PRIME SUSPECTS

The Law Breaking Polluters America Fails to Inspect

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ENVIRONMENTAL WORKING GROUP™

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Executive Summary

Federal environmental laws were created through bipartisan efforts in the 1970s to toughen and standardize a patchwork of inconsistent state pollution control laws. The establishment of environmental standards across state lines produced a dramatic improvement in the nation's environment. Yet almost unnoticed during the 1990s, there was a fundamental shift in environmental law enforcement authority away from U.S. EPA and back to the states. Now, three decades after passage of the nation's clean air and water laws, major polluters are slipping through the growing gaps in environmental enforcement.

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In passing the nation's major pollution control statutes, Congress specifically authorized the U.S. EPA to grant implementation and enforcement power to qualified states. The delegation of this authority, however, has not been accompanied by sufficient oversight of state programs or by regulations adequate to ensure their performance. As a result, many of the interstate disparities of the 1970s have reemerged in the form of substantial discrepancies between state enforcement of federal environmental statutes (GAO 2000, IG 1998). These vast differences have created pollution havens in some states where major polluters are not inspected, fines are incredibly low, and law breakers are protected by secrecy policies that shield their violations from public scrutiny and legal penalties.

Before granting enforcement powers to a state, EPA requires by regulation that states have adequate authority to seek civil and criminal penalties. But the agency does not require that the state have administrative penalty power, nor does the EPA require any minimum frequency of air or water inspections, base penalty amounts for major lawbreakers, or even that states report to them the worst violators of the law (GAO 2000).

Although the states were slowly granted environmental enforcement authority throughout the 1970s and 80s, in the 1990s this process accelerated as many governors and their political appointees, nearly all of them Republican, aggressively pursued this reversal of power. Under mounting political pressure to devolve authority to the states, the EPA was only too eager to

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The convergence of these forces has produced a fundamental breakdown in enforcement of the nation's environmental laws. EPA has lost control of environmental law enforcement, and in the absence of strong federal oversight many states have gutted enforcement programs.

comply. In 1993, for example, just 19 states were in charge of enforcing the Clean Air Act's critical new source review requirements, where inspectors certify whether changes to a polluting facility qualify it as a new source of pollution. In 1998, all 50 states were in charge of this program. In 1993, 20 states enforced industrial pollution "pretreatment" programs, which regulate industrial discharges to public sewage treatment facilities. In 1998, 32 states were running these programs. Today, the vast majority of all field level enforcement of federal environmental statutes is out of the hands of the EPA, and firmly under the control of state officials.

As the states gained authority to enforce federal pollution control laws, many also implemented a series of parallel polices that severely undermined environmental law enforcement. The two most important are, 1) the replacement of traditional deterrence-based enforcement with a new "compliance assistance" approach where major lawbreaking polluters negotiate their penalties and clean up measures with cooperative state environmental officials, often behind closed doors; and 2) audit privilege laws that allow polluters to police themselves and receive immunity from prosecution and secrecy protection for any violations they discover. Since 1993, 25 states have implemented audit privilege/immunity laws and eleven more have adopted audit privilege policies.

The convergence of these forces has produced a fundamental breakdown in enforcement of the nation's environmental laws. The U.S. EPA has lost control of environmental law enforcement, and in the absence of strong federal oversight many states have gutted enforcement programs. As just one example, more than 40 percent of all Clean Water Act inspections reported to the U.S. EPA in the most recent two year period, did not require inspectors to get out of their cars.

Due to budget cuts in the 1990s, EPA has been forced to choose between its own targeted inspection initiatives and oversight of state programs. The agency has opted for targeted inspections that have been very successful, however, in the process, oversight of state enforcement efforts has languished.

On June 22, 2000, the House of Representatives passed further cuts to EPA's enforcement budget. If enacted by the full Congress, these cuts would obliterate any prospect that the inspection process could be restored to levels that actually deter environmental crimes. According to the EPA, if enacted, the budget reductions passed by the House would eliminate 3,000 inspections, 200 criminal investigation and 400 enforcement cases per year.

Inspections – Not Enough Cops on the Beat

Thorough inspections are an effective deterrent against environmental crime (ELR 2000), and the core of any good enforcement program. A June 2000 report from the U.S. General Accounting Office lists inspection frequency as the number one indicator of an enforcement program's effectiveness (GAO 2000).

There is no evidence, on the other hand, that the "compliance assistance" approach to enforcement increases deterrence or reduces pollution, and substantial evidence that it does not (NCSL 1998, Ohio Citizen Action, Rivers Unlimited, Ohio Sierra Club, and Ohio PIRG 1999, EWG 1999, EWG 2000). An Environmental Working Group analysis of the most recent validated data from the states shows that replacing a punitive enforcement system with one based on "working with" law breakers has lead to a free ride for some of the nation's worst polluters, who in many cases are not even being inspected. In fact, the states that most stridently advocate the compliance assistance approach to enforcement – Ohio, Michigan and Texas – have some of the lowest inspection rates in the country for precisely the polluters who should be inspected most often: those classified by the U.S. EPA as high priority violators of the law (Table 1).

Table 1. Ohio, Michigan and Texas lead the country in failure to inspect factories with past records of environmental law violations.

State	Failure to conduct clean air inspections of known violators (rank)	Failure to conduct clean water inspections of known violators (rank)	Combined Rank
Ohio	1	2	1
Michigan	5	3	2
Texas	8	1	3
Illinois	4	8	4
Missouri	10	4	5
Massachusetts	11	5	6
New York	13	10	7
Georgia	16	8	8
Tennessee	5	22	9
Colorado	23	7	10
Maine	21	10	11
Mississippi	12	23	12
Pennsylvania	13	22	12
California	9	27	14
North Carolina	13	27	15

Source: Compiled by the Environmental Working Group from EPA data.

