

**GAO**

Testimony

Before the Committee on Transportation  
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Representatives

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# CLEAN WATER ACT

## Longstanding Issues Impact EPA's and States' Enforcement Efforts

Statement of Anu K. Mittal, Director  
Natural Resources and Environment Team



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Highlights of [GAO-10-165T](#), a testimony before the Committee on Transportation and Infrastructure, U.S. House of Representatives

## Why GAO Did This Study

Congress enacted the Clean Water Act to help reduce water pollution and improve the health of the nation's waterways. The Environmental Protection Agency (EPA) administers its enforcement responsibilities under the act through its Office of Enforcement and Compliance Assurance (OECA), as well as its 10 regional offices and the states.

Over the last 9 years, GAO has undertaken a number of reviews of EPA's environmental enforcement activities, including for the Clean Water Act. For this testimony statement, GAO was asked to summarize the results of five prior reports on the effectiveness of EPA's enforcement program. Specifically, this statement includes information on the (1) factors that cause variations in enforcement activities and lead to inconsistencies across regions, (2) impact that inadequate resources and work force planning has had on enforcement, (3) efforts EPA has taken to improve priority planning, and (4) accuracy and transparency of measures of program effectiveness.

GAO's prior recommendations have included the need for EPA to collect more complete and reliable data, develop improved guidance, and better performance measures. Although EPA has generally agreed with these recommendations, its implementation has been uneven. GAO is not making new recommendations in this statement.

View [GAO-10-165T](#) or [key components](#). For more information, contact Anu Mittal, (202) 512-3841, [mittala@gao.gov](mailto:mittala@gao.gov).

## CLEAN WATER ACT

### Longstanding Issues Impact EPA's and States' Enforcement Efforts

#### What GAO Found

In 2000, GAO found variations among EPA's regional offices in the actions they take to enforce environmental requirements. For example, the regions varied in the inspection coverage of facilities discharging pollutants, the number and type of enforcement actions taken, and the size of the penalties assessed and the criteria used in determining penalties. GAO also found that variations in the regions' strategies for overseeing state programs may have resulted in more in-depth reviews in some regional programs than in others. Several factors contributed to these variations including differences in the philosophical approaches among enforcement staff about how best to achieve compliance with environmental requirements, differences in state laws and enforcement authorities and how the regions respond to these differences, variations in resources available to state and regional offices, the flexibility afforded by EPA policies and guidance that allow latitude in state enforcement programs, and incomplete and inadequate enforcement data that hampered EPA's ability to accurately characterize the extent of variations. In 2007, GAO reported improvements in EPA's oversight of state enforcement activities with the implementation of a state review framework. However, while this framework helped identify several weaknesses in state programs, the agency had not developed a plan for how it would uniformly address these weaknesses or identify the root causes of these weaknesses.

In 2005, GAO reported that the scope of EPA's responsibilities under the Clean Water Act along with workload associated with implementing and enforcing the act's requirements had increased significantly. At the same time, EPA had authorized states to take on more responsibilities, shifting the agency's workload from direct implementation to oversight. In 2007, GAO reported that while overall funding for enforcement activities had increased from \$288 million in fiscal year 1997 to \$322 million in fiscal year 2006, resources had not kept pace with inflation or the increased responsibilities. Both EPA and state officials told GAO that they found it difficult to respond to new requirements while carrying out previous responsibilities and regional offices had reduced enforcement staff by about 5 percent. In 2005, GAO also reported that EPA's process for budgeting and allocating resources did not fully consider the agency's workload, either for specific statutory requirements such as those included in the Clean Water Act or the broader goals and objectives in the agency's strategic plan. Any efforts made by the agency to develop a more systematic process would be hampered by the lack of comprehensive and accurate workload data.

In 2007, GAO reported that EPA had made substantial progress in improving priority setting and enforcement planning with states through its system for setting national enforcement priorities and this had fostered a more cooperative relationship with the states. Finally, in 2008, GAO reported that EPA could improve the accuracy and transparency of some of the measures that it uses to assess and report on the effectiveness of its civil and criminal enforcement programs. GAO identified shortcomings in how EPA calculates and reports these data that may prevent the agency from providing Congress and the public with a fair assessment of the programs.

