 14	\$ 93.7(\$ 64.0)	220%
Mississippi	\$ 6	\$ 14.0(\$ 14.0)	83%
New Jersey	\$ 12	\$ 126.5(\$ 55.0)	73%
New York	\$ 29	\$ 201.4(\$ 118.9)	127%
Oregon	\$ 9	\$ 45.8(\$ 27.5)	49%
Texas	\$ 30	\$ 81.4(\$ 7.5)	594%

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All figures are presented in millions.

**Source:**

\* RESOURCE GUIDE, *supra* note 66, at 121.

\*\* The figures in this column were obtained from EPA's *Envirofacts Warehouse: Grants Information*. See *Envirofacts*, *supra* note 71. The first figure is the total amount of the grants the state received in fiscal year 1998. The second figure — in parentheses — is the total amount of grants minus amounts dedicated exclusively to State Revolving Funds for drinking water.

\*\*\* The percentage increases were calculated on the basis of data set forth in the RESOURCE GUIDE, *supra* note 66, at 111-20.

Once again, what is striking about these figures is the wide range among the three categories of figures. For example, Texas moves from a position as one of the top recipients in 1994 (\$ 30 million) to among the bottom tier of recipients in 1998 (\$ 7.5 million for all programs except drinking water infrastructure), while aid to Michigan followed the exact opposite trend (from \$ 25 million in 1994 to \$ 89 million for programs other than drinking water in 1998). It is possible that for one reason or another, these two years of data are anomalous and do not accurately reflect funding trends in the 10 states. The point remains, however, that there does not appear to be any transparent, readily understandable rationale for how such decisions get made.

Combining all of these indicators, using the rank order of the 10 states, the data indicate that there is little relationship between a state's spending on a per capita basis; its spending in relationship to the toxic releases it experiences; the effort the state has made to improve its own performance, as reflected in the percentage by which the state increased its own spending between 1986 and 1994; and the amount of federal aid it receives.

**Table 3: Rank Order of State Resource Commitment and Federal Aid**

	\$\$ per capita released	\$\$ per toxic lb. released	% increase in spending	Federal aid FY 1994	Federal aid FY 1998 **
California	2	2	6	1	2
Colorado	1	1	2	7 *	6
Massachusetts	8	5	8	5	8
Michigan	10	9	10	4	3
Minnesota	4	4	3	6	4
Mississippi	6	10	5	10	9
New Jersey	5	7	7	8 *	5
New York	9	6	4	3	1

Oregon	3	3	9	9	7
Texas	7	8	1	2	10

Some of these figures can be explained in isolation. For example, EPA undoubtedly gives more money to California and Texas than it gives to Mississippi and Oregon based on their relative sizes and population. But this hypothesis does not explain why Texas went from second to tenth as a recipient of aid between 1994 and 1998. Similarly, there is a remarkably close relationship between the states' rankings in money spent per capita and money spent per pound of toxic releases, except in Massachusetts, Mississippi, and New York, for reasons that probably defy a rational, policy-based explanation. Cumulatively, there are enough counterintuitive discrepancies to suggest that the process of assessing state performance and determining levels of federal aid is more arbitrary than is acceptable if the ultimate goal is to ensure that federally delegated programs deliver uniform levels of protection.

### *Enforcement*

Of all the quarrels that plague EPA's relationship with the states, none is more intense than their increasingly public disagreements over enforcement policy. It is difficult to remember a time in EPA's 35-year history that these uneasy partners have disagreed so publicly not only on the merits of federal accusations that the states are slacking off but on the basic *purpose* of enforcement actions. The states routinely invoke the need to shift from "bean counting" to "results" as the justification for their apparently<sup>72</sup> conscious deemphasis of enforcement, while federal officials reply that the states' poor performance makes a mockery of the three crucial principles of enforcement: punishment, deterrence, and equity.