Failing to inspect known violators of environmental laws is the policy equivalent of letting criminals out on parole, but not requiring them to check with their parole officers. If the worst environmental law-breaking factories are not even inspected, there is no way that the nation's environmental laws can ever be enforced.

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EWG's analysis of the most recent data available shows:

For the Clean Air Act:

- A total of 560 large factories officially listed as "high priority violators" of the Clean Air Act (CAA) were not inspected during the two-year period ending October 1999, the most

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recent period with reliable information. High priority violators are defined as major industrial facilities previously caught with major emissions infractions, significant pollution monitoring errors, or serious procedural violations of the law. Soot from these factories and other sources kill tens of thousands of people annually. Ozone pollution, to which they also contribute, puts nearly one million children and adults in emergency rooms with acute asthma attacks each year (Clear the Air, 1999).

Table 2. Five states account for more than half of the high priority violators of the Clean Air Act not inspected in fiscal year 1998 or 1999.

Rank	State	Number of major polluters listed as high priority violators of the CAA and not inspected FY 1998 - 1999
1	Ohio	86
2	Indiana	81
3	Wisconsin	52
4	Illinois	49
5 (tie)	Michigan	37
5 (tie)	Tennessee	37
7	New Jersey	23
8	Texas	21
9	California	20
10	Missouri	16
11	Massachusetts	15
12	Mississippi	11
13 (tie)	New York	10
13 (tie)	North Carolina	10
13 (tie)	Pennsylvania	10
	All Other States	82
	National Total	560

Source: Compiled by the Environmental Working Group from EPA data.

- Half of these uninspected violators were concentrated in five industrial states (Table 2). Officials from three of these states – Ohio, Wisconsin, and Michigan – have been outspoken advocates of a softer, less punitive style of enforcement.

- In these top five states, from 21 percent (Michigan) to 48 percent (Ohio) of all high priority Clean Air Act violators were not inspected from October 1, 1997 through September 30, 1999.

For the Clean Water Act:

- Two hundred and eighty three (283) significant violators of the Clean Water Act (CWA) were not inspected during the same two-year period (Table 2). Due to weak pollution rules and shoddy enforcement, 40 percent of the nation's waters remain unfishable and/or unswimmable nearly 30 years after the passage of the Clean Water Act.

- Half of these uninspected violators were concentrated in just four states – Texas, Ohio, Michigan, and Missouri, all of which openly advocate assistance, as opposed to punishment of environmental law breakers (Table 3).

- Texas, Michigan and Ohio failed to inspect 25, 20 and 16 percent, respectively, of all high priority violators of the Clean Water Act during the two-year period analyzed.

All Inspections

The above figures do not include all inspections but instead are limited to violators that EPA classifies as "significant" or "high priority" and to inspections that meet minimum federal requirements – so-called level 2 inspections under the Clean Air Act, and compliance evaluations under the Clean Water Act. Many states, however, also reported a substantial number of superficial inspections to the U.S. EPA. These cursory inspections reveal a pervasive cynicism in environmental enforcement that points to a deeper problem in many states than just a failure to inspect the worst polluters.

According to data submitted by the states to the U.S. EPA:

- Forty-two (42) percent of all Clean Water Act inspections were so called "reconnaissance" inspections where inspectors are not even required to get out of their cars. U.S. EPA does not consider drive-by or fly-over inspections sufficient to ensure compliance with federal pollution control rules.

Table 3. Texas, Ohio, Michigan and Missouri account for half of all significant violators of the Clean Water Act not inspected in fiscal years 1998 and 1999.

Rank	State	Number of major polluters listed in significant non-compliance of the CWA and not inspected FY 1998 - 1999
1	Texas	73
2	Ohio	31
3	Michigan	20
4	Missouri	18
5 (tie)	Massachusetts*	11
5 (tie)	Minnesota	11
7	Colorado	10
8 (tie)	Georgia	9
8 (tie)	Illinois	9
8 (tie)	Washington	9
11 (tie)	Maine*	8
11 (tie)	New York	8
11 (tie)	Puerto Rico	8
14 (tie)	Vermont	7
14 (tie)	West Virginia	7
	All Other States	44
	National Total	283

** CWA/NPDES permit program run by U.S. EPA.*

Source: Compiled by the Environmental Working Group from EPA data.

- In some heavily industrialized states, almost all Clean Water Act inspections were drive-bys or fly-overs. Delaware topped all states with 95 percent of all CWA inspections falling into this category, followed by Illinois with 89 percent, Pennsylvania with 88 percent, and Indiana with 86 percent (Table 4).

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Table 4. In ten states over 40 percent of Clean Water Act inspections conducted in 1998 and 1999 did not require inspectors to get out of their cars.

Rank	State	Reconnaissance or "drive-by" inspections	Total inspections	Percent "drive-by" inspections
1	Delaware	1,154	1,220	94.6%
2	Illinois	8,279	9,294	89.1%
3	Pennsylvania	6,810	7,783	87.5%
4	Indiana	3,210	3,730	86.1%
5	Maine	371	542	68.5%
6	South Dakota	243	385	63.1%
7	South Carolina	1,892	3,046	62.1%
8	New York	2,563	5,074	50.5%
9	Michigan	370	784	47.2%
10	Mississippi	594	1,359	43.7%

Source: Compiled by the Environmental Working Group from EPA data.

promulgate strict rules delineating minimum acceptable enforcement practices. There are quite literally no binding minimum standards for the frequency of inspections under either federal clean water or clean air laws. With no one minding the store, many heavily industrialized states are letting environmental enforcement programs deteriorate dramatically. As evidence of the problem our analysis shows that:

- Overall, one third of all the nation's major air polluters (as opposed to just high priority violators) have not been inspected in the last *three* years.