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Mr. Chairman and Members of the Committee:

We are pleased to be here today to participate in your hearing on the 37<sup>th</sup> anniversary of the Clean Water Act. As you know, the Clean Water Act has played a critical role in reducing water pollution and improving the health of the nation's waterways. The Environmental Protection Agency (EPA) administers its environmental enforcement responsibilities under the Clean Water Act and other environmental statutes, through its headquarters Office of Enforcement and Compliance Assurance (OECA). OECA monitors the compliance of regulated facilities, identifies national enforcement concerns and sets priorities, and provides overall direction on enforcement policies. While OECA headquarters occasionally takes direct enforcement action, much of EPA's enforcement responsibilities are carried out by its 10 regional offices. These offices are responsible for carrying out core program activities under each of the major federal environmental statutes, as well as significant involvement in implementing EPA's national enforcement priorities and taking direct enforcement action. In addition, the Clean Water Act directs EPA to authorize qualified states to implement and enforce environmental programs consistent with federal requirements. EPA expects its 10 regional offices to take a systematic and generally consistent approach in overseeing the state enforcement programs and, in doing so, to follow EPA's regulations, policies, and guidance.

Over the last 9 years, GAO has reviewed various aspects of EPA's enforcement activities and has made several recommendations to enhance its enforcement program. Our testimony today is based on the findings and conclusions contained in five of these reports and will specifically focus on the following:<sup>1</sup>

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<sup>1</sup>GAO, *Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement*, [GAO/RCED-00-108](#) (Washington, D.C.: June 2, 2000); GAO, *Clean Water Act: Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints*, [GAO-05-721](#) (Washington, D.C.: July 22, 2005); GAO, *Environmental Protection: EPA-State Enforcement Partnership Has Improved, but EPA's Oversight Needs Further Enhancement*, [GAO-07-883](#) (Washington D.C.: July 31, 2007); GAO, *Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness*, [GAO-08-1111R](#) (Washington, D.C.: Sept.18, 2008); GAO, *EPA's Execution of Its Fiscal Year 2007 New Budget Authority for the Enforcement and Compliance Assurance Program in the Regional Offices*, [GAO-08-1109R](#) (Washington, D.C.: Sept. 26, 2008).

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- Factors that cause variations in EPA's enforcement activities and lead to inconsistencies across its regional offices,
  - The impact that inadequate resources and workforce planning has had on EPA's ability to meet changing enforcement needs,
  - EPA's efforts to improve priority planning and enforcement planning as well as oversight of state programs, and
  - Improvements that are needed to improve the accuracy and transparency of measures of program effectiveness.

For the reports used to support this testimony statement, we conducted our work in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for the findings and conclusions in these reports. We discussed the contents of this testimony with an EPA official.

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## Background

Since EPA was created in 1970, the agency has been responsible for enforcing the nation's environmental laws. This responsibility has traditionally involved monitoring compliance by those in the regulated community (such as factories or small businesses that release pollutants into the environment or use hazardous chemicals), ensuring that violations are properly identified and reported, and ensuring that timely and appropriate enforcement actions are taken against violators when necessary. Most major federal environmental statutes, including the Clean Water Act, permit EPA to allow states under certain circumstances to implement key programs and to enforce their requirements. EPA establishes by regulation the requirements for state enforcement authority, such as the authority to seek injunctive relief and civil and criminal penalties.

EPA also outlines by policy and guidance its views as to the elements of an acceptable state enforcement program, such as necessary legislative authorities and the type and timing of the action for various violations, and tracks how well states comply. Environmental statutes generally provide authority for EPA to take appropriate enforcement action against violators in states that have been delegated authority for these programs when states fail to initiate enforcement action. The statutes also provide that

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EPA may withdraw approval of a state's program if the program is not administered or enforced adequately.

EPA administers its environmental enforcement responsibilities through its headquarters Office of Enforcement and Compliance Assurance (OECA). While OECA provides overall direction on enforcement policies, and sometimes takes direct enforcement action, it carries out much of its enforcement responsibilities through its 10 regional offices. These offices are responsible for taking direct enforcement action and for overseeing the enforcement programs of state agencies in those instances in which the state has been delegated such enforcement authority.

EPA has established principles for its enforcement and compliance program. State guidance, providing the framework for state/EPA enforcement agreements, has been in place since 1986. According to EPA, this state guidance, together with statute-specific guidance, is the blueprint for both EPA and state enforcement and compliance programs and serves as the basis for both authorizing and reviewing state programs.