All of these tensions were on display at a Senate hearing on enforcement held in June 1997.<sup>73</sup> For openers, consider the stark contrast between the following statements:

If I were to tell you that the number of detentions and expulsions in our nation's high schools had doubled last year, would you then conclude that our nation's students were better educated than before? No state would deny that enforcement is an important and necessary tool. But I can also make the case that ... an increase in enforcement actions would mean a terrible breakdown in communications between government and the regulated communities ....<sup>74</sup>

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One generally accepted enforcement approach is that of escalating enforcement actions for repeat violations.... We found numerous instances where this progressive enforcement approach was not employed.... The second [principle] is that penalties should be large enough to negate any economic benefits of noncompliance. EPA regions ... generally included an economic benefit component in their penalty assessment. But states generally did not.... A third enforcement approach is that in order to be fair, penalties must be consistent.... We found great variance when we compared EPA and state penalties and when we compared penalties between states.<sup>75</sup>

State regulators contend that EPA's heavy-handed approach to "enforcement for enforcement's sake" abuses their prerogatives and is ineffective because it does not achieve better "communications" with the regulated community.<sup>76</sup> They argue that when EPA delegates a program, it should be concerned about "overall effectiveness," which does not depend on the number of enforcement actions, but rather on the level of compliance achieved throughout industry.<sup>77</sup> They assert that informal counseling is often a better way to achieve compliance than a lawsuit, and offer statistics about the high levels of compliance in their states.<sup>78</sup>

The findings of federal investigators who have audited state enforcement programs contradict all of these arguments. Both the U.S. General Accounting Office (GAO) and the EPA Inspector General (IG) have criticized the states for lax enforcement in recent years, drawing an embarrassing picture of incompetence and even willful neglect of state responsibilities in this crucial area.<sup>79</sup>

Issued a month before the 1995 NEPPS *Joint Statement*, the GAO report on the status of EPA's relationship with the states concludes that the states have failed to meet many "high-priority program requirements," including the "performance of key functions such as monitoring environmental quality, setting standards, issuing permits, and enforcing compliance."<sup>80</sup> Further, "[s]tates have become increasingly reluctant to accept new requirements, and EPA seems unable to step in when states falter."<sup>81</sup>

In perhaps its most disconcerting finding, the report explains that significant backlogs of expired Clean Water Act permits have developed in some states, offering as an example the startling statistic that 65 percent of *major* facilities in Michigan were operating with *expired* Clean Water Act permits, while 150 new facilities were awaiting permits for the first time.<sup>82</sup> A series of EPA IG reports conducted in 1996-1997 made similar findings, documenting a pattern of lengthy delays in renewing expired permits and neglect of

basic enforcement activities.<sup>83</sup>

Ordinarily, the GAO is careful to point out, state deficiencies could be addressed by EPA withdrawal of delegated authority to implement national programs.<sup>84</sup> However, in recent years, the Agency has proved chronically unable to deliver on that threat. Thus, EPA has "taken the highly unusual step of initiating proceedings to withdraw primacy from programs in eight states — Alaska, California, Colorado, Hawaii, Kansas, Maine, South Dakota, and Washington" — but has not carried through on those threats.<sup>85</sup> It is no small irony that several of the states unable to make the grade in this fundamental regulatory program are among the most active leaders of ECOS and its campaign to devolve more authority to the states.<sup>86</sup>

The GAO and IG findings suggest that if EPA adopted a comprehensive and accurate set of performance indicators for measuring environmental quality, it would expose itself and the states to sharp criticism for failing to meet the new benchmarks. In this context, the states' resistance to the development of such measures cannot help but appear defensive, even evasive.

Some state regulators might counter that the confused web of federal regulations constitutes such overkill that their performance should not be assessed until the system is rationalized by allowing them to develop priorities that meet the true needs of their citizens. But federal investigators are not criticizing the states for failing to accomplish each and every one of the admittedly long list of federal statutory and regulatory mandates. Rather, the GAO and the EPA IG found serious deficiencies in programs that are the foundation of current law. If the states cannot keep the majority of national pollutant discharge elimination system permits current at major facilities, and EPA has lost the strength to withdraw programs for this fundamental kind of neglect, giving the states discretion to prioritize may [29 ELR 10083] constitute nothing less than explicit EPA approval of the status quo.

Once again, the statistics reported in the GAO and EPA IG reports may be the tip of the iceberg, or they may reflect anomalies that merely signify a few bad apples in an otherwise sound barrel. To know for sure requires a more extensive investigation of state capacity, one that EPA is unlikely to undertake any time soon.