Recommendations

State control of environmental law enforcement has taken environmental protection back a quarter century to a time when state level politics determined the degree of environmental protection provided to communities across the country. Recent budget cuts, passed in June, 2000 by the House of Representatives would practically eliminate all EPA oversight of state enforcement activities.

EPA will never regain the primary enforcement role it had ten years ago, nor should it necessarily seek to do so. But to make the current state-lead system accountable to the public and to the goals of the law, several major changes in current policy are needed:

EPA's enforcement budget must be restored to 1996 levels.

Budget cuts passed by the House of Representatives in June, 2000 would slash EPA's

enforcement budget by 70 percent from $51 in fiscal year 1996 to $15 million. These cuts would eliminate 3,000 inspections each year and derail any hope that much needed oversight of state enforcement programs could take place. Instead of these cuts, funding should be restored to FY 1996 levels.

EPA must immediately issue regulations defining minimum performance standards for state agencies enforcing the nation's environmental laws.

Currently there are no binding minimum requirements that state agencies must follow when enforcing the nation's environmental laws. EPA has developed guidance for many aspects of state enforcement, but that guidance has no teeth when states choose to ignore it. Until enforcement regulations are in place, there is no hope that the law will be consistently and effectively enforced nationwide.

As a part of these standards, high priority violators must be inspected every year.

At a minimum, state enforcement agencies must perform a full compliance evaluation every year at all facilities classified as high priority violators of the Clean Air Act or the Clean Water Act.

The U.S. EPA Inspector General must audit state enforcement programs to determine what full compliance with environmental laws means in each state.

Clearly, states need to step up enforcement activity, particularly for the known violators of the law. But beyond that, EPA needs to investigate state enforcement programs for consistency, and to determine that a state's claim of full compliance with the law is legitimate.

EPA and the states must make information about violations readily available to the public.

To ensure the public's right to know, the U.S. EPA and the states must post all violations of federal and state environmental laws on the web. The information must include the type and severity of the violation at specific facilities, any enforcement action taken, and the magnitude of any fines if and when they are levied.

Ensure that inspectors get adequate recognition for their work.

Too often the good work of inspectors is thrown away when cases are dropped as the cases move up the enforcement ladder. There needs to be more consistent follow-up on violations to ensure that inspections are seen as an important first step in the law and order process and not a complete waste of time.

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Empower inspectors to issue field citations.

Inspectors should be given the power to issue field citations. By empowering inspectors to issue tickets for clear-cut cases, EPA would streamline the enforcement process and focus the system on larger problems that cannot be addressed immediately.

The State Takeover of Environmental Law Enforcement

Devolution of Power

When the local river is polluted or the air is unfit to breathe, most people still blame the U.S. EPA. And while that is partly justified, in large measure their own state officials are to blame for failure to improve the environment.

The passage of national environmental laws in the 1970s created consistency out of chaos across state lines, and an almost immediate improvement in the nation's environment. Few people realize, however, that the Congress intended most environmental laws to be administered by the states. Fewer still realize that the devolution of authority to the states accelerated rapidly in the 1990s as Republican governors and a Democratic administration jockeyed for political advantage in the rhetorical race to curb the excesses of big government in Washington.

According to a 1999 report of the Environmental Committee of the States (ECOS), a national non-profit association of state and territorial environmental commissioners, the number of environmental regulatory programs delegated to the states increased 73 percent from 1993 to 1999. Among Clean Air Act and Clean Water Act programs the number of delegated programs increased 50 percent over that time (see Table 5). In the words of the report: "A remarkable, and largely unnoticed, change in environmental protec-

Table 5. The states have taken control of nearly all environmental programs.

Delegated Program	1993	1998	Percent Change
CAA - NSPS	34	41	21%
CAA - NESHAPS	27	41	52%
CAA - PSD	27	46	70%
CAA - New Source Review	19	50	163%
CWA - Construction Grants	37	45	22%
CWA - NPDES	38	43	13%
CWA - Pretreatment	20	32	60%
CWA - Sludge Management	0	3	N/A
CWA - Sec 604(b)	15	25	67%
CWA - Wetlands	1	2	100%
Clean Air Act & Clean Water Act	218	328	50%

Source: Environmental Working Group
1. U.S. EPA, Office of Regional Operations & State/Local Relations, February 3, 1993, as reported in Resource Guide to State Environmental Management, Third Edition. (Lexington, KY: The Council of State Governments)
2. Environmental Council of the States (data in press), June 25, 1998

Abbreviations: CAA - Clean Air Act; NSPS - New Source Performance Standards; NESHAPS - National Emission Standards for Hazardous Air Pollutants; PSD - Prevention of Significant Deterioration; CWA - Clean Water Act; NPDES - National Pollution Discharge Elimination System

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tion has occurred over the past five to 10 years. The States have become the primary environmental protection agencies across the nation" (ECOS 1999). Once the authority to run an environmental program is transferred to a state it is virtually never recalled, no matter how poorly the program is run.

After gaining the power to enforce the nation's environmental laws many states then implemented a series of related policies that virtually guaranteed that no enforcement would take place. U.S. EPA has not effectively used its oversight authority to ensure that increased state authority does not translate into the creation of pollution havens in states that choose not to enforce the law.