OECA expects the regions to take a systematic approach to administering and overseeing the enforcement programs among delegated and nondelegated programs and, in doing so, to follow the policies and guidance issued for this purpose. While federal and state enforcement officials agree that core enforcement requirements should be generally implemented consistently, according to EPA some variation is to be expected—and, in some cases, encouraged. For example, EPA expects some variation in how regions target resources to the most significant compliance issues in different regions and states, the level of enforcement activity—which should vary with the severity of the problem, and the level of regional oversight of state enforcement programs—with the greater oversight provided for weaker programs.

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## Variations in Enforcement By EPA's Regions Have Resulted in Inconsistencies in Program Implementation

As we noted in our 2000 report on the consistency of EPA's regions in enforcing environmental requirements, some variation in environmental enforcement is necessary to take into account local conditions and local concerns.<sup>2</sup> At the same time, EPA enforcement officials readily acknowledged that core enforcement requirements must be consistently implemented, and to ensure fairness and equitable treatment, similar violations should be met with similar enforcement responses, regardless of geographic location. However, when we reviewed EPA's enforcement efforts we found that variations among EPA's regional offices had led to inconsistencies in the actions they take to enforce environmental requirements. For example, we found that

- inspection coverage by EPA and state enforcement staff varied for facilities discharging pollutants within each region,
- the number and type of enforcement actions taken by EPA's regions also varied,
- the size of the penalties assessed and the criteria used in determining penalties assessed varied by region, and
- the regions' overall strategies in overseeing the states within their jurisdiction varied, which may have resulted in more in-depth reviews in some regional programs than in others.

EPA headquarters officials responsible for the water program explained that such variation was fairly commonplace and has posed problems. The director of OECA's water enforcement division, for example, said that in reacting to similar violations, enforcement responses in certain regions were weaker than in others, and that such inconsistencies had increased.

We identified a number of factors that contributed to variations in EPA's enforcement that included the following:

- differences in the philosophical approaches among enforcement staff about how to best achieve compliance with environmental requirements,
- differences in state laws and enforcement authorities, and in the manner in which regions respond to these differences,

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<sup>2</sup>GAO, *Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement*, [GAO/RCED-00-108](#) (Washington, D.C.: June 2, 2000).

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- variations in resources available to both state and regional enforcement offices,
  - the flexibility afforded by EPA policies and guidance that allow states a degree of latitude in their enforcement programs, and
  - incomplete and inadequate enforcement data which, among other things, hamper EPA's ability to accurately characterize the extent of variations.

We also noted in our 2000 report that EPA headquarters enforcement officials were developing performance information that would allow for comparisons among both regions and states in their conduct of key enforcement responsibilities. Such assessments were expected to highlight any major program variations and would be communicated through the issuance of periodic status reports. A number of EPA regional offices were also developing and applying new audit protocols in their state reviews and encouraging more effective communication between and among regional and state enforcement staff. But we also concluded that a number of factors would continue to challenge EPA's ability to ensure reasonably consistent enforcement across its regions. Among the most important of these factors was the absence of reliable data on how both states and regions are performing their enforcement responsibilities.

In 2007, we again examined EPA's efforts to improve oversight of state enforcement activities. At that time, we reported that EPA had improved its oversight of state enforcement programs by implementing the State Review Framework (SRF). We noted that EPA's implementation of the SRF gave it the potential to provide for the first time a consistent approach for overseeing authorized states' compliance and enforcement programs. Nonetheless, we also reported that the SRF had identified several significant weaknesses in how states enforce their environmental laws in accordance with federal requirements. For example, reviews conducted under the framework found that the states were not properly documenting inspection findings or how they calculate or assess penalties, as provided by EPA's enforcement policy and guidance, that the states were not adequately entering significant violations noted in their inspection reports into EPA databases, and that the states lacked adequate or appropriate penalty authority or policies. While we recognized the value in EPA's identification and documentation of these findings, we also reported that EPA had not developed a plan for how it would uniformly address them in a timely manner, nor had the agency identified the root causes of the weaknesses, although some EPA and state officials attributed the weaknesses to causes such as increased workloads concomitant with

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budgetary reductions. We concluded that, until EPA addressed enforcement weaknesses and their causes, it faced limitations in determining whether the states are performing timely and appropriate enforcement, and whether they are applying penalties to environmental violators in a fair and consistent manner within and among the states.