### The Implications of GPRA Versus the Devolution

Good government statutes come and go, rarely accomplishing the grand vision of their supporters. EPA's sparring with the states comes and goes and is the immutable product of the contradictions in their relationship. Through it all, the regulators soldier on, maintaining the most effective level of environmental protection in the world. As the saying goes, we never promised ourselves a rose garden. As long as the job is getting done, albeit far better in some places than in others, do we have any choice but to tolerate inefficiency? More to the point, is the GPRA-motivated shift to performance-based measures even relevant to the trend toward devolution EPA has endorsed for the moment?

There are four reasons that the synergy between GPRA's demands and EPA's efforts to placate state devolutionists could prove unacceptably destructive over the long run. First, EPA has yet to acknowledge that there is any tension between the two policies and instead has chosen to pretend that it can satisfy both imperatives with existing resources. EPA cannot write national PPAs fast enough.<sup>87</sup> At the same time, it has embraced the change to performance-based criteria with an enthusiasm that may well eclipse more traditional methods of justifying its existence. This enthusiasm has masked the reality that implementing reliable performance measures is going to be a very difficult job, especially in an atmosphere where the states feel free to boycott such efforts. To accurately evaluate progress toward improving the quality of the environment, we must first establish a baseline of where it stands now. The resources it will take to characterize even such obvious conditions as the pollution status of the nation's navigable waterways are very large. Without the active cooperation of the states, it is doubtful the job will get done.

Consider, for example, the touchy but important subject of the states' failure to survey the quality of surface waters in their jurisdictions, now the target of lawsuits challenging their consequent failure to promulgate total maximum daily load standards under the Clean Water Act.<sup>88</sup> According to EPA's *National Water Quality Inventory: 1996 Report to Congress*,<sup>89</sup> our 10 "indicator" states have many miles to go before they will complete their surveys, much less develop an effective program for cleaning up the most polluted river segments.

**Table 4: Status of River Mile Surveys Under the Clean Water Act**

STATE	Total River &Stream Miles Surveyed	Miles
California	211,513	15,110

Colorado	105,581	35,112
Massachusetts	8,229	1,307
Michigan	51,438	20,575
Minnesota	91,944	7,793
Mississippi	84,003	39,191
New Jersey	6,450	3,815
New York	52,337	52,337
Oregon	114,823	— *
Texas	191,228	14,177

**Source:** 1996 WATER QUALITY INVENTORY, *supra* note 89, app. A, tbl. A-1.

\* Oregon did not report survey results in 1996 because some states skip two-year reporting cycles. For the two-year cycle ending in 1994, Oregon surveyed 29,109 of its 114,823 river miles.<sup>90</sup>

The second, related danger is more subtle than the dearth of reliable information. As Professor Lisa Heinzerling recently explained in an insightful piece on the power of unsubstantiated statistics to confuse the debate over regulatory benefits and costs, translating the condition of the environment into numbers without carefully qualifying the limitations of such "empirical" evidence leads to bad decisionmaking.<sup>91</sup> EPA could well be driven to claim progress on the basis of fatally flawed, but nevertheless improving, core performance measures. These claims could take on a life of their own, lulling us into a false sense of security about the real state of the environment.

The third danger is that EPA's efforts to placate the states by granting them autonomy to run regulatory programs will not only confound the data, but will weaken EPA's authority to demand changes if the indicators demonstrate poor performance. Put another way, GPRA indicators are not a goal unto themselves. Rather, GPRA intends to hold agencies accountable by compelling them to respond to poor performance in an effective manner. If EPA allows state flexibility to reach the point where the states are free to ignore important federal regulatory requirements, it can only be a matter of time before the regulated community gets the same message. Retrieving an acceptable level of compliance at that point may take many years, even if the data motivate EPA to react to the problem.

Lastly, this method of law reform has some troubling implications for federalism and even American democratic government. From a purely pragmatic perspective, we might well conclude that there is enough "dead wood" within federal regulatory programs to permit the states to [29 ELR 10084] write off requirements without much effect on environmental quality. The problem with this rationale is that EPA's explicit acceptance of state write-offs, an acceptance that is motivated by GPRA's pressure to look good as well as the demands of the devolutionists, could well create a black market in law reform. Rather than go to Congress to request the elimination of some mandates and the streamlining of others, EPA and the states will amend the laws by administrative fiat. The fact that EPA is afraid to approach a congressional leadership with a conservative agenda is understandable, but may well prove insignificant in comparison to the long-term consequences of establishing such a black market in lieu of transparent and democratic policymaking.