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The three strategies that are most commonly used to undercut environmental enforcement are compliance assistance programs, audit privilege/immunity laws, and budget cutbacks or the failure to adequately use existing fee authority.

Compliance Assistance

In the early 1990s many governors and their high level political appointees began to articulate and implement a new "compliance assistance" philosophy of environmental enforcement. These policies assume that enforcement of environmental laws will be more effective if traditional strategies based on fines and penalties are scrapped. Instead, supporters argue, regulators should assist, nudge and negotiate with the worst polluters, who in many cases are overtly referred to as "customers" (EWG 2000).

This new approach is based largely on small-business compliance assistance programs devised to meet the needs of dry cleaners and gas stations faced with unprecedented environmental regulations. When applied to large industrial polluters, however, the rationale for the strategy – that the polluter in question actually needs technical assistance – no longer applies.

In spite of the widespread adoption of this policy, there is no evidence that compliance assistance works better than traditional punitive enforcement strategies, when applied to large industrial polluters. Indeed, the near complete absence of fines and penalties issued by the most vocal supporters of compliance assistance at the state level has prompted the U.S. EPA to launch an investigation into the effectiveness of these programs.

Politicians and their appointees in Ohio, Michigan and Pennsylvania are some of the most ardent proponents of helping polluters who break the law – as opposed to punishing them. These states are also among those with the lowest fines and inspection rates in the nation.

In 1999, an Ohio EPA official candidly characterized the agency's flaccid approach to enforcement when he told a gathering of the Bar Association in Cincinnati, "we are not an enforcement agency" (Ohio Citizen Action, Rivers unlimited, Ohio Sierra Club & Ohio PIRG, 1999).

Not surprisingly, the Ohio EPA consistently ranks at the bottom of any measure of agency performance (EWG 1999, EWG 2000). In fact, the state's environmental record is so abysmal that in response to a petition from Ohio public interest groups, EPA Region 5 has taken the unprecedented step of comprehensively reviewing Ohio EPA's execution of environmental laws (Randall Edwards, The Columbus Dispatch, *U.S. Probe Aimed At Ohio EPA Complaints Say Enforcement Is Lax*, January 31,2000).

In Michigan (and in many other states) audit privilege and immunity laws (see below), have been repeatedly touted as a key component of compliance assistance strategies because they neutralize the threat of punishment for polluters that volunteer information on their illegal practices. Russell Harding the head of the Michigan Department of Environmental Quality put it this way:

> *"The prospect of triggering federal enforcement action had a chilling effect on many businesses. They can now enjoy a high degree of confidence that participating in the audit program will not subject them to federal enforcement action" (Russell J. Harding, "Audit Law Encourages Improvement", Ethnic News Watch. December 22, 1998).*

Instead, the state will use this privileged information, revealed in the audit, to assist the erstwhile violator in complying with the law. Citizens will never know anything about the occurrence or severity of the violations, even if the illegal pollution in question directly compromised their health and well being.

In Pennsylvania, Governor Tom Ridge took office promising to overhaul the "job-crushing, community-harassing, regulatory nightmare" of a Department of Environmental Resources (DER). As promised, Ridge split the DER into two new agencies, with the Department of Environmental Protection (DEP) taking over all pollution permitting and enforcement functions, while the Department of Conservation and Natural Resources has responsibility for parks and forestry.

According to Ridge, the newly formed DEP has "…actively pursued an agenda that moves away from the philosophy of heavy-handed regulation and punitive sanctions". (Remarks given at Pennsylvania Environmental Council Annual Dinner in Philadelphia, May 31, 1995). The record bears out the governor's claim. Fines for big Pennsylvania polluters are

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incredibly low or non-existent (EWG 1999, EWG 2000).

Audit Privilege/Immunity Laws Protect Polluters, not the Environment

Environmental audits are voluntary internal evaluations of company operating procedures. In theory, they are used to measure compliance with environmental regulations, to identify problems early, and correct them quickly. When used appropriately an environmental audit can help a company comply with the law and shift a state's limited enforcement resources into areas of greater concern. In contrast, most audit privilege/immunity laws on the books seek to promote self-audits by insulating companies from the liability they would otherwise incur when they document violations of environmental law.

The audit privilege laws that have been passed in many states do not require, and often prohibit, the disclosure of any violations identified during the audit, no matter how serious. Some do not even require that the problems identified be corrected. Instead of promoting responsible corporate behavior, laws like these create a mechanism for corporations to shield themselves from the release of damaging information on illegal pollution practices.

Industry has effectively advocated audit privilege laws by arguing that without them, companies will not perform voluntary compliance audits because they will be subject to penalties for any violation revealed by the audit. In theory, once the fear of self-inflicted government penalties is removed, self-audits and compliance with the law will increase. There is little evidence to support these claims.

Twenty-five states have instituted audit privilege/immunity laws since 1993; an additional 11 states have instituted environmental audit policies since 1994. According to a recent study by the National Conference of State Legislatures (NCSL 1998), facilities in states with audit privilege laws or policies did not audit their environmental practices more frequently than other states. The study also found that the majority of the voluntary disclosures made were minor. These findings are consistent with the results of the first disclosures from Michigan, where only 33 violations were reported in 554 audits through March 31, 1999. In short, there is no evidence that audit privilege laws are producing more self-audits, eliminating polluting practices at the worst facilities, or increasing compliance with the law (NCSL 1998).

States get fee authority but refuse to use it to generate enforcement funds.

Historically, the U.S. EPA has been able to use the power of the purse as a means to ensure minimum state performance in

implementing federal environmental directives. When states failed to implement regulations, EPA could withhold funds for various environmental programs. Today, this power is substantially diminished as the Congress has diverted a significant portion of its permitting and fee generating authority to the state level. A good example is Title V of the Clean Air Act.