In 2000 and in 2007, GAO made several recommendations to EPA to address the concerns that we identified with the agency's enforcement programs. For example, in 2000, we recommended that EPA develop a comprehensive strategy to adequately address problems with the quality of the agency's enforcement data and issue guidance to the regions describing the required elements of audit protocols to be used in overseeing state enforcement programs. In 2007, we recommended that to enhance EPA's oversight of regional and state enforcement activities consistent with federal requirements that the agency should (1) identify lessons learned and develop an action plan to address significant issues, (2) address resource issues such as state staffing levels and resource requirements, (3) publish the results of the SRF reviews so that the public and others will know how well state enforcement programs are working, and (4) conduct a performance assessment of regional enforcement programs similar to the SRF. EPA generally agreed with most of the recommendations we made in 2007, but did not specifically comment on the recommendations we made in 2000. Although EPA has taken steps to address the recommendations in our 2000 report, it has not yet implemented the recommendations in our 2007 report.



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## Enforcement Resources Have Not Kept Pace with Increased Responsibilities and Better Resource Planning Would Enhance Enforcement Activities

In 2005, we reported that the scope of EPA's responsibilities under the Clean Water Act had increased significantly since 1972, along with the workload associated with implementing and enforcing the act's requirements.<sup>3</sup> For example, EPA's implementation of the 1987 amendments which expanded the scope of the act by regulating storm water runoff resulted in (1) increasing the number of regulated industrial and municipal facilities by an estimated 186,000 facilities and (2) adding hundreds of thousands of construction projects to states' and regions' workloads for the storm water program. At the same time, EPA had authorized states to take on more responsibilities, shifting the agency's workload from direct implementation to oversight.

In 2007, we reported that while overall funding for carrying out enforcement activities to regions and authorized states had increased from fiscal years 1997 through 2006, these increases had not kept pace with inflation and the growth in enforcement responsibilities.<sup>4</sup> Over the 10-year period we reviewed, EPA's enforcement funding to the regions increased from \$288 million in fiscal year 1997 to \$322 million in fiscal year 2006, but declined in real terms by 8 percent. Both EPA and state officials told us they found it difficult to respond to new requirements while carrying out their previous responsibilities.

In 2007, officials in OECA and EPA's Office of the Chief Financial Officer told us that in recent years OECA headquarters absorbed decreases in OECA's total enforcement funding to prevent further reductions to the regions. We determined that enforcement funding for OECA headquarters increased from \$197 million in fiscal year 2002 to \$200 million in fiscal year 2006—a 9 percent decline in real terms. During the same time, regional enforcement funding increased from \$279 million to \$322 million—a 4 percent increase in real terms. EPA also reduced the size of the regional enforcement workforce by about 5 percent over the 10 year period between fiscal years 1997 and 2006. During this 10-year period, the regional workforce was reduced from 2,568 full-time equivalent (FTE) staff in fiscal year 1997 to 2,434 FTEs in fiscal year 2006. In comparison, the OECA headquarters workforce declined 1 percent, and the EPA total

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<sup>3</sup>GAO, *Clean Water Act: Improved Resource Planning Would Help EPA Better Respond to Changing Needs and Fiscal Constraints*, [GAO-05-721](#) (Washington, D.C.: July 22, 2005).

<sup>4</sup>GAO, *Environmental Protection: EPA-State Enforcement Partnership has Improved, but EPA's Oversight Needs Further Enhancement*, [GAO-07-883](#) (Washington, D.C.: July 31, 2007).

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workforce increased 1 percent during the same period. However, the change in FTEs was not uniform across the 10 regions over the period. For example, two regions—Region 9 (San Francisco) and Region 10 (Seattle)—experienced increases in their workforce: Region 9 increased 5 percent, from 229 to 242 FTEs, and Region 10 increased 6 percent, from 161 to 170 FTEs. In contrast, two regions—Region 1 (Boston) and Region 2 (New York) experienced the largest declines: Region 1 experienced a 15 percent decline, from 195 to 166 FTEs, and Region 2 had a 13 percent decline, from 291 to 254 FTEs.