## Conclusion

Three decades ago, Congress chose to divide responsibility for environmental protection between federal and state governments because it recognized the need to address "transboundary" pollution; it desired to provide a level playing field for the national (increasingly multinational) corporations that are essential to the country's economy; and it decided to make a moral — and arguably constitutional — commitment to afford all citizens the same basic level of protection. As environmental issues become more technical and scientifically complex, economies of scale achieved by conducting essential research at the national level should be added to this list of reasons to preserve a strong federal role in protecting the environment.

There is no national consensus that we must revisit the balance of power between EPA and the states. Nor have we agreed to grant administrative agencies the power to revise statutory mandates. However good they sound on a rhetorical level, "performance partnerships" and "performance indicators" should not serve as a vehicle for delivering either change.

<sup>1</sup> Margaret Kriz, *Feuding With the Feds*, 29 NAT'L J. 1598, 1600 (1997).

<sup>2</sup> *Id.* at 1598.

[3.](#) *Id.*

[4.](#) The national campaign against unfunded mandates targeted environmental regulation as an apocryphal example of unrestrained federal authority. *See, e.g.,* Rena Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution or Reform?*, 81 MINN. L. REV. 97 (1996).

[5.](#) William D. Ruckelshaus, *Stopping the Pendulum*, ENVTL. F., Nov./Dec. 1995, at 25.

[6.](#) Pub. L. No. 103-62, 107 Stat. 285 (1993) (codified in scattered sections of 5 and 31 U.S.C.).

[7.](#) Rena I. Steinzor & William F. Piermattei, *Reinventing Environmental Regulation Via the Government Performance and Results Act: Where's the Money?*, [28 ELR 10563](#) (Oct. 1998).

[8.](#) The NEPPS program was created in 1995, when the EPA Administrator and Deputy Administrator signed a two-page joint statement with the directors of the Colorado and Illinois environmental agencies. This signed statement was accompanied by a nine-page, unsigned explanation of its intent, and the two documents are always circulated and read together. Carol M. Browner, Administrator & Fred Hansen, Deputy Administrator, U.S. EPA, Tom Looby, Director, Office of Env't, Colo. Dep't of Health & Mary Gade, Director, Ill. EPA, *Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System* (May 15, 1995) [hereinafter *Joint Statement*], reprinted in ENVIRONMENTAL, LAW INST., AN INDEPENDENT REVIEW OF THE STATE-FEDERAL ENVIRONMENTAL PARTNERSHIP AGREEMENTS FOR 1996 (1996) app. [hereinafter ELI REVIEW]; *National Environmental Performance Partnership System* [hereinafter *Joint Statement Explanation*], reprinted in ELI REVIEW, *supra*.

[9.](#) More than any other event, the well publicized dispute over state authority to waive federal regulatory requirements in the context of reinvention initiatives such as Project XL triggered the outbreak of open hostility between EPA and state environmental commissioners. *See, e.g.,* John H. Cushman Jr., *EPA Withdraws Plan to Empower States*, N.Y. TIMES, Mar. 3, 1997, at A22. Although the battle over Project XL and other reinvention initiatives has exacerbated tension and bred distrust, such programs remain a relatively small part of the work that EPA and the states do together.

[10.](#) 31 U.S.C. § 1115 (1983).

[11.](#) 5 U.S.C. § 306 (provisions regarding strategic plans).

[12.](#) *Id.* § 306(a)(1).

[13.](#) *Id.* § 306(a)(2).

[14.](#) *Id.* § 306(a)(5).

[15.](#) 31 U.S.C. § 1115 (1983) (provisions regarding performance plans).

[16.](#) *Id.* § 1115(a)(2) (emphasis added).

[17.](#) *Id.* § 1115(a)(4), (6).

[18.](#) *Id.* § 1115(b).

[19.](#) *Id.* § 1116 (provisions regarding program performance reports).

[20.](#) *See, e.g.,* Alice M. Rivlin, *Linking Resources to Results, Management and Budgeting in a Time of Resource Constraints: Government Performance and Results Act of 1993*, PUB. MANAGER: NEW BUREAUCRAT, June 22, 1995, at 3-4.