The 1990 amendments to the Clean Air Act replaced the system of multiple CAA permits for different parts of one facility, with one consolidated Title V permit. Title V, which applies to all large sources of air pollution and many smaller sources of hazardous air pollutants, also provides a potential major source of funds for state environmental enforcement by authorizing state officials to charge permit holders a per ton pollution fee that is set by the state. The per ton pollution fee is specifically designed to recover all costs of permitting and enforcing the conditions of the new Title V permits.

In many states, the fee process has not worked. Some states are simply hostile to the notion of assessing a fee on pollution to cover the costs of regulating these same polluting industries. Indeed, several state legislatures have required that the fees be used solely for the permitting process and not for an increase in funds or personnel for inspection functions (EPA 1999). In others states, agencies have simply failed to set the fees at a level that will provide enough funds to run an effective enforcement program.

A 1999 U.S. EPA analysis found that half the states have insufficient funds to meet their inspection commitments. Specifically, these states reported that Title V fees are insufficient to enforce Clean Air Act rules at Title V facilities. Other states reported a shifting of resources within the state budgets that resulted in no net gain for the state environmental agencies from Title V fees. Clearly, states are not using Title V funding authority to ensure that there are enough environmental cops on the beat.

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Environmental enforcement actions can greatly improve the environment.

Empirical studies of the effect of environmental enforcement have consistently shown what common sense and other law enforcement experience suggest: crime and pollution are reduced when inspections are increased. Studies of Coast Guard monitoring activities found that both the frequency and volume of oil spills decreased with stepped-up inspections. Other studies documented a strong deterrent effect of environmental inspections at pulp and paper mills (ELR April 2000).

These studies also found evidence that “targeted” enforcement may have an even greater

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deterrent effect. EPA's targeting of industry-wide pollution violations at power plants and engine manufacturers provide dramatic evidence of the effectiveness of this approach.

In 1998 seven diesel engine manufacturers agreed to pay out more than $1 billion, including $83.4 million in fines, to settle charges that their products illegally spewed tons of pollution into the air. They also agreed to make future engines much cleaner.

The settlement was the result of a targeted investigation by EPA and the Justice Department, alleging that the seven largest truck engine companies cheated on the Clean Air Act requirements by equipping diesel engines with "defeat devices." These computerized devices were programmed to pass federal emissions tests, but subsequently shut off pollution controls after the engines were in service, causing them to burn dirtier.

The companies committed $835 million to produce cleaner engines and $100 million for other environmental efforts. They also agreed to build engines by October 2002 that will meet emission standards that are not scheduled to go into effect until 2004.

In previous cases, three other auto-makers settled with EPA on similar charges that stemmed from targeted EPA investigations. Honda agreed to pay $17 million in 1998 to settle both California state and federal charges that involved pollution monitoring systems. General Motors paid an $11 million fine and agreed to spend $34 million on anti-pollution initiatives and recall 470,000 Cadillacs in 1995 to settle charges that it tampered with pollution-control computers on cars sold between 1991 and 1995. And in 1998 Ford agreed to pay $6.3 million in fines and costs for pollution-control problems on 60,000 of its 1997 vans. Toyota has not settled its suits with EPA.

Coal Power Plant Suits

In the largest environmental lawsuit in the nation's history, the government sued seven of the largest electric companies for defying pollution control requirements and illegally polluting the air.

The suits, against 32 coal fired power plants in ten states, accuse utilities of illegally modifying their plants without installing modern pollution control devices – in other words, the companies cheated on their requirements under the Clean Air Act. According to U.S. EPA, the efforts, if successful, will have the same effect as taking 26 million cars off the road.

Again, the problem was discovered only when one of EPA's targeted enforcement initiatives found similar problems with other industries. Both EPA and State inspectors failed

to identify the dramatic expansion in generating capacity at old power plants as a new source of pollution that required new emission controls. At the same time, the utilities failed, apparently deliberately, to inquire of states whether new permits would be required for the substantial upgrades they made at these plants.

To date, one company, Tampa Electric Company (TECO) of Florida has settled with the government. The settlement includes a $3.5 million fine, an agreement to switch one plant from coal operation to natural gas at a cost of $1 billion, and a commitment to conduct $10 million in pollution control research and experimentation. The utility, as usual, admitted no wrongdoing and stated that the decision was driven entirely by economic considerations.

Chapter 2

The Inspection Process

EPA has failed to implement consistent, mandatory baseline requirements for enforcement of environmental laws, even as they have delegated just about all enforcement authority to the states. As a result, programs vary widely from state to state, and the U.S. EPA has limited ability to ensure that minimum performance standards are met.

The EPA *has* published detailed guidance on targeting and other enforcement strategies, but these strategies are just guidelines and carry no weight with states that choose to ignore them. A June, 2000 report from the GAO found that half of the EPA regional offices had not taken any action to implement headquarters guidance on enforcement. These five regions, "did not implement the strategy and engage in only minimal inspection planning and oversight with their states" (GAO 2000, p. 24).

If a state is completely failing to enforce a particular statute, U.S. EPA can revoke the state's authority to enforce the law. This drastic action, however, has never been taken without state consent, and will not likely be contemplated in the future. Short of that, the federal government has virtually no means to reign in state authorities that simply choose to stop meaningful enforcement activities.

The Recommended Inspection Planning Process

The EPA recommends that every year the states develop an inspection plan based upon the agency's air quality Compliance Monitoring Strategy (CMS). This recommendation is entirely optional and in general states are not following it (GAO 2000).