Although we recognized that resources had not kept pace with EPA's responsibilities under the Clean Water Act, we also found that EPA's process for budgeting and allocating resources did not fully consider the agency's current workload, either for specific statutory requirements, such as those included in the Clean Water Act, or for the broader goals and objectives in the agency's strategic plan. Instead, EPA made incremental adjustments and relied primarily on historical precedent when making resource allocations. In 2005, we concluded that changes at the margin may not be sufficient because both the nature and distribution of the Clean Water Act workload had changed, the scope of activities regulated under the act had increased, and EPA had taken on new responsibilities while shifting others to the state.

While we reported in 2005 that EPA had taken some actions to improve resource planning, we also found that it faced a number of challenges that hindered comprehensive reform in this area. Specifically, we identified several efforts that EPA had initiated to improve the agency's ability to strategically plan its workforce and other resources. While some of these efforts were not directly related to workforce planning, we found that they had the potential to give the agency some of the information it needed to support a systematic, data-driven method for budgeting and allocating resources. In addition, we identified two initiatives within the Office of Water that we believed had the potential to provide relevant and useful information for a data-driven approach to budgeting and allocating resources. First, beginning in December 1998, EPA and the states collaborated on a state resource analysis for water quality management to develop an estimate of the resources that states needed to fully implement the Clean Water Act. The primary focus of the project was identifying the gap between states' needs and available resources. To develop the estimates of the gap, EPA and the states created a detailed model of activities associated with implementing the Clean Water Act, the average time it took to complete such activities, and the costs of performing them. The National Academy of Public Administration subsequently reviewed

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the model and determined that the underlying methodology was sound, and recommended that EPA and the states refine the model to support data-driven grant allocation decisions. However, as we reported, the agency did not implement the recommendation, citing resource constraints and reluctance on the part of some states. Second, in 2003, the Office of Water implemented an initiative called the Permitting for Environmental Results Strategy to respond to circumstances that were making it increasingly difficult for EPA and the states to meet their responsibilities under the Clean Water Act. According to EPA, in addition to the scope and complexity of the act expanding over time, the states were also facing an increasing number of lawsuits and petitions to withdraw their authorization to administer some Clean Water Act programs. As part of its effort to identify and resolve performance problems in individual states, EPA and the states were developing profiles containing detailed data on the responsibilities, resources, and workload demands of each state and region. We concluded that this information would be useful to any comprehensive and systematic resource planning method adopted by the agency.

Nonetheless, we also identified a number of larger challenges that EPA would face as it tried to adopt a more systematic process for budgeting and resource allocation. Specifically, we found that EPA would be challenged in obtaining complete and reliable data on key workload indicators, which we concluded would be the most significant obstacle to developing a systematic, data-driven approach to resource allocation. Without comprehensive and reliable data on workload, EPA cannot accurately identify where agency resources, such as staff with particular skills, are most needed. EPA officials told us that some of the key workload factors related to controlling point and nonpoint source pollution include the number of point source dischargers, the number of wet weather dischargers, and the quantity and quality of water in particular areas. However, we reported that for some of this information, the relevant databases may not have the comprehensive, accurate, and reliable information that is needed by the agency.

Even with better workload data, we found in 2005 that EPA would also find it difficult to implement a systematic, data-driven approach to resource allocation without staff support for such a process. Support might not be easily forthcoming because, according to EPA officials in several offices and regions, staff were reluctant to accept a data-driven approach after their experience in using workload models during the 1980s. At that time, each major program office used a model to allocate resources to the agency's regional offices. When the models were initially

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developed, agency officials believed they were useful because EPA's programs were rapidly expanding as the Congress passed new environmental laws. Over time, however, the expansion of EPA's responsibilities leveled off, and its impact on the relative workload of regions was not as significant. The change in the rate of the workload expansion, combined with increasingly constrained federal resources during the late 1980s, meant that the workload models were only being used to allocate changes at the margins. The agency stopped using the models in the early 1990s because, according to officials, staff spent an unreasonable amount of time negotiating relatively minor changes in regional resources.

To address the concerns that we identified with EPA's resource allocation and planning processes for the enforcement programs, in 2005, we made several recommendations to the agency. Specifically, we recommended that EPA identify relevant workload indicators that drive resource needs, ensure that relevant data are complete and reliable, and use the results to inform budgeting and resource allocation decisions. In responding to our recommendations, EPA voiced concerns that a bottom-up workload assessment contrasts with its approach, which links budgeting and resource allocation to performance goals and results. However, we reiterated our belief that assessing workload and how it drives resources was fully compatible with EPA's approach. In 2008,<sup>5</sup> when we again reported on EPA's resource allocation process, we found that the process was essentially the same as we reported in 2005 and that the agency had not made progress on implementing our recommendations.