21. U.S. EPA, EPA STRATEGIC PLAN. EPA/190-R-97-002 (Sept. 1997) [hereinafter STRATEGIC PLAN]. For further discussion of the plan, see Steinzor & Piermattei, *supra* note 7, at 10570-72.

22. STRATEGIC PLAN, *supra* note 21, at 24.

23. *Id.* at 26.

24. *Id.* at 29.

25. *Id.*

26. *Id.* at 35.

27. *Id.* at 36.

28. U.S. EPA, 1999 ANNUAL PLAN (1999) [hereinafter 1999 ANNUAL PLAN] (copy on file with author). This document has never been published, but can be obtained in an unbound, photocopied version from EPA. Again, for a fuller description of the plan, see Steinzor & Piermattei, *supra* note 7, at 10570-72.

29. Provisions delegating implementation and enforcement to state governments are a central feature of the Clean Air Act, 42 U.S.C. § 7410, ELR STAT. CAA § 110; the Clean Water Act, 33 U.S.C. § 1342, ELR STAT. FWPCA § 402; the Safe Drinking Water Act, 42 U.S.C. § 300g-2, ELR STAT. SDWA § 1413; and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6926, 6946, and 6991c, ELR STAT. RCRA §§ 3006, 4006, 9004.

30. This description of the recent history of state participation in the legislative process is based on the author's observations as staff counsel to the U.S. House of Representatives Energy and Commerce Committee between 1983 and 1987 and on subsequent work as a lobbyist on environmental issues.

31. *See, e.g.*, GREGG EASTERBROOK, A MOMENT ON EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM (1995); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994).

32. *See, e.g.*, E.J. Dionne Jr., *The New, New, New Federalism*, WASH. POST, Mar. 7, 1995, at A17; George F. Will, *Making States' Rights Respectable Again*, WASH. POST, Jan. 1, 1995, at C7.

33. ECOS was established at a meeting of some 20 state representatives in December 1993. The organization initially operated out of the state office of its first president, retaining a Washington, D.C.-based lobbying firm to represent its interests at the end of 1994, and establishing a full-time staff in the nation's capital in May 1995. ECOS President Tom Looby, head of the Colorado Office of Environment, and Vice President Mary Gade, head of the Illinois EPA, signed the *Joint Statement* on behalf of the states. *About ECOS* (visited Nov. 23, 1998) <http://www.sso.org/ecos/bkgrd.htm>.

34. *Joint Statement*, *supra* note 8.

35. *Id.*

36. The document acknowledges that "a core level of environmental protection must be maintained for all citizens" and that regulators must respect the "need for a 'level playing field' across the country." *Joint Statement Explanation*, *supra* note 8, at 1. But these statements appear in context as throw-away lines, eclipsed by more extensive and assertive statements regarding state authority.

37. *Id.*

38. *Id.*

[39.](#) *Id.* at 1-2.

[40.](#) *Id.* at 1.

[41.](#) *Id.* at 8-9.

[42.](#) The organization's 1998 *Annual Report* indicates that EPA provided \$ 1.4 million toward ECOS operating revenues, with another \$ 250,000 provided by state "assessments." The EPA grants fund a wide variety of advisory groups on most major policy issues. ENVIRONMENTAL COUNCIL OF THE STATES, 1998 ANNUAL REPORT 18, 20-23 (1998) [hereinafter 1998 ECOS ANNUAL REPORT].

[43.](#) Given its financial dependence on EPA, the aggressive posture ECOS has assumed in many of its dealings with EPA is a telling indication of the Agency's anxiety in managing its relationship with the states. *See, e.g., Kriz, supra* note 1.

[44.](#) U.S. EPA, QUICK REFERENCE FACT SHEET: STATE/EPA PERFORMANCE PARTNERSHIPS (June 1997) [hereinafter 1997 EPA FACT SHEET] (copy on file with author).

[45.](#) Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance, 61 Fed. Reg. 42887 (Aug. 19, 1996) [hereinafter PPG Guidance].

[46.](#) 1997 EPA FACT SHEET, *supra* note 44.

[47.](#) The 16 eligible programs run the gamut from such large-ticket items as air and water pollution control to relatively less significant items such as lead-based paint activities and radon assessment and mitigation, to EPA's cutting-edge effort to give states incentives to encourage pollution prevention. PPG Guidance, *supra* note 45, at 42892.