A 1998 Clean Air Act audit by the EPA's Office of Inspector General (OIG) found that most states were not complying with the CMS as a means for systematically targeting inspections, particularly for significant violators. According to the OIG, it is generally perceived outside the agency that EPA has abandoned its CMS.

EPA's own review following the OIG report found that only 16 of 22 states examined produced an annual list of facilities to be inspected; only eight of 22 states gave a rationale for their

The EPA has published detailed guidance on targeting and other enforcement strategies, but these strategies are just guidelines and carry no weight with states that choose to ignore them.

EPA's review found that only 16 of 22 states examined produced an annual list of facilities to be inspected; only eight of 22 states gave a rationale for their selections.

Table 6. Clean Water Act Inspection Types 1998 and 1999.

Inspection Type	Percent
Reconnaissance (drive-by)	42.0%
Compliance Evaluation (non-sampling)	38.8%
Compliance Evaluation (sampling)	10.7%
Other	8.5%

Source: Compiled by the Environmental Working Group from EPA data.

selections or explained how EPA priorities were addressed by the list.

The report further details that "for various reasons, including circumstances involving state-EPA relations, past regional practices, and current regional priorities, the [EPA regional offices] tend to pursue other strategies, including minimal or no interaction with States in the selection of sources for inspection." (EPA 1999.)

Currently many states claim that they do not have sufficient funds to inspect all of the "major" facilities they regulate and still maintain a reasonable presence at other polluting ("minor") facilities. To compensate for this deficit and in response to the states' demand for greater flexibility, EPA allows the states to "substitute" some inspections at other "higher risk" smaller factories for inspections at many major facilities

This flexibility, however, is not meant to apply to repeat offenders, or the so-called "high priority violators" of the law. The shift away from major polluters is intended to apply only to companies that have strong records of compliance with environmental law. Our analysis indicates that often this is not the case and that many facilities with poor compliance records are not being inspected at all.

Clean Air Act Inspections

U.S. EPA only counts 'level 2' inspections or higher (there are 5 levels) in its review of CAA inspections. A level 2 inspection is considered a compliance determining inspection. It includes a review of existing records on source operation, but does not require stack tests. Tests can be required, however, if an inspector feels it is necessary to verify compliance.

In addition to level 2 inspections the states also perform level 0 and 1 inspections. Level 0 inspections, which are often called "drive-by" or "windshield" inspections, cannot determine compliance with the CAA and are used primarily to determine whether the factory is still operating. Level 1 inspections are on-site visual inspections. They are used to detect malfunctions or excess emissions under unusual operating conditions. Neither level 0 or level 1 inspections satisfy minimum federal requirements. They are not reported to the EPA, and are not included in this analysis. (See Appendix 1.)

Field citations empower inspectors and cut red tape

One promising enforcement option is the use of field citations, "traffic ticket"-styled citations issued on-site by inspectors, generally carrying a penalty. Field citations are currently being used by a number of environmental programs on the federal, state, and local levels, including UST [Underground Storage Tank] programs. In the experience of many state and local UST enforcement programs, field citations are extremely useful in addressing many prevalent, clear-cut violations that are relatively easy to correct. Addressing these violations using established enforcement methods, … requires a greater commitment of staff time and resources, which may be difficult to obtain or which must compete with time and resources that staff directs toward releases or violations that are not appropriately addressed by the field citation program. When a citation program is properly designed, facilities issued citations for clear-cut violations have greater incentive to correct problems and pay penalties than to contest. Thus, in appropriate circumstances, field citation enforcement is less resource-intensive than traditional methods of enforcement. Resources are saved as citations are issued on the spot and preparation of formal legal documents and procedures, such as administrative appeals, are minimized.

While field citations were developed to expedite the enforcement process, they also encourage owners and operators to come into compliance in an effective and resource-efficient manner. By removing the incentive to expend their time and resources litigating the large penalties typical of more formal enforcement actions, owners and operators who receive field citations should see a clear advantage in focusing their energy and economic resources on achieving compliance. Thus, field citations are a critical component of Office of Underground Storage Tanks' (OUST) efforts to achieve high rates of compliance among regulated entities with minimal expenditure of public and private resources.

According to EPA field citations should only be used for:

- Select violations that are clear-cut and easily verifiable.
- Select violations that are easily correctable.
- Select first-time violators only.

(U.S. EPA, Office of Underground Storage Tanks, Guidance for Federal Field Citation Enforcement, October 1993)

The largest category of CWA inspections reported to the EPA is so-called reconnaissance inspections, which represent 42 percent of all inspections reported to the EPA. These inspections can be as simple as a "drive-by" or even a "fly-over".

Clean Water Act Inspections

Under the federal Clean Water Act, the U.S. EPA requires a full compliance evaluation at a factory before it considers the facility inspected. A full compliance inspection includes a review of company pollution and operation records and an inspection of the facility. EPA does not require water testing or pollution effluent testing for these inspections.

Unlike the Clean Air Act, inspections that do not qualify as a full compliance evaluation frequently are reported to the EPA by the states. Indeed, the largest category of CWA inspections reported to the EPA is so-called reconnaissance inspections, which represent 42 percent of all inspections reported to the EPA (Table 6). These inspections can be as simple as a "drive-by" or even a "fly-over", and except in the most unusual cases they do not allow for even basic compliance evaluations. U.S. EPA does not count reconnaissance as an inspection in their year end evaluation of enforcement activity. Some states, however, rely heavily on these drive-by evaluations, including Delaware, Illinois and Pennsylvania.