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## EPA Has Improved Its Process for Collaborating with States to Set Priorities

In 2007, we reported that, despite the interdependence between EPA and the states in carrying out enforcement responsibilities, effective working relationships have historically been difficult to establish and maintain, based on reports by GAO, EPA's Office of Inspector General, the National Academy of Public Administration, and others.<sup>6</sup> We identified the following three key issues that have affected EPA and state relationships in the past:

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<sup>5</sup> GAO, *EPA's Execution of Its Fiscal Year 2007 New Budget Authority for the Enforcement and Compliance Assurance Program in Regional Offices*, [GAO-08-1109R](#) (Washington, D.C., Sept. 26, 2008).

<sup>6</sup> GAO, *Environmental Protection: EPA-State Enforcement Partnership has Improved, but EPA's Oversight Needs Further Enhancement*, [GAO-07-883](#) (Washington, D.C.: July 31, 2007).

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- EPA's funding allocations to the states did not fully reflect the differences among the states' enforcement workload and their relative ability to enforce state environmental programs consistent with federal requirements. In this regard, EPA lacked information on the capacity of both the states and EPA's regions to effectively carry out their enforcement programs, because the agency had done little to assess the overall enforcement workload of the states and regions and the number and skills of people needed to implement enforcement tasks, duties, and responsibilities. Furthermore, the states' capacity continued to evolve as they assumed a greater role in the day-to-day management of enforcement activities, workload changes occurred as a result of new environmental legislation, new technologies were introduced, and state populations shifted.
  - Problems in EPA's enforcement planning and priority setting processes resulted in misunderstandings between OECA, regional offices, and the states regarding their respective enforcement roles, responsibilities, and priorities. States raised concerns that EPA sometimes "micromanaged" state programs without explaining its reasons for doing so and often did not adequately consult the states before making decisions affecting them.
  - OECA had not established a consistent national strategy for overseeing states' enforcement of EPA programs. Consequently, the regional offices were not consistent in how they oversaw the states. Some regional offices conducted more in-depth state reviews than others, and states in these regions raised concerns that their regulated facilities were being held to differing standards of compliance than facilities in states located in other regions.

Our 2007 report acknowledged that EPA had made substantial progress in improving priority setting and enforcement planning with states through its system for setting national enforcement priorities and the National Environmental Performance Partnership System (NEPPS), which was designed to give states demonstrating strong environmental performance greater flexibility and autonomy in planning and operating their environmental programs. We concluded that the NEPPS had fostered a more cooperative relationship with the states and that EPA and the states had also made some progress in using NEPPS for joint planning and resource allocation. State participation in the partnership had grown from 6 pilot states in fiscal year 1996 to 41 states in fiscal year 2006.

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## Measures Used to Report on the Effectiveness of Enforcement Efforts Can Be Improved

In 2008, we reported that EPA relies on a variety of measures to assess and report on the effectiveness of its civil and criminal enforcement programs.<sup>7</sup> For example, EPA relies on assessed penalties that result from enforcement efforts among its long-standing measurable accomplishments. The agency uses its discretion to estimate the appropriate penalty amount based on individual case circumstances. EPA has developed penalty policies as guidance for determining appropriate penalties in civil administrative cases and referring civil judicial cases. The policies are based on environmental statutes and have an important goal of deterring potential polluters from violating environmental laws and regulations. The purpose of EPA's penalties is to eliminate the economic benefit a violator gained from noncompliance and to reflect the gravity of the alleged harm to the environment or public health. In addition to penalties, EPA has also established what it considers two major performance measures for its civil enforcement program. These are (1) the value of injunctive relief—the monetary value of future investments necessary for an alleged violator to come into compliance, and (2) pollution reduction—the pounds of pollution to be reduced, treated, or eliminated as a result of an enforcement action. EPA relies on these measures, among others, in pursuing its national enforcement priorities and overall strategy of fewer, but higher impact, cases. However, unless these measures are meaningful, the Congress and the public will not be able to determine the effectiveness of the enforcement program.