[48.](#) *Id.* at 42888.

[49.](#) The implications of this change have already prompted the EPA Inspector General to warn Congress that EPA's troubled track record in administering state grants does not bode well for the new program. *EPA: Grant Mismanagement Raises Concern About New Partnership Program, IG Says*, Daily Env't Rep. (BNA), July 31, 1996, at A-3.

[50.](#) 31 U.S.C. § 1115 (1983).

[51.](#) *Joint Statement, supra* note 8, at 1; *Joint Statement Explanation, supra* note 8, at 2-3.

[52.](#) *See, e.g.,* David P. Clarke, *Data Needs for "Accountability": Collect One for the GPRA*, ST. ENVTL. MONITOR, July 7, 1997, at 14 (quoting one unnamed Massachusetts regulator regarding the states' fear that EPA staff see GPRA as "an opportunity to get back the minutiae they lost through the NEPPS").

[53.](#) *States Give Up on Drafting Pollution Prevention Core Measures*, REINVENTION REP., Oct. 26, 1998, at 3 [hereinafter *States Give Up*]. The *Reinvention Report* replaced the *State Environmental Monitor* and is devoted to detailed coverage of developments in the states. It is published by Inside Washington Publishers.

[54.](#) *States Seek Changes to EPA Memo on Core Measures*, REINVENTION REP., Nov. 20, 1998, at 10.

[55.](#) ELI REVIEW, *supra* note 8.

[56.](#) *Id.* at 18.

[57.](#) *Id.* at 19.

[58.](#) *Id.*

[59.](#) *Id.* at 24.

[60.](#) *Id.* at 16.

[61.](#) Kriz, *supra* note 1, at 1599.

[62.](#) *The Federal-State Relationship: A Look Into EPA's Reinvention Efforts, Hearings Before the Subcomm. on Oversight and Investigation of the U.S. House of Representatives Comm. on Commerce*, 105th Cong. 37-41 (1997) (statement of David B. Struhs, Commissioner, Massachusetts Department of Environmental Protection).

[63.](#) *Id.* at 31-36 (statement of Russell J. Harding, Director, Michigan Department of Environmental Quality).

[64.](#) Cushman, *supra* note 9, at 22.

[65.](#) Even a cursory examination of the trade press coverage of these issues is remarkable for its accounts of the incessant sparring between EPA staff and state officials. *See, e.g., States Launch Broad Attack on EPA Enforcement Authority*, REINVENTION REP., Nov. 6, 1998, at 9; *States Give Up*, *supra* note 53; *USEPA, Massachusetts Spar Over Relaxing Hazwaste Rules*, ST. ENVTL. MONITOR, Aug. 3, 1998, at 4; *Nebraska Sues USEPA Over Drinking Water Regulation*, ST. ENVTL. MONITOR, Aug. 3, 1998, at 7; *USEPA Moves to Improve Enforcement in Louisiana and Texas*, ST. ENVTL. MONITOR, Apr. 7, 1997, at 13; *see also* Cushman, *supra* note 9; Kriz, *supra* note 1.

[66.](#) COUNCIL OF STATE GOV'TS, RESOURCE GUIDE TO STATE ENVTL. MANAGEMENT (4th ed. 1996) [hereinafter RESOURCE GUIDE]. The fifth edition of the publication is due out at the end of December 1998, after this Dialogue went to press. Telephone Conversation with Ginny Mason, Sales Administrator, Council of State Governments (Nov. 20, 1998).

[67.](#) RESOURCE GUIDE, *supra* note 66, at iv.

[68.](#) Obviously, factors too numerous and complex to discuss here determine the actual costs of implementing state programs. The 10 states are sufficiently diverse, however, to provide an adequate basis of comparison for these purposes.

[69.](#) *Id.* at 121.

[70.](#) That fund was not established until the passage of the Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 103, 110 Stat. 1613, 1662-72.

[71.](#) U.S. EPA, *Envirofacts Warehouse: Grants Information* (last modified Dec. 4, 1998) <http://www.epa.gov/enviro/html/gics>.

\* Colorado and Minnesota received the same amount of money (\$ 12 million) in 1994 and are ranked here on an alphabetical basis.

\*\* This ranking uses the figures stated in parentheses in Table 2, which are the amounts states received *other than* drinking water infrastructure grants.