Findings

Local health departments regularly inspect restaurants, and automobiles are inspected routinely for both safety and pollution. But when it comes to environmental crime by big corporations, a different standard has evolved.

Too often, large-scale environmental lawbreakers receive little or no scrutiny by environmental law enforcement officials. The situation is especially egregious for major polluters with a record of past violations – precisely those facilities that warrant the most careful monitoring and oversight. Over the time period examined, hundreds of known high priority violators of the nation's clean air and water laws were not even inspected. If states are not keeping track of known violators, there is no way that the nation's environmental laws can be properly enforced.

The States and EPA fail to inspect factories on a timely basis.

- Overall, one third of all the nation's major air polluters (as opposed to just high priority violators) have not been inspected in the last *three* years. EPA recommends that all major polluters be inspected at least once a year.

Hundreds of factories with a history of violations are not inspected on a timely basis.

Our analysis found that the states have failed to inspect hundreds of facilities that on EPA's list of high priority violators of the clean air and water acts

- A total of 560 factories officially listed as high priority violators of the Clean Air Act were not inspected during the two year period ending October 1999, the most recent period with reliable information. Soot from these factories and other sources kills tens of thousands of people annually, while ozone pollution, to which they also contribute, puts nearly one million people, many of whom are children, in emergency rooms with acute asthma attacks each year (Clear the Air 1999).

Over the time period examined, hundreds of known high priority violators of the nation's clean air and water laws were not even inspected.

Cursory inspections reveal a pervasive cynicism in environmental enforcement that points to a deeper problem in many states than just a failure to inspect the worst polluters.

There are quite literally no binding minimum standards for the frequency of inspections under either federal clean water or clean air laws.

- Half of these uninspected violators were concentrated in five industrial states (Table 2). Officials from three of these states – Ohio, Wisconsin, and Michigan – have been outspoken advocates of a softer, less punitive style of enforcement.

- In these top five states, from 21 percent (Michigan) to 48 percent (Ohio) of all high priority Clean Air Act violators were not inspected from October 1, 1997 through September 30, 1999.

For the Clean Water Act (CWA):

- Two hundred and eighty three (283) significant violators of the Clean Water Act (CWA) were not inspected during the same two-year period (Table 2). Due to weak pollution rules and shoddy enforcement, 40 percent of the nation's waters remain unfishable and/or unswimmable nearly 30 years after the passage of the Clean Water Act.

- Half of these uninspected violators were concentrated in just four states – Texas, Ohio, Michigan, and Massachusetts, all of which openly advocate assistance, as opposed to punishment of environmental law breakers (Table 3).

- Texas, Michigan and Ohio, failed to inspect 25, 20 and 16 percent of percent of all high priority violators of the Clean Water Act during the two-year period analyzed.

All Inspections

The above figures do not include all inspections but instead are limited to violators that EPA classifies as "significant" or "high priority" and to inspections that meet minimum federal requirements – so-called level 2 inspections under the Clean Air Act, and compliance evaluations under the Clean Water Act. High priority and significant violators are limited to major emissions, monitoring, or major procedural violations of the law. Many states, however, also reported a substantial number of superficial inspections to the U.S. EPA. These cursory inspections reveal a pervasive cynicism in environmental enforcement that points to a deeper problem in many states than just a failure to inspect the worst polluters.

According to data submitted by the states to the U.S. EPA:

- 42 percent of all Clean Water Act inspections were so called "reconnaissance" inspections where inspectors are not even required to get out of their cars. U.S. EPA does not consider drive-by or fly-over inspections sufficient to ensure

compliance with federal pollution control rules.

- In some heavily industrialized states, almost all Clean Water Act inspections were drive-bys or fly-overs. Delaware topped all states with 95 percent of all CWA inspections falling into this category, followed by Illinois with 89 percent, Pennsylvania with 88 percent, and Indiana with 86 percent (Table 4).

The U.S. EPA has contributed significantly to weak state-level enforcement of the nation's environmental laws, by failing to promulgate strict rules delineating minimum acceptable enforcement practices. There are quite literally no binding minimum standards for the frequency of inspections under either federal clean water or clean air laws. With no one minding the store, many heavily industrialized states are letting environmental enforcement programs deteriorate dramatically. As evidence of the problem our analysis shows that:

- Overall, one third of all the nations major air polluters (as opposed to just high priority violators) have not been inspected in the last *three* years (Table 7).

Some states have failed to report inspections.

Several states have failed to accurately report their compli-

Table 7. Nearly one-third of all major air polluters were not inspected in the past three years.

Rank	State	Percent of factories not inspected FY 1997 - 1999
1	Illinois	63.2%
2	Massachusetts	58.0%
3	Alaska	57.1%
4	Idaho	55.1%
5	Ohio	54.4%
6	Nebraska	53.4%
7	New Hampshire	49.5%
8	Wisconsin	48.6%
9	New Mexico	42.4%
10	Colorado	42.0%
11	Indiana	41.5%
12	Wyoming	39.0%
13	North Dakota	38.3%
14	Texas	38.2%
15	New York	38.0%
16	Maine	36.5%
17	Kansas	33.5%
18	New Jersey	33.5%
19	Kentucky	31.9%
20	Montana	31.1%
21	Iowa	31.1%
22	Georgia	29.9%
23	Tennessee	29.0%
24	Nevada	28.9%
25	Utah	27.8%
26	Florida	26.2%
27	Arizona	24.1%
28	Louisiana	22.5%
29	Oklahoma	21.4%
30	Michigan	21.2%
31	Hawaii	19.6%
32	California	18.9%
33	West Virginia	18.0%
34	Connecticut	17.5%
35	Puerto Rico	17.3%
36	Missouri	15.6%
37	South Carolina	14.5%
38	North Carolina	13.8%
39	Pennsylvania	13.7%
40	Mississippi	13.5%
41	Washington	11.8%
42	Arkansas	11.1%
43	Alabama	10.4%
44	Delaware	8.6%
45	Virginia	7.2%
46	Maryland	5.4%
47	Oregon	3.4%
48	Vermont	0.0%
49	Rhode Island	0.0%
50	South Dakota	0.0%
N/A	Minnesota	N/A
	Average	31.8%