When we reviewed EPA's assessed penalties data we determined that from fiscal years 1998 to 2007 total inflation-adjusted penalties declined when excluding major default judgments.<sup>8</sup> When adjusted for inflation, total assessed penalties were approximately \$240.6 million in fiscal year 1998 and \$137.7 million in 2007. Moreover, we identified three shortcomings in how EPA calculates and reports penalty information to the Congress and the public that may result in an inaccurate assessment of the program. Specifically, we reported that EPA was

- Overstating the impact of its enforcement programs by reporting penalties assessed against violators rather than actual penalties received by the U.S. Treasury.

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<sup>7</sup>GAO, *Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness*, GAO-08-1111R (Washington, D.C.: Sept. 18, 2008).

<sup>8</sup>A default judgment is a binding judgment in favor of the plaintiff when the defendant has not responded to a civil complaint.

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- Reducing the precision of trend analyses by reporting nominal rather than inflation-adjusted penalties, thereby understating past accomplishments.
  - Understating the influence of its enforcement programs by excluding the portion of penalties awarded to states in federal cases.

In contrast to penalties, we found that both the value of estimated injunctive relief and the amount of pollution reduction reported by EPA generally increased. The estimated value of injunctive relief increased from \$4.4 billion in fiscal year 1999 to \$10.9 billion in fiscal year 2007, in 2008 dollars. In addition, estimated pollution reduction commitments amounted to 714 million pounds in fiscal year 2000 and increased to 890 million pounds in fiscal year 2007. However, we identified several shortcomings in how EPA calculates and reports this information as well. We found that generally EPA's reports did not clearly disclose the following:

- Annual amounts of injunctive relief and pollution reduction have not yet been achieved. They are based on estimates of relief and reductions to be realized when violators come into compliance.
- Estimates of the value of injunctive relief are based on case-by-case analyses by EPA's technical experts, and in some cases the estimates include information provided by the alleged violator.
- Pollution reduction estimates are understated because the agency calculates pollution reduction for only 1 year at the anticipated time of full compliance, though reductions may occur for many years into the future.

In addition, we identified a number of factors that affected EPA's process for achieving annual results in terms of penalties, estimated value of injunctive relief, and amounts of pollution reduction. Some of these factors that could affect the outcomes included:

- The Department of Justice (DOJ), not EPA, is primarily responsible for prosecuting and settling civil judicial and criminal enforcement cases.
- Executive Order 12988 directs DOJ, whenever feasible, to seek settlements before pursuing civil judicial actions against alleged violators.
- Unclear legal standards, as illustrated by the 2006 Supreme Court decision, *Rapanos v. United States* have hindered EPA's enforcement efforts. This case generally made it more difficult for EPA to take enforcement actions because the legal standards for determining what is a "water of the United States" were not clear.

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In our 2008 report, we recommended that EPA take a number of actions to improve the accuracy and transparency of the information that it reports to the Congress and the public regarding penalties assessed, value of injunctive relief, and estimates of pollution reduction. EPA generally agreed with most of our recommendations and stated that it would consider making these changes in the future.

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In conclusion, our work over the past 9 years has shown that the Clean Water Act has significantly increased EPA's and the states' enforcement responsibilities, available resources have not kept pace with these increased needs, and actions are needed to further strengthen the enforcement program. To address these concerns, we have made several recommendations to EPA, however, EPA's implementation of our recommendations has been uneven and several of the issues that we have identified over the last decade remain unaddressed today. The agency still needs comprehensive, accurate, and reliable data that would allow it to better target limited resources to those regions and potential pollution problems of the greatest concern. The agency still needs better processes to plan and allocate resources to ensure that the greatest risks are being addressed. Finally, the agency needs accurate and transparent measures to report on whether the Clean Water Act is being consistently implemented across the country in all regions and that like violations are being addressed in the same manner.

Mr. Chairman, this concludes our prepared statement, we would be happy to respond to any questions that you or other committee Members might have.

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## Contact and Staff Acknowledgments

Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. For further information about this testimony, please contact Anu Mittal at (202) 512-3841 or [mittala@gao.gov](mailto:mittala@gao.gov). Key contributors to this testimony were Steve Elstein, Diane Raynes, Ed Kratzer, Sherry McDonald, Antoinette Capaccio, and Alison O'Neill.



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## Public Affairs

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