[72.](#) I say "apparently" because I suspect that theories of reinvention are not the reason for less enforcement, but rather a *post hoc* effort to justify programs undercut by funding gaps and changes in statehouse politics.

[73.](#) *Enforcement of Environmental Laws: Hearings Before the Senate Comm. on Environment and Public Works*, 105th Cong. 30 (1997).

[74.](#) *Id.* at 30 (statement of Mark Coleman, Executive Director, Oklahoma Department of Environmental Quality).

[75.](#) *Id.* at 7 (statement of Nikki L. Tinsley, Acting Inspector General, EPA).

[76.](#) *Id.* at 30-31 (statement of Mr. Coleman); *id.* at 37-38 (statement of Christophe A.G. Tulou, Secretary, Delaware Department of Natural Resources and Environmental Control).

[77.](#) *Id.* at 38 (statement of Mr. Tulou).

[78.](#) *Id.* These statistics were not accompanied by materials that would allow them to be verified.

[79.](#) *See, e.g.,* U.S. GAO, EPA AND THE STATES — ENVIRONMENTAL CHALLENGES REQUIRE A BETTER WORKING RELATIONSHIP, GAO/RCED 95-64 (1995) [hereinafter GAO STATE REPORT]; OFFICE OF INSPECTOR GENERAL, U.S. EPA, SEMIANNUAL REPORT TO THE CONGRESS, APRIL 1, 1997 THROUGH SEPTEMBER 30, 1997, EPA-350-R-97-002, at 8 (1997) ("Arkansas, Maryland, and Massachusetts Did Not Report Significant Clean Air Violators") [hereinafter SECOND 1997 IG REPORT]; OFFICE OF INSPECTOR GENERAL, U.S. EPA, SEMIANNUAL REPORT TO THE CONGRESS, OCTOBER 1, 1996 THROUGH MARCH 31, 1997, EPA-350-R-97-001, at 12 (1997) ("Pennsylvania Did Not Report Significant Clean Air Act Violators") [hereinafter FIRST 1997 IG REPORT]; *id.* at 17 ("RCRA Civil Penalties by States Were Inconsistent"); OFFICE OF INSPECTOR GENERAL, U.S. EPA, SEMIANNUAL REPORT TO THE CONGRESS, APRIL 1, 1996 THROUGH SEPTEMBER 30, 1996, EPA-350-R-96-002, at 12 (1996) ("Inadequate Oversight of Drinking Water Programs Puts Children at Risk") [hereinafter SECOND 1996 IG REPORT]; *id.* at 15 ("Improvements Needed in EPA and State Air Enforcement Programs"). The reports have been featured in national news reports, exacerbating the tension between EPA and the states. *See, e.g.,* John H. Cushman Jr., *EPA and the States Found to Be Lax on Pollution Law*, N.Y. TIMES, June 8, 1998, at A1.

[80.](#) GAO STATE REPORT, *supra* note 79, at 4.

[81.](#) *Id.* at 16.

[82.](#) *Id.* at 17.

[83.](#) For a summary of these reports, see Cushman, *supra* note 79; *see also* SECOND 1997 IG REPORT, *supra* note 79; FIRST 1997 IG REPORT, *supra* note 79; SECOND 1996 IG REPORT, *supra* note 79.

[84.](#) GAO STATE REPORT, *supra* note 79, at 18.

[85.](#) *Id.*

[86.](#) 1998 ECOS ANNUAL REPORT, *supra* note 42, at 4, 10 (listing officials from Alaska, Colorado, Maine, and South Dakota as members of the senior staff and executive committee of the organization).

[87.](#) *See supra* note 44 and accompanying text.

[88.](#) For an excellent description of these suits and their ramifications, see Oliver A. Houck, *TMDLS: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, [27 ELR 10329](#) (July 1997); Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, [27 ELR 10391](#) (Aug. 1997).

[89.](#) U.S. EPA, NATIONAL WATER QUALITY INVENTORY: 1996 REPORT TO CONGRESS, EPA 841-R-97-008 (1997).

[90.](#) U.S. EPA, NATIONAL WATER QUALITY INVENTORY: 1994 REPORT TO CONGRESS, EPA-841-R-95-006, app. A, tbl. A-1 (1995).

[91.](#) *See* Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 10 YALE L.J. 1981 (1998).