Source: Compiled by the Environmental Working Group from EPA data.

ance information to U.S. EPA. Without complete enforcement data it's impossible for EPA to oversee the states execution of environmental laws. Two states – Virginia and Wisconsin – have not accurately reported their Clean Water Act data. Minnesota has also failed to report their Clean Air Act compliance data to U.S. EPA.

Chapter 4

Methodology

The analysis in this report is based on data from Permit Compliance System (PCS) database for Clean Water Act information. The Clean Air Act data is taken from U.S. EPA's Air Facility System (AFS) database. In both cases the data was extracted using U.S. EPA's IDEA Database

Both the PCS and AFS databases contain information submitted by the states (or EPA regional offices) to the U.S. EPA. U.S. EPA in turn compiles the data into a national database. We restricted the analysis to permits that are categorized by the states and regions as "major" for both Clean Air Act and Clean Water Act facilities – a designation that is based upon a combination of factors including toxic pollution potential, pollution volume, and public heath impacts.

The states and U.S. EPA regions submit their inspection data to U.S. EPA prior to the end of EPA's fiscal year (September 30) for accounting purposes. After lengthy conversations with EPA staff, it was determined that these fiscal year end data were by far the most reliable data available. Thus, we limited our analysis to inspection data for the fiscal years 1999, 1998 and 1997.

The analysis is targeted to facilities that were listed on the CAA "high priority violators" list or CWA "significant non-compliance" list in fiscal year 1997, 1998 or 1999. We then identified those major facilities that had not received a full compliance inspection in either fiscal year 1998 or 1999 in the analysis.

Clean Air Act Inspection Types

Level 0

Level 0 consists of a determination of the continued operation of the source and may not involve an on-site visit. It technically is not an inspection and the Agency does not consider a Level 0 inspection to be an acceptable compliance assurance method. A Level 0 inspection typically has been characterized as a “drive-by” or “windshield” inspection.

Level 1

The Agency does not consider a Level 1 inspection, in most cases, to be a bonafide compliance inspection. A Level 1 inspection is an on-site inspection that is usually limited to the evaluation of visible emissions from process vents, fuel combustion sources, incinerators, and fugitive emission sources. This type of inspection should only be used to enforce opacity standards or particulate standards when a correlation between opacity and mass emission rates has been established.

This inspection requires a minimum of time and manpower and places limited regulatory pressure or involvement on the source. A Level 1 inspection should be restricted to sources where there is a minimum potential for malfunction or excess emissions under non-representative, operating conditions.

Level 2

Level 2 is considered a compliance determining inspection in which current control device and process operating conditions may be recorded as part of the source evaluation in addition to visible emission observations. This level of inspection, however, does not include the measurement of operating conditions by the inspector or the completion of a detailed engineering analysis. It does include a

review of existing records and log books on source operations, particularly for the intervening period following the last inspection.

In a typical application, the inspector may record such process items as feed rates, temperatures, raw material compositions, process rates, and such control equipment performance parameters as water flow rates, water pressure, static pressure drop, and electrostatic precipitator (ESP) power levels. The inspector could then use these values to determine any significant change since the last inspection or any process operations outside normal or permitted conditions, particularly when coupled with the aforementioned records check.

A significant change in operating conditions could require that the inspector upgrades the inspection to a Level 3 or that a stack test be conducted to verify compliance.

Level 3

Level 3, a thorough and time-consuming inspection, is designed to provide a detailed engineering analysis of source compliance using measured operating parameters such as pressure drop, fan static pressure and current, gas stream temperature, ESP power levels, flue gas conditions, oxygen level, and water flow rates. The measured data are reduced and used to calculate flue gas volume, superficial velocity, specific collection area, inlet velocity, air-to-cloth ratio, hood inlet volume and velocity, liquid-to-gas ratio, throat velocity, etc. Because many of these are control device and source specific, they must be adjusted to the individual source being inspected.

There are three major purposes for this type of inspection:

- To establish baseline operating conditions;
- To support case development activity; and
- To verify whether the source is experiencing O&M problems that result in less than continuing compliance with the emission standards.

Level 4

The Level 4 inspection prepares an actual emissions baseline for the source through the use of a stack test. This inspection requires that the inspector monitor all process and control device-operating parameters during a stack test for use during future inspections. The Level 4 inspection is typically applied to sources with ESP's or high-energy wet scrubbers. The inspection may require documentation of

control equipment conditions through the use of an internal inspection before the stack test or a chemical analysis of process material or fuel that is being burned (e.g., percent sulfur, percent ash, heat content, or percent moisture).

The purpose of the increasing level of inspection is to concentrate the resources on those sources that have the greatest potential to exceed the emission limits. For instance, initial results of the Level 3 inspection may indicate that specific sources are not experiencing deficiencies in performance and, therefore, do not warrant a higher level of inspection. In these cases, the frequency or level of inspection may be adjusted downward consistent with the results of the Level 3 inspection.

Source: U.S. Environmental Protection Agency. The Clean Air Act: Compliance Enforcement Guidance Manual.

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